



Strasbourg, 11 February 2016

**CDL-LA(2016)001**  
Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**in co-operation with the**

**THE CONSTITUTIONAL TRIBUNAL OF CHILE**

**CONFERENCE ON  
THE CONSTITUTIONAL PROTECTION OF  
VULNERABLE GROUPS :  
A JUDICIAL DIALOGUE**

**Santiago, Chile**

**4 - 5 December 2015**

**The Case-Law of the European Court on Human Rights  
on Persons with Disabilities**

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## **The Case-Law of the European Court on Human Rights on Persons with Disabilities**

The European Convention of Human Rights (ECHR) is founded on the principles of human dignity, equality, and non-discrimination. These principles apply to all individuals, including those with mental or physical disabilities. Unlike the Charter of Fundamental Rights of the European Union,<sup>1</sup> the European Convention does not contain any provisions that would explicitly refer to persons with disabilities. Yet, those persons have filed numerous applications to the European Court of Human Rights (ECtHR) drawing attention to the particular challenges they encounter in their lives. In doing so, they have invoked not only the prohibition of discrimination but also a host of other human rights, including the right to life, the prohibition of torture, the right to education, or the right to vote. Virtually all relevant cases come from the past two decades. Despite that, the ECtHR has already developed quite a rich case-law relating to the protection of human rights of persons with disabilities. This paper gives an overview of this case-law (section 1) and identifies the main characteristic features that the approach of the ECtHR to the protection of human rights of persons with disabilities reveals (section 2). These features might then serve as a ground for the comparison with the approach of the Inter-American Commission and Court of Human Rights or with the approach of national courts in European and Latin American States.

### **The Overview of the Case-Law of the ECtHR on Persons with Disabilities**

The case-law of the ECtHR relating to persons with disabilities is quite diverse, reflecting the plurality of situations in which such persons might face difficulties due to their condition. Most of the cases however fall under one of five categories. The first one contains classical discrimination cases, where persons with disabilities were treated differently due to their physical or mental disability. The second category encompasses cases, in which persons with disabilities were also excluded from the enjoyment of certain rights due to their special condition but which were treated not as instances of discrimination but as a violation of a certain substantive right. The cases of the third category are those, in which the State failed to take into account special needs that persons with disabilities have in various spheres of life. The fourth category revolves around other positive obligations that the State has with respect to persons with disabilities. A minority of cases which cannot be subsumed under any of the previous categories are treated as other cases.

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<sup>1</sup> Article 26 of the Charter declares that *“the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community”*. It also explicitly invokes disability in the list of non-discrimination grounds (Article 21).

### **Category 1: Discrimination of Persons with Disabilities**

The prohibition of discrimination is enshrined in Article 14 of the European Convention and Article 1 of Protocol 12 to this Convention.<sup>2</sup> The two provisions are drafted in almost identical terms and read as follows: *“the enjoyment of the rights and freedoms set forth /in this Convention – Article 14, by law – Article 1/ shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”*. The prohibition of discrimination does not prohibit all differences in treatment. Discrimination solely means *“treating differently, without an objective and reasonable justification, persons in relevantly similar situations”*.<sup>3</sup>

Disability is not explicitly invoked in the list of non-discrimination grounds. Over the years, however, the ECtHR has repeatedly stated that the list is not exhaustive and other that grounds, including disability, have to be considered as well.<sup>4</sup> The Explanatory Report to Protocol 12 expressly ranks “physical and mental disability” among additional non-discrimination grounds that can be invoked by applicants. It specifies that these grounds were not included into its text *“not because of a lack of awareness that such grounds have become particularly important in today’s societies /.../ but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included”*.<sup>5</sup>

It might seem that Article 1 of Protocol 12 merely repeats – without any added value – what is already stated in Article 14 the Convention. Yet, there is an important difference between the two provisions. Whereas the latter can only be invoked in conjunction with one or several substantive rights of the Convention, the former is self-standing. It is important to recall that the application of Article 14 does not necessarily presuppose the violation of one of the substantive rights. It is sufficient that the facts of the case *“fall “within the ambit” of one or more of the Articles”*.<sup>6</sup> With respect to persons with disabilities, Article 8 protecting the right to respect for private and family life is probably the most frequently invoked. One would

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<sup>2</sup> The Protocol was adopted in 2000 and entered into force in 2005.

<sup>3</sup> ECtHR, *D. H. and Others v. Czech Republic*, Application no. 57325/00, 13 November 2007, par. 175.

<sup>4</sup> See, for instance, ECtHR, *Engel and Others v. the Netherlands*, Applications nos 5100/71 and 5101/71, 8 June 1976, par. 72.

<sup>5</sup> Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 2000, par. 20.

<sup>6</sup> ECtHR, *Petrovic v. Austria*, Application no. 20458/92, 27 March 1998, par. 22.

expect that the prohibition of discrimination would be the primary tool that persons with disabilities rely on when facing difficulties stemming from their vulnerable position. In reality, the case-law relating to persons with disabilities is relatively scarce under Article 14, and it does not exist under Protocol 12 at all. Some of the cases that the ECtHR has decided on the basis of other (substantive) provisions of the Convention could however have been qualified as discrimination cases as well.

The best-known case falling under the first category of cases is *Glor v. Switzerland* (2009).<sup>7</sup> The applicant suffered from diabetes and was declared unfit for military service. Yet, since his disability was considered a minor one (under 40%), he had to pay a tax for not doing the service. The ECtHR agreed with the applicant that such a treatment was discriminatory, violating Article 14 taken in conjunction with Article 8. The Court accepted that Switzerland was pursuing a legitimate aim when introducing the tax – that of re-establishing a sort of equality between people who actually did military or civilian service and those who were exempted from it. Yet, “*the domestic authorities failed to strike a fair balance between the protection of the interests of the community and respect for the Convention rights and freedoms of the applicant*”.<sup>8</sup> It was so due to the non-negligible amount of the tax and the number of years over which it was to be paid, the objective obstacle that prevented the applicant from doing military service, and the lack of the possibility for the applicant to do suitable civil service (reserved to conscientious objectors).

The *Glor v. Switzerland* case made a three-fold contribution to the protection of persons with disabilities under the European Convention.<sup>9</sup> First, the 2009 judgment was the first decision in which the ECtHR found a violation of the prohibition of discrimination on the grounds of disability. The Court, for the very first time, explicitly declared not only that “*the list of grounds of distinction given in Article 14 is not exhaustive*” but also that “*there is no doubt that the scope of this provision includes discrimination based on disability*”.<sup>10</sup> The Court also specified that when dealing with persons with disabilities, the margin of appreciation that the State enjoys in establishing different legal treatment is “*considerably reduced*”.<sup>11</sup> Secondly, the judgment saw the first reference to the 2006 UN Convention on the Rights of Persons with Disabilities made by the ECtHR. More than that, the Court denoted this Convention, as well as PACE Recommendation 1592 (2003) *towards full social inclusion of people with disabilities* a *prope* confirming that “*there is a European and*

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<sup>7</sup> ECtHR, *Glor v. Switzerland*, Application No. 13444/04, 30 April 2009.

<sup>8</sup> *Ibid.*, par. 96.

<sup>9</sup> See also Three Disability ‘Firsts’ in a European Court of Human Rights Case, *Mental Disability Advocacy Centre*, 2 June 2009.

<sup>10</sup> *Ibid.*, par. 80.

<sup>11</sup> *Ibid.*, par. 84.

*worldwide consensus on the need to protect people with disabilities from discriminatory treatment*".<sup>12</sup> Thirdly, when assessing whether the measures put in place by Switzerland were proportionate and necessary in a democratic society, the Court considered the availability of alternatives, such as "*setting in place special forms of service for people in a situation comparable to that of the applicant*".<sup>13</sup> This test is similar to that of reasonable accommodation, introduced by Article 2 of the UN Convention.<sup>14</sup>

Since the judgment in the *Glor v. Switzerland* case, several other cases pertaining to the discrimination of persons with disabilities have been considered by the ECtHR. Among them, cases relating to HIV-positive persons are particularly interesting. In one of the pioneer cases in this field, *Kiyutin v. Russia* (2011),<sup>15</sup> the applicant, an Uzbek citizen married to a Russian national, was denied a residence permit in Russia because he was HIV positive. Invoking, among other instruments, the UN Convention on the Rights of Persons with Disabilities, the ECtHR found that "*a distinction made on account of one's health status, including such conditions as HIV infection, should be covered – either as a form of disability or alongside with it – by the term "other status" in the text of Article 14 of the Convention*".<sup>16</sup> It then stated that due to the special vulnerability of HIV positive persons and little support that the exclusion of such persons from residence finds in Europe, Russia would need to provide a "*particularly compelling justification for the differential treatment*".<sup>17</sup> It concluded that Russia failed to do so, because the anti-HIV measures solely concerned a small minority of HIV positive persons and could therefore hardly serve to protect public health. The differentiated treatment in the case thus amounted to discrimination in violation of Article 14 taken in conjunction with Article 8.

### **Category 2: Exclusion of Persons with Disabilities from the Enjoyment of Certain Rights**

The second category contains cases, in which persons with disabilities are excluded from the full enjoyment of certain rights. Such cases mostly could, and probably should, be treated as instances of discriminations under Article 14 of the Convention or Protocol 12 to it. Yet, for reasons which remain mostly unclear, the ECtHR deals with them solely on the basis

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<sup>12</sup> *Ibid.*, par. 53.

<sup>13</sup> *Ibid.*, par. 94.

<sup>14</sup> Reasonable accommodation is defined as "*means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms*" (Article 2).

<sup>15</sup> ECtHR, *Kiyutin v. Russia*, Application no. 2700/10, 10 March 2011. See also ECtHR, *G. N. and Others v. Italy*, Application no. 43134/05, 1 December 2009; and *IB v. Greece*, Application no. 552/10, 3 October 2013.

<sup>16</sup> *Kiyutin Case*, *op. cit.*, par. 57.

<sup>17</sup> *Ibid.*, par. 65.

of certain substantive rights granted by the Convention (mostly the right to liberty and security and the right to a fair trial but also, occasionally, other rights, such as the right to respect for private and family life and the right to vote). It does so even in cases, when the applicants explicitly invoke the prohibition of discrimination.

Such was the situation in *Alajos Kiss v. Hungary* (2010).<sup>18</sup> The applicant, placed under partial guardianship due to his psychiatric conditions, could not vote in legislative elections, because the Hungarian Constitution disenfranchises individuals under guardianship. Although the applicant relied on Article 3 of Protocol 1 (right to vote), read alone or in conjunction with Articles 13 and 14 of the Convention, the ECtHR solely considered the case under the first provision. It held that the restriction imposed by the Constitution pursued a legitimate aim of “*ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs*”.<sup>19</sup> The restriction, however, failed to meet the test of proportionality, because it consisted in “*the imposition of an automatic, blanket restriction on the franchise of those under partial guardianship*”.<sup>20</sup> The State thus failed to take into account the specificity of each case and the differences in the seriousness of the mental disability of various individuals, which amounted to the violation of Article 3 of Protocol 1.

As noted above, cases relating to the exclusion of persons with disabilities from the full enjoyment of certain rights are typically decided by the ECtHR under Articles 5 and 6 of the European Convention. The two provisions are often considered at the same time. For instance, in *D. D. v. Lithuania* (2012),<sup>21</sup> the applicant who had been legally incapacitated due to schizophrenia, complained to have been placed to a care home without her consent and without the possibility of judicial review. The Court, referring to the UN Convention, noted that the Lithuanian legal order prevented the applicant “*from independently pursuing any legal remedy of a judicial character to challenge her continued involuntary institutionalisation*”.<sup>22</sup> This amounted to the violation of Article 5(4) of the Convention. Moreover, since the applicant had no saying in the proceedings relating to her incapacitation, Article 6(1) was violated as well.

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<sup>18</sup> ECtHR, *Alajos Kiss v. Hungary*, Application no. 38832/06, 20 May 2010.

<sup>19</sup> *Ibid.*, par. 38.

<sup>20</sup> *Ibid.*, par. 43.

<sup>21</sup> ECtHR, *D. D. v. Lithuania*, Application no. 13469/06, 14 February 2012.

<sup>22</sup> *Ibid.*, par. 165.

A similar conclusion was reached in *Stanev v. Bulgaria* (2012)<sup>23</sup> or in *Shtukaturov v. Russia* (2008).<sup>24</sup> The former case pertained to the placement of a person suffering from schizophrenia into a psychiatric institution without his consent. The Court held that such a placement, in the absence of any recent checking of the mental state of the applicant, amounted to illegal detention (Article 5 (1)). The applicant was, furthermore, unable to bring proceedings to have the lawfulness of his detention decided by a court (Article 5(4)) and to apply for compensation for the illegal detention and the lack of judicial review (Article 5(5)). In addition, he was denied access to a court to seek restoration of his legal capacity (Article 6). The latter case concerned a mentally disabled person who had been placed to a psychiatric hospital at the request of his mother, without his consent and the possibility to challenge the decision in a court through an independent legal action. Again, the Court held that “*the “incapacitation” court proceedings were seriously flawed*”<sup>25</sup> (breach of Article 5(4)) and the proceedings, in which the applicant despite his relative autonomy had no say, were not fair (breach of Article 6). The applicant also invoked Article 14, yet the Court considered that there was no need to examine the complaint under this provision separately.<sup>26</sup>

### **Category 3: Failure to Accommodate Special Needs of Persons with Disabilities**

The third category encompasses cases in which the State failed to take into account, and accommodate, special needs that persons with disabilities have in various spheres of life. These cases are typically not decided under Article 14 of the European Convention, i.e. they are not treated as cases implying discrimination, either. Instead, the ECtHR considers them in the light of various substantive rights granted by the Convention, most typically the right to life, the prohibition of torture (and inhuman or degrading treatment or punishment), the right to liberty and security, the right to a fair trial, the right to respect for private and family life, and the protection of property. Other substantive rights – for instance the right to vote and the right to marry – have been occasionally invoked in this context as well.

Most of the cases concern persons with disabilities who were placed in police custody, detention centres, hospitals, psychiatric centres or other similar installations in which personal liberty is limited. In *Jasinskis v. Latvia* (2010),<sup>27</sup> a deaf and mute person who had sustained serious injuries in an accident, was taken to a sobering-up cell in a police station, because he was believed to be drunk. He died of his wounds on the next day. In the

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<sup>23</sup> ECtHR, *Stanev v. Bulgaria*, Application no. 36760/06, 17 January 2012 (Grand Chamber).

<sup>24</sup> ECtHR, *Shtukaturov v. Russia*, Application no. 44009/05, 27 March 2008.

<sup>25</sup> *Ibid.*, par. 125.

<sup>26</sup> *Ibid.*, par. 134.

<sup>27</sup> ECtHR, *Jasinskis v. Latvia*, Application no. 45744/08, 21 December 2010.

*Center of Legal Resources on behalf of Valentin Câmpeanu v. Romania* (2014),<sup>28</sup> the applicant – a young man of Roma origin who was HIV positive and suffered from a severe mental disability – was placed into a psychiatric hospital, where he died. The representatives of the victim, a Romanian non-governmental organization called Center of Legal Resources, claimed that the death had resulted from the failure by Romania to provide the applicant with treatment appropriate for his condition. In both cases, the ECtHR found a violation of Article 2 (right to life) stemming from the failure by the State to “*demonstrate special care in guaranteeing such conditions as correspond to /.../ special needs resulting from /.../ disability*”.<sup>29</sup>

Similar judgments have been rendered by the ECtHR under Article 3 of the European Convention, prohibiting torture and inhuman or degrading treatment. A large majority of these cases pertain to the conditions in police detention centres and in prisons. For instance, in *Vincent v. France* (2006),<sup>30</sup> the Court considered that the detention of a paraplegic in a prison facility which was clearly not adapted to the special needs of disabled persons and where the applicant was prevented from moving autonomously, amounted to degrading treatment.<sup>31</sup> In *Grimailovs v. Latvia* (2013),<sup>32</sup> Latvia was found in violation of Article 3 due to the fact that the applicant, who had a metal insert in his spine, was placed in a regular detention facility unsuitable for people in wheelchair.

On the contrary, in *Zarzycki v. Poland* (2013),<sup>33</sup> the Court held that the detention for more than four years of a prisoner whose forearms had been amputated did not constitute a violation of Article 3, because Poland put in place a system allowing it to secure the adequate and necessary aid to disabled persons. In some cases, the conditions discussed were not those in a prison but in psychiatric institutions, social care homes or similar installations. In *Stanev v. Bulgaria* (2012),<sup>34</sup> the placement of a person suffering from schizophrenia in an unsanitary and dilapidated psychiatric institution with inadequate food and heating and no activities for residents, located in a remote mountain location, amounted to degrading treatment violating Article 3 of the Convention.

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<sup>28</sup> ECtHR, *Center of Legal Resources on behalf of Valentin Câmpeanu v Romania*, Application no. 47848/08, 17 July 2014 (Grand Chamber).

<sup>29</sup> *Jasinskis Case*, *op. cit.*, par. 59; *Câmpeanu Case*, *op. cit.*, par. 131.

<sup>30</sup> ECtHR, *Vincent v. France*, Application no. 6253/03, 24 October 2006.

<sup>31</sup> See also ECtHR, *Arutunayn v. Russia*, Application no. 48977/09, 10 January 2002; *Farbtuhs v. Latvia*, Application no. 4672/02, 2 December 2004; *Z. H. v. Hungary*, Application no. 28973/11, 8 November 2011; *D. G. v. Poland*, Application no. 45705/07, 12 February 2013; *Semikhvostov v. Russia*, Application no. 2689/12, 6 February 2014; *Asalya v. Turkey*, Application no. 43875/09, 15 April 2014; *Helhal v. France*, Application no. 10401/12, 19 February 2015.

<sup>32</sup> ECtHR, *Grimailovs v. Latvia*, Application no. 6087/03, 25 June 2013.

<sup>33</sup> ECtHR, *Zarzycki v. Poland*, Application no. 15351/03, 3 March 2013.

<sup>34</sup> ECtHR, *Stanev v. Bulgaria*, Application no. 36760/06, 17 January 2012 (Grand Chamber).



The argument relating to the obligation by the State to accommodate special needs of persons with disabilities, while quite successful in cases involving individuals whose liberty has been limited, has had a lower success rate in other cases, including those considered under Article 8 (right to respect for private and family life). In *Botta v. Italy* (1998)<sup>35</sup> the Court refused to see an impairment of private life in the lack of facilities enabling persons with disabilities to gain access to the beach in the Italian seaside resort Lido degli Estensi. It held that Article 8 was inapplicable to the case, because “*there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant’s private life*”.<sup>36</sup> In *Zehnalová and Zehnal v. the Czech Republic* (2002),<sup>37</sup> a similar conclusion was reached by the Court with respect to the physically disabled person, who claimed that the failure by the Czech Republic to remove the architectural barriers preventing disabled access to public buildings and buildings open to the public constituted an unlawful interference into the right to respect for her private life. Opining that the direct link between the measures required from the State and the right of the applicant had not been established, the Court found Article 8 inapplicable and the complaint incompatible *ratione materiae* with the provisions of the Convention.<sup>38</sup>

Occasionally, however, the argument may hold even under Article 8. In *X. and Y. v. the Netherlands* (1985),<sup>39</sup> the Court dealt with the case of a mentally handicapped girl who had been raped in the home with children with mental disabilities where she lived. Due to the trauma she had suffered, she was unable to sign an official complaint against the perpetrator without which the proceedings could not start. Her father wanted to sign in her place but the Dutch law did not allow him to do so. The Court held that there was a deficiency in the Dutch legislation, which resulted in the violation of Article 8. Similarly, in *Tysiac v. Poland* (2007),<sup>40</sup> the Court considered the application of a woman suffering from severe myopia who had been denied abortion under the Polish anti-abortion laws, despite the indication that her pregnancy could exacerbate her physical conditions, and who effectively lost her sight as a result of pregnancy and delivery. Declaring that “*authorities failed to comply with their positive obligations to secure to the applicant the effective respect for her private life*”,<sup>41</sup> the Court found violation of Article 8. It is interesting to note that the positive obligation the Court

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<sup>35</sup> ECtHR, *Botta v. Italy*, Application no. 153/1996/772/973, 24 February 1998.

<sup>36</sup> *Ibid.*, par. 35.

<sup>37</sup> ECtHR, *Zehnalová and Zehnal v. the Czech Republic*, Application no. 38621/97, 14 May 2002.

<sup>38</sup> See also ECtHR, *Molka v. Poland*, Application no. 56550/00, 11 April 2006; and *Farcas v. Romania*, Application no. 32596/04, 14 September 2010. See also ECtHR, *Gherghina v. Romania*, Application no. 42219/07, 18 September 2015 (Grand Chamber) – in this case, the applicant claimed the violation of the right to education (Article 2 of Protocol 1 to the Convention) but the application was declared inadmissible.

<sup>39</sup> ECtHR, *X. and Y. v. the Netherlands*, Application no. 8978/80, 26 March 1985.

<sup>40</sup> ECtHR, *Tysiac v. Poland*, Application no. 5410/03, 20 March 2007.

<sup>41</sup> *Ibid.*, par. 129.

refers to is that to put in place effective mechanisms capable of determining whether the conditions for a lawful abortion are met, not that to allow for such an abortion.

The third category of cases covers certain instances of extradition. In *Aswat v. the United Kingdom* (2013, 2015),<sup>42</sup> the applicant – a British national suffering from paranoid schizophrenia – was indicted in the United States as a participant in a conspiracy to establish a jihad training camp. Faced with the risk of extradition, the applicant complained that the conditions in the detention centres in the US would likely exacerbate his mental problems. The Court agreed with his view, concluding that the extradition would be in violation of Article 3 (prohibition of inhuman and degrading treatment) “*solely on account of the current severity of his mental condition*”.<sup>43</sup> Two years later, the Court had to consider the same case for the second time, after the United Kingdom decided to extradite the applicant upon the receipt from the USA of specific assurances regarding the conditions in the detention centre. In light of these assurances, the Court concluded that the extradition would no longer violate Article 3, and the application was thus declared inadmissible.

#### **Category 4: Other Positive Obligations with Respect to Persons with Disabilities**

The obligation to take into account, and accommodate their special needs is not the only positive obligation with respect to persons with disabilities that States have under the European Convention.<sup>44</sup> Most positive obligations arise under Article 8 (the right to respect for private and family life). In *La Parola and Others v. Italy* (2000),<sup>45</sup> unemployed parents of a minor who had been disabled since birth, suited Italy for the failure to provide them with effective sanitary, domestic and economic assistance reflecting the difficult positions in which they were due to the disability of their child. The Court declared the application inadmissible noting that the parents were receiving permanent benefit and that, therefore, “*Italy was already meeting the positive obligations stemming from Article 8 of the Convention*”.<sup>46</sup> The conclusion suggests that should Italy fail to introduce social benefits, it might have been found in violation of its positive obligations under the European Convention.

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<sup>42</sup> ECtHR, *Aswat v. the United Kingdom*, Application no. 17299/12, 16 April 2013 and Application no. 62176/14, 6 January 2015.

<sup>43</sup> *Aswat Case* (2013), *op. cit.*, conclusion.

<sup>44</sup> See also Xenos, Dimitris, *The Positive Obligations of the State Under the European Convention of Human Rights*, Routledge, London and New York, 2012.

<sup>45</sup> ECtHR, *La Parola and Others v. Italy*, Application no. 39712/98, 30 November 2000.

<sup>46</sup> *Ibid.*

This happened in *A. M. M. v. Romania* (2012)<sup>47</sup>. The case pertains to the proceedings to establish paternity of a disabled minor born outside of marriage. The minor, whose mother also suffered from disability, was to be represented in the proceedings by a guardianship office. Yet, the representatives of the office fail to attend the hearings. The Court qualified this failure as a violation of positive obligations stemming from Article 8, because “*the domestic courts did not strike a fair balance between the right of the minor applicant to have his interests safeguarded in the proceedings /.../ and the right of the presumed father not to participate in the proceedings*”.<sup>48</sup> In other cases, the Court has been more cautious. In *Nikky Sentges v. the Netherlands* (2002),<sup>49</sup> the applicant, suffering from a disease characterised by progressive muscle degeneration, claimed that by denying his request to be provided with a robotic arm, the Dutch authorities violated a positive obligation under Article 8. The Court rejected the claim, holding that the applicant had access to the standard health care in his country and that the Dutch authorities, when denying his request, acted within the acceptable margin of appreciation.

Another case in which the Court dealt with positive obligations under the European Convention is *Đorđević v. Croatia* (2012).<sup>50</sup> The case related to a complaint of a mother and her mentally and physically disabled son who had been harassed, both verbally and physically, for over four years, by children living in the neighbourhood, while the police, although informed, failed to take adequate measure to protect them. The Court held that Croatia “*had a positive obligation to protect the /.../ applicant from the violent behaviour of the children involved*”.<sup>51</sup> The State, however, failed in this obligation, because “*no relevant action of a general nature to combat the underlying problem has been taken /.../ despite their knowledge that the /.../ applicant had been systematically targeted and that future abuse was very likely to follow*”.<sup>52</sup> As a result, the Court found a violation of Article 3 (the prohibition of inhuman and degrading treatment), Article 8 (the right to respect for private and family life) and Article 13 (the right to an effective remedy). The disability of the applicant was not a decisive factor in the decision, yet in at least one instance, the Court stressed the particular seriousness of violence directed against persons with physical and mental disability.<sup>53</sup>

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<sup>47</sup> ECtHR, *A. M. M. v. Romania*, Application no. 2151/10, 14 February 2012.

<sup>48</sup> *Ibid.*, par. 64.

<sup>49</sup> ECtHR, *Nikky Sentges v. the Netherlands*, Application no. 27677/02, 16 July 2002.

<sup>50</sup> ECtHR, *Đorđević v. Croatia*, Application no. 41526/10, 24 July 2012.

<sup>51</sup> *Ibid.*, par. 93.

<sup>52</sup> *Ibid.*, par. 148.

<sup>53</sup> *Ibid.*, par. 143.

**Category 5: Other Cases Relating to Persons with Disabilities**

The last category includes cases that do not fall under any of the four major groups. This category is quite heterogeneous. Among the cases it encompasses are, for instance, those relating to the origins of the disability and its abuse. In *R. R. v. Poland* (2011),<sup>54</sup> the applicant was deliberately denied timely access to genetic tests which might confirm the deformation of her foetus, by anti-abortion doctors. When the tests were finally made, it was too late for the applicant to ask for a legal abortion and her child was thus born with disability. The Court held that the approach to the applicant was humiliating e degrading, breaching Article 3, and that the authorities also “*failed to comply with their positive obligations to secure to the applicant effective respect for her private life*”<sup>55</sup> under Article 8. Partly similar was the *Tysiak v. Poland* case described above,<sup>56</sup> in which a woman lost her sight as a result of her pregnancy that she was not allowed to terminate. In this case, physical disability was both the result of the violation of the applicant’s rights as well as the factor that the domestic authorities should have taken into account when dealing with her situation.

In other cases, the applicants claimed that the State had misused of their vulnerable condition consisting in their physical or mental disability, to interfere into their right. For instance, in *Gauer and Others v. France* (2012)<sup>57</sup> five young women with mental disabilities employed at a local work-based support centre were subject to sterilisation without their consent and without truly understanding the situation. They submitted that such a treatment constituted an unlawful interference into their physical integrity. The Court declared the application inadmissible due to the fact that it had been lodged out of time. Were it not so, it would be interesting to see how it would address the claim raised by the applicants.

A growing number of complaints relating to persons with disabilities are lodged under Article 1 of Protocol 1, granting the right to the protection of property. These cases mostly pertain to the denial of or changes in social benefits that persons with disabilities are entitled to and largely revolve around the concept of legitimate expectations. In *Draon v. France* and *Maurice v. France* (2005),<sup>58</sup> the Court dealt with the rights to compensation of parents whose children were born with congenital disabilities which had not been, due to medical errors, discovered during prenatal examinations. It agreed with the applicants that a new law which

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<sup>54</sup> ECtHR, *R. R. v. Poland*, Application no. 27617/04, 26 May 2011.

<sup>55</sup> *Ibid.*, par. 214.

<sup>56</sup> *Tysiak Case* (2007), *op. cit.*

<sup>57</sup> ECtHR, *Gauer and Others v. France*, Application no. 61521/08 61521/08, 23 October 2012.

<sup>58</sup> ECtHR, *Draon v. France* and *Maurice v. France*, Applications nos 1513/03 and 11810/03, 6 October 2005 (Grand Chamber). See also ECtHR, *Bélané Nagy v. Hungary*, Application no. 53080/13, 10 February 2015.

had abolished, with retrospective effect, the possibility to obtain not only non-pecuniary damage but also actual costs incurred as a result of the children's disability, violated Article 1 of Protocol 1. *"The amount of compensation awarded /.../ was very much lower than the applicants could legitimately have expected"*<sup>59</sup> and the change in the law *"upset the fair balance to be maintained between the demands of the general interest on the one hand and protection of the right to peaceful enjoyment of possessions on the other"*.<sup>60</sup>

### **The Main Characteristics of the Case-Law of the ECtHR on Persons with Disabilities**

The previous section showed that the case-law of the European Court of Human Rights on persons with disabilities is quite rich and also quite heterogeneous, encompassing at least five different categories of cases. Despite this diversity, several main features can be identified that characterise the approach of the ECtHR in this area. This paper will mention six characteristic features.

First, despite the silence of the European Convention on persons with disabilities, the ECtHR has made it clear that these persons enjoy the protection of the Convention not only as any other individuals who find themselves *"within the jurisdiction"* (Article 1) of one of the State Parties to the Convention but also as members of a particular group which, due to its vulnerability, has special needs.<sup>61</sup> Disability as an autonomous non-discrimination ground has been read into Article 14 as one of the instances of *"other status"* that the provision, giving a non-exhaustive list of non-discrimination grounds, refers to. Moreover, the ECtHR has repeatedly stressed the necessity to take special needs of persons with disabilities into account in the interpretation of various substantive rights guaranteed by the Convention. Thus, although the European Convention was not originally designed as an instrument offering special protection to persons with disabilities, the case-law of the ECtHR has effectively turned it into such an instrument.<sup>62</sup>

Secondly, the ECtHR, while often referring to persons with disabilities and to the concept of disability as such, has never offered a definition of these terms. In this, however,

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59 Ibid., par. 84.

60 Ibid., par. 85.

61 See also Lawson, Anna (ed.), *Disability Rights in Europe: From Theory to Practice*, Hart, Oxford and Portland, 2005.

<sup>62</sup> As Judge Loucaides noted: *"Although the Convention was not intended to be an instrument aiming specifically at the solution of such problems /problems of persons with disabilities/ the jurisprudence has evolved in a way as to give particular attention to these problems and to take them into account in applying the rights enshrined in the Convention."* Loucaides, Loukis D., *The European Convention on Human Rights and the rights of persons with disabilities*, in Loucaides, Loukis D., *The European Convention on Human Rights: Collected Essays*, Brill/Nijhoff, 2007, p. 105.

it is not alone. Even the UN Convention on the Rights of Persons with Disabilities, although focusing specifically on persons with disabilities, limits itself to stating that “*persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others*” (Article 1(2)). It is left up to the States, and courts, to determine what may, and what may not, count as a form of disability. This approach reflects the fact that, as the preamble to the UN Convention declares, “*disability is an evolving concept*” (par. e)). Both the UN Convention and the European Convention are thus open to re-conceptualizations of the concept of “disability” taking into account changing social, moral and behavioural standards. This is, at the European level, fully in line with the idea of the European Convention being a “*living instrument which /.../ must be interpreted in the light of present-day conditions*”.<sup>63</sup>

The case-law of the ECtHR indicates that so far, the term “disability” has been understood rather broadly. Not only does it encompass both physical and mental forms of disability,<sup>64</sup> but it is also not limited to major disabilities only.<sup>65</sup> Moreover, in some cases, the Court went so far as to qualify as a “disability” such conditions as HIV infection,<sup>66</sup> making it somewhat difficult to distinguish between “disability” and “health status” (as, for instance, two different non-discrimination grounds under Article 14). Whereas this distinction might be unimportant in some instances, it could play a role in others. For example, where determining the content of the obligations that States have with respect to persons with disabilities, the Court should take into account international instruments for the protection of these persons (including the UN Convention). Those instruments would not necessarily apply to persons characterised solely by a special “health status”. Yet, the line between the two categories remains unclear and the Court might actually wish to leave it so to retain flexibility.

Thirdly, the ECtHR, though deciding the application strictly on the basis of the European Convention, does not ignore the broader normative framework which has been established to protect persons with disabilities. Starting from the *Glor* case (2009), the Court has systematically – in some thirty judgments and decisions – referred to the *UN Convention*

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<sup>63</sup> ECtHR, *Tyrer v. the United Kingdom*, Application no. 5856/72, 25 April 1978, par. 31. See also Letsas, George, *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, in Føllesdal, Andreas, Peters, Birgit, Ulfstein, Geir (eds), *Constituting Europe. The European Court of Human Rights in a National, European and Global Context*, Cambridge University Press, Cambridge, pp. 106-141.

<sup>64</sup> See also Bartlett, Peter, Lewis, Oliver, Thorold, Oliver, *Mental Disability and the European Convention on Human Rights*, Brill/Nijhoff, 2007.

<sup>65</sup> See *Glor Case*, *op. cit.*

<sup>66</sup> *Kiyutin Case*, *op. cit.*

on the *Rights of Persons with Disabilities* adopted in 2006. It has done so even with respect to countries which have not yet become Parties to the Convention,<sup>67</sup> seeing in the Convention, as indicated above, the sign of a “*worldwide consensus on the need to protect people with disabilities from discriminatory treatment*”.<sup>68</sup> More than that, the Court occasionally uses concepts which are close to those present in the UN Convention (reasonable accommodation, etc.). Apart from the UN Convention, the Court has also invoked various Council of Europe instruments, such as the PACE Recommendation 1592 (2003) *towards full social inclusion of people with disabilities* or the Recommendation No. R(99)4 of the Committee of Ministers *on principles concerning the legal protection of incapable adults*. The European Convention is thus not read, and interpreted, in the clinical isolation from other international instruments, though the ECtHR uses these instruments solely as a source of inspiration, relying primarily on its own “home-made” concepts and approaches.

Fourthly, cases of unfavourable treatment of persons with disabilities are discussed by the Court both under Article 14, as instances of discrimination, and under other provisions of the Convention, as a violation of specific substantive rights. It is not clear from the case-law what makes the Court opt for one approach or the other. Sometimes, the choice might be determined by the position of the applicants. Yet, as we saw, the Court does not shy away from disregarding this position either by declining to consider the case under certain provisions,<sup>69</sup> or by stating that such a consideration is not necessary.<sup>70</sup> It is true that due to the non-autonomous character of Article 14, “discrimination” (category 1) and “other-than-discrimination” (categories 2-5) cases have important overlaps. Yet, the standards to prove that discrimination has taken place are not necessarily identical to those used in the determination whether a violation of a substantive right has taken place. That entails that the decision by the Court to include the case under one category rather than any other one – along the criteria which, if they exist at all, cannot be easily induced from the case-law of the ECtHR – might have an impact upon the chances of the applicant to succeed.

Fifthly, the case-law of the ECtHR indicates that the European Convention gives rise to an extensive set of obligations of State Parties with respect to persons with disabilities. These are the obligations not to discriminate against persons with disabilities, not to exclude these persons from the full enjoyment of human rights, to accommodate the special needs of persons with disabilities (especially in cases, where these persons have their liberty

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<sup>67</sup> That applied to Switzerland in 2009 (*Glor Case*) or Russia in 2011 (*Kiyutin Case*).

<sup>68</sup> *Glor Case*, *op. cit.*, par. 53.

<sup>69</sup> *Alajos Kiss Case*, *op. cit.*, par. 20.

<sup>70</sup> *Shtukaturov Case*, *op. cit.*, par. 133 and 134.

restricted in places such as prisons, detention centres or psychiatric institutions), and to adopt various other measures with respect to persons with disabilities. The case-law also shows that while the ECtHR does not hesitate to go quite faraway in the first three areas, it remains cautious in the fourth one. In other words, the Court is more reluctant to find a violation of positive obligations and, in fact, to declare the existence of such positive obligations in the first place, than, for instance, to hold the State responsible for discrimination.

This is partly understandable. As Judge Loucaides notes, “*any precedent to the effect of accepting an obligation on the part of the states to provide special facilities in order to solve general problems of disabled persons resulting from their disability will entail an inestimable burden on the economic capacity of the state concerned*”.<sup>71</sup> The same argument could be made with regard to obligations stemming from the third category of cases, as most of these obligations are positive in nature as well. Here, the ECtHR has so far largely focused on the special conditions of persons with disabilities placed in installations under the direct or indirect control by the State, showing a reluctance to extend the scope of the “accommodation of special needs” outside this framework. Beside the economic factor, the fact that when dealing with positive obligations towards persons with disabilities, the ECtHR often gets outside the traditional scope of civil and political rights granted by the Convention, might play a role. This however also shows how the classification of human rights into various groups or generations is problematic.<sup>72</sup>

Sixthly and finally, there seems to be a growing tendency on the side of the Court to treat cases relating to persons with disabilities primarily in their procedural aspects, leaving difficult and sensitive questions of substance aside. One example is the *Tysiack* case, relating to the controversial issue of abortion. Instead of discussing whether the right of the applicant were violated by the fact that she could not have her pregnancy terminated, the Court primarily focused on “*procedural and institutional mechanisms /.../ put in place in connection with the implementation of legislation specifying the conditions governing access to a lawful abortion*”.<sup>73</sup> Similarly, in *A. M. M. v. Romania*, the Court, while first deciding to deal with the case under Article 8 (and not under Article 6, although this provision was invoked by the applicant as well), then solely focused on the procedural aspects of the right. Commenting upon this approach, some authors have gone so far as to speak about “*a broader trend in*

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<sup>71</sup> Loucaides, Loukis D., *op. cit.*, p. 101.

<sup>72</sup> Macklam, Patrick, Human Rights in International Law: Three Generations or One?, *London Review of International Law*, Vol. 3, No. 1, 2015, pp. 61-92.

<sup>73</sup> *Tysiack Case*, *op. cit.*, par. 123.



*disability cases, whereby the Court increasingly focuses on issues of process instead of offering substantive guidance, with the result that entrenched abuse and discrimination remain unchallenged”.*<sup>74</sup>

Whereas this statement might be too strong, the trend it describes does indeed exist. This is probably not so surprising. Respecting the margin of appreciation that States have in the implementation and application of the European Convention, the Court refrains from taking a pro-active stance in areas where no consensus has so far emerged among European states.<sup>75</sup> At the same time, some instances of treatment of persons with disabilities are clearly wrong. The resort to institutional or procedural aspects of the case might offer to the ECtHR a possibility of reconciling these two opposite motives. As such, it should not be rejected easily. At least as long as it does not jeopardize the final aim of the legal regulation in this sphere – that of ensuring that persons with disabilities are treated with decency and respect, that their human rights are adequately and efficiently protected and that this protection takes into account the special needs they may have due to their vulnerable condition.

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<sup>74</sup> See, for instance, Cojocariu, Constantin, *Silencing the Voices of People with Disabilities: Recent Developments before the European Court of Human Rights*, *Strasbourg Observers*, 3 December 2014.

<sup>75</sup> See Greer, Steven, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Human Rights Files No. 17, Council of Europe Publishing, Strasbourg, 2000.