



## Legal Opinion of the Mental Disability Advocacy Center on the Venice Commission's "Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Participation of People With Disabilities in Elections" [CDL-AD(2010)036]

25 February 2011

1. The Mental Disability Advocacy Center (MDAC) respectfully submits this Legal Opinion to the Venice Commission, requesting the Commission to remove the underlined wording of paragraph 2 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] (hereafter "Interpretative Declaration"):

No person with a disability can be excluded from the right to vote or to stand for election on the basis of her/his physical and/or mental disability unless the deprivation of the right to vote and to be elected is imposed by an individual decision of a court of law because of proven mental disability. [emphasis added]

2. This deletion is required if the Interpretative Declaration is to comply with pre-existing European and international human rights law. This Legal Opinion sets out the reasons why MDAC requests this action.
3. The right to vote and stand for election is a basic human right that empowers each adult human being to take part in public life as active citizens and influence politics and policies, yet people with intellectual disabilities and people with psycho-social (mental health) disabilities who have been deprived of legal capacity and placed under guardianship are denied the right to vote in most Council of Europe Member States: this denial is discriminatory, the result of historic stigmatization and segregation and is prohibited in international law.

### UN Convention on the Rights of Persons with Disabilities (CRPD)

4. Other paragraphs of the Interpretative Declaration refer authoritatively to the UN Convention on the Rights of Persons with Disabilities (CRPD), a legally binding human rights treaty which was adopted unanimously by the UN General Assembly on 13 December 2006. The CRPD has been ratified by 27 Council of Europe Member States and signed by a further 18. It has also been ratified by the European Union.
5. The purpose of the CRPD is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity". Of particular note is that the Convention applies to all human rights – including the right to vote and stand for election – and applies to all persons with disabilities – including those with severe, profound intellectual disabilities and psycho-social disabilities, and including those who have been deprived or restricted of their legal capacity under domestic law.
6. Three of the guiding principles of the Convention, which should be read into each substantive provision, are "[r]espect for inherent dignity, individual autonomy including the freedom to make one's own choices,



and independence of persons", (Article 3(a)), "[n]on-discrimination" (Article 3(b)), and "[f]ull and effective participation and inclusion in society." (Article 3(c)). None of these principles can be achieved if some people with disabilities are denied fundamental political rights.

7. Article 29 of the CRPD (see below) sets out an unambiguous right of people with disabilities to vote and stand for election, compelling States 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".<sup>1</sup>
8. An adult who asserts their desire to vote should be allowed and supported to do so. No democratic State requires its citizens to prove that they, for example, can understand the democratic process or can remember party political manifesto pledges. The simple fact of being an adult human being is enough. The CRPD obliges States to remove legal prohibitions and physical barriers to voting, and it further requires States to ensure that people with disabilities are provided with adequate supports when exercising their right to vote, drawing on the legal notion of "reasonable accommodation" (defined in Article 2 of the CRPD), a principle which the Interpretative Declaration cites in paragraph 6. Furthermore, Article 12 of the CRPD sets out the right of legal capacity, whereby everyone has the right to legal capacity on an equal basis with others (Article 12(2), and that if a person needs assistance exercising these rights, the State has an obligation to provide such support (Article 12(3)).
9. There is nothing in the CRPD which suggests that the right to vote and stand for election applies only to people with mild disabilities, or to people with disabilities who have passed a legal or other test. Indeed these rights are not subject to approval or removal by a court. The Interpretative Declaration's claim that that courts should be able to remove the right to vote from a person with a "proven mental disability" (however that is defined), is clearly wrong as a matter of international law.

### Council of Europe law

10. CRPD standards on the right to vote and stand for election are supported also by an array of Council of Europe law, policies and statements. The Venice Commission's Interpretative Declaration would be wrong and need amendment without relying on the CRPD.
11. The **Council of Europe's Disability Action Plan 2006-2015** – which has the status of a Committee of Ministers Recommendation – obliges Member States to "[e]nsure 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".<sup>2</sup> The Interpretative Declaration goes against this Recommendation by specifying that some people with disabilities may lawfully be excluded from the right to vote or stand for election on the basis of disability.
12. In January 2009 the Parliamentary Assembly of the Council of Europe (PACE) adopted a **Resolution on access to rights for people with disabilities and their full and active participation in society**. PACE calls on Member States "[t]o guarantee that people with disabilities retain and exercise legal capacity on an equal

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<sup>1</sup> CRPD Article 29(a)

<sup>2</sup> Council of Europe Recommendation R(2006)5 of the Committee of Ministers to Member 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. 3.1.3(iii).

basis with other members of society”.<sup>3</sup> The Resolution specifies that in order to implement the CRPD, people must not be deprived of their fundamental rights including, specifically, the right to vote.

13. In September 2009, Thomas Hammarberg, the **Council of Europe Commissioner for Human Rights** stated in one of his official Viewpoints, that “[p]ersons with mental health and intellectual disabilities should have the right to vote in elections and stand for election. Though this is stated clearly in the UN Convention (Article 29), individuals in a number of European countries are excluded. Being deprived or restricted of their legal capacity they have been denied these rights as well. This has further exacerbated their political invisibility”.<sup>4</sup>

14. Most recently, in its judgment in the case of *Kiss v. Hungary*,<sup>5</sup> the **European Court of Human Rights** – in a case brought by a person with disabilities who was not allowed to vote under domestic law as he had been restricted of legal capacity – found a violation of Article 3 of Protocol No. 1 to the European Convention on Human Rights, and stated that the Convention does not allow for an absolute bar on the right to vote by a person under guardianship, irrespective of a person’s actual dis/abilities. The Court stated that:

[...] if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question [...] [t]he reason for this approach, which questions certain classifications *per se*, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs [...].<sup>6</sup>

## Conclusion

15. United Nations treaties, as well as Council of Europe law, policy and statements all support the notion of the right to vote and to stand for election applies without discrimination to all persons with disabilities. As it stands, the Interpretative Declaration undermines this fundamental human right and MDAC urges the Venice Commission to speedily amend this error.

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<sup>3</sup> Parliamentary Assembly of the Council of Europe, Resolution 1642 (2009) on Access to rights for people with disabilities and their full and active participation in society, 6 January 2009, para. 7.

<sup>4</sup> Viewpoint of the Council of Europe Commissioner for Human Rights: “Persons with disabilities should be assisted but not deprived of their individual human rights”, 21 September 2009.

<sup>5</sup> *Kiss v. Hungary*, Application No. 38832/06, judgment 20 May 2010.

<sup>6</sup> *Kiss v. Hungary*, op cit, para. 42.