

**THE RIGHT TO VOTE OF ADULTS PLACED UNDER
GUARDIANSHIP IN THE LIGHT OF INTERNATIONAL LAW,
EUROPEAN REGIONAL LAW AND COMPARATIVE PUBLIC LAW**

Abstract of Ph.D. Thesis

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“Even people without learning disabilities find it hard to understand politics. They just speak jargon and don’t get to the point. [...] They don’t involve us. If people with disabilities all vote, we will be heard. The more we get our voices heard, the more people will respect us.”¹

Lucy, a person with intellectual disabilities from the UK

I. Research objectives

Universal suffrage is not universal; the right to vote can be restricted. Research results show that in many countries adults with intellectual disabilities, psycho-social disabilities and autism are denied to exercise their right to vote, especially if they are placed under guardianship. Since exclusion from the right to vote separates these people from the subjects of social discourse, this way forcing them into the category of *personae non gratae* in political and public life, Tocqueville's prophecy (1835) seems to be particularly important:

“Once a people begins to interfere with the voting qualification, one can be sure that sooner or later it will abolish it altogether. [...] there is no halting place until universal suffrage has been attained.”²

Is Tocqueville right here? Will we reach universal suffrage? If yes, then the only possible way to do it is that all voters having disabilities, including those placed under guardianship, should have the right to vote. The overall objective of my research is to explore this possibility. In order to achieve this goal I have focused on the following guiding questions:

- Can the right to vote of adults placed under guardianship be restricted? If yes, under what conditions? If not, is there any obligation on States and international or European regional level organisations (the United Nations, the European Union, the Council of Europe, the OSCE) to go further than simply recognising that all adults who have disabilities have the right to vote regardless of their legal capacity status?
- In what direction are regulations on the right to vote of adults placed under guardianship developing?

The *actuality* of the research is given by the fact that according to the interpretation of the UN Committee on the Rights of Persons with Disabilities (CRPD Committee), Article 29 of the UN Convention on the Rights of Persons with Disabilities (CRPD) does not enable to deprive adults with disabilities of their right to vote, even if the person concerned is placed under guardianship. Recently, voting rights of adults placed under guardianship has become the focus of attention not only in various entities of the United Nations, but in the European Union and in the Council of Europe as well. Furthermore, reconsideration of electoral rights of adults placed under guardianship has been on the agenda in several European countries for the last several years.

In order to be able to give accurate and correct answers to the research questions, I have thoroughly analysed the development of legal regulations governing the right to vote of adults with intellectual disabilities, psycho-social disabilities and autism under guardianship in the areas of international law and European regional law, furthermore, I have carried out

¹United Response: *Every Vote Counts. Getting voices heard. A report exploring how people with learning disabilities can become better engaged in the democratic process.* January 2010. 5.

² Alexis de TOCQUEVILLE: *Democracy in America.* ed. J.P. Mayer, trans. George Lawrence. New York, NY: HarperCollins/Perennial Classics. 2000. 59-60.

comparative analyses concerning relevant legislation of Member States of the European Union and the Council of Europe. Finally, based on the results of these phases of the research, I have conducted *de lege lata* theoretical analyses and formulated *de lege ferenda* practical recommendations in connection with which I have outlined legislative opportunities that may arise as options when it comes to reconsidering the electoral rights of adults with intellectual disabilities, psycho-social disabilities and autism under guardianship.

II. Research methodology

The starting point of my research is the *lived experiences of persons with disabilities* as well as the *social model of disability*. Development and implementation of legislation often ignore lived experiences of persons with disabilities, although this experience and knowledge are unavoidable not only in the field of such relatively new disciplines as Disability Studies, but can be the origin of legal science as well in any case, when it is intended to govern legal relations, including the right to vote of persons with disabilities. *Disability Studies* is, inter alia, multi-disciplinary, and is built on a social constructivist view and the lived experiences of persons with disabilities. *In interaction with legal science*, Disability Studies wants to see the social model of disability as a starting point for all legal instruments relating to persons with disabilities.

Instead of using the medical approach to disability, which regards persons with disabilities as weak, sick and fallen, and therefore need to be defended and protected, healed and rehabilitated and are looked at as if they were people whose rights required to be restricted, the CRPD applies the social model of disability, according to which persons with disabilities are subjects with rights and are able to exercise their rights themselves if they are provided with the necessary supports and reasonable accommodations. This *paradigm shift* does not deny the presence of impairments, or the potential benefit of treatments, however, *it questions and rejects every myth, ideology and stigma that are linked to impairments and that influence social interactions, and development and implementation of any legislation*.

Thus, in the course of writing this doctoral thesis I aspired to analyze the relevant fields of Jurisprudence in the light of Disability Studies and the social model of disability. This attitude towards the topic of the thesis required that the principle of '*nothing about us without us*', which characterizes the movements of persons with disabilities, be given special attention.

I was looking for answers to the research questions by narrowing the topic of the thesis as follows:

- The *geographical scope* of the thesis covers the United Nations and some - mainly European - UN Member States; since the CRPD Committee is a relatively young 'treaty body' within the UN system, therefore very few 'concluding observations' are available which justify not to limit the geographical scope solely to Europe but to go beyond this continent. Furthermore, the geographical scope is limited to the European Union, the Council of Europe and the Organization for Security and Co-operation in Europe (OSCE) and to their Member States.
- The *personal scope* of the thesis covers adults with intellectual disabilities, psycho-social disabilities and autism with special focus on those placed under guardianship;
- The *temporal scope* of the thesis is limited to the period starting with 1948, the adoption of the Universal Declaration of Human Rights (UDHR), and lasts to present

days. The reason for starting the research with the UDHR is that this is the first relevant instrument which can be invoked in connection with the topic of the thesis.

- The *material scope* of the thesis strictly covers the right to vote and stand for election, and the relationship between suffrage and adult guardianship regimes.
- The *disciplinary scope* of the thesis is intended to locate the research topic at the intersection of international law, European regional law, comparative public law and civil law. Furthermore, the thesis implies the results of Disability Studies and the relevant statements of the psychiatric approach in connection with the ‘assessment of voting capacity.’

Since my research objective was to carry out an encyclopaedic, broad-based and up-to-date analysis of the research topic, I have opted for a widespread use of appropriate research methods. The thesis is primarily based on *critical document analysis* in which study and thematic structuring of relevant legal instruments and other useful documents, including databases of legal regulations, country reports, and repositories were appropriate and necessary. I have compared all the available information which was gathered during the research in order to be sure of the reliability of the various sources.

I have combined the *grammatical, logical, systematic, purposive, historical and comparative methods* in the course of the *interpretive analysis* of the contradictions and connections between different legal instruments. This approach clearly characterizes the thesis’ first two parts which deal with international law and European-level legislation respectively. I have typically applied *descriptive-analytical* and *comparative methods* in the third part of the thesis in order to reveal legal regulations on the right to vote of adults with intellectual disabilities, psycho-social disabilities and autism under guardianship and the development of these regulations in the Member States of the European Union and the Council of Europe. The *historical approach* is an important feature of the analysis of both (1) the development of law which characterizes the documents presented in the first two parts, and (2) the legal reforms which are studied in the third part of the thesis. The *de lege lata* theoretical analyses and the *de lege ferenda* practical recommendations constitute the fourth part of the doctoral thesis. These analyses and recommendations are built on the results identified in the first three parts of the thesis, and were elaborated by applying *interdisciplinary method*.

III. Research results

Is Tocqueville right? Will we reach universal suffrage? The starting point of the research was that if our answer is ‘yes’, then the only possible way to reach it is that all voters having disabilities, including those placed under guardianship, should have the right to vote. The analyses of the thesis show that the arrival at this aspect of universal suffrage has not yet happened, but initiatives aiming to move towards this direction and even meaningful results can be clearly identified in the areas of international law, European-level regional legislation and legal regulations of the Member States of the Council of Europe and the European Union. However, the right to vote of adults with intellectual disabilities, psycho-social disabilities and autism is often restricted by law, and in most cases this limitation of the right to vote is linked to total or partial denial of legal capacity of the adult persons concerned and their ‘ward’ status.

As a result of the research I have arrived at the following questions, opinions and conclusions:

A) *With respect to the analyses carried out in the field of international law:*

- i. The UDHR does not explicitly provide protection for persons with disabilities in respect of the right to vote; however, since 'other status' implicitly includes disability, the question to which various international and European-level legal instruments give different answers already arises in relation to the interpretation of the UDHR. And the question is *whether the protection against discrimination on the ground of disability extends to all persons with disabilities including those placed under guardianship, or only to a specific category of persons with disabilities, excluding certain or all adults placed under guardianship.*
- ii. According to the answer of the International Covenant on Civil and Political Rights (ICCPR) and the UN Human Rights Committee (HRC) disability is a protected ground; however, *this protection does not extend to all adult persons with disabilities in respect of the right to vote. The exercise of the right to vote may be excluded on certain grounds established by law which are objective and reasonable. For example, 'established mental incapacity' may be such an objective and reasonable ground.* In practice, 'established mental incapacity' covers intellectual disability, autism, as well as psycho-social disability.
- iii. According to the HRC's interpretation, the ICCPR *does not want to guarantee suffrage to all adults with disabilities.* The HRC clearly *enables to* deprive the adults with intellectual disabilities, psycho-social disabilities and autism of their voting rights. States parties to the ICCPR have been implemented this authorization in a way according to which *deprivation of the right to vote is closely linked to placement under guardianship.*
- iv. Regarding the question raised in para i., the position of the CRPD and the CRPD Committee is that *protection against discrimination extends to (1) all persons with disabilities including those placed under guardianship and (2) covers all aspects of life including the right to vote.*
- v. Regarding the right to vote of adults with disabilities, including those placed under guardianship, the CRPD Committee calls for States parties to ensure that
 - a) all adult persons with disabilities can exercise the right to vote on an equal basis with others;
 - b) a person's impairments, including intellectual or psycho-social impairments, shall never be a basis for denial or restriction of the right to vote;
 - c) limitation and deprivation of legal capacity shall never result in denying or restricting the right to vote of persons with disabilities, even if the denial or restriction of the voting rights is based on an individual decision of a court of law;
 - d) institutionalisation of persons with disabilities, including persons with intellectual disabilities, psycho-social disabilities and autism, shall never result in restriction or denial of the right to vote of adults with disabilities;
 - e) appropriate support measures and reasonable accommodations are available for persons with disabilities in the field of electoral rights.
- vi. There is opposition between Article 25 of the ICCPR and Article 29 of the CRPD, as well as between the UN Treaty bodies interpreting the Covenant and the Convention. A very important reason for this tension is that while persons with disabilities and their representative organisations did not participate in the negotiations of the ICCPR, they did actively participate in the drafting of the CRPD. Furthermore, while expertise based on experiencing living with disabilities does not play an important role in the UN Human Rights Committee, such expertise is clearly relevant among members of the CRPD Committee. In addition to this, while the UN Human Rights Committee's approach is still

rather based on the medical model of disability, the CRPD Committee's work is clearly based on the social and human rights models of disability.

- vii. *Automatic deprivation of the right to vote on the basis of disability or 'ward' status is not accepted by either of the entities of the United Nations.*
- viii. Previous attempts to resolve the conflict between Article 25 of the ICCPR and Article 29 of the CRPD, as well as between the UN Treaty bodies interpreting the Covenant and the Convention have failed which leads to the fact that *there is a double standard at the UN level when it comes to formulating positions on the legal regulations of the States parties in connection with the restrictions of the right to vote of adults with disabilities, including those placed under guardianship.* The following solutions might be used to address the problem:
 - a) The Human Rights Committee leaves its previous standpoint behind and follows the standard of the CRPD Committee when it comes to the consideration of the reports of State parties;
 - b) The Human Rights Committee addresses this issue under the individual complaint mechanism, if there should be any complaints relating to this topic;
 - c) The Human Rights Committee revises its General Comment No 25 which was adopted in 1996;
 - d) The CRPD Committee revises its General Comment No 1 which was adopted in 2014;
 - e) The two UN Treaty bodies set up a joint working group to develop a joint General Comment on the right to vote of adults with disabilities, including those placed under guardianship.

Among the options listed here, (1) *the most unrealizable* is d) due to the very recent adoption of General Comment No 1, and (2) *the most needed to be realized* is solution e).

B) *With respect to the analyses carried out in the field of European-level legislation:*

- ix. *The double standard applied at the entities of the United Nations has clearly appeared at the levels of the European Union and the Council of Europe. The standard set by the UN Human Rights Committee is followed by two institutions of the Council of Europe, namely the European Court of Human Rights and the Venice Commission.* In their opinion, the right to vote of adults with disabilities may be denied if the following conditions are met:
 - a) existing intellectual disability, psycho-social disability or autism may serve as a basis for deprivation of the right to vote; nevertheless
 - b) existing disability must not result in automatic loss of the right to vote; so
 - c) existing disability may lead to the denial of the right to vote only if this denial is based on individual decision of a court of law.
- x. *The interpretation of the CRPD Committee is followed by the following institutions of the Council of Europe: Committee of Ministers, Parliamentary Assembly and the Commissioner for Human Rights.*
- xi. *Automatic deprivation of the right to vote on the basis of disability or 'ward' status is not accepted by either of the entities of the Council of Europe.*
- xii. The issue of regulations governing the right to vote of adults with intellectual disabilities, psycho-social disabilities and autism placed under guardianship at the level of the European Union is *closely linked to the division of competencies between the EU and its Member States.* Citizenship of the European Union and the closely related right to vote at municipal and European Parliamentary elections are not ensured for adult persons with disabilities placed under either plenary or partial guardianship in the majority of EU Member States, if the legal regulations of the Member State in question allow franchise on the basis of disability and/or 'ward' status regardless of whether the deprivation of the

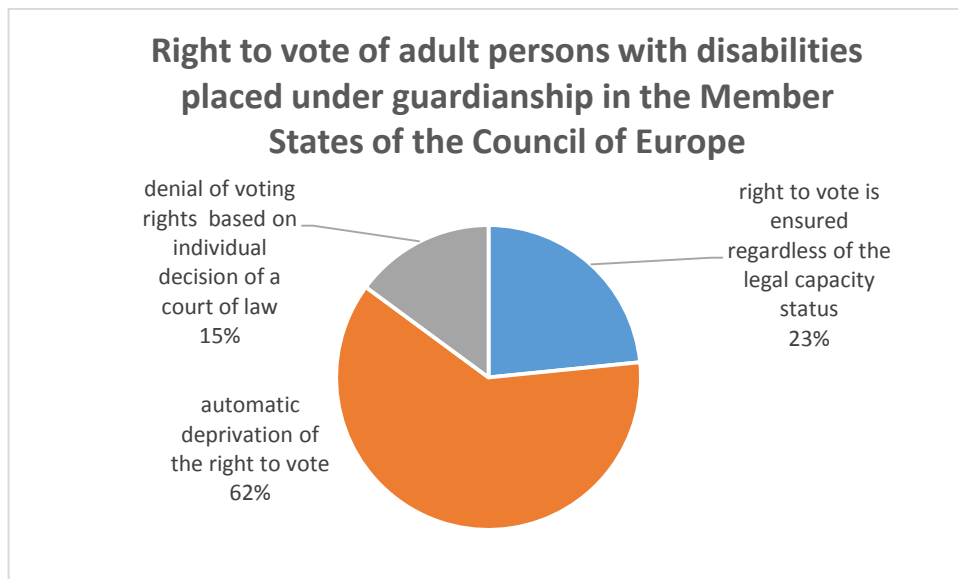
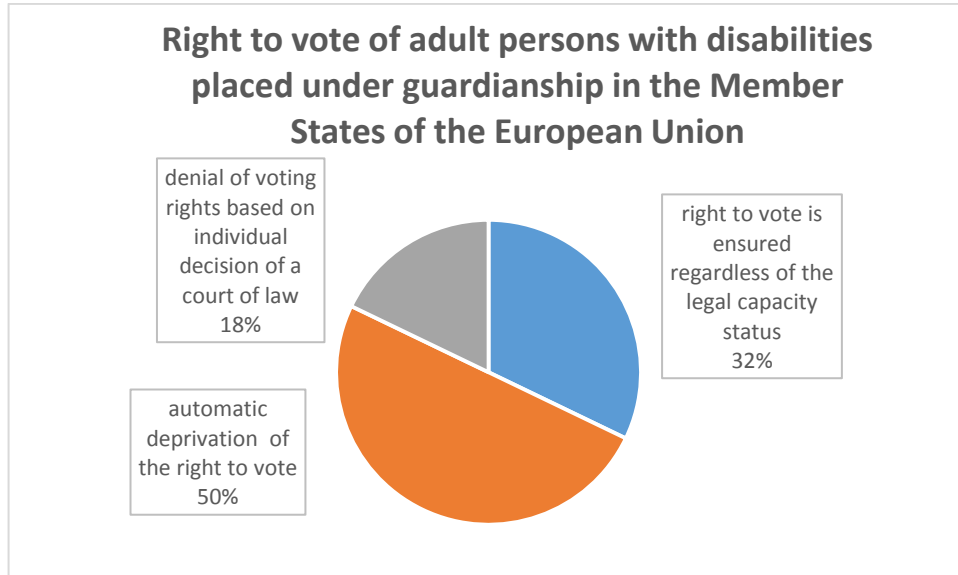
right to vote is based on individual decision of a court of law or automatic removal of the voting rights.

- xiii. *The European Union Agency for Fundamental Rights (FRA), following the 'guidelines' of the CRPD Committee, represents a progressive position and urges EU Member States to abolish all voting restrictions based on disability and 'ward' status. However, such or similar call is not addressed to EU Institutions. A FRA-like trend can be identified in the European Parliament.*
- xiv. *The standard set by the UN Human Rights Committee is followed by two institutions of the European Union, namely the European Council and the European Commission.*
- xv. *The Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (OSCE/ODIHR) follows the standard which is set by the UN Human Rights Committee and represented by the Venice Commission. Similarities between opinions of the OSCE/ODIHR and the Venice Commission might be rooted in the fact that the two organizations often work together on joint opinions and other documents.*
- xvi. *General harmonization of electoral systems of the EU Member States in respect of the European Parliamentary and municipal elections is not a necessary consequence of the provisions of the Treaty on the Functioning of the European Union (TFEU). In other words, while the TFEU only provides an opportunity for the EU to legislate in relation to the right to vote, the CRPD obliges the EU and each State party in this regard in respect of persons with disabilities.*
- xvii. *From the perspective of the area of anti-discrimination, the EU is allowed to fight against discrimination on the ground of disability, as well as to take action within this context in the framework of its powers. On the other hand, according to the CRPD the EU is obliged to take legislative steps in the following areas so that persons with disabilities placed under guardianship can have and practice their right to vote on an equal basis with other citizens of the Union:*
 - a) *modification of the regulations governing municipal elections;*
 - b) *amending regulations governing European Parliamentary elections;*
 - c) *broadening the fight against discrimination on the ground of disability.*
- xviii. *EU level legal reforms mentioned in the previous paragraph should aim at the fact that all adults with disabilities, regardless of whether they are placed under plenary or partial guardianship, are guaranteed the following aspects as parts of their citizenship of the European Union:*
 - a) *possibility of exercising active and passive suffrage;*
 - b) *reasonable accommodations;*
 - c) *support measures to exercise legal capacity;*
 - d) *accessibility.*

C) *With respect to the analyses carried out in the field of comparative public law:*

- xix. *Regarding Member States of the European Union and the Council of Europe, significant relationship cannot be identified between the lack of ratification of the CRPD and the possibility of deprivation of the right to vote of persons placed under guardianship.*
- xx. *Interpretative declarations and reservations on Articles 12 and 29 of the CRPD clearly result in (the possibility of) deprivation of persons placed under guardianship of their right to vote.*
- xxi. *In respect of the Member States of both the European Union and the Council of Europe, I have found that (1) placement under guardianship automatically results in*

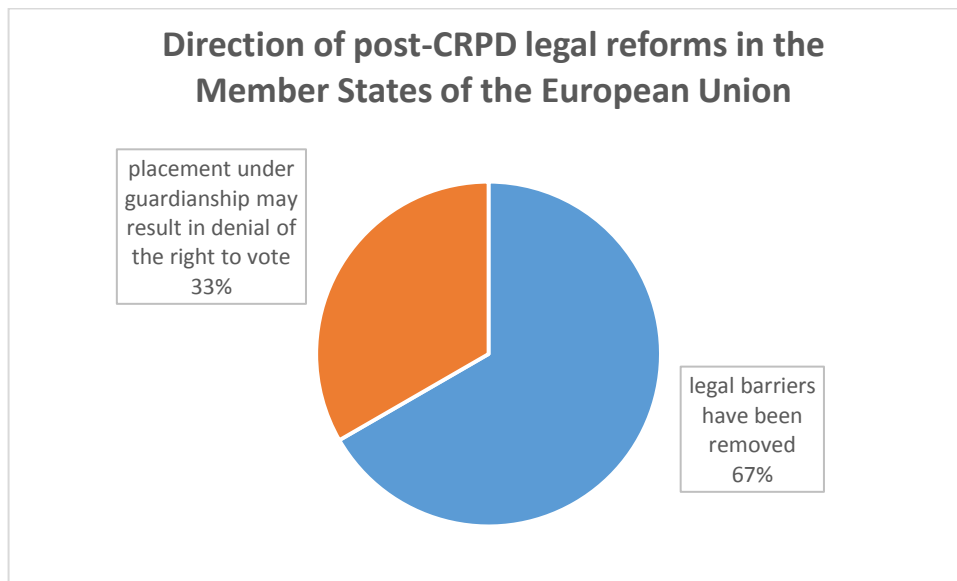
deprivation of the voting rights in the majority of the Member States, while (2) the least-used solution is the denial of the right to vote, based on individual decision of a court of law in guardianship proceedings; (3) the third group of Member States ensures that the right to vote can be exercised by all adult persons with disabilities regardless of their legal (capacity) status.



xxii. In those Member States of the EU and the Council of Europe *where placement under guardianship automatically results in deprivation of the right to vote, disenfranchisement is typically required by the Constitution* and thereby modification or abolishment of these restrictions is seriously hampered compared to those national regulations where these kinds of provisions are included in statutory laws.

xxiii. As a result of post-CRPD legal reforms took place in the Member States of the EU, *automatic deprivation of adults with intellectual disabilities, psycho-social disabilities and autism placed under guardianship of their voting rights was typically replaced by regulations according to which all adult persons with intellectual disabilities, psycho-social disabilities and autism including those placed under guardianship can freely exercise their right to vote.* Legal reforms resulted in the replacement of automatic

deprivation of the right to vote by the *possibility of denying the right to vote on the basis of individual decision of a court of law in guardianship proceedings in 1/3 of the cases.*



xxiv. *In the majority of the Member States of both the European Union and the Council of Europe, persons with intellectual disabilities, psycho-social disabilities and autism, may be assisted by a support person (1) if the person with disabilities desires to get this help, and (2) if the voter with intellectual disabilities, psycho-social disabilities or autism is not deprived of their right to vote.*

D) *With respect to the analyses carried out in the field of potential directions of regulations on electoral rights of persons with disabilities placed under guardianship:*

xxv. *Stereotypes and popular beliefs about persons with intellectual disabilities, psycho-social disabilities and autism lead to prejudices and stigmatisation; these attitudes towards persons with disabilities affect, inter alia, legal regulations on the right to vote.*

xxvi. *Invocation of legitimate aims in relation to deprivation of the right to vote of adult persons with intellectual disabilities, psycho-social disabilities and autism placed under guardianship is still widespread; however, questioning the legitimacy of this view is increasingly present in the legal measures at the levels of the international law and the European regional law, as well as in the latest academic literature.*

xxvii. *Legitimacy of depriving all adults with intellectual disabilities, psycho-social disabilities and autism of their voting rights is not accepted by either legal measures at the levels of the international law, the European regional law, or directions of European legal reforms or even the academic literature.*

xxviii. There are many arguments to divest those adult persons with intellectual disabilities, psycho-social disabilities and autism of their right to vote, who are labelled as persons with ‘serious, and multiple disabilities.’ However, this view ignores that

- a) this approach is not compatible with the view of the CRPD Committee;
- b) exercising the right to vote would never cause any damage to anyone, even if the suffrage is exercised by ‘persons with the most serious disabilities.’ In the worst case, persons concerned might later regret their decisions made in the voting booth;
- c) politicians, policy- and decision-makers can easily leave persons with intellectual disabilities, psycho-social disabilities and autism out of their electoral programs and

legislative agenda, especially if these persons with disabilities are placed under guardianship. The reason behind ignoring these persons is that politicians, policy- and decision-makers cannot count on their votes. Ensuring the right to vote to all adult persons with disabilities would certainly draw more attention of politicians, policy- and decision-makers to the rights, interests and needs of persons with disabilities.

- xxix. *Automatic deprivation of the right to vote of adult persons with disabilities once they are placed under guardianship is clearly rejected* by either legal measures at the levels of the international law and the European regional law or directions of European legal reforms or the academic literature.
- xxx. The view according to which *the right to vote of adult persons placed under guardianship may be exercised by their guardians* can be supported by arguments on the basis of both theoretical and practical aspects. However, this approach is *based on a substituted decision-making mechanism which (1) ignores that the right to vote represents the character of the most personal legal statements, and (2) was criticised by the CRPD Committee.*
- xxxi. The view according to which *(1) the right to vote of adults placed under guardianship may be deprived on the basis of individual decision of a court of law and (2) the measurement of the 'voting capacity' are considered* by many relevant legal measures at the levels of the international law and the European regional law *to be appropriate solutions* to the problem discussed in this doctoral thesis. *However, (1) this solution is the least used system not only in the European Union but in the Council of Europe as well, and (2) the CRPD Committee clearly and consistently takes the position that this solution is not compatible with the provisions of the CRPD.*
- xxxii. The view according to which *the right to vote can be de facto exercised by all adult persons with intellectual disabilities, psycho-social disabilities and autism regardless of their legal (capacity) status is both supported and rejected* by relevant legal measures at the levels of the international law and the European regional law, as well as by academic literature. However, *directions of the post-CRPD European legal reforms* represent mostly the tendency according to which *all adults with disabilities, even if they are placed under guardianship, can freely exercise their voting rights.*
- xxxiii. If a state is committed to the *removal of legal barriers* that affect the right to vote of adults with disabilities placed under guardianship, it will be *a necessary but not sufficient condition for persons with intellectual disabilities, psycho-social disabilities and autism to be able to freely exercise their right to vote.* Rights and obligations included in the *CRPD have to be fully implemented* by States parties.

IV. List of relevant publications

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