

## **European Court of Human Rights' ruling to remove voting rights from persons with disabilities on the basis of their "mental skills" is disappointing – remarks by UN disability Experts**

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In the context of the judgment of the European Court of Human Rights (*Strøbye and Rosenlind v. Denmark*), the [Special Rapporteur on the rights of persons with disabilities](#), Gerard Quinn, and the [Committee on the Rights of Persons with Disabilities](#), issued the following remarks:

The recent judgment of the European Court of Human Rights in [Strøbye and Rosenlind v. Denmark](#) is a major, but hopefully temporary, disappointment. The net effect of the ruling is to allow for the removal of voting rights from those people with disabilities who reputedly lack the requisite 'mental skills' to vote.

There now seems to be considerable unevenness with which many sides of the Council of Europe deal with inclusion and the rights of people with disabilities. At around the same time as the above judgment, the [European Committee on Social Rights](#) (the Council of Europe's treaty body on economic and social rights) issued a major [Decision in a Collective Complaint](#) which significantly advances the cause of inclusive education for children with disabilities across Europe. This unevenness of treatment within and between the various organs of the Council of Europe tends to undermine the good efforts of many sides of the house while needlessly detracting from the credibility of the Court.

What makes the Court's judgment unusual are three things.

First of all, the Court too readily accepts that it is a 'legitimate aim' of Governmental restrictions on the right to vote to restrict it to those who have the requisite 'mental skills'. Simply put, this does not accord with modern scientific understandings of human decision-making (especially during elections).

Even a cursory glance at the [World Bank's pioneering 2015 report on 'Mind, Society and behavior'](#) is enough to demonstrate that most decision making (and that would include voting) does not rest on the exercise of rational abilities. The World Bank asserts that most decision-making is 'automatic,' some is 'social' (mimicking outcomes desired within a valued group) or 'cultural' (reflecting background).

That is not to say that rationality is redundant. But it is to say that it does not generally lie at the fulcrum of decision-making. Therefore, possession of a certain threshold of cognitive ability is not really the key threshold. That is not to deny decision-making frailty. But it is to suggest that such frailty should never justify the withdrawal of a decision-making capacity to vote – it should be the occasion for a broader enquiry about supports, to enable a person to vote (including having access to voting materials).

Clearly, the Grand Chamber needs the benefit of arguments as to why cognitive ability is no longer to be considered the essence of decision-

making. Consequently, to confine voting rights to those who exhibit the requisite ability should no longer be considered a 'legitimate aim.'

Secondly, the Court relies on 'balancing tests' to gauge the proportionality of the restrictions in question. Balancing tests have their place particularly where rights must yield to other rights. But it is suggested they are out of place in the context of the right to vote.

The drafters of the European Convention were very much alive to the need to use rights underpin a viable democracy, to protect democracy and to promote it, since a flourishing democracy would, in turn, protect rights. It goes without saying that protecting the right of citizens to vote is a crucial enabler to ensure the legitimacy of the democratic process. Persons with disabilities are already at a disadvantage in the democratic process. They tend to form a 'discrete and insular minority' whose collective voice is unlikely to be listened to.

To the many disadvantages they experience in the democratic process is now added a new one – they can be excluded altogether if they do not exhibit the requisite cognitive skill. This is not only unnecessary, as it does not represent contemporary understandings of decision-making; but it doubly compounds their exclusion and goes to the very legitimacy of the democratic process. The resulting democratic deficit is in nobody's interests.

It is suggested that, because Article 3 of Protocol 1 of the [European Convention on Human Rights](#), on the right to free elections, is so foundational to the functioning of a legitimate democratic order (and especially because it carries no limitations on its face to the rights in question) that it should be read expansively. Strict scrutiny here should mean that ableist assumptions are completely unacceptable even if they mean that only a small number of people are directly affected.

Thirdly, the Court cites to the 2014 [EU Fundamental Rights Agency's \(EU FRA\) report on the right to political participation for persons with disabilities](#). It omits some key findings in that report: e.g., that persons with disabilities are in fact more politically engaged than most, and that the goal of ensuring persons with intellectual disabilities can play their full share in political life remains a challenge for EU Member States. The EU FRA report did not mean to point to '*what is*' (restrictions in some Member States) as an accurate summary of '*what ought to be*'.

When the case reaches the Grand Chamber, hopefully there will be time and space allotted to placing reports such as the EU FRA report in context. The Court also cited to the jurisprudence on the United Nations Committee on the Rights of Persons with disabilities on the right to vote. After unpacking the views of the UN CRPD Committee, the Court continues:

'[O]n the other hand' the Venice Commission appears to allow more space for restrictions (than the CRPD Committee)'. It is suggested that this juxtaposition is misplaced. The views of an international treaty monitoring body are not to be placed alongside an advisory body, no matter how elevated. Again, when the case reaches the Grand Chamber, then hopefully some more serious treatment will be afforded to the views of the CRPD Committee.

It is to be hoped that this case will find its way to the Grand Chamber which will then have an opportunity to frame the issues around personhood, new understandings of decision-making, the paradigm shift in the United Nations [Convention on the Rights of Persons with Disabilities](#) (as echoed strongly in the Decisions of its sister body the European Committee on Social Rights) and the imperatives of a legitimate democratic process.

**Mr. Gerard Quinn**, *Special Rapporteur on the rights of persons with disabilities*, is part of what is known as the [Special Procedures of the Human Rights Council](#). *Special Procedures*, the largest body of independent experts in the UN Human Rights system, is the general name of the Council's independent fact-finding and monitoring mechanisms. *Special Procedures mandate-holders* are independent human rights experts appointed by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world. They are not UN staff and are independent from any government or organization. They serve in their individual capacity and do not receive a salary for their work.

The **Committee on the Rights of Persons with Disabilities** monitors States parties' adherence to the [Convention on the Rights of Persons with Disabilities](#), which to date has 182 States parties. The Committee is made up of 18 members who are independent human rights experts drawn from around the world, who serve in their personal capacity and not as representatives of States parties. The Committee's concluding observations are an independent assessment of States' compliance with their human rights obligations under the treaty.