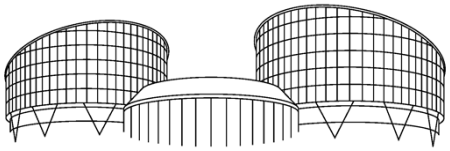

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF CAAMAÑO VALLE v. SPAIN

(Application no. 43564/17)

JUDGMENT

Art 3 P1 • Vote • Justified disenfranchisement of person with intellectual disability, based on thorough, individualised assessment by domestic courts • Free expression of the opinion of the people • Margin of appreciation for States • Systems disenfranchising persons with mental disabilities must apply only to those effectively unable to make a free and self-determined electoral choice, as in present case
Art 14 (+ Art 3 P1) • Art 1 P12 • Discrimination • Justified difference in treatment based on mental capacity

STRASBOURG

11 May 2021

FINAL

11/08/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Caamaño Valle v. Spain,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Paul Lemmens, *President,*
Georgios A. Serghides,
Dmitry Dedov,
Georges Ravarani,
María Elósegui,
Anja Seibert-Fohr,
Peeter Roosma, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 43564/17) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Spanish national, Ms Maria del Mar Caamaño Valle ("the applicant"), on 9 June 2017;

the decision to give notice of the application to the Spanish Government ("the Government");

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by the Commissioner for Human Rights of the Council of Europe who intervened as a third party;

Having deliberated in private on 19 January and on 30 March 2021,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The application concerns the right to vote of the applicant's daughter, placed under partial guardianship owing to her intellectual disability. The applicant relied on Article 3 of Protocol No. 1, read alone or in conjunction with Article 14 of the Convention and Article 1 of Protocol No. 12.

THE FACTS

2. The applicant was born in and lives in Santiago de Compostela. She is the mother of M., a mentally disabled young woman born in A Coruña (La Coruña) in 1996. The applicant was represented by Ms L. Gonzalez-Lagana Vicente, a lawyer practising in A Coruña.

3. The Government were represented by their Agent, Mr R.-A. León Cavero, State Counsel and head of the Human Rights Department at the Ministry of Justice.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. In December 2013, given the fact that M., the applicant's daughter, would soon turn 18, the applicant lodged a request with a judge of First-Instance Court No. 6 of Santiago de Compostela ("the First-Instance Judge") that she be deprived of her legal capacity. The applicant requested that her legal guardianship over her daughter be extended, but specifically asked that her daughter not be deprived of her right to vote.

6. On 2 September 2014, the First-Instance Judge decided that the applicant's daughter should be placed under the extended partial legal guardianship of her mother and that, in the light of the evidence and the case file, M.'s right to vote should be revoked.

7. In an extensively reasoned judgment, the First-Instance Judge held that, given the specific circumstances of the case, the applicant's daughter was not capable of exercising her right to vote. Having examined the Convention on the Rights of Persons with Disabilities (CRPD) (see paragraph 23 below) in the light of the Spanish legal system, the First-Instance Judge explained the difference between the CRPD's general concept of disability and the Spanish legal institution of incapacitation (*incapacitación*), which is intended to guarantee the rights of disabled people. He also referred to the case-law of the Supreme Court (according to which the CRPD and the institution of incapacitation, as regulated under the Spanish legal system, are compatible); he furthermore stated that a person who has been declared incapacitated (*incapacitado*) in the course of judicial proceedings (and who is not able to manage himself or herself) cannot be compared to a person who suffers a disability but is capable of managing himself or herself. The First-Instance Judge indicated in particular that:

> "It is necessary to bring on this particular controversial aspect the most recent and consolidated scientific doctrine and jurisprudence, citing, *inter alia*, the recent Supreme Court judgment 341/2014, of 1 July 2014, which states that ... (as is clear from the New York Convention and as was maintained by Supreme Court judgment 421/2013 of 24 June) Article 29 of the CRPD guarantees to persons with disabilities all political rights, and the possibility to enjoy them, under equal conditions, and as a logical corollary thereto ... the right to vote ...; sections 3(1)(b) and 2 of Institutional Law 5/85 of 19 July 1985 on the General Electoral System states that those declared incapacitated by virtue of a final judicial decision shall be deprived of the right to vote, provided that the decision expressly declares the relevant person's incapacity to exercise it, and that the judges or courts deciding on that person's incapacity or on confinement proceedings expressly rule on that person's incapacity to exercise his right to vote. The loss of the right to vote is not an automatic or necessary consequence of incapacity ... It is for the judge in charge of the case to analyse and assess the situation of the person under his consideration and to rule on the advisability of denying that person his right to exercise of this fundamental right, ... which is a rule and not the exception ..."

8. The First-Instance Judge considered that in respect of the instant case, the limitations imposed on M. in respect of her right to vote were based

neither on the requirement of a higher cognitive or intellectual capacity nor on M.'s lack of knowledge regarding her voting options (that is to say her choice of candidate or party) nor on any hypothetical irrationality in respect of such choices, but on the strict and objective establishment of her lack of capacity in respect of political affairs and electoral matters. The court's medical expert and the First-Instance Judge had ascertained the notable – and at that time insuperable – deficiencies of M. (without, in accordance with section 761 of the Civil Procedural Law, prejudging any possible subsequent change in her capacity) in respect of her exercising an electoral choice. The First-Instance Judge acknowledged that depriving a person of her voting rights could not be an automatic consequence of a judicial declaration of legal incapacity and that decisions dealing with such situations had therefore to be extensively reasoned. He noted that the task at hand was not that of examining the knowledge of the applicant's daughter about a specific political system, but to assess the circumstances of the case. The restriction of her right to vote was not justified by the fact that she hardly knew anything about the Spanish political system, but because she was highly influenceable and not aware of the consequences of any vote that she might cast. The First-Instance Judge emphasised in his judgment that such decisions were always subject to judicial review.

9. In October 2014, the applicant lodged an appeal with the Regional Court (*Audiencia Provincial*) of A Coruña. She asked the court to expressly recognise her daughter's right to vote, submitting that under Articles 12 and 29 of the CRPD, the right to vote of persons with disabilities was recognised and that States had to provide them with the support necessary for the full exercise of that right to be guaranteed.

10. On 11 March 2015, the Regional Court of A Coruña dismissed the applicant's appeal. The Regional Court considered that a decision to deprive a person of his or her right to vote was legal and compatible with the CRPD, provided that that person's capacity to exercise the right to vote had been subjected to individual review by a judicial body; it noted that the first-instance judgment had been sufficiently reasoned. The Regional Court emphasised that the intellectual ability of the applicant's daughter was equivalent to that of child aged between six and eight.

11. In April 2015, the applicant lodged an appeal on points of law with the Supreme Court. She argued that all citizens had the right to vote under Article 23 of the Spanish Constitution (taken in conjunction with Article 10 § 2 thereof, which provided that fundamental rights recognised under the Constitution should be interpreted in accordance with the international conventions ratified by Spain). Moreover, she considered it to be contrary to the principle of non-discrimination that disabled people were prevented from exercising the fundamental right to vote.

12. On 17 March 2016, the Supreme Court dismissed the applicant's appeal, upholding the decision of the Regional Court and ruling that the

reasoning of the contested judgment had contained a thorough analysis of the case and had correctly balanced the interests at stake.

13. On 28 April 2016 the applicant lodged an *amparo* appeal alleging a violation of Article 23 of the Spanish Constitution, defending her daughter's right to vote. It was dismissed by the Constitutional Court on 28 November 2016 (notified on the 22 December 2016).

14. In its reasoned decision (*auto*), the Constitutional Court stated as follows:

> "... 2. With regard to doubt about the constitutionality of sections 3(1)(b) and 2 of Institutional Law 5/1985 ... on the general electoral system (the LOREG) under Article 23 § 1 of the Spanish Constitution, the applicant assumes that this constitutional provision guarantees to all citizens the right of active suffrage, without any limitation or exception ...
>
> ...
>
> Sections 2 and 3 of the LOREG limit the ... right to vote to those who, besides holding Spanish nationality ..., have reached the minimum legal age, have been included in the electoral census, and are not affected by the circumstances provided by section 3 (including having been judicially deprived of the right to vote in incapacity proceedings or being confined owing to a psychiatric disorder). Thus, the constitutional model of universal suffrage is not *per se* incompatible with an individual being deprived of the right to vote for a reason legally provided for, especially when such deprivation is covered by the standard legal guarantees.
>
> 3. On the basis of the considerations listed in the previous paragraph, the arguments employed in the appeal are insufficient to effectively question the constitutionality – owing to the infringement of Articles 23 §§ 1 and 14 of the Spanish Constitution – of the above-mentioned legal provisions (paragraphs (1)(b) and (2) of section 3 of the LOREG), which enable courts and tribunals to restrict the exercise of a person's right to vote on the basis of that person's legal incapacity – in particular, on the basis of the specific circumstances of each person and after the completion of the appropriate judicial procedure determining his or her incapacity (or the authorisation of his or her confinement on the basis of mental illness).
>
> With regard to the alleged interpretation of Article 23 of the Spanish Constitution in accordance with the CRPD – and, in particular, in accordance with Article 29 thereof – which was adopted in New York on 13 December 2006 and ratified by Spain ... on 9 April 2008 ..., it is necessary to take into account, first of all, the distinction between 'disability' (a) in the sense of the Convention – a very broad concept that includes any 'long-term physical, mental, intellectual or sensory impairment' that may prevent any actual equality, and (b) 'disability' in the sense of the Spanish Civil Code (CC) – that is to say 'persistent physical or mental illnesses or impairments that prevent the person from caring for himself/herself' (Article 200 of the CC) with regard to his/her exercise of the right in question under section 3 of the LOREG. The latter deals with the ability of ... each person to cast a vote as a 'free expression of the will of the elector', which is also guaranteed by the CRPD (Article 29 (a) (iii)), the purpose of which is ..., in line with the mandate specified by Article 9 § 2 of the Spanish Constitution: to remove obstacles that prevent or hinder free and secret voting without fear (Article 29 (a) (ii) and (iii)) by persons with disabilities and to ensure that they are 'assisted in voting by a person of their choice, ... where necessary and at their request'.

...

It should be stressed that section 3 of the LOREG does not deprive the 'disabled' of their right to vote as a group or on the basis of any disability. On the contrary, it gives the judicial authorities the task of deciding on such a restriction of the exercise of the fundamental right on an individual basis, because of the specific circumstances of each person and after due process has been observed. This provision does not stipulate the deprivation of this right of suffrage in its active aspect in respect of people suffering from any disability, but only to those in respect of whom it has been so decided, by a judgment, after the appropriate proceedings have been conducted with due respect to the guarantees of adequate defence and evidence, and by virtue of the specific dysfunctionality from which they suffer and which affects their intellectual and volitional capacity with respect to the exercise of the right to vote. Therefore, the restriction should only affect those persons who lack the minimum level of understanding and will necessary to freely exercise their vote, as provided by Article 23 § 1 of the Spanish Constitution. Furthermore, the nature of the measures referred to in Article 29 (a) (i) to (iii) of the CRPD is such ... that their purpose is to ensure the effective exercise of the right to vote as a true reflection of the free will of a person with a disability and not, on the contrary, the mere insertion of the ballot paper into the ballot box.

4. ... The case-law of the Civil Chamber of the Supreme Court ... requires that a decision not to allow someone to exercise his fundamental right to vote be preceded by an individualised examination of that person's situation and by an assessment of the competing interests in play. ...

... It is necessary to point out that an assessment of the specific circumstances from which the contested decisions imply the inability to exercise the right to vote in the present case not only does not manifest any arbitrariness, irrationality, or obvious error in the wording of those decisions, but also complies with the principle of reinforced reasoning, which is required when a restriction of the exercise of fundamental rights is involved ...

... The contested judicial decisions take into consideration the data that they extract from the evidence – in particular from the forensic report and the examination carried out by the judge himself, as well as ... the statement given by the applicant's daughter at the hearing – in order to reach a decision that cannot be categorised as unreasonable.

As is clear from the judgments appealed against and as was explicit in the first-instance judgment, the disputed decision does not depend on the person's threshold of knowledge or instruction, which is not required for other citizens not subject to incapacity proceedings. The said knowledge is only one piece of information which, together with others – particularly medical-psychiatric expert reports – can be reasonably used to evaluate a person's aptitude ... This can also be applied to the question of 'influence exerted by third parties' ... It is not ... a question of identifying an absence of knowledge ... on the part of a person lacking capacity, but of recognising that through these elements (among others) ... the degree of development of the mental faculties of the person in question can be ascertained."

15. The Constitutional Court concluded that there had not been any violation of the fundamental rights alleged.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW

16. The relevant provisions of the Spanish Constitution read as follows:

Article 14

"All Spanish citizens are equal before the law and they may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance."

Article 23

"1. Citizens have the right to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage.

2. They likewise have the right to access on equal terms to public office, provided that they meet the requirements provided by law."

17. The relevant provisions of the Civil Code read as follows:

Article 199

"No one may be declared incapacitated, except under a court judgment for reasons set forth in the law."

Article 200

"Persistent physical or mental illness or deficiencies that prevent a person from caring for himself constitute reasons for ruling that person legally incapacitated."

Article 232

"Guardianship shall be exercised under the supervision of the Public Prosecutor, who shall act *ex officio* or at the request of any interested party.

The Public Prosecutor may require at any time a guardian to inform him of the situation of the minor or incapacitated person in question and of the state of the administration of the guardianship."

Article 233

"The judge may establish, in the resolution establishing a guardianship or in another subsequent resolution, any supervision and control measures deemed suitable for the benefit of the person under guardianship. Likewise, he may at any time require the guardian to inform him of the situation of the minor or incapacitated person and the state of the administration of the guardianship."

18. The relevant provisions of Institutional Law 5/1985 of 19 June 1985 on the general electoral system (the LOREG), as worded at the material time, read as follows:

Section 2 – Right to vote

"1. All Spanish citizens of legal age not falling within any of the categories listed in the following section have the right to vote."

Section 3 – Disenfranchisement

"1. The following have no right to vote:

...

b) Persons declared incapacitated by a final judicial decision, provided that that decision specifically declares the person in question incapable of exercising suffrage.

c) Persons residing in a mental hospital by order of a court, in the event that the court explicitly declares in its order that the person in question is incapable of exercising the right to vote.

2. For the purposes of this section, courts or tribunals having jurisdiction to declare a person's legal incapacity or to order a person's residence in a mental hospital must specifically decide whether that person is incapable of exercising the right to vote, and if that is the case, they shall require that fact to be noted in the Civil Register."

19. Institutional Law 2/2018 of 5 December 2018 modified the LOREG so that it guaranteed the right to vote to persons with a disability, eliminating the provisions of the LOREG relating to the possibility of depriving disabled people of the right to vote. Institutional Law 2/2018, which entered into force on 7 December 2018, amended the wording of section 3 of the LOREG, so that it now reads, where relevant, as follows:

"(i). Sub-paragraphs (b) and (c) of section 3 § 1 are deleted.

(ii). The second paragraph of section 3 shall read as follows:

Everyone shall be entitled to exercise his right to vote, knowingly, freely and voluntarily, whatever the manner in which that vote is cast and whatever means of support he may require.

An eighth, additional, provision is added with the following wording:

As of the entry into force of Organic Law 5/1985 of 19 June modifying the Organic Law on the General Electoral System in order to adapt it to reflect the International Convention on the Rights of Persons with Disabilities, any limitations on the exercise of the right to vote established by judicial resolution (on the basis of section 3(1)(b) and (c) of Organic Law 5/1985 – no longer in force) shall cease to have effect. Those persons whose right to vote has been limited or annulled owing to disability shall fully regain that right by virtue of the law".

20. The relevant provisions of the Code of Civil Procedure read as follows:

Article 759

"1. In incapacity proceedings, in addition to examining evidence adduced in accordance with the provisions of Article 752, the court shall hear the next-of-kin of the allegedly incapacitated person, examine the person himself and agree on which expert opinions in respect of the claims made in the application for a declaration of

incapacity should be ordered and on what other measures provided by law should be undertaken. A decision on a declaration of incapacity shall never be made without first securing, with the agreement of the relevant court, an expert medical opinion.

2. Where an application for a declaration of incapacity requests the appointment of a person or persons to assist or represent the incapacitated person and to look after him, the next-of-kin of the allegedly incapacitated person, the allegedly incapacitated person himself if there is sufficient reason, and such other persons as the court considers appropriate shall be heard regarding the matter.

3. If the judgment on incapacity is appealed against, the evidence referred to in the preceding paragraphs of this Article shall also be secured by the second-instance court."

Article 760

"1. The judgment declaring a person's incapacity shall specify the extent and limits of that incapacity, as well as the system of guardianship or tutelage to which the incapacitated person is to be subjected, and shall rule, where appropriate, on the need for confinement, without prejudice to the provisions of Article 763.

2. In the case referred to in paragraph 2 of the preceding Article, if the court allows the application, the judgment declaring a person's incapacity or the prodigality [*prodigalidad*] shall indicate the person or persons who, under the law, are to assist or represent the incapacitated person and look after him.

3. The judgment declaring a person's prodigality shall determine the acts that the prodigal [*pródigo*] cannot perform without the consent of the person who is to assist him."

Article 761

"1. A finding of incapacity shall not preclude the possibility of new proceedings being instituted, in the event of new circumstances, for the purpose of terminating or modifying the scope of the incapacity already established.

2. The persons referred to in Article 757 § 1, those exercising guardianship or who have custody of the disabled person, the Public Prosecutor's Office or the disabled person himself shall be requested to initiate the proceedings referred to in the preceding paragraph.

If the incapacitated person has been deprived of the capacity to appear in court, he must obtain express judicial authorisation to act in the proceedings on his own behalf.

3. The mandatory evidence referred to in Article 759 shall be adduced *ex officio*, both during the first-instance proceedings and, where appropriate, in the second-instance proceedings.

The judgment to be delivered shall rule on whether or not the declaration of incapacity should be revoked, or whether or not the extent and limits of the incapacity should be modified."

II. INTERNATIONAL LEGAL INSTRUMENTS AND COMPARATIVE PRACTICE

21. The relevant provisions of the International Covenant on Civil and Political Rights (CCPR), adopted on 19 December 1966, and ratified by Spain on 13 April 1977, read as follows:

Article 25

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."

22. In recent concluding observations – notably in those on the fifth periodic report of Portugal, adopted on 2-27 March 2020 (CCPR/C/PRT/CO/5) – the Human Rights Committee made the following observations with respect to persons with psychosocial or intellectual disabilities:

"18. ... The Committee further notes with concern the undue restrictions imposed on the right to vote for people with mental disabilities.

19. The State party should:

...

(c) Ensure that it does not discriminate against persons with mental, intellectual or psychosocial disabilities by denying them the right to vote on grounds that are disproportionate or have no reasonable and objective relation to their ability to vote, taking account of article 25 of the Covenant."

23. The relevant provisions of the Convention on the Rights of Persons with Disabilities (CRPD), adopted on 13 December 2006 and ratified by Spain on 9 April 2008, read as follows:

Article 1 – Purpose

"The purpose of the present Convention 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.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

Article 2 – Definitions

"For the purposes of the present Convention:

...

‘Discrimination on the basis of disability’ means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

‘Reasonable accommodation’ means 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.”

Article 12 – Equal recognition before the law

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

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

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

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.

...”

Article 29 – Participation in political and public life

“States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

a. To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:

i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;

b. To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:

i. Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties.

ii. Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels."

24. In its General Comment No. 1 (2014) on Article 12 of the CRPD (Equal recognition before the law), adopted on 19 May 2014, the Committee on the Rights of Persons with Disabilities made the following comment on Article 29 of the CRPD:

Article 29: Political participation

"48. Denial or restriction of legal capacity has been used to deny political participation, especially the right to vote, to certain persons with disabilities. In order to fully realize the equal recognition of legal capacity in all aspects of life, it is important to recognize the legal capacity of persons with disabilities in public and political life (Article 29). This means that a person's decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights, including the right to vote, the right to stand for election and the right to serve as a member of a jury.

49. States parties have an obligation to protect and promote the right of persons with disabilities to access the support of their choice in voting by secret ballot, and to participate in all elections and referendums without discrimination. The Committee further recommends that States parties guarantee the right of persons with disabilities to stand for election, to hold office effectively and to perform all public functions at all levels of government, with reasonable accommodation and support, where desired, in the exercise of their legal capacity."

25. Recommendation R (99)4 of the Committee of Ministers to member States on Principles Concerning the Legal Protection of Incapacitated Adults (adopted on 23 February 1999) provides as follows:

Principle 3 – Maximum preservation of capacity

"... 2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so."

26. The Code of Good Practice in Electoral Matters, adopted by the European Commission for Democracy through Law (the Venice Commission) at its 51st and 52nd sessions (5-6 July and 18-19 October 2002, opinion no. 190/2002), provides as follows:

"I.1. Universal suffrage – 1.1. Rule and exceptions

d. Deprivation of the right to vote and to be elected:

"i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:

ii. it must be provided for by law;

iii. the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;

iv. The deprivation must be based on mental incapacity or a criminal conviction for a serious offence.

v. Furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law."

27. The European Union Agency for Fundamental Rights noted (in its report of 21 May 2014 entitled "The right to political participation for persons with disabilities: human rights indicators") that the right to vote is often linked in national legislation to legal capacity; consequently, people who have been deprived of their legal capacity (either wholly or in part) are prohibited from voting.

This report stated, in its relevant parts, as follows (pages 40-41; footnotes omitted):

"Seven out of the 28 EU Member States – Austria, Croatia, Italy, Latvia, the Netherlands, Sweden and the United Kingdom – guarantee the right to vote for all persons with disabilities, including those without legal capacity.

In Croatia, legal reform in December 2012 abolished the exclusion of persons without legal capacity from the right to vote, meaning that people deprived of legal capacity were able to participate in the European Parliament and local elections in 2013. Similarly, amendments to the Latvian Civil Code which came into force in 2013 end the denial of the right to vote for those deprived of legal capacity. The relevant electoral legislation has not yet been amended, however, meaning people deprived of legal capacity can be barred from voting.

A second group of EU Member States have a system whereby an assessment is made of the individual's actual ability to vote. In Hungary, a system where everyone under guardianship was prohibited from voting was changed in 2012; now judges decide whether persons with "limited mental capacities" are allowed to vote. In Slovenia, the legal test for judges deciding whether to restrict the right to vote is whether the person with a disability is capable of understanding the meaning, purpose and effect of elections.

A further 15 EU Member States prohibit people with disabilities who have been deprived of their legal capacity from voting. The Member States are Belgium, Bulgaria, Cyprus, Denmark, Estonia, Germany, Greece, Ireland, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania and Slovakia. This exclusion is either set out in the country's constitution or in electoral legislation".

28. The situation since that report has slightly changed (see a report of the Agency for Fundamental Rights of 2019 titled "Who will (not) get to

vote in the 2019 European Parliament elections? Developments in the right to vote of people deprived of legal capacity in EU Member States"). It seems that, apart from Spain (2018), also France (2019) and Germany (2019) granted the right to vote to persons with mental disabilities. Denmark (2016 and 2018) eased the restrictions on the right to vote for persons with mental disabilities, and Belgium (2018) moved from a system of automatic disenfranchisement to one of disenfranchisement upon an individual assessment by a judge. The Supreme Court of Slovakia (2017) struck down legal provisions tying the right to vote to legal capacity.

THE LAW

I. ON THE REQUEST FOR THE APPLICATION TO BE STRUCK OUT OF THE LIST

29. The Government argued that the application should be struck out, in accordance with the provisions of Article 37 § (1) (a) and (b) of the Convention, since the applicant's daughter had been legally recognised as having the right to vote and the judicial decisions that had given rise to that procedure had been automatically annulled. The Government argued in particular that Institutional Law 2/2018 of 5 December 2018 had modified the LOREG, eliminating the provisions of the LOREG relating to the possibility of depriving disabled people of the right to vote and guaranteeing the right to vote to persons with a disability.

30. The Court notes that for a certain period of time the applicant's daughter was not permitted to vote. Various elections were held in Spain and in Europe between 2014 and 2018 (namely, elections to the European Parliament in May 2014, Spanish general elections in 2015 and 2016). In none of these elections was the applicant's daughter, despite being of legal age, able to exercise her right to vote.

31. Therefore, the application does not fall under Article 37 § 1; it is true that the relevant legislation was amended in 2018 and that since then, all disabled persons have been allowed to vote, but the fact remains that the applicant's daughter was not able to vote in several elections held after she had reached her majority until the amendment of the law in 2018.

32. The Court considers in any event that respect for human rights, as defined by the Convention and the Protocols thereto, requires it to continue the examination of the application (Article 37 § 1 *in fine).*

II. ON THE APPLICANT'S STANDING TO BRING THE PRESENT APPLICATION

33. The Court notes that the application was brought by Ms Maria del Mar Caamaño Valle in her own name, acting on behalf of her daughter, M.

It accepts that under Spanish law, as is evidenced by the proceedings under review, the applicant has been exercising the rights of her disabled daughter.

34. It is worth noting that the judicial process at each domestic instance – prior to the lodging of the instant application – consisted precisely of the domestic proceedings initiated at the time in question by the mother with the intention of extending her custody over her disabled daughter. That process ended with the declaration of her daughter's incapacity and the extension of the parental-guardianship. It therefore considers that the applicant had the required capacity to lodge the present application. It will proceed, however, under the assumption that the actual victim of the alleged violation in this case is M.

III. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 AND ARTICLE 14 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL No. 12

35. The applicant complained of a violation of Article 3 of Protocol No. 1. She also complained of a violation of Article 3 of Protocol No. 1. in conjunction with Article 14 of the Convention and Article 1 of Protocol No. 12, asserting that the prohibition, in force at the relevant time, on people with disabilities voting had been discriminatory.

The relevant provisions read as follows:

Article 3 of Protocol No. 1

"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

Article 14 of the Convention

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ...other status."

Article 1 of Protocol No. 12

"1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

A. Admissibility

36. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

37. The applicant noted that despite the universality of the right to vote, as recognised by the Constitution, the LOREG stated that people whose legal capacity had been modified could be deprived of the right to vote by a judicial decision. Such a restriction constituted unquestionable discrimination on the basis of disability, did not pursue a legitimate aim and was disproportionate.

38. The applicant reiterated that international treaties on human rights served as interpretative criteria in respect of the rights safeguarded by the Convention. In that regard, the CPRD, which had been largely ratified worldwide, defined the standards of protection to be afforded to people with disabilities, guaranteed the right to vote of people with disabilities, and established that States were responsible for guaranteeing the exercise of this right in conditions of equality and non-discrimination.

39. In the applicant's opinion, it was an "impossible chimera" (*quimera imposible*) to attempt to limit a person's right to vote through an evaluation of his or her capabilities or ability to think freely. She maintained that voting constituted an individual and personal choice and that political pluralism was an expression of human diversity in terms of elections and respect for elections.

(b) The Government

40. The Government stated that people with disabilities in Spain enjoyed the same fundamental rights as other citizens. The key point in the present case was that the term "disability", as used in the CRPD, was not the equivalent of the term "incapacity", as used by Spanish legal system.

41. The Government noted that under Article 200 of the Civil Code, incapacity proceedings were designed to guarantee the rights of people suffering persistent mental illness or deficiencies preventing them from looking after themselves (see paragraph 17 above). Such proceedings were undertaken before a judge, a public prosecutor took part in such proceedings in order to help the person whose legal capacity was at stake, and the judgment delivered had to be properly reasoned and based on evidence. The judge examined the person concerned and the specific circumstances of the case and considered what was in that person's best interests, the object of the judgment being only to guarantee that person's rights. Any such judgment could be revised to reflect the evolution of the disabilities suffered by the subject of the judgment.

42. The Government referred to the principles established by the Court's conclusions in respect of the case of *Alajos Kiss v. Hungary* (no. 38832/06,

§§ 38 et seq., 20 May 2010), and, in particular, to the wide margin of appreciation enjoyed by the national legislature in determining whether restrictions on the right to vote could be justified. In that respect, the Government submitted that preventing a person under guardianship from voting (depending on his or her specific circumstances) would be acceptable, particularly in a case such as the present one, in which the said restriction was not automatic but was only applicable to individuals following the completion of a judicial procedure that observed all due guarantees. Referring to *Cernea v. Romania* (no. 43609/10, §§ 34-36, 27 February 2018), the Government maintained that the applicant's daughter had not suffered discrimination on the grounds of her disability.

43. The Government reiterated that the case-law of the Court ensured that member States respected the minimum standard of protection of fundamental rights required by the European Convention on Human Rights. They submitted that the Court should not raise that standard by itself. The Court had the faculty to interpret the Convention as a living instrument, but only when there was a European consensus regarding a subject; however, even if that was the case, such an increase in the standard of protection could not be imposed by the Court.

44. The Government described the process that was compulsory in Spain in order for someone to be declared incapable or for a person's legal capacity to be modified. It furthermore pointed out the following guarantees: (i) only a party entitled to initiate that process could do so – that is to say the public prosecutor or a relative of the person in question, and (ii) the judge had to personally examine the person in question and be guided by a physician and by a report on the status of that person. The aim of the process was to protect the person, regardless of the aims sought by the initiator of the proceedings. The deprivation of the right to vote of the person in question was not an automatic consequence of the process; it depended on the specifics of each case. The decision was always revisable if the circumstances of the person in question changed. The Government also explained that the Venice Commission – in accordance with the Code of Good Practice in Electoral Matters – agreed with the approach followed under the Spanish legal system. Furthermore, the Government submitted that in the light of the Court's judgment in the case of *Alajos Kiss* (cited above), it was not possible to argue that there had been any violation of the fundamental rights of the applicant's daughter. The Government noted that Spanish law satisfied the standard set by Article 3 of Protocol No. 1.

45. The Government furthermore noted that a new law (Institutional Law 2/2018) had entered into force, modifying the LOREG by guaranteeing the right of suffrage to persons with disabilities. Consequently, all persons suffering from a mental disability of whatever degree now had the right to vote, and all previous final judicial decisions declaring such a disability were deemed to be null and void. All persons who were in the same

situation as the applicant automatically benefitted from the provisions of the new law.

(c) The third party's submissions

46. The Commissioner for Human Rights of the Council of Europe ("the Commissioner") considered that developments within the UN system and the Council of Europe demonstrated a clear evolution in terms of the clarification of international obligations and that there was a consensus among the Contracting States within the context of commonly agreed international standards to the effect that the withdrawal of political rights on the basis of a disability (including cognitive impairment) and mental health status was unacceptable, even when it stemmed from a judicial decision.

47. In the opinion of the Commissioner, when a large category of persons – such as the nearly 100,000 persons in Spain with intellectual and psychosocial disabilities – was excluded from the electoral process, not only were they deprived of any possibility of influencing the political process and the chance of shaping the policies and measures that directly affected their lives, but society as a whole was deprived of a legislature that reflected its full diversity. Therefore, such measures certainly interfered with the free expression of the opinion of the people in the sense of Article 3 of Protocol No. 1. They also perpetrated age-old stigmas against persons with intellectual and psychosocial disabilities; such stigmas were damaging to the whole of society. Voting was also an important symbol of empowerment and inclusion and could affect the motivation of persons with disabilities to participate in public life and contribute to the societies in which they lived.

48. In conclusion, the Commissioner was of the opinion that Article 3 of Protocol No. 1 to the Convention should be interpreted in the light of Article 29 of the CRPD and other international standards that provided that the right to vote of persons with disabilities should be upheld without exception. The Commissioner furthermore asserted that the practice of depriving persons with intellectual and psychosocial disabilities of their right to vote on the basis of a judicial decision could not be considered to be compatible with a legitimate aim in a modern democracy and amounted to discrimination; interfering with the ability of the persons concerned to freely express their opinions had serious negative effects on those persons, on society and on democracy. Accordingly, States should be reminded of their positive obligations to ensure that persons with disabilities (including intellectual and psychosocial disabilities) could effectively exercise their right to vote; they could realise those obligations by undertaking general measures securing the accessibility of electoral procedures, reasonable accommodation, and the provision of individual support where necessary.

(d) The parties' comments on the Commissioner's intervention

49. The applicant agreed with the Commissioner that the rights under the Convention of persons with disabilities should be interpreted in the light of the CRPD, and emphasised that Article 3 of Protocol No. 1, read in conjunction with Article 14 of the Convention and Article 1 of Protocol No. 12, should be interpreted as guaranteeing the right to vote of persons with disabilities, without exception and on an equal basis.

50. The Government reiterated that the role of the Court consisted of guaranteeing minimum common standards of protection of human rights – not legislating or harmonising legislation. They noted that Article 29 of the CRPD did not specify that any person with disabilities had the right to vote, but it did specify that persons who were entitled to vote should be furnished with sufficient means to enable them to exercise that right. The Government asserted in this regard that Spain provided all the means necessary to enable disabled persons to exercise their right to vote and their right to stand for election and to undertake public duties.

51. The Government emphasised that the Spanish legal system provided everyone reaching the age of eighteen automatically acquired the right to vote. Disenfranchisement could only be effected by a judge after the lodging of a request by an interested party (that is to say a parent, guardian or public prosecutor); under the relevant law, not all types of intellectual or psychosocial disabilities constituted grounds for disenfranchisement – only when they were persistent and so serious that the person in question was not able to take care of himself or herself unaided; a decision to disenfranchise a person was to be taken by a judge in a procedure in which all due guarantees would be observed, and which would be subject to judicial review at a minimum of three levels of jurisdiction and subject to review in the event that the relevant circumstances changed.

2. The Court's assessment

(a) The interpretation of the Convention in the light of relevant rules and principles of international law

52. Despite its specific character as a human rights instrument, the Convention is an international treaty that is to be interpreted in accordance with the relevant standards and principles of public international law and, in particular, in the light of the Vienna Convention on the Law of Treaties of 23 May 1969. Pursuant to the Vienna Convention, the Court must establish the ordinary meaning to be given to terms within their context and in the light of the object and purpose of the provision from which they are taken. Thus, the Court has never considered the provisions of the Convention to constitute the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in

relations between the Contracting Parties (see, among many other authorities, *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 67, ECHR 2008, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 134, 21 June 2016, *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 123, 8 November 2016, and *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 172, 13 February 2020).

53. At the same time, the Court reiterates that it has authority to ensure that the text of the European Convention on Human Rights is respected (see *Aliyeva and Aliyev v. Azerbaijan*, no. 35587/08, § 74, 31 July 2014). It is the Convention which the Court can interpret and apply; it does not have authority to ensure respect for international treaties or obligations other than the Convention (see *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no.36925/07, § 235, 29 January 2019).

54. The Court acknowledges that other instruments can offer wider protection than the Convention (regarding the CRPD, for example, see *Rooman v. Belgium* [GC], no. 18052/11, § 205, 31 January 2019), but the Court is not bound by interpretations given to similar instruments by other bodies, having regard to the possible difference in the contents of the provisions of other international instruments and/or the possible difference in role of the Court and the other bodies (see *Muršić v. Croatia* [GC], no. 7334/13, § 113, 20 October 2016). The Court understands that the Convention should be interpreted, as far as possible, in harmony with other rules of international law.

(b) Alleged violation of Article 3 of Protocol No. 1

(i) General principles

55. The Court has established that Article 3 of Protocol No. 1 guarantees individual rights, including the right to vote and to stand for election (see, inter alia, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 51, Series A no. 113, and *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 385 22 December 2020). However, the rights guaranteed under Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations, and the Contracting States have a margin of appreciation in this sphere, which generally is a wide one (see the above-cited cases of *Mathieu-Mohin and Clerfayt,* § 52, and *Selahattin Demirtaş*, § 387). The Court reiterates, however, that if a restriction on the right to vote applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower (see *Alajos Kiss*, cited above, § 42).

56. It is for the Court to finally determine whether the requirements of Article 3 of Protocol No. 1 have been complied with. It has to satisfy itself that the limitations imposed on the exercise of the rights under Article 3 of

Protocol No. 1 do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Mathieu-Mohin and Clerfayt*, cited above, § 52, and *Selahattin Demirtaş*, cited above, § 387).

57. In addition, any conditions imposed must not thwart the "free expression of the people in their choice of legislature" (see *Selahattin Demirtaş*, cited above, § 388). In other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws that it promulgates. The exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, among other authorities, *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 62, ECHR 2005 IX, and *Scoppola v. Italy (no. 3)* [GC], no. 126/05, § 84, 22 May 2012). More specifically, election results should not be obtained through votes cast in a manner that runs counter to the fairness of elections or the free expression of the will of voters.

58. The Court has stated that "since the Convention is first and foremost a system for the protection of human rights, it must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any emerging consensus as to the standards to be achieved. In this regard, one of the relevant factors in determining the scope of the authorities' margin of appreciation may be the existence or non-existence of common ground between the laws of the Contracting States" (see *Sitaropoulos and Giakoumopoulos v. Greece* [GC], no. 42202/07, § 66, ECHR 2012).

59. The Court reiterates that the presumption in a democratic State must be in favour of the inclusion of all, and that universal suffrage is the basic principle (see *Hirst (no. 2*), cited above, § 59; *Sitaropoulos and Giakoumopoulos*, cited above, § 67, and *Scoppola (no. 3)*, cited above, § 82). This does not mean, however, that Article 3 of Protocol No. 1 guarantees to persons with a mental disability an absolute right to exercise their right to vote. Under this provision, these persons are not immune to limitations of their right to vote, provided that the limitations comply with the conditions set out above (see paragraphs 58 and 59 above). It is not for the Court to express an opinion on whether Article 29 of the CRPD imposes stricter obligations on the States that are parties to that convention. For the purpose of the interpretation of Article 3 of Protocol No. 1, the Court notes the fact that there is at present no consensus among the States Parties to Protocol No. 1 in the sense of an unconditional right of persons with a mental disability to exercise their right to vote. On the contrary, a majority

of these States seems to allow for restrictions based on the mental capacity of the individual concerned (see paragraph 27 above).

60. The margin of appreciation left to the States is not unlimited. The Court has already stated that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, does not fall within any acceptable margin of appreciation (see *Alajos Kiss*, cited above, § 42). Likewise, an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote (ibid., § 44).

61. By contrast, the Court has accepted as legitimate the aim of "ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs" (ibid., § 38).

(ii) Application to the present case

62. The Court will now examine whether the disenfranchisement of the applicant's daughter pursued a legitimate aim in a proportionate manner, having regard to the principles identified above. It will also examine whether the limitation of the applicant's daughter's right to vote interfered with the free expression of the opinion of the people.

(α) Legitimate aim

63. The Court points out that Article 3 of Protocol No. 1 does not, as do other provisions of the Convention, specify or limit the aims that a restriction must pursue. A wide range of purposes may therefore be compatible with Article 3 (see *Hirst (no. 2)*, cited above, § 74, and *Alajos Kiss*, cited above, § 38).

64. The Court accepts that the measure complained of pursued the aim of ensuring that only citizens capable of assessing the consequences of their decisions and of making conscious and judicious decisions should participate in public affairs. It is therefore satisfied that the measure pursued a legitimate aim (see paragraph 61 above).

(β) Proportionality

65. The Court observes that at the relevant time the Spanish system did not establish an automatic bar on voting in respect of persons under guardianship in situations similar to that of the applicant's daughter, but took into account such persons' actual faculties, which were to be analysed during judicial proceedings brought in order for such persons to be declared incapable.

66. The Court notes, with respect to legal incapacitation in general of persons with disabilities, that the presumption in Spanish law is that they

have the legal capacity and ability to act, except in cases where the degree of disability is such that it prevents them from caring for themselves. Accordingly, those who suffer from a mental illness that prevents them from caring for themselves may be declared incapable and placed under the guardianship of a tutor or a curator (see paragraph 17 above). However, guardianship does not automatically lead to disenfranchisement.

67. At the time of the events in question, Spanish law provided for the deprivation of the right to vote only in respect of the most serious cases of disability and in respect of persons ruled incapacitated by a final judicial decision (always revisable according to the personal circumstances) declaring specifically that the person in question was incapable of exercising the right to vote (see paragraph 18 above).

68. The Court notes that Spain in 2018 eliminated the possibility of restricting disabled people's right to vote (see paragraph 19 above). This means that the applicant's daughter has been entitled to exercise her right to vote since the entry into force of the Law 2/2018 amending the LOREG. Nevertheless, the fact that the law was amended in 2018 in such a way as to return voting rights to all persons with a mental disability, without exception, does not imply that the previous system was incompatible with the requirements of Article 3 of Protocol No. 1.

69. The Court reiterates that in respect of the restriction of the rights of mentally disabled persons the margin of appreciation is relatively narrow (see paragraph 55 above); an individualised judicial evaluation of the cognitive capacity is therefore required, and it must be demonstrated that the limitation is not solely based on a mental disability necessitating partial guardianship (see *Alajos Kiss*, cited above, § 44).

70. The Court will therefore examine whether the domestic courts thoroughly examined the justification of the limitation of the daughter's rights, in the light of the Convention principles.

71. As indicated above, the applicant's daughter did not lose her right to vote as the result of the imposition of an automatic, blanket restriction on the franchise of those under guardianship but as the result of an explicit decision taken in the course of separate incapacity proceedings that were initiated at the request of her parents (contrast *Alajos Kiss*, cited above, § 43). The Court notes that those proceedings were initiated in December 2013 (shortly before M. reached the age of 18) after her parents lodged an application for her to be deprived of her legal capacity and for their guardianship over her to be extended. Her parents initiated the proceedings because they were aware that their daughter had serious problems that rendered her unable to manage her life on her own.

72. As noted above, four different judicial bodies were involved in the assessment of the "fitness to vote" (see *Alajos Kiss*, cited above, § 41) of the applicant's daughter. The First-Instance Judge examined the applicant's daughter's legal capacity in depth and – after weighing the interests at stake

and evaluating the evidence and reports made within that process – ruled that the guardianship should be extended and that M. should be deprived of her right to vote because she had a lack of cognitive skills to understand the meaning of a vote and was prone to be influenced very easily (see paragraphs 6-8 above). That decision was confirmed by the Regional Court on appeal (see paragraph 10 above). The latter's decision was upheld by the Supreme Court after an appeal on points of law. The Supreme Court examined the substance of the appeals lodged by the applicant and found that the decision of the Regional Court had contained a thorough analysis of the case and had correctly balanced the interests at stake (see paragraph 12 above). Finally, the Constitutional Court dismissed an amparo appeal, after having found that the contested judicial decisions were based on an individualised examination of the applicant's daughter's situation and did not manifest any arbitrariness, irrationality or obvious error (see paragraph 14 above).

73. Having regard to the foregoing, in particular the fact that the removal of the applicant's daughter's voting rights was based on her lack of understanding of the meaning of a vote and her susceptibility to being influenced, the Court concludes that her disenfranchisement was not disproportionate to the legitimate aim pursued.

(γ) The free expression of the opinion of the people

74. The Court emphasises that an overriding obligation under Article 3 of Protocol No. 1 is to "ensure the free expression of the opinion of the people". Any limitation of the right to vote must therefore be analysed not only from the perspective of the individual concerned, but also from the perspective of democratic society as a whole, since each individual's right is embedded within the broader framework of the electoral system. That system must be "aimed at identifying the will of the people through universal suffrage" (see paragraph 57 above). Such a result can only be obtained through a voting process that allows for the people freely expressing their opinion in the choice of the legislature.

75. It is for each State to determine how the "free" expression of the opinion of the people is to be ensured while at the same time making provision that the opinion expressed represents the one "of the people". The survey of 28 Member States of the European Union shows that while a number of States put the emphasis on the right of all people to participate in the elections, other States put the emphasis on the requirement of a free and self-determined electoral choice by the voters, thus prohibiting persons with certain mental disabilities from participating in the elections (see paragraphs 27-28 above). Article 3 of Protocol No. 1 does not impose either one of these systems. The Court considers that both systems fall within the margin of appreciation of the States, as long as -in the second system- the conditions for disenfranchisement are such that they apply only to those

persons who are effectively unable to make a free and self-determined electoral choice.

76. Having regard to the reasons for the exclusion of the applicant's daughter from the electoral process (see paragraphs 71-73 above), the Court considers that the contested measure does not thwart the free expression of the opinion of the people.

(δ) Conclusion

77. In the light of the above, the Court considers that the decision taken by the domestic courts in the present case falls within the margin of appreciation of the States to regulate the right to vote. The disenfranchisement of the applicant's daughter took place on the basis of her personal circumstances and by means of judgments that were delivered following a thorough analysis of her mental capacity. Contrary to the applicant's assertion, M. was not deprived of the right to vote simply because she belonged to a certain group of persons. Her disenfranchisement cannot be considered to thwart the free expression of the opinion of the people in the choice of the legislature.

78. Having regard to the foregoing, the Court concludes that there has been no violation of Article 3 of Protocol No. 1 to the Convention.

(c) Alleged violation of Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1, and of Article 1 of Protocol No. 12

79. The Court has stated that, in spite of the difference in scope between Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention, the meaning of the notion of "discrimination" in Article 1 of Protocol No. 12 is intended to be identical to that in Article 14 (see paragraphs 18 and 19 of the Explanatory Report to Protocol No. 12). In applying the same term under Article 1 of Protocol No. 12, the Court therefore sees no reason to depart from the established interpretation of "discrimination". It can be inferred that, in principle, the same standards developed by the Court in its case-law concerning the protection afforded by Article 14 are applicable to cases brought under Article 1 of Protocol No. 12 (see *Napotnik v. Romania*, no. 33139/13, § 69 and 70, 20 October 2020).

80. The Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without objective and reasonable justification, of individuals in analogous, or relevantly similar, situations. In other words, the requirement to demonstrate an analogous position does not require that the comparator groups be identical. For the purposes of Article 14, a difference in treatment is discriminatory if it "has no objective and reasonable justification" – that is to say if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality" between

the means employed and the aim sought to be realised (see *Napotnik*, cited above, § 71).

81. The Court has also established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14 (see *Fábián v. Hungary* [GC], no. 78117/13, § 113, 5 September 2017).

82. The Court notes, in respect of the instant case, that the right to vote of the applicant's daughter was restricted because of her limited mental capacity. The difference in treatment between the daughter (whose right to vote was restricted) and persons who had the right to vote was therefore based on the respective mental capacity of each person. The Court considers that (in respect of restrictions on the right to vote) a difference in treatment based on such grounds pursues a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The assessment underlying the Court's conclusion that the interferences with the right to vote of the applicant's daughter were justified under Article 3 of Protocol No. 1 took into account the applicant's daughter special status (that is to say the fact that the degree of her legal capacity had been modified). These considerations are equally valid within the context of Article 14 and, even assuming that the applicant's daughter can be deemed to be in a comparable position to other persons whose legal capacity has not been modified, justify the difference of treatment complained of.

83. In view of the foregoing, the Court concludes that there has been no violation of either Article 14 of the Convention, read in conjunction with Article 3 of Protocol No. 1, or Article 1 of Protocol No. 12.

FOR THESE REASONS, THE COURT,

1. *Declares,* unanimously, the application admissible;

2. *Holds,* by six votes to one, that there has been no violation of Article 3 of Protocol No. 1;

3. *Holds,* by six votes to one, that there has been no violation of either Article 14 of the Convention, read in conjunction with Article 3 of Protocol No. 1, or Article 1 of Protocol No. 12.

Done in English, and notified in writing on 11 May 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Paul Lemmens
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Lemmens is annexed to this judgment.

P.L.
M.B.

DISSENTING OPINION OF JUDGE LEMMENS

1. To my regret, I am unable to agree with the finding of the majority that there has been no violation of either Article 3 of Protocol No. 1 to the Convention or Article 14 of the Convention and Article 1 of Protocol No. 12.

I must admit from the outset that the majority's opinion is based on solid reasoning and that it is in line with the Court's existing case-law.[1] I believe, however, that the interpretation of the Convention in this area requires updating, and that an updated interpretation would necessarily lead to a different outcome in the present case.

I. ARTICLE 3 OF PROTOCOL No. 1

2. Article 3 of Protocol No. 1 provides that "the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

The present case deals with a limitation of the right to vote, based on the applicant's daughter's lack of capacity in respect of political affairs and electoral matters (see the decision of the first-instance court, referred to in paragraph 8 of the judgment). Such a limitation can be accepted only if it does not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, if it is imposed in pursuit of a legitimate aim, and if the means employed are not disproportionate (see paragraph 56 of the judgment). In addition, the limitation in question must not thwart the "free expression of the opinion of the people" (see paragraph 57 of the judgment).

A. The limitation of the applicant's daughter's right to vote

3. With respect to the first aspect, the justifiability from the point of view of the individual in question, the majority consider that the right to vote can be restricted on the basis of a person's mental capacity, if the aim is to ensure that "only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs" (see paragraph 61 of the judgment, referring to *Alajos Kiss v. Hungary*, no. 38832/06, § 38, 20 May 2010).

4. This point of view conflicts with the interpretation given by the Committee on the Rights of Persons with Disabilities (hereafter "the

[1] I will not discuss the recent case of *Strøbye and Rosenlind v. Denmark* (nos. 25802/18 and 27338/18, 2 February 2021), as the judgment in that case is not yet final at the moment of writing of this opinion.

CRPD" Committee) to Articles 12 and 29 of the Convention on the Rights of Persons with Disabilities (hereafter "the CRPD").

Article 12 § 2 provides that States Parties shall recognise that persons with disabilities enjoy legal capacity, on an equal basis with others, in all aspects of life. According to the CRPD Committee, "legal capacity includes the capacity to be both a holder of rights and an actor under the law" (General Comment No. 1 (2014) on Article 12: Equal recognition before the law, § 12, CRPD/C/GC/1).

The CRPD Committee further notes that "recognition of legal capacity is inextricably linked to the enjoyment of many other human rights provided for in the [CRPD]" (ibid., § 31). With respect to Article 29, which guarantees the right of persons with disabilities to "effectively and fully participate in political and public life on an equal basis with others" (Article 29 (a), the CRPD Committee is of the opinion "that a person's decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights, including the right to vote ..." (ibid., § 48, quoted in paragraph 24 of the judgment).

The statements referred to above should be read in conjunction with the CRPD Committee's views in *Zsolt Bujdosó and Others v. Hungary*, adopted a year earlier (communication no. 4/2011, views adopted on 9 September 2013, CRPD/C/10/D/4/2011). That case was brought by a number of persons suffering from intellectual disability and placed under partial or general guardianship. They complained about their disenfranchisement on the basis of disability. The CRPD Committee held that "an exclusion of the right to vote on the basis of a perceived or actual psychosocial or intellectual disability, including a restriction pursuant to an individualised assessment, constitutes discrimination on the basis of disability". A provision "which allows courts to deprive persons with intellectual disability of their right to vote ..., is in breach of Article 29 of the [CRPD]" (ibid., § 9.4).

The conclusion to be drawn from the above is simple: under the CRPD, all persons with disabilities, without exception, should have the right to vote, and no one should be deprived of that right on the basis of any perceived or actual intellectual disability.

5. The majority admit that the Convention should be interpreted, as far as possible, in harmony with other rules of international law (see paragraph 54 of the judgment). They underline, however, that the Court is "not bound by interpretations given to similar instruments by other bodies" (ibid.). I have no problem agreeing with that statement in general. It is for the Court to decide for itself how a provision of the Convention is to be interpreted, and it may conclude that the Convention provision is to receive an interpretation that is different from another human-rights body's interpretation of a similar provision.

The majority distance themselves from the CRPD Committee's position on the issue at stake, summarised above. They do so because of a lack of "consensus among the States Parties to Protocol No. 1 in the sense of an unconditional right of persons with a mental disability to exercise their right to vote"; they in fact see a consensus in the other direction, namely a prevailing view among the States Parties that "restrictions based on the mental capacity of the individual concerned" are permissible (see paragraph 59 of the judgment).

I respectfully disagree. In my opinion the Court should have aligned its approach to that of the CRPD Committee, for the reasons that I will now try to set out.

6. In the first place, voting is more than just expressing a certain preference on a particular day, every few years. As is confirmed by the title of Article 29 of the CRPD, it forms part of the broader right to participate in political and public life.

As eloquently stated by Martha Nussbaum, the exclusion of persons with cognitive disabilities from the right to vote means that these persons "are simply disqualified from the most essential functions of citizenship", "they do not count", "their interests are not weighed in the balance", "they are not regarded as fully equal citizens, with a dignity commensurate with that of others" (see M. Nussbaum, "The Capabilities of Persons with Cognitive Disabilities", *Metaphilosophy*, vol. 40, 2009, (331), at 347).

Respect for human dignity is a strong argument for fully respecting each person's right to vote.

7. Secondly, as underlined by the CRPD Committee in its general comment on Article 12 of the CRPD, there is a difference between legal capacity and mental capacity:

> "Legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors. ... Article 12 of the [CRPD] makes it clear that "unsoundedness of mind" and other discriminatory labels are not legitimate reasons for the denial of legal capacity (both legal standing and legal agency). Under Article 12 of the [CRPD], perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity" (General Comment No. 1 (2014), cited above, § 13).

I regret that the majority do not draw the above distinction. They accept the complete removal of the applicant's daughter's right to vote on the basis of her cognitive disability. This is exactly the kind of situation that the CRPD Committee denounced in 2014: "In most of the State party reports that the CRPD Committee has examined so far, the concepts of mental and legal capacity have been conflated so that where a person is considered to have impaired decision-making skills, often because of a cognitive or

psychosocial disability, his or her legal capacity to make a particular decision is consequently removed" (see General comment No. 1 (2014), cited above, § 15).

A much less far-reaching measure is possible, which fully respects the person's legal capacity to vote, while at the same ensuring that that capacity is exercised by a person "capable of assessing the consequences" of any vote cast (see the terms used by the first-instance court in the present case, quoted in paragraph 8 of the present judgment). In this respect I should like again to refer to Nussbaum, who argues that in the case of a person with "profound cognitive disabilities" a surrogate may be designated who would be able to vote on that person's behalf. Such an arrangement would reflect the principle "one person, one vote", a principle that is not observed when the person with a disability is excluded altogether from voting (see M. Nussbaum, cited above, p. 347; see also M. Nussbaum, *Creating Capabilities. The Human Development Approach*, Belknap Press, Cambridge, Mass., 2011, 24).

It should be noted that such an arrangement would be fully compatible with the CRPD. Article 12 § 3 of the CRPD provides that States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. The CRPD Committee explains that "support" is a broad term. It may encompass, depending on the type and intensity of the disability of the person, assistance by a trusted person in exercising his or her legal capacity (General comment No. 1 (2014), cited above, § 17). In the case of the exercise of the right to vote by a person with a cognitive disability, the trusted person can – and should – vote according to his or her interpretation of that person's "will and preferences" (Article 12 § 4 of the CRPD; see General comment No. 1 (2014), cited above, § 21).

8. Thirdly, I must also address the majority's reliance on a lack of consensus among the States Parties to Protocol No. 1 in favour of an unconditional right of persons with a mental disability to exercise their right to vote.

In a matter such as the one at issue, which is the subject of a specific treaty, adherence to that treaty should be a strong indicator of the existence or lack of consensus. The CRPD has to date been ratified by 45 of the 47 member States of the Council of Europe (the only two States that are not party to the CRPD are Liechtenstein and Ukraine). It is true that a number of these 45 States have made declarations or reservations with respect to Articles 12 and/or 29 (for an overview of the declarations and reservations, see the dedicated website of the United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en). This does not alter the fact that a very large

majority of States Parties to Protocol No. 1 unreservedly agreed with the principles contained in the CRPD.[2]

9. A different question is to what extent the States Parties also live up to the obligations to which they have committed themselves by ratifying the CRPD.

The majority refer to a report adopted in 2014 by the European Union Fundamental Rights Agency (hereafter, "the FRA"; see paragraphs 27 and 59 of the judgment). At that time only seven of the 28 EU Member States guaranteed the right to vote for all persons, including those without legal capacity. The FRA considered this to be a problematic situation, referring to the concerns expressed by the CRPD Committee (FRA, *The right to political participation for persons with disabilities: human rights indicators*, 2014, 39-41). It reminded the States concerned of the need to "amend national legislation depriving people of the right to vote based on a disability, or a proxy such as assessed 'capacity'" (ibid., 8). In a later report, adopted in 2019, the FRA noted "slow but steady progress in realising the right to vote for all" (FRA, *Who will (not) get to vote in the 2019 European Parliament elections? Developments in the right to vote of people deprived of legal capacity in EU Member States*, 2019, 3; see paragraph 28 of the judgment). Based on its analysis of reforms at the national level linked to the ratification of the CRPD, the FRA found that the reforms "demonstrate a clear trend towards reducing restrictions on the right to vote of people with disabilities deprived of legal capacity" (ibid., 3). Spain in particular was mentioned, as the State in which "the most comprehensive removal of restrictions to the right to vote took place" (ibid., 3; see the reference to the 2018 reform in paragraphs 19 and 68 of the judgment).

In my opinion, if anything can be learnt from the FRA reports, it is that there is a "slow but steady" trend to align national legislation with the CRPD, that is, to implement the obligations arising from the CRPD in domestic law.

10. Fourthly, I regret that the majority do not take the same approach as two other independent bodies of the Council of Europe.

The first body I am referring to is the Venice Commission. The majority quote from the Code of Good Practice in Electoral Matters, adopted by the Commission in 2002 (see paragraph 26 of the judgment). The Code allows

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[2] This same agreement is also reflected in Recommendation CM/Rec(2011)14 of the Committee of Ministers of the Council of Europe on the participation of persons with disabilities in political and public life, adopted on 16 November 2011. One of the principles which should guide the Member States in adopting the appropriate legislative measures is that "all persons with disabilities, whether they have physical, sensory, or intellectual impairments, mental health problems or chronic illnesses, have the right to vote on the same basis as other citizens, and should not be deprived of this right by any law limiting their legal capacity, by any judicial or other decision or by any other measure based on their disability, cognitive functioning or perceived capacity" (Appendix to the recommendation, point 3, on "non-discrimination in the exercise of legal capacity").

for the deprivation of individuals of their right to vote "by express decision of a court of law", on the basis of "mental incapacity" (item I.1.1, d, iv and v).

The relevant item has, however, been the object of two "interpretative declarations", specifically "on the participation of people with disabilities in elections". The first of these declarations was adopted by the Venice Commission on 15-16 October 2010. It provided, very much in line with the wording of the Code itself, that "no person with a disability can be excluded from the right to vote ... on the basis of her/his physical and/or mental disability unless the deprivation of the right to vote ... is imposed by an individual decision of a court of law because of proven mental disability" (Venice Commission, *Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections*, § 2, CDL-AD(2010)036). That position was criticised by the Council of Europe's Committee of experts on the participation of people with disabilities in political and public life (CAHPAH-PPL) for not being "in line with the spirit" of the CRPD, in particular the provisions of Articles 12 and 29 (see Venice Commission, *Information Note concerning the Interpretative Declaration of the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections*, p. 2, CDL(2011)043). Consequently, the Venice Commission reconsidered the matter. In a new version of the interpretative declaration, adopted on 16-17 December 2011, it stated: "Universal suffrage is a fundamental principle of the European Electoral Heritage. People with disabilities may not be discriminated against in this regard, in conformity with Article 29 of the [CRPD] and the case-law of the European Court of Human Rights" (Venice Commission, *Revised Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections*, § 2, CDL-AD(2011)045; the reference to the Court's case-law is to *Alajos Kiss*, cited above, §§ 43-44). The Venice Commission thus stands for a more nuanced approach than would appear from the wording of the Code of Good Practice.

The other Council of Europe organ is the Commissioner for Human Rights. She intervened as a third party in the present case. In that capacity she argues resolutely that Article 3 of Protocol No. 1 should be interpreted in the light of Article 29 of the CRPD and that "the right to vote of persons with disabilities should be upheld without exception" (see paragraph 48 of the judgment).

11. In conclusion, while I agree that the Spanish system under review pursued a legitimate aim (see paragraph 64 of the judgment), in my opinion it had a disproportionate effect on the applicant's daughter's right to vote.

B. The obligation to ensure the free expression of the opinion of the people

12. Turning to the second aspect of the analysis under Article 3 of Protocol No. 1, it is necessary to examine to what extent the restriction at issue has a bearing on the "free expression of the opinion of the people".

As is pointed out by the majority, any condition imposed on the individual right to vote "must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage (see paragraph 57 of the judgment, with references to the Court's case-law).

The key notion in the text of Article 3 of Protocol No. 1 is that of "the opinion of the people". As I understand that notion, it refers to the opinion, or the diversity of opinions, of the electorate as a whole. Article 3 requires that the electoral system is organised in such a way that the result of the election "fairly faithfully" reflects "the opinions of the people" (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 54, Series A no. 113; *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 112, ECHR 2008; and *Cernea v. Romania*, no. 43609/10, § 35, 27 February 2018).

The majority translate this requirement into one that concerns the capability of each individual voter to "make a free and self-determined electoral choice" (see paragraph 75 of the judgment). They thus reduce the notion of "opinion of the people" to that of an aggregation of the individual opinions of each voter. In doing so, they in fact return to the question of the justification for the restriction of the individual voters' right to exercise their right to vote. This concerns the first aspect to be analysed under Article 3 of Protocol No. 1 (as discussed in paragraphs 3-11 above), and adds nothing to it. The collective dimension of the "opinion of the people" is completely lost.

13. What is required by respect for the "free expression of the opinion of the people" is that the various groups in society, with their different views on how society should be organised and how the benefits and the burdens should be divided among the various categories of citizens, are fairly represented in the body set up to represent "the people" and to take important political decisions.

In this respect, I agree with the view of the Commissioner for Human Rights, namely that excluding a large category of persons, such as persons with intellectual and psychosocial disabilities, from the electoral process, not only deprives these persons "of any possibility of influencing the political process and the chance of shaping the policies and measures that directly [affect] their lives", but also deprives "society as a whole ... of a legislature that [reflects] its full diversity" (see paragraph 47 of the judgment).

An electoral system providing for the disenfranchisement of a whole category of vulnerable persons is hardly able to ensure "the free expression of the opinion of the people".

C. Conclusion

14. For the above reasons, I must conclude that there has been a violation of Article 3 of Protocol No. 1.

II. ARTICLE 14 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL No. 12

15. The majority conclude that there has been no violation of either Article 14 of the Convention or Article 1 of Protocol No. 12. They basically hold that the reasons which justified an interference with the right to vote as guaranteed by Article 3 of Protocol No. 1, "are equally valid within the context of Article 14 [and Article 1 of Protocol No. 12]" (see paragraph 82 of the judgment).

16. I feel compelled to disagree on this point as well.

In electoral matters, equality is of particular importance. By barring the applicant's daughter from the exercise of her right to vote, the State reduced her to a second-class citizen. Unlike other citizens, she cannot make her voice heard, not even via a trusted person.

I cannot see an objective and reasonable justification for the impugned difference in treatment. In my opinion, there has been a violation of Article 14 of the Convention and Article 1 of Protocol No. 12.

III. CONCLUDING REMARKS

17. This case is important not only for people with cognitive disabilities but also for the Court. How does it see its role as a guarantor of human rights?

In *Alajos Kiss*, decided in 2010, the Court took a major step by holding that the automatic disenfranchisement of the applicant, merely because he was under partial guardianship, could not be considered to be within an acceptable margin of appreciation of the domestic authorities (see *Alajos Kiss*, cited above, § 42). It added that "the treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and [that] the curtailment of their rights must be subject to strict scrutiny" (ibid., § 44). It nevertheless suggested that a removal of voting rights after "an individualised judicial evaluation, and solely based on a mental disability necessitating partial guardianship", could be considered compatible with Article 3 of Protocol No. 1 (ibid., § 44). In the present case the majority make that suggestion an explicit statement.

Since 2010, however, a number of things have changed. The CRPD, which had already entered into force in 2008, has been given a concrete content by the CRPD Committee. While some of the CRPD Committee's interpretations may not be directly transposable to the Convention, others are. The CRPD Committee's interpretation of the right to vote of persons with disabilities is one such relevant analysis.

The majority prefer not to follow the CRPD Committee's views. They opt for a cautious approach. As long as there is no consensus among the States Parties to the Convention to adapt their laws to the CRPD as interpreted by the CRPD Committee, they do not consider it the Court's task to read into Article 3 of Protocol No. 1 an obligation for the States to do so.

18. The CRPD is based on the model of "inclusive equality", implying among other things "the full recognition of humanity through inclusion in society" (CRPD Committee, General comment No. 6 (2018) on equality and non-discrimination, § 11, CRPD/C/GC/6).

In a recent publication, which for obvious reasons I read with more than usual interest, Jenny Goldschmidt explains that inclusion also means "removing the barriers" that prevent people from enjoying their rights (see J. Goldschmidt, "The Implementation of the CRPD in the ECHR: Challenges and Opportunities", in K. Lemmens, St. Parmentier and L. Reyntjens (eds.), *Human Rights with a Human Touch. Liber Amicorum Paul Lemmens*, Intersentia, Cambridge, 2020, (611), at 613). She focuses on the relevance of the CRPD, with its emphasis on inclusion, for the interpretation and application of the Convention (ibid., 614). She concludes her research as follows: "The CRPD challenges the [Court] to reconsider its own jurisprudence, as can be required to incorporate differences instead of reaffirming inequality by allowing exceptions or accommodations, which leave the excluding normative frames untouched. The progressive realisation of the rights of the [Convention] demands a more fundamental re-thinking of the cases and laws that are considered and an unveiling of the neutrality of the underlying perspectives. In some cases, the [Court] seems aware of this, but ... it seems often reluctant to take a more substantive approach" (ibid., 631).

To reconsider the case-law is sometimes necessary. The present case evidently offered an opportunity to do so. Article 12 § 2 of the CRPD obliges the States Parties to the CRPD to recognise the legal capacity of all persons with disabilities, on an equal basis with others. While the States Parties to Protocol No. 1 enjoy a certain margin of appreciation in the sphere of limitations of the right to vote, the Court has already accepted that that margin is relatively narrow when the restriction applies to the mentally disabled (see paragraph 55 of the judgment, referring to *Alajos Kiss*, cited above, § 42). Given the obligations imposed on the States by Article 12 of the CRPD, as clarified by the CRPD Committee, the Court should have

indicated that the margin for restrictions under Article 3 of Protocol No. 1 has been further reduced.

19. The irony of this case is that while the Court is reluctant to update its case-law in accordance with the CRPD, the respondent State has in the meantime already adapted its legislation. The State did not wait for a ruling by the Court. The majority do not consider this development worth of much attention. They simply state that the fact that the law was amended "does not imply that the previous system was incompatible with the requirements of Article 3 of Protocol No. 1" (see paragraph 68 of the judgment).

The Court occasionally warns itself against failing "to maintain a dynamic and evolutive approach", as this would "risk rendering it a bar to reform or improvement" (see, among other authorities, *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002-IV; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI; and *Bayatyan v. Armenia* [GC], no. 23459/03, § 98, ECHR 2011). I am afraid that the present judgment could constitute a bar to the alignment of the Convention and domestic laws with the inclusive approach to equality as introduced by the CRPD in human-rights law.