

Disability and Universal Human Rights

Legal, Ethical, and Conceptual Implications of the Convention on the Rights of Persons with Disabilities

edited by

Joel Anderson and Jos Philips

SIM Special 35 (2012)

Netherlands Institute of Human Rights

Joel Anderson and Jos Philips (eds)

Disability and Universal Human Rights: Legal, Ethical, and Conceptual Implications of the Convention on the Rights of Persons with Disabilities

SIM Special 35

A Publication of the Netherlands Institute of Human Rights (SIM)

Utrecht University (October, 2012)

ISBN/EAN: 978-90-393-5863-4

NUR-code: 828

Keywords: disability, human rights, United Nations, Convention on the Rights of Persons with Disabilities (CRPD), law, ethics, social model of disability, discrimination, inclusion, capability approach

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6 Intellectual Disability and the Human Right to Vote: Evolving Conceptions of the Universality of Suffrage¹

Joel Anderson

One of the important contributions of the 2006 Convention on the Rights of Persons with Disabilities is to make clear that restricting voting rights on the basis of disability is a violation of human rights.² As in the case of women or racial minorities, the disenfranchisement of persons with disabilities is at odds with the principle of “universal and equal suffrage” articulated in the Universal Declaration of Human Rights.³

At the same time, the right to vote is standardly been taken to be a *qualified* right, permitting the exclusion of children, prisoners, non-citizen residents, and persons who lack mental capacity. Although these restrictions on voting rights are imposed by nearly all UN Member States, they have become topics of debate in recent years. In light of the CRPD, the disenfranchisement of persons with psychosocial or intellectual disabilities has come to be seen as particularly problematic and for two reasons. First, many of the voting restrictions in question have tended to rely on overly broad classifications, for example, disenfranchising all individuals placed under guardianship. Inspired in some cases by the CRPD, human rights jurisprudence has identified a need for much more carefully tailored restrictions, such as the “*Doe* standard” of mental capacity,” according to which individuals could not be disenfranchised unless it has

¹ Previous versions of this text were presented in the Practical Philosophy & Ethics Colloquium at Utrecht University and a conference organized by the Dutch Coalition on Disability and Development, on “The World Report on Disability and CBR Guidelines in Different National and Cultural Contexts”. I would like to thank especially Jos Philips, Thomas Fossen, Caroline Harnacke, Rob van Gerwen, and Pauline Kleingeld for feedback on earlier versions.

² Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 70.

³ The Universal Declaration of Human Rights (adopted 10 December 1948 by the United Nations General Assembly, Resolution 217 A(III)), Art. 21(3).

been demonstrated that they lack “the mental capacity to make their own decision by being able to understand the nature and effect of the voting act itself”.⁴

Recently, however, a second critique has emerged regarding the disenfranchisement of persons with mental illness or cognitive impairments, one that challenges the very idea that voting restrictions should ever be based on mental capacity, no matter how carefully the lines are drawn. In December 2011, this challenge was articulated in the first official statement of the UN Committee on Human Rights regarding the implications of the CRPD for political rights. As I discuss below, this “Thematic Study on Participation in Political and Public Life by Persons with Disabilities”⁵ argues that the CRPD, by classifying limited cognitive and psychosocial abilities as intellectual disabilities,⁶ reframes capacity-based restrictions on voting rights as human rights violation.

This second challenge (against capacity-based voting restrictions) is controversial, however, and raises fundamental issues about the universality of voting rights. The tension is this. On the one hand, the notion of universality that is central to the human rights tradition suggests that suffrage should be unconditional. The CRPD can be seen as bringing out the sense in which universality is a matter of

⁴ *Doe v. Rowe*, 156 F.Supp.2d 35 (U.S. District Court, Maine, 2001), 53. As I discuss below, several researchers have been working to develop precise protocols for fair and objective measures of mental capacity. For present purposes, the formulation just given for the “*Doe* standard” serves as a placeholder for the type of cognitive impairment that is frequently deemed to be a legitimate threshold for disqualifying individuals as voters.

⁵ Thematic Study on Participation in Political and Public Life by Persons with Disabilities, by the UN Office of the High Commissioner for Human Rights (December 21, 2011) A/HRC/19/36. On March 22, 2012, the Human Rights Council adopted a resolution (A/HRC/19/L.9/Rev.1) broadly endorsing the Thematic Study.

⁶ I will be using the term “intellectual disabilities” throughout as an umbrella term for a wide range of diminished abilities resulting from the interaction of broadly cognitive impairments and the (typical) environment. Although for some purposes it is important to distinguish intellectual disability from disability resulting from mental illness, that distinction is not central here. The term “mental capacity” refers to a particular threshold level of cognitive functioning, typically, the level required for individuals to make their own decision by being able to understand the nature and effect of the voting act itself. Thus, some persons with intellectual disabilities will still have mental capacity in this sense, depending on where that threshold is set.

“full inclusion” of “all members of the human family”. On the other hand, Member States do seem to have a compelling interest in taking measures to increase the likelihood that votes cast in an election express the free and informed political views of citizens. The very point of democratic elections seems to be threatened by arbitrary and ignorant voting, and discouraging that might require setting minimal standards for voter competence.⁷ Promoting democracy, after all, is not just about expanding the number of people casting ballots but about more fully realizing an ideal of self-governance, a goal that is advanced primarily by voters who can understand and care about the issues and how to address them effectively.

The issue, then, is whether capacity-based restrictions on the voting rights of persons with intellectual disabilities are fundamentally at odds with the letter and spirit of the CRPD or whether, if formulated and implemented in a precise and proportionate fashion, they are permissible exceptions to the principle of universal suffrage. My aim in this paper is not argue for one particular way of resolving this issue. Rather, my more modest aim to articulate the issue, the underlying jurisprudence (leading up to and in the wake of the CRPD), and the wider issues raised in the debate, so as to make clear that this is not an issue that can be avoided. What is at stake are fundamental principles that are in deep conflict.

I begin by recalling four central arguments for universal suffrage. I then summarize the central claims of the CRPD with regard to political rights (and especially the right to vote), highlighting its implications for various forms of passive discrimination and the importance of ensuring real accessibility. In section 3, I focus in on the disenfranchisement of persons who lack mental capacity, reviewing several of the human rights documents that have supported restrictions on “universal suffrage”, before turning to the recent shift away from making suffrage conditional on capacity. I conclude by identifying some of the issues that must be addressed by critics of capacity-

⁷ In *The Ethics of Voting* (Princeton: Princeton University Press, 2011), Jason Brennan argues that poorly informed and irrational voting is a form of reckless wrongdoing. Although he stops short of advocating capacity-based disenfranchisement, he clearly sees this as undermining the notion that expanding the number of voters is always a good idea.

based restrictions on the voting rights of persons with intellectual disabilities.

1 The Presumption of Universal Suffrage

The right to vote is clearly one of the most central political rights, particularly in light of the democratic principle that the exercise of state power over individuals is legitimate only with the consent of the people. As such, there is a strong presumption in favour of interpreting the reference to “universal and equal suffrage” strictly, as ruling out any restrictions or qualifications. As the European Court of Human Rights stated in *Hirst v. U.K. (No.2)*, in the context of challenging the disenfranchisement of prisoners, “...the right to vote is not a privilege. In the twenty- first century, the presumption in a democratic State must be in favour of inclusion... Universal suffrage has become the basic principle....Any departure from [this] principle risks undermining the democratic validity of the legislature thus elected and the laws it promulgates”.⁸ In particular, there are at least three reasons for thinking that universal suffrage is fundamentally important, based on concerns with self-determination, non-discrimination, and democracy.

The first reason for granting the right to vote unconditionally has to do with the connection between basic human dignity and having a say in what happens to one. To treat individuals as if they have no perspective that matters is to treat them as mere objects of manipulation. Having a vote may not actually give one significant power or influence, but it does mean that one counts as having a voice. Universal suffrage is a matter of categorical respect for rights to self-determination and decision-making authority, which is violated when one is denied an opportunity to express one’s preferences in a way that is taken seriously. In this sense, the right to vote in elections is aligned with the same basic dignity that is violated when persons with disability have to deal with medical professionals or

⁸ *Hirst v. U.K., No.2* (App no 74025/01) European Court of Human Rights (2005), 122.

caregivers manipulating their bodies or rearranging their furnishings as if they were not even there. Being disenfranchised does not merely eliminate a means for resisting domination (by voting against the government), it amounts to being told that one has no legitimate claim to do so. Respect for human worth rules this out. Put slightly different, restrictions in universal suffrage are fundamentally at odds with the principle of political autonomy, according to which one's individual liberty can be legitimately curtailed only by laws of which one is, ultimately, a co-legislator.⁹ This idea is also captured in one of the guiding principles of the disability movement: "Nothing about us without us!"

Second, universal suffrage is a matter of equality and nondiscrimination. Not only is it fundamentally important that one have a voice but also that one's voice not be seen as of lesser worth than that of others. Individuals can be free and equal citizens only if the basis for their governing their affairs jointly is not marked by arbitrary exclusions or differences. In this sense, nondiscrimination is tied to respect, as it is expressed in the enforcement of equality: "State action must express 'equal concern and respect' for all persons (to cite Ronald Dworkin's well-known formulation). It also must express a collective understanding of all citizens as equal members of the State, all equally part of "us", notwithstanding their racial, ethnic, or religious differences."¹⁰ Disenfranchisement of groups within society explicitly and directly accords them a unequal and subordinate status, but there are also many indirect and passive ways in which individuals are denied "participatory parity".¹¹ Differences in access to information and polling stations represent real forms of inequality, whether they result from living in a rural location, being illiterate, or having a visual impairment.

⁹ J. Anderson, "Autonomy," in *The International Encyclopedia of Ethics*, edited by H. LaFollette, (Oxford: Blackwell, 2013).

¹⁰ E.S. Anderson and R.H. Pildes, "Expressive Theories of Law: A General Restatement," *University of Pennsylvania Law Review* 148(2000): 1503-1575, here 1520.

¹¹ N. Fraser, "Social Justice in the Age of Identity Politics: Redistribution, Recognition, Participation," in N. Fraser and A. Honneth, *Redistribution or Recognition?: A Political-Philosophical Exchange*, (London: Verso, 2003), 7-109.

Finally, there is also a third consideration that is often raised in advocating the enfranchisement of previously excluded groups, namely, that inclusivity improves democracy. The key idea is that, when a society excludes voices from the democratic process, it thereby diminishes its ability to appreciate what is in the common good or what full justice requires. That is to say, because the democratic process has an important *epistemic* function in facilitating a better understanding of which course is best for a society to take (and, above all, which course would be wrong), it matters a great deal that the democratic process be maximally inclusive.¹² In trying to determine what laws would be just and how their implementation can be appropriate, democratic societies must ensure that the distinctive perspectives of those who are not average or “standard” citizens are included.

2 The CRPD and Political Rights – Negative and Positive Rights

Taken together, these principles would seem to ground a strong conception of the universality of voting rights, and the CRPD represents a consolidation of this vision with regard to the political rights of persons with disabilities. More specifically, the CRPD conceptualizes this universality of the voting rights of persons with disability in terms of both “negative” and “positive” understandings of these rights (discussed in the present section),¹³ as well as conceptions oriented towards avoiding group-based discrimination and towards unconditional inclusion (discussed in subsequent sections).

¹² D. Estlund, “Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority,” in *Deliberative Democracy: Essays on Reason and Politics*, edited by W. Rehg and J. Bohman, (Cambridge, MA: MIT Press, 1997), 173-204; and I.M. Young, *Inclusion and Democracy*, (New York: Oxford University Press, 2001).

¹³ On the relation between “positive” and “negative” rights in the context of disability rights, see J. Philips, “Human Rights, the CRPD, and Priority-Setting” and C. Harnacke and S. Graumann, “Core Principles of the UN Convention on the Rights of Persons with Disabilities: An Overview,” both in this volume.

It is useful, at this point, to quote the relevant text of Article 29 of the CRPD:

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.

As a statement of “negative rights” regarding voting,¹⁴ the CRPD provides a forceful expression of the wrongness of disenfranchising people because they have a disability. This is vitally needed for combatting ordinary violations based on prejudice toward the differently bodied, as in cases where persons with intellectual disabilities are turned away at polling stations because of their disability. The CRPD makes clear that the fact that a person one uses a wheelchair or is blind ought not to count as grounds for restricting one’s access to political participation. These prejudiced interferences with the exercise of individuals’ voting rights was already a wrongful viola-

¹⁴ The full text of the article has wide and important implications for other domains of political participation and inclusions – such as the right to be a candidate for office, to participate in political organizations, and so on – but I will focus throughout on voting rights.

tion of key political liberties, but at the end of the 20th century, a consensus emerged in the human rights community that persons with disabilities constituted a group whose human rights were in need of a distinct articulation of their right to inclusion and participation on a par with others, and human rights documents began emerging to protect these rights more generally.¹⁵ In this regard, the CRPD and related documents reinforce the rights of persons with disabilities by making emphatically clear that these forms of interference are human rights violations.

Simply removing explicit forms of exclusion and interference is not enough, however, to guarantee full participation on a par with others. In part, this is a matter of power. As Gerard Quinn pointed out early on in the movement for disability rights, "...[I]t is arguable that the "voice" of the disabled community needs to be amplified somewhat as a corrective and as a way of ensuring effective political participation".¹⁶ More concretely, as a statement of positive rights, the CRPD articulates the universal rights to political participation in a way that radicalizes the correlative duties of member states proactively to take all reasonable measures to *enable* full participation. It is particularly distinctive in emphasizing that universal protection of human rights entails a fundamental and urgent commitment to providing the assistance necessary for exercising the rights.¹⁷ It is not enough for Member States to ensure that citizens are not disenfranchised directly; they are obliged to actively intervene in ensuring that individuals are included in society and have real, effective access to participation on a par with others.

¹⁵ These documents include the World Programme of Action concerning Disabled Persons, the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, the International Covenant on Civil and Political Rights, the European Charter on Human Rights, and the Americans with Disabilities Act; see also E. van Weele, "The UN Convention on the Rights of Persons with Disabilities in the Context of Human Rights Law," in this volume.

¹⁶ G. Quinn, "The International Covenant on Civil And Political Rights and Disability: A Conceptual Framework," in *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments*, edited by T. Degener and Y. Koster-Dreese, (Dordrecht: M. Nijhoff, 1995), 92.

¹⁷ S. Graumann, *Assistierte Freiheit: Von einer Behindertenpolitik der Wohltätigkeit zu einer Politik der Menschenrechte*, (Frankfurt am Main: Campus, 2011).

In the case of voting rights, the commitment to including those of us with disabilities *as a matter of realizing genuine universality* means that there are obligations to provide ramps for wheelchair accessibility, Braille or other accessible versions of the electoral materials, and so on. In line with the insights of the social model of disability, the source of barriers is to be understood in a wider sense, as a way of providing access that accepts people as they are, in the diversity of modes of embodiment we have.¹⁸

In the case of voters with intellectual disabilities, this calls for presenting information in an “easy to read” format as well as finding ways of accommodating, for example, persons with severe anxieties about public voting areas or persons who need extra assistance in understanding voting procedures (such as touch screens or complex ballots). Note that, given the range of psychosocial or intellectual disabilities, this commitment to enabling political participation creates problems for the “pragmatic” approach to resolving the tension between unconditional inclusion and a “qualified” right to vote. That is, one might think that there is no need for capacity-based restrictions on suffrage, since persons who lack the capacity to vote will not notice what they are missing. They will tend not to find their way to the polling places or even request the opportunity to vote. However, one of the significant implications of the CRPD is that “natural barriers” to non-participation should not be assumed to be legitimate. Indeed, Member States are obliged to take an active role in enabling and facilitating participation. Seen from this perspective, neglecting individuals’ lack of awareness could arguably be seen as a *de facto* exclusion on the basis of disability.

As this last point makes clear, realizing the ideal of enablement raises particularly complicated issues in the case of intellectual disability and voting, issues that I return to in section 5. But the more fundamental issue, in the case of voting rights, is whether the capacities being enabled and facilitated can also legitimately function as criteria for qualifying for suffrage.

¹⁸ See C. Harnacke and S. Graumann, “Core Principles of the UN Convention of the Rights of Persons with Disabilities: An Overview,” this volume.

3 Lack of Mental Capacity as a Non-Arbitrary Basis for Disenfranchisement

In the jurisprudence leading up to and directly after the adoption of the CRPD, the developments just discussed (regarding to positive and negative rights), have been complemented by a discussion of issues of group discrimination, to which I now turn. Particularly in the case of intellectual disabilities, mental health issues, and psychosocial impairments, the position that has emerged in the human rights jurisprudence permits disenfranchisement on the basis of incapacity but insists that it must be done in a way that does not amount to discrimination against persons with disability. It will be important to look closely at this approach, because it represents the main alternative to the emerging interpretation of the CRPD expressed in the 2011 “Thematic Study” that rejects capacity-based restrictions on voting rights. The approach incorporates three components: a stated presumption in favour of universality (discussed above), a practice of permitting restrictions on suffrage to specific groups (on various grounds of the “margin of appreciation” afforded Member States in how they go about meeting human rights obligations), and an emphasis on eliminating *arbitrary* implementations of restrictions on suffrage.

As we have seen, although there is a strong presumption, in both the letter and spirit of human rights law, in favour of the universal suffrage, human rights documents have *always* tended to treat it as a qualified right. It is not just that countries fall short of full compliance. Nor is this only a matter of the limits of what accommodations Member States can reasonably be expected to make, given limited resources. Rather, it is argued that some voters fail to qualify and therefore may legitimately be excluded. As a matter of fact, most Member States of the U.N. deny the right to vote to four groups: children, prisoners, non-citizen residents, and persons who lack mental capacity.

Although the 1948 Declaration does not mention any restrictions on universal suffrage (speaking in Art. 21 only of “universal and equal suffrage”), the 1966 International Covenant on Civil and Political Rights states that restrictions on universal suffrage are allowa-

ble, as long as they are not “unreasonable”: “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions.”¹⁹ In 1996, the UN Human Rights Committee provided an interesting and influential elaboration of implications of this CCPR article in “General Comment No. 25”:

Any conditions which apply to the exercise of the rights protected by Article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen. The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office.²⁰

The document makes very clear that the disenfranchisement of some groups is not necessarily objectionable, as long as it is done in a way that is not arbitrary, gratuitous, or disproportionate. In the background is also the view that, given the variety of electoral approaches systems among democratic countries, Member States should be allowed some leeway (some “margin of appreciation”, as the European Court of Human Rights puts it) in how they implement the restrictions.²¹

¹⁹ Article 25 of the International Covenant on Civil and Political Rights (adopted 16 December 1966) 999 UNTS 171.

²⁰ General Comment No. 25 on the right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) CCPR/C/21/Rev.1/Add.7 (July 12, 1996), para. 4

²¹ With regard to cognitive impairment, it is interesting to note further that the General Comment No. 25 adds that it is “unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements” (ibid, para. 10). The formulations seems designed to allow room for excluding persons with

This general approach is further elaborated in the European context in the Venice Commission’s 2002 “Code of Good Practice in Electoral Matters”, which is particularly specific regarding when limitations on universal suffrage may be appropriate. It begins by enumerating the conditions to which the right to vote is subject — age (I.1.1.a), nationality (I.1.1.b), and residence (I.1.1.c) — and then addresses the “deprivation of the right to vote”:

(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.²²

As of 2001, all but four UN Member States have exclusions from the vote based on mental capacity.²³

The Venice Commission recommendations make no reference to the grounds on which these restrictions are justified, but the current jurisprudence seems to follow two tracks. Whereas a first set of restrictions — age, citizenship, and residency — are taken to apply

intellectual disabilities — as long as it is done, as it were, properly. But it is not obvious why literacy is automatically and categorically rejected, while other forms of capacity qualifications would be allowed.

²² European Commission for Democracy through Law (Venice Commission), *Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report*, Council of Europe, CDL-AD (2002) 23 rev., adopted 19 October 2002, at 1(1)d; cf. the appendix “Explanatory Report,” at para. 6(d)).

²³ Blais, A., L. Massicotte, and A. Yoshinaka, “Deciding Who Has the Right to Vote: A Comparative Analysis of Election Laws,” *Electoral Studies* 20(2001): 41–62, here, 51. The four countries at the time were Canada, Ireland, Italy and Sweden. For an overview of disenfranchisement on the basis of mental incapacity in various U.S. states see K. Schriener and L. Ochs, “‘No Right Is More Precious’: Voting Rights and People with Intellectual and Developmental Disabilities,” *Policy Research Brief* 11(2000): 1–15.

categorically (with some allowances, e.g., for non-citizen voting in local elections), the second set of conditions — criminal offense and mental incapacity — as seen as requiring careful scrutiny and the avoidance of “blanket” exclusions. For example, in *Hirst vs. U.K.* (no. 2), the European Court of Human Rights ruled in 2005 that disenfranchising all prisoners failed to meet the proportionality test. Similarly, in the landmark 2010 case of *Alajos Kiss v Hungary*, the European Court of Human Rights made a decision with significant implications for persons with cognitive disabilities, drawing on the CRPD and emphasizing the problematic character of blanket disenfranchisement. The plaintiff in this case had been placed under partial guardianship as the result of a diagnosis of bipolar disorder — a cognitive impairment in the broad sense — and on this basis had been denied the right to vote. In this case the European Court of Human Rights ruled that “[t]he applicant in the present case lost his right to vote as the result of the imposition of an automatic, blanket restriction on the franchise of those under partial guardianship. He may therefore claim to be a victim of the measure”.²⁴ In addition to affirming that discrimination on the basis of mental illness represents a human rights violation under CRPD, the decision is significant in arguing that automatic disenfranchisement on the basis of being under guardianship is insufficiently proportional. The position taken is clearly that judgements of mental incapacity may be permissible grounds for disenfranchisement but need to be more circumscribed in scope and careful in its administration. As the European Court of Human Rights concluded in *Kiss v. Hungary*, “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”.²⁵

In the disability rights community, the *Kiss v. Hungary* decision of the European Court of Human Rights has been widely hailed as a watershed in defending the voting rights of persons with intellectual

²⁴ *Alajos Kiss v Hungary* (App no. 38832/06) European Court of Human Rights (20 May 2010), §43.

²⁵ *Kiss v Hungary*, §44.

disabilities and mental illness, partly because it draws explicitly on the CRPD.²⁶ To the extent to which advocacy of the voting rights of persons with disability takes its cue from this *Kiss v. Hungary* decision, the key task lies in developing more narrowly tailored, objective, and specific criteria for capacity-based disenfranchisement, as well as fair procedures for applying those criteria (usually only by court judges). Particularly to the extent to which nursing home staff, officials at polling stations, and others routinely prevent persons with mental illness or cognitive impairments from voting, reducing discrimination involves developing and enforcing clear guidelines regarding when and by whom persons may be excluded from voting. Accordingly, in the words of the recent report of the Fundamental Rights Agency, the European Court of Human Rights is centrally concerned with “arbitrariness or a lack of proportionality in the restrictive measures introduced by national authorities”.²⁷

In the United States, recent efforts in this regard have centred on a U.S. District Court decision in the 2001 case of *Doe v. Rowe*. As in *Kiss v. Hungary*, this case involved the blanket disenfranchisement of persons placed under guardianship because of mental illness, as specified in the Constitutions of the state of Maine that had been endorsed in two state-wide referenda. The court focused on the unequal and disproportionate treatment involved in relying on being placed under guardianship for mental illness, “while permitting incapacitated persons diagnosed with mental retardation or senility to vote as they choose.”²⁸ The *Doe* court concurred with the parties in the case “that Maine has a compelling state interest in ensuring that ‘those who cast a vote have the mental capacity to make their own decision by being able to understand the nature and effect of the voting act itself’”. And, in line with this, that court argued that failure to meet what has become known as the “*Doe* standard” does

²⁶ See “Thematic Study” cited above and report of the European Union Agency for Fundamental Rights (F.R.A.) on “The Right To Political Participation of Persons with Mental Health Problems and Persons with Intellectual Disabilities” (October, 2010), <http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2010/pub-vote-disability_en.htm>.

²⁷ F.R.A. report, 10.

²⁸ *Doe v. Rowe*, 156 F.Supp.2d 52.

constitute legitimate grounds for disenfranchisement, as long as it is done in a precise and procedurally correct way. This has led to several efforts to develop scientifically rigorous tests for assessing whether individuals meet the *Doe* standard, as well as for new understanding of “mental capacity” that is based on individuals’ actual ability to function.²⁹

4 From “Non-Arbitrary” Exclusion to Full Inclusion

These efforts to develop fair and accurate measures of voting competence fit into a long history of expanding suffrage by eliminating false claims about the incompetence of groups of people. Suffrage movements have frequently focused on refuting myths about the purported incompetence members of some particular group – e.g., women or people of color – by showing that they are, in fact, at least as capable as established groups of contributing effectively and appropriately to the democratic process. Thus, in cases like *Kiss v. Hungary* and *Doe v. Rowe*, the courts were sharply critical of persons with a diagnosis of mental illness or with being placed under guardianship, but primarily because being placed under guardianship on grounds of mental illness is not a reliable proxy for voting competence.

The strategy for expanding suffrage does, however, assume that it is appropriate that meeting something like the *Doe* standard of mental capacity is a relevant criterion for suffrage. But what if disenfranchising prospective voters on the basis of lack of mental capacity is less like disqualifying prospective airplane pilots with visual impairments and more like barring racial minorities from public spaces, no matter how “scientific” the criteria for racial membership

²⁹ Appelbaum, P.S., R.J. Bonnie, and J.H. Karlawish, “The Capacity to Vote of Persons with Alzheimer’s Disease,” *American Journal of Psychiatry* 162(2005): 2094-2100; Karlawish, J.H., R.J. Bonnie, P.S. Appelbaum, C. Lyketsos, B. James, D. Knopman, C. Patusky, R.A. Kane, and P.S. Karlan, “Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons With Dementia,” *Journal of the American Medical Association* 292(2004): 1345-1350; M. Redley, “Citizens with Learning Disabilities and the Right To Vote,” *Disability & Society* 23(2008): 375-384.

might be? Indeed, there appears to be an emerging trend in human rights discussions of challenging the very idea of capacity-based restrictions. And the CRPD is playing an important role here, with its emphasis on inclusion of “all members of the human family” on a par with others, regardless of abilities.

The strongest official statement of this shift comes from the 2011 “Thematic Study” of the UN Human Rights Committee mentioned earlier. What is particularly striking about this document is the explicit distance taken from voting restrictions, even those that are based on objective and reasonable criteria. After acknowledging the fact, as we saw in the previous section, that human rights documents have explicitly permitted restrictions to voting rights in the case of mental incapacity, the “Thematic Study” asserts, “The legal landscape has changed dramatically”, concurring with Manfred Nowak’s statement that the majority of voting restrictions “are no longer compatible with the prohibition of discrimination in articles 2, para. 1, and 25 [of the Universal Declaration of Human Rights] or with the present-day understanding of democracy.” Furthermore, “This holds true, in particular, with regard to limitations of the right to vote and stand for election on the basis of psychosocial or intellectual disabilities.”³⁰ The “Thematic Study” adds that Article 29 of the CRPD “does not foresee any reasonable restriction, nor does it allow any exception for any group of persons with disabilities. Thus, any exclusion or restriction of the right to vote on the basis of a perceived or actual psychosocial or intellectual disability would constitute “discrimination on the basis of disability” within the meaning of article 2 of the Convention.”³¹ This is particularly

³⁰ United Nations Office of the High Commissioner for Human Rights, “Thematic Study,” para. 26-28. See also the following statement from the November 2011, recommendation of the Committee of Ministers to member states on the participation of persons with disabilities in political and public life (adopted by the Council of Europe’s Committee of Ministers on 16 November 2011): “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”.

³¹ United Nations Office of the High Commissioner for Human Rights, “Thematic Study,” para. 29. The report also refers directly to the earlier work of the Committee on the Rights

clear language. But if there was any room for doubt as to whether the Human Rights Committee is here arguing for a change of course, it was eliminated in the March 2012 remarks to the Human Rights Committee by Theresia Degener, Special Rapporteur for the Committee on the Rights of Persons with Disabilities:

Many countries have laws that deny those disabled persons who are declared legally incapacitated, the right to vote and stand for elections. In reality these are persons with intellectual or psychosocial impairments. These laws are in violation with Art. 29 CRPD, according to which all disabled persons, no matter what their impairment is, have an equal right to participate in the electoral process. I know that this runs counter to many legal opinions on who should have the right to vote....[T]here is reason to believe that there is a growing readiness to revise the traditional understanding of voting capacity....The incapacity approach to disability is [being] challenged.³²

This is articulation what genuinely *universal* suffrage looks like in the wake of the CRPD amounts to saying, in effect, that requirements of voter competence of the sort articulated in the “*Doe* standard” should be rejected the way in which literacy tests have been rejected.³³

Although the position taken here by the Human Rights Committee has not yet, to my knowledge, been tested in the courts, there are a number of theorists who have been arguing along similar lines. One

of Persons with Disabilities, whose September 2011 monitoring report on Spain explicitly recommended that Spain amend legislation allowing “the denial of the right to vote based on individualized decisions taken by a judge”, something previously taken to be the gold standard for legitimate restrictions on voting (Ibid, para. 48).

³² T. Degener, “The Right to Political Participation in Context of Disability (Art. 29 CRPD),” opening statement to the Fourth Interactive Debate on the rights of persons with disabilities during the 19th Session of the Human Rights Council (March 1, 2012), <https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/19thSession/OralStatements/CRPD%20Committee.pdf>, accessed on June 3, 2012 via the link from <http://www.ohchr.org/EN/Issues/Disability/Pages/politicalpubliclife.aspx>.

³³ United Nations Office of the High Commissioner for Human Rights, “General Comment No. 25,” para. 10.

important statement is found in a recent article by Martha Nussbaum, who makes very clear the indignity and inequality of the current failure to accommodate and enable the political participation of persons with intellectual disability.³⁴ For the current failure to implement such measures for all individuals means that “a large group of citizens are simply disqualified from the most essential functions of citizenship. They do not count. Their interests are not weighed in the balance”.³⁵ Anticipating the difficulties many will have envisioning what such accommodation would involve, she argues for a set of proposals for how to move toward full political participation of persons with intellectual disabilities. She usefully distinguishes accommodations for those with relatively minor cognitive impairments (like easy-to-read instructions), decision-making assistance via a “buddy” in cases of more significant impairments, and surrogate-voting in case of individuals with profound impairments. This is an area where a great deal of work still needs to be done in finding feasible and effective strategies of inclusion.³⁶ As I discuss in the next section – and as Nussbaum readily acknowledges – there are complex details to work out, particularly of how to implement these accommodations while avoiding fraud and manipulation.

At the same time, not all of the remaining issues regarding the voting rights of persons with intellectual disabilities are matters of practical implementation. There are also deep issues about what considerations may actually weigh in favour of permitting some capacity-based voting restrictions. In my discussion here, I have focused on the emergence of a CRPD-influenced line of argument that rejects any such restrictions, but there is more that needs to be

³⁴ M. Nussbaum, “The Capabilities of People with Cognitive Disabilities,” *Metaphilosophy* 40(2009): 331-351.

³⁵ *Ibid.*, 347.

³⁶ Important work is already being done; see, for example, Redley, “Citizens with Learning Disabilities and the Right To Vote”; J. Vorhaus, “Citizenship, Competence and Profound Disability,” *Journal of Philosophy of Education* 39(2005): 461-475; P.S. Karlan, “Framing the Voting Rights Claims of Cognitively Impaired Individuals,” *McGeorge Law Review* 38(2007): 917-30; K. Schriener, L.A. Ochs, and T.G. Shields, “The Last Suffrage Movement: Voting Rights for Persons with Cognitive and Emotional Disabilities,” *Publius: The Journal of Federalism* 27 (1997): 75-96.

said, particularly about the tension I mentioned at the outset. Without trying to actually adjudicate the disputes between defenders of unconditional suffrage and defenders of capacity-based restrictions, I will now try to identify some of the issues and concerns that still need to be addressed going forward.

5 Remaining Questions Regarding Unconditional Suffrage

In sharply criticizing capacity-based restrictions on suffrage, the UN Human Rights Committee's "Thematic Study" fundamentally challenges many existing electoral policies, policies that are not only firmly entrenched in the political culture of the vast majority of Member States but also explicitly supported by earlier human rights documents and a long tradition of jurisprudence regarding the restriction of the "qualified" right to vote. The interpretation of CRPD as incompatible with competence-based disenfranchisement represents a bold and radical departure from the standard understanding of voting rights as "qualified" rights reserved for citizens who meet certain levels of competence (or age). It is sure to be scrutinized closely, and appropriately so. Even those who fully endorse the CRPD's commitment to full inclusion of all persons in the political life of society, may well feel the force of certain principled objections to eliminating all capacity-based restrictions on voting rights, many of which go unmentioned in the "Thematic Study". In closing, I will mention several of them, in order to identify the issues that are likely to be central to the continuing discussion of how to interpret and implement Article 29 of the CRPD.

A first set of issues to be addressed has to do with the capacity-based disenfranchisement on the grounds that Member States have "compelling state interests" and "legitimate aims" that could justify restricting suffrage in the case of persons who are unable to meet the *Doe* standard. If the state has an interest in the electoral process being such that the votes cast reflect voters' informed choices about candidates and issues, is that interest a compelling basis for disenfranchising voters who are unable to understand the issues on the ballot? Would any restriction on the basis of voter competency vio-

late the human right to vote, or could restrictions be developed that represent a proportional response to a compelling social (in this case, electoral) interest? In this connection, opponents of capacity-based restrictions should be careful not to rely too heavily on the fact that the state does not restrict the voting opportunities of the numerous citizens *without* disabilities who have no clue what they are doing when they vote. For advocates of capacity-based restrictions could still argue that the right to vote is “qualified”, but that it should be conditional upon actual capacities, rather than group membership. As we saw, this was the approach taken by the European Court of Human Rights in *Kiss v. Hungary*.

Second, there are complicated issues of as to the leeway or “margin of appreciation” that Member States have in meeting their obligations under Article 29 of the CRPD and other documents articulating universal political rights. Out of respect for “the diverse cultural and legal traditions embraced by each Member State” and in order to “avoid damaging confrontations between the Court and the Member States”, the European Court of Human Rights has typically granted Member States wide discretion in determining how to organize electoral processes.³⁷ In line with this, Member States might argue that the margin of appreciation should permit them to restrict the suffrage of citizens who fail to meet *Doe*-type criteria for mental capacity (or political knowledge), for example as part of ensuring confidence in the integrity of elections, as expressions of the will of the people. Any such argument would be subject to close scrutiny, however, especially given the point made forcefully in *Kiss v. Hungary* that “if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question”.³⁸

³⁷ For an overview, see the Council of Europe’s Lisbon Network briefing, “Margin of Appreciation,” http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp (last consulted on July 8, 2012).

³⁸ *Kiss v Hungary*, §42.

Third, if the CRPD is read as forbidding capacity-based disenfranchisement and as obligating Member States to guarantee political participation regardless of intellectual disability, this has significant implications for proxy voting or voting by guardians. Member States' discretionary leeway is likely to be deemed particularly significant with regard to specifying the most appropriate ways to facilitate surrogate-voting and assistance in decision-making for persons with profound intellectual disability. Given the concerns expressed about the permissibility of "family voting" and postal voting,³⁹ this is a subject that calls for careful and creative exploration of possibilities, involving persons with disabilities to the extent possible. Some of the issues raised relate to compelling state interests in avoiding voter fraud, but they also engage fundamental concerns about the guaranteeing rights of self-determination. Indeed the entire issue of "assisted decision-making" and its relation to political participation by persons with intellectual disabilities is a particularly complex issue that must be addressed in developing a comprehensive human rights framework for securing and promoting the political rights of persons with intellectual disabilities.

Fourth, given the importance of the disability movement's forceful arguments against conceptualizations of persons with disability as passive patients in need of charity, there are sensitive issues that arise in connection with the form of political "participation" that is possible for persons with profound intellectual disabilities. Particularly in cases in which the scope of individual agency and political will is very limited, the appropriate model of political rights may need to shift from a focus on participation to a focus on the protection of interests and advocacy for well-being, raising further complications regarding the relationship between will-based and interest-based conceptions of political rights.

Fifth and finally, there are also important issues that need to be addressed regarding the wider implications of rejecting competence-based suffrage restrictions. In combination with the principled rea-

³⁹ See, respectively, the Venice Commission, "Guidelines on Elections," Art. 4(b) and United Nations Office of the High Commissioner for Human Rights, "Thematic Study," para. 57-8.

sons for universal suffrage outlined in section 1 above, the emerging rejection of competence-based restrictions also challenges one of the other standard exclusions on suffrage, children. Insofar as minimum-age restrictions are defended on the basis of an inability to appreciate what is at stake when they cast their vote, they too are implicitly challenged by the CRPD-inspired shift away from capacity-based voting restrictions. For once surrogate-voting, assisted decision-making, and easy-to-read electoral materials are mandated as accommodations for adults with intellectual disabilities, it becomes much more difficult to argue that 10-year-olds ought not to have a voice in elections or that the interests of infants ought not to be represented in the political process. Indeed, this starts to look like a violation of the principle of equal treatment. In this context, it is particularly striking that, even as she emphasizes the importance of universal suffrage and the outdated character of previous jurisprudence in her remarks to the Human Rights Committee, Special Rapporteur Degener nonetheless treats the ongoing disenfranchisement of children as obviously appropriate: “We all know the right to vote is not an absolute right and can be restricted for various reasons, such as age.”⁴⁰ And, indeed, given the likely opposition among Member States to eliminating age-based disenfranchisement, the issue of “margin of appreciation” is sure to arise here again, along with political considerations as to how hard to push for further expansion of suffrage in the face of resistance from Member States and the potential for an anti-CRPD backlash.

These are complicated issues, but a sustained engagement with them is long overdue. To this day, most UN Member States take their commitments to “universal suffrage” to permit the disenfranchisement of persons who lack a certain level of mental capacity. The emerging understanding of the human rights of persons with disabilities challenges this assumption and has put these issues of voting rights on the human rights agenda. The most recent interpre-

⁴⁰ Degener, “The Right to Political Participation in Context of Disability,” 2012, p. 1. For a discussion of capacity-based conceptions of the threshold between childhood and adulthood, see J. Anderson and R. Claassen, “Sailing Alone: Teenage Autonomy, Parental Supervision, and Regimes of Childhood,” *Law and Philosophy*, 31(2012): 495-522.

tations of the CRPD from the Office of the High Commissioner for Human Rights, make a shift with profound and controversial implications for the relationships between individual capacities, political inclusion, the universality of rights, and the very nature of democratic self-governance. In this regard, there is much more theoretical and jurisprudential work to be done in investigating these issues and articulating the relevant principles. And this is work that is well worth doing, for what is ultimately at stake in these debates is the dignity and self-determination of persons with intellectual disabilities, and their right to political participation on an equal basis with others.