

Political Participation for Person with Disabilities: State's Obligation and Failure

Mutiah Wenda Juniar

University of Leeds, England, UK

E-mail: mutiahwendajuniar93@gmail.com

Abstract

This paper discusses state's obligation and implementation failure to fulfil the rights to political participation for the person with disability. There are two questions this paper proposed to address. First, what are the obligation of states to fulfill the rights to political participation for person with disability that are set out in CRPD and interpreted by the Committee on the Rights of Persons with Disability? Second, what are the failures that states did in the implementation of political participation for person with disabilities? In answering the question, the writer uses journals, concluding observation, shadow reports from NGO, cases and official publications. This research find that 1) under CRPD the states are obliged to provide accessible facilities for person with disabilities from registration process until the vote counting process and states are obliged for not to exclude person with intellectual disability to enjoy their political rights as emphasized in the case of Budjoso v Hungary and General Comment No. 1 produced by the Committee. 2) The Implementation failure are the exclusion of person with intellectual disabilities to enjoy their political rights, lack of accessibilities, support and awareness regarding political participation for person with disabilities.

Keywords: Political Participation; Person with Disabilities; CRPD

Introduction

As the increase of democratic states today, the democracy is achieved as the result of political participation from all society. Political participation including participate in voting, stand for election and join political affairs. The right to vote has been mentioned in Article 21 of Universal Declaration of Human Rights and address it as the rights of all people.¹ Subsequently, rights to vote is promoted by the International Covenant on Civil and Political Rights² and European Convention on Human Rights and Fundamental Freedoms.³ Unfortunately, the political rights



of the person with disabilities are not specifically protected by those human rights treaties.⁴

Then, Convention on the Rights of Person with Disabilities through an Article 29 guarantees the rights of person with disabilities in political participation.⁵ To fulfil the political rights of the person with disabilities, CRPD obliges states to take action to ensure the political participation of the person with disabilities.

This paper will evaluate what kind of obligations that states shall do to fulfil the political rights of person with disabilities that are set out in CRPD and interpreted by Committee on the Rights of Persons and Disability and identify common or significant types of implementation failure in fulfilling political participation for person with disability. To find the answer, the writer uses journals, concluding observation, shadow reports from NGO, cases and official publications.

First part will address the obligation of states under Article 29 and other provisions in CRPD to ensure the rights to vote, stand for election and join public and political affairs; and the interpretation of Committee on the Rights of Person with Disability regarding the political rights of person with mental or intellectual disabilities. Second part will address the common and significant failure of the CRPD implementation.

International Human Rights Obligation for Political Participation in UN Convention on the Rights of Person with Disabilities (CRPD)

Article 29 of CRPD regulates positive and negative obligation for states to fulfil the political and public life participation of person with disabilities.⁶ The positive obligation is ensuring reasonable accommodation for the person with disabilities, and negative obligation is eliminating the legal limitation on the rights to vote.⁷ Furthermore, article 29 suggests state to ensure the person with disabilities can participate fully and effectively in both of political (to vote and be elected) and public life participation.⁸ To embody this rights, states have obligation to ensure and provide facilities, materials and information about voting procedure that are accessible for person with disabilities.⁹ Besides that, states also have obligation to promote an environment that enable person with disabilities to fully and effectively participate in political and public life without discrimination and equal to others.¹⁰ There are two main pledges in this article which are pledges to guarantee person with disabilities can participate 'effectively and fully', and guarantee them to participate fairly like the others.¹¹ Full participation in CRPD means that person with disabilities did not have any practical or legislative restriction in enjoying their electoral and political rights.¹² Being able to participate fully in society implies that person with disabilities are accepted and appreciated just like other peoples.¹³ Their demands are in line with social and economic rights, thus their needs are not considered as 'special'.¹⁴ Moreover, article 29 also emphasize that states shall ensure person with disabilities possess 'rights and opportunity' to enjoy their

political rights.¹⁵ Rights to vote in political affairs in this context meaning that person with disabilities assert their personal autonomy which consist of freedom to take their personal decision and be recognized as person in law.¹⁶ While opportunity in article 29 implies that the person with disabilities possesses chance to vote and be elected, thus countries have to guarantee that all person with disabilities are fully able to enjoy their voting rights.¹⁷

In order to ensure the political rights of the person with disabilities, Article 29 has to be supported from other rights in CRPD. It should say that Article 29 has interdependent relationship with other CRPD provisions such as Article 4, Article 9, Article 12, Article 19 Article 21¹⁸ and Article 5.

Article 4, para. 1 (b), obliges countries to adopt all proper measures, including legislation, to adjust or abrogate existing legislation, rules, practice and customs that create discrimination to persons with disabilities.¹⁹ It implies that existing regulations and legislations that appear as the restriction to the person with disabilities to enjoy their political rights on an equal basis with others must be modified.²⁰ Besides, according to article 4 (3) CRPD, this article emphasize the potential exclusion of person with disabilities from the legislation process,²¹ thus countries should embrace person with disabilities in the process of improvement and application of the law and policies regarding issues of disability.²² For example, regulation that forbid person with psychosocial and intellectual disabilities to vote, this regulation has to be abolished or modified to allow them exercise their political rights.²³

Article 9 concerning accessibility, this provision is significant in ensuring political rights for person with disabilities. Article 9 addresses countries requirement to eliminate the barriers that exist in environment²⁴ that might complicate person with disabilities to enjoy their political rights. For example, access to polling station and political information through media and internet.²⁵

Article 12 of the CRPD recognized legal capacity of person with disabilities and obliges countries to implement proper actions to guarantee person with disabilities enjoy their legal capacity.²⁶ Article 12 has become the illumination for person with disability, which recognize person with disabilities as subject no as objects of law.²⁷ Being the subject of law or having legal capacity authorize person with disabilities to vote or be elected.²⁸ Even if Article 12 ensure all people have equal recognition of legal capacity whether they are with or without disabilities.²⁹ However, there still some issue regarding the restriction of legal capacity according to category of person with disabilities particularly person with intellectual and mental disabilities.³⁰ Thus, it automatically leads to the limitation for person with disabilities to exercise their political rights.

Article 19 of CRPD assert the right of person with disabilities to fully participate in community.³¹ However, there are still person with disabilities who stay in institution for a long time and it might cause problems in enjoying their

rights to vote.³² For instance, it will be difficult for person with disability to travel to polling station since usually institution are placed in isolated region.³³

Article 21 of CRPD emphasizes rights to freedom of expression and opinion, and access to information.³⁴ Related to political rights, it obliges states to take actions in facilitating access to information in both of private and public institution.³⁵ For example, providing Braille and sign language in media information that contain political information.³⁶

Article 5 explains that state obliges to supply reasonable accommodation in the fulfillment of whole rights, consist of voting accommodation.³⁷ There are several cases when it cannot be avoided that certain person with disabilities cannot enjoy their voting rights even if they have an assistance.³⁸ It is happening due to the interaction between the personal impairments and unsupported environment.³⁹ The solution is states shall supply reasonable accommodation.⁴⁰

Finally, all of these obligation support to fulfil the political rights of person with disabilities including right to vote, be elected and join public and political affairs.

Rights to Vote

Rights to vote for person with disabilities is quiet complex. Person with disabilities cannot exercise their voting rights fully if states fail to consider: access to information regarding political information; convenient registration; access to polling station; information to use ballot or other method of voting; providing assistance; considering person with disabilities who live in institution; prevent electoral fraud; and the right to vote of person with intellectual disability.

First, states have to ensure person with disabilities possess equal access to political information and activities.⁴¹ Information is useful in advancing the awareness of voters regarding theirs rights to vote and awareness to several issues about election day including the information about parties and candidate.⁴² Public - private media, internet and political parties play important role in this field.⁴³ Media is pivotal in forming public opinion through the publication of information, also providing information regarding voter registration requirements.⁴⁴ For instance, in Quebec, the information is available in in Braille, video cassette in sign language and TV has subtitle for person with visual and hearing disabilities.⁴⁵ There is also good example from Malta and Poland that provide information about the way to complaint if there is violation of voting rights exists in public website which fulfil international accessibility standard.⁴⁶ While political parties do not have obligation like states do, but when they get sponsored by states, providing an accessible information for disability is mandatory.⁴⁷ It is important to be considered since there are many person with disabilities are isolated and need political parties to approach them.⁴⁸

Second, states shall provide an easy process of voting registration. Moreover, the voter registration is the major obligation of electoral commission and also it is essential for the participation of person with disabilities as marginalized group.⁴⁹ Registration is pivotal in analyzing the needs of person with disabilities and analyzing the constraints to eliminate before the election day.⁵⁰ For instance, the National Voter Registration in order to boost the registration for person with disabilities who do not own driver license and are not able to come to vehicle registration office to register themselves, National Voter Registration provide registration office in every place and in the national office that serve public or disability assistance.⁵¹

Third, state has to ensure the accessibility of place and method to vote. According to US Government Accountability Office, the main barriers for polling place is inadequacy of accessible parking space, unpaved surface and curb cuts,⁵² thus, State has to ensure that the polling places are free of those barriers. Moreover, states may provide flexible opportunities for person with disabilities, for example, they can vote in more convenient place or time.⁵³ For instance, in Bulgaria, when person with disabilities are not able to vote in their selected polling station, they can inform and request to the election commission at least 14 days in advanced to change their polling station place into more accessible place to vote.⁵⁴ Furthermore, regarding the accessibility of polling station, person with disabilities who live in institution have their own problem.⁵⁵ It is because several institutions are placed in isolated area, they have less transportation, or they are not able to travel without assistance.⁵⁶ In order to solve that problem, states shall provide alternative method of voting such as building up voting chamber at institution or bring mobile ballot boxes to institution.⁵⁷ Another method of voting may be offered such as voting via mail or email to person with disabilities. Yes, voting via mail is convenient⁵⁸ but there is still problem voting via mail, according to Lisa Schur⁵⁹ :

‘And additional obstacle to mail voting in twenty-one states in the US is the requirement of an excuse when applying for mail ballot, which can discourage mail voting due to stigma of recording a disability on an official government document.’⁶⁰

Voting via email is also quite problematic since not all person with disabilities have access to internet because economic factors and technological restrictions.⁶¹

Besides alternative voting method, one of the way to ensure person with disabilities truly vote is by providing assistance.⁶² Assistance in this term means to assist person with disabilities to declare their individual will and do not determine the decision for person with disabilities.⁶³ Article 29 mentions that assistance has to be accommodated only based on the request of person with disabilities and they are the one who determines the assistant.⁶⁴ Furthermore, using assistance to participate in political and public affairs must not be considered as substitute for

voting in polling station, still, accessible political information and ballot papers are mandatory to decrease the demand for using assistance.⁶⁵ There are 15 European Union Member States that is allowing assistance in voting process for person with intellectual, visual and physical disabilities.⁶⁶ However, this system has problem about the secrecy of voting since in several legislation, electoral committee member has to be there along with assistance and person with disabilities in voting chamber,⁶⁷ this system show the contradiction with Article 29 regarding ‘voting by secret ballot.’

Apparently, the problem regarding assistance not only about secrecy but also manipulation and fraud.⁶⁸ Person with disabilities who are under guardianship are highly vulnerable to manipulation.⁶⁹ This circumstance will bring chance to third parties to compel them to vote certain candidate⁷⁰ or interrupt their absentee ballot and use it to vote.⁷¹ Depriving rights to vote on the reason of their disability is violating the human rights of person with disabilities,⁷² pressuring and manipulating the vote of person with disabilities obviously harms the process of democracy.

To avoid any problems and barriers in political participation, it is necessary for states to implement monitoring for ensuring the rights of political participation of person with disabilities according to Article 32 CRPD. Specifically, the purpose of monitoring is to evaluate the inclusion of person with disabilities, monitoring the whole process of election that contains of information from media about election campaign; registration process; the result of voting; problem such as violence and pressure; and access to election process.⁷³ It is also important to give training agenda and technical direction for electoral officer, national monitoring body, political parties and reporter to address the issue regarding access to election. Furthermore, embracing disability, NGO also has to take into account.⁷⁴

Rights to be Elected

CRPD obliges countries to provide actions such as employing assistive tools and technology to facilitate person with disability stand for election.⁷⁵ This rights include both of negative and positive requirements from states to person with disabilities.⁷⁶ The positive requirement is guarantee person with disabilities are able to stand for election as other people, in embodying this obligation states must provide reasonable accommodation based on Article 2.⁷⁷ Meanwhile, for negative requirement, states shall refrain to take action that will create difficulty for person with disabilities to stand for election.⁷⁸ For instance, in Uganda, the government provide quota seat system for person with disabilities in Parliament and provide fund for hiring individual assistants and sign language interpreter for elected person with disabilities.⁷⁹

Considering the right to stand for election, in several states they still associate it with the legal capacity of person with disabilities even if the person has

the rights to vote but it does not necessarily mean the person also have rights to be elected.⁸⁰ This condition occurs in France.⁸¹ Clearly, article 12 address that person with disabilities possess legal capacity like other people and this provision does not mention any exclusion for type of disabilities.⁸² Prohibit person with disabilities to stand for election because they do not have legal capacity due to their mental or psychological disabilities is breach the Article 12 of CRPD.⁸³ Furthermore, states shall provide access to assert their legal capacity.⁸⁴ Thus, there should be no constraint to exercise right to stand for election for person with disabilities, the application of this regulation only exist in a few states such as United Kingdom.⁸⁵

Rights to Participate in Public and Political Affairs

The existence of civil society organizations support fresh model of political participation and accelerate the movement of person with disabilities.⁸⁶ The main factor of disability movement is the perception that disability issues are commonly seen as private issue, however, in fact this private issue occurred due to society make them disabled and the political environment.⁸⁷ Thus, this issue has to be fixed by public action.⁸⁸

The inclusion of disability organization and person with disability in decision-making influence the creation of CRPD, it describes the motto of disability movement 'nothing about us without us'.⁸⁹ Another example, an American woman who used wheelchair before Americans with Disabilities Act (ADA) discovered there was nothing accessible fitting room existed in shopping store, and she was ordered to bring the clothes to home and try them in her home, later she started to campaign to demand all department stores to provide accessible fitting rooms.⁹⁰

Rights to Political Participation Interpreted by UN Committee on the Rights of Person with Disabilities

Issues regarding the rights to vote for person with intellectual disabilities is a significant problem among state parties. The committee finally bring clear interpretation in the case of Budjoso v Hungary⁹¹ case. Moreover, it is necessary to understand the Kiss v Hungary⁹² case first as this case is being referred by Budjoso v Hungary case.

The case of Kiss v Hungary which was brought to European Court of Human Rights (ECtHR).⁹³ At that time, Hungary argued that country must had a broad freedom of appreciation in organizing election.⁹⁴ ECtHR refuse Hungary's argument based on the regulation under European Convention on Human Rights that person with mental disabilities are considered as a particularly susceptible people and the limitation for their rights is justifiable through highly weighty reasons.⁹⁵ Furthermore, there were big portion of Hungarian people of voting age with guardianship and this action affected them.⁹⁶ Subsequently, Hungary was not

qualified to a wide liberty of appreciation in regulating election⁹⁷ and Kiss did not have rights to vote because the limitation of rights for people under guardianship.⁹⁸

The case of Kiss has advocated CRPD to take concern about guardianship issue⁹⁹ and increase the requirement for the implementation of the rights of person with disabilities outside Europe through supporting the CRPD's requirement of fair access to voting rights.¹⁰⁰

Later, in the case of *Budjoso v Hungary*, there were six people who had intellectual disability and under guardianship, subsequently because they were under guardianship, their names were abolished from electoral register.¹⁰¹ Thus, they did not have rights to vote because the limitation on their legal capacity, then they were blocked to participate in Hungarian election on 2010.¹⁰²

The commission considers Article 29 of CRPD obliges countries to guarantee that person with disabilities are capable of participating in public and political life like others people, including ensuring their voting rights.¹⁰³ Furthermore, article 29 does not restrict any type of person with disabilities, thus, the exception of voting rights according to the type of person with disabilities such as psychosocial or intellectual disabilities and the limitation according to an individual judgement, create discrimination on the basis of disability under Article 2 CRPD.¹⁰⁴ Restriction of the voting rights from person with intellectual or psychosocial disabilities due the deprived of their legal capacity as happening in Spain; and authorizing court to disenfranchise person with intellectual disabilities are violating article 29 of CRPD.¹⁰⁵

In addition, the committee also consider article 12 (2) of CRPD that states shall acknowledge and reinforce the legal capacity of person with disability in the same way like other people, including right to vote.¹⁰⁶ Furthermore, countries are obliged to take action to ensure person with disabilities can enjoy their legal capacity.¹⁰⁷ Disenfranchise person based on their intellectual disability clearly violate article 29 in the relation of Article 12.¹⁰⁸

The finding in this case is really important¹⁰⁹, it is clear that this finding attempts to abolish medical model perception of disability and implement right-based concept.¹¹⁰ Moreover, the committee address the trend from the concluding observation from countries parties, which mostly the reports demonstrate the exclusion of person with intellectual disability from voting and stand for election.¹¹¹ Thus, the committee presented a guidance to countries in understanding and interpretation the obligation under article 29.¹¹² The guidance includes states shall not provide limitation in executing voting rights but states shall provide access to person with disabilities and assistance if it is necessary.¹¹³ Implementing those obligations will assert that person with disability (including person with intellectual disability) can enjoy their rights to vote on the equal basis with other.¹¹⁴

Later, on 2014, the Committee produced General Comment for Article 12 and also emphasized that the denial of legal capacity for certain person with disabilities has been a reason to reject the political participation.¹¹⁵ The ability for

person to make decision shall not be a justification for the restriction of person with disabilities to participate in political affairs.¹¹⁶ Furthermore, states shall take any action to ensure the political rights of person with disabilities.¹¹⁷

To sum up, the obligation to fulfil the political rights of person with disabilities under CRPD involve not only obligation under Article 29 but also obligation under other articles that support the implementation of Article 29. It obliges to provide all appropriate measures to ensure the rights to vote, stand for election and participate in public and political affairs. The stakeholders to guarantee political rights not only come from states but also political parties, electoral official and NGO. When the issue regarding voting rights of person with intellectual disability emerges, the Committee plays important role to give clear understanding and interpretation through the case of *Budjoso v Hungary* and General Comment No. 1.

Implementation Failure of CRPD

There are 2 common and 1 significant failures that writer found regarding the implementation of political participation under CRPD. First; The exclusion of person with intellectual disabilities. Second; Accessibility. Third; Lack of Social Support.

1. The Exclusion of Person with Intellectual Disabilities

Mostly in several state parties of CRPD the main failure is the exclusion of person with mental or intellectual disability. States restrict the rights to vote and stand for election for person with mental or intellectual person with disabilities due to the perception that they are ‘unsound mind’ which means they are not capable to understand the importance and the nature of voting and enrolment.¹¹⁸ Thus, they do not possess legal capacity to participate in election¹¹⁹. It can be seen that the state’s national law adopts that perception. Furthermore, the national law of states parties usually do not conform with the provision of Article 29 CRPD.

According to International Disability Alliance (IDA)¹²⁰, states such as Ethiopia, China and Thailand have national regulations that restrict person with mental disabilities to vote. While in Spain, the legislation need a judge to decide whether a person with disabilities can have their rights to vote.¹²¹ Similar situation also happen in Hungary, the constitution of Hungary stated that people who disenfranchised by court because of their mental capacity must not possess right to vote even if the constitution of Hungary promote equal rights to all people without any distinction.¹²² There is interesting fact the writer found in Australia regarding the person with mental disabilities. When A Green Paper failed to put Article 29 of CRPD on electoral forum, there were 4,812 people were eliminated from voter list by objection based on unsoundness mind.¹²³ Surprisingly, the objection was made by family to avoid penalties for not re-registering person with mental disabilities.¹²⁴

It implies, family can hamper the fulfilment of political rights for person with disabilities.

To prevent this restriction, the Committee in Ethiopia¹²⁵ and China Concluding Observation¹²⁶ and Disability Council International Shadow Report to Thailand¹²⁷ recommend states to revised and removed the restriction of political rights of person with mental or intellectual disabilities.

2. Accessibility

Accessibility is highly important to ensure the political rights of person with disabilities. Common problem with accessibility is the lack of access to material and access in polling station. That happen due to lack of budget in providing accessible facilities to person with disabilities¹²⁸ particularly in developing countries. Besides that, less standard and guidelines of accessible information to fit the needs of person with disability also become the reason.¹²⁹

For instance, In Uganda, according to concluding observation, the Committee recommend to provide financial support to disabilities organization to assist the election process.¹³⁰ It implies ‘budget’ is one of the determine aspect to provide accessible facilities. Furthermore, in Concluding Observation of Brazil and Thailand, the Committee found that the voting procedures information is not provided on accessible formats.¹³¹ The findings from the Committee implies that there are few countries that do not regulate the standard information on accessible formats, this condition will lead to the lack of understanding of person with disabilities regarding their political rights.

To solve the lack of budget for providing facilities, it needs international cooperation¹³² such as AusAID provide funding to Indonesia, Philippines and Papua New Guinea to provide accessible election.¹³³ Meanwhile for accessible standard information, it can be learned from European Countries such as the regulation to provide information in web format shall meet the standard of Web Content Accessibility Guidelines (WCAG).¹³⁴

3. Lack of Social Support and Awareness

Lack of support is significant restriction for person with disability to enjoy their political rights.¹³⁵ According to General Election Network for Disability Access (AGENDA), in the developing states such as Cambodia and Indonesia, there is a perception of person with disabilities that their political aspiration is the responsibility of their family.¹³⁶ Subsequently, when they need assistance to enjoy their voting rights, the assistance must be from their family.¹³⁷ Unfortunately, even their family are not aware that person with disabilities possess political rights on equal basis like other people.¹³⁸ Furthermore, there is belief that exist in society that the voices of person with disabilities are not important, thus, the society do not require to encourage the person with disabilities to exercise their voting rights.¹³⁹

In general, family has the closest relationship for all people including person with disabilities. It will be difficult obviously for person with disabilities to obtain information about election and to exercise their political rights when their family even do not know that they are entitled to political rights. To encounter this problem, media and NGO have to provide information not only to person with disabilities but more important to the family regarding political participation of person with disabilities.

To sum up, the implementation of CRPD still encounter several problems and the reason behind is the national law, fund and family.

Conclusion

In ensuring the political rights of person with disabilities, CRPD requires states a 'complex' obligation. States must ensure person with disabilities have accessible facilities from the registration process until the vote counting. The obligation not only under article 29 but also under other article in CRPD that support the fulfilment of political rights for person with disability. In addition, The Committee on the Rights of Persons with Disability itself through case of Budjoso v Hungary and General Comment No.1 for Article 12 clearly oblige states for not to restrict political participation for person with intellectual disability. Unfortunately, states cannot fully implement all the obligation that has been set out in CRPD and interpreted by the Committee, it can be seen by some mistakes states did in the fulfilment of political rights of person with disability, for instance, the failure in restriction rights of certain disabilities, the failure in providing exhaustive access and the failure in giving awareness. It indicates that states practices, in reality, cannot fully undertake the obligation. Then at the end, the state practices have not been conformed with Article 29 CRPD.***

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