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Vanessa Bliecke
Research Associate & PhD Student IFHV
Ruhr-Universität Bochum

NACHFRAGEN:
vanessa.bliecke@rub.de

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On Ballots, Barriers and Biases

Introducing General Comment No. 11 on Political and Public Participation, Art. 29 CRPD

This summer, the Committee on the Rights of Persons with Disabilities (the Committee) published General Comment No. 11 on Art. 29 of the Convention on the Rights of Persons with Disabilities (CRPD), concerning the right to participation in political and public life.

While the GC elaborates on various relevant aspects of public and political participation, such as the right to hold political office or join assemblies and other non-governmental organisations, this post will focus on the right to vote of persons with disabilities. To that end, it will explore the key findings of the new General Comment (GC) and seeks to concretize and, where appropriate, contextualize it within broader legal developments. Against this background, this post will show how the Committee succeeded in consolidating an unconditional understanding of political participation, making the corresponding positive obligations more concrete, and connecting formal voting rights to the systemic barriers that continue to prevent persons with disabilities from exercising them on an equal basis with others.

The Unconditionality of the Right to Vote for Persons with Disabilities

Art. 29(a) CRPD requires States 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". In interpreting this provision, the Committee follows its established practice to initiate its findings by highlighting the need to interpret the rights in question through the lens of the human rights model of disability (paras. 10–11). Marking the fundamental paradigm shift from understanding disability through a charity or medical approach to recognizing full legal personhood, this makes one point already clear from the beginning: the right to vote must not under any circumstances be restricted based on impairment or any other ability assessment but be unconditionally granted and protected. It reiterates its findings made in the Committee's first General Comment on equal recognition before the law , Art. 12 CRPD (GC No. 1) and remains firm in rejecting any restriction of legal capacity or any substituted decision-making regime that is used by States to justify any legal restrictions on the right to vote and calls upon States who still have such measures in place to immediately reform the respective laws.

This must be understood in the broader context of reluctance among States to fully recognise legal capacity for persons with disabilities. This is reflected, *inter alia*, in the numerous reservations and interpretative declarations made by States upon ratifying or acceding to the CRPD, several of which maintained that limitations of legal capacity, including forms of substituted decision-making, were compatible with Art. 12 CRPD (e.g. France, Canada, Ireland and the Netherlands). For example, Egypt declared that persons with disabilities have the capacity to hold rights and assume legal responsibilities, but not to exercise those rights themselves, while Norway considered the withdrawal of legal capacity and compulsory guardianship permissible as measures of last resort. Against this background, it is perhaps not surprising that the Committee's interpretation in GC No. 1, which firmly rejected substituted decision-making and upheld legal capacity without

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such limitations, was met with resistance (see e.g. from the World Psychiatric Association here). Similarly, parts of legal scholarship have approached GC No. 1 with reluctance (see e.g. here and here), with some characterising the Committee's position as "extreme". The current GC, however, illustrates that the Committee's position is neither extreme nor entirely reflective of how the law should be. Rather, its rejection of disability-based restrictions on the right to vote follows from a consistent purposive interpretation of the Convention based on the human rights model of disability and the understanding of legal capacity established in Art. 12 CRPD, in accordance with Art. 31(1) Vienna Convention on the Law of Treaties (i.a. paras. 10-11). While States openly embraced the paradigm shift away from outdated models of disability that reduced persons with disabilities to recipients of charity or medical care during the negotiation and ratification of the Convention, some have shown reluctance when it comes to its full implementation and the structural changes it requires. Against this backdrop, the Committee plays a crucial role in reminding States and scholars alike what it means to take the human rights of persons with disabilities seriously and to their full extent. Despite this reluctance, many States have followed the Committee's leadership, for instance, Peru was the first State to comprehensively implement the changes required by Art. 12 CRPD.

At first sight, the right to vote appears to have seen greater progress towards equal recognition than the right to legal capacity. Already in 2010, the European Court of Human Rights (ECtHR) rejected an automatic exclusion of persons with disabilities under domestic guardianship from governmental elections in *Alajos Kiss v Hungary*. Furthermore, the German Constitutional Court (BVerfG) made similar findings in 2019 when it declared the German electoral law excluding persons under guardianship automatically from elections to be unconstitutional. However, with a closer look, the Committee's findings go far beyond these two bodies' reasoning, showing that both courts adopted a certain reluctance in fully complying with CRPD standards. Both the ECtHR as well as the BVerfG base their rejection on the automatic exclusion but accept the general possibility to exclude persons with disabilities based on an individual assessment of capacities. While the ECtHR generally accepted "ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs" as a legitimate aim to justify interferences with political rights (paras. 38, 44), the BVerfG openly contests the Committee's findings, upholding its legal assessment that the CRPD does not prohibit any form of electoral exclusion (paras 76-77).

The recent GC clearly rejects this line of argumentation by clarifying that any "individualized assessment of capacity or competence to exercise political rights, whether conducted by a judicial, administrative, medical or electoral authority, also constitutes disability-based discrimination and cannot justify the denial, suspension or restriction of those rights" (para. 16), reiterating the findings it had made already in 2011 in *Bujdosó v. Hungary* against the same Hungarian law that was tackled in Alajos Kiss before the ECtHR.

Thus, while many States (e.g. France, Spain and Ireland, p. 5) have reformed their electoral laws motivated by the CRPD by eliminating automatic exclusion from elections, many still allow individualized, disability-based exceptions, and the current GC is a strong reminder for States that this is a rather blatant violation of Art. 29, read in conjunction with Arts. 12 and 5 CRPD.

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Beyond Formal Equality: Positive Obligations under Art. 29 CRPD

Art. 29(a)(i) CRPD requires States to ensure "that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use". Still, the vital and extensive positive obligations to protect and fulfil the right to vote have received considerably less attention in the legal discourse so far. Under the CRPD framework, the concepts of accessibility and denial of reasonable accommodation require particular attention. The current GC elaborates in depth on particular obligations related to accessibility and the right to vote (paras. 18-31). It primarily reiterates its general findings from its GC No. 2 on accessibility and highlights that accessibility is an *ex ante* obligation that States need to comprehensively consider at the earliest step of initiating voting procedures during the entire process (paras. 18–19). To provide some examples, States need to apply universal design approaches when designing or choosing voting facilities to guarantee physical accessibility, provide relevant information in accessible formats, including in sign language, Braille or easy-to-read formats, and must provide barrier-free technologies where voting is digitalized (paras. 19–20).

Only in cases in which accessibility could not successfully be guaranteed *ex ante*, States are under an obligation to provide for reasonable accommodation to enable the voting procedure, denial of which can constitute discrimination (see Art. 5(3) CRPD and para. 22 of the GC).

Furthermore, Art. 29(a)(ii) CRPD importantly protects the right to vote by secret ballot in elections and protects against intimidation and undue interference. Since many States misunderstand the right to secrecy of elections and protection against interference to be incompatible with assistance by a third party, the Committee clarifies that assistance in voting "does not diminish autonomy but operates as an enabling measure of substantive equality" (para. 28), if it is guaranteed that such assistance is based on the free choice of the voting person and in conditions preserving secrecy and preventing coercion, pressure or undue influence (para. 27). However, if assistance serves as a substitute for systemic accessibility and inclusive communication rather than as a form of support freely chosen by persons with disabilities, it may result in dependence on third parties based on necessity rather than choice. This risks undermining the equalizing function of assistance, reinforcing structural dependency, and increasing the potential for interference (para. 29).

Importantly, the Committee recalls that the effective implementation of these obligations requires the meaningful participation (see e.g. here, para. 5) of persons with disabilities and their representative organisations, reflecting the CRPD's broader commitment to "nothing about us without us" (para 7).

Beyond the Ballot: Ableist Structures and Systemic Exclusion

Lastly, the Committee succeeds in highlighting several important forms of systemic and structural discrimination that present barriers to the effective enjoyment of the right to vote. It clearly condemns ableist power structures and, importantly, stereotypes and prejudices that paint persons with disabilities as less capable and dependent in political decision-making. Such stereotypes are therefore the root causes of legislative, administrative and judicial measures excluding persons with

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disabilities from elections and the Committee therefore calls for corresponding awareness raising measures under Art. 8 CRPD (paras. 10, 56).

The Committee further consistently points out that institutionalization poses one of the most persistent systemic shortcomings that prevent effective participation in elections and thereby not only reiterates important arguments made in its deinstitutionalization guidelines but follows its vehement call to end institutionalization as it constitutes a root cause of various human rights violations (see on institutionalization and crisis resilience e.g. here). Precisely, they raise particular concern regarding autonomy and secrecy of voting by highlighting that voting is often subject to supervision or organized collectively, with staff or other intermediaries sometimes assisting or influencing voters. Such settings could facilitate group voting and create risks of coercion, manipulation, or undue influence, particularly where relationships of dependency exist (para. 30). Further, the Committee generally observes, in conjunction with Art. 19 – the right to be included within society – that institutional and segregated living arrangements and inadequate support may restrict persons with disabilities' right to vote by limiting access to information, mobility and independent participation, and by increasing the risk of control or undue influence (para. 61) and frequently highlights the general vulnerability of institutionalized persons (e.g. paras. 25, 54).

These findings highlight the broader transformative mandate of the CRPD, envisioning widespread societal change to end disability-based discrimination in all areas of life, even the most hidden forms (pp. 17 ff.). Therefore, the Committee provides valuable assistance to States by making these forms visible and clearly calling their connection to human rights violations out, although States are likely to show reluctance in the implementation of this mandate.

Conclusion

The new GC on political and public participation sheds light on many important facets of the right to vote, not only reaffirming its unconditionality but making visible what is required for that right to be meaningful in practice. As the comment importantly points out, implementing the right to public and political participation is "neither a discretionary benefit nor a matter of policy preference but gives concrete expression to the status of persons with disabilities as autonomous rights holders whose legal capacity and dignity must be fully acknowledged" (para. 1). Hopefully, States will follow this call.

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