

Protection of autonomy and personal freedom of persons with mental disabilities

- the case law of the European Court of Human Rights -

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Convergence between the ECHR and the CRPD

Case-law of the European Court of
Human Rights



Normative background

Article 2 Right to life

„Everyone’s right to life shall be protected by law...”

Article 3 – Prohibition of torture, inhuman and degrading treatment

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Article 8 - Right to private and family life

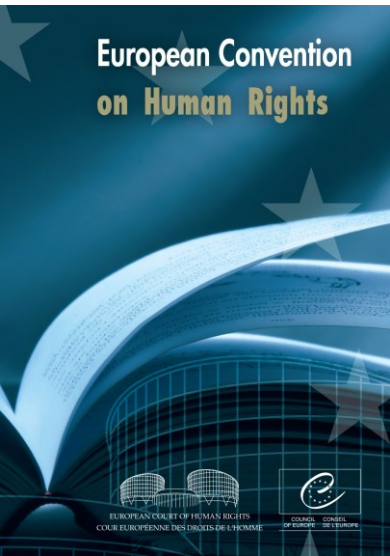
Everyone has the right to respect for his private and family life, his home and his correspondence.

Article 5 – Right to liberty and personal freedom

„Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
e) the lawful detention of...persons of unsound mind”

Article 14 - Prohibition of discrimination

„The enjoyment of the rights and freedoms set forth in this Convention 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”



Right to self-determination?

Health care decisions :

Pretty v. the United Kingdom

Article 8 embraces physical and psychological integrity of a person and aspects of an individual's physical and social identity the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of the Convention. It concerns a particularly important aspect of the applicant's existence and identity – one of the core rights attracting the protection of Article 8 of the Convention.

McDonald v. the United Kingdom: Article 8 is relevant to complaints about public funding to facilitate the mobility and quality of life of disabled applicant

Provide care so that the applicant does not face the possibility of living in a manner which “conflicts with [her] strongly held ideas of self and personal identity”

Participation in society

Arnar Helgi Lárusson v. Iceland (no. 23077/19, 2022) right to personal development, and the right to establish and develop relationships with other human beings and the outside world

accessibility is a precondition for people with disabilities to live independently and participate fully and equally in society

Antoni MÓŁKA v. Poland (56550/00) : failure to provide appropriate access for the applicant, who wishes to lead an active life can arouse feelings of humiliation and distress capable of impinging on his personal autonomy, and thereby on the quality of his private life .

***Enver Şahin v. Turkey* (23065/12)**

the ability of persons with disabilities to live autonomously with a fully-developed sense of dignity and self-respect is of cardinal importance and is central to the CRPD (Articles 3 (a), 9 § 1, 20 *in limine* and 24 § 1 (a) – paragraph 25 above),

Recommendation No. R (92) 6 of 9 April 1992 on a coherent policy for persons with disabilities

the very essence of the ECHR is respect for human dignity and human freedom, which necessarily includes a person's freedom to make his or her own choices



Barriers to personal autonomy and freedom



Legislative stereotyping

- „Historical discrimination” : persons with disabilities were historically subject to prejudice with lasting consequences, resulting in their social exclusion
- indiscriminate removal of rights, without an individualised judicial evaluation and solely on the basis of a mental disability
- prohibits the individualised evaluation of capacities and needs (*Alajos Kiss v. Hungary*)

Substitute / deprive decision making

- Inability to take (any) legal action, deprivation / restriction independence in all legal spheres.
- Persons put in a situation where they depend on others to take decisions concerning various aspects of their lives
- Numerous rights of such persons are extinguished or restricted (*X. and Y. v. Croatia*, no. 5193/09)
- Absence or transfer to a third person of valid and fully informed consent for medical interventions (*G. M. and Others v. Moldova*)
- Compulsory psychiatric treatment (*Shopov v. Bulgaria*)

Institutionalisation

- Social isolation of vulnerable persons placed in nursing homes, health care facilities, etc
- Creates dependency on the institution / guardian
- Entails *de facto* restriction / deprivation of rights and compulsory medical treatment without judicial decision / guarantees (*Calvi and G.C. v. Italy*, 46412/21, *X. v. Finland*)
- Denial / level of care level of care offered by the authorities results in isolation and deprivation of autonomy (*Jivan v. Romania* 62250/19)

Deprivation of liberty

- Objective and subjective elements of confinement : question of valid consent of persons *de jure* deprived of legal capacity, *de facto* understanding their situation (*Shtukaturov v. Russia*, 44009/05)
- In the context of deprivation of liberty on mental-health grounds: person could be regarded as having been “detained” even during a period when he was in an open hospital ward with regular unescorted access to the unsecured hospital grounds and the possibility of unescorted leave outside the hospital (*Ashingdane v. the United Kingdom*)
- *De facto* control of the authorities (*Stanev v. Bulgaria*)

What does the protection of rights mean?

Old function :

Protect the individual's **interests**
(**health, well-being...**)

Protect people with limited capacity
by taking their autonomy and
decision-making away and
placing it in the hands of 3rd parties.

Protect people against those 3rd
parties with safeguards

Protect society so that only persons
with „required level of mental skills”
participate /decide

Protect society from „harm”

New function:

Protect the individual's the right to respect
for **the dignity and self-determination**

Protect the **autonomy** of the person by
discovering his / her will and preference

Ensure that the support does not lead to
undermining the person

Ensure adequate safeguards in support



Obligations of the State



Assess the cognitive ability of a person

- disability affects cognitive skills: rendering the individual unable to adequately understand the significance and the implications of a specific decision, or lack the ability to administer his/ her affairs (*A.-M.V. v. Finland*)
- individual is unable to express a coherent view (*D.D. v. Lithuania*)
- Asses Existence of a true mental disorder (*Winterwerp v. the Netherlands*)

Assess capacity function by function

- explain what kind of actions the applicant is unable to understand or control
- what are the consequences of illness for his social life, health, pecuniary interests (*Sykora v. the CZ*)
- the mental disorder must be “of a kind or degree” warranting restriction of autonomy (*Shtukurov v. Russia*)

Tailor made protective measures

- Is the measure to divest of person of legal capacity an adequate answer to the situation? (*X. and Y. v. Croatia*)
- Provision of care does not entail deprivation of legal capacity
- no other, less restrictive, measure would serve the purpose (*P.W. v. Austria, Ivinovic v. Croatia*)

Regularise procedure



Strike a fair balance

- balance between the respect for the dignity and self-determination of the individual and the need to protect the individual and safeguard his or her interests where his or her individual qualities or situation place the person in a particularly vulnerable position
- ensuring that the individual's rights, will and preferences are **taken into account** (*A.-M.V. v. Finland*)

Facilitate autonomy

- facilitate the participation of disabled persons or older “dependent” persons in the life of the community and to prevent their isolation or segregation (*Calvi and G.C. v. Italy*)
- provide specialist assistance in education aimed at promoting personal autonomy and communication skill, learning process, relationship with others, integration **to prevent marginalisation** (*G.L. v. Italy*)
- **introduce legislative safeguards** and mechanisms to support persons with (intellectual) disability to express a valid and fully informed consent for medical interventions (*G.M. and Others v. Moldova*)

Preserve autonomy

- authorities must discharge their duties of protection in a manner compatible with the rights and freedoms of the individual concerned and in such a way as to diminish the opportunities for self-harm, **without infringing personal autonomy** (*Fernandes de Oliveira v. Portugal*, 78103/14, 2019)

