

# **The Promise of Democracy – Why the Venice Commission should adopt universal suffrage for people with disabilities**

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**Oliver Lewis**, Executive Director, Mental Disability Advocacy Center

Email [olewis@mdac.info](mailto:olewis@mdac.info), web <http://www.mdac.info>

Mr President, Distinguished Members of the Venice Commission,

Thank you for inviting me to present to you, and for engaging with civil society in your deliberations. In front of you is a one-page statement from several NGOs, including the International Disability Alliance, European Disability Forum, Human Rights Watch and the organisation for which I work, the Mental Disability Advocacy Centre. We are pleased that you have focused your attention on the exclusion faced by people with disabilities from democratic process. We ask you to do a simple thing, and that is to embrace *universal* suffrage by supporting today's amendment.[1] [and delete from your Interpretive Declaration any wording which allows the right to vote to be removed from a person due to a finding of disability, mental incapacity, or 'lack of proper judgment'.]

Whilst few of us would agree with all of Plato's ideas, he once said that, 'Democracy is a charming form of government, full of variety and disorder, and dispensing a sort of equality to equals and unequal alike.' I would like to speak two concepts – stigma and discrimination – and offer you a way to dispense a sort of equality to people who have historically been treated unequally.

## **1. Stigma**

Huge damage is caused by stigma. For people with disabilities and their families, this includes loss of self esteem, shame and secrecy. Historically excluded from political discourse and therefore from the democratic process, people with disabilities have been isolated and segregated, their voices unheard and their autonomy and voting rights stripped away. Sometimes viewed as economically useless and abandoned by their families and communities, they are segregated in remote institutions where they are at increased risk of exploitation, violence and abuse. Disproportionately living at the edges of society, people with disabilities are truly 'unequals'.

This need not be so.

Stigma is based on prejudices, myths and outdated notions. Distinguished members of the Venice Commission are likely no different from other people who do not have direct contact with people with an intellectual disability or a person with a user of mental health services. One myth for example, is that a person's mental functioning remains constant throughout life. Another myth is that mental illness takes over a person's whole being so that they become incapable of making any choices whatsoever. Another myth is that people with intellectual disabilities cannot understand or express themselves and that they are unduly suggestible. We must be wary of bringing these stereotypes to this table.

Voting is one of the most potent rights of all, and denying it will have the effect of increasing stigma and social harm.

## **2. Discrimination**

On the plainest of readings, the Venice Commission's [pre-today] proposals fail to comply with Article 29 of the UN Convention on the Rights of Persons with Disabilities, which sets out the right to public and political participation in some detail, including the right to vote and stand for election.[2]

The Disability Convention is the latest articulation of human rights agreed on by all governments worldwide and adopted unanimously by the UN General Assembly. It has immense coverage across the world. There have been no reservations on Article 29, in other words every State is committed under international law to uphold the right to vote for people with disabilities without discrimination.

The Convention makes no distinction between people with mental health diagnoses or difference, people with intellectual disabilities, 'mild' or 'severe' disabilities, people deprived or restricted of legal capacity, and those requiring more intensive support. Universal suffrage really does mean universal [as today's proposal supports].

One of the motivating factors behind the drafting of the Convention was a keen awareness that persons with disabilities could not exert pressure for change within the democratic system. They could not do so as they were directly locked out through disfranchisement and indirectly through inaccessible processes. Enhancing the voice of persons with disabilities in the political process *was*, and *is*, seen as just as important as securing other substantive rights. It remains the key to unlocking the invisibility of persons with disabilities at the policy level and throughout society more generally.

There will be no dispute in this room that any measure constituting disability-based discrimination is unlawful under international law.[3] Given that it is only people with actual or perceived mental or cognitive disabilities who will be subjected to the 'proper judgment' test in the first place, it does not matter whether the word 'disabled' appears in the test or not. No matter how elegant the legal formulation, and no matter whether it is legislation or a judge which removes the franchise, these measures will still constitute unlawful discrimination.

Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights, also shares this opinion. He has recently stated that there is '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.' If applied only to people with disabilities any test would, Hammarberg says, constitute 'blatant discrimination'.

If I were legal counsel to the Venice Commission I would be advising you that the only way for a 'proper judgment' to be non-discriminatory is for the test to be administered to people with disabilities and *all* other potential voters. As far as I know this proposal is – unsurprisingly – not on the table.

So the current proposals promote an understanding of disability which crystallizes on deficit. When viewed through this lens, the role of a judge is to regulate the level of pollution in the democratic environment by filtering out votes from irrational and incompetent disabled people. As well as being deeply offensive, the current proposals miss the point about political choices. A voter's priorities in matters of politics are often intuitive and felt.

So *why* would we allow a judge to prevent votes on the basis that a voter lacks ‘proper judgment’? In other words, what is the legitimate aim, or the public policy goal being served? The hard truth is that democracies are – as Plato said, full of *disorder*. For example, 16% of Hungarian voters voted for the far-right and xenophobic Jobbik party in 2010. Do we remove these people who you may think lack ‘proper judgment’? Should we remove the right to vote from the 7,500 people who voted last year in the UK for the Monster Raving Loony Party? What *is* and what is *not* a ‘proper judgement’ is clearly nonsense, and reminds me of Winston Churchill who said that ‘The best argument against democracy is a five minute conversation with the average voter.’ However uncomfortable we may be ultimately to live in a democracy is to value each vote equally, whatever we think about the voter.

Perhaps what we’re really talking about is mental capacity, but what does this mean in the context of someone who wants to vote? Is the ‘proper judgment’ test intended to remove voters who are not intellectual enough? Or perhaps who hold beliefs which may not align with a judge’s worldview. If this is the aim, then a potentially enormous number of people will be affected: People without a high school completion? Illiterate people? People who cannot explain how the machinery of government works? Anyone with a mental health problem? - that’s a huge number itself, given that one in four people at any time in their life has a mental health problem. Count also older people with degenerative diseases of ageing such as Alzheimer’s disease whose numbers are growing each year, people with intellectual disabilities, people with degenerative diseases unrelated to ageing such as Parkinson’s disease, and those with acquired brain injury.

What an enormous waste of resources in deciding whether to decide whether these people have the ‘proper judgment’ to vote! Not to mention the manifest injustice, the risk of costly litigation and potential civil uprising.

Even if there were a legitimate aim to be pursued – which there is not – let’s consider *how* would this be done. A judge will sit in a court room with a potential voter, and the judge will reach a decision *today* that this person will not have the capacity to do *what* exactly? The judge will not know when the election will be, who the candidates will be, how the voter is going to be, what sort of supports she will have to help her understand the issues, what the major political issues will be, and which of these will be important for her. Think of how traumatic this process will be for the individual.

## **Conclusion**

Many of the Venice Commission’s most important documents proclaim that ‘universal franchise is a key element of modern democracies’. The simple task before you is to ensure that universal means just that.

Worldwide, *women* and others have fought prejudices to secure *their* right to vote. If their struggle for universal suffrage tells us one thing, it is that we should count the vote of every person rather than exclude those belonging to a certain group. What hangs in the balance in this room is nothing smaller than the promise of democracy.

After rational deliberation, by adopting today's proposal [deleting the unlawful and unfeasible parts of the text] you will *reduce* the devastating effects of stigma, you will *restore* autonomy to those who for centuries have been denied their basic rights, and you will *uphold* the emblematic right of one person one vote. You will return home having dispensed a sort of equality to equals and unequal alike.

Mr President, thank you for the giving me the honour of addressing the Commission today.

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[1] Document entitled "CDL(2011)041 – Draft Revised Interpretative Declaration to the Code of Good Practice in Electoral Matters on the participation of people with disabilities in elections" which states:

New Proposal of amendment to paragraph 2:

"Universal suffrage is a fundamental principle of the European Electoral Heritage. People with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. States should ensure that persons with disabilities can effectively and fully participate in public and political life on an equal basis with other citizens."

[2] Article 29 states:

Participation in political and public life

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

(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;

[3] The UN Disability Convention defines “disability-based discrimination” in Article 2:

“Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

It sets out in Article 5 the prohibition against disability-based discrimination:

#### Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.