October 2011

**Submission to the Office of the High Commissioner for Human Rights**

**For the Thematic Study on Participation of Persons with Disabilities**

**in Political and Public Life**

The Rights Initiatives of the Open Society Foundations[[1]](#footnote-1) is pleased to submit the following analysis in response to the Office of the High Commissioner for Human Rights’ request for contributions towards a thematic study on participation of persons with disabilities in political and public life.

**A. Question for analysis: Can the right of persons with disabilities to vote be limited on the basis of a finding of incapacity?**

The analysis addresses the proposal by the European Commission for Democracy Through Law (the Venice Commission), advising the Council of Europe, that the principle of universal suffrage can be overridden by “an individual decision of a court of law” to deprive a person of the right to vote and be elected “because of a proven mental disability.”[[2]](#footnote-2) This recommendation reflects existing law and policy in some Council of Europe countries, as well as a trend in others – of replacing a blanket denial of the right to vote for certain groups of persons with disabilities with criteria that would deny the right to vote of individuals by way of an individually-applied capacity test.

This question is analyzed in light of the standard established by the UN Convention on the Rights of Persons with Disabilities (CRPD), as well as other branches of international law, including the 2010 ruling of the European Court of Human Rights in *Kiss v. Hungary*.[[3]](#footnote-3)

**B. The right to vote of persons with disabilities**

**B.1 Under the CRPD**

The right to vote is a foundational tenet of democracy that recognizes the equal voice of a State’s citizens in electing representatives. It is emblematic of full participation of the individual in political and public life, and of the power to partake in influencing events of personal and national consequence.

Bearing in mind the tendency throughout history to exclude persons with disabilities from public life and from making decisions affecting their own lives, the CRPD includes an article specifically drafted to ensure participation in political and public life. Article 29 echoes the right to participate in public affairs as enshrined by the International Covenant on Civil and Political Rights (ICCPR),[[4]](#footnote-4) while spelling out how universal suffrage is to be achieved for persons with disabilities. Article 29 recognizes the categorical right and specifies the measures for realizing it: accessibility, accommodations, and, where necessary and requested, support.

**CRPD Article 29**

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:

(*a*) 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, inter alia, by:

(i) Ensuring that **voting procedures, facilities and materials are appropriate, accessible and** **easy to understand and use**;

(ii) **Protecting the right of persons with disabilities to vote** by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

(iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, **where necessary, at their request, allowing assistance in voting by a person of their own choice**.

No qualifications are attached to the right. The types of accommodations and support enumerated include easy-to-understand and use procedures and materials and assistance in voting. These suggest that the right to vote is protected—indeed, should be promoted—for the full range of persons with disabilities.

It is clear that Article 29, when read in conjunction with three other core CRPD principles, not only prohibits restricting the right to vote of persons with disabilities, but imposes an active duty on States Parties to take measures that will expand the population of persons exercising this right.

Article 3 highlights *full and effective participation* and inclusion in society as one of the CRPD’s foundational principles. Articles 2 and 5 include within the meaning of disability-based discrimination both the exclusionary act itself and the denial of *reasonable accommodations* to promote equality and eliminate discrimination. Article 12 reaffirms the *recognition of legal capacity* of persons with disabilities on an equal basis with others in all aspects of life. What appears in Article 29 as a particular measure, to provide *support* in exercising the right to vote, is a foundational principle of the exercise of legal capacity: the duty to provide *access for persons with disabilities to the support they may require in exercising legal capacity* (Article 12(3)). The traditional form of denying legal capacity—for example, by appointing a guardian—is thereby replaced by a model of supported decision-making, free of the effects of a determination of legal “incapacity.” Finally, under the “Purpose” of the Convention, Article 1 clarifies whose rights are promoted and protected throughout the Convention—those of persons with *physical, mental, intellectual or sensory disabilities*.

**B.2 Under the ICCPR**

The state obligation to take positive measures to overcome difficulties in exercising the right to vote existed even prior to the CRPD. General Comment 25 on the ICCPR highlights that,

“(p)ositive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement. . . . Information and materials about voting should be available in minority languages. Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice.”[[5]](#footnote-5)

**B.3 The right to vote for all persons with disabilities: In practice**

The right to vote for all persons with disabilities is a reality in some countries. The United Kingdom, Ireland, Sweden, the Netherlands, Austria, Spain, Canada, Italy, and Israel are some of the countries in which no capacity-based limit exists on the right to vote.[[6]](#footnote-6) Existing qualifications on the right to vote on the basis of mental capacity were removed from the constitutions of the Netherlands and Italy, and in the United Kingdom an elections law abolished the common law rule that a person lacks legal capacity to vote by reason of mental health problems.[[7]](#footnote-7)

In these countries, various policies are implemented in order to enable persons with intellectual or psychosocial disabilities to vote. These include increasing access to the process through accessible information and assistance in voting, putting in place anti-fraud measures to prevent exploitation and manipulation, and empowering persons with disabilities to exercise this right.

In some cases (United Kingdom, Denmark), the stated purpose of assisted voting is to support those with intellectual or psychosocial disabilities and those who are illiterate.[[8]](#footnote-8) A debate is ongoing over the best way to regulate assisted voting, whether by way of the electoral committees situated at the polling stations or by a designated person of the individual’s choice. Placing the obligation on the electoral committee to provide this assistance necessitates training for all its electoral officials in providing this support, and is therefore costly compared with enabling the individual to vote with the assistance of a person on her behalf, but more easily enables monitoring for fraud and manipulation.[[9]](#footnote-9) If assistance remains in the hands of a person designated by the individual, anti-fraud measures would include clarifying who may or may not serve as an assistant in voting. Laws addressing this issue commonly preclude staff at an institution where the person resides from being such assistants.

In some cases, proactive steps are taken to increase the population of persons with disabilities exercising their right to vote. The law in Israel regulates the placement of mobile polling stations in psychiatric and other institutions to facilitate voting by those who cannot reach regular polling stations.[[10]](#footnote-10) Increasing access to the process has resulted in providing information on how to vote in easy-to-understand form. In the United Kingdom, political parties provide their party manifestos in easy-to-understand language.[[11]](#footnote-11) The International Foundation for Electoral Systems (IFES), a key international leader in election assistance and democracy, has highlighted the right to vote of all persons with disabilities without exception and incorporates work to this effect in its assistance to various countries.[[12]](#footnote-12)

In many countries, self-advocates work to raise awareness of persons with disabilities, families, professionals, electoral committees and government representatives of the importance of political participation by persons with disabilities, as well as the types of accommodations and supports that can help facilitate political participation. Down Syndrome Ireland and Inclusion International have issued materials demonstrating how voting processes and party platforms can be made accessible to persons with intellectual disabilities.[[13]](#footnote-13) Advocates speak on this before forums across Europe. Similar activity is taking place even in countries where the right of some persons with disabilities is qualified: Self-advocates from Ne Per Ne (“We For Ourselves”), supported by Mental Disability Rights International-Kosovo actively advocated on this issue, as well as self-advocates from the Peruvian Down Syndrome Society.[[14]](#footnote-14)

**B. 4 “Assistance – while retaining rights”[[15]](#footnote-15)**

The position of the Commissioner for Human Rights of the Council of Europe summarizes the elements introduced above: the universality of the right to political participation and how the process is strengthened when supports are offered to exercise this right. Referring to the case of *Kiss v. Hungary*, which proposed a test for voting competence even while striking down a blanket ban on the right to vote for those appointed a guardian, the Commissioner concludes that the right to vote is unequivocal, regardless of disability:

[The CRPD] does not specify any exceptions to the rights therein. On the contrary, it stipulates that state authorities “shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”  
  
The very purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights by all persons with disabilities. This leaves no room for procedures in which judges or medical practitioners would assess the voting competence of a person and then give a green light - or not. As we do not test that capability for someone without disabilities, this would amount to blatant discrimination.

According to the Commissioner, recognizing difficulties individuals may have in exercising their right to vote does not necessitate a removal of the right, but instead calls for assisting in its exercise:

There are of course those who – because of their disability – have difficulties in fully exercising their human rights. In these situations society should offer assistance to make it possible for the individual to exercise them, including to take part in political life. The Convention places an obligation on governments to ensure that such assistance is provided if needed, including in exercising the right to vote. There is a huge difference between this approach and just depriving someone of their rights.  
  
This is the paradigm shift that the UN Convention represents: it builds on the idea that we should go further than to just help persons with disabilities to adjust to existing conditions – our societies should seek to adapt to and accommodate everyone, including those with special needs.

**C. Limitations on the right of persons with disabilities to vote in light of international law**

**C.1 The link between guardianship and denial of the right to vote**

Traditionally, guardianship in its various forms has served as the main tool for denying the right to vote. Where plenary guardianship is the prevalent form of limiting a person’s legal capacity,[[16]](#footnote-16) the tool has been especially convenient and cost-effectiveness: with the determination that an individual is a non-person before the law, the individual’s actions become devoid of legal consequence and he is denied the ability to carry out any action that would have legal implications, such as making a contract, getting married, or voting, without further need to examine actual capabilities.

Even in countries that allow for partial guardianship (through which some ability is retained to take actions with legal ramifications), the vast majority of persons are in fact under plenary guardianship, and the bundle of legal actions denied to them is an automatic result of the guardianship determination.[[17]](#footnote-17)

**C.2 Breaking the link between guardianship and voting – a step forward**

Maintaining a regime through which persons can be determined “legally incapable” contravenes CRPD Article 12(2), which states that all persons with disabilities enjoy legal capacity on an equal basis with others.

The European Court of Human Rights (European Court) recently held that plenary guardianship constitutes a breach of Article 8 of the European Convention on Human Rights (ECHR) on the right to respect of private and family life.[[18]](#footnote-18) Chipping away at the institution of plenary guardianship helps thwart the denial of the right to vote. In some countries, however, even partial guardianship is sufficient to render a person incapacitated to vote,[[19]](#footnote-19) though cracks are appearing in this practice, as well. In fact, in *Kiss v Hungary*, the European Court ruled that a blanket ban on the right to vote for all those appointed any form of guardianship was a violation of Article 3 of Protocol No. 1 of the ECHR.[[20]](#footnote-20)

This jurisprudence limits States’ ability to use guardianship as a way to automatically disenfranchise persons with disabilities and raises the question whether the right to vote could be curtailed through an individualized capacity test.[[21]](#footnote-21)

**C. 3 Capacity test: From the perspective of the CRPD**

Taken together, CRPD Article 29 on the right to vote and Article 12 on recognizing the legal capacity of persons with disabilities preclude such an individualized capacity test.

According to the interpretation of a growing community of rights advocates, practitioners, and jurists, any disability-based denial of the legal effect of a person’s actions contravenes the right to full legal capacity.[[22]](#footnote-22) Disability and any perception of incapacity associated with it no longer justify derogating from the rule of full legal capacity. The only implication arising from the disability is the duty to provide individuals with support in the exercise of their legal capacity. Society must continuously strive to implement solutions to maximize individuals’ ability to communicate their will. Solutions may include making accommodations around the particular decision-making process, developing support networks for more intensive support needs, or ensuring that supports available to the public can be applied in a situation involving a person with a disability.

Even if, following a discrete and individualized test, a person’s ability to make decisions under certain circumstances is compromised, whether because States have not yet aligned their practices with CRPD Article 12 or because they argue that extreme cases may warrant an interpretation of the will of another such that an effective “substitution” of the individual’s decision occurs, there are no grounds for postulating a capacity test for *voting*.

Individuals not categorized as having a disability are not required to demonstrate capacity in decision-making as a condition for recognizing their legal capacity. They are not held accountable to the reasonableness, rationality, or the extent to which their decision furthers or damages their interest, or the interest of others, as long as they are acting within the boundaries of the law.[[23]](#footnote-23) Even where particularly compelling interests are perceived as justifying the application of disability-based tests for capacity, the reasoning for a disparate approach with regard to persons with disabilities with the sole distinction being the disability (an approach challenged by the CRPD Article 12), would have to be weighty and grounded in strong competing interests. Across jurisdictions, these traditionally have had to do with serious concerns over adverse effects to the life, health, welfare, property or protected interests of the individual with a disability, or situations in which a person with a disability constitutes a danger to himself or others.[[24]](#footnote-24) None of these concerns are applicable to the situation of voting. Absent these compelling interests, testing only of persons with disabilities for capacity around voting constitutes *prima facie* discrimination.

**C.4 Capacity test: From the perspective of the right to vote**

1. General

Capacity testing goes against the essence of the right to vote. In each of the major human rights treaties addressing the right to vote, the right implies free elections by secret ballot, under conditions that ensure free expression without intimidation.[[25]](#footnote-25) Referring to the seemingly indirect reference to the right to vote as enshrined in the ECHR, courts have stressed the “greater solemnity” States must afford their commitment to implement the right to vote. States must not only refrain from interfering with this right (as with the majority of civil and political rights), but are obligated to take positive measures to ensure its implementation.[[26]](#footnote-26)

1. From a historical perspective

The last 150 years have seen a steady extension of the right to vote to categories of people previously excluded from suffrage. First, the pre-condition of wealth was eliminated, allowing all male citizens, regardless of property ownership, to vote. Further grounds of exclusion were next removed: gender, race, status, knowledge and literacy, recognizing the suffrage of women, non-whites, slaves, minorities, indigenous populations, and people of all statuses and walks of life. Maintaining competency tests is at odds with this historical trend of enfranchisement.

This idea was aptly expressed in an *amicus curiae* brief submitted by Mental Disability Advocacy Center (MDAC) and 25 human rights experts to the Constitutional Court of the Czech Republic, challenging a blanket ban on voting for persons with disabilities deprived of legal capacity:[[27]](#footnote-27)

It follows that the right to vote – and just as important, the equal weighting of votes regardless of the gender, social status, literacy, intelligence and other factors of the voter – reflects a core understanding of the basis of legitimacy in liberal democracies. **No power has the right to peer behind or question the validity of a vote if cast according to the proper procedures laid down by law. …[A] vote may be based on a mix of influences, some personal, some cultural, and some traditional. Most voters are manipulated through campaigns** [Rosenberg, S., McCafferty, P., “The image and the vote: Manipulating voters’ preferences,” *Public Opinion Quarterly* 51 (1987), pp. 31-47], which form a core part of elections in democracies. **Ultimately a vote expresses a preference. No system has ever purported to overturn the will of the people on the basis that its decision lacked rationality or was “manipulated” by personal preferences**.” (Emphasis added.)

1. “Rationality” of voting not a legitimate aim

International law recognizes the non-absolute character of the right to vote, in turn implying a margin of appreciation for States in this sphere. In placing such limitations, however, it must be guaranteed that these limitations “do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.”[[28]](#footnote-28)

Restrictions to universal suffrage related to age,[[29]](#footnote-29) residency, and citizenshipare not construed as contravening the principle of universal suffrage:

…[T]he imposition of a minimum age may be envisaged with a view to ensuring the maturity of those participating in the electoral process or, in some circumstances, eligibility may be geared to a criteria, such as residence, to identify those with sufficiently continuous or close links to, or a stake in, the country concerned.[[30]](#footnote-30)

The only aim that can be associated with maintaining a competency test for voting with regard to persons with disabilities—maintaining a purely rational democratic process—is fallacious on two accounts. First, it assumes that the democratic process, in this case the voting process, is purely rational, while the reality is “that most votes cast are a mix of the rational and the irrational, and it would be impossible—not to mention impermissible—to read the mind of the electorate to screen out votes that were in part or wholly founded on an irrational basis.” (MDAC *amicus curiae* brief). Second, it plays on the perception of persons with psychosocial or intellectual disabilities as “mad,” irrational, out of touch with reality, or unable to understand parts of reality and therefore unworthy of partaking in shaping it unless they can prove an ability to do so. It is exactly this stereotypical perception that has relegated persons with disabilities to the margins of society and that the CRPD has set out to dismantle. Self-advocates around the world, campaigning for their right to vote (see Section B above), are breaking down the misconception of the impairment itself as a determinant of the ability to understand and partake in the political process, and thereby rendering disability a discriminatory grounds for applying a competency test.

The only way to introduce a competency test for voting, which is not discriminatory on the basis of disability, would be to apply it to all potential voters. That, of course, would not pass muster with basic rules of democracy, which reveals the true nature of such a test.

1. A note on criminality

It is worthwhile to reflect on the one other remaining ground for exclusion from universal suffrage: criminality. Though the door has not closed on this ban, national and international jurisprudence is gradually restricting its application. In the 2005 case of *Hirst v. The United Kingdom*, a blanket ban on voting applied to all convicted prisoners was struck down, since it precluded a process of weighing competing interests and assessing the proportionality of the ban in relation to the severity of the crime and the effect on the prisoner.[[31]](#footnote-31)

This line of reasoning is echoed in the discourse around striking down blanket bans in the area of disability, as exemplified in the *Kiss* case. Yet it would be a mistake to apply the solution of a proportionality test from the area of criminality to that of disability (in fact, this mistaken application may have led to some of the dicta in *Kiss v. Hungary*). With prisoners, a proportionality test would assess disenfranchisement against the severity of the individual’s criminal act and breach of the rule of law. Obviously, criminality of conduct is an inapplicable test in assessing the prospect of disenfranchisement of persons with disabilities, and an alternative one is non-apparent given the problems associated with testing for “rationality.” Finally, it is worth noting that, as with persons with disabilities, some countries protect the right of all prisoners to vote.[[32]](#footnote-32)

1. Fraud and manipulation

A possible underlying concern motivating the placement of a limit on the right of persons with disabilities to vote is the concern over fraud and manipulation. Various groups in society may be exposed more than others to this risk: individuals facing language and social barriers, as well as older persons and persons with disabilities who depend on others in their everyday life or in making decisions and communicating them. The appropriate response, however, is to manage the risk of fraud and manipulation, not to curtail the rights of those perceived to be particularly susceptible to manipulation. Indeed, in countries where universal suffrage is the rule, including for persons with disabilities, the debate has shifted to the most appropriate steps to provide protection against fraud, as has been described in section B above.

Where the disability is so pronounced that assistance and support do not yield a decision by the person that could be understood by others, basic rules of fraud and manipulation bar anyone from casting a vote in that person’s name.

**D. *Kiss v. Hungary*** **revisited**

In its 2010 ruling, *Kiss v. Hungary*,[[33]](#footnote-33) the European Court declared that the automatic ban of persons under partial guardianship from voting was incompatible with the principle of universal suffrage recognized by the European Convention on Human Rights. The Court’s decision, however, cites the possibility of disenfranchisement based on an individual assessment of the capacity to vote.

In addition to the preceding arguments that such an assessment contradicts basic tenets of the equal recognition of the right to vote and of legal capacity, a closer look at the Court’s [*rationes decidendi*](http://en.wikipedia.org/wiki/Ratio_decidendi) casts doubt on the strength of such a conclusion. In *Kiss*, the applicant challenged the assumption that people under guardianship in general could not make responsible choices required for participation in elections, but left uncontested the view that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs and that persons with disabilities may lack the capacity to exercise their right to vote. The Court’s finding that an individual assessment “pursued a legitimate aim” is thus *obiter dictum*, based entirely on the applicant’s premise, rather than on an examination of this premise, despite its shaky legal foundations, particularly in light of the CRPD, or its practical implications.[[34]](#footnote-34)

Furthermore, referring to the blanket ban on persons under partial guardianship from voting, the Court observed that “there is no evidence that the Hungarian legislature has ever sought to weigh the competing interests or to assess the proportionality of the restriction as it stands.”[[35]](#footnote-35) Indeed, in its determination that an individualized competency test for political participation was warranted, the Court itself failed to weigh the competing interests and assess the proportionality of such a test.

Finally, having proceeded from the unexplored premise that a voting competency test is warranted, the details of how a voting competency test would be applied remained unexplored by the Court. Probing into the implementation of a competency test would have revealed the anomalies embedded within it:

Would the assumption of incapacity to vote be one which can be rebutted? If so, what would the process of rebuttal look like?

Who would be vested with authority to bring capacity into question before the court—would it be left to arbitrary criteria such as whether family members or care-givers serve to increase a person’s capacity or not?

If the presumption would be that a person has to prove capacity to vote in each case, would every person “suspected” of having a disability that, some would perceive, impacts their understanding, undergo proceedings before courts to determine his voting status?

Would each individual be required to present credentials proving “capacity to vote” at the voting booth? If so, what would those be? Would election officials be vested with authority to refuse to allow a person to vote who, according to their judgment, does not exhibit such capacity?

And considering that the tests for rationality and understanding are far from an exact science, and open to widely differing interpretations, could standard criteria be established for such capacity at all?

It is difficult to imagine a court remaining supportive of the notion of a competency test after drilling down into its “practicalities.”

**E. In summary**

CRPD Article 29 establishes the unequivocal right of all persons with disabilities to fully participate in political and public life on an equal basis with others, including the right and opportunity to vote. Some of the means cited to facilitate the exercise of this right (procedural accessibility, including material in easy-to-understand language, and assistance in voting) are utilized to support persons with intellectual or psychosocial disabilities in voting in countries that adhere to a universal right to vote. Carefully crafted anti-fraud and anti-manipulation measures protect individuals who for diverse reasons (among which disability is only one) are at risk of manipulation and guarantee the integrity of the process.

Support to enable the exercise of the right to vote is an example of one of the fundamental principles of the CRPD, highlighted in Article 12. In place of denying the right to be recognized as a person before the law, full legal capacity is retained, complemented by access to the support necessary for its exercise. Guardianship for persons perceived as incapable of making decisions affecting their lives is emblematic of a paradigm of paternalism and protection that has been replaced by a paradigm of rights and self-determination. Guardianship has also been the main channel by which to restrict the right to vote of persons with disabilities; appointment of a guardian, whether indicating a limited or complete denial of legal capacity, has entailed a denial of the right to vote. There is a trend to curb this process of denial. Inspired by the CRPD, national and international jurisprudence has taken steps to sever the link between guardianship and denial of the right to vote. Guardianship status in itself is no longer recognized as a valid conduit through which to deny the right to vote, giving rise to the question of whether an individually tailored examination of the voting competency of categories of persons with disabilities, as has been suggested by those same courts, can be justified in light of international law.

A narrower test for stripping persons with disabilities of the right to vote based on a perceived, even if individualized, assessment of “mental incapacity,” contravenes the principle of full legal capacity mandated by CRPD Article 12. The only justification that can be offered for such a test—that persons who cannot vote rationally should not be allowed to vote—is based on false assumptions with regard to the “rationality” of the voting process and the “irrationality” of persons with intellectual or psychosocial disabilities. Its universal application is unfeasible in a democratic society; its application to persons with disabilities only is inherently discriminatory.

The strength of the European Court’s decision in *Kiss v. Hungary* is in undermining the utilization of guardianship in restricting the right to vote. The Court’s suggestion that a competency test is an appropriate substitute is *obiter dicta*. By its own account, the Court proceeded from an assumption that the competency test is uncontested by the applicant and thus did not examine the merits or feasibility of such a test.

As the Court noted in its 2005 decision, *Hirst v. The United Kingdom*, “[T]he right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion. . . . Universal suffrage has become the basic principle.”[[36]](#footnote-36) The right to vote does not allow for restrictions based on disability. The notion of “knowledge” as a threshold criterion to voting is anathema to the principle of universal suffrage. International jurisprudence has chipped away at blanket bans restricting the right of all prisoners to vote, and the alternative proportionality test, assessing the denial of the right to vote against the degree of criminality, by its nature does not lend itself to application to persons with disabilities.

It follows that the Venice Commission’s proposal, which suggests that the principle of universal suffrage can be overridden by “an individual decision of a court of law” to deprive a person of the right to vote “because of a proven mental disability,” does not adhere to international standards on universal suffrage nor to the rights of persons with disabilities. The only conclusion can be in favor of recognizing universal suffrage for persons with disabilities, without exception.

1. <http://www.soros.org/initiatives/rights-initiatives> [↑](#footnote-ref-1)
2. European Commission for Democracy Through Law (Venice Commission) in its Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections” [CDL-AD(2010)036]. [↑](#footnote-ref-2)
3. *Kiss v. Hungary*, no. 38832/06, ECHR, judgment of 20 May 2010 [hereinafter *Kiss Case*]. [↑](#footnote-ref-3)
4. ICCPR Article 25:

   Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

   (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

   (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

   (c) To have access, on general terms of equality, to public service in his country. [↑](#footnote-ref-4)
5. ICCPR, General Comment 25, paragraph 12. <http://www.unhchr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb?Opendocument>

   An analysis of the caveats cited in the general comment will be addressed below. [↑](#footnote-ref-5)
6. For an analysis of the situation in European countries mentioned here, *see* the European Union Agency for Fundamental Rights, “The right to political participation of persons with mental health Problems and persons with intellectual disabilities” (October 2010), pp. 18-22, <http://fra.europa.eu/fraWebsite/attachments/Report-vote-disability_EN.pdf> [hereinafter, FRA Report]. [↑](#footnote-ref-6)
7. *Ibid* and at <http://www.legislation.gov.uk/ukpga/2006/22/section/73>. [↑](#footnote-ref-7)
8. *Ibid.* Though Denmark does limit the right of some persons with intellectual or psychosocial disabilities to vote, it also expressly provides for those considered eligible from among that group to vote with assistance. [↑](#footnote-ref-8)
9. In Israel, a debate is ensuing on this precise question (memo from Advocate Yotam Tolub, Bizchut – the Israel Human Rights Center for Persons with Disabilities (July 26, 2011)). [↑](#footnote-ref-9)
10. Regulations on Knesset Elections (Voting Procedures and Guidance on Voting in Hospitals and Recognized Institutions), 1996. [↑](#footnote-ref-10)
11. FRA Report, *supra* note 5, p. 22. [↑](#footnote-ref-11)
12. For IFES’ position *see* <http://www.ifes.org/Content/Publications/Press-Release/2011/IFES-Accepts-InterAction-Award-for-Disabilities-Work-Expresses-Concern-over-Threats-to-Voting-Rights.aspx>. [↑](#footnote-ref-12)
13. For example: “My Opinion My Vote,” [www.myopinionmyvote.eu](http://www.myopinionmyvote.eu); “Preparing Easy-to-Read Political

    Manifestos – The Guidelines,” <http://www.downsyndrome.ie/index.php?option=com_docman&task=doc_download&gid=62&ItemId=204> [↑](#footnote-ref-13)
14. <http://www.disabilityrightsintl.org/work/country-projects/kosovo/> [↑](#footnote-ref-14)
15. Thomas Hammarberg, Human Rights Commissioner, the Council of Europe, “Assistance – while retaining rights” (March 22, 2011), <http://commissioner.cws.coe.int/tiki-print_blog_post.php?postId=127>.

    [↑](#footnote-ref-15)
16. Such is the case, for example, in Bulgaria, the Czech Republic, Lithuania, Poland, and other countries. *See* the FRA Report, *supra* note 5, pp. 15-16. [↑](#footnote-ref-16)
17. In Croatia, for example, close to 90% of the 17,810 individuals appointed guardians are fully deprived of their legal capacity in the process. *See* Human Rights Watch, *“Once You Enter, You Never Leave” –* *Deinstitutionalization of Persons with Intellectual or Mental Disabilities in Croatia*, Report (September 2010), near footnote 100. [↑](#footnote-ref-17)
18. *Shtukaturov v. Russia*, (no. 44009/05), ECHR, judgment of 27 March 2008, paras. 77-96. [↑](#footnote-ref-18)
19. For example in Bulgaria, Greece, Lithuania, Luxembourg, Malta. *See* FRA Report, *supra* note 5, p. 15. [↑](#footnote-ref-19)
20. Similar to *Kiss Case, supra* note 25; *Hlavac Tomas and Soldan* *Jiri*, Cases No. IV US 3073/08 and 3102/08, submitted to the Constitutional Court of the Czech Republic, challenged the blanket ban on the right to vote that follows automatically from the deprivation of legal capacity. Case No. 3102/08 has been decided (2010) similarly as well: though the process of depriving one of legal capacity is maintained, the automatic link between a finding of limited legal capacity and an incapacity to vote was found unsustainable. Case No. 3073/08 is still pending. *See* FRA Report, *Ibid.* p. 18. [↑](#footnote-ref-20)
21. As suggested, for example, by General Comment No. 25 (paragraph 4) on the ICCPR and in *Kiss v. Hungary*. [↑](#footnote-ref-21)
22. *See* “Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities” presented to the Human Rights Council (January 2009), paragraphs 43-46, <http://www.un.org/disabilities/documents/reports/ohchr/A.HRC.10.48AEV.pdf>; and “Legal Opinion on Article 12 of the CRPD” by academics and civil society experts and advocates, at <http://www.internationaldisabilityalliance.org/representation/legal-capacity-working-group/>. [↑](#footnote-ref-22)
23. The one exception has to do with life-threatening situations which may warrant urgent medical intervention against a person’s express wish. As long as the test is disability-neutral and universally applied, such intervention is different in nature than a disability-based intervention. [↑](#footnote-ref-23)
24. Such are the grounds for appointing guardians, limiting legal capacity or intervening in matters of institutionalization or treatment in Australia, Germany, the UK, Israel, and other countries. [↑](#footnote-ref-24)
25. ICCPR Article 25; ECHR Article 3 of Protocol 1; CRPD Article 29. [↑](#footnote-ref-25)
26. “Article 3 of Protocol No. 1 appears at first sight to differ from the other rights guaranteed in the Convention…as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom… Indeed, it was considered that the unique phrasing was intended to give greater solemnity to…States’ commitment and to emphasise that this was an area where they were required to take positive measures as opposed to merely refraining from interference.” *Hirst v. the United Kingdom* *(no. 2) [GC]*, no. 74025/01, ECHR 2005-IX [hereinafter *Hirst Case*] *para*. 56. *See also* *Mathieu-Mohin v. Belgium*, judgement of 2 March 1987, Series A no. 113, paragraphs 48-50. [↑](#footnote-ref-26)
27. “Amicus Curiae Briefby 25 Non-Governmental Organizations and Academic Institutions” (<http://mdac.info/amicus-curiae-brief-czech-constitutional-court>) in *Hlavac Tomas and Soldan* *Jiri* Case No. IV US 3073/08, and Case No. IV. US 3102/08. *See* footnote 18. [↑](#footnote-ref-27)
28. *Hirst Case*, *supra* note 25, para. 62, with reference to *Mathieu-Mohin v. Belgium*, judgment of 2 March 1987, Series A no. 113. [↑](#footnote-ref-28)
29. Even if the age-limit on voting is construed as a capacity issue – a blanket assumption that under-age citizens lack the capacity to assess the consequences of their decisions and make conscious and judicious decision – its automatic and universal revocation upon entering the age of maturity, with no subsequent calling into question of capacity, fundamentally differentiates it from the questioning of capacity applied to adult persons with disabilities. [↑](#footnote-ref-29)
30. *Ibid,* with reference to *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999-VI and others. [↑](#footnote-ref-30)
31. *Hirst Case*, *supra* note 25. [↑](#footnote-ref-31)
32. For example Ireland, Sweden, Germany and Denmark. [↑](#footnote-ref-32)
33. *Kiss Case*, *supra* note 25. [↑](#footnote-ref-33)
34. *Ibid*, para. 38: “The applicant accepted this view [that ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs] and the Court sees no reason to hold otherwise. It is therefore satisfied that the measure pursued a legitimate aim.” *See also* para. 28. [↑](#footnote-ref-34)
35. *Ibid*, para. 41. [↑](#footnote-ref-35)
36. *Hirst Case*, *supra* note 25, para. 59. [↑](#footnote-ref-36)