

**EVERY VOTE COUNTS!**

**THE POLITICAL PARTICIPATION OF PEOPLE WITH MENTAL OR  
INTELLECTUAL DISABILITIES IN THE UNITED KINGDOM AND IN  
HUNGARY IN LIGHT OF THE INTERNATIONAL OBLIGATIONS**

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## Abstract

The right to vote is a fundamental human right and “the most powerful non-violent tool we have in a democratic society.”<sup>1</sup> Although the right to vote is guaranteed for everyone in the core, international human rights treaties, including the United Nations Convention on the Rights of Persons with Disabilities (hereinafter: CRPD), most democratic States impose general or assessment-based legal restrictions in their domestic legislations on the right to vote for people with mental and intellectual disabilities. One comprehensive study, revealed that 89 percent<sup>2</sup> of the countries studied worldwide disenfranchise people with mental and intellectual disabilities.

On the one hand, one of the justifications for limitations is that the denying of the right to vote for this group of people aims to ensure an educated and well-informed electorate, as people with mental and intellectual disabilities lack the capacity to exercise their right to vote properly and competently; on the other hand it is also a common doubt that due to their mental incompetence they cast their vote irrationally. They could also far more easily be manipulated compared to the general population, therefore their votes could be misappropriated.

In line but at the same time partly contrary to the European Court of Human Rights’ conclusion that “indiscriminate removal of voting rights, without an individualized judicial evaluation...cannot be considered compatible with the legitimate grounds for restricting the right to vote”<sup>3</sup>, the findings of the thesis argues that the right to vote should be ensured for people with

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<sup>1</sup> Ari Berman: John Lewis’s Fight for Voting Rights, *The Nation*, 24 (June 24/July 1, 2013) available at <https://www.thenation.com/article/john-lewiss-long-fight-voting-rights/> (last visited: Nov. 25, 2016)

<sup>2</sup> Dinesh Bhugra et al. (2016), *Mental illness and the right to vote: a review of legislation across the world*, *International Review of Psychiatry*, 28:4, 395, 396 DOI: 10.1080/09540261.2016.121 1096

<sup>3</sup> *Alajos Kiss v Hungary* App no 38832/06 (ECHR, 20 May 2010) para 44

mental or intellectual disabilities too on a general and equal footing without assessment procedures and provides evidence that the “ability to voting” as such could not be precisely described and due to the discriminatory nature of voting competences tests, it must not be assessed.

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## Introduction

The right to vote as a fundamental human right directly allows citizens in a democratic state to exercise political power and popular sovereignty directly or through elected representatives. Therefore it “play[s] a crucial role in the promotion of democratic governance, the rule of law, social inclusion and economic development, as well as in the advancement of all human rights.”<sup>4</sup> Moreover, political participation could contribute to the reduction of the discrimination of marginalized groups and also closely linked to the exercise of other fundamental human rights such as equality before the law, the rights to association and assembly or the freedom of thought and expression.

Legal guarantees for the exercise of equal and universal political participation are ensured in international human rights treaties. First, the Universal Declaration of Human Rights (hereinafter: UDHR) proclaims “equal and universal suffrage”<sup>5</sup>, likewise, the International Covenant on Civil and Political Rights (hereinafter: ICCPR) enacts that “every citizen shall have the right and the opportunity” [to vote] without unreasonable restrictions.”<sup>6</sup> Second, Article 29 of the Convention on the Rights of Persons with Disabilities<sup>7</sup> (hereinafter: CRPD) expressly guarantees the equality of political rights, including the right to vote and stand for elections for people with any kinds of disabilities<sup>8</sup>. Apart from these treaties, a series of other international human rights instruments also contain different guarantees for equal political

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<sup>4</sup> UN Human Rights Council, General Assembly, *Factors that impede equal political participation and steps to overcome those challenges*, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc A/HRC/27/29, (30 June 2014), [I.2.]

<sup>5</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), Art. 21 (Dec. 10, 1948) (hereinafter: UDHR)

<sup>6</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/ 6316, art. 25 (Dec. 16, 1966) (hereinafter: ICCPR)

<sup>7</sup> Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/ 106 (Dec. 13, 2006) (hereinafter: CRPD)

<sup>8</sup> *ibid* art. 29

rights.<sup>9</sup> Moreover, the Committee on the Rights of Persons with Disabilities (hereinafter: CRPD Committee), further reiterated in its jurisprudence that a “person’s decision-making ability cannot be considered as a legitimate ground for any limitations on the right to vote”,<sup>10</sup> and in addition to this, it underlined that „exclusion of the right to vote on the basis of a perceived or actual psychosocial or intellectual disability including a restriction pursuant to an individualized assessment, constitutes discrimination on the basis of disability.”<sup>11</sup>

However, most democratic countries party to the CRPD and other international human rights treaties, either limit or deny the right to political participation for people with mental or intellectual disabilities. With respect to the right to vote in countries around the world, it appears that the vast majority of them “have some kind of restriction.”<sup>12</sup> As highlighted by the European Union Agency for Fundamental Rights (hereinafter: FRA), in the EU “the right to vote is often linked in national legislation to legal capacity.”<sup>13</sup> As a consequence, the majority of EU Member States prohibit people with mental or intellectual disabilities from voting.<sup>14</sup> Some of them ensure the right to equal voting for people with disabilities<sup>15</sup>, while for example

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<sup>9</sup>The International Convention on the Elimination of All Forms of Racial Discrimination (art. 5 (c)); The Convention on the Elimination of All Forms of Discrimination Against Women (arts. 7 and 8); The Convention on the Rights of the Child (art. 15); The International Convention on the Protection of All Migrant Workers and Members of Their Families (arts. 41 and 42); the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (art. 2 (2)); the United Nations Declaration on the Rights of Indigenous Peoples (arts. 5 and 18); Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (art. 3), the American Convention on Human Rights (art. 23) and the African Charter on Human and Peoples’ Rights (art. 13).

<sup>10</sup>UN Committee on the Rights of Persons with Disabilities, *General Comment No. 1.*, UN Doc CRPD/C/GC/1, (19 May 2014), para 48

<sup>11</sup> UN Committee on the Rights of Persons with Disabilities, *Communication No 4/2011*, UN Doc CRPD/C/10/D/4/2011, [9.4], (16 October 2013)

<sup>12</sup>Andre Blais et al., *Deciding who has the right to vote: a comparative analysis of election laws*, Electoral Studies, 51 (2001)

<sup>13</sup>European Union Agency for Fundamental Rights, *The right to political participation for persons with disabilities: human rights indicators*, 39 (2014)

<sup>14</sup>The Member States are Belgium, Bulgaria, Cyprus, Denmark, Estonia, Germany, Greece, Ireland, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania and Slovakia. Ibid, 40

<sup>15</sup>The Members States are Austria, Croatia, Italy, Latvia, the Netherlands, Sweden and the United Kingdom. ibid, 40

Hungary and Slovenia have a system based on individual assessments testing the individual's ability to vote.<sup>16</sup>

In 2010, the European Court of Human Rights (hereinafter: ECtHR) in its landmark decision, *Alajos Kiss v Hungary*<sup>17</sup> concluded that an absolute ban on voting by any person under guardianship cannot be considered legitimate and “the treatment as a single class of those with intellectual or mental disabilities is a questionable classification.”<sup>18</sup> Nevertheless, even in countries, such as in the UK, where no legal restrictions are imposed on the voting rights of people with mental or intellectual disabilities, often the existing administrative and institutional barriers, such as the lack of accessible information or the behavior of the polling staff, exclude people with mental disabilities from democratic processes.

Chapter 1 aims to put the topic in a wider theoretical context and provide the foundation to the following in-depth legal analysis in Chapter 2. The first section of Chapter 1 shortly introduces the importance of the disability movement in the struggle for the rights of people with disabilities, first and foremost by the evolution of the human rights model of disability, then the second and third sections of Chapter 1 tries to find the answer to the question on why and on what legal basis countries in the world disenfranchise people with mental or intellectual disabilities. To summarize the findings in the second section of Chapter 1, the last section compiles the possible justifications for the disenfranchisement and explores research outcomes that may confute these explanations.

The three sections of Chapter 2 provides a thorough analysis of the normative content of the international, the Hungarian and the UK legislation and jurisprudence. By the adoption of the CRPD, the analysis of the international legal framework is beyond any doubt indispensable

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<sup>16</sup>ibid, 41

<sup>17</sup>supra note 3

<sup>18</sup>supra note 3, para 44



and inevitable. In light of the international legal requirements, the second chapter examines the domestic legislation in Hungary where the restriction is based on judicial consideration assessed on a case-by-case basis. This section on Hungary also covers the analysis of the groundbreaking decision of *Alajos Kiss v. Hungary*<sup>19</sup> in studying the Hungarian legal evolution from automatic disenfranchisement to individual based assessments.

The last section of Chapter 2, and in contrast to the disenfranchisement and individual assessments explored in the previous section, presents an example and provides thorough analysis of the legislation in the UK as one of the few countries in the world that does not place any legal restrictions on the right to vote for people with mental or intellectual disabilities.

Finally, before drawing the final conclusions, Chapter 3 continues with the critical analysis of the domestic legislations and practices summarized in the previous Chapter and similarly to Chapter 2, it conducts its study in light of the international legal obligations. The last Chapter raises the issue of access to voting and explores all the barriers people with mental disabilities may face beyond legal restrictions first in general and then in the case of the UK. In the case of Hungary, the last Chapter strives to highlight the implications and possible dysfunctions of the individual assessments procedures.

As to the research methodology, the thesis is primarily based on comprehensive critical document analysis including relevant legal regulations, country reports and research outcomes. It is important to note that the research is entirely conducted along the principles of the human rights model of disability, taking the paradigm shift into account that substitute decision-making regimes should be moved to supported decision-making systems. In line with the human rights model, people with disabilities are entitled to have and enjoy their rights on an equal basis with others. The human rights model of disability was first referred to by Theresia

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<sup>19</sup> *supra* note 3

Degener and Gerard Quinn in 1999/2000.<sup>20</sup> As Degener cites in her article entitled “A Human Rights Model of Disability” the bottom line of this approach is that it “focuses on the inherent dignity of the human being and subsequently but only if necessary, on the person’s medical characteristics [and] [i]t places the individual centre stage in all decisions affecting him/her, most importantly, locates the main “problem” outside the person and in society.”<sup>21</sup>

Therefore the core element of this approach on the one hand, is the destruction of all past stigmas against people with disabilities and on the other hand, the shift from absolute protection to assistance in exercising their rights. In accordance with the definition and approach of the CRPD,<sup>22</sup> the notion of “people with mental or intellectual disabilities” will be used throughout the whole thesis. The broad term is used to describe and cover all people with mental, or psychosocial, intellectual disabilities or autism or any other disabilities that could affect the person’s mental or intellectual abilities. Mental or intellectual disabilities could occur alone or as part of a multiple disabled status. Due to their mental status the majority of these people may be affected by placement under guardianship or any other measure limiting their legal capacity and consequently by disenfranchisement.

It is also worth mentioning at the outset, that one billion people around the world live with some form of disability, making up around 15% of the global population as the world’s largest minority group.<sup>23</sup> Approximately 1-3 percent of the global population has an intellectual

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<sup>20</sup> Degener and Quinn: *A Survey of International, Comparative and Regional Disability Law Reform in M.L. Breslin and S. Yee (eds), Disability Rights Law and Policy*, 13 (2002) as cited by Theresia Degener: *A human rights model of disability*, 5 (2014), available at: [http://www.academia.edu/18181994/A\\_human\\_rights\\_model\\_of\\_disability](http://www.academia.edu/18181994/A_human_rights_model_of_disability) (last visited: Nov. 24, 2016)

<sup>21</sup> G. Quinn and T. Degener: *Human Rights and Disability*, 14 (2002) as cited by Theresia Degener: *A Human Rights Model of Disability*, 6 (2014) available at: [http://www.academia.edu/18181994/A\\_human\\_rights\\_model\\_of\\_disability](http://www.academia.edu/18181994/A_human_rights_model_of_disability) (last visited: Nov. 24, 2016)

<sup>22</sup> CRPD, art. 1, “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” The notion of psychosocial disability is also often used to describe people with mental disabilities. In case if the original text uses this definition, it is left and cited unchanged in the thesis.

<sup>23</sup> World Health Organization, The world Bank, *World Report on Disability*, Preface, xi, (2011), available at: [http://www.who.int/disabilities/world\\_report/2011/en/](http://www.who.int/disabilities/world_report/2011/en/) (last visited: Nov. 24, 2016)

disability, as many as 200 million people<sup>24</sup> and around 450 million people has some form of mental health problems.<sup>25</sup>

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<sup>24</sup> What is intellectual disability? *available at:*  
[http://www.specialolympics.org/Sections/Who\\_We\\_Are/What\\_Is\\_Intellectual\\_Disability.aspx](http://www.specialolympics.org/Sections/Who_We_Are/What_Is_Intellectual_Disability.aspx) (last visited: Nov. 24, 2016)

<sup>25</sup> Press release, Mental disorders affect one in four people, Treatment available but not being used, *available at:*  
[http://www.who.int/whr/2001/media\\_centre/press\\_release/en/](http://www.who.int/whr/2001/media_centre/press_release/en/) (last visited: Nov. 24, 2016)

## Chapter 1 - Disability, legal capacity and the right to vote

### 1.1. The struggle for universal suffrage but not for people with mental and intellectual disabilities

Although in the 20th century, significant efforts have been made towards universal and equal enfranchisement as a consequence of which voting restrictions associated with class, sex and race have systematically been eradicated, addressing and promoting the equal voting rights of people with mental and intellectual disabilities is only a recent but massive development.

Disability in and of itself has become a human rights issue in the last four decades.<sup>26</sup> The perception of disability has gone through a radical paradigm shift, which has placed the rejection of the belief that disability is a medical problem in its center of attention and has viewed any kind of disability, including mental or intellectual disabilities as a human rights and equality issue. One of the main deficiencies of the medical model of disability that has become apparent as an impediment in the struggle for equal rights, is that it does not address the existing legal, physical, informational, institutional, including legal and attitudinal obstacles people with disabilities face within society in fulfilling their own potential. The medical model places the responsibility of handling this complex situation entirely on people with disabilities and locate the “problem” within the individual.

Alongside these underlying principles, self-organizations of people with disabilities from the 1970s started to raise the issue of disability from a human rights perspective on the North

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<sup>26</sup> Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?*, 34 Syracuse J. Int'l L. & Com. 563, 572 (2006-2007), Dr. Halmos Szilvia, *A fogyatékoság orvosi és társadalmi modelljének szintézise, különösen a munkajog területén*, 17, Doktori értekezés, Pázmány Péter Katolikus Egyetem Jog-és Államtudományi Kar, Doktori Iskola, Budapest (2016) available at: [https://jak.ppke.hu/uploads/articles/12332/file/Dolgozat\\_Halmos\\_2016jan11.pdf](https://jak.ppke.hu/uploads/articles/12332/file/Dolgozat_Halmos_2016jan11.pdf) (last visited: 24 November 2016)

American continent and in the Western European countries, mainly in Germany and in the UK. As a consequence of these movements a new paradigm started to be evolving: namely the social model of disability, which started challenging the medical model of disability and its institutional background. The social model of disability “explains disability as a social construct”<sup>27</sup> and although acknowledges disability as an existing condition, understands it as a consequence of complex barriers. Instead of medical cure or rehabilitation, it pursues social change and the removal or correction of disabling social barriers.

In 2006, the CRPD, ratified currently by 167 States from the 193 UN Member States<sup>28</sup>, laid down the global foundation for the major shift in thinking about disability which has been welcomed by the worldwide disability movement as “the universal human rights standard for rights...[which] has taken precedence over previous instruments”<sup>29</sup> The CRPD recognizes disability as the result of “the interaction between persons with impairments and attitudinal and environmental barriers that hinders full and effective participation in society,”<sup>30</sup>

However, the CRPD even “goes beyond the social model of disability and codifies the human rights model of disability.”<sup>31</sup> It identifies people with disabilities as right-holders and subject of human rights and establishes its purpose to promote, protect and ensure the full and equal enjoyment of human rights and fundamental freedoms of all persons with disabilities.<sup>32</sup> The human rights model of disability places the individual’s human dignity in its centre and regards disability as a component of human diversity and not as a deviation from the normal population, thus not as a reason for exclusion and treatment as second-class citizens. Under this approach,

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<sup>27</sup> Theresia Degener, *A human rights model of disability*, 4, (2014), available at [http://www.academia.edu/18181994/A\\_human\\_rights\\_model\\_of\\_disability](http://www.academia.edu/18181994/A_human_rights_model_of_disability) (last visited: Nov. 24, 2016)

<sup>28</sup> Status of ratification available at <http://indicators.ohchr.org> (last visited: Nov. 25, 2016)

<sup>29</sup> Fiona Morrissey, *The United Nations Convention on the Rights of Persons with Disabilities: A New Approach to Decision-Making in Mental Health Law*, European Journal of Health Law 19 423-440, 424 (2012)

<sup>30</sup> CRPD, Preamble

<sup>31</sup> supra note 27, 4

<sup>32</sup> CRPD, art. 1

people with disabilities first and foremost are recognised as right-bearers who are entitled to have all civil and political as well as economic, social and cultural rights without any distinction. Consequently, their disability may not be used by legislators as an exception, cause or justification to deny any of their human rights on the basis of their disability. The human rights model of disability rejects not only the medical model but the charity approach too. The charity model perceives people with disabilities as members of society dependent on social welfare and pity of the “normal “ people due to their condition and provides legislation and policy accordingly, strengthening negative stereotypes towards people with disabilities.<sup>33</sup>

In the US, the disability movement “swept the nation in a similar fashion to the Civil Rights’ and Women’s Rights movement”<sup>34</sup> as one of the results of which the Americans with Disabilities Act of 1990<sup>35</sup> explicitly prohibits discrimination on the basis of disability within the state and local government, including voting.<sup>36</sup> However, studies conducted on the restrictions of the civil rights of people with mental or intellectual disabilities at the same time have revealed that “a clear trend towards increased restriction”<sup>37</sup> appear to be happening in the US.

On the basis of the examination of the statutory provisions of US States in relation to five civil rights (jury service, voting, holding public office, marriage and parenting), studies<sup>38</sup> have found

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<sup>33</sup> Janet E. Lord et al, *Human Rights. YES! Action and Advocacy on the Rights of Persons with Disabilities*, 22 available at: [http://hrlibrary.umn.edu/edumat/hreduseries/HR-YES/HR\\_YES\\_Full\\_2012.pdf](http://hrlibrary.umn.edu/edumat/hreduseries/HR-YES/HR_YES_Full_2012.pdf) (last visited: Nov. 24, 2016)

<sup>34</sup> ASHE Higher Education Report, *A Historical Overview of the Disability Movement*, Vol. 39 Issue 5, 13-29, 13 (2013)

<sup>35</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990)

<sup>36</sup> *ibid*, § 102 (a), § 2 (3)

<sup>37</sup> Craig Hemmens et al., *The consequences of official labels: An examination of the Rights Lost by the Mentally Ill and Mentally Incompetent Ten Years Later*, *Community Mental Health Journal*, Vol. 38., No. 2., 129-140, 131 (April, 2002)

<sup>38</sup> *ibid*, Andrea M. Walker et. al, *An Examination of the Rights Lost by the Mentally Ill and Mentally Incompetent since 1989*, *Community Ment Health J* (2016) 52:272-280, Patrick W. Corrigan et. al, *Structural Levels of Mental Illness, Stigma and Discrimination*, *Schizophrenia Bulletin* 2004 30(3): 481-491

that States are “fairly consistent”<sup>39</sup> in excluding people with mental disabilities from exercising their personal or political rights. Despite, “the trend towards restrictions appears to have slowed, it has not stopped, and it certainly does not appear to be reversing.”<sup>40</sup>

By 1999, neither of the restrictions that was in place in 1989 had been removed, moreover a total of 18 further restrictions had been added to the existing ones in ten years time. As of 2014, a total of 49 States restrict at least one of the five rights examined by the research.

As of the restrictions on voting rights in 2014, 42 States restricted the voting rights of people with mental disabilities, which means a 10% increase in the number of States with voting restrictions since 1989.

In 1989, a relatively lower number, 33 States restricted the right to vote but by 1999, this number has increased to 37 States. 4 out of the 17 States which did not restrict the right to vote in 1989 had restricted this right by 1999. From the 42 States from the 2014 data, 19 States completely deny the voting rights for people who are diagnosed with a mental illness, 17 restrict the right for those deemed “mentally incompetent” and 6 States disenfranchise both groups.”<sup>41</sup>

In the European Union, the adoption of the Amsterdam Treaty in 1997 made the breakthrough in legislation towards the social model of disability, as it incorporated a general anti-discrimination provision, including the prohibition of discrimination on the basis of disability, into the Treaty of the European Union.<sup>42</sup> These worldwide trends in the changing of legislations has started to shape the domestic laws of the Members States from the 1990s, however people

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<sup>39</sup> supra note 37, 137

<sup>40</sup> supra note 37, 279

<sup>41</sup> ibid, 277

<sup>42</sup> Dr. Halmos Szilvia, *A fogyatékoság orvosi és társadalmi modelljének szintézise, különösen a munkajog területén*, Doktori értekezés, 33, Pázmány Péter Katolikus Egyetem Jog-és Államtudományi Kar, Doktori Iskola, Budapest (2016) available at: [https://jak.ppke.hu/uploads/articles/12332/file/Dolgozat\\_Halmos\\_2016jan11.pdf](https://jak.ppke.hu/uploads/articles/12332/file/Dolgozat_Halmos_2016jan11.pdf) (last visited: 24 November 2016)

with mental or intellectual disabilities in Europe too, are subject to serious substantive restrictions in exercising their right to vote.

Obviously, the same trend has been identified examining the problem from the perspective of the UN Member States. The systematic analysis<sup>43</sup> of the Constitutions and domestic and electoral laws of all UN Members States found that only 11% of UN Members States placed no legal restrictions at all on the right to vote of people with mental or intellectual disabilities. Meanwhile, 36% of Member States automatically disenfranchise all persons with any mental health problems, yet in 77 countries a Court order is needed for the restriction.

Although, disability could not be the reason for the realization of basic human rights, as it is evident from these data massive restrictions exist around the world on the voting rights of people with mental or intellectual disabilities. The next section will describe in general the various approaches and legal justifications of these evident restrictions provided by domestic legislations. The arguments for and against these justifications will be explored in detail in the second chapter from the point of view of the international human rights obligations.

## **1.2 Mental vs legal capacity - The different approaches and legal justifications with respect to the right to vote for people with mental and intellectual disabilities**

Despite its distinct nature as a fundamental right and responsibility in a democracy and in spite of the existing national, regional and international anti-discrimination requirements<sup>44</sup>, as

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<sup>43</sup> Dinesh Bhugra et al., *Mental illness and the right to vote: a review of legislation across the world*, International Review of Psychiatry, 28:4, 395-399, (2016)

<sup>44</sup> See for example European Union Agency for Fundamental Rights, Handbook on European non-discrimination law (2010) available at [http://fra.europa.eu/sites/default/files/fra\\_uploads/1510-FRA-CASE-LAW-HANDBOOK\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf) (last visited: Nov. 24, 2016), Interights, *Non-discrimination in International Law, A Handbook for Practicioners* (2011) available at <http://www.interights.org/handbook/index.html> (last visited: Nov. 24, 2016)



studies have revealed, currently most countries restrict or deny the political participation of people with mental or intellectual disabilities around the globe. Anti-discrimination principles and provisions in general prohibit distinctions of the basis of race, color, sex, religion, disability, political or other opinion, national or social origin, property, birth or other status. However, restrictions on the other hand are permitted provided that they are established by law and based on objective and reasonable criteria.<sup>45</sup> On the other hand, in case of the restriction of a fundamental right a compelling and legitimate state interest or the protection of another fundamental right should be identified and the restriction must be necessary and proportionate.<sup>46</sup> As it was fairly straightforward from the data of the studies analyzed above, people with mental or intellectual disabilities are not deemed legally competent to vote and most States require a certain level of capability based on their mental capacity in order for them to vote.

The United Nations Human Rights Committee in 1996<sup>47</sup> also strengthened this view when it identified mental incapacity as an objective and reasonable criteria, thus a legitimate ground for disenfranchisement.

The Office of the United Nations High Commissioner for Human Rights' thematic study and report<sup>48</sup> highlighted that the legal basis for restricting voting rights „in many countries, [...] continues to be linked to the legal capacity of the individual.”<sup>49</sup> It is also important to note that

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<sup>45</sup> Roza Pati, *Rights and Their Limits, The Constitution for Europe in International and Comparative Legal Perspective*, 224, 232-238, Berkeley Journal of International Law, Volume 23, Issue 1, Article 7 (2005)

<sup>46</sup> *ibid*

<sup>47</sup> UN Human Rights Committee, *General Comment No 25 on Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* (27 August 1996), UN Doc CCPR/C/21/Rev.1/Add. 7, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.7&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.7&Lang=en) (last visited: Nov. 24, 2016)

<sup>48</sup> UN General Assembly, Human Rights Council, *Thematic study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities* (21 December 2011) UN Doc A/HRC/19/36 available at <http://www.ohchr.org/EN/Issues/Disability/Pages/ThematicStudies.aspx> (last visited: Nov., 24, 2016)

<sup>49</sup> *ibid* para 38

people with disabilities constitute the group whose legal capacity “is most commonly denied”<sup>50</sup> worldwide on the basis of their impaired mental capacity.

The presumed lack of capacity in is in general linked to the fact of the impairment of the mental status adjudged by the court<sup>51</sup> which is most commonly used to justify disenfranchisement. However, legal capacity is not identical to the mental capacity of the person. Legal capacity means the capacity to hold rights and at the same time the legal power to exercise those rights. On the other hand, mental capacity refers to the “decision-making skills of a person”<sup>52</sup> which is not a constant but a continuously changing category, varying from one person to another, even in the case of people with mental or intellectual disabilities and depending on numerous components such as environmental or social factors. Moreover, legal capacity is an “inherent right”<sup>53</sup> guaranteed by the legal obligations enshrined by the CRPD<sup>54</sup>, while mental capacity is an individual factor which may constantly alter even within the same person as it could not be described by objective or measurable criteria. Consequently, the restriction based on legal capacity is flawed for two key reasons: first, as it is based on the legal capacity of the person it is disproportionately affect people with mental or intellectual disabilities, thus raises the question of an automatic therefore discriminatory blanket ban. Second, due to the nature of decision-making skills, the objective and reasonable feature of the restriction may be questioned.

Currently, the following statuses could legitimately justify the disenfranchise of people with mental or intellectual disabilities: “insanity, weakness of mind, unsound mind, lunatic, mental

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<sup>50</sup> supra note 47, 2

<sup>51</sup> André Blais et al., *Deciding who has the right to vote: comparative analysis of election laws*, Electoral Studies 20, (2001) 41, 51 (2001)

<sup>52</sup> UN Committee on the Rights of Persons with Disabilities, *General Comment no 1, Article 12: Equal recognition before the law* para 13 UN Doc CRPD/C/GC/1, p 3 (19 May 2014)

<sup>53</sup> ibid para 14

<sup>54</sup> CRPD, art. 12, para 2 “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”

disability, mentally ill, psychiatric patient, certified insane, medically proven total mental incapacity, mental derangement, notoriously insane, mental incapacity, mentally incompetent, lost his mind, demented, seriously weakened mental state, mentally deficient, insane or imbecile, certified to be insane and mental ineptitude” or “non compos mentis.”<sup>55</sup> These obviously stigmatizing and outdated notions of mental capacity are definitely not in line with the previously described, human rights model of disability and the corresponding human rights laws. They inherently presuppose a negative stigma and do not take into account any other considerations, such as the lack of adequate support or paternalistic practices. Moreover as referred above mental capacity are not and may not be consistently and precisely defined by law and “may even differ from country to country.”<sup>56</sup>

Besides these automatic or quasi-automatic restrictions, limitations could also be prescribed by law on the basis of the outcome of an individual assessment either in the context of an exclusion or in the framework of a full participation policy approach. The assessments may vary on the basis of the fact whether it is conducted by a judge or a medical practitioner.<sup>57</sup> However, as it is referred above, the diagnosis of mental incapacity is usually based on standardized intelligence tests supplemented by clinical judgment of adaptive behavior.<sup>58</sup>

Practically, in most cases it means that the competence of the individual to vote depends on the fact whether their legal capacity is restricted or denied in any way. Although blanket

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<sup>55</sup> supra note 2, 396

<sup>56</sup> Martin Agran, Carolyn Hughes, “*You Can’t Vote - You’re Mentally Incompetent: Denying Democracy to People with Severe Disabilities*, Research and Practice for Persons with Severe Disabilities, Vol 38, No 1, 58, 59 (2013)

<sup>57</sup> European Union Agency for Fundamental Rights, *The right to political participation of persons with mental health problems and persons with intellectual disabilities*, 17, (2013) available at [http://fra.europa.eu/sites/default/files/fra-2010-report-vote-disability\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2010-report-vote-disability_en.pdf) (last visited: Nov. 24, 2016)

<sup>58</sup> Barbara B. Green and Nancy K. Klein *The Mentally Retarded & the Right to Vote*, Polity, Vol 13, No 2., 184, 198 (1980), American Association on Intellectual and Developmental Disabilities, *Frequently Asked Questions on Intellectual Disability* available at <https://aaidd.org/intellectual-disability/definition/faqs-on-intellectual-disability#.WA5-2OCLTIU> (last visited Nov. 24, 2016)

prohibitions are not allowed due to the international and domestic anti-discrimination requirements, States still disenfranchise people on the basis of an automatic restriction.

### **1.3 The arguments for and against disenfranchisement on the basis of mental or intellectual disability**

International human rights law and domestic legislations also, require States to justify any restrictions applied in relation to basic human rights. Although, the right to vote is a fundamental human right similarly to other highly valued, basic rights legal doctrines usually allow for the legislatures to have some discretion to reasonably restrict them for the sake of the various interests of the state (security, public health, peace etc.) or for the protection of the rights of others. However, a strict scrutiny must be applied and in no case may the essence of the basic right be infringed. Furthermore, the least restrictive measure must be applied in order to satisfy the proportionality test in connection with the limitation.<sup>59</sup>

One of the main reasons for disenfranchising certain groups of people throughout history has been the idea to preserve the intelligence therefore the legitimacy of the electorate and exclude everyone from public affairs who were considered to lack competence or “stake in society.”<sup>60</sup>

The white, male property owner has been presumed for some time to have all the essential characteristics to participate in democratic processes and exercise meaningfully the protection and advancement of the democratic conception. For example in the US “African Americans,

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<sup>59</sup> Deborah S. James Yale Law Journal, *Voter Registration: A Restriction on the Fundamental Right to Vote*, 96 Yale L.J. 1615, 1617 (1987)

<sup>60</sup> Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787-1828*, 219, 220, Journal of the Early Republic, Vol. 33 Issue 2 (2013)

Native Americans, women, immigrants, and other people considered inferior”<sup>61</sup>, such as the illiterate were excluded from voting in the 19th and 20th century

However, despite the progressive extension of voting rights most people with intellectual disabilities are still excluded from voting on the same reasons: the legitimate aim for the denial of people with mental or intellectual disabilities from the right to vote for the sake of the protection of the integrity of the electoral system and the exclusion of any possible harm caused by an incapable voter.

This justification relies on the presumption that people with mental disabilities are “not morally fit to vote, cannot be trusted, or are insane”<sup>62</sup> and does not possess the ability of self-determination with respect to the laws.<sup>63</sup> Therefore, they as the member of this group lack the capacity to make informed choices and decisions as a consequence of which it is undoubtedly better for the integrity and legitimacy of the electoral process and the protection of democratic values if they are not allowed to vote.

These concepts and approaches are reflected by the works of leading theorists. Robert Dahl for example notes that “we must accept the need for a judgment on competence” and then states that a criterion for the electorate must include “all adult members” of the citizenry “except transients and persons proved to be mentally defective.”<sup>64</sup> He also argues that apart from people with mental disabilities young children do not have the adequate level of self-autonomy in order to exercise their voting rights. His views are also echoed in the comments

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<sup>61</sup> supra note 56, 59

<sup>62</sup> supra note 56, 59

<sup>63</sup> Linda Barclay, *Cognitive Impairment and the Right to Vote: A Strategic Approach*, Journal of Applied Philosophy, Vol. 30., No. 2., 146, 148 (2013)

<sup>64</sup> Kay Schriener et al. , *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 Berkeley J. Emp. & Lab. L. 437, 450 (2000)

of Henry Mayo, who describes the exclusion of “incarcerated criminals and the insane” as “uncontroversial”.<sup>65</sup>

If we accept the legitimacy of the electoral process on the basis of the rational voting practices as a justifiable reason to deny persons with mental or intellectual disabilities the right to vote, it may only be legally justifiable on equality measures, if “relevant difference between the average man and the mentally retarded in rationality or knowledge” could be shown. However, studies have revealed that ideally only “half of the eligible electorate has a coherent set of political attitudes”<sup>66</sup> in other words, similarly to people with mental or intellectual disabilities, half of the population eligible to vote do not possess the adequate competence to vote, if we regard voting as a rational process.

Several voting studies have found evidence to confute further the above cited arguments against equal voting. One study, has for example concluded that on the basis of the theory of a rational voter<sup>67</sup> mainly due to the inadequacy of information and the voters’ difficulties with abstract thinking “many [voters] lack the interest or background to differentiate between candidates or parties.”<sup>68</sup> Another striking example of voters rationality is the 1992 presidential campaign in the US, where “86 percent of the American people knew that George Bush’s dog’s name was Millie, but only 15 percent were aware that both he and Bill Clinton supported the death penalty.”<sup>69</sup>

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<sup>65</sup> *ibid*

<sup>66</sup> *supra* note 58, 189

<sup>67</sup> A rational voter is someone who is aware of the issue at stake, has some sense of its importance and has an opinion about it, added that he or she realizes that the parties will handle it differently. *see* Angus Campbell et al., *The American Voter* (New York: Wiley, 1960) 170-171 as cited by Barbara B. Green and Nancy K. Klein *The Mentally Retarded & the Right to Vote*, *Polity*, Vol 13, No 2., 184, 188 (1980)

<sup>68</sup> *supra* note 58, 189

<sup>69</sup> Paul S. Appelbaum, M.D., “*I Vote. I Count*”: *Mental Disability and the Right to Vote*, *Law and Psychiatry*, Vol. 51., No. 7, 849, 850 (2000)

On the other hand, such as the rationality of the average voter, the incompetency of people with mental disabilities is not as unequivocal as it seems to be. First, people with mental or intellectual disabilities does not constitute a homogenous groups, on the one hand because it includes people with a various kinds of mental or intellectual disabilities, on the other hand because similarly to non-disabled people, each and every one of them has different skills as their intellectual functioning, adaptive behaviour, including conceptual, social and practical skills varies greatly. Moreover, in defining and assessing disability different other factors such as community environment or cultural differences should also be taken into consideration.<sup>70</sup> Consequently, it is impossible and misleading to make a general statement to determine their legal status on the fact of belonging to the same group.

Second, studies have also showed that voters with mental or intellectual disabilities who had not have any previous education on voting “had acquired a knowledge at the level of white middle-class fifth graders”<sup>71</sup> and some of them achieved better results on the test “than a group of college freshmen of similar social and economic status.”<sup>72</sup> Other empirical evidence also suggests that both people with mental or intellectual disabilities and college freshmen have “a well-developed interest in politics.”<sup>73</sup>

Besides political scientists, States often refer to the fact to justify limitations of the voting rights of people with mental or intellectual disabilities that the restriction pursues the same legitimate aim, as in case of children, namely that people with mental or intellectual disabilities are not

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<sup>70</sup> American Association on Intellectual and Developmental Disabilities, *Frequently asked questions*, available at <https://aaidd.org/intellectual-disability/definition/faqs-on-intellectual-disability#.WDdlEPnhDIV> (last visited: Nov. 24, 2016)

<sup>71</sup> *supra* note 58, 190

<sup>72</sup> *ibid*

<sup>73</sup> *ibid*, 192

capable of participating in public life either, due to the fact that “they are not capable of making conscious and judicious decisions”<sup>74</sup>

However, this argument is flawed by at least two reasons: first, people with mental or intellectual disabilities are not underage citizens, however most legislations deal with them accordingly and only restrict their capacity to act, when placed under guardianship. On the other hand, competency tests fail to fulfill their purpose in ensuring judicious decision-making in reference to voting, as IQ scores are not the prerequisite to voting. The Voting Rights Act in the US for example outlawed the application of literacy tests because of their discriminatory application as a consequence of which those people who are unable to read are also allowed to vote. Although the definition of mental disability has changed substantially recently, “IQ or similar standardized test scores should still be included in an individual’s assessment”<sup>75</sup> however similarly to literacy tests, they are not only discriminatory but do not prove political responsibility or “intelligent voting”<sup>76</sup> moreover are claimed to be an “unreliable measure of ability.”<sup>77</sup> These tests measure the competency on a given day and are developed to judge school performance. As we do not incarcerate a person on the basis of high scores on a probability test to commit a crime, it is also irrational to deprive people from a fundamental right on the basis of a competency test.<sup>78</sup> It is obvious from these measures that people with mental or intellectual disabilities are not treated as citizens but a lower category of people in society.

However, voting is not a reasonable or impartial process, thus it would be impossible to measure it with standardized testing. Voting is fundamentally based on personal values and

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<sup>74</sup> supra note 3, para 25

<sup>75</sup> American Psychiatric Publishing, *Intellectual Disability*, 2 available at <http://www.dsm5.org/documents/intellectual%20disability%20fact%20sheet.pdf> (last visited: Nov. 24, 2016)

<sup>76</sup> supra note 58, 198

<sup>77</sup> *ibid*, 191

<sup>78</sup> *ibid*



beliefs, family traditions or subjective impressions about the candidates and in case of most voters is not the outcome of a prudent research or a well-reasoned mechanism.

Therefore determining who are and are not able to vote with the help of literacy or IQ tests are not only discriminatory but cannot lead to the desired result.

Another common argument for the restriction of voting rights in pursue of the legitimate aim of the integrity of the electoral process is the idea that people with mental or intellectual disabilities could easily be manipulated, especially those living in large residential institutions due to their isolation, which highly increases the possibility of fraud and manipulated voting.

It is undoubtedly true that institutional life could have very strong negative effects on the residents' social skills as most of these institutions especially in Eastern Europe "are located in remote areas and residents have little to no contact with the outside world"<sup>79</sup> and the "[r]igid regime...takes no account of individual needs or preferences."<sup>80</sup> Consequently, isolation as an invoked risk factor in this context is not attributable to disability status rather the evidence of the controlled institutional lifestyles. Institutional care segregates residents from the broader community and care ethic in institutions is predominated by "paternalistic rather than interactive approach"<sup>81</sup> and service is largely based on the medical approach. Institutions could be best described by the following characteristics: "depersonalisation (removal of personal possessions, signs and symbols of individuality and humanity), rigidity of routine (fixed timetables for waking, eating and activity irrespective of personal preferences or needs), block

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<sup>79</sup> Open Society Foundations, *The European Union and the Right to Community Living, Structural Funds and the European Union's Obligations under the Convention on the Rights of Persons with Disabilities*, 21 (2012) available at <https://www.opensocietyfoundations.org/sites/default/files/europe-community-living-20120507.pdf> (last visited: Nov. 24, 2016)

<sup>80</sup> *ibid*

<sup>81</sup> European Commission, *Report of the Ad Hoc Expert Group on the Transition from Institutional to Community-based Care*, 9, (2009) available at <http://ec.europa.eu/social/main.jsp?langId=hu&catId=89&newsId=614&furtherNews=yes> (last visited: Nov. 24, 2016)

treatment (processing people in groups without privacy or individuality) and social distance (symbolising the different status of staff and residents).”<sup>82</sup> Size is not a definitive matter in this sense as a small living setting might also be characterised by the above factors.

Consequently, the residents do not have sufficient level of autonomy and control over their own lives and the passive behavior necessarily forced by the circumstances on them lead to a hopeless life. Due to the lack of meaningful activities and adequate personal care they do not have the chance to develop their skills and abilities which otherwise just deteriorate or stagnate. However, the restriction of one of their fundamental rights as a consequence of these circumstances and the lack of adequate community care and services could not be morally acceptable as legitimate and justified. Moreover, no empirical evidence exist on this issue<sup>83</sup> thus the assumed high probability of people with mental disabilities becoming victims of manipulation is not yet proved. The problem should be addressed in its complexity for example by the spread of supported living models which would also decrease the possible negative effects of institutional care and the responsibility should not be placed in people with mental or intellectual disabilities.

In sum, no empirical data or justification exist to treat people with mental or intellectual disabilities differently from the average voter and it is also highly misleading to treat them as a homogenous group who are unable to vote in general. Similarly to literacy tests, fitness tests substantially based on IQ scores are irrelevant in measuring 'voting capacity' as voting is not about deciding complex issues rather expressing political opinions.

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<sup>82</sup> *ibid*

<sup>83</sup> János Fiala-Butora et al., *The democratic life of the Union: The Democratic Life of the Union: Toward Equal Voting Participation for Europeans with Disabilities*, Volume 55, Number 1, 55 Harv. Int'l L.J. 71, 86 (2014)

## **Chapter - 2 The right to vote for people with mental and intellectual disabilities – The normative content and evolution of the legislations in the different jurisdictions**

### **2.1 The international legislative framework - The equal participation of people with mental and intellectual disabilities in political and public life on an equal basis with others**

While serious restrictions exist across the world in relation to the voting rights of people with mental or intellectual disabilities, international human rights obligations in general require States to ensure fundamental rights and freedoms for people with disabilities without distinction of any kind and on an equal basis with others.

The Universal Declaration of Human Rights (UDHR)<sup>84</sup> proclaims “universal and equal suffrage” and everyone’s right to take part in his or her own country’s government.<sup>85</sup> It guarantees that “all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Reading Article 21 in conjunction with the Declaration’s anti-discrimination clause<sup>86</sup> it could be affirmed that people with mental or intellectual disabilities are entitled to exercise their rights on an equal basis with others under the UDHR.

Article 25 of the ICCPR, reinforces the same requirements and strives to ensure universal and equal voting rights to every citizen. It stipulates that “every citizen shall have the right and the

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<sup>84</sup> Although the Declaration is not a legally binding document but without any doubt it is a milestone in the history of human rights. Its provisions are now have become part of the international customary law *see* <http://www.un.org/en/universal-declaration-human-rights/> (last visited: Nov. 24, 2016)

<sup>85</sup> UDHR, art. 21

<sup>86</sup> UDHR, art. 2

opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; to have access, on general terms of equality, to public service in his country.”

Likewise, in the UDHR Article 2 of the ICCPR stipulates that the rights compiled in the Covenant, must be respected and ensured to all individuals “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” There is clear evidence that other status incorporated disability too.

While, the Human Rights Committee’s General Comment on Non-discrimination issued in 1989<sup>87</sup> did not mention disability as a possible ground for discrimination, the General Comment of the UN Committee on Economic, Social and Cultural Rights<sup>88</sup> twenty years later expressly highlights disability as a protected ground under ‘other status’. The Committee first states that the list containing the notion of other status with respect to the non-discrimination obligations “indicates that this list is not exhaustive and other grounds may be incorporated in this category.”<sup>89</sup> Second, it requires a flexible approach in considering grounds for discrimination as “discrimination varies according to context and evolves over time.”<sup>90</sup> On the

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<sup>87</sup> UN Human Rights Committee, *General Comment No. 18: Non-discrimination* (1989) available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6622&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6622&Lang=en) (last visited: Nov. 24, 2016)

<sup>88</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20 on Non-discrimination in economic, social and cultural rights* UN Doc E/C.12/GC/20. (2009) available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en) (last visited: Nov. 24, 2016)

<sup>89</sup> *ibid* para 15

<sup>90</sup> *ibid* para 27

basis of these interpretative documents' analogical interpretation and the massive progress with respect to the rights of people with disabilities in the international arena, it could be concluded that 'other status' should include disability in relation to the ICCPR too.

However, Article 25 of the ICCPR explicitly states that reasonable restrictions are permitted under these provisions which on the other hand must be prescribed by law and "be based on objective and reasonable criteria." The UN Human Rights Committee's General Comment on political participation<sup>91</sup> also strengthened this view when held that "established mental incapacity may be a ground for denying a person the right to vote or to hold office."<sup>92</sup> However at the same time it also held that "it is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements."<sup>93</sup> In other words, the ICCPR in 1996 did not intend to grant the franchise for all people with disabilities.

However, with the paradigm shift introduced by the obligatory legal provisions of the CRPD, there is no legitimate justification to continue to restrict the rights of persons with mental or intellectual disabilities with reference to the ICCPR on the basis of 'mental incapacity.'

Several other sources confirm this approach. The Office of the United Nations High Commissioner for Human Rights (hereinafter: OHCHR) in its thematic study<sup>94</sup> on participation in political and public life by persons with disabilities, expressly refers to the CRPD and outlines that the CRPD "heralds a new era for the political participation of persons with

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<sup>91</sup> UN Human Rights Committee, *General Comment No 25 on Article 25, The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* (27 August 1996) CCPR/C/21/Rev.1/Add.7. available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F21%2FRev.1%2FAdd.7&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F21%2FRev.1%2FAdd.7&Lang=en) (last visited: Nov. 25, 2016)

<sup>92</sup> *ibid* para 4

<sup>93</sup> *ibid* para 10

<sup>94</sup> UN General Assembly, *Thematic study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities*, UN Doc A/HRC/19/36 (21 December 2011) available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/175/27/PDF/G1117527.pdf?OpenElement> (last visited: Nov. 24, 2016)

disabilities.”<sup>95</sup> The study concluded that “Article 29 [of the CRPD] requires States parties to guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others”<sup>96</sup> and “does not foresee any reasonable restriction, nor does it allow any exception.”<sup>97</sup>

As a consequence of this, the OHCHR recommends that “Article 25 of the International Covenant on Civil and Political Rights should be interpreted and applied taking into account the developments in the areas of human rights of persons with disabilities. The OHCHR also concluded that the “Human Rights Committee should consider reviewing its general comment No. 25 (1996)...so as to reflect the progressive evolution of international human rights law in this field.”<sup>98</sup>

Although the Human Rights Committee’s General Comment has not yet been reviewed, “the Committee has projected that it will examine more closely the right of persons with disabilities to political participation”<sup>99</sup> mainly through State reports and individual communications.<sup>100</sup>

For example, the Committee recommended to Argentina in 2010 to “take measures with a view to protecting the rights of these persons [users of mental health services] under the Covenant and to aligning its legislation and practice with international standards on the rights of persons with disabilities.”<sup>101</sup> Likewise in the case of Argentina, the Human Rights Committee requested

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<sup>95</sup> *ibid* para 68

<sup>96</sup> *ibid* para 29

<sup>97</sup> *ibid*

<sup>98</sup> *ibid* para 71

<sup>99</sup> Gábor Gombos, *Implications of the paradigm shift on the right of persons with disabilities to vote and stand for election* in IDA Human Rights Publication Series, Issue 1, 23 (2013) available at <http://www.ohchr.org/Documents/Issues/EqualParticipation/contributions/IDA.pdf> (last visited: Nov. 24, 2016)

<sup>100</sup> Gurbai Sándor, *A gondnokság alá helyezett személyek választójoga a nemzetközi jog, az európai regionális jog és a komparatív közjog tükrében*, Doktori értekezés, 20, Pázmány Péter Katolikus Egyetem Jog-és Államtudományi Doktori Iskola, Budapest (2014) available at [https://jak.ppke.hu/uploads/articles/12332/file/Gurbai\\_dolg\\_v\(1\).pdf](https://jak.ppke.hu/uploads/articles/12332/file/Gurbai_dolg_v(1).pdf) (last visited: Nov. 25, 2016)

<sup>101</sup> UN Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations by the Human Rights Committee, Argentina, [24] UN Doc CCPR/C/ARG/CO/4, (31 March 2010) available at

Belgium to “intensify its efforts to combat discrimination, further the integration of persons with disabilities into political, social and economic affairs and adopt measures to facilitate such persons’ access to the labour market.”<sup>102</sup>

More recently, in the case of Paraguay and Hong Kong for example the Committee formulated even more precise recommendations in relation to the requirements to ensure equal franchise for people with mental disabilities and explicitly referred to the UN CRPD and the State’s obligation to take Article 29 of the UN CRPD into account.

In case of Paraguay<sup>103</sup>, the Committee again expressly articulated that it was “concerned about the disproportionate restrictions on the right to vote of persons deprived of their liberty and persons with disabilities.”<sup>104</sup> As a recommendation it held that the State should revise its legislation in order to “ensure the elimination of discrimination exercised against persons with mental or psychosocial disabilities, and deaf mutes, through denial of their right to vote for reasons out of proportion or not reasonably or objectively related to their ability to vote, taking into account article 25 of the Covenant and article 29 of the Convention on the Rights of Persons with Disabilities.”<sup>105</sup>

More recently, the Committee in 2015 recommended to Hong Kong<sup>106</sup> to “revise its legislation to ensure that it does not discriminate against persons with mental, intellectual or psychosocial

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[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FARG%2FO%2F4&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FARG%2FO%2F4&Lang=en) (last visited: Nov. 25, 2016)

<sup>102</sup> UN Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations by the Human Rights Committee, Belgium, para 11 UN Doc CCPR/C/BEL/CO/5, (16 November 2010), *available at* [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/BEL/CO/5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/BEL/CO/5&Lang=en) (last visited: Nov. 25, 2016)

<sup>103</sup> UN Human Rights Committee, Concluding observations on the third periodic report of Paraguay, adopted by the Committee at its 107th session, para 11 (29 April 2013), UN Doc CCPR/C/PRY/CO/3 *available at* [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/PRY/CO/3&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/PRY/CO/3&Lang=en) (last visited: Nov. 25., 2016)

<sup>104</sup> *ibid*

<sup>105</sup> *ibid*

<sup>106</sup> UN Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session (29 April 2013) *available at*

disabilities by denying them the right to vote.”<sup>107</sup> The Committee once again stressed that “it was concerned about the disqualification from voting of all persons who are found to be incapable, by reason of their mental, intellectual or psychosocial disabilities of managing and administering their property and affairs”<sup>108</sup> and recommended that:

“Hong Kong should revise its legislation to ensure that it does not discriminate against persons with mental, intellectual or psychosocial disabilities by denying them the right to vote on bases that are disproportionate or that have no reasonable and objective relation to their ability to vote, taking account of article 25, of the Covenant and article 29 of the Convention on the Rights of Persons with Disabilities.”<sup>109</sup>

All in all, it could be concluded that the Committee has started to urge States to take not only the provisions of the ICCPR into consideration in relation to the realization of political rights but to bring their legislation and policies in line with the CRPD as well.

As to the CRPD, Article 29 requires from State Parties on the one hand to ensure political rights to people with disabilities on an equal basis with others and on the other the to guarantee accessible and full enjoyment of these rights by people with any kind of disabilities. Article 29 stipulates that State Parties shall guarantee the following:

“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.”

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[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/CHN-HKG/CO/3](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/CHN-HKG/CO/3)  
(last visited: Nov. 25, 2016)

<sup>107</sup> *ibid* para 24

<sup>108</sup> *ibid*

<sup>109</sup> *ibid*



Article 29 of the CRPD, read in conjunction with the general principle of full and effective participation and inclusion in society<sup>110</sup> and the definition of persons with disabilities<sup>111</sup>, specifically guarantees equal participation in political and public life for all people with disabilities irrespective of their disabled status. The article encompasses both the right to participation in political and public life and the obligation for States to guarantee the exercise of it on an equal basis with others. In order to ensure the enjoyment of equal political and public participation rights, State Parties shall ensure among other things, the access to voting and proper assistance, if necessary. Furthermore, State Parties have the duty to establish an enabling environment in which persons with disabilities could “fully participate in the conduct of public affairs”<sup>112</sup>, including the participation in the activities of political parties or organizations of persons with disabilities.

Apart from voting, States shall also ensure that people with disabilities can “effectively and fully participate in the conduction of public affairs”<sup>113</sup> by the possibility of participation in any non-governmental organizations or other association.

The CRPD Committee, in its Concluding Observations on the initial report of Tunisia<sup>114</sup>, the first country that was reviewed by it, held that the State should urgently adopt “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

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<sup>110</sup> CRPD, art. 3, c)

<sup>111</sup> *ibid*, art. 1

<sup>112</sup> *ibid*, art. 29. b.

<sup>113</sup> *ibid*

<sup>114</sup> UN Committee on the Rights of Persons with Disabilities, Consideration of reports submitted by States parties under article 35 of the Convention, *Concluding observations of the Committee on the Rights of Persons with Disabilities, Tunisia* UN Doc CRPD/C/TUN/CO/1 (13 May 2011) available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUN%2fCO%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUN%2fCO%2f1&Lang=en) (last visited: Nov. 25, 2016)

equal basis with others.”<sup>115</sup> The CRPD Committee thus undoubtedly highlighted that denying or restricting franchise to people with mental or intellectual disabilities could not legitimately be based on any kind of protective measures.

In its Concluding Observations on Spain<sup>116</sup>, the Committee reflected on the situation in Spain with concern and highlighted 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. It is further concerned that the deprivation of this right appears to be the rule and not the exception. The Committee recommended to the State party that: “all relevant legislation be reviewed to ensure that all persons with disabilities, regardless of their impairment, legal status or place of residence, have the right to vote and participate in public life on an equal basis with others.”<sup>117</sup> It called on Spain to review and amend the provisions which allow “the denial of the right to vote based on individualized decisions taken by a judge”<sup>118</sup> and recommended Spain to introduce reasonable accommodation measures that “all persons with disabilities who are elected to a public position are provided with all required support, including personal assistants”.<sup>119</sup>

The CRPD Committee’s first General Comment<sup>120</sup> on the right to equal recognition before the law further reiterates that “it is important to recognize the legal capacity of persons with

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<sup>115</sup> *ibid*, para 35

<sup>116</sup> UN Committee on the Rights of Persons with Disabilities, *Consideration of reports submitted by States parties under article 35 of the Convention, Concluding observations of the Committee on the Rights of Persons with Disabilities, Spain* UN Doc CRPD/C/ESP/CO/1, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fESP%2fCO%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fESP%2fCO%2f1&Lang=en) (last visited: Nov. 25, 2016)

<sup>117</sup> *ibid* para 48

<sup>118</sup> *ibid*

<sup>119</sup> *ibid*

<sup>120</sup> UN 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 General comment No. 1 (19 May 2014) Article 12: Equal recognition before the law available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en) (last visited: Nov. 25, 2016)

disabilities in public and political life [which] means that a person's decision-making ability cannot be a justification for any exclusion from exercising their political rights, including the right to vote, the right to stand for election and the right to serve as a member of a jury."<sup>121</sup> Bearing in mind that the "Convention affirms that all persons with disabilities have full legal capacity"<sup>122</sup> in all areas of life originating from the social and human rights model of disability, "States parties must refrain from denying persons with disabilities their legal capacity and must, rather, provide persons with disabilities access to the support necessary to enable them to make decisions that have legal effect."<sup>123</sup> Having said this, it could be concluded that the CRPD and the CRPD Committee undoubtedly oblige States to provide the right to vote for people with mental or intellectual disabilities too on an equal basis with others.

The above explained provisions are strengthened by the CRPD Committee's jurisprudence as well. The CRPD Committee has the competence "to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention"<sup>124</sup> from States having ratified not only the Convention but the Optional Protocol too. In the case of Bujdosó and five others<sup>125</sup> the Committee held that Hungary failed to eliminate discrimination on the basis of disability and to respect the right of people with disabilities to an equal right to vote due to the automatic disenfranchisement applicable at the time. Bujdosó case will be

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<sup>121</sup> *ibid* para 48

<sup>122</sup> *ibid* para 8

<sup>123</sup> *ibid* para 16

<sup>124</sup> UN General Assembly, Optional Protocol to the Convention on the Rights of Persons with Disabilities, art 1.1 A/RES/61/106, Annex II, (13 December 2006)

<sup>125</sup> UN Committee on the Rights of Persons with Disabilities, Communication No. 4/2011 UN Doc CRPD/C/10/D/4/2011 (16 October 2013)

discussed in detail in the next section, under the analysis of Hungarian legislation and its evolution in the context of international and regional legislation and jurisprudence.

While the CRPD and the CRPD Committee's recommendations expressly require States to ensure full and equal voting rights to people with mental or intellectual disabilities, other UN instruments and mechanism have not yet come to this clear conclusion. Although it could be concluded that a double standard exists within the UN system with respect to the interpretation of the right to vote of people with mental or intellectual disabilities, a growing trend could also be identified which in line with the CRPD favors the acceptance of equal voting rights for people with mental or intellectual disabilities and rejects restrictions based on their discriminatory nature.

## **2.2 From the automatic ban to the assessment-based approach – The domestic legislation in Hungary**

Hungary ratified the CRPD in 2007 when Act X of 1949, the former Constitution of Hungary automatically excluded from the suffrage all people placed under any kind of guardianship stating that “[t]he right to vote shall not be granted to persons who are under guardianship.”<sup>126</sup> However, on the one hand as a consequence of the ratification and on the other hand the decision of the European Court of Human Rights in *Alajos Kiss v. Hungary* case<sup>127</sup>, the current provisions of Hungary's Fundamental Law<sup>128</sup> together with the Elections Procedure Act<sup>129</sup>

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<sup>126</sup> 1949. év XX. törvény, a Magyar Köztársaság Alkotmánya *available at* in Hungarian <http://ki.oszk.hu/sites/ki.oszk.hu/files/dokumentumok/1949.pdf> (last visited: Nov 25., 2016)

<sup>127</sup> *Alajos Kiss v Hungary App no 38832/06* (ECHR, 20 May 2010)

<sup>128</sup> The Fundamental Law of Hungary (25 April 2011) *available at* <http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf> (last visited: Nov. 25, 2016)

<sup>129</sup> Act of XXXVI of 2013 on Electoral Procedure *available at* [http://valasztas.hu/en/ovi/241/241\\_1\\_10.html](http://valasztas.hu/en/ovi/241/241_1_10.html) (last visited: Nov. 25, 2016)

were amended in 2012. The previous automatic disenfranchisement were abandoned by these amendments.

Alajos Kiss the applicant in this case, was diagnosed with manic depression and was placed under partial guardianship, complained that his disenfranchisement as a consequence of his placement under guardianship involved a disproportionate and unjustified restriction of his right to vote and alleged the violation of Article 3 of Protocol No 1<sup>130</sup> of the ECHR, read alone or in conjunction with Articles 13 and Article 14.<sup>131</sup>

The Hungarian Government argued that States as part of general, historical practice enjoy a wide margin of appreciation in relation to the restriction of voting and cited that the restriction pursued the legitimate aim “that only citizens capable of assessing the consequences of their decisions, [and] capable of making conscious and judicious decisions”<sup>132</sup> should participate in the electorate. The possibility of the periodic reviews of the placement under guardianship as a potential means of restoration of the right to vote was another argument submitted by the Government.

The applicant accepted without any doubt the necessity of his placement under guardianship, however challenged the deprivation of his right to vote as an inevitable consequence of the decision of placing him under guardianship. The applicant argued that although the right to vote is not an absolute right, States do not enjoy a wide margin of appreciation but a narrow one because “any exclusion of people with disabilities from public life must be subject to

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<sup>130</sup> “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

<sup>131</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, (4 November 1950) art 13 Right to an effective remedy, “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity” and art 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.”

<sup>132</sup> supra note 126 para 25

scrutiny as to whether it was compatible with relevant international human rights requirements.”<sup>133</sup> However, on the basis of the applicant’s claim a link had not been established at all between the applicant’s mental capacity and capacity to vote before he had been placed under guardianship. The applicant also referred to the international trends in the disability field that “the decision-making capacity of people with intellectual or mental disabilities should be recognised as much as possible, especially in the field of the right to vote”<sup>134</sup> and agreed with the intervener<sup>135</sup> that the provisions of the ECHR must be interpreted under the obligations of the CRPD.

The Court first and foremost referred to its well-established case law<sup>136</sup> and held that “Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law.” Moreover the Court held that “the right to vote is not a privilege [because] [i]n the twenty-first century, the presumption in a democratic State must be in favour of inclusion.”<sup>137</sup> However, the Court reaffirmed that States have a wide margin of appreciation in this area but the restriction must pursue a legitimate aim and be proportional in effect. In other words the restriction must not deprive the right in question from its very essence and effectiveness.<sup>138</sup>

In assessing the legitimate aim of the restriction the Court accepted the Government’s argument with which the applicant also agreed and saw “no reason to hold otherwise”.<sup>139</sup>

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<sup>133</sup> *ibid* para 28

<sup>134</sup> *ibid* para 32

<sup>135</sup> *ibid* para 34

<sup>136</sup> *see* among others *Hirst v. the United Kingdom (no. 2)* App no. 74025/01 (ECHR 6 October 2005), *Mathieu Mohin and Clerfayt v. Belgium*, App no. 9267/81 (ECHR 2 March 1987), Series A no. 113 ECtHR No. 9267/81

<sup>137</sup> *ibid* para 59

<sup>138</sup> *ibid* para paras 24, 41, 42

<sup>139</sup> *ibid* para 38

In relation to the proportionality of the restriction, the Court first of all held that although it is legitimate to establish rules on the conditions of disenfranchisement “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”<sup>140</sup> the margin of appreciation is necessarily narrower. The Court stressed the importance of the rejection of restriction on the basis of group classifications, because groups such as people with mental disabilities had been affected by massive social prejudice and stereotyping resulting in their exclusion, therefore the “curtailment of their rights must be subject to strict scrutiny.”<sup>141</sup> The Court thus maintained that as people with mental disabilities constitutes a susceptible group “very weighty reasons”<sup>142</sup> must exist to limit their fundamental rights. The Court also highlighted the fact that in accordance with international law, people with mental disabilities must not be treated as a homogenous group and

As a final conclusion, the Court concluded “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”<sup>143</sup> therefore established the violation of Article 3 of Protocol No. 1 to the Convention.

One of the obvious significance of the groundbreaking decision in the *Alajos Kiss v. Hungary* case is that the Court declared automatic disenfranchisement contrary to the ECHR, also taking international human rights law and the CRPD into consideration in concluding its decision. As

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<sup>140</sup> *ibid* para 42

<sup>141</sup> *ibid* para 44

<sup>142</sup> *ibid* para 42

<sup>143</sup> *ibid* para 44

a result of this Hungary amended its laws and the ruling also “sparked off reforms at the EU and national level as well.”<sup>144</sup>

On the other hand, it was “the first occasion where the ECtHR declared persons with disabilities to be a protected group under the ECHR”<sup>145</sup> which also means that in case of any restrictions which affects people with mental or intellectual disabilities States must apply a strict scrutiny and the outdated approach of disability must also be rejected in this context. On the basis of the same arguments the Court further reiterated its conclusions in *Harmati v Hungary* case.<sup>146</sup>

However, despite the existence of these these groundbreaking conclusions the question still remains how a State could legally limit the rights of people with mental or intellectual disabilities.

In another international case, concerning Hungary, in *Bujdosó and five others*<sup>147</sup> referred above, the applicants were people with intellectual disabilities placed even under partial or plenary guardianship as a consequence of which were erased from the electoral register and could not participate in the 2010 parliamentary elections. The Constitution applicable at the time denied the right to vote from everyone simply and automatically by the placement under partial or plenary guardianship, irrespective of “the person’s disability, individual abilities or the scope of the incapacitation measure.”<sup>148</sup> However, the applicants argued that they were aware of the meaning and effects of voting and were able to understand politics.

In support of the authors’ communication the Harvard Law School Project on Disability in its third-party intervention argued that as “such assessments only affect persons under

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<sup>144</sup> János Fiala-Butora et al., *The democratic life of the Union: The Democratic Life of the Union: Toward Equal Voting Participation for Europeans with Disabilities*, Volume 55, Number 1, 55 Harv. Int’l L.J. 71, 79 (2014)

<sup>145</sup> *ibid*

<sup>146</sup> *Harmati v Hungary App no 63012/10* (ECHR 21 October 2014)

<sup>147</sup> Committee on the Rights of Persons with Disabilities, Communication No. 4/2011 UN Doc CRPD/C/10/D/4/2011 (16 October 2013)

<sup>148</sup> *ibid* para 3.1



guardianship who are all persons with psychosocial or intellectual disabilities”<sup>149</sup> the legislation permitted to disenfranchise people with disabilities on the basis of their perceived lack of legal capacity to vote<sup>150</sup> which constitutes direct discrimination on the basis of disability. Moreover the capacity assessments inevitably disenfranchise capable individuals as well because, on the one hand, there is no scientifically proven line to separate the incapable voters from the rest and on the other hand the deprivation of the right to vote as a consequence of individual assessments appears to be the rule and not the exception. Furthermore, the capacity assessment tests necessarily involve the deeply embedded prejudice that people with mental and intellectual disabilities are incapable of voting which results in a disproportionate number of disenfranchised people from this group.

Hungary, however highlighted that the referred legislation were no longer in effect and the Fundamental Law of Hungary is now in conformity with the European Convention of Human Rights<sup>151</sup> therefore in conformity with the decision of the European Court of Human Rights in *Alajos Kiss v Hungary* too. The decision in *Alajos Kiss v. Hungary*<sup>152</sup> the European Court of Human Rights concluded that “an indiscriminate removal of voting rights without an individualised judicial evaluation and solely based on a mental disability, cannot be considered compatible with the legitimate grounds for restricting the rights to vote.”<sup>153</sup> On the basis of this, Hungary argued that it “no longer treats [people with mental disabilities] as a homogenous group”<sup>154</sup> as the new legislation requires the courts to individually assess the capacity to vote in each and every guardianship procedure with the obligatory involvement of a forensic expert and guardianship could no longer be a basis for the exclusion of voting rights. The State also

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<sup>149</sup> *ibid* 5.2

<sup>150</sup> *ibid*

<sup>151</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14,

<sup>152</sup> *supra* note 126

<sup>153</sup> *ibid* para 44

<sup>154</sup> *ibid* para 4.2

submitted that the termination of exclusion may be requested under the new provisions too and similar restrictive rules exist across the Member States of the European Union.

The Committee however concluded that that the new legislation is still in breach of Article 29 read alone and in conjunction with article 12 and found assessment of individuals' capacity to be discriminatory in nature because "the exclusion of the right to vote on the basis of a perceived or actual psychosocial or intellectual disability, including a restriction pursuant to an individualized assessment, constitutes discrimination on the basis of disability."<sup>155</sup> Consequently these measure cannot be considered legitimate, moreover they are "not proportional to the objective to preserve the integrity of the political system."<sup>156</sup> Therefore the Committee's conclusions revealed that the capacity assessment tests breaches the Convention's requirements to guarantee the right to vote to people with disabilities on an equal basis with others.

As referred above, arising basically from the Court's decision Hungary changed its laws in 2012 and the Fundamental Law now declares that "[a] person disenfranchised by a court for committing an offence or due to his or her limited mental capacity shall have no suffrage."<sup>157</sup> In other words the right to vote of people with mental and intellectual disabilities could only be excluded if it is based on an individualised assessment by the Court.

The Act on Electoral Procedure provides the details on the exclusion from suffrage:

"(1) Courts shall decide on exclusion from suffrage in decisions ordering placement under guardianship limiting competency, decisions ordering placement under guardianship

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<sup>155</sup> *ibid* para 9.4

<sup>156</sup> *ibid* para 9.6

<sup>157</sup> Fundamental Law of Hungary, art. XXIII para 6 *available at* <http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf> (last visited: Nov. 25, 2016)

precluding competency, and decisions issued in the course of proceedings aimed at reviewing guardianship.

(2) Courts shall exclude persons of legal adult age from suffrage whose capacity for exercising suffrage

a) is greatly reduced permanently or recurrently owing to their mental state, unsound mind or pathological addiction; or

b) is permanently and completely lost owing to their mental state or unsound mind.

(3) If the court does not exclude a legal adult placed under guardianship from suffrage, then he or she shall exercise electoral rights personally and shall have the power to make valid legal statements alone in the context of these rights.

(4) Persons empowered to initiate lawsuits aimed at the termination of conservatorship may request the termination of the exclusion from suffrage of a legal adult placed under guardianship irrespective of the provisions of (1).”<sup>158</sup>

As it is obviously expressed in the laws, the Court decides on the capacity to vote in guardianship proceedings or reviewing guardianship decisions and shall exclude the right to vote of people whose capacity to vote is greatly reduced or reduced permanently or recurrently due to their mental state. It is worth mentioning that despite the paradigm shift in disability laws and policy the legislation still use the outdated and stigmatizing notions such as “unsound mind” or “pathological addiction”. Apparently if the Court does not exclude the person from suffrage he or she may exercise his or her right to vote and make valid legal statements in this

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<sup>158</sup> Act on Electoral Procedure, Part 9/A Exclusion from Suffrage, Section 13/A, arts (1)-(4) *available at* [http://valasztas.hu/en/ovi/241/241\\_1\\_10.html](http://valasztas.hu/en/ovi/241/241_1_10.html) (last visited: Nov. 25, 2016)

context and the exclusion may be removed in the framework of the review of the placement under guardianship.

Although, Hungary argued that the voting legislation is now in line with the European laws, the CRPD Committee in its Concluding observations on Hungary<sup>159</sup> highlighted that the possibility that a judge is entitled to remove the voting rights of people with intellectual or psychosocial disabilities if the person is placed under guardianship, thus his or her legal capacity is removed is an alarming issue.<sup>160</sup> Therefore the Committee, completely in accordance with its previous recommendations cited above, suggested that “all relevant legislation be reviewed to ensure that all persons with disabilities regardless of their impairment, legal status or place of residence have a right to vote, and that they can participate in political and public life on an equal basis with others.”<sup>161</sup>

Furthermore, the Committee in connection with Article 12, recommended Hungary to “take immediate steps to derogate guardianship in order to move from substitute decision-making to supported decision-making which respects the person’s autonomy, will and preferences and is in full conformity with article 12 of the Convention, including with respect to the individual’s right, in his or her own capacity, to give and withdraw informed consent for medical treatment, to access justice, to vote, to marry, to work, and to choose a place of residence.”<sup>162</sup>

Taking the previously explained decision in the case of Bujdosó and five others into consideration as well, it could be concluded that although Hungary took a huge step from automatic deprivation of voting rights to a more balanced system, its new laws on the restriction

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<sup>159</sup> UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial periodic report of Hungary, adopted by the Committee at its eighth session* UN Doc CRPD/C/HUN/CO/1 (22 October 2012) [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fHUN%2fCO%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fHUN%2fCO%2f1&Lang=en) (last visited: Nov. 25, 2016) available at

<sup>160</sup> *ibid* para 45

<sup>161</sup> *ibid* para 46

<sup>162</sup> *ibid* para 26

of the right to vote by the individualised assessments are still in breach of its international human rights obligations stipulated under the CRPD.

### **2.3 Does every vote count? Voting rights of people with mental and intellectual disabilities in the United Kingdom**

Seven out of 28 EU Member States, including the United Kingdom guarantee the right to vote to people with mental or intellectual disabilities on an equal basis with others, without any legal restriction.<sup>163</sup> In other words, all people with intellectual, psychosocial disabilities or autism may exercise their right to vote on an equal basis with others. People with mental or intellectual disabilities in Austria, Croatia, Italy, Latvia, The Netherlands, Sweden and The United Kingdom are entitled to vote irrespective of the type and level of disability and without any judicial or medical decision.

The UK Government reaffirmed its commitment to guarantee equal voting rights for people with mental or intellectual disabilities in its initial report submitted to the CRPD Committee.<sup>164</sup>

It is strictly established that “in the UK disabled people, including people with learning difficulties, have the same right to vote as everyone else”<sup>165</sup> and also declared that people with learning disabilities include “residents in psychiatric hospitals unless they have been detained under certain sections of the relevant mental health legislation or are convicted criminal offenders.”<sup>166</sup> The UK also explained that likewise non-disabled people, people with

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<sup>163</sup> European Union Agency for Fundamental Rights, *The political participation for persons with disabilities: human rights indicators*, 40 (2014) available at [http://fra.europa.eu/sites/default/files/fra-2014-right-political-participation-persons-disabilities\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-right-political-participation-persons-disabilities_en.pdf) (last visited: Nov. 25, 2016)

<sup>164</sup> Committee on the Rights of Persons with Disabilities, *Initial reports of State parties due in 2011, United Kingdom of Great Britain and Northern Ireland*, UN Doc CRPD/C/GBR/1 available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fGBR%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fGBR%2f1&Lang=en) (last visited: Nov. 25, 2016)

<sup>165</sup> *ibid* para 318-319

<sup>166</sup> *ibid* para 318.

disabilities have the power to decide on their own whether and how they wish to participate in the electoral procedure.<sup>167</sup> However, the UK also acknowledged in the report that people with disabilities, especially people with learning disabilities “can face barriers to exercising their right to vote”<sup>168</sup> but confirmed its dedication to eliminate these barriers and provide full participation in political and public life for people with mental or intellectual disabilities too.<sup>169</sup>

In 2006, the Electoral Administration Act<sup>170</sup>, in line with UK equalities legislation, such as the Disability Discrimination Act of 1995<sup>171</sup> abolished archaic common law provisions that denied voting rights to people on grounds of “intellectual or mental state.”<sup>172</sup>

The Mental Capacity Act<sup>173</sup> established a number of factors to be considered in the decision-making of people with disabilities and undoubtedly establish a presumption of capacity. The statutory principles<sup>174</sup> first, stipulates that decision-making capacity is assumed unless the lack of it is established; second all practicable and necessary steps must be taken to support the decision-making of a person; and third, an unwise decision must not be considered as an evidence of incapacity. The Act only allows for substitute decision-making provided that even under these circumstances and with assistance the person is unable to make a decision.

The Act on the other hand explicitly outlaws substitute decision-making on behalf of a person with mental disability with regards to voting as well, stipulating that: “[n]othing in this Act permits a decision on voting at an election for any public office, or at a referendum, to be made

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<sup>167</sup> *ibid* para 14. In the United Kingdom all voters can vote using alternative methods, typically postal voting. *See supra* note 163, 42

<sup>168</sup> *supra* note 164, 319

<sup>169</sup> *ibid* 318

<sup>170</sup> Electoral Administration Act 2006 *available at* <http://www.legislation.gov.uk/ukpga/2006/22/contents> (last visited: Nov. 25, 2016)

<sup>171</sup> Disability Discrimination Act 1995 *available at* <http://www.legislation.gov.uk/ukpga/1995/50/contents> (last visited: Nov. 25, 2016)

<sup>172</sup> *ibid* Part 8 s. 73

<sup>173</sup> Mental Capacity Act 2005 *available at* <http://www.legislation.gov.uk/ukpga/2005/9/contents> (last visited: Nov. 25, 2016)

<sup>174</sup> *ibid* s. 1 (1)

on behalf of a person.”<sup>175</sup> This specific prohibition is deriving from the fact that various decisions such as whether and whom to marry, whether to consent to an adoption of a child or whether and with whom to have sexual relations, the exercise of the right to vote is also deemed to be a personal one by law that must be taken personally.<sup>176</sup>

In practice, in order to be able to vote in elections in the UK, a person’s name must be included in a register of electors.<sup>177</sup> Electors who are entitled to be registered to vote are also entitled to apply for a postal or a proxy vote.<sup>178</sup>

However, as referred above mental or intellectual disability does not mean legal incapacity to vote and “those who may be the carer of a person or who otherwise make decisions on behalf of a person may not make decisions on voting.”<sup>179</sup> Persons with disabilities are equally eligible for registration irrespective of their mental capacity status. Legal incapacity concerns the ineligibility to register only for the following categories: peers who are members of the House of Lords from voting at UK Parliamentary elections, detained convicted prisoners, convicted offenders detained in a mental hospital, persons found guilty of certain corrupt or illegal practices.<sup>180</sup> This provision is also applicable to persons admitted to a mental hospital or any other similar establishment.

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<sup>175</sup> *ibid* s. 29 (1)

<sup>176</sup> The Law Commission Consultation, *Paper No. 128. Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction*, HMSO, para 6.3 (1992) available at <http://www.lawcom.gov.uk/wp-content/uploads/2015/04/cp128.pdf> (last visited: Nov. 25, 2016)

<sup>177</sup> The Electoral Commission (2013), *Guidance for Electoral Registration Officers, Part 2, The Registration Framework*, 3 (last updated: July 2016) available at [http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0006/162573/Part-2-Registration-framework.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0006/162573/Part-2-Registration-framework.pdf), (last visited: Nov. 25, 2016)

<sup>178</sup> The Electoral Commission (2013), *Guidance for Electoral Registration Officers, Part 5, Absent voting*, 3, 18 [http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0004/162580/Part-5-Absent-voting.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/162580/Part-5-Absent-voting.pdf) (last updated: July 2016) (last visited: Nov. 25, 2016)

<sup>179</sup> *supra* note 176, 3.83

<sup>180</sup> *ibid* 3.81

The Handbook for polling station staff<sup>181</sup> expressly highlights that a person who is registered as an elector, regardless of his or her mental or intellectual disability cannot be refused ballot papers, therefore excluded from voting by the Presiding Officer or the polling station staff. The Presiding Officer should provide the elector the necessary assistance, such as explaining how the person could cast his or her ballot or allow for the assistance of a companion.<sup>182</sup>

The elector may wish the Presiding Officer to mark the ballot paper for him or her. In this case the Presiding Officer must ensure the secrecy of the vote and guarantee the privacy of the conversation to make sure that no one else could overhear the conversation between them.<sup>183</sup>

In case if the elector is unsure about how to cast the ballot paper, the Presiding Officer should read out the instructions and the names of candidates and once the elector has made a decision, the Presiding Officer must mark the ballot papers accordingly. If the Presiding Officer has to mark ballot papers for an elector, the name of the voter must be noted on the official form List of votes marked by the Presiding Officer.

An elector with mental or intellectual disabilities may also be assisted by a companion must be either a close relative over the aged 18 or over or a qualified elector. This kind of assistance must be authorized by the Presiding Officer and the companion should also complete a declaration about the fact of assistance. The Presiding Officer must guarantee that the process is clear and understandable to both the elector and their companion and both the voter's and his or her companion's personal details are registered.<sup>184</sup>

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<sup>181</sup> The Electoral Commission, *Handbook for polling station staff, Supporting a UK Parliamentary general election and local government elections in England* (2014) available at [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0003/175620/Polling-station-handbook-UKPGE-Combined.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0003/175620/Polling-station-handbook-UKPGE-Combined.pdf) (last visited: Nov. 25, 2016)

<sup>182</sup> *ibid* 22

<sup>183</sup> *ibid* 20-21

<sup>184</sup> *ibid*



Contrary to its obligations prescribed by the CRPD and in breach of the CRPD Committee's recommendations, the UK holds also that, "[t]here may be circumstances in which a disabled person needs support to exercise that capacity, or where they lack the mental capacity to make decisions for themselves, and decisions may then be made on their behalf."<sup>185</sup> However, in relation to political rights it states that the "lack of mental capacity" could not be a barrier to exercise this right without any restriction.

Nevertheless, as Mencap, one of the leading charities in the UK advocating for the rights of people with learning disabilities concluded on the basis of the outcomes of their survey, despite many people with mental or intellectual disabilities have an appetite for politics and are interested in public life are excluded from the process of voting and are not able to exercise their voting rights. Most frequently they face barriers when it when it comes to registering to vote, deciding who they want to vote for and casting their vote. Mencap found that more than half of the surveyed individuals (64%) with mental disabilities did not vote in the recent local elections most of them because registering to vote was too hard for them (60%) or due to the fact that they were turned away at the polling station because of their disability (17%). 56% of them said they did not participate because didn't want to vote for any of the political parties.<sup>186</sup> The barriers faced by people with mental or intellectual disabilities in voting and their reasons will be explored in detail in the last chapter.

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<sup>185</sup> *supra* note 164, 104

<sup>186</sup> Mencap, Press release (8 October 2014) *available at* <https://www.mencap.org.uk/press-release/people-learning-disabilitys-passion-politics-thwarted-system-excludes-them> (last visited: Nov. 25, 2016)

## Chapter 3 - Access to voting – Assessments and practical barriers

### 3.1 How does Hungary assess the right to vote? – The individual assessment procedures in practice

As it was explained above, in the previous Chapter, one of the two countries in Europe, in which the capacity to vote of people with mental or intellectual disabilities is decided by individual assessment procedures is Hungary. In Hungary, courts shall exclude persons of legal adult age from suffrage whose capacity for exercising suffrage is greatly reduced or completely lost permanently or recurrently owing to their mental disability.

In 2014, the The National Office for the Judiciary conducted a research<sup>187</sup> requested by the Ministry of Justice in order to review specifically whether there is a link between the type of guardianship and the exclusion of the right to vote and to provide a general overview about the application of the new laws and the practice of the courts with respect to the assessment of the voting rights of people with mental disabilities.

The research involved the review of case studies from district courts from all around the country.<sup>188</sup> It aimed to provide an overview and find answers to the following questions: first, the report sought to discover at least ten of the most typical questions the courts ask to assess the ability to vote; second, it attempted to explore facts and circumstances in the judicial decisions used to justify the exclusion; third, it investigated whether there is a tendency to exclude the right to vote in case if the person is placed under guardianship.

The report first and foremost highlighted that in line with what is required by law, courts put great emphasis on the personal hearing of the defendant concerned in the guardianship procedure, furthermore in each and every case the courts appoint a forensic expert to examine

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<sup>187</sup> Országos Bírósági Hivatal, Bírósági Főosztály, Vizsgálati Összefoglaló, 2014.OBH.XX.T.3.4.

<sup>188</sup> The review is based on the involvement of eight Regional Courts and the examination of 30 cases by each.

specifically the ability to vote. As part of the procedure, witness testimonies are also often applied and in some cases or the observations of home visits are also utilized.

At the personal hearings the most frequently asked questions to test the ability to vote are the following:

1. Are you interested in politics?
2. How frequently elections are held?
3. Do you vote at elections?
4. Are you willing to vote at elections in the future?
5. Do you watch, listen to or read political news, programs?
6. Do you know why elections are held in Hungary?
7. What political parties do you know?
8. Currently who is the Prime Minister of Hungary?
9. Currently who is the President of Hungary?
10. Do you know the name of the Mayor of your district? Do you know what are his or her duties, tasks?
11. Have you heard about the European Union?

However, the questions addressed to the forensic experts by the courts generally wish to find out the disability, diseases, mental status of the person, its level or severity and consequence on the ability to vote and in accordance with the laws whether it is greatly reduced or completely lost permanently or recurrently.

The vast majority of courts firmly agreed that the exclusion from voting is closely related to the type of guardianship, namely that if the court places a person under plenary guardianship at the same time it deprives the person from his or her right to vote too. In accordance with the statistics of the report, defendants kept their voting rights in only 2% of the reviewed cases. The report cites only one example where the court did not exclude the voting right of the person concerned despite the full guardianship decision. With respect to partial guardianship, the report pointed out that relying heavily on the outcomes of the personal hearings and the forensic expert opinions, courts excluded the right to vote in only exceptional cases. Nevertheless, data cited by the summary show that in almost 80% of partial guardianship cases (77%) defendants lost their rights to vote as well.

The review also concluded that the depth and details of the justifications vary greatly from one court to another. At one end of the scale are the judgements which reflect in more detail the outcomes of the results of the evidence conducted in the proceeding, in other cases courts only refer to the fact of the exclusion and cites the relevant part from the forensic expert opinion. The expert opinions in many cases summarize the opinion on the voting capacity in only one or two sentences. However, the report insists that the number of decisions with in depth justifications are increasing. Obviously, the judicial practice is undivided in the aspect of detailed justifications, in case if the defendant submitted a counter petition or if there is a difference between the expert opinion and the decision of the court.

Sparse evidence exist that courts tend to put the assessment in a wider context and only few of them place heavy emphasis on the opinion of the defendant. It is also clearly indisputable from the report that the exclusion of voting rights still closely correlates with the mental status of the person. In the vast majority of the cases, there is direct link with the placement under guardianship and the restriction on voting, irrespective of the type of the guardianship. It is also straightforward from the questions most commonly asked by the courts that no common

standards could be identified in assessing the capacity to vote. Furthermore, courts in general tend to rely their decisions on the level of political knowledge of the defendants. However, as the evidence of forensic expert opinions are more frequently used as a justification in the decisions, the personal statements could only be particularly relevant when the person expressly states its intention to keep his or her voting rights. It is also true however, that in one forward looking case cited by the report<sup>189</sup> the court of second instance held that the level and quality of public awareness and political knowledge cannot be tested and additional requirements cannot be maintained on people with mental or intellectual disabilities otherwise not requested by law from people not placed under guardianship.

In sum, it could be established that although the new legislation requires individual assessment of each and every case, in most cases still the status approach prevails and people are deprived of their right to vote on the basis of their disabled status. On the other hand, it should also be kept in mind that competence has totally different meanings in medicine, law, philosophy or other sciences. Competence could not be described as a constant state but fluctuates between the two end, full capacity and complete lack of capacity.<sup>190</sup> No clear and objective cut-off point based on medical diagnosis or IQ score paired with other methods exist, thus the capacity to vote could not consistently and unambiguously be examined. Having said this, not only exclusion based on the status of the person, namely his or her disability or placement under guardianship but the restriction on the basis of the outcome of the functional, individual assessment is also impermissible under international law as it discriminates against some people with mental disabilities, thus unfairly applied. Furthermore, the necessity and

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<sup>189</sup> supra note 187, 11

<sup>190</sup> dr. Jakab Nóra, *A cselekvőképesség elméleti háttere és munkajogi kérdései*, Phd értekezés, Miskolci Egyetem Állam-és Jogtudományi Kar, Deák Ferenc Állam-és Jogtudományi Doktori Iskola (2011), 40 *available at in Hungarian* [http://midra.uni-miskolc.hu/JaDoX\\_Portlets/documents/document\\_6344\\_section\\_1723.pdf](http://midra.uni-miskolc.hu/JaDoX_Portlets/documents/document_6344_section_1723.pdf) (last visited: Nov. 25, 2016)

proportionality of the restriction could not either be adequately justified by this functional standard because of the reasons explained in section three of Chapter 1.

### 3.1.1 Other examples of assessments - The assessment tools in the United States

A well established common standard is used in the US to assess the capacity to vote. Under the standard of a federal district court decision in *Doe v. Rowe*<sup>191</sup>, the court produced a specific test to assess the capacity to vote: persons are considered incompetent to vote only if they “lack the capacity to understand the nature and effect of voting such that they cannot make an individual choice.”<sup>192</sup> On the basis of this standard Appelbaum and colleagues developed an instrument, called the Competency Assessment Tool for Voting, or CAT-V.

As Appelbaum and colleagues describes: “The CAT-V uses six questions to assess a person’s performance on all four standard decision-making abilities: understanding, choice, reasoning, and appreciation. Each question is scored on a 3-point scale, where a score of 2 describes adequate performance on the measure, 1 marginal performance, and 0 clearly inadequate performance.”<sup>193</sup>

Appelbaum and colleagues conducted a study in 2007 and 2008, with the help of the CAT-V test and with the participation of 52 outpatient and day treatment service patients with serious mental illnesses: Seventy-two percent of the sample had psychotic disorders, and another 20% had major mood disorders. The research outcomes showed that most participants had well results on the test and the vast majority of the participants “understood the nature and effect of

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<sup>191</sup> *Doe v Rowe*, 156 F. Supp. 2d 35 (D.Me. 2001)

<sup>192</sup> *ibid*

<sup>193</sup> Paul S. Appelbaum, M.D. et al., *The Capacity to Vote of Persons with Serious Mental Illness*, Volume 60, Issue 5, 624, 625 (2009)

voting and could choose between two candidates”<sup>194</sup> and only four individuals received a score less than 5 out of 6 on the group of questions. On the basis of the results, Appelbaum suggests that “the outpatient population with mental illness may be even higher on average than in this study's sample.”<sup>195</sup>

With respect to the overall functioning of this standard, Appelbaum argues that the test is “permissive enough that it does not arbitrarily and unnecessarily deprive individuals of their rights”<sup>196</sup> and on the other hand it is capable to protect the integrity of the vote. Nevertheless, the presumption could be drawn from this research involving people with serious mental disabilities that persons with mental or intellectual disabilities are capable of voting.

However, Appelbaum in 2000 argued that people with mental or intellectual disabilities should not be deprived of their right to vote because guardianship or conservatorship “often occur because of focal impairments in functioning — for example, inability to handle one’s finances— that are unrelated to the capacity to vote.”<sup>197</sup>

As Bhugra et al summarized, with the help of capacity tests other researches also highlighted the capability of people with mental or intellectual disabilities to vote competently. With the involvement of 325 hospital patients from New York City in a mock voting, Klein and Grossman (1967) found that “the hospital sample resembled the results in the district surrounding the hospital.”<sup>198</sup> Wellner and Gaines examined the voting patterns in three large Maryland psychiatric hospitals in 1970 and concluded that the voting patterns of the hospital in the US Presidential election closely resembled the voting patterns in urban areas of the

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<sup>194</sup> *ibid* 627

<sup>195</sup> *ibid* 628

<sup>196</sup> *ibid* 627

<sup>197</sup> Paul S. Appelbaum, M.D., “*I Vote. I Count*”: *Mental Disability and the Right to Vote*, *Law and Psychiatry*, 849 (July 2000), Vol. 51., No. 7.

<sup>198</sup> Dinesh Bhugra et al. (2016), *Mental illness and the right to vote: a review of legislation across the world*, *International Review of Psychiatry*, 28:4, 395, 398 DOI: 10.1080/09540261.2016.1211096

state.<sup>199</sup> Moreover, not only similar voting patterns could prove capability but firm preference too. For example a research conducted in Germany (Bullenkamp & Voges, 2004) showed the preference of left-wing parties among the residents of a group home, pointing to the fact that the participants were well aware of their socioeconomically disadvantaged situation. As Bughra et al also notes: “[s]tudies have also shown that persons with chronic mental illness are able to comprehend the task of voting and execute it properly (Klein & Grossman, 1967; Melamed, Solomon, & Elizur, 1997).”<sup>200</sup>

In sum, it could be concluded that many empirical data confirms the presumption that almost all people with mental or intellectual disabilities are capable of voting. Capacity testing such as in the case of Hungary raises serious controversies and could not provide an objective measurement criteria.

### **3.2 The barriers beyond legal restrictions in exercising the right to vote - Participation of people with mental and intellectual disabilities at the elections in the United Kingdom**

Article 29 of the UN CRPD requires States not only to ensure that people with any kind of disabilities possess the right to vote without any restriction on an equal basis with others but oblige State Parties to ensure that people with disabilities could exercise this right freely and equally and are encouraged to participate in public life. In order to guarantee this, voting procedures, facilities and materials must be appropriate and accessible and States must allow voters with disabilities the assistance of their own choosing to help them vote where that is necessary.<sup>201</sup> A very important and necessary precondition in ensuring the equal participation

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<sup>199</sup> *ibid*

<sup>200</sup> *ibid* 399

<sup>201</sup> CRPD, art. 29. para a. subpara i-iii.



for people with mental or intellectual disabilities at the elections is the accessibility of information. States have the obligation under Article 9 of the UN CRPD to provide not only the accessibility of physical environment and transportation but also to promote the accessibility of information and communications, including information and communications technologies and systems.<sup>202</sup> In order to provide this, States must among others “provide training for stakeholders on accessibility issues”<sup>203</sup> “provide easy to read and understand forms”<sup>204</sup> with respect to services and facilities open to the public and most importantly accessibility includes “live assistance”<sup>205</sup> or “any other forms of assistance”<sup>206</sup> needed to ensure full access to information.

However, people with mental or intellectual disabilities may be hampered in exercising their right to vote in many different ways. In general, as referred above the lack of access to adequate information or the lack of appropriate training programs both for people with disabilities and support personnel or electoral staff are probably the most relevant factors that may encourage or hinder people with mental and intellectual from voting. For example the fact that some people with disabilities are not aware of the information that they are entitled to vote or the lack of adequate information or instruction in relation to registration, voting or the inability or reluctance of voting staff to support people with mental and intellectual disabilities may exclude them from political participation. Moreover, the approach and perception of support staff may also exclude them from voting. It could be presumed that if a support personnel is skeptical about his or her client’s ability to make an informed choice in his or her everyday

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<sup>202</sup> *ibid* art. 9

<sup>203</sup> *ibid* art.9 para 2. subpara c.

<sup>204</sup> *ibid* art. 9. para 2.subpara d.

<sup>205</sup> *ibid* art. 9. para 2. subpara e.

<sup>206</sup> *ibid* art. 9. para 2. subpara f.

life, he or she will not be interested in teaching skills relevant to voting as many of them believe that they have to teach “more important skills to their clients.”<sup>207</sup>

Although, as explained above people with mental or intellectual disabilities have equal voting rights in the UK, the group of 700 000 people with dementia and 1.2 million people with learning disabilities<sup>208</sup> is substantially “underrepresented at the polling stations.”<sup>209</sup>

The Representation of the People Act of 2000, provides for people with disabilities to vote with the assistance of another person if due to “his blindness, other incapacity, or by inability to read, is unable to vote without assistance.”<sup>210</sup> The Electoral Administration Act of 2006<sup>211</sup> requires that “the authority must seek to ensure that so far as is reasonable and practicable every polling place for which it is responsible is accessible to electors who are disabled.”<sup>212</sup>

The first, comprehensive empirical study<sup>213</sup> on voting of people with intellectual disabilities, which concluded their under-representation at the polling stations was conducted across six Parliamentary constituencies in the county of Cambridgeshire with respect to the 2005 general elections. The research examined the number of registered voters with mild to severe intellectual disabilities known to the Cambridgeshire Learning Disability Partnership (CLDP), their actual participation ration in the 2005 general elections and the factors that may hinder their participation. The study demonstrated that fewer people with intellectual disabilities in the examined region were registered (34% of them were unregistered while only 5% of the

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<sup>207</sup> Martin Agran, Carolyn Hughes: “*You Can’t Vote - You’re Mentally Incompetent*”: Denying Democracy to People with Severe Disabilities, *Research and Practice for Persons with Severe Disabilities*, Vol. 38, No 1., 58, 60 (2013)

<sup>208</sup> Marcus Redley et al. *Voting and mental capacity*, *British Medical Journal*, Vol. 341, Issue 7771, 466 (2010)

<sup>209</sup> H. Keeley et al., *Participation in the 2005 general election by adults with intellectual disabilities*, *Journal of Intellectual Disability Research*, Volume 52, Part 3, 175, 176 (2008)

<sup>210</sup> The Representation of the People Act 2000, Schedule 1, Rule 39 (1) available at <http://www.legislation.gov.uk/ukpga/2000/2/section/13> (last visited: Nov. 25, 2016)

<sup>211</sup> The Electoral Administration Act 2006, available at <http://www.legislation.gov.uk/ukpga/2006/22/part/4> (last visited: Nov. 25, 2016)

<sup>212</sup> *ibid* pt 4, s 16, sub-s 18B, para (4) subpara (b)

<sup>213</sup> *supra* note 209

general population were not registered) and voted (only 23% voted compared to the participation at the polling stations of the 61 % of the general population) in comparison to the general population. Interestingly, in relation to the factors that may hinder their participation the research showed that cohabitees and different residential types have a substantial effect upon the likelihood of registration and of voting. The study showed that people with intellectual disabilities “significantly more likely to vote if they live in a household with at least one other voter”<sup>214</sup> however “those in supported accommodation were more likely to be registered to vote, though less likely to cast their vote”<sup>215</sup> compared to people living in private households. As the study concludes: “[t]he strongest predictor of both registration and voting, respectively, was living at an address with at least one other registered voter, who voted. When the presence, or otherwise, of other voters at the same address was controlled for, other social (residence type, deprivation score and administrative geographies) and individual factors (sex, age) were of no significant predictive value.”<sup>216</sup>

The previously cited Mencap survey from 2014 gave evidence that the largest proportion (60%) of people with intellectual disabilities interviewed could not participate in recent local elections because they found the process of registering to vote too difficult. Another report<sup>217</sup> by Disability Action on the accessibility of political party information showed that “many people with disabilities were not able to access information from political parties”<sup>218</sup> in 2010.

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<sup>214</sup> *ibid* 180

<sup>215</sup> *ibid* 180

<sup>216</sup> *ibid* 179

<sup>217</sup> Disability Action, *Review of the Accessibility of Political Party Information for People with Disabilities for the Westminster Elections May 2010*, 9 (November 2010) available at <http://webcache.googleusercontent.com/search?q=cache:GsQZCsr8Z4J:www.disabilityaction.org/fs/doc/publications/accessibility-review-of-political-party-information-westminster-elections-november-2010-final.doc+&cd=1&hl=hu&ct=clnk&gl=hu> (last visited: Nov. 25, 2016)

<sup>218</sup> *ibid* 9

The highly unfavorable consequences of the lack of accessible information was particularly apparent in one of the focus groups in which almost all participants were first-time voters and “where only half of those participating felt that the information they had received from political parties had helped them make a decision.”<sup>219</sup>

Another example from a former project by Disability Action was called “Count Us.” The outcomes of this research showed that the effective engagement with political representatives could also significantly contribute to the participation of people with mental or intellectual disabilities in democratic processes. With the involvement of altogether 743 participants in various activities from three-day training programmes to meetings with political representatives, the outcomes pointed out that “[o]nly 27% of project participants indicated that they had voted at the last general election, however, having engaged in training or meeting with political representatives 96% said they intended to vote at the general election.”<sup>220</sup>

The Electoral Commission report on the 2015 UK elections,<sup>221</sup> also notes that “some disabled voters still encounter difficulties when voting in person or by post.”<sup>222</sup> The Electoral Commission’s public opinion survey discovered that “people with disabilities were more likely to be dissatisfied with the voting process at their polling station (5%) than those with no disability (2%).”<sup>223</sup> With respect to the difficulties people with any kind of disabilities may face the report refers to the Leonard Cheshire Disability organisations’ findings on the accessibility of the 2015 elections. The research<sup>224</sup> demonstrates that 24 % of voters with

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<sup>219</sup> *ibid* 10

<sup>220</sup> *ibid*

<sup>221</sup> The May 2015 UK Elections, *Report on the Administration of the 7 May 2015 elections, including the UK Parliamentary general elections available at* [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0006/190959/UKPGE-report-May-2015-1.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/190959/UKPGE-report-May-2015-1.pdf) (last visited: Nov. 25, 2016)

<sup>222</sup> *ibid* 47

<sup>223</sup> *ibid*

<sup>224</sup> Alice Mitchell-Pye, Barriers to voting - one in four disabled voters found polling stations inaccessible. Leonard Cheshire Disability (18 May 2015) *available at* <https://www.leonardcheshire.org/support-and-information/latest->

disabilities from the 344 respondents found voting difficult mainly due to the following factors: the lack of accessible parking spaces at some polling stations; the inaccessibility of voting booths and ballot boxes; the lack of adequate training of the polling station staff or reluctance to help people with disabilities in voting.<sup>225</sup>

Specifically, with respect to people with mental and intellectual disabilities the report acknowledges that they may experience difficulties in registering or casting their vote, however in order to provide that everyone who is eligible to vote could exercise his or her voting rights without barriers, the Commission express its commitment “to identify ways to improve the experience and service that voters with disabilities receive.”<sup>226</sup>

In 2014, the system of household registration, which required one person in every household to register everyone living at that same address was replaced by Individual Electoral Registration (IER), which means that each person is now required to register to vote individually. Individuals eligible to vote can register online, providing their identifying information, i.e. their name, date of birth and national insurance number supplemented by a declaration of truth verifying the truth of the personal details given.<sup>227</sup> However, some people with mental and intellectual disabilities may have problems to complete this declaration. The Electoral Commission’s Guidance on assisted applications<sup>228</sup> says that third parties can assist a person with supplying these information but the declaration of truth must be made by the applicant which can also be given orally.<sup>229</sup> The Electoral Registration Officer also has the duty

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news/news-and-blogs/barriers-voting-one-four-disabled-voters-found#.VZpwbOnbJGE (last visited: Nov. 25, 2016)

<sup>225</sup> *ibid*

<sup>226</sup> *supra* note 219, 48

<sup>227</sup> Cabinet Office, *Individual Electoral Registration* (11 October 2013) available at <https://www.gov.uk/government/collections/individual-electoral-registration> (last visited: Nov. 25, 2016)

<sup>228</sup> Electoral Commission, *IER Guidance on assisted applications in England and Wales*, (30-09-2014) available at [http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0011/176168/IER-Guidance-on-assisted-applications-in-England-and-Wales.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0011/176168/IER-Guidance-on-assisted-applications-in-England-and-Wales.pdf) (last visited: Nov. 25, 2016)

<sup>229</sup> *ibid* para 1.6

to make enquiries in case a person may need help and assist the person to make an application to register for example, information being taken in person or by phone.<sup>230</sup>

Although no legal restrictions exist in the UK on their franchise, people with mental or intellectual disabilities face loads of barriers in exercising their voting rights.

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<sup>230</sup> *ibid* para 1.26

## Conclusion

The approach to disability has been described by progressive development in the last couple of decades. Especially, the adoption and entry into force of the UN CRPD marked a milestone in this process. The appearance and empowerment of the human rights model in the context of disability, acknowledging that people with disabilities are not patients but likewise everyone else in society are entitled to the same rights, advanced their visibility and opened the road to encourage thinking from the point of view of dependence to the idea of independence for people with disabilities in all areas of life. The CRPD and especially its Article 12 generated discussions around the globe on how to stimulate profound change and far-reaching development with respect to different rights, including the right to political participation and contributed to growing political awareness of disability rights.

As Degener and Quinn pointed out: “[o]ne of the main tasks of the international human rights system in this field is to make societies aware of the contradiction between their self-professed values and their application (or rather their non-application or misapplication) in the context of disability.”<sup>231</sup> However, as old-fashioned attitudes, conceptions and prejudices against people with mental disabilities are deeply embedded in societies, restrictions of their rights, including their right to vote are still very widespread around the world.

Similarly to the assessment of legal capacity, disenfranchisement of people with mental or intellectual disabilities are fundamentally based on the status or the functional test. While the former one presumes lack of capacity if a person is deemed to be disabled, the latter one applies if a person with disability, by reason of his or her disability is unable to perform a specified

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<sup>231</sup> Gerard Quinn & Theresia Degener, *Expanding the System: The Debate about a Disability-Specific Convention in Human Rights and Disability: The current use and future potential of United Nations Human Rights in the context of disability* 181, 183 (Gerard Quinn & Theresia Degener eds., 2002) as cited by Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?*, 34 *Syracuse J. Int'l L. & Com.* 563, 584 (2006-2007)

function.<sup>232</sup> The status approach is focusing on establishing the fact of disability in due process by an expert opinion and the existence of disability is the relevant basis for the presumption of the lack of competence, thus the restriction of rights. On the other hand, in the functional approach test medical opinion also plays a significant role but the court's task is to "assess both the presence and absence of disability and whether the particular disability has rendered the person incapable of performing a specific function."<sup>233</sup> In sum, the status approach constructs a direct link between disability and the lack of competence, while the functional test strives to construct a framework to measure capacity but only applied to people with mental disabilities. When it comes to the assessment of competence, it should be kept in mind that competence has totally different meanings in medicine, law, philosophy or other sciences. Competence could not be described as a constant state but fluctuates between the two ends, full capacity and complete lack of capacity.<sup>234</sup> Moreover, a clear and objective cut-off point based on medical diagnosis or IQ score paired with other method of assessment simply does not exist, and as it could be seen in the case of Hungary, the functional test could end up as a means to justify the status approach.

The problem with these tests is that both breach international legal obligations as they contradict the requirements of equality and equal human dignity and they are discriminatory in their nature and application. Former tests such as the literacy tests had been on this basis banned in the US, as they were considered to be unfair and discriminatory in nature and application. Several researches have proved and it is also a common sense, that voting is basically not about

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<sup>232</sup> Amita Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?* 34 Syracuse J. Int'l L. & Com. 429, 431 (2006-2007)

<sup>233</sup> *ibid* 432

<sup>234</sup> dr. Jakab Nóra, *A cselekvőképesség elméleti háttere és munkajogi kérdései*, Phd értekezés, Miskolci Egyetem Állam-és Jogtudományi Kar, Deák Ferenc Állam-és Jogtudományi Doktori Iskola (2011), 40 *available at in Hungarian* [http://midra.uni-miskolc.hu/JaDoX\\_Portlets/documents/document\\_6344\\_section\\_1723.pdf](http://midra.uni-miskolc.hu/JaDoX_Portlets/documents/document_6344_section_1723.pdf) (last visited: Nov. 25, 2016)



rationality or political knowledge rather about profound, personal preferences, beliefs and choices among different sets of values. If we accept that the application of a literacy test as a basis for disenfranchisement is discriminatory, we can nothing but conclude that the functional tests are thoroughly determined by stigma, myths and prejudice about people with mental disabilities, as it is based on the presumption and belief that people with mental disabilities are not able to vote as it is hard to present any objective or justifiable criteria. Although, the higher probability of fraud, on the basis of the presumption that people with mental or intellectual disabilities could easily be manipulated has not been proved by research. However it is also true that institutionalization of people with mental and intellectual disabilities could have disastrous consequences on their autonomy, independence and social skills. Nevertheless, it is easier to disenfranchise people with mental or intellectual disabilities in order to avoid fraud and manipulation apparently but voter fraud is not a disability-specific issue and it does not address and provide solutions to the real problem, namely dealing with the strong negative consequences of institutional culture and care.

It is also beyond doubt that a smaller part of people with mental or disabilities disabilities would be most probably unable to exercise their right to vote, even with assistance, for example some people with profound or multiple disabilities or people in a coma state are most probably will not be able to cast their ballot. However, the respect for every person's autonomy and human dignity, irrespective of their abilities, requires States not to treat a certain group of people as second class citizens, but to ensure equal opportunity for their participation in political and public life.

Even where no legal restrictions exist, such as in the UK, people with mental or intellectual disabilities could still face numerous barriers in exercising their right to vote, such as the lack of adequate trainings or availability of accessible voting materials or personal support, just to name a few. States should commit themselves and constantly take action to improve their

voting systems in order to provide that people with mental disabilities who wish to, could participate in the democratic processes in a purposeful way.

In order to change the picture and turn full restrictions to full participation, there is a strong need to increase opportunities for people with mental or intellectual disabilities to participate in public and political life as it is one of the most important ways through which marginalized groups could effectively seek equality and realize their fundamental human rights. Every vote will only count if the “last suffrage movement”<sup>235</sup> based essentially on academic theory<sup>236</sup> and politicized action realize that rights, accessibility and participation of people with mental or intellectual disabilities all at once are protected and promoted equally and in a meaningful way.

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<sup>235</sup> Kay Schriener et al., *The Last Suffrage Movement: Voting Rights for Persons with Cognitive and Emotional Disabilities*, Publius, 7/1/1997, Vol. 27, Issue 3, p 75

<sup>236</sup> Matthew T. Wappett, *Self-Determination and Disability Rights: Lessons from the Women's Movement*, Journal of Disability Policy Studies. Fall 2002, Vol. 13 Issue 2, 119

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