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The Rights of Persons with Disabilities in the Case-law of the European Court of Human Rights

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ABSTRACT
The contribution deals with the European Court's case-law on persons with disabilities, examined under different Articles of the Convention (2, 3, 4, 5, 6, 8 et 10) and Articles 1, 2 and 3 of Protocol No. 1. The author has sought to show the complexity, richness and variety of the case-law, having in mind the type of vulnerability and a need to ensure concrete and effective protection of rights (both qualified and absolute) and the human dignity of persons with disabilities.

RESUME
La contribution traite de la jurisprudence de la Cour européenne des droits de l'homme au sujet des personnes handicapées sous différents articles de la Convention (2, 3, 4, 5 , 6 , 8 et 14) et les articles 1, 2 et 3 du Protocol additionnel. L'auteur cherche à démontrer la complexité, la richesse et la variété de la jurisprudence, à la lumière du type de vulnérabilité et du besoin de garantir la protection concrète et effective des droits (aussi bien qualifiés qu'absolus) ainsi que la dignité humaine des personnes handicapées.

KEYWORDS :
Disability; Vulnerability; Human Dignity; Rights; Persons with Disabilities

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The Rights of Persons with Disabilities in the Case-law of the European Court of Human Rights

Branko Lubarda[*]

1. INTRODUCTION

The Court's case-law on people with disabilities is extraordinarily rich and diverse. Having in mind the vulnerability of these persons and a need for concrete and effective protection of their rights under different Articles of the European Convention on Human Rights (Convention) and Additional Protocols, many of these cases may be analyzed from the perspective of the protection of their health.

Another general feature of the case-law is the constant use of cross references to other relevant international instruments, both universal and regional, with the aim of interpreting the Convention and its Additional Protocols in harmony with international instruments and the findings of their monitoring bodies. In the field we are discussing today, regular reference is made to the UN Convention on rights of persons with disabilities and the corresponding Guidelines of the UN Committee on Rights of Persons with Disabilities (2015). Thus, in the Grand Chamber case of *Fernandes de Oliveira*[1], reference was made to UN General Assembly Resolution 46/119, 1991 on principles for the protection of persons with mental illness and the improvement of their mental health care ; as well to Recommendation REC 2004 of the Committee of Ministers of the Council of Europe (CoE) concerning the protection of human rights and the dignity of persons with a mental disorder. In the Grand Chamber case of *Ilnseher v. Germany*[2], there were references to the observations of the UN Human Rights Committee (report of Germany) ; UN Committee against Torture (CAT) ; European Committee for the Prevention of Torture and Inhuman and Degrading Treatment ; report of the Commissioner for Human Rights of the CoE. References to these instruments and supervisory bodies have been made in cases on alleged violations of Articles 2 (the right to life), 3 (prohibition of torture and inhuman and degrading treatment) and 5 (right to liberty and security) – classical civil rights, and that is why there were not so many references to the Revised/European Social Charter and reports of the European Committee of Social Rights.

However, in a significant number of cases examined also under Article 3, the Court has made reference to the European Social Charter. Thus, in the Grand Chamber case of

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[1] *Fernandes de Oliveira v. Portugal* Application No 78103/14, 31 January 2019 [Grand Chamber].

[2] *Ilneseher v. Germany* Application Nos. 10211/12 and 27505/14, 4 December 2018 [Grand Chamber].

Paposhvili v. Belgium[3], a case involving the proposed deportation of a seriously ill person to Georgia, the Court based its findings, *inter alia*, on the information referred to in the European Committee of Social Rights' conclusions in assessing the conformity of the Georgian health-care system with Article 11 of the European Social Charter (the right to protection of health). In *Paposhvili* the Court specified that in addition to situations of imminent death, there might be "other very exceptional cases" where the humanitarian considerations weighing against removal were equally compelling (§183):

> "situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy."

In a number of cases where the Court has found a violation of Article 8 (right to private and family life) and Article 1 of Protocol No. 1 (Protection of property), the Court has also made reference to the Revised/European Social Charter and to a certain extent to the case-law of the European Committee for Social Rights. Thus, in the Grand Chamber case of *Béláné Nagy v. Hungary*[4], the Court made reference not only to Articles 12 and 15 of the European Social Charter, but also to the case-law related to the assessment of compliance with the Charter, as reflected by the conclusions adopted by the European Committee of Social Rights (Hungary has ratified both the ESC and the RESP and declared itself bound by paragraph 1 of Article 12 and by Article 15). It goes without saying, that the Court made reference also to the UN Convention on the Rights of Persons with Disabilities and ILO Convention no. 102 on Social Security (Minimum Standards) and ILO Convention no. 128 on Invalidity, Old-Age and Survivors' Benefits.

The case-law on persons with disabilities from the perspective of health may be divided between the context of police custody or prison and situations outside that context, thus between custodial **(Part 2)** and non-custodial **(Part 3)** contexts.

2. THE CUSTODIAL CONTEXT

As to the custodial context (where the person is held in police custody or in prison), the case-law has been developed mainly under Articles 2 and 3, including both negative and positive obligations of the authorities ; a few examples will follow.

In the case of *I.E. v. Moldova*[5], the Court found a violation of Article 3, for the failure of the authorities to prevent ill-treatment in prison of a 17 year old minor suffering from a

[3] *Paposhvili v. Belgium* Application No 41738/10, 13 December 2016 [Grand Chamber].
[4] *Béláné Nagy v. Hungary* Application No 53080/13, 13 December 2016 [Grand Chamber].
[5] *I.E. v. Moldova* Application No 45422/13, 25 May 2020.

mild mental disability, who was detained in a cell with adults, all of whom had been convicted of grave crimes including rape of a minor. Once he was noticeably injured, he accepted that he had been assaulted and, much later, he accepted that he had been raped by those cellmates.

In the case of *Blokhin v. Russia*[6], the Court found a violation of Article 3 on account of a lack of necessary medical treatment at the temporary detention center, having regard to the applicant's young age of 12 years and particularly vulnerable situation as an ADHD (attention-deficit hyperactivity disorder) sufferer. The applicant was arrested and taken to a police station on suspicion of extorting money from a 9-year old. Since he was below the statutory age of criminal responsibility, no criminal proceedings were opened against him, and instead the court ordered his placement in a temporary detention center for juvenile offenders for a period of 30 days in order to 'correct his behavior' and to prevent his committing further acts of delinquency. The Court also found a breach of Article 5§ 1 on account of 30-day placement of a minor in a detention center, as well as a violation of Article 6§ 1 in conjunction with Article 6§ 3 due to the lack of adequate procedural guarantees in proceedings leading to a minor's placement in a detention center.

In the case of *W.D. v. Belgium*[7], the Court found a violation of Articles 3 and 5 (1) and noted a structural problem resulting in the applicant's detention for more than 9 years in the psychiatric wing of a prison with no prospect of change or appropriate medical help. Furthermore, because of the refusal of residential care centers and psychiatric hospitals to admit him, he remained in detention without any realistic prospect of treatment in an outside institution, and thus without any hope of reintegrating into the community.

However, in the case of *Jeanty v. Belgium*[8], the Court found no violation of Article 2, since the prison authorities were held to have intervened in time to effectively stop suicide attempts by the applicant, who had a history of psychological difficulties and was already in pre-trial detention on domestic violence charges where he tried (unsuccessfully) to commit suicide three times. When released he failed to comply with the conditions of release, was detained again and, after some weeks, attempted (unsuccessfully) to commit suicide, but (as already said) the prison authorities intervened in time to effectively stop his suicide attempts.

3. THE NON-CUSTODIAL CONTEXT

As to persons with disabilities in non-custodial contexts (including compulsory placement in a psychiatric institution) the case-law of the Court has been highly developed under a number of Articles, on both absolute and qualified rights.

[6] *Blokhin v. Russia* Application No 47152/06, 23 Mars 2016 [Grand Chamber].
[7] *W. D. v. Belgium* Application No 73548/13, 6 September 2016.
[8] *Jeanty v. Belgium*, Application No 82284/17, 31 Mars 2020.

A. Article 2 Case-law

The Court's approach to the protection against ill-health in general outside the custodial context – horizontal effect of the Convention – is set forth in the case of *Pentiacova and Others v. Moldova* (dec.)[9], where the Court found that an issue may arise under Article 2 where it is shown that the authorities put an individual's life at risk through denial of health care which they had undertaken to make available to the population generally. For the positive obligation to arise under Article 2, it is necessary that an individual's life is put at risk through the denial of health care and that the government ought to be aware of that risk.

As for *access to adequate health care*, the Court found breaches of Article 2 under its substantive and procedural heads in the case of *Nencheva and Others v. Bulgaria*[10] regarding the deaths of 15 children and young adults with physical and mental disabilities in a specialised public facility on account of the cold and lack of food, medicines and basic necessities and in the case of *Centre for Legal Resources on behalf of Valentin Campeanu v. Roman*ia[11] regarding the death of a vulnerable person, a young Roma aged 18, in a psychiatric hospital for lack of appropriate care, heating and food. In both cases breaches were found in that the authorities had failed in their positive obligations to protect the lives of the persons in their care and to carry out an effective investigation into these circumstances.

The substantive positive obligations of the Member State under Article 2 consist in having to put in place a regulatory framework in both the public and the private sector for securing the protection of the patients' lives and to take preventive operational measures in general, and this has a particular application in the case of persons with disabilities. In that vein is the case of *Fernandes de Oliveira v. Portugal*[12], where the Grand Chamber dealt with the suicide of a mentally ill man voluntarily admitted to a State psychiatric hospital for treatment after a suicide attempt. The Court found no violation of the substantive limb of Article 2, but a violation of the procedural limb of Article 2, under a procedural obligation of the State to set up an effective and independent judicial system apt to determine the cause of death of patients and to make those responsible accountable, namely the excessive length of proceedings (over 11 years for two levels of jurisdiction).

Turning to the case-law in the context of *alleged medical negligence*, the case of reference here is of course the Grand Chamber case of *Lopes Da Sousa Fernandes v. Portugal*[13] where the judgment reviewed and clarified the Court's case-law on the scope of the

[9] *Pentiacova and others v. Moldova*, Decision, 4 January 2005.
[10] *Nencheva and others v. Bulgaria* Application No 48609/06, 18 June 2013.
[11] *Centre for Legal Resources on behalf of Valentin Campeanu v. Roman*ia Application No 47848/08, 17 July 2014 [Grand Chamber].
[12] *Fernandes de Oliveira v. Portugal* Application No 78103/14, 31 January 2019 [Grand Chamber].
[13] *Lopes De Sousa Fernandes v. Portugal* Application No 56080/13, 19 December 2017 [Grand Chamber].

substantive positive obligation of the State as regards deaths resulting from alleged medical negligence : the judgment confirms that the obligation is an essentially a regulatory one and that it is only exceptionally that the responsibility of the State to protect life will be engaged in respect of acts or omissions of health-care providers. In L*opes de Sousa* the Court found a violation of the procedural limb of Article 2 and no violation of its substantive limb (the case concerned allegations of medical negligence rather that denial of treatment).

This case-law was applied in a disability *context* in the case of *Ulusoy v. Turkey*[14] where the Court found a breach of the procedural limb of Article 8, because of an inadequate investigation into the causes of the medical condition of a new-born baby suffering from a permanent disability. The case is about several sets of proceedings against a hospital following the birth of a child suffering from a serious disability as a result of the new-born being deprived of oxygen. However, the Court found no violation of the substantive limb of Article 8 (protection of the moral and physical integrity of individuals in the context of medical care), and pointed out that the substantive positive obligations on Turkey were confined to the effective introduction and implementation of a statutory framework capable of protecting patients. It then noted that the statutory framework in force at the material time did not, *per se*, point to any infringement on the part of the State.

The above-mentioned Grand Chamber judgment of *Valentin Campeanu*[15] is of particular importance also for the evolutive interpretation of the *locus standi* of a non-governmental organisation, as the *de facto* representative of the victim, in very exceptional circumstances, in view also of the particular vulnerability of persons with disabilities. The issue of *locus standi* was discussed also in the case of *Delecolle v. France*[16] where the Court held that M.S. had standing to replace the (deceased) applicant with a slight cognitive impairment (who had been under an enhanced supervision order, and whose request for an authorisation (owing to the restriction on his legal capacity) to marry M.S. had been refused by the guardianship judge), but found no violation of Article 12 (right to marry) of the Convention, having regard to the margin of appreciation afforded to the domestic authorities and the fact that the restrictions on the applicant's right to marry had not limited or reduced that right in an arbitrary or disproportionate manner.

B. Article 3 Case-law

i. Treatment in Hospital and Protection of Human Dignity

As to treatment in hospital and human dignity, I will mention two cases in which the Court found *a violation of Article 3* because of treatment that was not strictly necessary and was

[14] *Ulusoy and others v. Turkey* Application No 54969/09, 3 May 2019.
[15] *Centre for Legal Resources on behalf of Valentin Campeanu v. Roman*ia Application No 47848/08, 17 July 2014 [Grand Chamber].
[16] *Delecolle v. France* Application No 37646/13, 25 October 2018.

not respectful of the human dignity of the applicants : *Aggerholm v. Denmark*[17] and *Pranjić-M-Lukić v. Bosnia and Hercegovina*[18]. In the former case, the applicant suffering from paranoid schizophrenia was sentenced to committal to a psychiatric hospital after being convicted of various incidents of violence and threats of violence. He was strapped in hospital to a restraint bed for approximately 23 hours, and the Court found that this measure was not strictly necessary and not respectful of his human dignity. In the latter case, in addition to the Article 3 violation the Court found a breach of Article 8, because the applicant's vulnerability as a mentally ill person was not taken into consideration when being handcuffed in front of his family and forcibly escorted by the police to an involuntary psychiatric examination. Handcuffing had not been made strictly necessary by the applicant's conduct.

ii. Expulsion of a Person Suffering From a Serious Mental Illness

As to the expulsion of persons suffering from a serious mental illness, in the pending case before the Grand Chamber *Savran v. Denmark*[19] the issue is, *inter alia*, the proposed deportation of a person suffering from a serious mental illness without individual assurances from the receiving State as to the availability of supervision to accompany intensive outpatient therapy. The case concerns the general issue of the application of the *Paposhvili v. Belgium*[20] principles as regards, *inter alia*, the availability and accessibility of medical (psychiatric) treatment in the receiving State. In *Paposhvili*, the Court clarified that, in addition to situations of "imminent death", there might be "other very exceptional cases" where the humanitarian considerations weighing against removal were equally compelling.

C. Articles 5 and 6: Case-law On Confinement For Medical Reasons And On Denial Of Legal Capacity

I will now comment briefly on two key issues on which there would not yet appear to be full harmony between the case-law of the Court and general comments of the UN Committee on Rights of Persons with Disabilities, namely the issues of detention for medical reasons (compulsory confinement of "persons of unsound mind") as well as the denial of legal capacity of persons with mental impairment, and this could be explained by a lack of (emerging) European consensus in the field (whether from domestic and international standards). It is worth noting that the UNCRPD adopted a Statement in 2018, which uses different terminology – "persons with intellectual or psychosocial impairment".

As to liberty and security of the person (Article 14 of the UN Convention), the UN Committee position is unequivocal : 'Involuntary commitment of persons with disabilities

[17] *Aggerholm v. Denmark* Application No 45439/18, 15 September 2019.
[18] *Pranjić-M-Lukić v. Bosnia and Hercegovina* Application No 4938/16, 2 June 2020.
[19] *Savran v. Denmark* Application No 57467/15, 1st October 2019.
[20] *Paposhvili v. Belgium* Application No 41738/10, 13 December 2016 [Grand Chamber].

on health-care grounds contradicts the absolute ban on deprivation of liberty on the basis of impairment (Art. 14 (1) (b) and the principle of free and informed consent of the person concerned for health care (Art. 25)'. The Committee has repeatedly stated that States Parties should repeal provisions that allow for the involuntary commitment of persons with disabilities in mental health institutions based on actual or perceived impairment. Involuntary commitment in mental health facilities amounts to a denial of person's legal capacity to decide about care, treatment and admission to a hospital or institution, and therefore violates Article 12 in conjunction with Article 14.

In that respect, the Court case-law has developed not only under Article 3 but also under Article 5§ 1 (e) (Right to liberty and security – one of the situations where deprivation of liberty is permitted is "the lawful detention of persons of unsound mind") in the context of compulsory confinement in an institution. In this respect the Court's case-law is in principle in line with the general comments of the UN Committee, save in exceptional cases where the individual's mental disorder warrants compulsory confinement, and where the established criteria set down by the Court (*Winterwerp v. the Netherlands*, 1979), with additional safeguards against arbitrary detention, are fulfilled. In *Stanev v. Bulgaria*[21], the Court recalled the principles that an individual cannot be deprived of his or her liberty as being of 'unsound mind' unless the following three minimum conditions are satisfied : 1. the individual must be reliably shown, by objective medical expertise, to be of unsound mind ; 2. the individual's mental disorder must be of such a kind as to warrant compulsory confinement because the person needs therapy, medication or other clinical treatment [to cure or alleviate] his condition ; 3. the mental disorder, verified by objective medical evidence, must persist throughout the period of confinement.

As to the medical treatment (psychiatric and psychological) of mentally ill and vulnerable detainees in compulsory confinement, in the Grand Chamber case of *Rooman v. Belgium*[22] the Court found a violation not only of Article 3 on account of the lack of appropriate psychiatric treatment, due to the unavailability of therapists who spoke the applicant's language for 13 years (the purely linguistic element could prove to be decisive as to the availability or administration of appropriate treatment, but only where other factors do not make it possible to offset the lack of communication), but also a violation of Article 5§ 1 (e). Namely, the deprivation of liberty of persons of unsound mind had to fulfil a dual function : on the one hand, the social function of protection ; and, on the other, a therapeutic function in the interest of the person of unsound mind – 'an appropriate individualised treatment plan has to be drawn up, after consultation in so far as possible with the person in compulsory treatment' (with repeated attempts at consultation, if initially refused). Accordingly, in *Rooman* (§ 203) the Court stressed that :

> "although the persistent attitude of a person deprived of his of her liberty may contribute to preventing a change in their detention regime, this does not dispense the authorities from taking the appropriate initiatives with a

[21] *Stanev v. Bulgaria* Application No 36760/06, 17 January 2012 [Grand Chamber].
[22] *Rooman v. Belgium* Application No 18052/11, 31 January 2019 [Grand Chamber].

> view to providing this person with treatment that is suitable for his or her condition and that would help him or her to regain liberty".

Similarly, in *Lorenz v. Austria*[23] the applicant refused, during the proceedings to review his preventive detention from 2010 to 2013, to undergo further therapy and to be examined by a psychiatric expert (the applicant 'explained' that he was not suffering from a mental illness), the Court however found a violation of Article 5§ 1, *inter alia*, on account of not having a sufficient factual basis on which to decide on Mr Lorenz's requests for release – the domestic court's decision had been taken on the basis of the old experts opinions, instead of attempting to obtain a new expert opinion *proprio motu* in the course of the 2013 review proceedings. In addition, the Court stated that it fell within the authorities' positive obligation to find a way to overcome this obvious deadlock and examine the question of the applicant's transfer to the Vienna-Mittersteig Prison, the only institution where the applicant could receive the appropriate therapy. The need for an appropriate individualised treatment had been emphasised by the UN Convention on the Rights of Persons with Disabilities (2006) and by Recommendation REC 2004 10 of the Committee of Ministers of the CoE concerning protection of the human rights and dignity of persons with mental disorders.

The Committee of Ministers of the CoE, relying on the Court's case-law, argued that 'involuntary measures in psychiatry could be justified subject to strict protective conditions' and noted that 'involuntary measures continued to be provided for in the laws of member States and regularly applied'.[24] As a general rule, a measure considered to be a therapeutic necessity convincingly shown to exist, based on the established principles of medicine (including the therapeutic method to be used, if necessary, by force) cannot be regarded as inhuman or degrading treatment.[25]

As to the scope of the treatment provided, the Court's role is not to analyse the content of the treatment that is offered or administered. What is important is that the Court is able to verify whether an individualised program has been put in place, taking into account the specific details of the detainee's mental health with a view to preparing him of her for possible future reintegration into society. In this area, the Court affords the authorities a certain latitude with regard both to the content of the therapeutic care or of the medical program in question.[26] Importantly, the applicant, who had legal capacity, had been receptive to the treatment plan offered and domestic law prohibited its imposition. The Grand Chamber confirmed that, while his disorder weakened his discernment and rendered him vulnerable, this did not imply that treatment was to be imposed : rather it was to be proposed, thereby including the applicant as much as possible in developing his care plan path and providing him with a choice of treatment. Having regard to the significant efforts

[23] *Lorenz v. Austria* Application No 11537/11, 20 July 2017.
[24] (CM/AS (2016) Rec2019-final).
[25] See also *M.S. v. Croatia (No. 2) Application No 75450/12*, 19 February 2015.
[26] *Rooman v. Belgium* Application No 18052/11 31 January 2019 [Grand Chamber], at para 209.

made by the authorities to provide the applicant with access to treatment which was, on the face of it, coherent and adapted to his situation, and to the short period during which they had an opportunity to implement these treatment measures (August 2017 to date), together with the fact that the applicant had not always been receptive to them, the Grand Chamber was able to conclude that the treatment available since 2017 corresponded to the therapeutic aim of the applicant's compulsory confinement (a violation of Article 5 being found on another basis).

D. Article 6: Case-law On The Procedural Safeguards Against The Deprivation Of Legal Capacity of Persons With Disabilities In The Case-law Of The Court

According to the General Comments of the UNCRPD :

> "[8.] The absolute ban on deprivation of liberty on the basis of actual or perceived impairment has a strong link with Article 12 of the Convention, on equal recognition before the law. In its general comment No. 1 (2014) on equal recognition before the law, the Committee has clarified that States Parties should refrain from denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without the free and informed consent of the persons concerned or with consent of the substitute decision maker [a guardian], as that practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention (para. 40)."

The humanitarian motivation behand the General Comments of the UN Committee is evident (liberty v. arbitrary deprivations of liberty ; *sui iuris* - equal recognition before the law against *alieni iuris* – a denial of legal capacity). This has a long libertarian prehistory, which goes back to the times and ideas of the age of Enlightenment and the French Revolution. Thus, according to (Jean Pierre Georges) Cabanis, the humanist and libertarian medical doctor (of Honoré-Gabriel Riqueti de Mirabeau) and philosopher, the author of *Rapports du physique et du moral de l'homme* and *Œuvres philosophiques* :

> "L'humanité, la justice et la bonne médicine ordonnent de ne renfermer que les fous qui peuvent nuire véritablement à autrui ; de ne resserrer dans les liens que ceux qui, sans cela, se nuiraient à eux-mêmes." (according to Michel Foucauld, *L'histoire de la folie à l'âge classique*, Gallimard, 1972, p. 548).

To illustrate the point that the Court's approach is close to that of the UN Committee's General Comments, I would mention the case of *A.N. v. Lithuania*[27] where the Court found a *violation of the right of access to a court* under Article 6§ 1 of the Convention. The applicant had a history of mental illness and complained that he had been deprived of his legal capacity without his participation in or knowledge of the proceedings and that, as a

[27] *A.N. v. Lithuania* Application No 17280/08, 31 May 2016.

person without legal capacity, he had then been unable himself to request that his legal capacity be restored. His mother was later appointed as his guardian. A violation of Article 6§ 1 was found because the applicant had been deprived of a clear, practical and effective opportunity to have access to a court in connection with the incapacitation proceedings, in particular, in respect of his request to restore his legal capacity. The Court noted the absence of proper procedural safeguards in proceedings to deprive an applicant suffering from mental disorders of his legal capacity.

In addition, the Court found *a violation of Article 8* of the Convention, on account of the interference with the applicant's right to respect for his private life, as it made him fully dependent on his mother as his guardian in almost all areas of his life. The domestic authorities failed to take into account the form or degree of the applicant's mental disorder when depriving him of his legal capacity. The district court had no opportunity to examine the applicant in person and relied in its decision essentially on the testimony of the mother and the psychiatric report. Thus, the Court concluded that the interference with the applicant's right to respect for his private life was disproportionate to the legitimate aim pursued.

E. Article 3 of Protocol No. 1 – Case-law On The Right To Free Elections And Legal Capacity Of Persons With Mental Disabilities

The UN Committee on Rights of Persons with disabilities recommended that States Parties abolish in law and practice the deprivation of legal capacity on the basis of impairment, and introduce supported decision-making schemes, to ensure that persons with disabilities have access to individualised support that fully respects their autonomy, will and preferences, and that it is provided on the basis of the free and informed consent of the person concerned and, when applicable, with due recourse to the "best interpretation of will and preferences" test, in line with the Committee's General Comment No. 1 (2014) on Article 12 (Equal recognition before the law).

In the case of *Alajos Kiss v. Hungary*[28] the Court found a violation of Article 3 of Protocol No. 1 (Right to free elections) on account of the fact that under the national legislation any form of guardianship automatically led to disenfranchisement, without an individualised judicial evaluation :

> "The Court concludes that an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote" (§ 44).

[28] *Alajos Kiss v. Hungary* Application No 38831/06, 20 May 2010.

In the very recent case of *Strøbye and Rosenlind v. Denmark*[29] the Court found no violation of Article 3 of Protocol No. 1 to the Convention, inter alia, having in mind that there is no European consensus :

> "it cannot be concluded that there was common ground between the national laws of the Contracting States to uncouple disenfranchisement from deprivation of legal capacity" (§ 111). The lack of European consensus prevented the Court from following the UN COPWD and Guidelines of the UN Committee on Article 12 whereby "it is contrary to the Convention on the Rights of Persons with Disabilities for a State Party to exclude persons with intellectual disabilities from the suffrage".

F. Article 8 Case-law: The Protection Of Personal/Medical Data And Surveillance

In the case of *Mockutė v. Lithuania*[30] the Court found a violation of Article 8 since the interference with the applicant's private life was not 'prescribed by law'. The applicant complained that the doctor at a psychiatric hospital had disclosed information about her health and private life to a journalist and to her mother. The Court further found a breach under Article 9 of her right to practise her religion on account of the restrictive environment at Vilnius Psychiatric Hospital and because the psychiatrists had persuaded her to adopt a critical attitude towards her religion (interference was not prescribed by law).

In the case of *Vukota-Bojic v. Switzerland*[31] the Court found a violation of Article 8 but no violation of Article 6, since the applicant had been given a fair opportunity to challenge the evidence obtained by the surveillance, and that the Swiss court had given a reasoned decision as to why it should be admitted. The applicant was injured in a road accident which gave rise to disputes with her insurance company about her capacity to work. The insurance company, acting within the framework of powers conferred on it under the State insurance scheme, decided to place her under surveillance. Private investigators monitored her movements. The insurance company sought to rely on the detailed surveillance reports in court proceedings in order to contest the level of disability alleged by the applicant and the accuracy of the medical reports that she relied on. The Court found a violation of Article 8 as the domestic law had not indicated with sufficient clarity the scope and manner of exercise of the discretion conferred on insurance companies acting as public authorities in insurance disputes to conduct secret surveillance of insured persons. In particular, it did not set out sufficient safeguards against abuse. The interference had thus not been in accordance with the law.

[29] *Strøbye and Rosenlind v. Denmark* Application Nos 25802 and 27338/18, 2 February 2021.
[30] *Mockutė v. Lithuania* Application No 66490/09, 27 February 2018.
[31] *Vukota-Bojic v. Switzerland* Application No 61838/10, 18 October 2016.

G. Article 10 Case-law: Protection Of Good Faith Whistle-blowers And Indirect Protection Of Health (Not Only Of Persons With Disabilities)

In the case of *Heinisch v. Germany*[32] the issue was related to the protection of a whistle-blower acting in good faith, who reported shortcomings in the institutional care of older persons in a nursing home for the elderly, the patients were partly bedridden, disoriented, and generally dependent on special assistance, and the Court found a violation of Article 10, while making reference also to Article 24 of the Revised European Social Charter (the right to protection in cases of termination of employment), but not also to Article 23 - the right of elderly persons to social protection. The Court considered that the applicant's dismissal without notice had been disproportionately severe.

I must refer also to the recent case of *Gawlik v. Liechtenstein*[33] another whistle-blower case in the health-care system (where the applicant, a doctor and deputy chief physician of the department for internal medicine in the Liechtenstein National Hospital, was disciplined for reporting suspicions of active euthanasia), where the Court (Chamber) found no violation of Article 10, making reference to the relevant international and regional standards (including reference to Article 24 of the RESC). The Court noted that the applicant had raised suspicions of a serious offence with an external body (the Public Prosecutor's Office) without having carefully verified, in accordance with professional ethics, that the information he disclosed, which was as such of public interest, was accurate and reliable. The Court observed that the domestic courts adduced relevant and sufficient reasons for their finding that the applicant's dismissal without notice, having regard to the prejudicial effect of his complaint on the reputation of the employer (the hospital) and a staff member (the doctor concerned), was justified. They had struck a fair balance between the need to protect the said reputations on the one hand and the need to protect the applicant's right to freedom of expression on the other.

H. Article 14 Case-law: Discrimination Against Persons with Disabilities

i. In Conjunction with Article 1 of Protocol No. 1 (Protection oOf Property)

In the case of *Guberina v. Croatia*[34] the Court found a violation of Article 14 in conjunction with Article 1 of Protocol No. 1, for the failure of the authorities to take account of the needs of a child with disabilities when determining the applicant father's eligibility for tax relief on the purchase of suitably adapted property. The applicant lived with and provided care for his severely disabled child. In order to provide the child with better and more suitable accommodation, the applicant sold the family's third-floor flat, which did not have a lift, and bought a house. He then sought tax relief on the purchase, but his request was refused on the grounds that his previous flat had met the family's needs.

[32] *Heinisch v. Germany* Application No 28274/08, 21 July 2011.
[33] *Gawlik v. Lichtenstein* Application No 23922/19, 16 February 2021.
[34] *Guberina v. Croatia* Application No 23682/13, 22 Mars 2016.

In the case of *Popović and Others v. Serbia*[35] the Court found no violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1. The applicants became paraplegic after sustaining injuries in accidents. They alleged discrimination in the provision of disability benefits to civilian as opposed to military beneficiaries. As civilian beneficiaries, they maintained that they had been awarded a lower amount than those classified as military beneficiaries, despite having the same disability. The Court found no violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1, because the impugned difference in treatment had an objective and reasonable justification. The legislator's choice was based on relevant and sufficient grounds. The Court noted that the relevant difference in treatment was a consequence of their distinct positions and the corresponding undertakings on the part of the respondent State to provide them with benefits to a greater or lesser extent. This includes a moral debt which States may feel obliged to honor in response to the service provided by their war veterans ('principle of national recognition'). The Court took into considerations, *inter alia*, the Explanatory Report to the European Convention on Social and Medical Assistance and Protocol thereto, which provides that the term 'assistance' within the meaning of the Convention 'does not cover… benefits paid in respect of war injuries" and that such benefits "are generally governed by different laws to those governing social security and social assistance benefits' (§ 42).

ii. In Conjunction with Article 2 of Protocol No. 1 to the Convention (Right To Education)

In the case of *Çam v Turkey*[36] the Court found a violation of Article 14 in conjunction with Article 2 of Protocol No. 1, because the relevant domestic authorities had at no stage attempted to identify the applicant's needs (they refused to enrol a blind person in the Music Academy even though she had passed the examination) or to explain how her blindness could have impeded her access to a musical education. Nor had the authorities ever considered the possibility that reasonable accommodation might have enabled her to be educated in the Music Academy (the domestic authorities at no stage considered special accommodations in order to meet any special educational needs resulting from the applicant's blindness). Thus, the Court considered that the applicant had been denied, without any reasonable justification, an opportunity to study in the Music Academy, solely on account of her visual disability.

In a similar vein, in the case of *G.L. v. Italy*[37] the Court found a violation of Article 14 in conjunction with Article 2 of Protocol No. 1. Namely, the applicant, a child born in 2004 who suffers from non-verbal autism, was not able to receive, in the first two years of primary school, the specialised assistance to which she was entitled under the relevant

[35] *Popović and Others v. Serbia* Application Nos 26944/13 and 3 others, 30 June 2020 [Grand Chamber].
[36] *Çam v Turkey* Application No 51500/08, 23 February 2016.
[37] *G.L. v. Italy* Application No 59751/15, 10 August 2020.

legislation. She was thus obliged to pay for private specialised assistance herself. A violation was found because of a difference in treatment due to the applicant's disability and the lack of determination of the applicant's real needs and of the solutions likely to meet them - for her to attend primary school under conditions equivalent as far as possible to those benefiting other children.

I. Article 1 of Protocol No. 1 To The Convention - Disability Allowance

In the case of *Béláné Nagy v. Hungary*[38] the Court found a violation of Article 1 of Protocol No. 1. The case was about the loss of a disability allowance as a result of legislative changes to eligibility criteria. There was a ('dormant') right or legitimate expectation of the applicant to an asset. She had received the disability allowance for almost ten years. A violation of Article 1 of Protocol No. 1 was found because the applicant had been subjected to a complete deprivation of entitlement, rather than to a commensurate reduction in her benefits. She did not have any other significant income on which to subsist and she had difficulties in pursuing gainful employment and belonged to a vulnerable group of disabled people. Despite the State's wide margin of appreciation, the applicant had had to bear an excessive individual burden.

4. CONCLUDING REMARKS

This paper has sought to show the complexity and variety of the Court's case-law on persons with disabilities, having in mind their vulnerability and a need for concrete and effective protection of their rights (both qualified and absolute) under different Articles of the Convention (2, 3, 5, 6, 8, 10 and 14) and Additional Protocols (Articles 1, 2 and 3 of Protocol No. 1), many of these cases being analysed from the perspective of the protection of their health. Reference has been made to the (Revised) European Social Charter and the practice of the European Committee of Social Rights, to show the harmonious interpretation of the relevant rights. Lastly, the author has also endeavored to compare, in certain aspects, the position of the European Court of Human Rights with that of the UN Committee for the Rights of Persons with Disabilities.

[38] *Béláné Nagy v. Hungary* Application No 53080/13, 13 December 2016 [Grand Chamber].