



## Convention on the Rights of Persons with Disabilities

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### Committee on the Rights of Persons with Disabilities

#### Communication No. 4/2011

#### Views adopted by the Committee at its tenth session (2–13 September 2013)

<i>Submitted by:</i>	Zsolt Bujdosó, Jánosné Ildikó Márkus, Viktória Márton, Sándor Mészáros, Gergely Polk and János Szabó (represented by counsel, János Fiala, Disability Rights Center)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Hungary
<i>Date of communication:</i>	14 September 2011 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 70 decision, transmitted to the State party on 1 November 2011 (not issued in document form)
<i>Date of adoption of Views:</i>	9 September 2013
<i>Subject matter:</i>	Failure by the State party to eliminate discrimination on the basis of disability, and to respect the obligation to guarantee to persons with disabilities political rights, including the right to vote, on an equal basis with other citizens
<i>Substantive issues:</i>	Equal and effective legal protection against discrimination on the basis of disability; participation in political and public life
<i>Procedural issues:</i>	None
<i>Articles of the Convention:</i>	Articles 12 and 29
<i>Articles of the Optional Protocol:</i>	None

## Annex

### **Views of the Committee on the Rights of Persons with Disabilities under article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (tenth session)**

concerning

#### **Communication No. 4/2011\***

*Submitted by:* Zsolt Bujdosó, Jánosné Ildikó Márkus, Viktória Márton, Sándor Mészáros, Gergely Polk and János Szabó (represented by counsel, János Fiala, Disability Rights Center)

*Alleged victims:* The authors

*State party:* Hungary

*Date of communication:* 14 September 2011 (initial submission)

*The Committee on the Rights of Persons with Disabilities*, established under article 34 of the Convention on the Rights of Persons with Disabilities,

*Meeting on 9 September 2013,*

*Having concluded* its consideration of communication No. 4/2011, submitted to the Committee on the Rights of Persons with Disabilities by Zsolt Bujdosó, Jánosné Ildikó Márkus, Viktória Márton, Sándor Mészáros, Gergely Polk and János Szabó under the Optional Protocol to the Convention on the Rights of Persons with Disabilities,

*Having taken into account* all written information made available to it by the authors of the communication, and the State party,

*Adopts* the following:

#### **Views under article 5 of the Optional Protocol**

1. The authors of the communication are Zsolt Bujdosó, born on 22 July 1976, Jánosné Ildikó Márkus, born on 29 August 1967, Viktória Márton, born on 20 October 1982, Sándor Mészáros, born on 11 January 1955, Gergely Polk, born on 18 June 1985, and János Szabó,

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\* The following members of the Committee participated in the examination of the present communication: Mr. Mohammed Al-Tarawneh, Mr. Martin Mwesigwa Babu, Mr. Monthian Buntan, Ms. María Soledad Cisternas Reyes, Ms. Theresia Degener, Mr. Hyung Shik Kim, Mr. Lofti Ben Lallahom, Mr. Stig Langvad, Ms. Edah Wangechi Maina, Mr. Ronald McCallum, Ms. Diane Mulligan, Ms. Safak Pavey, Ms. Ana Peláez Narváez, Ms. Silvia Judith Quan-Chang, Mr. Carlos Ríos Espinosa, Mr. Damjan Tatić and Mr. Germán Xavier Torres Correa.

Pursuant to rule 60 of the Committee's rules of procedure, Committee member Mr. László Gábor Lovász did not participate in the adoption of the present Views.

born on 6 December 1967. They are all Hungarian nationals. The authors claim to be victims of a violation by Hungary of their rights under article 29 of the Convention on the Rights of Persons with Disabilities. The Optional Protocol to the Convention entered into force for the State party on 3 May 2008. The authors are represented by counsel, János Fiala, of the Disability Rights Center.

### **The facts as submitted by the authors**

2. All six authors “suffer from intellectual disability”, and were placed under partial or general guardianship pursuant to judicial decisions.<sup>1</sup> As an automatic consequence of their placement under guardianship, the authors’ names were removed from the electoral register, pursuant to article 70, paragraph 5, of the Constitution of the State party that was applicable at the time, which provided that persons placed under total or partial guardianship did not have the right to vote. Due to this restriction on their legal capacity, the authors were prevented from participating in the Hungarian parliamentary elections held on 11 April 2010 and the municipal elections held on 3 October 2010. They remain disenfranchised to date and cannot therefore participate in elections.

### **The complaint**

3.1 The authors submit that, as persons under guardianship, the direct application of article 70, paragraph 5, of the Constitution automatically removed them from the electoral register. The decisions to incapacitate them in this way did not take into consideration their ability to vote, as they were automatically and indiscriminately disenfranchised pursuant to the Constitutional provision, regardless of the nature of their disability, their individual abilities or the scope of the incapacitation measure. The authors argue that they are able to understand politics and participate in elections. They maintain that this automatic ban is unjustified, and that it breaches article 29, read alone and in conjunction with article 12 of the Convention.

3.2 Regarding the exhaustion of domestic remedies, the authors allege that no effective remedy was available to them. They claim that they could have submitted an application to have their guardianship lifted under article 21, paragraph 2, of the Civil Code, but that this would have remedied the violation of their right to vote only if it had completely restored their legal capacity. This was neither possible nor desirable for the authors, who recognize their intellectual disability and acknowledge that they require support in managing their affairs in certain areas of their lives. Hungarian law only provides for one legal measure — guardianship (plenary or partial) — for persons with disabilities who require assistance. While challenging their guardianship under the Civil Code was the only available remedy, it did not constitute an effective remedy for the authors, as the courts do not have the power to consider and restore a person’s right to vote. The authors refer to the decision of the

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<sup>1</sup> Zsolt Bujdosó was placed under partial guardianship with general limitation on 23 November 2004, pursuant to a decision of the Gyula City Court; the limitation of his legal capacity was reviewed and upheld by decision of the Pest Central District Court on 14 October 2010. Jánosné Ildikó Márkus was placed under plenary guardianship on 17 February 2003 by decision of the Battonya City Court. Viktória Márton was placed under partial guardianship on 11 October 2008 by decision of the Budapest II and III District Court, with respect to application for social security benefits and disposal of such benefits, as well as regarding employment income. Sándor Mészáros was placed under partial guardianship with general limitation by decision of the Buda Central District Court on 2 June 2010. Gergely Polk was placed under partial guardianship with general limitation on 14 September 2004, pursuant to a decision of the Buda Central District Court. János Szabó was placed under partial guardianship with general limitation on 7 October 2003, by decision of the Budapest II and III District Court; his incapacitation was reviewed and upheld by the Pest Central District Court on 24 March 2009.

European Court of Human Rights in the case of *Alajos Kiss v. Hungary*, in which the Court accepted this argument from applicants who were similarly challenging the restriction imposed on their right to vote by reason of their legal guardianship.<sup>2</sup>

3.3 The authors further submit that they did not lodge a complaint under paragraph 82 of Act C of 1997 on Electoral Procedure regarding the deletion of their names from the electoral register. They allege that such a complaint would have been dealt with by the local electoral committee and, on appeal, by the relevant city court. However, none of these authorities have the power to restore the authors' right to vote and to order their inclusion in the electoral list, as this exclusion is Constitution-based. The authors refer to a decision of the Pest Central District Court, which ruled on 9 March 2006, in a similar matter, that Hungarian courts do not have the power to overrule exclusion from the electoral register which is based on the Constitution.<sup>3</sup> They thus contend that, as this procedure could not lead to the restoration of their right to vote, it was not an effective remedy which they needed to exhaust.

3.4 The authors ask the Committee to find that they have been victims of a violation of articles 29 and 12 of the Convention, to request the State party to introduce the necessary changes to the domestic legal framework, and to award them compensation for non-pecuniary damages on an equitable basis.

#### **State party's observations on the merits**

4.1 On 16 January 2012, the State party informed the Committee that it would not challenge the admissibility of the present communication.

4.2 On 31 May 2012, the State party submitted its observations on the merits of the communication. It states that, since the authors' complaint was filed with the Committee, the relevant legislation has been significantly amended. The Fundamental Law of Hungary entered into force on 1 January 2012 repealing article 70, paragraph 5, of the 1949 Constitution of the Republic of Hungary, which automatically excluded from suffrage all persons under guardianship, restricting or excluding their capacity for any civil law election. Contrary to the previous rigid provision, which is now obsolete, the Fundamental Law requires judges to make decisions on suffrage that take into consideration the individual circumstances of each case. Therefore, adults with disabilities are no longer treated as a homogenous group. Under article XXIII, paragraph 6, a person disenfranchised by a court due to his or her intellectual disability, by virtue of a decision made in due consideration of all the relevant information in the case, shall have no suffrage.

4.3 The State party further argues that this new provision is in conformity with the right to free elections enshrined in article 3 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and with the judgement of the European Court of Human Rights in the case of *Alajos Kiss v. Hungary*. According to the State party, several member States of the European Union have set similar restrictive rules with respect to suffrage. It notes that Parliament adopted the Transitional Provisions of Hungary's Fundamental Law as part of the Fundamental Law. This source of law came into force on 1 January 2012, together with the Fundamental Law, and regulates the status of persons who were under guardianship when the Fundamental Law came into force. By

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<sup>2</sup> Application No. 38832/06, judgement of 20 May 2010, para. 9. The Court found that the exclusion measure pursued a legitimate aim, but nevertheless ruled that it breached article 3 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms as it was an indiscriminate measure, lacking an individualized judicial evaluation.

<sup>3</sup> Decision No. 1.P.50.648/2006/4, also mentioned in the European Court of Human Rights decision in the case of *Alajos Kiss v. Hungary* (footnote 2 above), para. 9.

virtue of article 26, paragraph 2, of the Transitional Provisions, “a person under guardianship which restricts or excludes his or her legal capacity under an absolute sentence at the time of the coming into force of the Fundamental Law shall not have suffrage until such guardianship is terminated, or *until a court establishes the existence of his suffrage*” (emphasis added by the State party). The Transitional Provisions thus make it possible to address the issue of suffrage separately from that of placement under guardianship.

4.4 The State party further submits that Act CCI of 2011 on the Amendment of Certain Acts related to the Fundamental Law, which came into force on 31 December 2011, incorporated the provisions on the guardianship procedure, along with several other relevant provisions.<sup>4</sup> As a result of these amendments, court decisions on the exclusion from suffrage are made in guardianship procedures. Placement under guardianship is not a ground for exclusion from suffrage. However, a decision must be made on exclusion from suffrage in respect of every person under guardianship. In their rulings on placement under guardianship that restrict or exclude legal capacity, and when reviewing guardianship, the courts decide on exclusion from suffrage. They exclude from suffrage any adult whose discretionary power required for exercising suffrage (a) has been significantly reduced, whether permanently or recurrently, due to his or her mental state, intellectual disability or addiction, or (b) is permanently missing in its entirety, due to his or her mental state or intellectual disability. The courts rely on expert opinions of forensic psychiatrists to decide on exclusion from suffrage.

4.5 Where a court excludes an adult from suffrage, the person under guardianship is not entitled to active or passive suffrage under article XXIII, paragraph 6, of the Fundamental Law. Active suffrage concerns a person’s right to cast a vote in an election for office, while passive suffrage concerns a person’s capacity to be elected to office. The exclusion, and the termination of the exclusion, may be requested by any person entitled to file for termination of guardianship. Consequently, a person under guardianship may reclaim suffrage without losing the protection offered by guardianship, provided that he or she is capable of exercising this right.

4.6 The State party adds that any exclusion from suffrage is subject to review in any procedure for the compulsory review of guardianship, which is to take place no later than five years after the guardianship ruling becomes absolute. Also, by virtue of the Transitional Provisions, the situation can now be reviewed in an extraordinary procedure at the request of any person entitled to file for a guardianship review (i.e. the person under guardianship, his or her spouse or registered partner, next of kin, brother or sister, guardian, guardianship authority, or prosecutor). Alternatively, the exclusion may be revised in the course of the next compulsory review.

4.7 As the relevant laws came into force very recently, the State party submits that it is not in a position to inform the Committee about their implementation in practice. It concludes that, in its view, by introducing the above-mentioned amendments, its laws now comply with article 29 of the Convention. Consequently, the State party calls for the authors’ request for legal amendment and non-pecuniary compensation to be dismissed by the Committee.

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<sup>4</sup> Act IV of 1959 on the Civil Code (sect. 15, para.2); Act C of 1997 on Electoral Procedure; and Act III of 1952 on the Code of Civil Procedure (sects. 311–312).

### Third-party intervention

5.1 On 23 June 2012, the Harvard Law School Project on Disability submitted a third-party intervention in support of the authors' communication. On 19 September 2012, during its eighth session, the Committee decided to request the written consent of the authors with respect to the submission of this third-party intervention, based on rule 73, paragraph 2, of its rules of procedure. On 17 October 2012, the authors transmitted their formal consent to the Committee in this regard.

5.2 In its intervention, the Harvard Law School Project on Disability ("the interveners") noted that under article XXIII, paragraph 6, of the Fundamental Law of Hungary, a person loses his or her right to vote if a court finds that he or she lacks the capacity to vote. Such assessments only affect persons under guardianship, who are all persons with psychosocial or intellectual disabilities. Hungarian legislation thus permits the disenfranchisement of persons with disabilities on the basis of a perceived lack of capacity to vote arising from their disability status. The interveners stress that article 29 of the Convention provides for an unconditional right to vote for all persons with disabilities, and does not allow any implicit restrictions on the basis of real or perceived ability to vote, whether imposed by an overall ban on broad categories of disabled persons, bans on all persons with particular types of disabilities who are presumed to have limited voting capability, or through an individualized assessment of the voting capacity of specific individuals with disabilities.<sup>5</sup> The interveners submit that article 29 of the Convention does not provide for any exception to the universal right to vote on the basis of the person's disability. Rather, the Convention provides that no individuals with disabilities, including the most "profoundly disabled", may be disenfranchised on the basis of their disability.

5.3 The interveners observe that the practice of most States worldwide is in stark contrast with the standard expressed above. According to a study from 2001, some 56 out of the 60 countries surveyed restricted the right to vote in some way on the basis of disability.<sup>6</sup> A 2010 report of the European Union Agency for Fundamental Rights gave similar results: only 7 of the 27 European Union member States did not restrict franchise on the basis of disability.<sup>7</sup> The situation among other European States that are not members of the European Union is even more depressing. According to the interveners, the present case therefore raises issues which have implications for many other countries besides the State party.

5.4 The interveners stress that restricting the right to vote on the basis of disability constitutes direct discrimination, and is predicated on the unacceptable and empirically unfounded stereotype that all persons with disabilities are incapable. This is equally true for classifications that target specific subgroups of persons with disabilities, such as persons

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<sup>5</sup> See the Committee's concluding observations on Tunisia, which recommend the "urgent adoption of legislative measures to ensure that persons with disabilities, including persons who are currently under guardianship or trusteeship, can exercise their right to vote" (CRPD/C/TUN/CO/1, para. 35). See also the Committee's concluding observations on Spain, in which it expressed the concern that domestic legislation allowed for an individualized assessment of voting capacity, which in turn led to the disenfranchisement of persons with disabilities. The Committee therefore recommended that "all relevant legislation be reviewed to ensure that all persons with disabilities, regardless of their impairment, legal status or place of residence, have the right to vote and participate in public life on an equal basis with others" (CRPD/C/ESP/CO/1, para. 48).

<sup>6</sup> André Blais, Louis Massicotte and Antoine Yoshinaka, "Deciding who has the right to vote: a comparative analysis of election laws", *Electoral Studies*, vol. 20. No. 1 (March 2001), p. 41.

<sup>7</sup> European Union Agency for Fundamental Rights, "The rights of people with mental health problems and intellectual disabilities to take part in politics", November 2010. Available from <http://fra.europa.eu/en/publications-and-resources> (accessed 10 October 2013).

under guardianship. These restrictions arise directly from the status of persons with disabilities, and must therefore be rejected as contradicting article 29 of the Convention. In addition, some States disenfranchise people with disabilities on the basis of an individual assessment of their right to vote. A common justification of such evaluations of voting capacity is the proportional nature of restrictions on this fundamental right. The European Court of Human Rights examined and rejected this argument when assessing the State party's practice of disenfranchisement on the basis of guardianship in the case of *Alajos Kiss v. Hungary*. The State party argued that its measure constituted proportionate interference with the right to vote. However, the European Court rejected that argument, holding that disenfranchisement on the basis of guardianship "without an individualised judicial evaluation" of a person's ability to vote constitutes disproportionate interference, and is not compatible with the European Convention on Human Rights.<sup>8</sup> The ruling, however, left open the possibility that disenfranchisement could be acceptable under the European Convention with an individualized assessment of voting capacity, and that any such measure should be analysed and decided on in the framework of proportionality.

5.5 The interveners invite the Committee to consider the present case beyond the narrow scope of the violation of the authors' human rights in the State party, contrary to article 29 of the Convention, and to rule explicitly on the other question raised by this case, namely that subjecting persons with disabilities to individualized assessments of their voting capacity is in itself a violation of article 29 of the Convention. According to the interveners, such a decision, adopted with a compelling explanation that sheds light on the reasons behind the provisions of the Convention, would be a very effective tool to convince States parties and allay any concerns national stakeholders might have in implementing article 29. The Committee could also strongly influence the understanding of the European Court of Human Rights and other regional and national courts and tribunals, all of which are likely to be approached on the same issue, and thereby strengthen the protection of the rights of persons with disabilities worldwide. This approach would be entirely consistent with the purpose of the Convention — to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities (art. 1), as every person who is disenfranchised through an individual assessment suffers a violation of his or her right to vote, but very few can seek justice before the Committee. Nor can it be the Committee's task to remedy every instance of disenfranchisement, as this would be simply impossible due to the number of victims of such measures, considering all the countries where these violations are taking place. According to the interveners, in order to ensure that the right to vote can in fact be enjoyed by all persons with disabilities, the Committee must address the situation of those who are not currently before it but who are similarly restricted.

5.6 Turning to the substance of the justification advanced by the State party, the interveners submit that the right to vote — a fundamental human right — should never be subject to a proportionality assessment and justification, because disenfranchisement could never be proportional interference, for three central reasons: (a) capacity assessments constitute discrimination on the basis of disability; (b) they inevitably result in disenfranchising capable individuals; and (c) in practice, their application leads to the disenfranchisement of a large number of persons with disabilities.

(a) *Capacity assessment as discrimination on the basis of disability*

5.7 Assessments of voting capacity rest on the assumption that it is permissible to protect the integrity of the political system from individuals who are unable to formulate a

<sup>8</sup> Application No. 38832/06, judgement of 20 May 2010, para. 44.

valid political opinion. According to that argument, individuals who are objectively found to lack the capacity to vote are by definition unable to vote competently. However, according to the interveners, the legitimacy of that aim is itself questionable, since it is not for the State to determine what constitutes a valid political opinion. While conceding that there are persons with disabilities who are unable to formulate a rational political opinion, the interveners stress that the inability to cast a “competent” or “rational” vote is by no means specific to persons with disabilities. Consequently, if there are both persons with disabilities and persons without disabilities who are unable to cast a competent vote, it cannot be maintained that only the former should be subject to assessment of their capacity. Long-entrenched prejudice against persons with disabilities is the only reason for the current practice, which must be rejected under the Convention.

(b) *Inevitable disenfranchisement of capable individuals*

5.8 According to the interveners, capacity assessments are not a proportionate means of assessing competence in this context. Capacity assessments rest on the assumption that it is possible to objectively separate “incapable” voters from the rest. However, that assumption is not well-founded according to psychological experts. There is no scientifically determinable cut-off point between persons who have and those who lack the capacity to vote. Accordingly, incapacity assessments will always result in disenfranchisement of at least some capable voters with disabilities.

5.9 The interveners add that the goal of the State — to protect the integrity of the electoral system — is neither compelling, given that it targets only a small subset of the potentially incompetent voters (those who are labelled as having a disability), nor legitimate, since it is discriminatory.

(c) *Capacity assessment in practice*

5.10 Additionally, the interveners stress that practice in many countries shows that if capacity assessment on the basis of disability is permitted, it will result in the disenfranchisement of a large number of persons with disabilities on the sole basis of their disability status. The interveners refer to the Committee’s concluding observations on Spain, in which it noted with concern “the number of persons with disabilities denied their right to vote”, and stated that “the deprivation of this right appears to be the rule and not the exception.”<sup>9</sup> According to the interveners, the situation in the State party similarly infringes the rights of persons with disabilities: as of 1 January 2011, some 71,862 persons, constituting 0.9 per cent of the adult population of the State party, were excluded from the right to vote. However, only 1,394 persons are registered as having “severe or profound intellectual disabilities”, thus constituting the primary target and justification of the policy of exclusion.<sup>10</sup> There is therefore a huge discrepancy between the number of people whose competence to vote could conceivably be questioned and the number who are currently disenfranchised. Moreover, the number of people who are disenfranchised is constantly increasing. Regardless of how these assessments will be changed by the Government of the State party in the future, it is a fair prediction that the number of disenfranchised persons

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<sup>9</sup> CRPD/C/ESP/CO/1, para. 47.

<sup>10</sup> According to the 2001 census, there were 38,841 adult persons with intellectual disability in Hungary: see the results of the census at <http://www.nepszamlalas.hu/>. Persons with severe and profound disabilities are estimated to constitute 3.5 per cent of all persons with intellectual disability: see Martha A. Field and Valerie A. Sanchez, *Equal Treatment for People with Mental Retardation: Having and Raising Children*, Cambridge, Massachusetts, and London, England, Harvard University Press, 1999.



will be much larger than the number who could reasonably be considered “incapable of voting” under any scientifically acceptable test.

5.11 The interveners underscore the long-entrenched belief that persons with disabilities are incapable of managing their affairs, making competent decisions or participating in public affairs. They add that the professionals who participate in the assessment process, such as judges, psychologists, psychiatrists and social workers, are not immune to such prejudice. This is why any system that permits exclusion will produce a disproportionate number of disenfranchised persons with disabilities, which is one of the reasons why any such system should be abolished under the Convention.<sup>11</sup> Article 29 of the Convention requires States parties to adapt their voting procedures to facilitate the exercise of the right to vote by persons with disabilities, and to ensure that they are able to cast a competent vote. Their capacity to vote should not be contested, and nobody should be forced to undergo an assessment of voting capacity as a precondition for participating in elections.

### **State party’s observations on the third-party intervention**

6.1 In its communication dated 30 January 2013, the State party submits that the Fundamental Law of Hungary, which came into force on 1 January 2012, significantly changed the regulation of suffrage of persons with disabilities. While the previous Constitution automatically excluded from suffrage all persons under guardianship, restricting or excluding their capacity in terms of any civil law election, the new Fundamental Law empowers the courts to remove the right to vote solely in the case of persons who completely lack legal capacity. Removal of the right to vote is possible only on the basis of an individual assessment of the person’s individual situation, and only if his or her legal capacity is limited to such extent that he or she is incapable of exercising his or her electoral rights.

6.2 The legislative change was intended primarily to implement the provisions of the Convention on the Rights of Persons with Disabilities, and was also prompted by the decision of the European Court of Human Rights in the case of *Alajos Kiss v. Hungary*. In the State party’s view, this provision in the Fundamental Law reflects a significant change that is in accordance with the spirit of the Convention and in full conformity with the requirements of the *Alajos Kiss* decision.

6.3 In the light of the prevailing legislative environment, the State party considers irrelevant the estimation of the Harvard Law School Project on Disability that a considerable number of individuals are excluded from suffrage based on their disability. The estimation is in fact an assumption based on the previous legislation, which automatically excluded from suffrage all persons under guardianship. As such, the data merely shows the number of people under guardianship. However, direct causality cannot be established, as the courts will need to make individual decisions regarding the potential exclusion of such persons from suffrage, as prescribed by the new legislation.

6.4 Consequently, the State party maintains its previous position, expressed in its observations on the merits of the communication, and calls on the Committee to dismiss the authors’ request for legal amendment and non-pecuniary compensation.

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<sup>11</sup> The interveners observe that some States, such as Italy, the Netherlands, Sweden and the United Kingdom, as well as several Canadian provinces and some states of the United States, have already prohibited all restrictions on the right to vote on the basis of disability.

**Authors' comments on the State party's observations**

7.1 On 13 August 2012, the authors provided their comments on the State party's observations. They submit that the State party did not contest the fact that their right to vote under article 29 of the Convention had been violated by the removal of their names from the list of voters in the 2010 parliamentary elections. The State party's arguments refer to the legislative steps that have been taken since then to comply with article 29 of the Convention. According to the authors, the State party has not offered any justification or explanation as to why the authors of the present communication were prevented from participating in the 2010 elections. The legislative steps that have been taken since then have no effect on the harm already suffered in 2010. The authors add that they received no redress, no recognition of the violation of their rights or any other moral satisfaction or compensation. The measures cited by the State party could only ensure that their right to vote is not violated in the next parliamentary elections in 2014.

7.2 The authors reject the State party's contention that it has taken the necessary legislative steps to address the alleged violation since the submission of the authors' communication. The authors stress that on 1 January 2012, Hungary's new Fundamental Law came into force, replacing the previous Constitution. Under article XXIII, paragraph 6, of the Fundamental Law, the court can limit the right to vote of persons who do not have the necessary capacity to vote. To enforce this provision, the Civil Code, the Code of Civil Procedure and the Act on Electoral Procedure were also amended. As a result of these changes, the courts can decide separately on the disenfranchisement of a person under guardianship in proceedings concerning the restriction or restoration of legal capacity. While the laws in force in 2010 automatically excluded all persons under guardianship from the electoral register, courts will now decide on the right to vote independently from placement under guardianship, on the basis of an individualized assessment. Despite these changes, the authors stress that the courts can decide on disenfranchisement only in guardianship proceedings; there is no provision for separate proceedings to limit the right to vote. All persons under guardianship are persons with disabilities. Their disenfranchisement is specifically based upon their intellectual disability, and is therefore discriminatory.

7.3 The authors add that a vote is a subjective choice, linked to personal preferences. While persons with disabilities are therefore not the only group that experiences difficulty in exercising their suffrage, they are nevertheless singled out by the State party for disenfranchisement. The authors add that the State party has other means at its disposal to increase the voting competence of citizens, such as improving civic education standards, raising awareness about the electoral process, and providing specific assistance to vulnerable groups, as required by article 29 of the Convention.

7.4 The authors reiterate that, since the State party's system is based on individual assessment and only targets persons with disabilities, it cannot be in compliance with article 29 of the Convention, which does not provide for any exception to the universal right to vote. The enforcement of the disenfranchisement system also raises issues, as according to the Transitional Provisions of the Fundamental Law, all persons currently under guardianship will continue to be disenfranchised until their right to vote is restored. This applies to the authors, who remain disenfranchised. As no reassessment of voting rights has been announced or implemented by the State party, only persons who submit individual court applications to restore their right to vote will be assessed by the courts. Also, no legal, financial or other assistance is contemplated under these proceedings, which places persons under guardianship in an unfair and disadvantageous position as compared to persons without disabilities. The authors contend that the State Party should have declared that all persons who are currently disenfranchised would regain their right to vote, unless it has been revoked by a court decision.

7.5 Referring to the State party's assertion that the courts would rely on the expert opinions of forensic psychiatrists in cases concerning disenfranchisement, the authors submit that these psychiatrists are trained to diagnose and treat mental illnesses, not administer intelligence quotient tests, evaluate social skills or otherwise assess the individual abilities of persons with intellectual disabilities. The authors further stress that there is currently no psychiatric protocol in the State party to assess "voting capacity". As a consequence, the psychiatric assessment contemplated by the State party can only be arbitrary, replicating the practice of guardianship proceedings, where the existence of a disability itself is the only determinant of the psychiatric assessment, and thus of the court decision.

7.6 Turning to the State party's contention that the Hungarian legal system is in conformity with the decision of the European Court of Human Rights in the case of *Alajos Kiss v. Hungary*, the authors recall that the standards of the European Court are different from those of the Committee. The State party's compliance with the European Convention on Human Rights is thus not decisive for the Committee. The authors add that in the *Alajos Kiss v. Hungary* decision, the European Court did not hold that an individual assessment, such as the one currently in force in the State party, complies with the European Convention. Rather, it ruled that a system based on automatic exclusion without an individual assessment would not comply with the Convention, thus leaving open the question of whether the system of individual assessment currently in place would be acceptable.

7.7 The authors conclude that the State party has failed to submit arguments that justify the disenfranchisement of persons with disabilities, or to demonstrate that such a system is in conformity with the Convention. The authors therefore renew their call for the Committee to (a) hold that the State party's current system of individual assessment is in violation of article 29 of the Convention; (b) request the State party to amend its legislation so as to ban disenfranchisement on the basis of disability, be it automatic or based on an individual assessment of voting capacity; and (c) acknowledge the violation suffered by the authors and provide them with compensation for the non-pecuniary damage suffered.

## **Issues and proceedings before the Committee**

### *Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the Committee on the Rights of Persons with Disabilities must decide, in accordance with article 2 of the Optional Protocol and rule 65 of the Committee's rules of procedure, whether the communication is admissible under the Optional Protocol to the Convention.

8.2 While the Committee notes that the State party does not challenge the admissibility of the present communication, it is appropriate for the Committee to examine its admissibility. The Committee has ascertained, as required under article 2 (c) of the Optional Protocol, that the same matter has not already been examined by the Committee and that it has not been and is not being examined under another procedure of international investigation or settlement. The Committee further notes that the State party has not raised any objection concerning the exhaustion of domestic remedies, or identified any specific remedy that would have been available to the authors. The Committee thus considers that the requirements of article 2 (d) of the Optional Protocol have been met. Accordingly, the Committee considers that it is not precluded by article 2 of the Optional Protocol from examining the communication.

8.3 The Committee considers that the authors have sufficiently substantiated, for the purposes of admissibility, their claims under articles 12 and 29 of the Convention. In the

absence of other impediments to the admissibility of the communication, the Committee declares these claims admissible and proceeds to their examination on the merits.

*Consideration of the merits*

9.1 The Committee on the Rights of Persons with Disabilities has considered this communication in the light of all the information received, in accordance with article 5 of the Optional Protocol and rule 73, paragraph 1, of the Committee's rules of procedure.

9.2 The Committee notes the authors' claim that the automatic deletion of their names from the electoral registers, by application of article 70, paragraph 5, of the Constitution in force at the time of submission of their communication, breached article 29, read alone and in conjunction with article 12 of the Convention. The authors claim, more specifically, that their automatic disenfranchisement regardless of the nature of their disability and their individual abilities was discriminatory and unjustified. The Committee also takes note of the State party's arguments that, as article 70, paragraph 5, of the Constitution was repealed with the adoption of the Fundamental Law of Hungary, and that article 26, paragraph 2, of the Transitional Provisions of the Fundamental Law provides for an individualized assessment of a person's right to vote, based on his or her legal capacity, its laws are now in conformity with article 29 of the Convention.

9.3 The Committee observes that the State party has merely described, in the abstract, the new legislation applicable to persons under guardianship, stating that it has brought it into conformity with article 29 of the Convention, without showing how this regime specifically affects the authors, and the extent to which it respects their rights under article 29 of the Convention. The State party has not responded to the authors' contention that they were prevented from voting in the 2010 parliamentary elections, and remain disenfranchised pursuant to their placement under guardianship, despite the legislative changes introduced.

9.4 The Committee recalls that article 29 of the Convention requires States parties to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, including by guaranteeing their right to vote. Article 29 does not provide for any reasonable restriction or exception for any group of persons with disabilities. Therefore, an exclusion of the right to vote on the basis of a perceived or actual psychosocial or intellectual disability, including a restriction pursuant to an individualized assessment, constitutes discrimination on the basis of disability, within the meaning of article 2 of the Convention. The Committee refers to its concluding observations on Tunisia, in which it recommended "the urgent adoption of legislative measures to ensure that persons with disabilities, *including persons who are currently under guardianship or trusteeship*, can exercise their right to vote and participate in public life, on an equal basis with others" (emphasis added).<sup>12</sup> The Committee further refers to its concluding observations on Spain, in which it expressed similar concern over the fact that the right to vote of persons with intellectual or psychosocial disabilities can be restricted if the person concerned has been deprived of his or her legal capacity, or has been placed in an institution.<sup>13</sup> The Committee considers that the same principles apply to the present case. Accordingly, the Committee concludes that article XXIII, paragraph 6, of the Fundamental Law, which allows courts to deprive persons with intellectual disability of their right to vote and to be elected, is in breach of article 29 of the Convention, as is article 26, paragraph 2, of the Transitional Provisions of the Fundamental Law.

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<sup>12</sup> CRPD/C/TUN/CO/1, para. 35.

<sup>13</sup> CRPD/C/ESP/CO/1, para. 47.

9.5 The Committee further recalls that under article 12, paragraph 2, of the Convention, States parties must recognize and uphold the legal capacity of persons with disabilities “on an equal basis with others in all aspects of life”, including political life, which encompasses the right to vote. Under article 12, paragraph 3, of the Convention, States parties have a positive duty to take the necessary measures to guarantee to persons with disabilities the actual exercise of their legal capacity. Accordingly, the Committee is of the view that, by depriving the authors of their right to vote, based on a perceived or actual intellectual disability, the State party has failed to comply with its obligations under article 29 of the Convention, read alone and in conjunction with article 12 of the Convention.

9.6 Having found the assessment of individuals’ capacity to be discriminatory in nature, the Committee holds that this measure cannot be purported to be legitimate. Nor is it proportional to the aim of preserving the integrity of the State party’s political system. The Committee recalls that, under article 29 of the Convention, the State party is required to adapt its voting procedures, by ensuring that they are “appropriate, accessible and easy to understand and use”, and, where necessary, allowing persons with disabilities, upon their request, assistance in voting. It is by so doing that the State party will ensure that persons with intellectual disabilities cast a competent vote, on an equal basis with others, while guaranteeing voting secrecy.

9.7 The Committee therefore finds that the State party has failed to comply with its obligations under article 29, read alone and in conjunction with article 12 of the Convention.

10. The Committee on the Rights of Persons with Disabilities, acting under article 5 of the Optional Protocol to the Convention, is of the view that the State party has failed to fulfil its obligations under article 29, read alone and in conjunction with article 12 of the Convention. The Committee therefore makes the following recommendations to the State party:

- (a) Concerning the authors: the State party is under an obligation to remedy the deletion of the authors’ names from the electoral registers, including by providing them with adequate compensation for moral damages incurred as a result of being deprived of their right to vote in the 2010 elections, as well as for the legal costs incurred in filing this communication;
- (b) In general: the State party is under an obligation to take measures to prevent similar violations in the future, including by:
  - (i) Considering repealing article XXIII, paragraph 6, of the Fundamental Law, and article 26, paragraph 2, of the Transitional Provisions of the Fundamental Law, given that they are contrary to articles 12 and 29 of the Convention;
  - (ii) Enacting laws that recognize, without any “capacity assessment”, the right to vote for all persons with disabilities, including those with more need of support, and that provide for adequate assistance and reasonable accommodation in order for persons with disabilities to be able to exercise their political rights;
  - (iii) Upholding, and guaranteeing in practice, the right to vote for persons with disabilities, on an equal basis with others, as required by article 29 of the Convention, by ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use, and where necessary, at their request, allowing assistance in voting by a person of their choice.

11. In accordance with article 5 of the Optional Protocol and rule 75 of the Committee’s rules of procedure, the State party shall submit to the Committee, within six months, a written response including any information on action taken in the light of the Views and

recommendations of the Committee. The State party is also requested to publish the Committee's Views, to have them translated into the official language of the State party, and circulate them widely, in accessible formats, in order to reach all sectors of the population.

[Adopted in Arabic, English, French and Spanish, the English text being the original version. Subsequently to be issued also in Chinese and Russian as part of the Committee's biannual report to the General Assembly.]

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