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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**INFORMATION NOTE
CONCERNING THE INTERPRETATIVE DECLARATION
OF THE CODE OF GOOD PRACTICE
IN ELECTORAL MATTERS ON THE PARTICIPATION
OF PEOPLE WITH DISABILITIES IN ELECTIONS**

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Background

- 26-28 May 2010: the Committee of Experts on the participation of people with disabilities in political and public life (the CAHAPAH-PPL, which is an intergovernmental experts' committee of the Council of Europe) adopts at its 3rd meeting an Interpretative Declaration of the Code of Good Practice in Electoral Matters ([CDL-AD\(2002\)023rev](#)) on the participation of people with disabilities in elections (CAHAPAH-PPL(2010)9rev2), which is submitted to the Council for Democratic Elections and the Venice Commission for adoption.
- 21 October 2010: the Venice Commission adopts the Interpretative Declaration of the Code of Good Practice in Electoral Matters on the participation of people with disabilities in elections ([CDL-AD\(2010\)036](#); "the Interpretative Declaration") on the basis of the proposal submitted by the CAHAPAH-PPL, with two amendments.
- 15 December 2010: the CAHAPAH-PPL adopts an opinion on the limitation of the right to vote in the case of "proven mental disability" criticising one of the two amendments to the Interpretative Declaration adopted by the Venice Commission, underlining that this amendment is "not in line with the spirit and in particular the provisions of Article 12 – *"equal recognition before the law"* and Article 29 – *"Participation in political and public life"* of the UN Convention on the Right of People with Disabilities (the UNCRPD)."
- 24 March 2011: the Council for Democratic Elections further discusses the Interpretative Declaration and asks the Secretariat to prepare an alternative proposal for the disputed paragraph with a view to consider this proposal at its next meeting (16 June 2011).
- 6 April 2011: at the request of the Council for Democratic Elections, the Secretary of the Venice Commission writes to the CAHAPAH-PPL Secretariat and makes an alternative proposal of wording of the paragraph 2 of the Interpretative Declaration (see below) with the following explanation:

"The Interpretative Declaration [as proposed in April 2011] is in conformity with the relevant international instruments and case-law. In particular, the United Nations Convention on the Rights of Persons with Disabilities (CRPD), in its Article 29, does not provide for an absolute right.

The judgment of the European Court of Human Rights in the case of *Kiss v. Hungary*¹ asks for individuals decisions on the issue of deprivation of the right to vote on the basis of mental disability and therefore does not preclude such a deprivation.

The key principle of universal suffrage, as part of the European Electoral Heritage,² is therefore fully applicable to people with disabilities, without any discrimination."

- 12-13 May 2011: at its 5th meeting, the "CAHAPAH Bureau [...] supported the compromise proposal on the paragraph in question in the "Interpretative declaration to the code of good practice in electoral matters on the participation of people with disabilities in elections", made by the Belgian CAHAPAH-PPL delegate, encouraged CAHAPAH-PPL to approve it, entrusted the Secretariat with the task of sending the thus approved version to CAHAPAH for adoption by correspondence, and of forwarding the thus adopted version to the Venice Commission" (see below the Belgian proposal).

¹ Application No. 38832/06, judgment 20 May 2010. See in particular par. 43-44, with a reference to Article 29 of the UN Convention and the Code of Good Practice in Electoral Matters (I. 1.1 d).

² Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), I. 1.1.

- Non governmental organisations criticised the position of the Venice Commission and considered the Interpretative Declaration as contrary to the United Nations Convention on the Rights of Persons with Disabilities (CRPD; its Articles 12 and 29 more precisely). They interpreted the disputed paragraph of the Interpretative Declaration as a discrimination vis-à-vis the political right of people with disabilities. For this reason and in order to debate openly on the issue, the Venice Commission invited a representative of one of these NGOs, the Mental Disability Advocacy Centre, to participate in the plenary session of the Commission on 17-18 June 2011.

For information, **the next meeting (6th meeting) of the CAHPAH-PPL** will take place from 22-24 June 2011 in Strasbourg.

For information as well, the UN Committee on the Rights of Person with Disabilities has published a Call for papers on the practical and theoretical measures for the implementation of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities, which may be discussed at 6th session of the Committee (Geneva, 19-23 September 2011).

The evolution of the relevant paragraph of the Interpretative Declaration

Version of the Declaration as approved by the CAHPAH-PPL at its 3rd meeting, 26-28 May 2010:

"No person with a disability can be excluded from the right to vote or to stand for election on the basis of her/his disability" (document CAHPAH-PPL(2010)9rev2, Draft Interpretative Declaration on People with Disabilities' Participation in Elections).

Version of the Declaration as agreed by the CAHPAH-PPL at its 4th meeting, September 2010:

"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 individual decision of a court of law."

Version as adopted by the Venice Commission on 21 October 2010:

(...)

II. THE FOLLOWING COMPLETES THE PRINCIPLES STATED IN THE CODE

1. Universal suffrage

(...)

2. 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.

(...)

Proposal by CAHPAH-PPL, November 2010:

Amend the version of October 2010. Delete at least the end of the sentence "(...) because of proven mental disability"

Version as suggested by the Venice Commission to the CAHPAH-PPL on 6 April 2011 and as submitted at the June session of the Venice Commission:

(...)

II. THE FOLLOWING COMPLETES THE PRINCIPLES STATED IN THE CODE

1. Universal suffrage

(...)

2. Universal suffrage is a fundamental principle of the European Electoral Heritage. People with disabilities may not be discriminated against in this regard.

Nevertheless, a court, in an individual decision, may consider that the lack of proper judgment of a [disabled] person may prevent him or her from exercising his or her right to vote or to stand for elections.

(...)

Proposal made by the Belgian CAHPAH-PPL Delegate and supported by the CAHPAH Bureau, 12-13 May 2011:

"Universal suffrage is a fundamental principle of the European electoral heritage. A person can only be excluded from exercising his/her right to vote or from standing for election on the basis of an individual decision given by an independent and impartial tribunal, under national legislation, based on objective and reasonable arguments and never solely on the basis of a situation of disability."

Sources

- United Nations, [Convention on the Rights of Persons with Disabilities](#), 13 December 2006 (UN CRPD); relevant provisions:

Article 1 - Purpose

... Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.

Article 12 - Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests. ...

Article 29 - Participation in political and public life

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

- a. 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;
- b. Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:
 - i. Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;
 - ii. Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.
- International Covenant on Civil and Political Rights (19 December 1966; the ICCPR); Article 2
 - 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
 - 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
 - 3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.

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."

- UN Human Rights Committee, General Comment no. 25 of the International Covenant on Civil and Political Rights. Extract:

"4. Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen. The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office."

- European Court of Human Rights, [Case of Alajos Kiss v. Hungary](#), Judgment, Application no. 38832/06, judgment, 20 May 2010
 “44. The Court further considers 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. This approach is reflected in other instruments of international law [...]. The Court therefore concludes that an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote.”
- Venice Commission, [Code of good practice in Electoral Matters](#) (CDL-AD(2002)023rev), § I.1.1.d:
 - I. Principles of Europe's electoral heritage
 - (...)
 - 1. Universal suffrage
 - (...)
 - 1.1. Rule and exceptions
 - Universal suffrage means in principle that all human beings have the right to vote and to stand for election. This right may, however, and indeed should, be subject to certain conditions:
 - (...)
 - d. Deprivation of the right to vote and to be elected:
 - (...)
 - iv. The deprivation must be based on mental incapacity or a criminal conviction for a serious offence.
- Council of Europe, Parliamentary Assembly, [Resolution 1642 \(2009\)](#) on Access to rights for people with disabilities and their full and active participation in society.
- Council of Europe, Committee of Ministers, Recommendation R(99)4, on Principles Concerning the Legal Protection of Incapable Adults (adopted on 23 February 1999), which provides as follows:
 - Principle 3 – Maximum preservation of capacity
 - “... 2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so.”
- Council of Europe, Committee of Ministers, Recommendation Rec(2006)5 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 (adopted on 5 April 2006), which provides as follows:
 - 3.1. Action line No.1: Participation in political and public life
 - 3.1.3. Specific actions by member states
 - “... iii. to ensure that no person with a disability is excluded from the right to vote or to stand for election on the basis of her/his disability; ...”
- Council of Europe, Committee of Ministers, [Recommendation CM/Rec\(2009\)2](#) of the Committee of Ministers to member states on the evaluation, auditing and monitoring of participation and participation policies at local and regional level.

- Council of Europe, Committee of Ministers, [Recommendation CM/Rec\(2009\)8](#) of the Committee of Ministers to member states on achieving full participation through Universal Design.
- Council of Europe, CAHPAH-PPL, Background of the elaboration of the Interpretative Declaration and changes proposed: see CAHPAH-PPL-T(2011)1, 9 May 2011.
- European Union, Fundamental Rights Agency (the FRA), [The right to political participation of persons with mental health problems and persons with intellectual disabilities, Report](#), October 2010.
In its report, the FRA compares the different solutions adopted in the legislation by the 27 EU member states regarding legal capacity and suffrage rights: in the majority of them, the loss of the legal capacity automatically deprives the persons of their right to political participation (active and passive suffrage rights); other countries provide with an individualised assessment of the actual ability to vote of persons with mental disabilities; a third group of few countries have moved towards the full enjoyment of the right to vote for persons with mental disabilities.
- Mr Thomas HAMMARBERG, Council of Europe Commissioner for human rights, [Viewpoint of the CoE Commissioner for Human Rights](#).