

Mental Disability and the Right to Vote in Europe: A Few Notes on the Recent Development

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I. Introductory remarks

The principle of universal suffrage is without doubts one of the most important constitutional principles of electoral law; the practical importance of this principle might be illustrated by its impact on the electoral laws all around the world throughout the 20th century: the struggle for universal suffrage resulted in granting the right to vote to the previously neglected groups of citizens such as women² or „paupers“. However, some groups of citizens did not benefit from this extension of voting rights. The most important examples in this regard are prisoners³ and mentally disabled people. However, some interesting developments have taken place in Europe⁴ in the recent years which indicate that the period of disregard for the voting rights of mentally disabled persons may be over.

As of the year 2000, mentally disabled people were not granted the right to vote in most of the Central and Eastern European countries.⁵ The same applied to the

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² It is however necessary to mention that in Switzerland women were granted the right to vote at the federal level in 1971 and Appenzell Innerrhoden was the last canton to grant women the right to vote in cantonal elections no sooner than in 1990!

³ A breakthrough at the European level was caused by the ECHR judgement *Hirst v. United Kingdom* (No. 2), of 6 October 2005, n. 74025/01, 42 EHHR 41 (hereinafter „*Hirst v. United Kingdom*“), but many European countries have not yet complied with the judgement.

⁴ As regards the situation in the USA, comp. Note. *Mental Disability and the Right to vote*. 88 Yale L.J. 1644 or BRESCIA, N. F. *Modernizing State Voting Laws that Disenfranchise the Mentally Disabled with the Aid of Past Suffrage Movements*. 54 St. Louis U. L. J. 943, who states that: „United States history has been characterized by granting voting rights to increasing numbers of the population. Individuals with mental disabilities, however, remain one of the few groups singled out for disenfranchisement.“

⁵ Usually referring to „persons deprived of legal capacity“ or „persons under guardianship“.

Netherlands, Switzerland and to some extent even to Germany.⁶ On the other hand, legal orders of several European states did not contain such a restriction (*inter alia* Sweden, Ireland, Italy or Austria).

This paper addresses recent developments and changes in the European approach towards individuals with disabilities. It first describes how states restrict the right to vote of mentally disabled people; then it identifies the relevant constitutional principles and sources of international law and finally, it analyzes recent developments that have occurred in certain European countries as well as at the all-European level.

II. Means of restrictions on the right to vote

States which restrict the right to vote of a mentally disabled person use one of the following legislative techniques.

The first possible solution is to include an explicit limitation clause directly in the constitution. This was the case of the Netherlands until 2008 (*see infra*). The Dutch constitution provided in art. 54 para. 2 that the persons who were placed under guardianship (*curatele*) could not exercise their right to vote. Similarly, art. 45 para. 2 of the Albanian constitution provides that: „Citizens who have been declared mentally incompetent by a final court decision do not have the right to vote.”⁷

Some states preferred to omit the limitation clause in the constitution but to allow the legislator to restrict the right to vote itself. The typical example is the Czech Charter of Fundamental Rights and Freedoms which in art. 21 para. 3 provides that: „The right to vote is universal and equal, and shall be exercised by secret ballot. The conditions for exercising the right to vote shall be provided for by law.” Acting according to the second sentence of that provision, the Czech Parliament adopted a law [n. 247/1995 Coll., § 2 b)] which provides that deprivation of legal capacity presents an impediment to the exercise of right

⁶ Since 1 of January 1992 was the deprivation of legal capacity (Entmündigung) replaced by so called „Betreuung“. It was first planned that the Betreuung should not affect the right to vote but the result of the legislative process differed from the original intentions. Betreuung for all purposes (für alle Gelegenheiten) thus deprives the person of the right to vote.

⁷ A similar solution is used in many other European constitutions (art. 70 para. 5 of the Hungarian Constitution, art. 62 para. 2 of the Polish Constitution, art. 36 para. 2 of the Romanian constitution etc.).

to vote.⁸ It means that, strictly speaking, the person deprived of legal capacity has the constitutional right to vote but can not exercise it as long as the deprivation (proclaimed by the court) lasts. It is however needless to say that the actual consequences are the same.

The Greek constitution (art. 51 para. 3) chose a “compromise” solution: „*The Members of Parliament shall be elected through direct, universal and secret ballot by the citizens who have the right to vote, as specified by law. The law cannot abridge the right to vote except in cases where a minimum age has not been attained or in cases of legal incapacity or as a result of irrevocable criminal conviction for certain felonies.*“ It thus (as in the Czech or the Slovak case) leaves some space for the legislator to decide who may exercise the right to vote, but on the other hand, it explicitly enumerates the grounds for restrictions (including legal incapacitation).⁹

The difference between constitutional and statutory entrenchment of the restriction is not purely technical; whereas the constitutional entrenchment calls for intervention of the constitution-maker, the statutory regulation may be amended by a legislator or reviewed by a (constitutional) court. This was the case in Slovenia or the Czech Republic where the changes have been introduced by constitutional courts (see *infra*). On the contrary, constitutional amendment was necessary in the Netherlands and would be necessary in any other state with constitutional restriction of the right to vote. Of course, the impetus for change does not have to come from the national level; the international law (be it a treaty or a decision of an international body) may help to abolish the restrictions as well.¹⁰

As regards the language of the restrictions, the European legal orders (be it in constitutions or in other laws) usually link the deprivation of the right to a certain legal status which is based on a judicial decision (i. e. a *person under guardianship, a person deprived of his legal capacity* etc.). It is a welcomed difference from the “old-fashioned”

⁸ The same applies for example to Slovakia [Act n. 333/2004 Coll., § 2/2 let. b)].

⁹ The Norwegian constitution (in art. 50) is very similar in this regard, stating: „Rules may be laid down by law concerning the right to vote of persons otherwise entitled to vote who on Election Day are manifestly suffering from a seriously weakened mental state or a reduced level of consciousness.“

¹⁰ The most practical example (in Europe) is probably a judgement of European Court of Human Rights.

language which was (or even is) used in some other U.S. states.¹¹ The distinction is probably caused by the fact that a majority of European constitutions is quite new and those which are not (cf. the Norwegian constitution, 1814) have been amended many times, whereas for example constitutions of many states in the USA were drafted more than a hundred years ago.¹²

Disenfranchisement of certain mentally disabled individuals is usually motivated by a “need to defend integrity and dignity of elections”; it rests on a premise that a vote in the elections should be a result of rational consideration, whereas the mentally disabled lack capacity to vote rationally.¹³ From the other side, of course, one may argue that the mentioned motivations are rather a disguise for persistent exclusion and discrimination.¹⁴

III. The relevant law and principles

The question remains (in all the above mentioned cases) whether such restrictions comply with the constitutional principles of the respective countries¹⁵ and with the relevant international law.

III. 1. International law

As regards the international law, the right to vote is governed by several international treaties as well as by numerous soft-law sources.

Art. 25 of the International Covenant on Civil and Political Rights (ICCPR), to which all the European states are parties, guarantees the right to vote for all citizens of a country (universal suffrage). According to the General Comment no. 25¹⁶ „*the right to vote at*

¹¹ See for example section 182 of the Constitution of Alabama: „The following persons shall be disqualified both from registering, and from voting, namely: All idiots and insane persons (...).“

¹² For example the above mentioned sixth Alabama constitution (1901), or the constitution of Texas (1876) which excluded „Idiots and lunatics“ in the original version, but now instead refers to „persons who have been determined mentally incompetent by a court“.

¹³ Compare NOTE. Mental Disability and the Right to vote. 88 Yale L.J. 1644. Sometimes, fears of manipulated votes are also mentioned.

¹⁴ See Amicus Curiae Brief sent to the Czech Constitutional Court by the Mental Disability Advocacy Center. Available at <http://www.mdac.info/amicus-curiae-brief-czech-constitutional-court>. All hypertext links in the text were checked on 21 of October 2010.

¹⁵ This applies mainly to those countries which restrict the right to vote by an ordinary statute and not in the constitution itself.

¹⁶ Office of the High Commissioner for Human Rights. General Comment No. 25, para. 10, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument).

elections and referenda must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements.“ It is not *prima facie* clear whether the General Comment should be read so as to prohibit restrictions based on grounds of mental disability. Since it explicitly rules out restrictions on grounds of physical but not mental disability, it can be argued that the latter may be consistent with art. 25 of the ICCPR.

Art. 3 of Protocol No. 1 to the European Convention of Human Rights (hereinafter the „European Convention“) provides that *„The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.*“ This – at a first sight – does not explicitly guarantee the right to vote for all citizens of a country. Yet, the European Court of Human Rights (hereinafter „ECHR“) has established that Article 3 of Protocol No. 1 guarantees individual rights, including the right to vote and to stand for election¹⁷ The ECHR further made it clear that the High Contracting Parties have a certain margin of appreciation (discretion) as regards the restrictions of the right to vote.¹⁸ Still, it employed the proportionality analysis of the restrictions on several occasions. In *Hirst v. United Kingdom*, the ECHR held that: *„[the restrictions may] 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 (see Mathieu-Mohin and Clerfayt, p. 23, § 52). In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. For example, the 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*

¹⁷ Judgement of 2 March 1987, *Mathieu-Mohin and Clerfayt v. Belgium*, Series A no. 113 or *Hirst v. United Kingdom*.

¹⁸ *Hirst v. United Kingdom*, § 60.

criteria, such as residence, to identify those with sufficiently continuous or close links to, or a stake in, the country concerned [see Hilbe v. Liechtenstein (dec.), no. 31981/96, ECHR 1999-VI, and Melnychenko v. Ukraine, no. 17707/02, § 56, ECHR 2004-X]. Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1.” The ECHR has already labeled as disproportionate the restrictions concerning the prisoners¹⁹ or persons who are suspected of belonging to the Mafia,²⁰ but the conformity of restrictions aimed at mentally disabled people has been left open to interpretation (until the judgement *Kiss v. Hungary* which will be analyzed further).

The European Convention seems to be stricter than the ICCPR since it requires the restrictions to be *proportionate*, whereas the ICCPR as interpreted by the General Comment n. 25 requires only *reasonability* of such restrictions; the requirement of proportionality (containing the “least restrictive measure” test) leaves almost no maneuvering space ^{for the legislator.}

Moreover, some of the Council of Europe soft-law sources (often cited by the ECHR) provide for even stricter regulation. Opinion no. 190/2002 of the European Commission for Democracy through Law on the Code of Good Practice in Electoral Matters dictates that any deprivation of the right to vote and to be elected must be provided for by law, must observe the proportionality principle; and that the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law. Section 3.1.3 of The Council of Europe Recommendation R (2006) 5 provides that the member states of the Council of Europe undertake to ensure that no disabled person is excluded from the right to vote or to stand for election on the basis of his disability.

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) should also not be forgotten. CRPD has been ratified or at least signed by the vast majority

¹⁹ Hirst v. United Kingdom.

²⁰ Labita v. Italy, judgement of 6 April 2000, n. 26772/95, 2000-IV.

of the European states.²¹ The purpose of CRPD is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.”²² Art. 29 of CRPD demands that the states guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others. The states should 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.²³

Such a regulation seems to be stricter towards possible limitations than the ICCPR and the European Convention; it is however not clear whether the provisions of the convention can be read in a way that prohibits *any* restrictions of the right to vote of the mentally disabled people. One can suggest that CRPD prohibits only those restrictions which are based solely on the fact that a person is disabled, but does not prohibit those which are proportional and based on qualified reasons. It is hence not entirely clear – in the authors opinion – whether CRPD prohibits proportionate and nondiscriminatory restrictions aimed only at those disabled who can not understand the meaning, procedure and consequences of the elections at all (i. e. are not aimed at all disabled people).²⁴

III.2. Domestic level

The most important constitutional principle which has to be taken into consideration when evaluating the deprivation of the right to vote is without any doubts the principle of universal suffrage. In addition to the recognition at international level, constitutions of

²¹ United Nations Enable. Convention and Optional Protocol Signatures and Ratifications. Available at <http://www.un.org/disabilities/countries.asp?navid=12&pid=166>.

²² Persons with mental health disabilities as well as persons who have intellectual disabilities are included.

²³ In order to do so, the states are obliged to ensure that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use; to protect the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, 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; and to guarantee 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.

²⁴ Compare the further analyzed decisions of the Czech and the Slovenian constitutional courts as well as the ECHR’s judgement *Kiss v. Hungary* which use a similar line of reasoning. The author of this paper favours the interpretation which allows such a restriction; it is not likely that CRPD seeks to turn the right to vote into an absolute right. On the other hand, disproportionate and discriminatory measures against the disabled persons are clearly incompatible with CRPD.

European countries recognize the universal suffrage either by directly using the notion “universal” or by using the phrase “all citizens”.²⁵ The principle of universal suffrage is usually not deemed absolute; it means that some groups of citizens may be deprived of the right to vote but only with respect to the principle of proportionality; this principle is recognized by almost all European constitutions – sometimes explicitly (art. 31 para. 3 of the Polish constitution), but mostly rather as an implied principle common to the states based on the rule of law and respect to fundamental rights.²⁶

The constitutional courts throughout Europe (as well as the ECHR) use the proportionality test in order to determine whether certain restriction of fundamental right may be considered proportionate. The test is usually divided in three steps in which the court²⁷ assesses 1) if there is a legitimate aim and if the restriction is rationally connected to the objective 2) if the restriction impairs the right to the least possible extent and 3) if there is proportionality (in the narrow sense) between the infringement and the objective.²⁸

Moreover, in the specific case of the mentally disabled, attention must be paid to the principles of human dignity²⁹ and equality (prohibition of discrimination on grounds of disability).

IV. The recent developments at the national level

IV.1. The Netherlands

²⁵ Cf. art. 45 para. 1 of the Albanian Constitution, art. 45 para. 1 of the Croatian constitution, art. 21 para. 3 of the Czech Charter of Fundamental Rights and Freedoms, art. 38 para. 2 of the German Basic Law, section 14 of the Finnish Constitution, art. 43 of the Slovenian Constitution, art. 52 of the Serbian constitution, section 23 of the Spanish constitution etc.

²⁶ See STONE SWEET, A., MATHEWS, J. Proportionality Balancing and Global Constitutionalism. 47 Colum. J. Transnat'l L. 72; the authors note that the proportionality analysis in the rights adjudication spread from Germany across Europe to some Commonwealth system countries. Of course, the German influence was supported by the ECHR which uses balancing (proportionality analysis) regularly.

²⁷ The principle of proportionality must – of course – be observed even by a legislator that regulates fundamental rights issues.

²⁸ The exact wording of the proportionality test often varies amongst courts but the steps and the objectives are the same.

²⁹ Cf. APPELBAUM, P. S. Law & Psychiatry: "I Vote. I Count": Mental Disability and the Right to Vote. Psychiatric Services. 2000, col. 51, p. 850: „Deprivation of the right to vote sends a message to mentally ill and retarded citizens that they are not like other people and are not wanted as part of the broader polity.“

In 2003, the Dutch Council of State faced the question whether art. 54 para. 2 of the Dutch constitution (that deprived the right to vote of the persons who were placed under guardianship because of their mental health or intellectual disability) was in violation of the ICCPR. It held that such restriction could generally not be considered unreasonable restriction under Article 25 of ICCPR but that the outcomes of some specific cases may be in breach of ICCPR.³⁰ The Council of State further ruled that the specificity of the case (i. e. whether the mental disorder is of such a nature that the exclusion from voting is appropriate) can not be taken in account by the judge who decides to place a person under guardianship because the Dutch civil code does not allow it.³¹ The Council of State thus made it clear that any change of the *status quo* must be made via constitutional amendment.

Art. 54 para. 2 of the Dutch constitution was changed in 2008, five years after the decision, so that the persons placed under guardianship may exercise their right to vote.

IV.2. Slovenia

The Constitutional Court of Slovenia adjudicated in a very similar case in the same year.³² Art. 43 of the Slovenian constitution³³ did not explicitly disenfranchise the mentally disabled persons (neither directly nor indirectly), but it allowed for statutory provisions which could limit the right to vote.³⁴ The Constitutional Court made it clear that any interference with the right to vote and the right to be elected (just as in case of any other fundamental right) is only allowed if it is necessary for the protection of the rights of others or the protection of the public interest provided that thereby the rights of others are protected (Art. 15.3 of the Slovenian constitution); in other words, the restriction of the right to vote or of the right to be elected must be consistent with the principle of proportionality.

³⁰ The decision of the State Council of 23. October 2003, LJN: AM5435, para. 2.6.3. (in Dutch available at: <http://zoeken.rechtspraak.nl/default.aspx>).

³¹ *Supra*, para. 2.6.2. This proclamation is clearly contradictory to the ruling of the Czech constitutional court.

³² Judgement of 10 July 2003, n. U-I-346/02, available at www.us-rs.si.

³³ The right to vote shall be universal and equal. Every citizen who has attained the age of eighteen years has the right to vote and be elected.

³⁴ Art. 15 para. 2: „The manner in which human rights and fundamental freedoms are exercised may be regulated by law whenever the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom.“

The statutory regulation provided that any person deprived of legal capacity is automatically deprived of the right to vote (just as in the Dutch case). In the light of the above mentioned criteria, the criteria for the deprivation of legal capacity (and consequently of the right to vote) must be determined precisely and in a manner such that they at least as possible interfere with the universal right to vote. It meant – as formulated by the Constitutional Court – that only those individuals, who are truly not capable of understanding the meaning, purpose and effects of elections, may be disenfranchised.

The Constitutional Court held that criteria set for the deprivation of legal capacity are not narrowly tailored to the pursued objective (i. e. that the capability to understand understanding the meaning, purpose and effects of elections is not considered in the proceedings leading to deprivation of legal capacity) and consequently that the challenged provisions of Electoral Act were unconstitutional. The Slovenian Parliament was given six months to replace the unconstitutional provision but the period lapsed and the unconstitutional provisions were annulled without replacement.

IV.3. The Czech Republic

The factual background of the Czech case³⁵ was almost identical. As mentioned above, Art. 21 para. 3 of the Czech Charter of Fundamental Rights and Freedoms reads: „*The right to vote is universal and equal, and shall be exercised by secret ballot. The conditions for exercising the right to vote shall be provided for by law.*” Act. n. 247/1995 Coll., § 2 b) then provides that deprivation of legal capacity (but not a “mere” limitation of legal capacity) presents an impediment to the exercise of right to vote.

The Czech Constitutional Court (just as the Slovenian one) held that the principle of universal suffrage (although being one of the most important principles in a democratic society) is not an absolute one and that it can be subject to some proportionate restrictions (citing the case law of the ECHR). According to the Constitutional Court, the restriction of the right to vote could only be considered proportionate if it would be narrowly tailored to fit the pursued legitimate aim. The Court held – unlike the *Amicus*

³⁵ Judgement of 12 July 2010, n. IV. ÚS 3102/08, available at <http://nalus.usoud.cz>.

Curiae Brief – that there was a legitimate aim of ensuring that only citizens capable of understanding the meaning, purpose and effects of elections have the right to vote.³⁶

However, the condition of narrow tailoring (proportionality) could only be fulfilled if the courts deciding about the deprivation of legal capacity would examine – in each individual case – one’s ability to understand the meaning, purpose and effects of elections. In fact, the Constitutional Court went even further and used this opportunity to express its views on the nature of deprivation of legal capacity. It stated that, while deciding on deprivation of legal capacity, the ordinary courts must bear in mind all practical fundamental rights limitations resulting from the deprivation. The courts have to – according to the Constitutional Court – separately examine (and justify) whether each of the limitations³⁷ is inevitable with regard to the mental state of the individual in question. A contrary approach would be inconsistent with the principle that fundamental rights limitations must be individualized (narrowly tailored). The Constitutional Court thus challenged the very nature of deprivation of legal capacity.³⁸ In order to establish whether the ordinary courts respected the mentioned principles, the Constitutional Court reviewed the relevant judicial practice; not surprisingly, it found out that the approach of the ordinary courts was disproportionate in virtually all cases.³⁹

The Constitutional Court thus ordered the ordinary courts to follow the reasoning of its judgement in future (i. e. to separately examine and justify all consequences and fundamental rights implications of their decision.⁴⁰ Following the decision of the Constitutional Court, an court deciding on deprivation/limitation of one’s legal capacity must then examine whether the person understands the meaning, purpose and effects of

³⁶ This is the ground for excluding children from the elections.

³⁷ I. e. not only disenfranchisement which was at stake in the case.

³⁸ The demands of the Constitutional Court could probably be met by the German „Betreuung“ (see supra) which has to be explicitly labelled as „for all purposes“ to deprive the person in question of his right to vote.

³⁹ The separate examination of individual fundamental rights limitations was not present in any of the known cases. Moreover, about 25.000 persons were deprived of legal capacity in the end of 2009 whereas only about 4.000 of them were subject to the more proportionate limitation of legal capacity. This is a striking imbalance which indicates that it is probably more convenient (for the courts) to deprive the person of legal capacity than to examine his status carefully and with regard to the principle of proportionality. The quality of reasoning of the decisions in most cases supports this assertion.

⁴⁰ Needless to mention, the courts are also obliged to provide proper reasoning of a conclusion regarding the right to vote.

elections. If he does, she may not be deprived of legal capacity; the person's legal capacity in such a case may be at the utmost partially and proportionately limited.⁴¹

IV.4. United Kingdom

The path to change in the United Kingdom was not (for understandable reasons) cleared by the courts but by the legislator itself. The Electoral Administration Act 2006 abolished the common law rules which rendered persons unable to vote on the basis of mental incapacity.⁴²

V. The development at the European level: *Kiss v. Hungary*

The year 2010 brought yet another important development at the European level. In May 2010, the ECHR decided the case *Kiss v. Hungary*;⁴³ the Court addressed almost the same questions as the Czech and Slovenian constitutional courts and answered them almost identically.

The applicant, Mr. Kiss, complained that the disenfranchisement, imposed on him because he was under partial guardianship for manic depression,⁴⁴ constituted an unjustified and disproportionate deprivation of his right to vote.

The ECHR referred to its settled case-law according to which the rights guaranteed under Article 3 of Protocol No. 1 are not absolute and the states enjoy certain margin of appreciation. On the other hand, it declared that universal suffrage has become the basic principle of electoral law under the European Convention. The Court thus analyzed proportionality of the disenfranchisement in the present case. The Hungarian government succeeded with its assertion that the restriction of the right to vote pursued a legitimate aim (again the aim of ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs), but the Court nevertheless labelled the disenfranchisement as disproportionate.

⁴¹ It must be underlined that a mere limitation of legal capacity (for example that a person may not handle larger amounts of money) does not imply deprivation of the right to vote in the Czech legal order (unlike for example in Hungary where partial guardianship implies the deprivation of the right to vote).

⁴² The explanatory notes refer to case-law that considered idiots and lunatics unable to vote (available at http://www.legislation.gov.uk/ukpga/2006/22/pdfs/ukpgaen_20060022_en.pdf).

⁴³ Judgement of 20 May 2010, n. 38832/06.

⁴⁴ In Hungary, unlike in the Czech Republic, even imposition of partial guardianship deprived the concerned person of right to vote.

The Court argued that imposition of an automatic, blanket restriction on the franchise of those under partial guardianship is impermissible; such an approach does not allow the proper assessment of the person’s actual “voting” capacity. It also stressed that: “*the treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny.*”

VI. A few notes on the recent development

The ECHR, the Slovenian Constitutional Court and the Czech Constitutional Court explicitly expressed their opinion that a restriction of the right to vote of persons deprived of legal capacity pursues a legitimate aim but that the provisions in question were not narrowly tailored to fit the aim.⁴⁵ Both of these conclusions are extremely important for the future development.

VI.1. Legitimate aim

The assertion that the state pursues a legitimate aim if it restricts the voting rights of mentally disabled individuals was criticized by many non-governmental organizations and academics. For example the *Amicus Curiae Brief* sent to the Czech Constitutional Court by the Mental Disability Advocacy Center⁴⁶ argued that fears of the irrational, incompetent or manipulated vote are unfounded. According to the *Brief* most votes cast are a mix of the rational and the irrational, and it is impossible (or even impermissible) to read the mind of the electorate to screen out votes that were in part or wholly founded on an irrational basis. Moreover, there is no test to measure the capability to vote and having a blanket prohibition on a category of persons (i. e. people restricted or deprived of legal capacity) is inherently discriminatory. The *Brief* also pointed to the fact that the mentally disabled persons are not the only ones who can be influenced or “manipulated” in the voting process; it mentioned the role of electoral campaigns and the natural level of interdependency among persons in each society.

⁴⁵ Such a conclusion is implicitly present even if the decision of the Dutch Council of State, *supra* note n. 26.

⁴⁶ Available at <http://www.mdac.info/amicus-curiae-brief-czech-constitutional-court>. The Brief was signed by many other NGOs and academics including Michael Stein, Luke Clements, Renáta Uitz and many others.

Nevertheless, the ECHR accepted that there may be a legitimate aim of ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs; this view was shared by both constitutional courts in the cited decision. From this point of view, the developments have not been revolutionary, since certain people will remain being excluded from the voting process because of their mental state.

The question of “measurability” of one's capacity to vote probably can not be answered purely by lawyers; there is a disagreement over the answer even in the scientific community. It is however almost undisputed that people with serious mental retardation or severe dementia are not capable of understanding the voting process.⁴⁷

VI.2. How to tailor?

The ECHR's conclusion that the current prevailing method of regulation (i. e. blanket deprivation of the right to vote linked to the legal capacity status) is disproportionate has (and even more will have) a direct impact on the legal orders of those European states that still restrict the right to vote of the mentally disabled persons.

It is crystal clear that those legal orders, which blanketly disenfranchise all persons deprived of legal capacity (placed under guardianship etc.) of the right to vote and do not allow a separate examination of the voting capacity, are inconsistent with the European Convention.

The question remains how should states comply with the ECHR's demands. One of the possibilities is of course to abolish all restrictions related to a mental disability of a person (Ireland, United Kingdom of Austria); but it does not seem very likely that the states would pass on from disproportionate restrictions to no restrictions. Hence, we might suppose that the solution chosen either by the Czech Constitutional Court or by its Slovenian counterpart will be followed by another states. Although there was a slight

⁴⁷ For example APPELBAUM, P. S., BONNIE, R. J., KARLAWISH, J. H. The Capacity to Vote of Persons With Alzheimer's Disease. *American Journal of Psychiatry*, 2005 (162), p. 2097, state that there is a strong correlation between dementia severity and the capacity to vote and that the „Doe voting capacity standard“ (see infra) is suitable for deciding on the capacity. This does not necessarily apply to those with mental illnesses, such as schizophrenia.

difference between the Czech and the Slovenian ruling,⁴⁸ both constitutional courts seem to favour the functional approach which specifically examines the person's capability of voting rather than the „status approach“ that treats a person depending on his class membership (e.g., all persons deprived of legal capacity for any reason). The exact method of testing the voting capability has of course not been proposed by any of the courts; in fact it is very hard to answer the question „*what it means to be competent to vote?*“, but the American experience shows that the problem is not insolvable.

The U. S. District Court for the District of Maine ruled in case *Doe. Rowe*⁴⁹ that only persons, who lack the capacity to understand the nature and effect of voting so that they cannot make an individual choice, may be considered incompetent to vote. Following the decision, „*efforts have been made to operationalize the relevant legal criteria in assessment instruments that can be applied in a reliable fashion. With regard to voting, such a process not only will help to limit the number of persons excluded from voting by the courts but will also permit election officials and caregivers to decide when a person has become incapable of voting.*“⁵⁰ Appelbaum, Bonnie and Karlawish have proposed an efficient (3-4 minutes long questioning) which 1) uses the *Doe v. Rowe criteria*⁵¹ and 2) seems to be proportionate and far less restrictive than the treatment of the persons under guardianship as a single class. Such a test demands relatively low standard⁵² and would open the possibility to vote for many persons previously deprived of legal capacity. This method – or a similar one – of assessing the voting capacity would probably be easily transferable to the European systems, since the *Doe* criteria are practically the same as the

⁴⁸ The Slovenian Constitutional Court left to the legislator to decide which solution would be proportionate (and only indicated the path) the Czech Constitutional Court adopted an activist approach and ordered the ordinary courts to examine one's capability of understanding the meaning, purpose and effects of elections.

⁴⁹ *Doe v Rowe*, 156 F Suppl 2d 35 (D Me 2001).

⁵⁰ APPELBAUM, P. S., BONNIE, R. J., KARLAWISH, J. H. The Capacity to Vote of Persons With Alzheimer's Disease. *American Journal of Psychiatry*, 2005 (162), p. 2094.

⁵¹ The *Doe* criteria are practically the same as the criteria of the ECHR and the cited European constitutional courts.

⁵² *Ibid.* The tested people are asked questions like: „Imagine that two candidates are running for Governor of, and that today is Election Day. What will the people do today to pick the next Governor?“ or „When the election for governor is over, how will it be decided who the winner is?“. The method of course suggests that many answers could be accepted ant that – in response to the second question – no specific knowledge about the electoral system is necessary. So an answer: „He who gets more votes“, would be accepted.

criteria of the ECHR and the cited European constitutional courts and the method addresses the demands of the courts properly.

The option proposed by the American Bar Association („Any person who is able to provide the information, whether orally, in writing, through an interpreter or interpretive device or otherwise, which is reasonably required of all persons seeking to register to vote, shall be considered a qualified voter.”⁵³) is transferable only with difficulties, because the European countries usually do not require a registration procedure.⁵⁴

VI.3. The role of constitutional courts

As already mentioned in the introduction, many Western European states underwent a change of guardianship systems (with an impact on the right to vote) a few decades ago.⁵⁵ After recent developments in the United Kingdom and the Netherlands, mostly Central and Eastern European (usually post-communist) states still disproportionately disenfranchise mentally disabled individuals.⁵⁶

One should note in that regard that the first internal changes in Central and Eastern European states have been introduced by constitutional courts which relied on “global constitutional principles” such as universal suffrage and proportionality, whereas legislators remained and still remain inactive. That is very familiar pattern in the Central and Eastern European countries where the constitutional court played a crucial role in the process of transition to democracy and rule of law. Especially as regards the final polishing⁵⁷ of the transition to rule of law, constitutional courts often implant changes the society does not even think of. Unlike a court, a legislator does not face an actual case it would need to decide and it therefore may not even suspect that there is a certain

⁵³ APPELBAUM, P. S. Law & Psychiatry: "I Vote. I Count": Mental Disability and the Right to Vote. *Psychiatric Services*. 2000, col. 51, p. 850.

⁵⁴ In the Czech Republic, for example, the municipalities administer the voting register ex officio.

⁵⁵ Entmündigung reform in Germany (1992) and Austria (1984) or the reform in Sweden 1988. The German law prior to the reform was criticized for reasons which are relevant even for this paper (i. e. overreaching legal effects of the guardianship, disregard for specific capabilities etc.). Cf. DORON, I. Elder Guardianship Kaleidoscope - A Comparative Perspective. 16 *Int'l J.L. Pol'y & Fam.* 368 (2002), p.378, 384.

⁵⁶ See above, for example Albania, Romania, Poland, Hungary, Greece (even if Greece is not a post-communist state); Slovenia and the Czech Republic seem to have answered the problem.

⁵⁷ It must be stressed that the courts usually play an important role in the „marginalities“ (such as the right to vote of mentally disabled), whereas „when dealing with the most complex and polycentric issues of transition, like privatization or social security reform, they have turned out to be poor policy-makers.“ BUGARIC, B. Courts as Policy Makers: Lessons from Transition. 42 *Harv. Int'l L.J.* 247, p. 286.

(constitutional) problem.⁵⁸ On the other hand, it is considered to be a task of a constitutional court in to identify and apply the constitutional principles, so that it is only natural if it is a constitutional court who points them out.

It may be that “only” 20 years after the fall of communist regimes, societies in post-communist states have not had enough time to re-value their attitude (see further) towards people with mental disability and that their position in a society has not become a social issue (and, consequently a parliamentary issue). On the contrary, reforms in Germany or in the United Kingdom were results of parliamentary deliberation.⁵⁹ We might assume that in Central and Eastern Europe (without constitutional courts) changes would not come in decades.⁶⁰

The “traditional” attitude towards people with mental disability was inevitably influenced by policies of the Central in Eastern European states which included massive over-institutionalisation of people with mental disorders and intellectual disabilities and overall exclusion of mentally disabled from the society.⁶¹ The problems of mentally disabled people have thus not become „high-priority“, even if in Central and Eastern Europe, there are some specific and weighty reasons for a cautious approach as regards political rights deprivation of mentally disabled people.⁶²

VI.4. Some practical implications

It is not certain what will be the real impact of the discussed developments on electoral systems in the respective states. In the Czech case, for example, the number of persons deprived of legal capacity is about 25.000, whereas there were 8.415.892 of registered voters and 5.263.822 of them actually exercised their right to vote in 2010

⁵⁸ Explanatory notes to a new Slovak Elections Act (n. 333/2004 Zb.) contained only a mention that „deprivations of the right to vote are regulated in the same manner as in the previous regulation“ and no reflection of the constitutional principles or international law.

⁵⁹ See supra note n. 55 as to the situation in Germany or Electoral Administration Act and explanatory notes. Available at <http://www.legislation.gov.uk/ukpga/2006/22/contents>.

⁶⁰ The changes in Western Europe took place in 80's, i .e. after decades of evolution of free society.

⁶¹ Jenkins, R., Klein, J., Parker, C., Mental health in post-communist countries. *BMJ* 2005, 331, available at <http://www.bmj.com/content/331/7510/173.full.pdf>.

⁶² Central and Eastern European states have a first hand experience with abuse of psychiatric “care” to silence political opponents of former communist regimes. It is a well known practice which is still used in some states. Cf. van Voren, R. Political Abuse of Psychiatry—An Historical Overview. Available at <http://www.gip-global.org/images/46/516.pdf>.

elections.⁶³ It follows that even if all cases of deprivation would be re-considered and annulled (which is highly improbable), the “new” voters would constitute only 0,29 % of the overall number (and it is not known how many of those people actually have a desire to vote). Even if the traditional fears of incompetent or irrational vote would be true, the real impact on elections outcomes would be insignificant.⁶⁴

The practical importance of the analyzed decisions lies elsewhere. The decisions were a matter of principle; they have shown that constitutional principles must be applied consistently even if it means to disrupt a traditional approach towards a group of people. At this symbolical level, it is enough that there is a possibility for the previously neglected people to use their right to vote.

It remains to be seen how quick and willing is the reaction of the European states going to be. It is probable that the (predominantly Central and Eastern) European states, which still deprive the mentally disabled of the right to vote in a disproportionate manner, will follow the Czech and Slovenian example and succumb to the reasoning of *Kiss v. Hungary*. However, as indicated by the aftermath of *Hirst v. United Kingdom*,⁶⁵ it may be a long run.

⁶³ The 2010 Elections Results. Available at <http://www.volby.cz/pls/ps2010/ps2?xjazyk=en>.

⁶⁴ APPELBAUM, P. S. *Law & Psychiatry: "I Vote. I Count": Mental Disability and the Right to Vote*. *Psychiatric Services*. 2000, col. 51, p. 850 mentions that “When patients at a New York state hospital in the early days of deinstitutionalization were asked to cast mock ballots for a mayoral contest on election day, the results closely resembled the outcome in the district surrounding the hospital”.

⁶⁵ Many European states – four years after the judgement – still treat the prisoners as a single class as regards the voting right deprivation (for example art. 42 para. 1 of the Bulgarian constitution or art. 70 para. 5 of the Hungarian constitution).