

## EVERYBODY COUNTS: THE RIGHT TO VOTE OF PERSONS WITH PSYCHOSOCIAL DISABILITIES IN SOUTH AFRICA

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The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.<sup>1</sup>

### Summary

*Persons with psychosocial disabilities were historically denied the right to vote due to the long-held perception that they do not have the required decision-making capabilities required for voting. The adoption of the UN Convention on the Rights of Persons with Disabilities (CRPD) in 2006 has necessitated a re-examination of this perception, leading to the growing recognition internationally that a universal limitation on the right to vote of persons with psychosocial disabilities can no longer be justified. This article accordingly examines the right to vote of persons with psychosocial disabilities in South Africa, which is generally regarded as an exemplary electoral model in the African region. The South African Constitution guarantees universal suffrage; at the same time, persons who are regarded as being 'of unsound mind' are excluded from voting. The article considers this 'systemic electoral inconsistency' against the paradigm shift mandated by the CRPD (and to some extent presaged by earlier international instruments). The traditional justifications for excluding persons with psychosocial disabilities from voting are weighed against the contemporary notions of legal capacity and decision-making, again with reference to the CRPD and recent interpretations by the Committee on the Rights of Persons with Disabilities.*

\* LLD (University of the Western Cape); Associate Professor, Centre for Disability Law and Policy, University of the Western Cape. This article owes its existence to my attending a training course on mental disability law presented by the Mental Disability Advocacy Centre (MDAC) during July 2011 in Budapest, Hungary, and in particular, a thought-provoking discussion on art 29 of the Convention on the Rights of Persons with Disabilities presented by Oliver Lewis. I am further indebted to participants in the regional workshop of the PANPPD (Pan-African Network of Persons with Psychosocial Disabilities) convened in Cape Town in August 2011 for the information they provided on voting rights in their respective countries and a discussion of voting rights led by Eyong Mbuem from the MDAC at this workshop. I also acknowledge the thoughtful suggestions of anonymous peer reviewers.

<sup>1</sup> *August v Electoral Commission* 1999 (3) SA 1 (CC) para 17.

## 1 Introduction

The right to vote is regarded as one of the fundamental cornerstones of democracy, and at the beginning of the 21st century, the recognition of this right (which encapsulates the principle of universal suffrage),<sup>2</sup> appears to be beyond debate. However, for many persons with psychosocial<sup>3</sup> disabilities globally, the right to vote remains out of reach, due to the long-held perception that they do not have the decision-making capacity that is required for voting. More often than not, it has gone unremarked that the very same constitutions or legislative enactments that proclaim the principles of non-discrimination and universal suffrage also exclude persons 'of unsound mind' from voting and from standing as candidates in elections.

This position is set to change in the light of a growing recognition that the limitation of the right to vote of persons with psychosocial disabilities cannot be justified on the basis of disability. Indeed, several recent developments, most notably the introduction of the Convention on the Rights of Persons with Disabilities,<sup>4</sup> point to the need for a radical reconsideration on the part of governments (and society more broadly) of the assumption that persons with psychosocial disabilities should be excluded from voting. While the pursuit of the principles of democratic elections is valued everywhere, this is particularly the case in Africa, given its notorious history of electoral discontent. Ensuring the right to vote, as an aspect of the right to political participation, therefore takes on a distinct note of urgency in this context.

Against this background, this article examines the question whether existing limitations placed on the right to vote of persons with psychosocial disabilities can be sustained, with specific reference to the position in South

2 Defined as 'the right of all the adults in a country to vote in elections': [http://www.macmillandictionary.com/dictionary/british/universal-suffrage#universal-suffrage\\_3](http://www.macmillandictionary.com/dictionary/british/universal-suffrage#universal-suffrage_3) (accessed 11 July 2014); 'the right of all a nation's citizens above a certain age, usually eighteen or twenty-one, to vote, unless they are in violation of certain basic legal requirements': <http://www.wordsmyth.net/?level=3&ent=universal+suffrage> (accessed 11 July 2014).

3 The term 'psychosocial' is used here to refer to the interaction between the psychological and social/cultural components of this disability. The psychological component refers to ways of thinking, processing experiences and perceptions of the world. The social/ cultural component refers to societal and cultural limits for behaviour that interact with the psychological aspect as well as the stigma that society attaches to label people as disabled – World Network of Users and Survivors of Psychiatry *Implementation manual for the United Nations Convention on the Rights of Persons with Disabilities* (2008) 9. Psychosocial disabilities are also sometimes referred to as 'psychiatric disabilities', 'mental disabilities' or 'mental health problems'. Because of the array of different terms used in the literature (legal and otherwise), it is not always possible to establish exact terminological equivalence. For example, the term 'mental disability' is sometimes used as a collective for both psychosocial disability and intellectual disability; in other work it denotes only the former.

4 GA Res A/RES/61/06, adopted on 13 December 2006, entered into force on 3 May 2008 (CRPD).

Africa. It commences by looking into the background to disability-based voting exclusions and considering the primary current justifications for such restrictions. It then investigates the international human rights framework, with specific reference to the CRPD. It also considers two regional human rights instruments, notably the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) and the African Charter on Human and Peoples' Rights (the African Charter). The article subsequently discusses the position relating to the right to vote of people with psychosocial disabilities in South Africa, and concludes with recommendations for alignment of the law with the CRPD.

While this article constitutes an investigation in its own right, it can also be seen as a 'case study' of the requirement for incisive law reform brought about by the ratification by states parties of the CRPD. In this sense, it also seeks to demonstrate a need for different ways of conceptualising disability and citizenship, in particular psychosocial disability.

## **2 Background: Understanding disability and the right to vote**

### **2.1 Disability-based exclusions**

Earl and Bushner explain that the types of obstacles encountered by voters with disabilities fall loosely into three categories: inaccessible polling places; inaccessible vote recording technologies; and disability-based voting restrictions.<sup>5</sup> The inaccessibility of polling places generally includes environmental barriers, for instance a lack of parking accommodations and architectural barriers such as stairwells up to the polling site or doorways too narrow for wheelchairs.<sup>6</sup> Inside the building, persons with visual impairments may require clear and easy-to-read signs in large font.

When it comes to inaccessible voting technologies,<sup>7</sup> persons with visual impairments are again often at the receiving end. Paper ballots are

5 TH Earle & KM Bushner 'Effective participation or exclusion: The voting rights of people with disabilities' (2001-2002) 11 *Temple Political & Civil Rights Law Review* 327 329; K Schriner et al 'Democratic dilemmas: Notes on the ADA and voting rights of people with cognitive and emotional impairments' (2000) 21 *Berkeley Journal of Employment & Labor Law* 437 483. See also JE Lord et al 'Facilitating an equal right to vote for persons with disabilities' (2014) 6 *Journal of Human Rights Practice* 115 117.

6 Earle & Bushner (n 5 above) 329.

7 These may include paper ballots (the method still used most frequently in developing countries), mechanical lever machines, punch cards, optical scan systems and Direct Recording Electronic (DRE) systems – see <http://inventors.about.com/library/weekly/aa111300b.htm> (accessed 11 July 2014). Earl and Bushner refer to 'voting machines'.

not always available in Braille format (assuming that all voters with visual impairments make use of Braille), and alternatives such as a Braille ‘template’ that can be placed over the paper ballot are not consistently supplied. Similarly, voters with motor impairments, who require assistance in marking their ballot paper, may experience obstacles in the form of small voting booths that do not allow entry of two persons at the same time. In such instances, voting technologies such as direct recording electronic systems may provide potential solutions; however, these are probably out of reach in developing countries for the foreseeable future.

It is however the third category, namely disability-based voting restrictions, that compels our interest here. The first two categories are increasingly addressed<sup>8</sup> either in general or disability-specific legislation setting standards for accessibility<sup>9</sup> and reasonable accommodation.<sup>10</sup> There is also a growing trend to make legislative provision for persons with disabilities to make use of assistance of their choice when casting their vote<sup>11</sup> – another form of reasonable accommodation. On the other hand, it is noteworthy that the disability-based voting restrictions for the most part affect only persons with psychosocial disabilities and/or those with intellectual disabilities.<sup>12</sup> These restrictions stand alongside constitutional and legislative assurances of equality, prohibition of disability-based discrimination and universal suffrage. This constitutes an internal dissonance between foundational constitutional principles and the exclusion of persons with psychosocial disabilities from voting. Nelson refers to this disjuncture as ‘systemic electoral inconsistency’, an aptly descriptive term that will also be used for the purposes of this article.<sup>13</sup>

## 2.2 Who votes – and who does not?

Since the earliest democratic formations (from the Greek city states and the subsequent Roman period), public participation was characterised by a

8 See M Waterstone ‘Political participation for people with disabilities’ in MH Rioux et al (eds) *Critical perspectives on human rights and disability law* (2011) 371 380-381.

9 See art 9 of the CRPD.

10 See art 5 of the CRPD, which makes it clear that a failure to provide reasonable accommodation constitutes disability-based discrimination. ‘Reasonable accommodation’ is defined in art 2 of the Convention as ‘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’ (my emphasis). Reasonable accommodation is therefore aimed at meeting the requirements of a specific individual, whereas ‘accessibility’ entails the identification and elimination of barriers and obstacles to ensure to persons with disabilities (*generally*) access, on an equal basis with others, to the physical environment, to transportation, etc.

11 See eg discussion of South African legislation below.

12 Another group that is regularly excluded is prisoners, whether awaiting-trial or sentenced. The rationale for exclusion for each group is different.

13 JS Nelson ‘Fair measure of the right to vote: A comparative perspective of voting rights enforcement in a mature democracy’ (2010) 18 *Cardozo Journal of International & Comparative Law* 425 429. Although this article deals with sentenced prisoners in Ghana, I argue that the same principle applies.

binary division between those who had the right to take part (the 'insiders') and those who were excluded (the 'outsiders'), such as slaves, women and non-citizens.<sup>14</sup> Schriner and Ochs, in their study of the development of disability exclusions in the United States, make the compelling point that the question of 'who votes' historically has been a contentious one because this issue is 'so basic to the functioning of a representative democracy'.<sup>15</sup>

They recount that in early colonial America, property ownership was required as the basis for voting.<sup>16</sup> This requirement was carried forward from the English notion that property ownership was a prerequisite for selfhood; there was also a fear that the votes of landless persons such as renters or tenants would be controlled by the direct and indirect influence of the wealthy.<sup>17</sup> Although the requirement of property ownership was eventually replaced by a taxpaying qualification, states at the same time began to exclude outsiders such as 'foreigners, the free negro, and [women]'.<sup>18</sup> This was also when states began to develop disability-based exclusions.<sup>19</sup> Importantly, the disability exclusions were initially linked to perceptions of economic dependency.<sup>20</sup>

By 1880, 26 of the 38 American states had enacted provisions disenfranchising persons with 'diminished mental capacities'.<sup>21</sup> The motivation accepted for these disenfranchising provisions was first, that persons with mental illness were considered to have 'no intellect at all'.<sup>22</sup> This disqualified them from participation in civic society, given the emphasis on rationality as the essence of democratic citizenship during this period.<sup>23</sup> A second motivation was based in Social Darwinist theory, which held that 'some persons are more socially desirable than others' and that future generations can be improved biologically by increasing the

14 See J Fishkin 'Equal citizenship and the individual right to vote' (2011) 86 *Indiana Law Journal* 1289 1334.

15 Schriner et al (n 5 above) 483.

16 Schriner et al (n 5 above) 487; JA Bindel 'Equal protection jurisprudence and the voting rights of persons with diminished mental capacities' (2009) 65 *New York University Annual Survey of American Law* 87 101. Of course one also had to be an adult white male.

17 Schriner et al (n 5 above) 488. Renters would be susceptible to the power of their landlords, and employees subject to the influence of their employers. This thought replicated ideas already common in England.

18 Schriner et al (n 5 above) 489.

19 Bindel (n 16 above) 102.

20 In Massachusetts, for example, the constitution was amended in 1821 in two respects. First, the property qualification was dropped in favour of a taxpaying qualification; second, 'paupers and persons under guardianship' were excluded from the electorate. This exclusion was justified on the basis that paupers (persons who had no means of self-support and thus were dependent on public relief) and persons under guardianship (insane persons, drunkards, and others whose financial affairs were managed by a guardian for the primary purpose of avoiding dependency on public relief) were viewed as unworthy because of their economic dependency – Schriner et al (n 5 above) 490.

21 Bindel (n 16 above) 102. Terminology used in source.

22 Bindel (n 16 above) 103.

23 Interestingly, similar arguments based on citizenship and inferior mental capacity were proposed at the time to deny women the right to vote – see NF Brescia 'Modernizing state voting laws that disenfranchise the mentally disabled with the aid of past suffrage movements' (2010) 54 *Saint Louis University Law Journal* 943 957-960.

proportion of 'desirable individuals' and decreasing the rate of propagation of 'inferior individuals'. At the time<sup>24</sup> concern about a perceived increase in the rate of mental illness in America led to a view that society needed to be protected from the actions of those who were less capable – which included voting.<sup>25</sup>

The third motivation was one of electoral advantage, which entailed that political parties perceived an advantage in limiting the pool of potential voters by excluding certain groups. Interestingly, the adoption of disenfranchisement statutes often coincided with initiatives to construct 'asylums' for persons with mental illness and institutions for persons with intellectual disabilities; this concentrated people with psychosocial and intellectual disabilities in large numbers in a single location, with a potential to control the outcome of local elections.<sup>26</sup>

The more contemporary justification for disbaring persons with psychosocial disabilities from voting has been described as 'preserving the political community'<sup>27</sup> or 'preserving the integrity of the election process'<sup>28</sup> as well as the prevention of voter fraud.<sup>29</sup> The assumption is that the political community will be preserved by making a distinction between voters who intend to affect the election outcome by expressing some preference, and those who do not understand the nature of voting and are unable to vote competently.<sup>30</sup> As Brescia observes,<sup>31</sup> there is a prevailing belief that a person with a mental health diagnosis is intrinsically irrational and incapable of participating in civic functions. However, it should be noted that a psychosocial disability does not necessarily affect a person's ability to make decisions or understand concepts.<sup>32</sup>

On a more fundamental level, however, the question is whether it is for the state to determine what 'voting competently' means – whether it is the role of the state to determine what is a valid political opinion.<sup>33</sup> It has been

24 The late 19th and early 20th centuries.

25 Bindel (n 16 above) 104-105. Social Darwinism also gave rise to the eugenics movement, which saw prohibitions on marriage and procreation of people with especially intellectual disabilities and also encouraged laws permitting involuntary sterilisation – see KB Glen 'Changing paradigms: Mental capacity, legal capacity, guardianship, and beyond' (2012) 44 *Columbia Human Rights Law Review* 93 104-105.

26 Bindel (n 16 above) 106.

27 PS Karlan 'Framing the voting rights claims of cognitively impaired individuals' (2007) 38 *McGeorge Law Review* 917 925.

28 As above.

29 See also Schriener et al (n 5 above) 486.

30 R Kelley 'Toward an unconditional right to vote for persons with mental disabilities: Reconciling state law with constitutional guarantees' (2010) 30 *Boston College Third World Law Journal* 359 370.

31 Brescia (n 23 above) 959.

32 Brescia concedes that while 'some severe mental disabilities' can inhibit individuals from making decisions or comprehension, by no means do the vast majority of people with mental disabilities lose these functions.

33 MA Stein & R Allen *Third party intervention in the matter of Bujdosó, Zsolt et al. v. Hungary* (2013) para 19.

observed that the (in)ability to cast a rational vote is not specific to people with disabilities.<sup>34</sup> Karlan observes that much of political discourse ‘bypasses the conscious mind altogether’;<sup>35</sup> a voter will likely vote for a candidate he or she supports, but his or her approval need not be driven by agreement with the candidate’s policies.<sup>36</sup> In some instances, it may be motivated by the candidate’s appearance, a long-standing political affiliation (especially relevant in the South African context) or grounds that would have been impermissible if applied in another context – such as the race, gender, religion or sexual orientation of the candidate.<sup>37</sup> As Quinn notes, ‘our choices are nearly always a mix of raw preferences with rationality’.<sup>38</sup>

The apprehension about voter fraud entails first, that persons with psychosocial or intellectual disabilities may receive inappropriate assistance when voting (for example, from caregivers) or may be unduly influenced.<sup>39</sup> Secondly, there is a concern about fraudulent absentee voting.<sup>40</sup> The first concern involves persons with disabilities receiving inappropriate assistance when voting. At its extreme, this could devolve into proxy voting on behalf of the person with a disability by another, for example, a caregiver.<sup>41</sup> Voting is one context in which delegation of decision-making is impermissible.<sup>42</sup> Even short of a caregiver engaging in proxy voting, some are concerned that persons with psychosocial disabilities can be unduly persuaded by others. The question of undue influence ultimately becomes one of degree: for example, when do candidates’ electioneering promises cross the line to ‘undue influence’?

The issue that arises with fraudulent absentee voting is that absentee ballots may be requested on behalf of a person with a psychosocial disability and cast without the knowledge of this person. However, Bindel points out that these concerns also apply to other groups of voters, such as those with physical or communicational disabilities or newly registered voters.<sup>43</sup> And, as Fiala-Butora et al observe, given the lack of any empirical evidence that persons with disabilities are either ‘generally more susceptible or relatively more prone to becoming victims of fraud’, concerns about this aspect must be attributed to prejudice and stigma.<sup>44</sup>

34 Stein & Allen (n 33 above) para 20.

35 Karlan (n 27 above) 917; Brescia (n 23 above) 960.

36 Bindel (n 16 above) 115.

37 Stein & Allen (n 33 above) para 20; Bindel (n 16 above) 115.

38 G Quinn *Personhood and legal capacity: Perspectives on the paradigm shift of article 12 CRPD* (2010) 7.

39 Bindel (n 16 above) 107.

40 Bindel (n 16 above) 108.

41 Bindel (n 16 above) 107.

42 See also the discussion below.

43 Bindel (n 16 above) 122.

44 J Fiala-Butora et al ‘The democratic life of the Union: Toward equal voting participation for Europeans with disabilities’ (2014) 55 *Harvard International Law Journal* 86.

The strongly held preconceptions described above remain powerfully entrenched, as can be seen in the number of jurisdictions where the right to vote remains elusive to people with psychosocial disabilities. A study conducted in 2009-2010 amongst 27 European Union (EU) member states found that national practice in this regard was diverse: it ranged from total exclusion from political participation, through a case-by-case consideration to full participation.<sup>45</sup> The majority of EU member states were found to link the right to political participation to the legal capacity of the individual.<sup>46</sup> These member states had an automatic or quasi-automatic exclusion provision in their legal systems, which denies the right to political participation to all persons under a protective measure such as a partial and plenary guardianship,<sup>47</sup> regardless of their actual and/or individual level of functional ability or whether they have an intellectual disability or a mental health problem.<sup>48</sup> Plenary guardianship remains one of the primary mechanisms depriving persons with psychosocial disabilities of the right to vote.

Secondly, several EU member states were observed to have adopted a variety of practices falling between the two ends of the spectrum, in which an assessment is made of the individual's actual ability to vote.<sup>49</sup> These countries have adopted either an exclusion policy coupled with an individualised assessment or a full participation policy complemented with a specific decision on voting capacity. Furthermore, amongst these countries a differentiation can be made between those in which the individual's situation is assessed by a medical practitioner and those in which the assessment is made by a judge. A minority of countries has lifted all restrictions on political participation, including Austria; Finland; The Netherlands; and Sweden.<sup>50</sup> This means that these countries have opted for full participation in the electoral process for persons with psychosocial disabilities and with intellectual disabilities.

Bindel similarly reported in 2010 that 41 states in the US disenfranchise persons with 'diminished mental capacities', either in their

45 European Union Agency for Fundamental Rights (FRA) *The right to political participation of persons with mental health problems and persons with intellectual disabilities* (2010) 15; see also Fiala-Butora et al (n 44 above) 75. See Brescia (n 23 above) 946-948 for a brief summary of the position in the US.

46 The notion of legal capacity is discussed below.

47 Guardianship traditionally means that when the state determines that an individual lacks the 'capacity' to make some or all decisions, the state removes the individual's legal right to make those decisions and appoints a guardian to make those decisions for that individual – so-called 'substituted decision-making': L Salzman 'Guardianship for persons with mental illness – A legal and appropriate alternative?' (2011) 4 *St Louis University Journal of Health Law & Policy* 279 279. The notion of guardianship is closely bound up with a discussion of legal capacity; this is however beyond the scope of this article. For a thorough discussion of guardianship and recent changes in guardianship laws, see generally Salzman (above) 279-329; Glen (n 25 above) 92-169.

48 FRA (n 45 above) 15.

49 FRA (n 45 above) 16.

50 FRA (n 45 above) 18.



state constitutions or statutes.<sup>51</sup> A brief overview of Anglophone African jurisdictions reveals a similar trend.<sup>52</sup>

### **2.3 Why is the right to vote so important?**

The significance of the right to vote cannot be overstated. Waterstone notes that voting should be viewed as more than the instrumental choice of electing a candidate: Voting in a polling place is a way in which a citizen asserts his or her 'place in a community'.<sup>53</sup> This is particularly important in the case of people with disabilities, a group that has traditionally been excluded and marginalised. It is this expressive<sup>54</sup> function of voting that is restricted when people with disabilities are prevented from voting in polling places because of lack of accessibility; the expressive aspect is also curtailed where people with disabilities vote by absentee or 'special' ballot.<sup>55</sup>

It can be said that voting forms the basis of equal citizenship; Fishkin points out that it is also closely bound up with dignity.<sup>56</sup>

It is a dignity inhering in the idea that my vote counts just as yours counts – that I am, with respect to the right to vote, your equal.<sup>57</sup>

Voting exclusion therefore amounts to 'dignitary harm', which may be especially acute when the disenfranchised person is someone who is also disregarded as a full and equal citizen in other contexts, namely when it is part of a broader pattern of unequal treatment.<sup>58</sup>

## **3 International human rights framework**

### **3.1 General**

The right to vote, as an aspect of the right to public participation, is set out in article 21 of the Universal Declaration of Human Rights (UDHR).<sup>59</sup>

51 Bindel (n 16 above) 92. See also Bazelon Centre for Mental Health Law *State laws affecting the voting rights of people with mental disabilities* (2012), available at [http://www.bazelon.org/LinkClick.aspx?fileticket=-Hs7F\\_Ohfgg%3d&tabid=543](http://www.bazelon.org/LinkClick.aspx?fileticket=-Hs7F_Ohfgg%3d&tabid=543) (accessed 9 April 2014).

52 Electoral laws in the following jurisdictions contain disability-based voting exclusions: Angola; Botswana; Ethiopia; Ghana; Liberia; Sierra Leone; South Africa; Tanzania; and Zambia. This list, which does not purport to be exhaustive, is limited to Anglophone jurisdictions due to language restrictions.

53 Waterstone (n 8 above) 378.

54 A Winkler 'Expressive voting' (1993) 68 *New York University Law Review* 330 331, 368.

55 Waterstone (n 8 above).

56 Fishkin (n 14 above) 1335-1336.

57 Fishkin (n 14 above) 1336.

58 Fishkin (n 14 above) 1296.

59 Adopted by the UN General Assembly resolution 217 A (III) on 10 December 1948.

Article 21(1) provides that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. In article 21(2), the principles of 'periodic and genuine elections', 'universal and equal suffrage' and 'secret vote' are set out as expressing the will of the people, which forms the basis of the authority of government.

### 3.2 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights<sup>60</sup> (ICCPR) recognises the right to participate in public affairs in article 25. It provides that every citizen has the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions,<sup>61</sup> to take part in the conduct of public affairs both directly or through freely chosen representatives. Secondly, they have the right to vote and to be elected at genuine period elections which shall be 'by universal and equal suffrage' and held by secret ballot, guaranteeing the free expression of the will of the electors.

In 1996, the Human Rights Committee (HRC) adopted a General Comment on this article. The Committee noted that limitations on the right to vote are permissible; however, it emphasised that such restrictions should be 'based on objective and reasonable criteria'.<sup>62</sup> It pointed out that no distinctions are permitted between citizens in the enjoyment of these rights on a number of grounds, including race, colour, sex, language, religion, political or other opinion, property, birth 'or other status'.<sup>63</sup> The HRC regards it as unreasonable to exclude persons from voting on the ground of physical disability or to impose literacy, education or property requirements.<sup>64</sup> At the same time, it states that 'mental incapacity may be a ground for denying a person the right to vote or to hold office'.<sup>65</sup>

It is noteworthy that this General Comment is a product of its time (specifically predating the adoption of the CRPD). Significantly, the Office of the UN High Commissioner for Human Rights, in its 2011 thematic study, observed that 'the legal landscape has changed dramatically since the adoption of the Human Rights Committee's general comment in 1996'. It may therefore be argued that limitations of the right to vote on the basis of psychosocial or intellectual disabilities are no longer compatible with

60 Adopted on 16 December 1966, entered into force on 23 March 1976.

61 Art 2 refers to 'distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

62 Human Rights Committee *General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25)* UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996) para 4.

63 Para 3.

64 Para 10.

65 Para 4.

the prohibition of discrimination or ‘with the present-day understanding of democracy’.<sup>66</sup>

### 3.3 Convention on the Rights of Persons with Disabilities

The Convention, adopted in 2006, was developed on the basis of ‘a recognition that the existing human rights framework had failed to protect the human rights of people with disabilities in an equal measure with others’.<sup>67</sup> Based on the foundational principles of, inter alia, respect for inherent dignity and individual autonomy, non-discrimination and full and effective participation and inclusion in society,<sup>68</sup> the CRPD represents a definitive shift in the right of persons with disabilities – not only through the actual substance of its provisions, but also through the transformative power of the instrument as a whole.<sup>69</sup> While the interpretation of the Convention is still in the early stages of its development, a number of clear trends may already be drawn out.

Article 29 of the Convention (examined below) sets out the right to public participation of persons with disabilities. Given the strong correlation drawn in many national contexts between the right to political participation (including the right to vote) and legal capacity, it is also important to consider article 12, which deals with legal capacity.<sup>70</sup>

Article 12 has been described as lying at the very heart of the revolution in disability introduced by the Convention – treating people as ‘subjects’ and not as ‘objects’.<sup>71</sup> Trömel explains that this is the provision that best reflects the paradigm shift accomplished by the Convention;<sup>72</sup> it also

66 Office of the UN High Commissioner for Human Rights *Thematic study on participation in political and public life by persons with disabilities* A/HRC/19/36 (21 December 2011) para 28. For this reason, the General Comment is currently being reviewed in this respect – Fiala-Butora et al (note 43 above) 79 fn 48. See also FRA (note 45 above) 9 and discussion of art 29 of the CRPD below.

67 European Commissioner for Human Rights *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities* (2012) CommDH/IssuePaper(2012)2 12.

68 Art 3 of the CRPD.

69 See generally JE Lord & MA Stein ‘The domestic incorporation of human rights law and the United Nations Convention on the Rights of Persons with Disabilities’ (2008) 83 *Washington University Law Review* 449 449-479.

70 Para (c) of the preamble to the CRPD reaffirms the principle of the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms. Additional articles of significance to the present analysis are art 3 (general principles) and art 5 (equality and non-discrimination).

71 G Quinn ‘Resisting the “temptation of elegance”: Can the Convention on the Rights of Persons with Disabilities socialise states to right behaviour’ in O Arnardóttir & G Quinn (eds) *United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009), 49; see also A Lawson ‘The United Nations Convention on the Rights of Persons with Disabilities: New era or false dawn?’ (2006-2007) 34 *Syracuse Journal of International Law & Commerce* 563 595.

72 S Trömel ‘A personal perspective on the drafting history of the United Nations Convention on the Rights of Persons with Disabilities’ in *European Yearbook of Disability Law* (2009) 125.

generated the most heated and complex debates during the preparatory negotiations.<sup>73</sup> Much of this discussion was devoted to the meaning of 'legal capacity' and whether this notion included both the capacity to *have* rights<sup>74</sup> ('passive' legal capacity) and the capacity to *act* or *exercise*<sup>75</sup> these rights ('active' legal capacity).<sup>76</sup> Certain delegates favoured an approach that would limit the interpretation of legal capacity in article 12 to 'passive legal capacity'; as Lawson explains, this had the potential of authorising a lower standard of human rights protection.<sup>77</sup> During the negotiations, attempts were accordingly made to qualify (by means of a footnote to the main text) the meaning of 'legal capacity'.<sup>78</sup> These attempts ultimately proved unsuccessful, and the text as it stands is free of such limitations.<sup>79</sup>

Article 12 is clear in its simplicity. The unequivocal starting point is that all persons have legal capacity, without any mention of a distinction between active and passive legal capacity. This starting point is not conditional ('all persons have legal capacity *provided that they have the capacity to ...*') or presumptive ('*all persons are presumed to have legal capacity until proved otherwise*').<sup>80</sup> Once this starting point is grasped, it also becomes apparent how other closely related rights should be approached – such as the right to vote. This is when we begin to get a glimpse of the vertiginous paradigm shift<sup>81</sup> brought about by article 12.

In addition to requiring states parties to recognise that persons enjoy legal capacity on an equal basis with others in all aspects of life,<sup>82</sup> article 12(3) provides that states parties must take appropriate measures to provide access to persons with disabilities to the support they may require in exercising their legal capacity. This (unconditional) recognition of legal capacity on an equal basis with others in all aspects of life has to include

73 Trömel (n 72 above) 126; M Schulze *Understanding the UN Convention on the Rights of Persons with Disabilities* (2009) 86.

74 Ie being someone who can own property and possess rights provided for by domestic legislation, including the right to vote – European Commissioner of Human Rights (n 67 above) 7.

75 Specifically including the power to dispose of one's property (ie to use it, sell it, give it away or destroy it) and claim one's rights before a court – European Commissioner on Human Rights (n 67 above) 7. This includes exercising the right to vote.

76 This distinction is more familiar to civil law systems than common law systems.

77 Lawson (n 71 above) 596.

78 For an overview of this history, see Trömel (n 72 above) 126-128; Lawson (n 71 above) 595; Schulze (n 73 above) 88-89.

79 However, it is noteworthy that several of the reservations entered by states parties relate to art 12.

80 Eg the declaration entered by Canada includes the following statement 'Canada recognises that persons with disabilities are *presumed* to have legal capacity on an equal basis with others in all aspects of their lives'.

81 See Glen (n 25 above) 96-97 for the origin (in the history of science) of the term 'paradigm shift' and how this has come to be the standard 'term of art' for describing the phenomenon of re-examination and re-orientation in disability rights concretised by the adoption of the CRPD.

82 Art 12(2).

the political sphere;<sup>83</sup> furthermore, where the state is required to provide support in exercising legal capacity, this would also apply to the act of voting.

This understanding of article 12 underpins the construction of the right to vote in article 29, a point that was recently emphasised by the Committee on the Rights of Persons with Disabilities in its first interpretive General Comment, which deals with article 12 of the Convention. The Committee explains that recognition of legal capacity is inextricably linked to the enjoyment of many other human rights provided for in the Convention, including the right to vote and stand for election in article 29.<sup>84</sup>

The Committee further notes that while the denial or restriction of legal capacity has been used to deny political participation, especially the right to vote, for certain persons with disabilities, a person's decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights.<sup>85</sup>

Article 29 of the CRPD, which sets out the right to public participation,<sup>86</sup> covers first, the right to participate in elections (both active

83 This reading is reinforced by the definition of disability-based discrimination in article 2 of the CRPD, which reads as follows: "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the *political*, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation' (my emphasis).

84 Committee on the Rights of Persons with Disabilities *General Comment No 1 Article 12: Equal recognition before the law* UN Doc CRPD/C/GC/1 (dated 11 April 2014) para 27.

85 Para 44.

86 Article 29 provides as follows:

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

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

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

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

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

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

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

and passive) and second, general public participation.<sup>87</sup> Under paragraph (a), the article addresses inter alia the questions of accessibility and assistance by a person of the voter's choice.<sup>88</sup>

For present purposes, however, the important section is the undertaking by states parties 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). Two points may be observed. The commitment is first to ensure that persons with disabilities may *effectively and fully participate* and second, that they may *participate on an equal basis with others*. The latter raises the question whether a disability-based voting exclusion of any nature would be permissible. It is notable that these provisions make no exception for persons with an 'established mental incapacity'.<sup>89</sup>

This question was recently answered by the Committee on the Rights of Persons with Disabilities in the communication of *Bujdosó v Hungary*.<sup>90</sup> The authors of this communication were six Hungarian nationals with intellectual disabilities who had been placed under partial or general guardianship pursuant to judicial decisions. As an automatic consequence of their placement under guardianship, the authors' names were erased from the electoral register.<sup>91</sup> This meant that they were unable to vote in either the parliamentary or municipal Hungarian elections held in 2010. They also subsequently remained disenfranchised.<sup>92</sup> The authors maintained that they were able to understand politics and participate in elections if they were allowed to do so, and therefore complained that as persons under guardianship, they were, by direct application of the constitutional provisions automatically deleted from electoral registers.<sup>93</sup> This automatic ban was unjustified, and therefore breached article 29, read alone and in conjunction with article 12 of the Convention.

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

87 See Committee on the Elimination of Discrimination against Women *General Comment 23, Political and public life* para 5 for an explanation of the term 'political and public life'.

88 The degree of assistance was the subject of heated debates over the danger(s) of manipulation – Schulze (n 73 above) 151.

89 The wording would therefore appear to depart from the position previously adopted by the Human Rights Committee on this issue - Lawson (n 71 above) 606.

90 Communication No 4/2011, views adopted on 9 September 2013, UN Doc Ref CRPD/C/10/D/4/2011, dated 20 September 2013.

91 Pursuant to article 70(5) of the state party's Constitution, applicable at the time, which provided inter alia that persons placed under total or partial guardianship did not have a right to vote.

92 Para 2.

93 The decisions incapacitating them did not address their ability to vote, as they were automatically and indiscriminately disenfranchised by operation of the Constitutional provision, regardless of the nature of their disability, their individual abilities, and the scope of the incapacitation measure – para 3.1.

The state party's response mainly revolved around the fact that the relevant legislation had undergone significant changes since the authors had filed their complaint: Hungary's Fundamental Law now required judges to make decisions on suffrage on consideration of the individual circumstances of each case.<sup>94</sup> While it was therefore still possible for a person with an intellectual disability to be disenfranchised, this would only be done subject to an individual judicial assessment.<sup>95</sup> The state party further argued that this new provision was in conformity with the right to free elections enshrined in article 3 of Protocol No 1 to the European Convention, and with the judgment of the European Court of Human Rights in the case *Alajos Kiss v Hungary*.<sup>96</sup>

The Committee on the Rights of Persons with Disabilities was of the view that article 29 does not foresee any reasonable restriction, nor does it allow any exception for any group of persons with disabilities.<sup>97</sup> Therefore, an exclusion of the right to vote 'on the basis of a perceived, or actual psychosocial or intellectual disability, including a restriction pursuant to an individualised assessment', constitutes discrimination on the basis of disability, within the meaning of article 2 of the Convention. The Committee referred to its Concluding observations on Tunisia<sup>98</sup> and Spain<sup>99</sup> and noted that the same principles applied in casu. Accordingly, the Committee concluded that the relevant provisions, which allow courts to deprive persons with intellectual disabilities of their right to vote and to be elected, are in breach of article 29 of the Convention. Similarly, a breach of article 12 was found.<sup>100</sup>

This finding by the Committee is a significant one. It appears that the Committee took up the invitation by the third party intervener to make a

94 Para 4.2.

95 Article XXIII, paragraph (6) of the Fundamental Law.

96 Application No 38832/06, 20 May 2010. See also the discussion below.

97 Para 9.4.

98 The Committee recommended that the state party adopt urgent legislative measures to ensure that persons with disabilities, *including persons who are currently under guardianship or trusteeship*, can exercise their right to vote and participate in public life, on an equal basis with others – Committee on the Rights of Persons with Disabilities *Concluding observations: Tunisia* UN Doc CRPD/C/TUN/CO/1 dated 13 May 2011 para 35.

99 The Committee expressed a similar concern over the fact that the right to vote of persons with intellectual or psychosocial disabilities can be restricted if the person concerned has been deprived of his or her legal capacity, or has been placed in an institution – Committee on the Rights of Persons with Disabilities *Concluding observations: Spain* UN Doc CRPD/C/ESP/CO/1 dated 19 October 2011 para 48.

100 Under art 12(2) of the CRPD, states parties must recognise, and uphold the legal capacity of persons with disabilities 'on an equal basis with others in all aspects of their lives', including political life, which encompasses the right to vote. Under art 12(3) of the Convention, states parties further have a positive duty to take the necessary measures to guarantee to persons with disabilities the actual exercise of their legal capacity. Accordingly, the Committee was of the view that by depriving the authors of their right to vote, based on a perceived or actual intellectual disability, the state party had failed to comply with its obligations under art 29 of the Convention, read alone and in conjunction with art 12 – para 9.5.

finding beyond the narrow confines of this particular matter,<sup>101</sup> and in fact provided broader guidance to state parties in the interpretation of article 29. Most significant is the Committee's emphasis that article 29 does not permit any exclusion or 'reasonable restriction'; however, of similar weight is the statement that a disability-based voting exclusion, including a restriction pursuant to an individualised assessment, would constitute discrimination in terms of article 2 of the Convention.

It is also helpful to states parties attempting to gain an understanding of the Convention that the Committee explains that under article 29 of the Convention, the state party is required to adapt its voting procedures, by ensuring that they are 'appropriate, accessible, and easy to understand and use', and allowing, where necessary, assistance in voting upon request of the person with disability.<sup>102</sup>

It is by so doing that the state party will ensure that persons with intellectual disability cast a competent vote, on an equal basis with others, while guaranteeing the secrecy of the vote.<sup>103</sup>

The Committee's reference to article 12(3) further assists in this regard.<sup>104</sup> States parties will therefore be required not only to repeal discriminatory provisions, but also to adapt voting procedures and to take additional supportive measures to ensure that persons with intellectual (and by extension, psychosocial) disabilities may cast their vote on an equal basis with others.

The Committee's approach in the *Bujdosó* matter strengthens the trend that is discernible in its concluding observations to initial reports of states parties. In the majority of the reports that have been considered to date, the Committee has expressed concerns about the way in which states parties approach the political rights of persons with intellectual and psychosocial disabilities. For example, the Committee has voiced its apprehension about the exclusion from voting of persons with intellectual or psychosocial disabilities,<sup>105</sup> the exclusion of persons who are under some form of 'guardianship' limitation (and hence precluded from voting);<sup>106</sup> and provisions preventing persons with intellectual or psychosocial

101 See Stein & Allen (n 32 above) para 15.

102 Para 9.6.

103 Para 9.6.

104 Para 9.5.

105 See Committee on the Rights of Persons with Disabilities *Concluding observations: China* UN Doc CRPD/C/CHN/CO/1 dated 15 October 2013 para 45; *Australia* UN Doc CRPD/C/AUS/CO/1 dated 21 October 2013 para 51.

106 Committee on the Rights of Persons with Disabilities *Concluding observations: Tunisia* UN Doc CRPD/C/TUN/CO/1 (13 May 2011) para 35; *Spain* CRPD/C/ESP/CO/1 (19 October 2011) para 48; *Argentina* UN Doc CRPD/C/ARG/CO/1 dated 18 October 2012 para 47; *Hungary* UN Doc CRPD/C/HUN/CO/1 dated 22 October 2012 para 45; *Azerbaijan* UN Doc CRPD/C/AZE/CO/1 dated 12 May 2014 para 44.



disabilities from running for municipal office.<sup>107</sup> Austria alone was commended for upholding article 29 by allowing all persons, including persons with intellectual disabilities and psychosocial disabilities, to vote.<sup>108</sup>

### 3.4 European regional instruments

In terms of Protocol No 1 to the European Convention, member states undertake to hold free elections at reasonable intervals by secret ballot, under conditions that will ensure the free expression of the opinion of the people in the choice of the legislature.<sup>109</sup>

The European Court of Human Rights has dealt with the right to vote in a number of noteworthy judgments. The issues to be decided have included an absolute ban on the voting rights of convicted prisoners in the United Kingdom,<sup>110</sup> as well as an automatic voting exclusion imposed on persons placed under guardianship.<sup>111</sup> In the latter case, Mr Kiss (a Hungarian citizen diagnosed with manic depression)<sup>112</sup> contested the voting exclusion that resulted from his being placed under partial guardianship.<sup>113</sup>

It was common cause that the aim of the constitutional measure in question was to ensure that only citizens capable of 'assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs'.<sup>114</sup> The Court was satisfied that this constituted a legitimate aim. The Hungarian government argued, with reference to the margin of appreciation, that it must be permissible for the legislature to establish rules limiting participation in public affairs to this group of citizens only.<sup>115</sup>

The Court accepted that this is an area in which, generally, a wide margin of appreciation should be granted to the national legislature in determining whether restrictions on the right to vote can be justified in

107 *Concluding observations: El Salvador* UN Doc CRPD/C/SLV/CO/1 dated 8 October 2013 para 59.

108 *Concluding observations: Austria* UN Doc CRPD/C/AUT/CO/1 dated 30 September 2013 para 48. Peru was also commended for removing voting restrictions on certain persons with intellectual and psychosocial disabilities; however, persons with disabilities who have been 'judicially interdicted' remained ineligible to vote, which was still of concern to the Committee – *Concluding observations: Peru* UN Doc CRPD/C/PER/CO/1 dated 16 May 2012 para 44.

109 Art 3.

110 *Hirst v United Kingdom No 2 (GC)* Application No 74025/01, 6 October 2005.

111 *Kiss v Hungary* (n 96 above).

112 Terminology employed in the ECtHR judgment.

113 Similar to the authors in *Bujdosó* (n 90 above), the applicant was excluded from the electoral register pursuant to the Hungarian Constitution, which contained (at the time) an absolute voting ban for people under guardianship.

114 Para 38.

115 Para 40.

modern times and, if so, how a fair balance is to be struck.<sup>116</sup> It was noted that the restriction in question does not distinguish between those under total and those under partial guardianship;<sup>117</sup> furthermore, the Court was unwilling to accept that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation. The Court reiterated that while this margin of appreciation is wide, it is not all-embracing.<sup>118</sup>

Importantly, the Court cautioned 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 (a comparable example is those suffering different treatment on the ground of their gender). The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail 'legislative stereotyping' which prohibits an individualised evaluation of their capacities and needs.<sup>119</sup>

The conclusion reached by the Court was that 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. It accordingly found that there had been a violation of Article 3 of Protocol No 1 to the Convention.<sup>120</sup>

While the Court's conclusion regarding the imposition of an indiscriminate voting restriction of persons under partial guardianship is sound, the judgment may be criticised for its interpretation in that it leaves a margin for the state to permissibly impose an 'individualised judicial evaluation'. This indeed led to the amendment of the Hungarian Constitution that was examined by the Committee on the Rights of Persons with Disabilities in the *Bujdosó* communication (above); while the state party maintained that these amendments, which now allowed individualised assessments instead of the prior 'blanket' restriction, were in line with the European Court's judgment in the *Kiss* matter, the Committee's conclusion was that the (amended) provisions were not consistent with the CRPD.<sup>121</sup>

116 Para 41.

117 Para 39.

118 Para 42.

119 The Court referred to its judgment in *Shtukaturov v Russia*, Application No. 44009/05, 27 March 2008 – *Kiss v Hungary* (n 96 above) para 42.

120 Para 44.

121 It is important to consider that the European Court was pronouncing on a violation of the European Convention, while the Committee on the Rights of Persons with Disabilities in *Bujdosó* was concerned with the interpretation of the CRPD.

Importantly, the Council of Europe adopted a Recommendation in 2006 to the effect that the participation of all citizens in political and public life and the democratic process is essential for the development of democratic societies. Society needs to reflect the diversity of its citizens and benefits from their varied experience and knowledge; it is therefore important that persons with disabilities can exercise their rights to vote and participate in such activities.<sup>122</sup>

The European Commission for Democracy through Law (the so-called 'Venice Commission') has adopted a revised interpretative declaration to the Code of Good Practice in Electoral Matters.<sup>123</sup> The aim of this document is to align the Code with the principles guaranteed by article 29 CRPD. Significantly, it notes that universal suffrage is a fundamental principle of the 'European Electoral Heritage'.<sup>124</sup> People with disabilities may not be discriminated against in this regard, in conformity with article 29 of the Convention of the United Nations on the Rights of Persons with Disabilities and the case law of the European Court of Human Rights.<sup>125</sup> The declaration also requires that voting procedures and facilities should be accessible to people with disabilities so that they are able to exercise their democratic rights, and allow, where necessary, the provision of assistance in voting, with respect to the principle that voting must be individual.<sup>126</sup>

This declaration is an important development of the original Code, which provided for deprivation of the right to vote and be elected based on 'mental incapacity' or criminal conviction for a serious offence as an exception to the rule of universal suffrage.<sup>127</sup>

Finally, it must be borne in mind that the European Union as a 'regional integration organisation' has acceded to the CRPD in terms of article 44. This may further shape regional developments in line with article 29 of the Convention.<sup>128</sup>

122 Council of Europe *Recommendation Rec (2006) 5* of 5 April 2006. See also Recommendation Rec (2004)10 of 22 September 2004 – persons with 'mental disorder' should be entitled to exercise all their civil and political rights. Any restrictions to the exercise of these rights should be in conformity with the provision of the European Convention and should not be based on the mere fact that the person has a mental disorder. See also *Recommendation Rec (99)4* of 23 February 1999.

123 European Commission for Democracy through Law (Venice Commission) *Revised Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections* (adopted at the 89th Session of the Venice Commission, 16-17 December 2011) CDL-AD(2011)045.

124 Para II.2.

125 A reference is provided here to the judgment in *Kiss v Hungary* (n 96 above).

126 Para II.3.

127 European Commission for Democracy through Law (Venice Commission) *Code of good practice on electoral matters: Guidelines and explanatory report* (adopted by the Venice Commission at its 52nd Session, 18-19 October 2002) CDL-AD (2002) 23 rev para I.1.1(d).

128 Articles 39-40 of the Charter of Fundamental Rights of the European Union guarantee the rights to political participation.

### 3.5 African regional system

An investigation into the human rights framework at African regional level commences with the African Charter. The right to political participation<sup>129</sup> is addressed in article 13 of the African Charter.<sup>130</sup> For present purposes, article 13(1) is of particular interest. As Mbondenyi correctly observes, the formulation of this provision appears somewhat curtailed when compared to its counterparts in similar instruments, which do include explicit references to the obligations resting on states to hold 'periodic and genuine elections'<sup>131</sup> underpinned by universal suffrage and held by secret vote.<sup>132</sup> He therefore concludes that the right to political participation is recognised in the African Charter in a fairly superficial way.<sup>133</sup>

The African Commission on Human and Peoples' Rights has however been robust in its interpretation of article 13(1) and is developing a body of jurisprudence emphasising that it will not lightly sanction limitations of the right to political participation.<sup>134</sup> In the key communication of *Purohit v The Gambia*,<sup>135</sup> the Commission found that the disputed legislation,<sup>136</sup> in addition to being discriminatory and violating the guarantee of equal protection of the law,<sup>137</sup> also constituted a violation of article 13(1) since its application precluded persons detained in the psychiatric unit in question from exercising their right to vote.

The Commission made the following important observation:

The right provided for under Article 13(1) of the African Charter is extended to 'every citizen' and its denial can only be justified by reason of legal incapacity or that the individual is not a citizen of a particular State. Legal incapacity may not necessarily mean mental incapacity. For example a State may fix an age limit for the legibility of its own citizens to participate in its government. Legal incapacity, as a justification for denying the right under

129 Article 13 reads as follows:

'(1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

(2) Every citizen shall have the right of equal access to the public service of his country.

(3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law.'

130 African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, entered into force 21 October 1986.

131 See eg European Convention.

132 As above.

133 MK Mbondenyi 'The right to participate in the government of one's country: An analysis of article 13 of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 political crisis' (2009) 9 *African Human Rights Law Journal* 183 186-187.

134 See *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000); *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001).

135 (2003) AHRLR 96 (ACHPR 2003).

136 The 'Lunatics Detention Act' (Gambia).

137 The Commission further found violations of arts 5, 7 (1)(a) and (c), 13(1), 16 and 18(4) of the Charter.

Article 13(1) can only come into play by invoking provisions of the law that conform to internationally acceptable norms and standards.<sup>138</sup>

The Commission further explained that since article 13(1) of the African Charter is similar in substance to those provided for under article 25 of the ICCPR and it therefore endorsed the clarification provided by the Human Rights Committee in relation to the latter article.<sup>139</sup> In this instance, besides the view held by the Gambian government respondent state questioning the mental ability of mentally disabled patients to make informed choices in relation to their civic duties and obligations, it is very clear that there are no objective bases within the legal system of the respondent state to exclude mentally disabled persons from political participation.

The right to vote also features in the African Charter on Democracy and Good Governance.<sup>140</sup> The objectives of this Charter include the promotion of adherence to the values and principles of democracy and respect for human rights and the holding of regular free and fair elections to 'institutionalise legitimate authority of representative governments as well as democratic change of governments'.<sup>141</sup> States parties must implement the Charter in accordance with certain principles, which include the effective participation of citizens in democratic and development processes and in governance of public affairs.<sup>142</sup>

Significantly, in terms of article 4, states parties must recognise popular participation through universal suffrage as the 'inalienable right of the people'.<sup>143</sup> This provision should be read firstly with article 8, which places a duty on states parties to eliminate all forms of discrimination, with a list of specific grounds.<sup>144</sup> Although disability is not explicitly listed, the open-ended formulation of the list allows for its easy inclusion.<sup>145</sup> Secondly, states parties have a duty to promote participation of social groups 'with special needs', including the youth and persons with disabilities, in the governance process.<sup>146</sup>

The African regional standards, while not as fully developed as the European counterparts, recognise the broad principles of participation and non-discrimination. The statement by the African Commission on Human

138 Para 75.

139 Para 76. This referred to General Comment No 25 adopted by the HRC discussed above.

140 Adopted on 30 January 2007, came into operation 15 February 2012.

141 Art 2.

142 Art 3(7).

143 Art 4.2.

144 Art 8.1.

145 Art 8.2 further enjoins states parties to adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, persons with disabilities, refugees and displaced persons and other marginalised and vulnerable social groups.

146 Art 31.1.

and People's Rights to the effect that the exclusion of persons with psychosocial disabilities should be considered in conformity with international standards is an important one, bearing in mind that these international standards have evolved since the statement by the HRC on which the African Commission based its original views in the *Purohit* communication.

## 4 South Africa

Since the advent of democracy, South Africa's electoral history is regarded as one of the African 'success stories'. Who can forget those enthralling images of queues of people waiting to vote, the majority for the first time ever, in the first multi-racial elections in 1994?<sup>147</sup> Subsequent elections, both at national and provincial and at local government levels, have proceeded comparatively smoothly, and the Independent Electoral Committee (IEC) has been lauded for its innovative approaches to election administration.<sup>148</sup>

Given the country's history of race-based electoral exclusion, it is not surprising that the Constitution states emphatically that one of the foundational values of the South African state is universal adult suffrage.<sup>149</sup> It further notes 'human dignity, the achievement of equality and the advancement of human rights and freedoms' amongst these values. The right to vote is addressed in section 19, which sets out various aspects of the right to political participation. Section 19(3) provides that every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and to stand for public office and, if elected, to hold office.<sup>150</sup>

These provisions must however be read with sections 47, 106 and 158, which deal with membership of the National Assembly,<sup>151</sup> provincial legislatures and municipal councils respectively. Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except 'anyone declared to be of unsound mind by a court of the Republic'.<sup>152</sup> Section 106(1)(d) similarly states that every citizen who is qualified to vote for the National Assembly is eligible to be a member of the provincial legislature, except anyone declared to be of

147 See eg 'In Pictures: South Africa's freedom day' *BBC News* (undated), available at [http://news.bbc.co.uk/2/shared/spl/hi/africa/04/photo\\_journal/94election/html/5.stm](http://news.bbc.co.uk/2/shared/spl/hi/africa/04/photo_journal/94election/html/5.stm) (accessed on 7 April 2014).

148 See Independent Electoral Commission 'IEC receives fifth award in 12 months' 22 November 2011, available at <http://www.elections.org.za/content/new.aspx?id=1980> (accessed on 7 April 2014).

149 Sec 1(d) of the Constitution of the Republic of South Africa, 1996.

150 Sec 19(3).

151 The South African Parliament consists of the National Assembly and the National Council of Provinces.

152 Sec 47(1)(d).

unsound mind by a court of the Republic. Finally, section 158(1)(c) provides that every citizen who is qualified to vote for a Municipal Council is eligible to be a member of that Council, except anyone who is disqualified from voting for the National Assembly or is disqualified in terms of section 47(1)(c), (d) or (e) from being a member of the Assembly.

The Electoral Act 73 of 1998 further sets out how the right to vote takes shape in practice.<sup>153</sup> In terms of the Act, a 'voter' is a South African citizen who is 18 years or older and whose name appears on the national common voters' roll.<sup>154</sup> In order to place their names on this voters' roll, citizens are required to register as voters;<sup>155</sup> the chief electoral officer, who is responsible for registering voters, may not register (amongst others) persons who have been declared by the High Court to be 'of unsound mind or mentally disordered'<sup>156</sup> or are detained under the Mental Health Care Act 17 of 2002.<sup>157</sup>

The question of electoral exclusion has served before the South African courts in the form of a limitation on the voting rights of prisoners. Brickhill and Babiuch recount that the right of prisoners to vote was one of the most contentious issues during the negotiation process.<sup>158</sup> These challenges have given the courts an opportunity to pronounce on the limitation of the right to vote.<sup>159</sup>

In *August v Electoral Commission*, Sachs accordingly made the following statement:

In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and

153 As Lord et al observe, the legal framework for a fair and democratic process for political participation must look beyond electoral laws to also include anti-discrimination legislation (amongst others) – see Lord et al (n 5 above) 120. In the South African context, this implies that one also needs to consider legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 Act in understanding the electoral framework; see sec 6 read with sec 9 of this Act, which prohibits unfair discrimination based on disability.

154 Sec 1 (definition of 'voter').

155 Secs 5-7.

156 Sec 8(2)(c).

157 Sec 8(2)(d) of the Electoral Act.

158 J Brickhill & R Babiuch 'Political rights' in S Woolman et al (ed) *Constitutional law of South Africa* 2nd ed (2007) 45-49.

159 See *Masuku & Mbonani v State President* 1994 (4) SA 374 (T), challenging sec 16 of the Electoral Act of 1993, which excluded certain categories of prisoners from voting; *August* (n 1 above), where the courts had to determine whether the Electoral Commission had an obligation to take affirmative steps to ensure that prisoners awaiting trial and sentenced prisoners could register and then vote in an upcoming general election; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 3 SA 280 (CC), where a limitation on the right to vote of prisoners serving a sentence without the option of a fine was challenged.

legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.<sup>160</sup>

Given these strong views expressed by the Constitutional Court against restriction of the right to vote, I argue that the present exclusion of persons with psychosocial disabilities constitutes an impermissible limitation of this right that may not survive constitutional scrutiny. Brickhill and Babiuch posit that this exclusion constitutes a form of unfair discrimination on the 'prohibited' ground of disability.<sup>161</sup> They further argue (correctly) that since the Electoral Act does not make allowance for a person with a psychosocial disability to challenge their disqualification from voting, the provisions may also be found to be overbroad.<sup>162</sup>

In September 2013, when the Electoral Act was undergoing amendments, efforts were made to persuade the relevant portfolio committee<sup>163</sup> to remove the current restrictions on the right to vote of persons with psychosocial disabilities.<sup>164</sup> The Independent Electoral Commission, in briefing the portfolio committee, however noted that many jurisdictions exclude persons with 'mental disabilities' from registering as voters due to concerns about the faculty to form informed opinions.<sup>165</sup> It stated that the exclusion was not 'arbitrary and automatic', and came into operation at the instance of the High Court after examining medical evidence presented. While the portfolio committee devoted some attention to the reform proposal in its deliberations,<sup>166</sup> the amended Bill as adopted did not include the proposal.<sup>167</sup> This omission represents a lost opportunity to take a first step towards aligning the current South African position with the CRPD by eliminating the electoral exclusion of persons with psychosocial disabilities.<sup>168</sup>

Finally, it is with some irony that one notes that the Electoral Act also makes clear provision for what may be termed 'reasonable accommodation' for certain voters. The Act states that a person may assist

160 n 1 above, para 17.

161 Brickhill and Babiuch (n 158 above) 45-49. See sec 9(3) of the Constitution.

162 Brickhill and Babiuch (n 158 above) 45-49.

163 The National Assembly Portfolio Committee on Home Affairs.

164 The Ubuntu Centre 'Submission to The Department of Home Affairs Portfolio Committee: Comment on Electoral Amendment Bill B222013' (28 August 2013), available at <http://www.pmg.org.za/report/20130910-electoral-amendment-bill-b22-2013-public-hearings> (accessed 7 April 2014).

165 See minutes of meeting of Portfolio Committee on 16 September 2013, available at <http://www.pmg.org.za/report/20130916-electoral-amendment-bill-electoral-commission-response-public-submissions> (accessed 7 April 2014).

166 As above.

167 The Electoral Amendment Act 18 of 2013 as adopted included provisions inter alia to give effect to the judgments in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) and *Richter v Minister of Home Affairs* 2009 (3) SA 615 (CC).

168 In terms of sec 4(1)(b) of the CRPD, states parties are under an obligation to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.



a voter in voting if the voter requires assistance due to a physical disability, including 'blindness or other visual impairment'; the voter has requested to be assisted by the person; and the presiding officer is satisfied that the person rendering assistance has attained the age of 18 years and is not an agent or candidate.<sup>169</sup> A voter may also apply for a special vote if they cannot vote at a voting station in the voting district in which they are registered as a voter, due to that person's 'physical infirmity or disability, or pregnancy'.<sup>170</sup> Finally, at the request of a voter who is unable to read, the presiding officer must assist that voter in voting in the presence of a person appointed by an accredited observer and two agents from different parties, if available.<sup>171</sup>

These arrangements indicate a recognition of the increasing trend in providing voters with disabilities with reasonable accommodation. They stand in stark contrast however with the exclusion of persons with psychosocial disabilities from voting.

## 5 Conclusion

Kelley notes that persons with psychosocial disabilities have faced unique challenges in the battle for recognition of their rights.<sup>172</sup> In the African context, this often includes a prevailing perception that psychosocial disability is linked to ill omens, curses and spiritual misfortune. Their position as 'outsiders', who experience exclusion and prejudice, stands starkly against the ideal of full participation in society. The right to vote, in its expressive sense, therefore becomes an important signifier of such participation. As Fishkin proposes, the right to vote is 'fundamental' because it makes citizenship real.<sup>173</sup>

This article has demonstrated that 'systemic electoral inconsistencies' exist in one of Africa's more progressive electoral democracies in respect of the right to vote of persons with psychosocial disabilities. These inconsistencies are in contrast with recent developments in international law, most notably the introduction of the CRPD and the interpretation of article 29 by the Convention's monitoring body.

Waterstone notes that the trend in international human rights law (as well as state domestic laws) has been to move from 'a general statement of voting equality' to more specific protections for people with disabilities.<sup>174</sup> Where domestic law is lagging behind this standard, as is the case with

169 Sec 39(2).

170 Sec 33(1). Sec 33A makes a similar provision for special votes in election of provincial legislatures.

171 Sec 39(1).

172 Kelley (n 30 above) 362; see also Brescia (n 23 above) 957-958.

173 Fishkin (n 14 above) 1355.

174 Waterstone (n 8 above) 381.

South Africa, law reform is clearly indicated. However, as Keys indicates, successful law reform presupposes a significant attitudinal change in the mind-set of public and civil servants, policy makers and other key players, like the judiciary.<sup>175</sup> Law reform, as the key change, has to be underpinned at a more substantive level by 'embracing the notion of capacity as an integral part of all human beings'.<sup>176</sup>

As noted above, I propose that the reform of existing South African constitutional and legislative provisions is required in order to reflect the 'paradigm shift' reflected in the CRPD. This reform cannot be based on a midway compromise position where persons with psychosocial disabilities who 'qualify' (however this is determined) are permitted to vote – and those who do not remain excluded.

While this may appear to some to be a startling proposition, Lawson notes that the CRPD is, in many ways, a startling instrument.<sup>177</sup> This is particularly true in the realm of legal capacity and concomitant rights of persons with psychosocial disabilities, where stigma, prejudice and 'dignitary harm' still prevail. But it is precisely the role of the CRPD to startle (and dislocate) preconceived notions underpinning discriminatory laws – such as those denying persons with disabilities the right to vote.

175 M Keys 'Legal capacity law reform in Europe: An urgent challenge' in *European yearbook of disability law* (2009) 63.

176 As above.

177 Lawson (n 71 above) 619. See also Glen (n 25 above) 98.

