

**Disenfranchising the Absent:
Reframing the Discussion about the Voting Rights
and Voting Competence for Persons with Severe
Psychosocial and Intellectual Disabilities**

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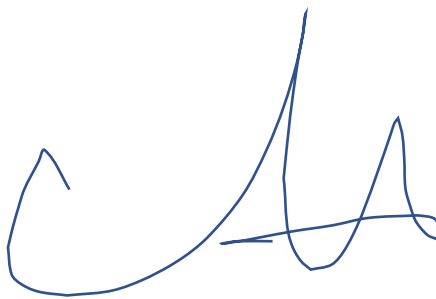
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Abstract

In most countries in the world, provisions in domestic law restrict legally incapacitated citizens from voting due to their cognitive impairments which affect decision-making capacity. Practices in court assessments and guardianship proceedings do not rely on any standardized testing criteria that look at cognitive requirements for decision-making in voting, and this largely exposes persons with psychosocial or intellectual disabilities to discrimination stemming from the use of discretionary criteria which, as I argue, are unfairly burdening citizens whose right to vote rather gets to be negotiated. There is no threshold of voter competence for disabled or non-disabled citizens, nonetheless restrictions are in place as such a cut-off point exists for everyone. As the aim of this right deprivation is to avoid harms to the integrity of elections, I contend that it is essential to address considerations on voter competence which do not accommodate, at the moment, people who are affected by disenfranchisement. Not every citizen will be able and/or willing to vote, but there is a great difference between interest and choice to vote and the imposition of a ban on active suffrage because of fears which are to a high extent fueled by no evidence for its legitimate aim and the lack of opportunities that would promote independence in decision-making and ‘valid political opinions’. The review of legislation aims to uncover such interpretations and the grounds of disenfranchisement by concentrating on ideas of voter competence.

Key words: active suffrage, disability, political participation, psychosocial disabilities, voting

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Introduction

Relatively little attention has been devoted in the field of political science to the political participation of people with psychosocial or intellectual disabilities.¹ Moreover, a small amount of studies was earnestly dedicated to the difficulties faced in terms of political representation. Eligibility criteria determine who can be part of the electoral register. Elections are important as they are a crucial source of democratic legitimacy for citizens in a polity who delegate this power to representatives (Dalton, 2008). An entire literature is more recently dedicated to exploring new forms of political participation, giving the technological advancements that made possible a variety of changes in the traditional ways of participation. Removing the right to vote symbolizes exclusion from the first channel towards representation and participation of a greatly marginalized group. The demographic issue of the increasing prevalence of people with cognitive impairments, especially among elderly people, will pose certain difficulties in the future and the struggle has the potential to be a more widespread concern for the electoral process (Appelbaum et al., 2005). Vigo and his colleagues (2016) argued that the global burden of mental illness is dramatically underestimated, and the prevalence of dementia alone will increase tremendously.

Fundamentally, voting is considered as the essence of democratic citizenship (Bauböck, 2003). Voting involves more than the process of casting a ballot: it also bears the meaning of interest-representation and being included as a full citizen within the community. In the of universal suffrage, restrictions on active suffrage open broader discussions about what citizens

¹ The use of the concept of ‘psychosocial disabilities’ puts the focal point not only on the psychological and medical aspects of mental disorders, but also on the highly important social aspects and the environment. The more widespread and mainstream use of this concept in the literature in spite of the widespread terms of ‘mental disability’, ‘intellectual disability’, or ‘cognitive impairment’ was generated by the United Nation Convention on the Rights of Persons with Disabilities, from 2006.

require for political participation and representation. The Council of Europe Commissioner for Human Rights, who intervened in a court case on the matter at the European Court of Human Rights (ECHR),² stated that any deprivation of the right to vote on the basis of disability or cognitive status, whether imposing an automatic blanket restriction or through court assessment³, contravenes standards related to universal suffrage and non-discrimination principles, perpetuating exclusion and stigma.⁴

The current and widespread legal norm is that those who have been adjudged to be 'mentally impaired/incapacitated' - individuals who are under legal guardianship and/or who reside in a psychiatric institution due to a severe disability - are deprived from the universal right to vote and be elected, as ascribed in international legislation and domestic law. Most countries in the world impose automatic blanket restrictions for persons under guardianship or who are institutionalized, while other countries, much smaller in number, impose the requirement of a judge's decision on the voting capacity of the ward (Bhugra et al. 2016).

The competence to vote is questioned in relation to rights when one's competence is in doubt; however, in practice, staff assesses voting capacity with various unstandardized indirect methods (Bosquet & Mahé, 2018; Link et al., 2012) and likely resting on commonsense and presumed lack of competence, irrationality, and lack of interest of the one who is assessed - in other words, discriminatory practices. The 'degree of mental capacity' is the main reason for the correlation

² Maria del Mar Caamano Valle v. Spain (2018) at the European Court of Human Rights (ECHR), where the plaintiff has been deprived of her right to vote due to an intellectual disability. The ECHR, through its decisions, holds that the right to vote is not a privilege and it should be the responsibility of the state to be in favor of inclusion in the political process.

³ Which may easily follow the same evaluation as the one in guardianship proceedings or by emphasizing arbitrary standards on what voter competence means.

⁴ Legal scholars have been looking at this subject by focusing on positive law, as well as the litigations on this legal matter. International legislation, primarily through the Article 12 and 29 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), broadly promotes suffrage rights of all people with disabilities and recommends domestic laws to respect and facilitate the exercise of this right and the equal protection under law for everyone.

between decision-making capacity and voting capacity. Removing people with mental illness from electoral registers for reasons of legal incapacity is not new (British Medical Association, 2004). Disenfranchisement is said to protect in maintaining the quality of the electoral process, outcomes of voting, and to some extent protect citizens from undue influence which are the justification of proportionality (Douglas, 2008). Disqualifying citizens from the active suffrage was sought as a solution to promote the integrity of the electoral procedure.

What determines a citizen to be disqualified from active suffrage? Visible tensions between having a right and exercising that right, arise, division which involves different notions of voter competence as requirements for a right. The absence of political capacity is primarily used as the justification of restrictions based on cognitive impairments that decision-making ability. I shed light upon the current standards used for disenfranchised persons with psychosocial and intellectual disabilities and the variety of unfair criteria used to handle the matter.⁵

As the main aim of this endeavor, I investigate how to approach the right to vote for legally incapacitated citizens with psychosocial and intellectual disabilities in the context of a tension between decision-making capacity and an equal and universal political right to active suffrage.⁶ Political incapacity is said to be the source of potential harm caused due to influenceability and manipulation which affects electoral integrity and outcomes of elections. The Doe standard of voting⁷ suggests that a person whose mental capacity is in question needs to understand the nature

⁵ Karlawish and his colleagues (2008) briefly mentions the lack of preparation and expertise of professionals to handle evaluations on decision-making ability for voting. There is no work to date which puts this into a political and electoral studies context.

⁶ Hence, this work focuses on answering this research question as the quintessential concern at stake when persons with psychosocial or intellectual disabilities are deprived of the right to vote.

⁷ The Doe standard for voting capacity is restrictive in its preservation of electoral integrity while permissive because it does not strip persons of their voting rights.

and consequences of the voting decision, but these criteria are not used and not enforced.⁸ Practices in assessments and guardianship proceedings do not rely on this basal requirement and this exposes a vulnerable group to more discrimination based on arbitrary criteria, which I argue that is unfairly burdening persons whose environment does not allow them to have the same exposure and interest in politics as they are asked to have.

Political equality requires fair opportunities to be ensured by authorities and support personnel which can increase political education. The current understanding of voter competence does not accommodate a discussion about the political participation of disenfranchised persons with cognitive impairments. Adequate support is rarely offered by authorities or care personnel and the burden falls on the incapacity of the individual as an innate feature which cannot be changed, and which brings disadvantages to the state of the polity.⁹

Guardianship or institutionalization as criteria that proves voting incapacity are not enough to show incompetence to cast a vote. For states to ensure political inclusion we need a careful understanding of aspects that correspond to the political environment and assistance in political judgements instead of restricting the right to vote. Performance in decision-making depends on the legal standard which apply, and it is unfair to measure voter competence with arbitrary criteria which is not used for other citizens and highly prone to very subjective interpretations of what voting should be.

⁸ The operationalized version of the Doe voting capacity standard (CAT-V test) is currently only used in Maine, United States of America. Although the criteria are fair from the perspective of cognitive capacity as task-specific and while this standard is less biased than any other procedure, its applicability would rely on why some citizens can be granted the right to vote on the basis on a test, which fundamentally is stemming from a type of disability-related discrimination.

⁹ Conversely, capturing a much greater number of people who may be able to understand these criteria and stripping them of the choice whether to participate or not is more harmful and discriminatory. This has been held in court cases which brought more evidence and numbers that show the harmful associations, such as in *Bujdaso et al. v. Hungary*.

Practices in court assessments and guardianship proceedings do not rely on any standardized minimal requirements of voting capacity, and this largely exposes persons with psychosocial or intellectual disabilities to discrimination stemming from the use of discretionary criteria, which I argue are unfairly burdening for citizens restricted from the right to have a choice to participate at all. As the purpose of this right deprivation is to avoid certain harms towards the integrity of elections, I contend that this purpose is unjustly served by depriving more citizens than there should by resting on assumptions of voting competence. Additionally, these assumptions disenfranchise a considerable number of citizens who most likely do not have the methods to contest the decision. Not every citizen will be able and/or willing to vote, but there is a great difference between such considerations and the imposition of a ban on active suffrage because of fears which are to a high extent fueled by the lack of opportunities that would promote independence in decision-making and ‘valid political opinions’. As the CRPD stipulates, states need to ensure that equal opportunities are being offered for these citizens and necessary support is provided instead of restricting people.¹⁰

The first two chapters draw attention upon various claims about voting competence and how current restriction regimes rely on idealistic but discriminatory accounts of voting which are applied only to persons from this vulnerable group. Essentially, any criteria that does not transpose understanding the nature and consequences of the voting decision should not be applied to persons with psychosocial and intellectual disabilities and instead forms of support to participate should be exhausted before making claims about voting incapacity. The third chapter concentrates on the existing legislation on the matter but with more focus on Europe and EU countries as of 2020. Additionally, five case studies of more in-depth analysis will account for the variety in regimes,

¹⁰ Article 29 of the CRPD states that states parties shall guarantee opportunities for the political participation of persons with disabilities.

argumentations, and narratives used in political debates and forces that participate with different sets of arguments. Following the theoretical discussion present in this work, the legislation review attempts to reveal how evaluating voter competence is addressed in positive law, as proceedings on the matter are private and unavailable. The review contributes by addressing both the domestic legislation in European countries and the differing discourses over participation and capacity for persons who are falling under this restriction on active suffrage, as there is no review to date that gives insight on the legislation.¹¹

¹¹ Manipulation and vote fraud are existing in the political environment for every citizen and some people are more susceptible to it. Disenfranchised citizens are believed to be the main target of manipulation but without prior education and assistance to this matter.

Chapter 1. Narratives of Mental Illness and the Construction of Rights

1.1 Genealogies of Mental Illness, Citizenship, and Disability

Citizenship stems from ideas about legal protection against external interference and power in a community of people. Citizenship establishes membership in a territory formed as a nation-state and it entails both obligations and rights in relation to the community and the promotion of the public good. There have been many changes in the understanding of citizenship and a great part of this construction had to address who is included in this broad category of such legal membership. In short, citizenship summarizes the relationship individuals have with the state (Bartlett & Connor, 2010) and represents ‘a set of legal, political, and social rights and practices for membership in the political community’ (Prince, 2016).

This chapter is concerned with presenting the development of mental illness in relation to rights and a more critical approach on the picture of inclusion. Although this work centers on persons with severe cognitive impairments, discourses on mental illness and disability contribute to marginalization from which political exclusion stems from. Restrictions on rights relate to these views through attributions of fear and incapacity which shape behaviors towards persons with disabilities. Firstly, I will present several approaches towards disability and psychiatry which are relevant in understanding the power structures around people with psychosocial and intellectual disabilities. Secondly, I present that such views over mental illness and incompetence from the standpoint of rationality and madness determine a certain approach to competency.

The focus on the psychosocial aspects on mental disorders and especially about persons with severe cognitive impairments is rather recent¹² and it shifts the focus towards both the psychological and social inputs in the complexity around mental disorders and the role of addressing these two vital aspects in treatment instead of relying on biological considerations ('diseased brain') as determinants of mental disorders.¹³ As this work concentrates on suffrage, the key concept of psychosocial instead of mental incapacity (or cognitive deficiency from a biological standpoint)¹⁴ introduces a different approach by emphasizing the impact of the environment and adequate support.

Mental illness is generally portrayed as the 'social death' of an individual, given the potential for disability and difficulties it may pose to one's social life. Long (2014) argued that the public ignorance and discrimination directed towards mental illness has been partly constructed and sustained by healthcare professionals, primarily from psychiatry but also from other medical fields. The author contends that, by analyzing the historical narrative of mental illness, one can risk assessing past events in misleading ways. Long (2014) described the many theories and historiographies that were addressed towards psychiatry and the psychiatric movement, as well as the birth of the anti-psychiatric work.¹⁵

¹² The UN started using this term since the Convention of the Rights of Persons with Disabilities (CRPD) but it did not pertain the terminology used in domestic law for many states. Within the literature about personhood and dementia, Tom Kitwood stressed the existence of a complex interaction of factors in the manifestation of dementia: personality, biography, social psychology, physical health status, and neurological impairment (Bartlett and O'Connor 2010).

¹³ However, the biological approach is still the most widespread and normalized in both legal and professional language.

¹⁴ Mental disability, mental incapacity, and many other similar terms are most frequently used in legislation as the reason for the status of legal incapacity.

¹⁵ Anti-psychiatry refers to a movement within which scholars argue that psychiatry does more harm than good for its patients. This approach does not only undermine the conditions wards have in hospitals and asylums, but also the core principles of psychiatry and classification systems that guide the psychiatric diagnosis. Foucault's famous theory about asylums, power, and psychiatry emphasized the desire to separate reason from lack of reason, hence the cruel treatment and stigma stemmed from this.

There are various factors that influence how the discourse on mental illness has changed. Goodey (Goodey, 2011; McDonagh et al., 2018) put forth that excluding people with disabilities was established based on a natural kind, without considering the psychological profile of the individuals which is modified by the social context one was exposed to. Intelligence and disability are not natural kinds but rather (recent) historical forms determined by the ‘human self-representation and social reciprocity’ (Goodey, 2011). These meanings change constantly.

Later, the cognitive ability tests (intelligence quotient, IQ) has set standardized evaluations of ability and general competence. Many psychologists have seen this criticism as an ideological intrusion.¹⁶ Main critiques from the field of psychometry have shown not only the cultural bias around the construct of intelligence and its measurements, but also how this construct is not stable throughout time and is highly influenced by social factors which the test could not fully account for. Intelligence in its broad meaning is highly determined by the environment, available resources, and support - this is a rather recent development in ideas. Goodey (2011) argues that it is important to delve into the historical inheritance behind the everyday notions of intelligence which currently still operate.

“Intellectual disability is a product of certain historical idiosyncrasies: the complexity specific to modern social organization, the atomization of modern living arrangements, the demand from the market and a marketized bureaucracy that each of us answer to it individually, and a shift in the typical Western proletarian activity from manual labor to services.” (Goodey, 2011)

Psychiatry and the view on mental illness has changed tremendously. The initial purpose of psychiatry was concentrated on explanations of behavior manifestations that are out of the ordinary

¹⁶ The perceived lack of general functioning due to mental illness is seen as both a public matter for the law and public good, but also as a private aspect of one’s life. This tension of two extremes – public and private - results in a greater burden on the wards due to the fear given in terms of public matters and participation but also as something that should be privately dealt with in both milder or more severe cases of mental illnesses. The lack of independence is seen as a private matter and as the responsibility of the ward, not necessarily as something that others can contribute to.

or normalized behavior (e.g. what Michel Foucault has outlined through the Renaissance ideas regarding ‘the mad’ being in contact with the forces of ‘cosmic tragedy’ and the more modern idea of madness as lack of reason). The late modern view has changed to a rather medical-oriented approach that sees mental illness as being determined by brain processes and chemicals that are altered (‘diseased brain’ approach). In the latter view, somatic reductionists resume everything to determinants of brain functions. Alongside these views there are many other notable chronologically competing theories, such as social Darwinism, phrenology, or psychoanalysis which I will not detail here as they do not constitute the focal point of this work. It is however noticeable that there was a great shift in the explanations assigned to and philosophy of mental illness. The current scientific expectations in the field of psychiatry are to provide genetic proof over the existence of more measurable features of diagnosis and prognosis.¹⁷ However, gradual acknowledgement to the psychosocial aspect has brought focus on a biopsychosocial approach that gets attention in psychiatry more recently.

Foucault is famously known for his ideas regarding the institutions of coercion and discipline as places that forcefully impose political and social conformity in *an age of reason* (Foucault, 2003). In this sense, any work dedicated to the reformation of the organized psychiatry and its institutions is seen by Foucault as a work of ‘moral imprisonment’ (Foucault, 1961) because mental illness was fundamentally conceptualized as a status of irrationality.

Szasz (1958) put emphasis on the moral-religious views over the mentally ill as requiring forms of punishment for attaining divine grace. He argues that the conception of mental illness has changed from a religious to a secular society together with the conceptions over sin and crime. The latter is, according to Szasz, a public matter, hence related to the public good and social order. The

¹⁷ Hence, the biomarker-seeking component of psychiatry is further expanding to provide medical legitimacy to a field which does not solely rely on exact metrics as in other medical fields.

laws have been modelled on the “social game of living” (Szasz, 1958). Szasz reaches the essential ethical concerns regarding how psychiatry perpetuates the existing customs established by such arising secular and newly formed social views over the correct social behavior. Disenfranchisement follows the logic that has been used for treating people with mental illness as having a high risk of committing criminal offences. The severity is said to influence the competence of handling certain legal affairs, which in most countries is expressed as ‘legal capacity’.¹⁸ Szasz nuanced how the criminal justice system relies on broad diagnoses that are based on very different epistemological grounds than the measurable medical diagnostic which does not rely on a ‘theory’ of why someone behaves in a certain way. *Non compos mentis* is a term used in the laws of many countries suggesting someone is found guilty by reasons of insanity. Szasz particularly pointed out that psychiatry endorsed that people who defy social rules will be morally and legally condemned, also to discredit opponents of certain majority views (Betts 2008). Madness was perceived to be a moral transgression from the social and human norms established in a society.¹⁹

The legal and psychiatric narratives have changed towards a more evidence-based approach and an understanding of structural patterns and biological determinants. The paternalistic relationship between ward and psychiatrist has gradually changed terms: from religious and ethical explanations of mental illness, the relation has converted towards an acknowledgement over the

¹⁸ Szasz criticizes the epistemological gaps that psychiatry has been using when dealing with the reasons for criminal offense and the causation process used when assigning the blame to someone with mental illness. The primary thesis Szasz put forth that as a person is responsible for its own act, so is society for vulnerable groups who are morally condemned. In other words, a psychiatric diagnosis is one way of expressing moral condemnation and protection of society from abnormal behaviors. Szasz further points out that psychiatrists should not take part in the broad process of disenfranchisement (Szasz, 1974).

¹⁹ What both Foucault and Thomas Szasz have argued for is that there is an ill interpretation of the contribution of scientific discoveries in psychiatry as a basis for the medical and therapeutic practices. Foucault’s theory has been groundbreaking for the existing theoretical accounts about psychiatry mainly coming from the fields of philosophy and anthropology.

biological and social determinants of psychopathology, which shaped the therapeutic communication and environment of the ward in the professional setting.

“The biochemical efficiency seems to have its roots in fiscal efficiency: fast intellects are time-redeeming, the eugenic elimination of slow intellects a saving on public costs.” (Goodey, 2011)

Margaret Somers’ *Genealogies of Citizenship* (2008) addresses the changes in citizenship and public sphere have changed due to developing a market-oriented society. Vulnerable groups are the first to be the victims of the erosion of social protection by market fundamentalism which has eroded substantive citizenship and the real exercise of rights. Social belonging is tied to the social role which is currently shaped by one’s role in the market. With a similar stance, Asen (2017) argued that the neoliberal rationality has propagated the model of the market to all the domains of social and economic life. Ottmann (2010) expressed the importance of economic security, independence, and autonomy, which, in the absence of, civil rights do not have an impact in terms of self-determination. The new welfare state is not focused on solidarity but on a more productivity-centered society which determines a higher chance for the social exclusion of the citizens who are not contributing to the economy. According to Ottmann (2010), social exclusion in turn determines less participation and solidarity within the community.

In the present work, the focus is put on a vulnerable group, a specific category of persons with psychosocial or intellectual disabilities: disenfranchised citizens with severe cognitive impairments who have been put under certain legal restrictions²⁰ that deprive them of rights that involve making decisions and hence are ineligible to vote in most countries on the globe.

²⁰ Restrictions stem from certain types of legal status. I mainly refer to persons who are placed under guardianship/tutorship, hospitalized in a psychiatric care unit (long term) and any other legal terminology directed towards decision capacity. The focus on these categories stem from fundamental similarities in reasons behind the prohibitions, which are tied to the lack of decision-making capacity and inability to decide. This will be discussed in more detail in the next chapter where different types of decision-making capacities for different rights will be presented separately.

Nonetheless, there is a large variety of issues surrounding people with psychosocial and intellectual disabilities concerning political participation stemming from their disadvantaged status, such as exclusion from the polling station or the management of absentee ballots that are do not stem from disenfranchisement due to legal incapacity but from views over general mental capacity and how these apply to voting.²¹

²¹ The main difference between the two is the legal categorization and official rights deprivation, as well as the degree of incapacity as diagnosed by professionals; nonetheless, oftentimes de facto exclusion happens in practice.

1.2 Fitting in the Current Framework of Political Participation and Citizenship?

Fundamental rights rest on universalistic claims about the equality of all citizens (Vorhaus, 2005). Voting is a form of communication between citizens and state organs through the election of representatives. One possible way to understand inclusion in voting, the most fundamental form of political participation, is by looking at all the principle of ‘what affects all shall be approved by all’, or, in other words, all affected interests (Bauböck, 2003), a principle that stands at the root of universal suffrage. However, there are obvious limitations in the application of this principle. It is difficult to set a threshold for what ‘affected’ by a policy or political decision-making from representatives means in modern times. By this model of the participation of ‘all the people who are affected by political decisions’, hardly anyone gets excluded from political participation, including infants as laws apply to them too.²²

The broader concept of political participation represents an active process through which people are involved in making decisions about the polity. Disability is rarely employed as a variable in surveys about political participation (Priestley et al. 2016). A widespread perception is that most people with disabilities are not expressing interest in politics. This is a widely held belief among caretakers and personnel around people with psychosocial or intellectual disabilities (Agran & Hughes, 2013).²³

There is no strong evidence to show the correlation between political participation and quality of life. However, deciding over the political affairs of the community is not just one activity

²² What Cook (2013) has emphasized in his article about child suffrage and voting capacity testing was that exclusion within the demos does not entail that one gets excluded from the demos.

²³ The right to vote and to be elected as an official for people with PSDs turns into a matter of negotiation because of the perceived negative consequences of their participation in this electoral process. Michael Prince’s concept of *absent citizens* precisely catches the narrative around the political exclusion describing the situation of people with disabilities. Prince (2009) puts forth the importance of recognition and participation for the case of disabled people in Canada. These conceptual tools will be further used as useful models to describe marginalization from political activities.

that directly and unequivocally contributes to social inclusion which, in turn, results in better quality of life, even when there is an almost insignificant impact of one's action. Skelton and Valentine (2003) examined the discourse attached to the political participation of young people with auditory impairments. The authors frame their research by discussing the importance of asserting one's identity in the community and how political participation contributes to that. Matthews, Limb and Taylor (1999), in their study about the participation of young people, defined political participation as "processes of involvement, shared responsibility, and active engagement in decisions which affect the quality of life". Despite the small amount of empirical evidence concerning the impact of political participation on the quality of life, its influence on inclusion and integration within the community can hardly be a debatable topic when the purpose of participation is, in itself, to have a share in how resources and power are managed in the community by acting as a collectivity of right holders.

Michael Nash's paper (2002) is among the few in the literature that directly targets voting as an important tool of social inclusion for people with mental disorders. According to Nash, mental incompetence, access, and the therapeutic value of voting are three crucial aspects that need to be incorporated when studying voting for people with disabilities. Nina Kohn (2008) put the emphasis on the difference between managing one's affairs and the right to vote, and how the two should not be related as it is assumed by the widespread measure of disenfranchisement. Informal screening, a rarely discussed practice, is an important component analyzed by Kohn who looked at the techniques used in Virginia, United States of America. Screening, formal and informal, are crucial parts of the procedure that takes place in the process of political exclusion or inclusion for people with psychosocial or intellectual disabilities (Mattila & Papageorgiou, 2017). This evaluation of the decision capacity by caregivers and medical professionals oftentimes uses

methods that are not consistent with the legislative requirements and standards of voting and cognitive capacity. Kohn suggests the importance of studying this phenomenon and the barriers in terms of ‘cognitive access’ to the polling stations among many of the burdens to political participation.

When fulfilling the standards imposed regarding citizenship within a political community, an actor is more prone to develop a sense of identity, rights, and obligations, and support the cultural and political values of the group. Modern citizenship was formed in a dynamic of inclusion-exclusion and, throughout time and to a larger extent in the last century, the concept of citizenship started to be used in a customary and refined fashion by encompassing a larger community of people.

Having the necessary resources to the exercise full citizenship never resumes to one factor. A poor economic and education background may render the act of casting a vote irrelevant for numerous reasons. What situates persons with psychosocial or intellectual disabilities in a more distinct picture related to suffrage are the views on incapacity originating from the cognitive impairment which affects decision-making. From this assumption derive concerns about the quality of exercising the right.

Marshall’s view of citizenship considers only education and living condition without looking at the any absence of cognitive capacity due to a severe disorder (Hamilton & Marshall, 1951). Hence, citizenship is tailored for people who are cognitively able (Bartlett & O’Connor, 2010). His view puts forth ideas of the current welfare states, where the social, political, and civil modes of citizenship are in cohabitation. Social citizenship rests on state-guaranteed social and economic provisions (Prince, 2016). Marshall’s conception of citizenship relies heavily on redistribution and equality of status, which fundamentally pinpoints towards the basis of welfare states. Social

citizenship requires a greater understanding of structural barriers that contribute to the limited chances experienced by people from vulnerable groups, difficulties which in turn may determine smaller participation in politics.

Recognition in the community and, more importantly, the recognition of the limits in such individual resources can be essentially seen as struggles to be voiced through politics, as Lister and Somers both put it when discussing the case of people in poverty (Lister, 1997, 2007; Somers, 2008). Lister further develops on the need for research to uncover the theoretical nuances of citizenship and rights of people with disabilities, as this field is rarely analyzed from the perspective of exclusion from citizenship rights. The concept of lived citizenship was introduced by Lister and her colleagues (2007) as a conceptual tool that looks at ‘how individuals understand and negotiate the three key elements of citizenship: rights and responsibilities, belonging and participation’. Olsson (2017) pointed out that lived citizenship may be regarded as an action zone with certain boundaries that, in the case of her research about the lived citizenship of children, are set by adult authorities.

Lister’s (2003; 2007) criticism of Marshall’s theory of social citizenship started from the feminist and intersectional theory of the study of citizenship. Marshall (Hamilton & Marshall, 1951) puts forth the importance of all the aspects that contribute to the actual exercise of citizenship rights. A citizen with better education and better health would most likely make more informed choices when it comes to casting a vote, for instance. Social citizenship, as endorsed by Marshall, would be costly. As Cherubini (2011) puts it, Lister’s view on lived citizenship refers to “the meanings that citizenship actually has in people’s lives and the ways in which people’s social and cultural backgrounds and material circumstances affect their lives as citizens”. Consequently, the concept of lived citizenship, instead of focusing on the legal aspects of citizenship and legal

statuses, is conversely concerned with the meaning and perception of citizenship from the standpoint of the right bearer. Bartlett and O'Connor (2010) stress the importance of social citizenship for people with dementia and the delimitation between seeing a person and seeing a person as an active agent. The working definition used by the two authors sees social citizenship as 'a relationship, practice or status, in which a person with dementia is entitled to experience freedom from discrimination, and to have opportunities to grow and participate in life to the fullest extent possible.' (Bartlett & O'Connor, 2010)²⁴

Bartlett and O'Connor further stress the fragmentation and various social roles that compose citizenship, elements which form a distinction between active and passive modes of citizenship. Perceiving a citizen with a disability as a passive receiver of care and welfare is the norm which challenges any contribution brought to everyday life in the community. Bartlett and O'Connor (2007) contrasted different understandings of personhood and citizenship, the former being apolitical and with no reference to power and capturing important features about vulnerable and disempowered groups and their relation to the exercise of rights.²⁵ Citizenship captures the relationship between a person and the state. Bartlett (2014) used a novel methodological approach to capture the experiences of citizens with dementia in active citizenship by using diary interviews. The hurdles of being active in the community are additional efforts which make it difficult for persons with psychosocial or intellectual disabilities to enjoy activities without adequate support.²⁶

²⁴ This approach stresses the importance of adapting concepts of citizenship to subject experiences of disability.

²⁵ A sociological lens to the study of citizenship casts out complexities which relate to social dynamics, social roles, and power relations which cannot be displayed by a legal approach.

²⁶ The common discourse is that, generally, people with disabilities are not interested in politics and to participate in socially relevant activities instead of being aware of the experiences and additional efforts that need to be invested into such activities in contrast to persons without disabilities. Difficulties may determine the perceived lack of interest, but this should not be a driver in granting a right.

Accommodating citizens with severe disabilities to active citizenship, universal suffrage, and political participation needs to begin from approaching these citizens as equal persons with different needs instead of passive subjects of care.

1.3 The Basis of the Prohibitions

A legitimate aim justifies discrimination when the reason(s) behind discrimination are genuine concerns. An aim is proportionate when the advantages are harmonized with the disadvantages of discrimination. To have a legitimate aim, proportionate means should be used to justify a certain type of discrimination. This section aims to uncover the primary justifications used as legitimate aims for discriminating against the right to vote of persons with psychosocial or intellectual disabilities.

As shown by Bhugra and his colleagues (2016) who reviewed the electoral legislation of all the United Nations countries (167 states had available information), 36% deny all people with psychosocial disabilities the right to vote without any assessment, whereas 29% of the states require a court decision to restrict the right to vote. According to the 2016 data, only 11% of the countries posed no restrictions on voting for people under guardianship and who are institutionalized.

One first reason of the restriction over voting for people with psychosocial or intellectual disabilities is that they put in jeopardy the integrity of election because of the inability to understand voting process and grasp political information.²⁷ With regard to the outcome of elections, the same can be argued in terms of voters who lack knowledge about politics, candidates, and other election-relevant information but who have the franchise. However, this couples with the argument regarding the electoral integrity and administrative hurdles posed to the process, which might be more frequent among persons with severe cognitive impairments than among other people. Every non-disabled voter is perceived as competent to vote, which is far from the reality

²⁷ This is said to be especially problematic in situations of expected closeness or in local elections, where the pool of voters is small. However, the very small percentage of disenfranchised people would make it highly unlikely to have an impact on the outcome.

of voting. As there is no objective threshold of competence other than the Doe standard, which translates decision-making capacity to the task of voting, potentially any other standard related to political knowledge or interest may not be passed by many of the enfranchised citizens. Conversely, by using the Doe standard of voting, many of the currently disenfranchised voters would pass.

A second argument is that restrictions on the right to vote guard against possible undue influence and manipulation that would compromise the electoral process through vote fraud.²⁸ What Hirschman and his colleagues (2004) mentioned in their paper about legal and ethical issues of voting by people with dementia is that 60% of vote fraud in Chicago comes from absentee ballots, which are also a source of substantial fraud in the United Kingdom. It is important to acknowledge the fact that vote fraud and the manipulation of votes does not rely only the lack of understanding of the voting process and being ‘incompetent’ to comprehend the task at hand, but also relies on how electoral law is interpreted and applied by officials and professionals. Consequently, the officially reported numbers of fraud in the voting process, even if associated with absentee ballots, can be swiftly attributed to a small number of voters.

Beckman (2014) points out that the prospective fear of manipulating severely impaired citizens relates more to the existence of adequate opportunities for democratic participation. Vote fraud and vote buying are phenomena that take place among non-disabled voters frequently, but it is not used as a reason to disenfranchise them.

Conversely, the potential for manipulation at the court assessment of capacity was never discussed as a potential danger of unjust right deprivation practice. Janos Fiala-Butora mentioned

²⁸ Janos Fiala-Butora discussed this applied to the Kiss v. Hungary case. Hungary assumed that the restriction on the right to vote holds under the principle of protecting election integrity and influence the electoral process and outcome (approx. 0,15% of the population of Hungary in estimations from the authors). The legitimate aim of disenfranchisement is not proportionate to the expected aims and gains (Fiala-Butora et al., 2014). The authors nuance the differences between substitution versus assistance in voting.

the existence of such a phenomenon in Hungary when the assessment is performed, as there is no standardized evaluation.²⁹ The arbitrary judgement over political stances and opinions, although under the mask of individual assessment of voting capacity for people who are restricted, may be potentially more harmful than granting the right to vote. From the side of the ward, the decision is hardly contestable when it comes to the right to vote, time consuming, and it requires financial resources and support.³⁰

What may seem as an unnecessary and desultory action for some voters or personnel can be meaningful for someone who cannot do an action without willingness and support from citizens to have a choice and exercise a right. As presented in the previous sections, for people with psychosocial or intellectual disabilities there is an entire environment which does not promote self-determination because of isolation, paternalism, stigma, and institutional surroundings that determine a poor development and treatment. Economic contribution and wealth were used as reasons to prove one's competence to manage her affairs which lead to a better understanding of the polity and of voting.

The inability to form a correct vote is far from characteristic only to persons with psychosocial or intellectual disabilities, having the current restrictions limiting more people in a non-homogenous group who may be capable to vote.

²⁹ Examples of questions used in the evaluation in Hungary: 'Who would you vote for?' 'Why him?' 'Why would it be better for the country if this party won?' 'Why would it be better for you if this party won?' These questions rely on standards used in practices of corruption when voters are manipulated to vote for a certain candidate. Hence, this manipulation occurs for voters as well, but not in the context of granting the right to vote (Fiala-Butora, 2017).

³⁰ There is a small number of litigations on the matter. Legal support from advocates is crucial.

Chapter 2. Competence and Capacity in Voting

2.1 Voter Competence and Voting Behavior

Most frequently, voting competence in the voting behavior literature is used to refer to the capabilities and knowledge to make an informed decision in voting (Ashworth & Bueno De Mesquita, 2014; Goren, 2013), while voting competence for persons with psychosocial or intellectual disabilities reduces the discussion to basic decision-making competence (Tiraboschi et al., 2011). The study of voter competence focuses on how political information is received and used by voters, as well as the strategies used when casting a vote (Arzheimer et al., 2017). Rarely authors have looked at the voting behavior of people with disabilities more generally (Schur & Kruse, 2013) or people with cognitive impairments who are enfranchised (Link et al., 2012). Essentially, the voting behavior of every individual might differ considerably from the group or community they are in. Such differences for persons who are disenfranchised for reasons of decision-making incapacity are assumed to exist in an equal form for each individual when casting a vote.

In this section, I aim to see how literature on voter competence can accommodate a discussion about active suffrage for persons with severe cognitive impairments. Disenfranchisement assumes a cut-off point of voting capacity which can decide whether one is incompetent to enjoy the right to vote. Political scientists rarely consider discussions about the right to vote and to be elected, given that universal suffrage is thought of as present in a great majority of democratic countries.

Various theories have attempted to explain why people vote and how they make decisions. The Columbia model focused on explaining how voters make their decisions and how social characteristics shape political attitudes (Fisher & Fieldhouse, 2018). Following this, the Michigan

model put emphasis on individual particularities, which is a more psychological-driven model guided by psychological attachment towards a party than the previous, sociological one. Bartels (1996; 2007; 2008) focused his work on information-acquisition and voting behavior. He described that most of the electorate is uninformed and, despite having certain strong opinions or one specific political orientation, voting decisions may vary considerably and heuristics may influence to a great extent, ideas that undermine the ideal of rational voting behavior. The ideal of the informed citizen has been deconstructed by surveys that uncovered the poor information voters have. Bartels puts stress upon the role of information in elections.

Correct voting, according to Lau and Redlawsk (2007), is characterized by choosing the alternative that a voter would have chosen if they have been fully informed about policies, candidates, and other relevant information for elections but within conditions of uncertainty. Political sophistication, political experience, and motivation impact significantly the probability to cast a correct vote, while in elections with more parties running for candidacy this probability decreases (R. R. Lau et al., 2013). The idea of a correct vote implies a scale of good and less good votes based on the ideal of having fully informed preferences about elections and candidates. If the decision respects these conditions even in circumstances of uncertainty and not enough information, the vote is ‘correct’.

Lau, Andersen and Redlawsk (2007), in their discussion about correct voting, express that cognitive ability ‘is an inherited trait, and most relevant motivational differences are a product of early family socialization that is largely beyond the reach of policy makers’. The main interest of the authors is to analyze what elements form the quality of vote decisions.³¹ Cognitive capacity is

³¹ The variables Lau, Andersen and Redlawsk (2007) use are political motivation, exogenous campaign factors, political heuristics, and political expertise. The paper primarily looks at what variables have most influence in why some people vote correctly while others do not. In Lau et al. (2013), the authors investigate individual level variables, such as political sophistication, political experience, and political motivation.

measured by the authors through political knowledge based on answers to factual questions and years of education. This operationalization of cognitive capacity for voting shows the pitfalls of objective measures of correct voting and does not accommodate the variety of any cognitive challenges to decision-making.

However, normative considerations also require stronger evidence basis to allege deprivation from a fundamental right. Voting competence looks at how cues and information reach voters and how these may affect voting behavior. The operationalized version of competence to vote for persons whose decision capacity is in doubt comprises understanding of the nature and consequence of voting, which will be discussed in more detail in the next section. Blanket restrictions on the right to vote are treating the whole group³² as homogenous in terms of capacity to vote and interest in politics. The blanket restriction treats all the individuals under guardianship as a unitary group with the same decision-making capacity for voting, whereas the court assessment of voting capacity does not grant clear non-discriminatory standards.

A philosophical discussion about who shall be entitled to vote considering education or knowledge would exclude nonetheless a large proportion of the population, whereas minimal cognitive requirements impose requirements on decision capacity as for any other types of decisions. Work on voter competence centers on the quality of voting decisions and how ignorance poses threats to political outcomes. There are scholars who look at the quality of decisions by focusing on the potential harms to good governance. Brennan's (2011) arguments about the duty of citizens not to vote badly or, in other words, if one's vote can promote more harm by electing a bad government, that citizen should rather not vote. This view calls for a normative understanding of governance from each voter and understanding the potential for collective harm. Brennan

³² By group I refer to persons with disability under the legal status that puts them under the same umbrella and restrictions of rights.

further compares competence for voting to professional competence and draws attention to electoral outcomes in terms of collective action.

Voluntary political abstention, as the ideas suggested by Brennan, opens an interesting discussion about competence in voting; however, this does not bring insight to the situation of disenfranchised. The purpose of this paper is to consider the harmonization between voter competence and rights stemming from universal suffrage in the context of a legal deprivation based on moral stances against a group treated as ‘homogenously incapacitated’ to vote. The exclusion of various groups throughout history from the right to vote illustrates many reconsiderations of what suffrage means and who is expected to contribute and be represented. While excluded, an individual’s interests are not listened to by the ones in power. The purpose of elections is to build political majority and represent the interests of the electorate.

Turnout has been consistently shown to be lower among people with disabilities (Schur & Kruse, 2013). Minority groups and immigrants have been the main subject of interest when discussing exclusion in the electoral process. Social and political exclusion that leads to the lower turnout of people with disabilities is also tightly related to the socio-economic status. The socio-economic status model (SES) in voting behavior uses indices regarding the socio-economic status of an individual and the potential influence that such environmental circumstances pose on voting preferences (Brady et al., 1995).

Should the standards applied for correct voting be applied for granting the right to vote for an individual whose decision-making ability is in doubt? In other words, should standards based on political education and information collection relevant for elections be reasons to disenfranchise a group? I do not dispute that political education and sophistication are essential for informed decisions regarding voting, but such standards are easily translated when deciding on the right to

vote from a vulnerable and underrepresented group as they are not for other non-disabled citizens. The confusion between voter competence as political knowledge as requirements to understand the decision process involved in voting affects the choice of criteria used in evaluations of voting capacity. Guardianship proceedings are the main that suffer from the same risks as the individual assessment.

Voter competence was analyzed by Lupia (Lupia, 2006; Prior & Lupia, 2008) as subsuming two components: helpful knowledge and necessary knowledge to cast a competent vote. Lupia criticized how voter competence is measured by scholars did not consider the relation between choice and information, as a voter can make the same decision even with more information. I would stress that these aspects of voting do not accommodate understanding the nature and consequences of voting but items of political knowledge which depend on many environmental factors and additional support for voting.

Competence to vote may be understood from the lens of maturity too. The minimum voting age imposes a required voting competency that is in some states assumed to be 18 years old. Establishing a minimum voting age has met its criticism by outlining the irrelevance of the grounds under which there is an age of maturity, at the same time correlated with electoral competence. Cook (2013) argued for implementing a ‘procedural test for minimum literacy and independent voting’ as the only way to promote the democratic agency of children. However, the author fundamentally constructs his argument on being reasonable to allow as voters only the people who are responsible of their choices, competent, reducing the risk of harm to others (e.g. as previously presented, through a higher potential of vote fraud and potentially more costs attached to supporting such people in the electoral process). Lau (2012) argues that between child enfranchisement and the voting right of the elderly, the prior voting history makes a difference.

Moreover, other political agents look for the interests of children, while all adults are assumed to be able to ask to be represented but this usually happens in a paternalistic manner and such an assumption promotes further stigma.³³ Another difference is that, once disenfranchised, persons under guardianship are hardly in the possession of tools and support to fight the decision, whereas children will have the franchise at a definite voting age.

The lack of fit to existing standard electoral procedures due to unavailable tailored support is a part of. Proxy voting has been proposed as an alternative for disenfranchised people with psychosocial or intellectual disabilities (Fiala-Butora, Stein, and Lord, 2014) but only in normative accounts. Proxy voting is used in some isolated cases in the United States but rarely in cases of legal incapacity. The measure of proxy voting, if ever to be applied for people with psychosocial or intellectual disabilities, disregards the self-determination aspect of the exercise of this right by directly involving the citizen. An alternative to full or partial guardianship and the legal incapacity status supported decision-making, which has been used in some countries. Supported decision-making is a scheme that started to be firstly used in Canada as a substitute to the disadvantages created by guardianship.

The definitions of legal capacity vary from country to country. The essence of guardianship is the protection of the ward after a process that started when one's capacity is in question due to potential harms. However, legal capacity is tied to cognitive decision-making ability (mental capacity). Legal incapacity is a status of legal deprivation from rights prescribed in law, deprivation that protects against harmful decisions towards oneself and others. Diller (2016) points out that the two main reasons that link the deprivation of legal capacity with voting are: (1) the inability to

³³ Lau (2012) also addresses issues related to the existing dispersion when it comes to capacity among the elderly in contrast to children. Scalar versus threshold voting competence: if it were to be scalar, more competent people would receive two votes instead of one.

decide for oneself financial and personal needs and (2) the inability to appreciate alternatives for a decision. There are different rights that are based on decision-making capacity and from which a ward under guardianship or hospitalized can be restricted, such as the right to enter contract, to manage financial affairs, to litigate, right to vote and be elected, and others. Decision-making resumes to the ability to make an independent decision.

The evaluations on decision-making capacity for other rights fall under more standardized and personalized assessments given the nature of more private rights. Informed consent for treatment requires judgement on information provided about a personalized treatment option, whereas voting necessitates choosing between alternatives and political options which are put differently in various environments. A ward's past or present may be characterized by high political involvement or interest, or her family may be discussing politics often, which increases the likelihood to have a formed political opinion. Political scientists have not accommodated such a discussion.

2.3 Voting Capacity and its Assessment. Abilities for Political Decisions?

A large amount of studies has looked at the ways in which political participation and political behavior is influenced by personal characteristics of voters. The variety in forms of political participation has also greatly changed in the last decades and the rates of involvement in different forms has started to follow different distributions related to these personal characteristics of the citizens. Voting remains the most institutionalized form of political participation and is a stronghold for the inclusion of citizens in the affairs of the community they live in. I present in this section the primary studies on voting capacity for persons with psychosocial disabilities, research which will shed light on what existing research has been done on minimal voting capacity standards and their application.

It is assumed that a person whose decision-making capacity is in doubt exhibits absence of interest in politics and cognitive traits that fundamentally make it impossible to understand politics. The standards of handling this question about voting capacity have dramatically changed throughout time and these modifications are dependent on much of the understanding of citizenship in the community. Although many times used interchangeably, ‘mentally incompetent’ and mentally ill are not legally equivalent terms. Mental incapacity, a clinical term, can be defined as a person’s inability to make or carry out important decisions in their life about their well-being. Added to this definition are frequently encountered terms such as ‘psychotic’, ‘idiot’, or person ‘of unsound mind’.

The Doe v. Rowe court case (United States District Court, 2001)³⁴ was a critical case challenging the political exclusion supported through the electoral legislation. In the state of Maine, United States, the legislation used to impose an automatic blanket restriction for citizens

³⁴ This matter has never been sent to the Supreme Court. Additionally, the US is not a ratified the CRPD.

placed under guardianship (partial or full guardianship). The automatic blanket restriction imposed on the three citizens violated the right to a due process and the clause of equal protection. The three plaintiffs from the 2001 case went through all the procedure to gain back their voting rights and, after the case, the state removed the previous restrictive and discriminatory legislation by requesting the existence of a court decision which, through collecting evidence, proves the incapacity to vote of a citizen. Moreover, the court decision in Maine has provided criteria of evaluation through the Doe standard for voting which outlines the necessary requirements that need to be looked at by professionals before the court judges one as incapable to vote: understanding the nature and consequences of voting (Raad et al., 2009).³⁵

Agran and Hughes (2013) argued that the „presumed lack of competence is ultimately unfair as there has been little to no consensus or research on the grounds, apart from having a disability, as to why a citizen with disability should be denied the right to vote”. The authors have studied the standards and support people with intellectual and developmental disabilities are given from caretakers and support personnel in the voting process. The sample of 100 participants consisted of support personnel for beneficiaries with intellectual and developmental disabilities. Hence, the measurement of voting-related indicators relied on inquiries addressed to the personnel about their clients. The answers showed that clients do not show interest in voting but, as shown in the responses, alongside a personnel which does not provide instructions, education, and voting as not being included in service plans, or some clients being disenfranchised.

The lack of support for voting from the side of the personnel increases the probability of the clients to show no interest in voting. Agran and Hughes (2013) employed this methodological

³⁵ The Doe standard will be presented in the next chapter in more detail. Understanding the nature and consequences of voting essentially translate decision-making capacity in a specific task which are in line with cognitive requirements to make any decision.

approach to see the link interest in voting to the support received by beneficiaries and personnel, which is an essential component that is easily overlooked. Fundamentally, the poor information that is offered to clients and the social exclusion characterizing this vulnerable groups dramatically limits the interest that can be manifested toward political participation.

Klein and Grossman (1971) have looked at the voting patterns of disenfranchised people residing in a community state hospital. The results of their study show that institutionalized persons in mental hospitals do not differ in voting patterns when compared to a non-institutionalized and non-disabled community sample when making a voting decision for the gubernatorial elections in their state. The only difference that was identified related to the reversed party preferences, as the hospital sample mostly voted for the Liberal candidates, whereas the community sample targeted their votes toward the Conservative candidates. Moreover, 75% of the votes that were casted from the hospital sample were valid, which rather invalidates the perception that people with psychosocial disabilities cast invalid votes.

A similar study was employed by Melamed and his colleagues (2013), yielding consonant results. The lack of identity cards was shown to be the main reason for the smaller turnout among patients with mental disorders in this study in Israel. Melamed and his colleagues have done previous research (Melamed et al., 2000) based on a similar design to Klein and Grossman's study (1971), after Israel granted the right to vote to people with psychosocial disabilities, despite their residential or legal status. The relatively low turnout among people with psychosocial disabilities in Israel sheds light on many of the problems that the enfranchised citizens with psychosocial disabilities have even in the countries where there still are legal restrictions, illustrating that the legal provisions respecting disenfranchisement are rather adding more impediments to the inclusion process and higher political participation faced by disabled voters too.

Appelbaum and Grisso (1988) tested five standards on healthy elderly people, people with mild and with moderate Alzheimer's disease (AD). For the legal standards requiring evidence choice and reasonable choice there are small differences between the three groups, whereas for the other three standards (appreciate consequences, rational responses and understanding choice), people with moderate AD performed lower than the healthy individuals.

Raad, Karlawish and Appelbaum (2009) have been the first to study the Competency Assessment Tool for Voting (CAT-V) which is the only tool that operationalized the Doe standard with two other measures: reasoning and appreciation. The authors have measured the accuracy of the screening tool in the performance of the patients with mental disorders (outpatients and participants to day-care activities) resulting into promising conclusions regarding the performance of the individuals on the tasks. 92% of the 52 participants in the study scored in 5 out of the 6 items of the Doe standard score, concluding that it this screening tool is useful to guide capacity evaluations for the people who are under such monitorization due to questions regarding their voting capacity.³⁶ The results of the assessment tool did not correlate with clinical measures (Raad et al., 2009), hence using clinical indicators of severity and diagnostic is not recommended for indicating voting capacity. Desire to vote was measured and some of the participants who, although did not show an understanding of the nature and effect of voting, expressed their interest in voting.

Appelbaum, Bonnie and Karlawish (2005) assessed the performance on the questionnaire that operationalized the Doe standard among 33 patients with Alzheimer's Disease (AD), also

³⁶ The sample was not representative by any means, due to lack of randomly drawn participants from the existing population the re-searchers had access to. Additionally, the participants were 80% Hispanic, 10% African American, and 10 % of other ethnicities. The implications of this choice of sample are not discussed in the paper. Having outpatients as participants also contributed to the favorable results, whereas the main targets of the capacity assessment tool are institutionalized patients and people under guardianship, which were not part of the study and may exhibit different characteristics.

including reasoning and appreciation.³⁷ AD is the primary psychosocial condition that was evaluated through such tools when it comes to the impact of the disorder in the voting process due to its neurodevelopmental character. However, it is important to point out that there is a difference between a person who once had the right to vote or who was depicted as able to vote in contrast to someone who never had the right in the first place.³⁸

The results on the capacity assessment tool for voting were strongly correlated with the results in the Mini-Mental State Examination (MMSE), the latter evaluating general capacity and mental state related to the severity of the symptoms (dementia severity). The desire to vote is a widespread measure used in the screening methods, but it is not a part of the Doe standards for voting. Fundamentally, using this standardized assessment tool proved to be a valid measurement of voting capacity, correlated with the MMSE, and better in contrast to the unstructured clinical evaluations which can prove to be rather arbitrary.

Slightly different results were found by Tiraboschi et al. (2011), whose results have shown that the CAT-V score of their modified version of this questionnaire more accurately predicted voting capacity in their sample of 38 subjects with AD in Italy in contrast to the MMSE standard medical evaluation. The results show a moderate association between increasing severity in AD (MMSE score) and declining voting capacity (CAT-V), in contrast to previous findings. Subjects best scored in the choice measure among the others which had a smaller number of people who responded correct to, and all the indicators were correctly answered by three out of the total of 38 subjects. The Doe standard is seen as a less restrictive measurement due to how it only poses

³⁷ Reasoning and appreciation are not approved by the court from the Doe v. Rowe case in Maine, the United States of America, and the authors do not recommend the use of these two as a component for measuring voting capacity and any other measures outside the Doe standard. Appelbaum, Bonnie and Karlawish (2005) have also integrate their model of the CAT-V interview in the Appendix of their paper.

³⁸ The latter case usually happens when a person loses its legal capacity or institutionalized before the legal voting age.

understanding and making a choice in contrast to the other indicators added in the questionnaire applied by Tiraboschi and his colleagues (2011). The authors conclude that the capacity to express a choice is largely preserved even among people with moderate-stage AD.

Doron and his colleagues (2014) also assessed the capacity to vote by using the CAT-V among psychiatric inpatients in a hospital in Israel. Their results have shown that the integrity of the electoral process would be preserved if the sources of influence and manipulation would be instead addressed by authorities while protecting the right to vote for people with PSDs due to their general capacity to vote. Competency, as the authors put it, is mainly used as a legal term that is established after a clinical assessment at the advice of professionals has been given. Doron's research concluded that testing for capacity would be an appropriate measure only for people under legal guardianship in the countries where disenfranchisement is the existing practice.

Most of these studies that evaluated voting capacity by using the operationalization of the Doe standard through the CAT-V did not insist on any further implications in non-research settings. This approach adds to the complex landscape of screening methods used in clinical and legal practice regarding decision capacity for voting. As argued before, the general lack of interest in this regard stems not only from the disinterest in political inclusion *per se* but mainly from combining the decision capacity for a multitude of activities, whether they revolve around consent to treatment, managing one's financial affairs, or right to participate in election as a voter or as a candidate.

The component of political information which requires support from personnel and authorities is a key aspect used in non-standardized procedures. People with psychosocial or intellectual disabilities are perceived and kept in being passive citizens due to their health condition

and potential danger to the community. In practice, any criteria for testing can be applied, such as asking about political preferences in terms of parties (Fiala-Butora, 2017).

Applying minimal cognitive requirements are fair to the extent that they target persons whose decision capacity for voting may be affected in understanding the nature and consequence of elections. As shown in this chapter, there is a confusion between voter competence through the lens of political knowledge evaluated only for persons whose capacity is in doubt and basic cognitive requirements for voting, as expressed by the Doe standard. The latter is a standard which targets severe cognitive impairments but hardly known by forensic evaluators and not used.

Chapter 3. Severe Psychosocial or Intellectual Disabilities in Electoral Legislation

3.1 International Legislation on the Voting Rights of Persons without Legal Capacity

International legislation that addresses active suffrage and disability states that no restrictions should stem from one's disability, cognitive functioning, or perceived capacity as a fundamental difference.³⁹ The development of positive law targeting disability has seen great changes in the last three decades. The Convention on the Rights of Persons with Disabilities (CRPD) from 2006 is a cornerstone in the promotion and protection of human rights and fundamental freedoms for all people with disabilities (Kanter, 2015). There are various international treaties that refer to the rights of persons with disabilities; however, the CRPD is the most comprehensive one and a largely signed treaty among all as it is covering countries of the biggest international organization, the United Nations.

Previous chapters looked at the underpinnings of restrictions on active suffrage and confusions between evaluating voter competence and assessing basic cognitive standards such as understanding the nature and effects of a decision. With this confusion, the tension with universal suffrage and guaranteed right to vote in legislation arises. The first section focuses on international treaties on the rights of persons with disabilities and voting, as well as case law on the matter of disenfranchisement. Secondly, court cases and the most recent reforms will be presented to shed light upon the interpretations used about voting capacity and the universal right to vote. I will present the review of existing laws in all EU countries, accompanied by several case studies that will delve deeper in the discourses in certain states with different regimes of restrictions.

³⁹ Mainly the position of the CRPD but stated in other international documents referring to disability and rights.

Joshua Douglas (2008) puts forth the inconsistencies present in the legal system in the United States when it comes to the right to vote. The discussion entailed by Douglas shows how courts in the United States treat the right to vote differently, despite the legal framework that promotes the universalistic claims of how everyone has this fundamental right. Discrimination in elections is a widespread and common practice for many disadvantaged groups. The case of *Harper v. Virginia State Board of Elections*⁴⁰ in the United States is well known to human rights scholars for its battle against a poll tax required to register to vote, tax that restricted the right to vote and imposed bigger costs and burdens for the citizens who cannot afford to pay that sum of money.

Maine's court case decision in *Doe v. Rowe* suggests that there are four fundamental abilities that form capacity for decision-making in any type of decision to be made: understanding the nature and consequences of a decision.⁴¹ Electoral law is regulated at the domestic level and international law on disability rights is the only one that can formulate provisions on political participation and disability more broadly. The International Covenant on Civil and Political Rights (ICCPR) from 1966, which entered into force in 1976, expresses, in its first article, that states 'shall promote the realization of the right of self-determination in conformity with the provisions of the Charter of the UN'. The civil and political rights included in the Covenant derive from the inherent dignity of the human person. Article 20 of the Charter of Fundamental Rights of the European Union expresses equality before the law and Article 21 puts forth the principle of non-discrimination. Article 26 expresses the integration of persons with disabilities through 'ensuring their independence, social and occupational integration'.⁴²

⁴⁰ *Harper v. Virginia State Bd. of Elections* – 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169, 1966 U.S. LEXIS 2905 (LexisNexis, n.d.)

⁴¹ Qualls and Smyer (2007) point that jurisdictions will differ in their emphasis on the last two elements: reasoning and appreciation. Rationality and reasonableness as standards of the choice are subjective.

⁴² Disability organizations, such as Validity Foundation, hold that everyone should hold on an equal basis rights and fundamental freedoms as all other citizens, as endorsed in the CRPD.

The only treaty specifically targeting persons with disabilities is the CRPD, which addresses political participation in the context of legal incapacity too. The Convention refers to all people with disabilities from all Member States of the United Nations.

Article 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 (*UN, 2008*).

Article 5 – Equality and non-discrimination: 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided (3,4).

Article 12 – Equal recognition before the law: 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life (3,4,5).

Article 29 – Participation in political and public life: States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake: (...) ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use; (b) to promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs (...)

Article 29 of the CRPD declared that countries need to:

‘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’ (Barclay, 2013).

Despite the fact that the majority of Member States of the United Nations has ratified the Conventions which address the rights of people with any form of disability to vote and be elected, not all states do ensure this in their legislation.⁴³ The Convention is not binding for the immediate reevaluation of existing legislation on the matter; rather, it may produce a reexamination for potential reforms and unconformities when questions on the matter are arising through complaints or policy proposals.

According to the most comprehensive review of legislation from all United Nations Member States, 11% of the states who are part of the Organizations have no restriction in the law regarding the right to vote for people with any form of mental health diagnosis, while 36% deny this right fully (Bhugra et al., 2016).

Table 1. Review of UN Member States and provisions on disenfranchising persons with psychosocial or intellectual disabilities (reproduced from Bhugra et al. 2016)

No restriction	21 (11%)
Full restriction	69 (36%)
If detention under law	21 (11%)
If Declaration by Court	56 (29%)
Insufficient information	20 (10%)
Non-democratic countries	4 (2%)
Unclear	2 (1%)

Finally, recent legislative developments around the world show that states have started to gradually reform the electoral law and enfranchise people without legal capacity. The Council of

⁴³ There are various legislative documents that promote the protection of this fundamental right to political participation, such as the Convention on the Rights of Persons with Disabilities in the United Nations, the Voting Rights Act and Americans with Disabilities in the United States, Fundamental Rights Agency for the European Union Member States. These will be discussed in more detail in the following chapters.

Europe Recommendation R(99)4 (Council of Europe, 1999) states in its Third Principle regarding the Maximum Preservation of Capacity that ‘a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so’ (ECHR, 2010).

The CRPD Committee⁴⁴ held that ‘denial or restriction of legal capacity has been used to deny political participation, especially the right to vote, for certain persons with disabilities’. Reasonable accommodation, as encoded in Article 5 and defined by Article 2 of the CRPD, refers to “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms” (UN, 2008).

The recommendations of the Commissioner of Human Rights within the Council of Europe revolve around the ratification of the CRPD and the review of domestic legislation on legal capacity by each member state of the Council. The review of judicial procedures that can be more burdening towards people placed under guardianship and who want to challenge their placement in this status. Apart from these considerations about existing legislation, involving people with PSDs in reforming the legislation on legal capacity and providing alternatives of support in contrast to the deprivation of rights.

According to the commissioner, ‘legal capacity goes beyond decision-making; it is about what means to be human’ (Council of Europe, 2012). In most cases, if the decision has been done

⁴⁴ Committee on the Rights of Persons with Disabilities, General comment on Article 12: Equal recognition before the law, CRPD/C/11/4, 25 November 2013, para 44.

to deprive someone of legal capacity through guardianship, this can hardly be challenged and then changed.⁴⁵

⁴⁵ Establishing legal incapacity due to a disability with onset at a young age has a larger appanage on the decision-making capacity of an individual. For the right to vote, it is likely that if one is deprived of the right to vote before the legal age of voting, the citizen is completely deprived of that experience. This might not be the case for people whose legal incapacity is established later in life and at the point when the political franchise is taken away, there is a high chance that this right was exercised and more exposure to political information was available to them.

3.2 Legislation in European Union's States

Oftentimes, there are many contradictions in domestic legislation and, in most cases, lack of harmony between international treaties and existing recommendations from country reports. European jurisprudence states that any limitation of the right to vote shall not impair the essence of suffrage (European Union Agency for Fundamental Rights, 2019).

The EU Charter of Fundamental Rights can only handle provisions related to the elections to the European Parliament, which are still regulated at the domestic level. Article 3 of Protocol No. 1 to the European Convention of Human Rights from the Council of Europe expresses the right to free elections. Section A describes that deprivation of the right to vote can be a measure only for a legitimate aim. Despite that the Protocol only discusses the loss of civic rights, both active and passive suffrage, it does not even mention the deprivation of suffrage in the context of legal incapacity and guardianship. In contrast to what the Commissioner for Human Rights from the Council of Europe expressed in the context of the *Maria del Mar Caamano Valle v. Spain* ECHR case that the deprivation of the right to vote through both blanket restriction or cognitive assessments made by a judge⁴⁶ are 'not compatible with any legitimate aim and amounts to discrimination'⁴⁷, the following year (2019) the updated Protocol did not mention anything related to legitimate aims regarding disenfranchising and legal incapacitation.

In 2009, the Parliamentary Assembly of the Council of Europe adopted a resolution with reference to article 12 of the CRPD, emphasizing the importance that persons with disabilities have and exercise legal capacity on an equal basis with other citizens. In 2017, the same Parliamentary Assembly adopted Resolution 2155⁴⁸ which express that:

⁴⁶ The court assessment is rarely addressed by authorities as another form of discrimination along the automatic blanket restriction. However, the Commissioner for Human Rights mentioned that this measure is not satisfactory either.

⁴⁷ "Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights. Application No. 43564/17: (Council of Europe, 2018)

⁴⁸ PACE resolution 2155 (2017) on "The political rights of persons with disabilities: a democratic issue".

2. Political rights, such as the right to vote, stand for election and be elected, are fundamental human rights. Ensuring respect for the exercise of these rights by persons with disabilities does not mean creating a set of new rights or special rights for a specific category. Guaranteeing the respect of the political rights of persons with disabilities is a democratic issue relevant to the whole population, raising questions about the inclusiveness and efficiency of democratic systems.

4. The Assembly is convinced that the participation of persons with disabilities in political life can contribute to breaking down stereotypes, changing mindsets and combating overall discrimination.’

Moreover, the Assembly calls for actions that ‘delink the right to vote from legal capacity and full guardianship and replace substitute decision-making mechanisms with supported decision-making mechanisms, in respect of their international commitments.’ The Disability Action Plan 2006-2015 from the Council of Europe urges states to ‘ensure that no person with a disability is excluded from the right to vote or to stand for election on the basis of her/his disability’.⁴⁹

The following table is a review of the provisions on disenfranchisement for persons without legal capacity for reasons of psychosocial or intellectual disabilities in all European Union’s Member States. I have collected the data through individual research by analyzing each country’s provisions on the matter. ‘Full restriction’ refers to the disenfranchisement of persons under guardianship or institutionalized. The label of ‘individualized Court decision’ is a more specific assessment on voting capacity by a board of medical experts followed by a judge’s final decision

⁴⁹ Council of Europe Recommendation R(2006)5 of the Committee of Ministers to Members States on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015, 5 April 2006, para 3. 3.1.3(iii).

on the right to vote. Currently, there are 11 countries (including the UK) which have no eligibility restrictions when it comes to legal incapacity and the right to vote, 10 countries with automatic blanket restrictions, and 5 others which require an individualized assessment.

Table 2. Current legislation on restrictions to the right to vote for reasons of psychosocial or intellectual disabilities in EU Member States

State	Type of restriction on active suffrage	References in the legislation
Austria	No restriction	Not applicable ⁵⁰
Belgium	Full restriction	Law on diverse provisions regarding justice, 013DOC 54 3303/013, 2018; Article 492/1 of Civil Code for persons under guardianship and those in internment or institutionalized. ⁵¹
Bulgaria	Full restriction	Article 42 of the Constitution ⁵² and Article 3 and 4 of the Electoral Code ⁵³
Cyprus	No restriction ⁵⁴	For any violation of electoral procedure, a person is deprived of the right to vote
Czech Republic	Individualized Court decision	Election Act 247/1995 Article 2 (2): “limitation because of legal capacity restrictions. The court needs to consider whether a person is able to make qualified decisions and freely exercise their right to vote if the conditions are met.” ⁵⁵
France	No restriction	Article 5 of Law no. 2019-222 of the 23 of March 2019 ⁵⁶
Germany	Individualized Court decision	Section 13 of the Federal Election Act: excludes anyone who does not have the right to vote as the result of a judge’s decision. ⁵⁷

⁵⁰ Only in case of a criminal conviction (Section 22 of the Elections to the parliament Act/BGBI 471/1992)

⁵¹ (Chambre des Représentants de Belgique, 2018)

⁵² (Constitute Project, n.d.)

⁵³ (European Commission, 2014)

⁵⁴ Restriction on passive suffrage if one suffers from an incapacitating mental disability. Voting is mandatory and for people over 35 years old.

⁵⁵ (Legislationline, 1995)

⁵⁶ (Legifrance, 2019)

⁵⁷ (Bundesverfassungsgericht, 2019)

State	Type of restriction on active suffrage	References in the legislation
Denmark	Limited blanket restriction	Act no. 381 of 27 April 2016 amended the Act on Election on the European parliament and the Act on Municipality and Regional elections (enfranchising people under full and partial guardianship). ⁵⁸ Act 1722 of 2018 amended the Guardianship Act, the Act on Elections to the Folketing, the Act on the Central Person Register, the Act on Land Registration (enfranchising only people under partial guardianship)
Estonia	Full restriction	Exclusion from Article 57 of the 1992 Constitution and Article 5 of the Local Government Council Election Act. Article 526 (5) of the Code of Civil Procedure. ⁵⁹
Greece	Full restriction	Article 51 of the Constitution and Presidential Decree 26/2012 ⁶⁰
Spain	No restriction	Changes in 2018 to Organic Law 5/1985 ⁶¹
Finland	No restriction	Not applicable ⁶²
Croatia	No restriction	Not applicable
Hungary	Individualized Court decision	Article 13 (6) of the Fundamental Law. Article 13 (3) of the Election Procedure Act: “those who request the termination of guardianship may separately request the termination of exclusion from suffrage.” ⁶³

⁵⁸ (retsinformation, 2016)

⁵⁹ (Riigi Teataja, 2007)

⁶⁰ (Hellenic Parliament, 2008)

⁶¹ (Boletín Oficial del Estado, 2018)

⁶² Only in relation to passive suffrage, Section 27 of the Constitution states that persons under guardianship cannot be candidates in Parliamentary elections.

⁶³ (Nemzeti Jogszabálytar, 2011)

State	Type of restriction on active suffrage	References in the legislation
Ireland	No restriction	Article 7(1) of the Electoral Act of Ireland 1992: “only a presiding officer can refuse a person with a disability access to vote if they obstruct the electoral process in the last two hours of voting.” ⁶⁴
Italy	No restriction	Not applicable
Lithuania	Full restriction	Article 34 of the Constitution. Article 2 of the Law on elections to the Seimas. Article 3 of the Law on elections to the European Parliament. Article 2 of the Law on elections to municipal councils. Article 2 and 4 of the Law on presidential elections.
Luxembourg	Full restriction	The 2015 plan of reform is on-going. Article 53 of the Constitution prohibits those under guardianship (together with convicts) and this article would need to be abolished altogether in the reform process.
Latvia	Partial restrictions	Disenfranchised for national and local but not for European elections. Electoral legislation prohibits the right to vote for persons deprived of legal capacity. Amendments from 2012 to section 356 of the Civil Law states that people shall not be deprived of personal non-material rights (electoral legislation is not in line with the civil law) ⁶⁵
Malta	Individualized court decision	Article 58 of the Constitution: “interdicted or legally incapacitated people cannot qualify to be registered as voters for the house of representatives election if interdicted or incapacitated for any mental infirmity by a court in Malta” (of unsound mind). ⁶⁶ This article is used to deprive the right to vote depending on the interpretation. Binding decisions of the Medical Board (Section 14 of the General Elections Act) are communicated to the Electoral Commission.

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⁶⁴ (Irish Statute Book, n.d.)

⁶⁵ (Likumi, 2019)

⁶⁶ (Justice Services, n.d.)

State	Type of restriction on active suffrage	References in the legislation
The Netherlands	No restriction	Granted by the Constitution and Election Law since 2008.
Poland	Full restriction	Article 62 of the Constitution: legal incapacitation or deprived of public or electoral rights. Article 10 of the Electoral Code. ⁶⁷
Portugal	Full restriction	Article 71 of the Constitution: disability renders one unfit to exercise the right to vote. Parliamentary Election Law Article 2: acknowledged to be demented, hospitalized, or declared demented by a medical board of 2 doctors. Article 30 of the Electoral Law to Municipal Elections.
Romania	Full restriction	Article 36 (2) of the Constitution: mentally deficient and alienated persons laid under interdiction or by a final court decision. ⁶⁸
Sweden	No restriction	Not applicable
Slovenia	Individualized court decision	Law on election to the National Assembly: if one does not understand the purpose and meaning of elections does not have the right to vote.
Slovakia	Full restriction	Law governing the elections to the National Parliament: disenfranchised if deprived of legal capacity.
The United Kingdom	No restriction	Not applicable.

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⁶⁷ (Sejm, n.d.)

⁶⁸ (Constitutia Romaniei, n.d.)

3.3 Case Studies

Very few people seek justice for the right to vote because of the large amount of support required to carry out a complaint. This section presents important litigations on the right to vote for persons with psychosocial or intellectual disabilities under guardianship. I will present court cases in several countries of the European Union and the argumentation provided by the parts, as well as some of the reforms on this matter.

Hungary's 23th Article (6) of the Fundamental Law (amended in 2011) stipulates that the people who are disenfranchised by a court for a criminal offence or limited mental capacity shall not be granted the right to vote or be voted for.⁶⁹ The court has to decide over someone's mental ability to exercise the right to vote given the psychological state of the person which although it changed the previous automatic blanket restriction regime by adding a separate assessment⁷⁰ over voting capacity, uses the same unstandardized notions of voter competence⁷¹ With the new legislation established in the 2012 modified Constitution⁷², persons who are legally entitled to request the termination of guardianship for a ward can also separately request the termination of the exclusion from suffrage (Art 13/A (4) Election Procedure Act).

The new legislation on the right to vote and its capacity assessment changed after the case of Alajos Kiss v. Hungary (*Alajos Kiss v. Hungary*, 2010), with its final judgement in 2010, the plaintiff, a Hungarian citizen under partial guardianship due to manic depression, filed a complaint in 2006⁷³ related to his unfair automatic exclusion from the right to vote originating from his legal

⁶⁹ Hungary, The Fundamental Law of Hungary (*Magyarország Alaptörvénye*), 2011 April 25. Hungarian Official Gazette (*Magyar Közlöny*) No. 43/2011, available in Hungarian (Nemzeti Jogszabálytar, 2011).

⁷⁰ Amendments in the Fundamental Law of Hungary, Civil Code, Code of Civil Procedure, and the Act on Elections Procedure.

⁷¹ Art. 13/A (1) of the Election Procedure Act.

⁷² Came into force in January 2012 and abandoned section 70 (5) of Act XX of the 1949 Constitution which automatically removed the right to vote for persons under guardianship.

⁷³ One year after he was placed under partial guardianship, the plaintiff realized that he is not registered in the electoral lists.

status under guardianship.⁷⁴ Together with the right to vote, the right of disposition concerning moveable and real property, making certain legal statements in matters of family law, inheritance matters, dispositions of rights related to health services and other rights have been removed from him, as enclosed in the Hungarian legislation concerning legal capacity. The Hungarian Government rejected the application before it was taken to the ECHR, as the domestic remedies were not exhausted.⁷⁵ Kiss did not argue about his full status of guardianship but about deprivation of the right to vote specifically which was unjust giving his interest in politics. Articles 12 and 29 of the CRPD have been invoked and Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁷⁶

In the case of Alajos Kiss, there was no established scrutiny over the relation between mental state and capacity to vote. Furthermore, the Court emphasized that treating persons with psychosocial and intellectual disabilities as one class of citizens is questionable and strict scrutiny needs to be applied instead of an automatic blanket restriction. The case of Harmati v. Hungary (*Harmati v. Hungary*, 2014) presents another violation of Article 3 of Protocol No. 1 for a citizen with an intellectual disability. The applicant was removed from the electoral registers of the 2010 Hungarian general elections with reference to Alajos Kiss v. Hungary.

After the modification in both electoral legislation and the constitution, the case of Bujdaso et al.⁷⁷ v. Hungary stressed Hungary's violations of Article 29 of the CRPD through the automatic removal from the electoral register from the electoral register of the 2010 elections (as in Harmati

⁷⁴ Placed under guardianship because he "sometimes wasted money in an irresponsible fashion and was occasionally aggressive." (Fiala-Butora, Stein, & Lord, 2014)

⁷⁵ In this case, the domestic remedies would have been appealing against his guardianship status, which the applicant did not want to challenge.

⁷⁶ Right to free elections.

⁷⁷ Persons placed under partial or full guardianship due to intellectual disability.

v Hungary).⁷⁸ The new Fundamental Law of Hungary came into force in January 2012 and the automatic blanket restriction was removed and replaced with the individualized court assessment.⁷⁹ However, the courts did not establish the existence of suffrage in prior cases of people placed under guardianship because this could not be decided outside a guardianship proceeding and there is specific proceeding just for the right to vote. The interveners to this case held that Article 29 of the CRPD does not give any exception from the universal right to vote on any basis related to a person's disability. Under the European Convention of Human Rights, this ruling left open the discussion whether disenfranchisement is an interference with the right to vote in the context of an individualized assessment which should fall under the principle of proportionality.⁸⁰ The interveners stress that the right to vote, as in harmony with Article 29 of the CRPD, shall not be subject to a proportionality assessment and justification.

This case brought more discussion around competent voting and how any restriction of active suffrage for persons with psychosocial or intellectual disabilities rests on a threshold of competent voting. Moreover, any restriction as a measure of protection of the electoral system is not legitimate and not compelling, as it addresses a very small part of potentially incompetent voters. Another important point brought in the application was that capacity assessment does not fundamentally differ in the practice of disenfranchisement. There is a stark contrast presented by the interveners in terms of numbers from 2011 in Hungary between the total number from the census of persons deprived of the right to vote, 71,862 people, and the 1,394 people recorded as

⁷⁸ According to the application, in 1 January 2011, 71,862 persons (approx. 0.9% of the adult population of Hungary) were excluded from active suffrage.

⁷⁹ Bujdaso and five others v. Hungary decision: "Courts shall exclude from suffrage any adult whose discretionary power required for exercising suffrage (1) has been significantly reduced, whether permanently or recurrently, due to his or her mental state, intellectual disability or addiction; or (2) is permanently missing in its entirety, due to his or her mental state or intellectual disability. Courts shall rely on expert opinions of forensic psychiatrists to decide on the exclusion from suffrage."

⁸⁰ Legal test used when a clash between two legitimate rights occurs.

severely intellectually disabled whose decision-making capacity can be questioned.⁸¹ Therefore, this contrast is established between the actual number of disenfranchised citizens and the ones whose capacity is in question and who could probably not pass a standardized assessment.

Hungary did not implement any reform from accusations of violations of the right to vote both at the 2010 elections and after the modifications brought in legislation. The Committee has decided that the State has failed to respect its obligations under the CRPD on the right to vote for persons with disabilities by ensuring assistance instead of restricting a right. Hungary did not remove its provisions about court assessments and the right to vote, as recommended by the Committee.⁸² Fundamentally, the state needs to ensure access through adequate support for citizens to be equal in participation.⁸³

The argumentation used in *Bujdaso et al. v. Hungary* put emphasis on the subjective nature of voting and in-depth analysis on the scarce argumentation from the state behind restrictions on the right to vote.⁸⁴

In the last five years, some countries have modified their provisions. In Spain, Article 3.1 of Law 5/1985⁸⁵ of the General Electoral Regime previously restricted persons (b) whose legal incapacity to exercise the right to vote has been established by a court (in other words, under guardianship) or (c) who are hospitalized in a psychiatric hospital from a court's authorization.⁸⁶

⁸¹ This severe discrepancy between actual numbers of people disenfranchised and persons whose capacity can be questioned due to severe cognitive impairments illustrates an absence of following the actual reason used as the legitimate aim.

⁸² To be in accordance with Art. 12 and 29 of the CRPD, it was recommended to remove article 23, paragraph 6 of the Fundamental Law, and article 26, paragraph 2 of the Transitional Provisions to the Fundamental Law. The state needs to 'consider repealing' the articles.

⁸³ Training material for capacity assessment has been provided afterwards by EFOESZ, a Hungarian association for persons with intellectual disabilities (part of MEOSZ – National Federation of Disabled Persons' Associations). A Government Decree for implementing the National Disability Program (2015-2018) planned training programs for professionals, guardianship authorities, psychiatrists, judges, social assistants.

⁸⁴ The follow-up procedure on the implementation of the comments received from the Committee to Hungary is still on going.

⁸⁵ Same article (letter a) disenfranchises those sentenced by a final judicial sentence to the main or accessory penalty.

⁸⁶ According to the last electoral census, 100,000 people were deprived of the right to vote.

In 2013, a motion in the Lower House of the Parliament asked the Government to change the Electoral Act provisions on disenfranchisement. In 2018, Organic Law 2/2018 amended the previous law from 1985 (Boletín Oficial del Estado, 2018). Article 3 letters b and c were changed. Article 3.2 in its new version from 2018 now states that any person may exercise their right to vote freely and voluntarily with the means of support required.

Court case 196/2016 (Tribunal Constitucional De España, 2016) ruled over the importance of an objective capacity assessment which can be performed after an incapacitation process or institutionalization and which does not account for political knowledge. The parents of the disenfranchised held that despite her partial guardianship the right to vote to be recognized. The court issued a judgement in 2014 that has also deprived her of the right to vote. Stress was put on the probative force of the forensic medical report on capacity and how the right to vote does not require a higher competence or cognitive ability than for other citizens and is not based on political knowledge or opinions.⁸⁷ Influenceability has been used as a main argument, despite that the 2011 Committee on the Rights of Persons with Disabilities stated that the criteria used by judges lacks standards of evidence⁸⁸ and requested the amendment of Article 3 of Organic Act 5/1985. In the decision, it was argued that the Law of 1985 needs to be interpreted together with article 29 of the CRPD which was not in force when Law 1985 was approved.

In May 2018, the Council of Europe Commissioner for Human Rights intervened as a third party in the case of Maria del Mar Caamaño Valle v. Spain at the ECHR. The Commissioner stressed that both the blanket restriction and court decisions on voting capacity are not compatible standards with any legitimate aim and are discriminatory. In October 2018, the new Organic Law

⁸⁷ In this instance, it is argued that cognitive capacity (not the Doe standard) is sought instead of political preferences, interest in politics, or political knowledge.

⁸⁸ United Nations (UN), Committee on the Rights of Persons with Disabilities (CRPD) (2011) Consideration of reports submitted by State parties under article 35 of the Covenant. Concluding observations of the Committee on the Rights of Persons with Disabilities. Spain, 19-23 September 2012.

was approved and no possibility to deprive someone for reasons stemming from their disability. Disability organizations, parliamentary groups, and political parties have jointly contributed at changing the legislation.

In the case of France, in 2017, the National Consultation Commission on Human Rights stated that Article 5 of the Electoral Code needs to be repealed, as recommended by the UN. Bosquet and Mahe (2018) in their study captured the previous legislation in France when a judge's decisions with medical professionals were needed to assess voting capacity but with no official guidelines and based on indirect and arbitrary methods. In March 2019, the justice reform 2018-2022 granted 300,000 persons under guardianship their right to vote by repealing Article 5.

The case of *Marinov v. Bulgaria*, still on going, is, to a large extent, similar with *Alajos Kiss v. Hungary*, given the existing constitutional provisions through imposing an automatic blanket restriction in Bulgaria for citizens under guardianship. Marinov, placed under guardianship in 2000 and, at that moment, institutionalized, tried in 2017 to start the process of lifting the status of legal incapacity he has been placed under against his will. However, he could not vote in the 2017 elections because of the process not being finished and, additionally, could not challenge the voting restriction on any ground.

Prior to 2019, Germany imposed an automatic blanket restriction on the right to vote for persons under guardianship.⁸⁹ The Federal Constitutional Court has ruled⁹⁰ that Article 13 (2) and (3) from the Federal Election Act about disenfranchising people under guardianship and criminal offenders in psychiatric hospitals is unconstitutional because it discriminates without enough factual reason. Article 13 was changed by removing the blanket restriction and allowing people

⁸⁹ A 2013 study commissioned by the Federal Ministry of Labor and Social Affairs in Germany illustrated that around 85,000 people were affected by the provisions on legal capacity and voting.

⁹⁰ Case no. 2 BvC 62/14 (Bundesverfassungsgericht, 2019)

under court-appointed care to vote⁹¹, with the only restriction related to a judge's decision to deprive someone of the right (Bundesministerium der Justiz und für Verbraucherschutz, n.d.). The justification in the constitutional review set forth that exclusions on the right to vote can be constitutionally justified only if it is assumed that the group does not have opportunities to participate in the communication process between people and state organs. The reform⁹² applied to federal, municipal, and European elections.⁹³

The Green Party made many efforts to allow the disenfranchised to participate in the 2019 European elections, having CDU accusing them of politicizing the matter for potential votes for the elections that were upcoming. CDU's position was to change the restriction into case-by-base examinations. In 2013, a similar attempt to change the provisions with a bill has been done by the Green Party but with no success.⁹⁴ Civil society actors, such as Lebenshilfe and others, have contributed systematically. Clashes have been present especially for local elections in some regions but not with the European or Bundestag elections after the decision of the Constitutional Court.⁹⁵

Ireland poses an interesting case. The Lunacy Regulation Act of 1871 does not consider the right to vote, and the main document that applies is the Electoral Act of Ireland from 1992. In the latter document, although there is no provision that restricts the right to vote, it is stated that only a presiding officer may refuse the access of a person with disability if they need support in the last two hours of voting for reasons of obstructing the electoral process. What is particularly different

⁹¹ Active and passive suffrage.

⁹² There are more acts that contributed, together with the modification of Article 13, at the reform: State Assembly North Rhine Westphalia, 2016; State Assembly Schleswig-Holstein, 2016; Act for the Amendment of the Electoral Law of Bremen, 2018; Act for Expanding the Right to Vote in the State of Brandenburg, 2018; Seventh Act for the Amendment of Provisions in the Electoral Law of Hamburg, 2018.

⁹³ However, the changes came into effect on the 1st of July and it was difficult for most people to participate in the European elections in May 2019.

⁹⁴ Germany, German Bundestag (*Deutscher Bundestag*) (2013), 'Entwurf für ein Gesetz zur Umsetzung der UN-Behindertenrechtskonvention im Wahlrecht', BT-Drs. 17/12068, 16 January 2013 (Deutscher Bundestag, n.d.).

⁹⁵ In Germany, the process was different than in the countries where the restriction is placed in the Constitution, not just electoral legislation, hence making it easier to remove restrictions.

in this instance is that there are no restrictions based on incapacity to vote but are related to the electoral process itself.⁹⁶ Additionally, the Electoral Act restricts people of ‘unsound mind’ to stand for elections for the Parliament but a bill from 2016, when in force, will repeal this article regarding passive suffrage.

The litigations on the matter show an unfair discrimination against a vulnerable group by working with very limited evidence that restricting the right to vote.

⁹⁶ In other countries, even for people who have the franchise and are in the electoral register there is a large potential that polling officials simply do not allow someone with a disability to vote because of ‘obvious’ reasons. In Romania’s last elections in 2019, such a case was documented when polling officials did not allow persons from an elderly recovery house to vote (Libertatea, 2019).

Conclusion

For the purpose of protecting the integrity of elections, people with severe cognitive impairments are barred from active suffrage without also addressing structural issues: lack of support, contrasts with non-disabled on similar standards, the large numbers of persons who might actually not be able to make a decision and people who are legally incapacitated for different reasons. Essentially, the tension between equal active suffrage for all citizens and decision capacity requires an accommodation of what voter competence refers to for persons with cognitive impairments. As I have presented, an environment that creates structural inequality in opportunities between disabled and non-disabled may sustain evidence of incapacity to vote if concepts are not considered for disabled and non-disabled.

The purpose of restrictions on the right to vote is to exclude an electorate that can pose risks to the electoral process and integrity in procedures and outcomes. Throughout this work, I have presented how there is no objective threshold that provides a cut-off point of voter competence which is used in practice or offered in the political science literature. Furthermore, a discussion about conceptions on voter competence does not interact with the right to vote but with ethical concerns about political knowledge and correct voting. The Doe standard of voting is the only criteria which targets only cognitive capacity for decision-making in contrast to assessing the same aspects which are assumed to be present among all citizens whose capacity is not in question. Conversely, out of the people who fall under restrictions, there may be more capable voters according to the Doe standard of understanding the nature and consequences of voting. In practice, as seen in various argumentations, there is room for discretionary decisions starting from the assumption of incapacity.

I highlighted that there is a broad discourse that does not sustain self-determination, manipulation, and certain views of rationality of the people with psychosocial or intellectual disabilities. Moreover, I have presented the primary views on voter competence and how they do not address the matter given the medical and legal implications of the subject. The review of legislation and reforms in law has put together content on restrictions variously applied but with similar argumentations.

No analysis to date has revealed in detail ideas about voter competence in positive law and electoral studies literature for people who are disenfranchised. Addressing disability as a politically relevant subject⁹⁷ brings out certain limits of norms and laws based on ideal principles of rationality, equality, and views about voter competence which do not accommodate all citizens equally. One's incapacity should not define the right to be represented and to be a citizen if one chooses so.

As held by the ECHR, voting is not a privilege and states have to ensure inclusion to the largest extent. What scholars in political science and policy makers need to formulate are the tools that can support inclusion in the electoral process and political engagement more generally. Additionally, the assumption that the ones who have the right to vote are competent (and rational) was debated in the political behavior literature and shown to be distant from reality.

The role of active suffrage does not resume to political power and a tool of electing representatives. Active suffrage defines a citizen's role in society (Kohn, 2008) and exclusions from this process intensifies the absence of this vulnerable group in society.

⁹⁷ Voting is just one aspect to a wider picture of how political agency is perceived for disabled people in contrast to the non-disabled.

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