

# The Problems and Contradictions of the 'Awareness Constraints' of General Suffrage

## *Analysis of the Right to Vote for Children and Persons under Guardianship, with Particular Attention to the Hungarian Practice*

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### Abstract

*This paper deals with the question of the so-called 'awareness constraints', which include the problems of age-related voting rights and the rights of persons whose ability to vote is limited because of their lack of discernment. It examines the regulatory background and constitutional problems surrounding the two areas on the basis of international conventions and practice, as well as relevant views outlined in scholarship. With regard to age-related restrictions, the paper analyzes the possible alternatives (e.g. the possibility of lowering the voting age, or the substitute model), and in the case of persons under guardianship, it evaluates the trends in international practice, looking at how Hungarian practice fits into these trends, and what possibilities for further development there are. One of the main conclusions of the research is that there is a tension between the two types of 'awareness constraints' since there are similar arguments against minors' right to vote, as there are arguments in favor of the full extension of the right to vote for persons under guardianship. This double standard makes it much more difficult to achieve any progress in the area of 'awareness constraints'.*

Keywords: equal right to vote, family suffrage, guardianship, mental disabilities, discrimination

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## 1. Introductory Thoughts

The principle of the generality and equality of the right to vote is of particular importance when taking a fundamental rights approach to electoral law. In fact, by the second half of the 20th century, the view had become generally accepted that the right to vote was not merely a constitutional duty of the state, which could not be constitutionally enforced by the individual, but a human right which the state had a duty to guarantee, and that when it failed to do so, any rightful claimant could enforce it.<sup>1</sup> This clearly goes back to the idea that a democratic state can only exist if it derives its power directly or indirectly from the people. In this respect, the question of who can be considered a part of the concept of people is of particular importance. In this context, it is generally accepted that 'people' is primarily a community of citizens.<sup>2</sup> However, not everyone who belongs to the people has the right to vote. Over the centuries, the right to vote has always applied with certain limitations regarding the eligibility of natural persons. These frameworks (which, conversely, could also be called limitations<sup>3</sup>) have of course been opened up over the decades, and as censorship declined, the active right to vote has become an all-embracing concept. Nevertheless, the right to vote has not become completely general, *i.e.* there are still

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1 Ákos Domahidi, '[Választójog]', in András Jakab (ed.), *Az Alkotmány kommentárja I-II.*, Századvég, Budapest, 2009, p. 2474.

2 Gábor Kurunczi, *Az egyre általánosabb választójog kihívásai. Az általános és egyenlő választójog elvének elemzése a magyar szabályozás tükrében*, Pázmány Press, Budapest, 2020, pp. 19–22; Heather Lardy, 'Citizenship and the Right to Vote', *Oxford Journal of Legal Studies*, Vol. 17, Issue 1, 1997, pp. 75–100.

3 Myers defined the right to vote according to the following criteria: persons who register on the electoral roll, and meet the eligibility criteria (e.g. reaching the age of 21) are eligible to vote. William Fenton Myers, *Woman and the Law, Including Rights and Duties of Citizenship* (1918), Kessinger Legacy Reprints, 2010, p. 515. Magruder emphasized the requirements of being 21 years of age, possessing US citizenship, and having a permanent residence in the state in question as the conditions for eligibility to vote. Frank Abbott Magruder, *American Government with a Consideration of the Problems of Democracy*, Allyn and Bacon (etc.), 1921, p. 353.

limitations<sup>4</sup> that exclude certain people from voting.<sup>5</sup> Examples include the right to vote being linked to age, the requirement of discernment (these two conditions are the focus of this paper), or the right to participate in public affairs. In addition, when examining the fundamental right to vote, the issue of equality inevitably arises. Equality of suffrage<sup>6</sup> in legal terms means that everyone's vote is worth the same. That is, each voter has the same number of votes (this can be considered as the formal requirement of equality of suffrage), his/her vote carries the same weight (this can be seen as the substantive requirement of equality of suffrage), and each of the elected representatives represents approximately the same number of citizens/voters.

The present paper deals with the issue of the so-called 'awareness constraints' as one of the limitations to the generality of the right to vote. By 'awareness constraints' I mean aspects assessed in the context of voters' discernment, which, in this reading means a kind of political discernment. This, in other words, means that the voter concerned is a member of the political community who has the capability of selecting members of the representative body.<sup>7</sup> The term 'awareness constraints' does not, therefore, imply a requirement that only voters who are capable of making a rational, well-considered decision, taking into account economic and political considerations when casting their vote, should be allowed to participate in elections. To require this would, in my view, be completely contrary to the principle of the generality of the right to vote, as it would essentially result in a quasi-censorship of literacy and knowledge. In exercising their

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4 Kropf concludes in the context of the limitations on suffrage that although the right to vote has been expanded and broadened throughout history, it still has its limits today. The author cites, for example, restrictions on the right to vote on the grounds of disability. Martha E. Kropf, *Institutions and the Right to Vote in America*, University of North Carolina at Charlotte, Charlotte, 2016, pp. 80–83.

5 Bodnár explicitly states that general suffrage means that all natural persons have the right to vote and to stand as a candidate, but that this right is subject to restrictions. Eszter Bodnár, 'A Velencei Bizottság választási ajánlásainak érvényesülése a magyar szabályozásban és bírósági gyakorlatban', *Jogtudományi Közlöny*, Vol. 73, Issue 3, 2018, p. 142.

6 In the context of electoral equality, Ipsen emphasizes that the importance of achieving electoral equality varies from one type of electoral system to another, but that it should be taken seriously everywhere and that efforts should be made to solve any problems that may arise in connection with this principle. Jörn Ipsen, *Staatsrecht I. Luchterhand Verlag*, Neuwied und Kriftel, Berlin, 2002, p. 33.

7 Eszter Bodnár, *A választójog alapjogi tartalma és korlátai*, HVG ORAC, Budapest, 2014, p. 185.

right to vote, voters do not necessarily have to make a rational choice. The completeness of the right to vote (also given its fundamental rights nature) means, among other things, that voters do not have to decide on the basis of economic and political analyzes for whom to vote, but it is sufficient to base their decision on emotional factors, family conventions or even habit (of course, not excluding the first option). Thus, when I use the term 'awareness constraints', I mean the existence of a political discernment of the electorate.<sup>8</sup>

As far as the above interpretation of the concept of 'awareness constraints' is concerned, it is important to point out that almost all electoral systems currently in use in the world contain one or more restrictions that seek to guarantee that voters are capable of making an informed choice. (e.g. sets a minimum age limit or excludes people with mental disabilities from the active and passive electorate).<sup>9</sup> 'Awareness constraints' can therefore be interpreted as requiring a kind of political 'maturity' (i.e. the ability of the voter concerned to perceive what is happening in the outside world and to evaluate it in some way and 'use' this information in making a decision) in order to exercise the right to vote.<sup>10</sup> Now, the definition of political 'maturity' is, of course, the result of a balancing exercise: e.g. whether or not a 16-year-old person has this maturity is a matter for the sovereign decision of the state (i.e. whether or not the state includes them among the subjects of people's sovereignty). On the other hand, it could be argued that the reason for the existence of 'awareness constraints' is the state's duty to protect the integrity of the electoral system. According to Fiala, this means that the state must exclude from the exercise of the right to vote those voters who, for example, due to a total or partial lack of ability of discernment, are unable to make responsible decisions when exercising their right to vote.<sup>11</sup> This is because in their case there would be a high risk that someone else

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8 It is important to emphasize, therefore, that the existence of 'awareness constraints' does not mean that a person who has the right to vote is a person who is 'aware', and that a person who has not reached the age of 18 and is therefore not entitled to vote is an 'unaware' person.

9 Cf. Stefan Olsson, 'Children's Suffrage (A Critique of the Importance of Voter's Knowledge for the Well-Being of Democracy)', *The International Journal of Children's Rights*, Vol. 16, Issue 1, 2008, pp. 62–67.

10 For the reasons and rationale for this see and cf. Claudio López-Guerra, 'Enfranchising Minors and the Mentally Impaired', *Social Theory and Practice*, Vol. 38, Issue 1, 2012, pp. 115–138.

11 János Fiala, 'A fogyatékossággal élő személyek választójogának kérdései a Kiss Alajos kontra Magyarország döntés tükrében', *Fundamentum*, 2010/3, p. 109.

would make the decision for them, someone else would exercise their right to vote. Indeed, the protection of the integrity of the electoral system is primarily linked to the objective duty of the state to protect institutions pertaining to the context of the right to vote. Within this framework, the state, as the guarantor of the fundamental right, is obliged to protect the rights guaranteed by the fundamental right, and is also obliged to protect the institution of the fundamental right in the course of its enforcement – this, in turn, includes the protection of the purity of the election.

In the framework of the present paper, based on an analysis of international conventions and court decisions, as well as the legal environment of the individual countries, statistical data, and relevant literature, I will examine whether it is necessary to limit the right to vote on the basis of the 'awareness' of voters as defined above, and what possible directions can be identified in this context. In my analysis, I will also pay attention to the contradiction between age restrictions on the right to vote and the right to vote for people with intellectual disabilities discernible from international conventions and practice, as well as the literature. My hypothesis is that there is a significant contradiction in the reasoning behind the two elements of 'awareness constraints', which seems almost impossible to resolve at present.

## *2. Voting Rights for Children? The Dilemma of Family Suffrage*

One of the 'awareness constraints' on general suffrage is the age limit, the primary reason for which is that the legislator presumes that a voter must be of a certain age to be able to make a considered and prudent decision when casting his or her vote. According to Schreiber, linking the right to vote to age guarantees that participation in elections takes place with an appropriate degree of maturity, intelligence, and responsibility.<sup>12</sup> However, the question is whether this age limit can be defined with sufficient objectivity. Is it even possible to define it precisely? Going further, we can also ask whether age limits are necessary at all. And if the answer to this question is no, what are the possible solutions and what are their constitutional pitfalls.

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<sup>12</sup> Wolfgang Schreiber, *Kommentar zum Bundeswahlgesetz*, Varl Heymanns Verlag, Köln, 2009, p. 308; Ludwig Beckman, *The Frontiers of Democracy – The Right to Vote and its Limits*, CPI Antony Rowe, Chippenham and Eastbourne, 2009, p. 91.

## 2.1. General Aspects and Concepts Related to Age-related Voting Rights

The age limit on voting rights has historically been, and still is, a recognized limit on voting rights around the world. The need for an age limit is already mentioned by Constant in his writings.<sup>13</sup> In an international comparison, if we look at the constitutions of some European states, we can see that all of them apply age limits as a condition for both active and passive suffrage. In most European states, the active voting age is set at 18. The only general exception to this is Cyprus, where Article 63(1) of the Cypriot Constitution stipulates that only citizens aged 25 or over and resident in the country have the right to vote. However, in Italy, for example, Article 58(1) of the Constitution stipulates that only voters aged 25 or over can elect a senator. But there are also examples of the opposite 'direction'. In Austria, the voting age has been lowered to 16 following an amendment to the constitution, under Article 26 (the situation is similar in Scotland and Malta).<sup>14</sup>

However, despite the above, the question of whether it makes sense to link the right to vote to age is, in itself, a question. It is apparent that voting age has been steadily decreasing throughout history. Domahidi is of the view that

"the most proportionate method of restricting the right to vote is to impose an objective condition on whether someone is sufficiently mature and prepared to express their views on political issues [...] and the most appropriate method is age-censorship."<sup>15</sup>

As a general rule, therefore, citizens of voting age are eligible to vote, *i.e.* the age limit is usually set at 18. It is quite clear that the political 'maturity' and political discernment of an individual does not depend on the age of majority, since a person below the age of majority can have this kind of discernment, while a person of age can also lack it.<sup>16</sup> This is supported,

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13 Benjamin Constant, *A régiek és a modernek szabadsága*, Atlantisz, Budapest 1997, p. 114.

14 Looking at non-European states' practices, only a few states have higher or lower age limits for active voting (*e.g.* Fiji, Kuwait, Lebanon, and Malaysia have 21 years, Japan and Cameroon 20 years, South Korea 19 years, Indonesia and Sudan 17 years). Bodnár 2014, p. 188.

15 Domahidi 2009, pp. 2471–2494.

16 In today's legal understanding, there are two approaches to children's voting rights: on the one hand, that children are excluded from the right to vote, and on the other, that they have the right to vote but cannot exercise it in their own interest – for lack of maturity. András Jakab, 'Vajon a gyermeket választójoga az alkotmányjogi válasz

among other things, by an empirical study conducted in Germany, which shows that there is only little difference in political participation, values and attitudes towards political parties between 16 and 17-year-olds and young adults who are already eligible to vote.<sup>17</sup> Schanda also finds that minor citizens are also members of the nation as a political community, and their exclusion from political rights is not self-evident.<sup>18</sup> Yet, the main limit to general suffrage today is the age limit. With this, however, roughly 20 % of society is excluded from the right to vote. This creates a democratic deficit, since a significant part of society does not express an opinion in elections. However, it is questionable whether the inclusion of minors in the electoral process is the most appropriate way to address this deficit.<sup>19</sup>

From time to time,<sup>20</sup> therefore, the argument that these age limits should be changed (in particular, lowered) arises, and in many cases, it is claimed that they should be linked to the family as the most basic unit of society.<sup>21</sup> Schanda argues that the most common argument for children's voting rights is that it would help the sustainable development of society, forcing policymakers to take greater account of the needs of future generations.

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a mai demokráciák fenntarthatósági kihívásaira?' in Nóra Chronowski *et al.* (eds.), *A szabadság szerető embernek. Liber Amicorum István Kukorelli*, Gondolat, Budapest, 2017, p. 493.

- 17 Ursula Hoffmann-Lange & Johann de Rijke, '16jährige Wähler – erwachsen genug? Die empirischen Befunde' *Zeitschrift für Parlamentsfragen*, Vol. 27, Issue 4, 1996, pp. 572–585.
- 18 Balázs Schanda, 'A jog lehetőségei a család védelmére', *Iustum Aequum Salutare*, Vol. 8, Issue 2, 2012, pp. 77–88.
- 19 Dániel Gábor Antali, 'Egyenlőbbek az egyenlők között, avagy a kiskorúak után járó választójog' in Dániel Gábor Antali *et al.* (eds.), *Kérdőív az alkotmányozásról 2011*, Pólay Elemér Alapítvány, Szeged, 2011, p. 87.
- 20 Maura Priest, 'Why children should be allowed to vote?', *Public Affairs Quarterly*, Vol. 30, Issue 3, 2016, pp. 215–238.
- 21 The importance of the family is also reflected in the constitutions of European countries. Ireland's Constitution recognizes the family as the natural, primary, and fundamental community of society. The Polish Constitution states that the Republic of Poland protects the family, motherhood and fatherhood. In addition to the above, the Italian Constitution also recognizes the family as a natural unit based on marriage. In Hungary, the concept and importance of the family was enshrined in the Fundamental Law and has been given constitutional protection, but of course, the Hungarian Constitutional Court has also taken a number of decisions on the protection of families. In its *Decision No. 43/2012. (XII. 20.) AB*, the Constitutional Court stated that the life of the newborn child, as a value to be protected, follows from the state's obligation to protect institutions, since the family is the basis for the survival of the nation.

The theoretical consideration is that this would bring the community of voters closer, more in line with the community of citizens, the people.<sup>22</sup> Schanda, therefore, believes that the political representation of minors is an existing and legitimate issue: because the right to vote is not general today.<sup>23</sup> He argues that rethinking the right to vote could be a way of creating a new intergenerational social contract, institutionalizing a future-oriented approach that the democratic community desperately needs.<sup>24</sup>

In this vein, during the 20th century, both in Hungary and in other countries (especially in Germany<sup>25</sup>), the issue of children's voting rights and family suffrage was raised. Germany is worth highlighting in this respect because it is the country where the most heated debates on the right of minors to vote have taken place.<sup>26</sup> In Hungary, the first draft of the Fundamental Law still contained a provision on family suffrage, but the finally adopted text no longer contained this provision.

In light of the above, and in order to understand further aspects, it is first of all important to make a conceptual clarification and distinction. The right to vote for children and the right to vote for the family are not equivalent concepts in terms of their implementation. In the case of the former (which, to be clarified later, can be seen as one of the main models), there is no age limit to the right to vote, so that even newborn citizens have the right to vote. The main issue here for some of the other submodels will be how the child can 'exercise' his or her right to vote until the child becomes able to cast their vote. By contrast, the family voting model does not result in the abolition of the age limit, but in fact 'rewards' parent(s) with children with one or more extra votes, so that in essence the child has no voting rights by default, but the system only gives the parent(s) some extra vote(s).

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22 Schanda 2012, pp. 77–88.

23 Balázs Schanda, 'Családi választójog – alkotmányjogi képtelenség vagy a fenntartható demokrácia biztosítáka?', *Magyar Jog*, Vol. 57, Issue 10, 2010, pp. 608–611.

24 Schanda 2012, pp. 77–88.

25 According to Pfadenhauer, an important aspect of the social impact of children's suffrage is that, in addition to the churches, the introduction of children's voting rights has been raised from time to time at federal level, but has generally been met with a sterile debate. Björn Pfadenhauer, *Das Wunsch- und Wahlrecht der Kinder und Jugendhilfe – Entwicklungslinien, rechtliche Grundlegung und institutionelle Bedingungen*, Zugl. Dissertation an der Universität Duisburg-Essen, 2011, pp. 1–265.

26 Johanna Fröhlich, 'Alapkérdések a családi választójog vitájában', *Pázmány Law Working Papers*, 2011/20, p. 3–4.

## 2.2. Age as a Limit to the General Suffrage in Light of International Law, Hungarian Legislation and Practice

Following this overview of general issues pertaining to age and voting rights, let us examine the relevant international law, Hungarian legislation and practice.

First, it is important to note that international documents unanimously recognise age as a legitimate limitation to the right to vote. For example, General Comment No. 25 of the UN Human Rights Committee<sup>27</sup> in paragraph 10 considers the setting of a minimum age for voting to be reasonable. Opinion No. 190/2002 of the Venice Commission explicitly states that the right to vote should be subject to an age limit, the upper limit of which may be reaching the age of majority.<sup>28</sup> And the Final Document of the Copenhagen Conference (in subsection 7.3.), and the Inter-Parliamentary Union Declaration on the Criteria for Free and Fair Elections (in point 2(1)) identify adult citizens as eligible to vote. It is also important to point out that the UN Convention on the Rights of the Child, while granting children a number of political rights (such as freedom of expression, freedom of assembly and the right of association),<sup>29</sup> does not provide for the right to vote.

In the ECtHR's jurisprudence, the link between the right to vote and age is only indirect. In the *case of W, X, Y and Z versus Belgium*, the ECtHR held that the age limit for the right to vote and the fact that in Belgium the age of 40 years was required to become a member of the Senate were compatible with the ECHR.<sup>30</sup> And in the case of *Hirst versus the United Kingdom*, the ECtHR ruled that the age requirement could be justified by the need to ensure the maturity of voters in elections.

With regard to international 'trends', it is worth noting (especially since in Europe it is mainly in Germany that the right to vote for minors has emerged as a real narrative) that the German Constitutional Court has also

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27 UN Human Rights Committee (HRC), ICCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7.

28 Point I.I.1(a) of Venice Commission Opinion No. 190/2002.

29 Article 13 or Article 15 of the UN Convention on the Rights of the Child, signed in New York on 20 November 1989.

30 *W, X, Y and Z v Belgium*, No. 6745–6746/74, 30 May 1975.

examined the minimum age of eligibility for voting and found it to be constitutional, mainly justifying it with historical and customary traditions.<sup>31</sup>

In Hungary, Article XXIII(1) of the Fundamental Law states that all citizens of voting age have the right to vote. In other words, the Fundamental Law does not set an age limit, but follows a concept that can be interpreted using the Civil Code. The Civil Code, in turn, does not talk about the age of majority, but about who can be considered a minor. Accordingly, a minor is someone below the age of eighteen. A minor becomes an adult by marriage. However, this means that persons who have reached the age of 16 and who have married at that age under the Civil Code can also have the right to vote, since majority thus acquired is only possible if all the rights attached to it are simultaneously granted. This could even be an argument for lowering the voting age.

### 2.3. Children's Voting Rights versus Family Voting Rights – Emerging Constitutional Conflicts, Models, Possible Solutions

Following this brief look at national and international practice, let us examine the possible models for minors' right to vote.<sup>32</sup>

Although the right to vote for minors has not yet been implemented in any real form anywhere in the world (at most the age limit has been lowered, see Austria, Scotland, and Malta), several models have been developed on a theoretical level. One model is to give children the original right to vote by lowering or abolishing the voting age, without involving anyone else in the right to vote. Another model is to increase the number or weight of the parents' votes (based on their original voting rights) taking into account their number of children. The third model is the so-called 'derivative parental suffrage', where the child has the right to vote from birth, but is represented by their parents when they are still a minor.<sup>33</sup> In what follows, I will look at the possible problems of implementing these models and the constitutional conflicts arising in connection with them.

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31 Bodnár 2014, p. 189.

32 Olsson argues for children's right to vote: Olsson 2008, pp. 55–76.

33 Fröhlich 2011, p. 4.

### 2.3.1. Questions Surrounding Children's Original Right to Vote

The original right of children to vote is achieved by lowering or abolishing the voting age and allowing children to vote directly. Within this model, we can distinguish between two approaches. One of them is that the voting age should be abolished completely, *i.e.* the right to vote should be conferred on citizens as soon as they acquire the capacity to exercise their fundamental rights.<sup>34</sup> However, this solution may pose a number of difficulties. First of all, it is important to clarify what is meant by the concept of fundamental legal capacity and how it differs from civil legal capacity. In the latter case, as a general rule, the full capacity to act depends on the fulfilment of an objective age limit. Civil legal capacity is also dependent on the existence of a capacity of discernment, the lack or limited existence of which may also result in a restriction of civil legal capacity. By contrast, the capacity to act expresses whether the persons concerned (the subjects of the fundamental right) can exercise (or directly exercise) their rights.<sup>35</sup> Under fundamental rights capacity, the holder of a fundamental right may exercise and enforce the rights conferred on them by the constitution or by law, either individually or through another person. In respect of the right to vote, this means that a person has the fundamental legal capacity if he or she has the right to vote and is able to exercise it.<sup>36</sup> In the case of minors, the latter question may be difficult to answer under the original model of suffrage. The scope for the exercise of fundamental rights by children, including the exercise of personal rights, will increase with age as the capacity to make decisions about the consequences of the exercise of rights develops. In light of the above, the fundamental constitutional problem with the original model of children's suffrage – which requires the direct participation of the child in the electoral process – is that a minor who is incapacitated or excluded is physically and mentally unable to meet the expectations that electoral systems require of voters.<sup>37</sup> This would make direct voting almost unfeasible. It is, of course, possible that a 14-year-old minor (on a case-by-case basis)

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<sup>34</sup> In the case of a live birth, the natural person concerned acquires fundamental legal capacity from the moment of birth, as opposed to civil legal capacity, which in the case of a live birth is acquired from the moment of conception (until birth, as a so-called conditional legal capacity). János Sári & Bernadette Somody, *Alapjogok – Alkotmánytan II*, Oriris, Budapest, 2008, p. 54.

<sup>35</sup> Id. 55.

<sup>36</sup> Bodnár 2014, pp. 78–85.

<sup>37</sup> For example, to appear before the electoral commission, request a ballot box, sign the register and, last but not least, make a responsible decision.

could readily meet these requirements, but it is practically impossible to develop a differentiated age-appropriate regulation, especially in view of the fact that in this case, a solution would also have to be found for a newborn baby to cast its vote directly, on its own.

An other approach could be to lower the voting age. The issue of lowering the voting age was also examined by Daniel Hart and Robert Atkins in a study where they analyzed the readiness of US minors aged 16–17 in relation to the right to vote. The hypothesis of the research was that 16 and 17-year-olds should be given the opportunity to exercise their right to vote. This was supported by the view that a 16-year-old minor is no different in citizenship from a young adult aged 18 – empirical research does not support the assumption that 16 or 17-year-olds are socially immature. It is therefore unjustified to disenfranchise them. The researchers also consider it important to lower the voting age, as this would encourage governments to make demographically favorable decisions, with due consideration to the ‘new’ segment of the electorate.<sup>38</sup> We have seen examples of lowering the active voting age in Austria and Scotland (and Malta), where the current age of eligibility is set at 16.<sup>39</sup> In the case of this solution, the legislator would, in fact, be changing the presumption established within the framework of the ‘awareness constraints’ (that below a certain age there is no adequate sense of political responsibility and awareness, *i.e.* ultimately no capacity to act under fundamental rights). Under the latter approach, in order to protect the integrity of the electoral system, the legislator excludes persons below this age from the right to vote, by linking voting not to the age of majority, but to a lower age limit. In my view, this solution would be expedient, as it would neither violate the principle of equality of voting rights (since the minor would have neither fewer, nor more votes) nor the requirement of personal participation in voting (since the minor would cast their vote personally). The lower age limit could be 16, as in Austria, or even lower.<sup>40</sup>

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38 Daniel Hart & Robert Atkins, ‘American Sixteen- and Seventeen-Year-Olds are ready to vote’, *The Annals of the American Academy of Political and Social Science*, Vol. 633, The Child and Citizen (January 2011), pp. 201–222.

39 The voting age is currently 16 in Brazil, Cuba, Somalia, and Nicaragua, and 17 in Timor-Leste, Indonesia, Sudan, and North Korea. Jakab 2017, p. 491.

40 When considering the lowering of the active voting age, the question arises how to justify that the constitution-maker and the legislator consider a person qualified to decide on the composition of a representative body but, at the same time, unqualified to negotiate a major sale and purchase agreement on their own. However, this can be easily answered if the reason for lowering the voting age is to ensure the fullest

### 2.3.2. Dilemmas Surrounding Original Parental Suffrage

The second possible model is the implementation of original parental voting rights. Original parental voting means that additional votes go directly to the parent(s), depending on the number of children in the parent's custody. In this case, the age limit would be left untouched by the electoral system, essentially 'rewarding' the parent(s) with extra votes. However, this solution raises a number of serious problems. On the one hand, would both parents have the right to vote in this case? Would only married parents be entitled to vote, or would it also apply to parents in different relationships and divorced parents? Would this right be affected by the exclusion or restriction of parental custody? Would there be one vote for each child or one vote for all children? If only one parent (some proposals suggest only the mother<sup>41</sup>) could exercise the extra vote, how would the parents who share custody decide whom the cast the extra vote shall be for (especially if they have different political views)? Many questions such as these can be raised about this model.<sup>42</sup> In addition to the fact that these questions would be difficult or impossible to answer,<sup>43</sup> there are other tangible problems. One such issue is the equality of voting rights. According to Kis, equality of suffrage is an absolute requirement (for example, a voter is not allowed to cast more than one identical vote at a time).<sup>44</sup> In connection with this argument, it is worth mentioning the position of the Hungarian Constitutional Court. In its *Decision No. 22/2005. (VI. 17.) AB*<sup>45</sup> the Court stated that the right to vote expresses the equal value of the members of the political community who are entitled to vote, and that equality of the electorate must be realized not only on the day of the election but throughout the entire electoral process (in the latter case, the parents' plural voting right would

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possible enforcement of the social contract (*i.e.* people's sovereignty) and if the limits of civil capacity are approached from the point of view of the protection of the individual (since legal transactions covered by the Civil Code directly affect the individual, whereas the exercise of the right to vote can in fact be assessed as an expression of the citizens' opinion arising from the social contract). For similar issues, *see also* Isabel Rupprecht, *Das Wahlrecht für Kinder. Verfassungsrechtliche Zulässigkeit und praktische Durchführbarkeit*, Nomos, Baden-Baden, 2012.

41 In 2011, the press also suggested the alternative of giving one extra vote to each family with children, regardless of the number of children. Fröhlich 2011, p. 9.

42 For some of the questions, *see* Antali 2011, p. 87.

43 In her study, Fröhlich offers several possible solutions. Fröhlich 2011, p. 9.

44 János Kis, *Alkotmányos demokrácia*, Indok, Budapest, 2000, pp. 69–72.

45 The Hungarian Constitutional Court ruled in a similar way in its *Decision No. 47/2006. (X. 5.) AB* and *Decision No. 32/2004. (IX. 14.) AB*.

be difficult to reconcile with the principle – for example in the case of a recommendation). In its *Decision No. 33/2000. (X. 20.) AB*, the Hungarian Constitutional Court emphasized that legislation must express the equality of voters: it must not make unjustified distinctions between groups of voters, for example, because of their place of residence or, indirectly, because of their political views or national or ethnic origin. On this basis, votes can have nearly equal weight if it is possible for an equal number of voters to decide on a mandate. Thus, in addition to the difficult issues mentioned above, an additional vote for parents would clearly violate the principle of equality of voting rights. Therefore, this solution should be rejected.

### 2.3.3. Problems of derivative parental voting rights

The third model is the so-called derivative parental voting solution, which may also be referred to as a substitute model.<sup>46</sup> Under this model, the voting age would be abolished altogether, but the active voting rights granted to the child would be exercised not by the child but by the parent or legal guardian as a proxy. Nopper argues that children should have the right to vote from birth because all citizens, regardless of their age, have the capacity to exercise public rights. Nevertheless, until they reach the age of majority they are unable to make decisions and exercise these rights through their guardian.<sup>47</sup> This option would be very similar to the so-called proxy voting model<sup>48</sup> used in the United Kingdom<sup>49</sup> and France<sup>50</sup>,

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46 This model is also known as Demeny Voting, because Paul Demény, among others, formulated such a proposal in 1986. Paul Demeny, 'Pronatalist Policies in Low-Fertility Countries: Patterns, Performance and Prospects' *Population and Development Review*, Vol. 12, 1986, pp. 335–358. This means that the parent exercises the child's voting rights instead of the child, with each parent having half the vote. Warren C. Sanderson, 'A Near Electoral Majority of Pensioners', *Population and Development Review*, Vol. 33, Issue 3, 2007, pp. 543–554.

47 Kalus Nopper, *Minderjährigenwahlrecht – Hirngespinst oder verfassungsrechtliches Gebot in einer grundlegend gewandelten Gesellschaft?*, Tübingen, 1999, p. I.

48 John Wall, 'Why Children and Youth Should Have the Right to Vote: An Argument for Proxy-Claim Suffrage', *Children, Youth and Environments*, Vol. 24, Issue 1, 2014, pp. 108–123.

49 Fröhlich 2011, p. 10.

50 About the French model, see e.g. Michel Verpeaux, 'A francia példa. A választásokon való részvétel feltételei, avagy "az állampolgárok és választópolgárok"' in Ákos Cserny & András Téglási (eds.), *Tanulmányok a választási eljárás aktuális kérdéseiről*, Nemzeti Közszolgálati és Tankönyv Kiadó, Budapest, 2013, pp. 119–127.

whereby a person who is unable to attend an election for a specific reason but is on the electoral roll can vote by proxy.<sup>51</sup> However, according to Venice Commission’s Opinion No. 190/2002, stringent rules should be laid down for voting by proxy: for example, by setting a maximum number of voters a proxy can represent.<sup>52</sup> Of course, there are also several concerns surrounding the substitution model. One of these is the lack of immediacy of the voter’s choice. According to Schanda, however, this argument does not hold water. In his view, the substitution model would, as a matter of course, give greater weight to children and to those who are the legitimate representatives of the interests of minor children, *i.e.* parents.<sup>53</sup> However, a further argument against the substitution model may be that the child’s guardian may not necessarily put the child’s interests first, when voting on the child’s behalf. This fear is of course legitimate, as is the case with the original right of parental choice. In conclusion, although the substitution model may be based on international examples and would thus be a more constitutionally justifiable solution to the right to vote for minors than the original parental right to vote,<sup>54</sup> it would still raise a number of difficulties in implementation.<sup>55</sup>

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51 According to Rutherford, “representation is the normal system of delegation of voting rights. In fact, the whole system of democracy may be regarded as conferring on elected representatives the right to represent their constituents.” Jane Rutherford, ‘One Child, One Vote: Pixies for Parents’, *Minnesota Law Review*, Vol. 82, Issue 6, 1998, pp. 1463–1525.

52 Venice Commission Opinion No. 190/2002, point 3.2.2.1.

53 Schanda 2012, pp. 77–88.

54 At the same time, Reimer emphasizes in a study that, in his view, the derivative parental right to vote should be based on the assumption that the voter (*i.e.* the parent) can cast the child’s vote in the child’s interest, and that if the derivative parental right to vote is regarded as a substantively separate right of the voter, it does not violate the principle of equality of voting rights. Franz Reimer, ‘Nachhaltigkeit durch Wahlrecht? Verfassungsrechtliche Möglichkeiten und Grenzen eines “Wahlrechts von Geburt an”’, *Zeitschrift für Parlamentsfragen*, Vol. 35, Issue 2, 2004, pp. 322–339.

55 In addition to the above models, there is another possible ‘solution’: the possibility of vote retention. In essence, this would mean that children could collect up to their 18 years of age any votes they have not previously cast, and then cast them all at once when they reach the age of majority. Alessandra Casella, ‘Storable Votes’, *Games and Economic Behavior*, Vol. 51, Issue 2, 2005, pp. 391–419. A similar idea is outlined by Rehfeld, who argues that children are entitled to only a fraction of the vote until they reach adulthood, *i.e.* they can exercise their right to vote from a certain age (*e.g.* 12), but their vote is worth less and is only complete when they turn 18. Andrew Rehfeld, ‘The Child as Democratic Citizen’, *The Annals of the American Academy of Political and Social Science*, Vol. 633, The Child and Citizen (January 2011), pp. 141–166. These

## 2.4. Conclusions

It is clear that the right to vote for children is a recurring topic, but one that has not been introduced yet because of the difficulties surrounding its implementation. An analysis of this issue, however, confirms the hypothesis that any change to extend general suffrage is made when the legislator sees some political advantage to it.<sup>56</sup> However, this political turning point for children's suffrage has not yet taken.

The replacement model, or, more conservatively, lowering the voting age,<sup>57</sup> would be fully feasible, while at the same time respecting relevant constitutional principles. However, it is also apparent that this solution is a very divisive issue in professional circles. Antali, for example, opines that some people may decide to have children in exchange for additional rights and benefits.<sup>58</sup> In Beckman's view, children should not be given the right to vote, as it is not in their interest to be involved in casting a ballot.<sup>59</sup> For my part, however, I share Schanda's view that it is important for the future of society that the legislator open up elections to young people and encourage politicians to make decisions that help young people as constituents. Jakab also shares this view.<sup>60</sup> He argues that long-term sustainability is the key to the survival of the democratic state. This requires the recognition of those aspects that underpin it, such as the issue of children's suffrage (ensuring demographic sustainability). In this context, quoting Toynbee, he reminds us that civilizations are born and grow through successful responses to successive challenges. In this context, he also points out that by affording children the right to vote, governments faced with an ageing population can move away from short-term goals towards long-term goals and craft decisions that benefit families.<sup>61</sup> In my view, extending the right to vote would

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solutions, in my view, face a problem of principle: votes are not capital that can be collected and stored and then used as you wish. It can only be exercised at a given time, based on a decision taken at that time. It goes without saying that this solution would seriously undermine the principle of equality of suffrage.

56 Kurunczi 2020, p. 179.

57 They argue in favor of lowering the age: Michael S. Merry & Anders Schinkel, 'Voting rights for older children and civic education', *Public Affairs Quarterly*, Vol. 30, Issue 3, 2016, pp. 197–213.

58 Antali 2011, p. 87.

59 Cf. Beckman 2009, pp. 103–106, and 119.

60 András Jakab, 'Fenntarthatóság az európai alkotmányjogban', *Közjogi Szemle*, Vol. 9, Issue 3, 2016, p. 4.

61 Jakab 2017, pp. 486, 488, and 489.

also reduce the democracy deficit currently ‘caused’ by disenfranchising an important demographic (minors) through age censorship.<sup>62</sup>

### *3. Questions Concerning the Right to Vote of Persons under Guardianship*

Another element of ‘awareness constraints’ is the lack of ability of discernment. In Hungary, the former Constitution provided for automatic grounds for exclusion,<sup>63</sup> whereas under the current Fundamental Law, exclusion from the right to vote can only be based on a special court decision.

Even among the grounds for restriction, the restriction of the right to vote on the grounds of lack of ability of discernment (which therefore primarily affects people with intellectual disabilities) raises specific issues.<sup>64</sup> In this respect, there is a fundamental contradiction that electoral systems must deal with. (i) First, the non-discriminatory exercise of the right to vote, as a fundamental political right, requires that it be accessible to all. (ii) Second, as mentioned in respect of age restrictions, the state has a duty to protect the integrity of the electoral system<sup>65</sup> and as a corollary, to protect electoral institutions.<sup>66</sup> It follows not only that the State must guarantee the exercise of the right to vote, but also that it must ensure that not

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62 In this context, it is important to underline the position of Holste, who argues that, given that Members of Parliament have a free mandate, they represent all people, and therefore they must also represent the interests of those who did not elect them (including children) in their parliamentary work. Therefore, in his view, there is no need to extend the generality of the right to vote. Heiko Holste, ‘Wahlrecht von Geburt an: Demokratie auf Abwegen?’, *Die Öffentliche Verwaltung*, 2005/3, pp. 114–115.

63 According to this, a person was not entitled to vote if they were (i) subject to guardianship or exclusion from exercising public affairs; (ii) serving a sentence of imprisonment or a sentence of compulsory treatment in an institution ordered in criminal proceedings.

64 See e.g. ‘Mental Disability and the Right to Vote (Notes)’, *The Yale Law Journal*, Vol. 88, Issue 8, 1979, pp. 1644–1664; Joseph Fishkin, ‘Weightless Votes’, *The Yale Law Journal*, Vol. 121, Issue 4, 2012, pp. 1353–1354.

65 Cf. Beckman 2009, pp. 165–166.

66 According to Pozsár-Szentmiklós, the basis of a democratic society is a community of persons of equal dignity, who should enjoy the full range of rights to political participation. A decision to exclude persons from participation on the grounds of limited capacity of discernment continues to breach this principle, but the purpose of the restriction can only be the protection of other fundamental rights or other constitutional values in a very remote context. Zoltán Pozsár-Szentmiklós, ‘Politikai részvételi jogok az Alaptörvényben’ in Marianna Fazekas (ed.), *Jogi Tanulmányok 2012. I-II. kötet: Az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Doktori*

only the State itself, but also other individuals, refrain from infringing it. Consequently, in certain cases the State will be obliged to protect the voter from other voters to ensure the exercise of the right to vote and to safeguard the fairness of the election. As regards the lack of ability of discernment as an element limiting the right to general suffrage, the latter is of primary importance. This is because, as will be seen below, the full extension of the right to vote to persons whose right to vote is restricted because they lack discernment raises the possibility of a breach of the purity of elections.

### 3.1. The Problem of the of Ability of Discernment – the Concept of Disability

Before examining the above issues in depth, it is important to define disability, as the restriction of the right to vote due to lack of ability of discernment primarily affects people with intellectual disabilities. The definition of disability also has a particular impact on how governments and other organizations treat people with disabilities.<sup>67</sup> There are many approaches, models, and classification systems for determining who qualifies as disabled. The best-known classification system is the International Classification of Impairments, Disabilities, Handicaps (ICIDH), established by the WHO in 1980. In 2001, the WHO replaced the ICIDH with a new classification system, the International Classification of Functioning, Disability and Health (ICF).<sup>68</sup> The broadest definition of disability is a person with a disability. It is also used in the UN Convention on the Rights of Persons with Disabilities (CRPD), which defines a person with a disability as any person who has a long-term physical, mental, intellectual or sensory impairment which, together with a number of other limits, may limit that person's full, effective and equal participation in society. This concept is also used in Hungary in the Act on the Rights of Persons with Disabilities and Ensuring their Equal Opportunities.

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Iskoláinak III. konferenciája, ELTE Állam- és Jogtudományi Kar, Budapest, 2012, p. 191.

67 György Könczei (ed.), *A fogyatékosság definíciói Európában: Összehasonlító elemzés*, ELTE Bárczi Gusztáv Gyógypedagógiai Kar, Budapest, 2009, p. 7.

68 Michael Maschke, *Fogyatékosságpolitika az Európai Unióban*, Multiszolg Bt., Budapest, 2010, p. 33.

However, people with disabilities cannot be treated as a homogeneous group in terms of voting rights: people with physical and sensory impairments cannot be excluded from the right to vote. In this case, the aim is specifically to facilitate the exercise of the right (e.g. by making polling stations more easily accessible or by facilitating the means of voting, by providing mobile ballot boxes).<sup>69</sup> By contrast, in respect of people with intellectual disabilities, the various jurisdictions have always limited their right to vote in some way.<sup>70</sup>

### **3.2. The Relationship between the Ability of Discernment and the Right to Vote in Light of International Practice**

Having clarified the notion of disability, it is important to review the international and Hungarian practices related to the relationship between the capacity to discern and the right to vote.

In international law, there has recently been a growing emphasis on extending the right to vote to people with disabilities.<sup>71</sup> General Comment No. 25 of the UN Human Rights Committee states that it is an objective and reasonable restriction to deny the right to vote to a person who lacks the ability of discernment. By contrast, under CRPD, States Parties shall guarantee persons with disabilities the ability to exercise their political rights on an equal basis with others and undertake to ensure that persons with disabilities may participate effectively and fully in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right to stand for election.<sup>72</sup> The assessment of this article, however, is quite varied. It was only in 2011 that the first reports were published (e.g. the country report on Tunisia<sup>73</sup>), in which the Com-

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69 In the US, a special law was passed in 2002 to promote the voting right of people with disabilities (Help America Vote Act of 2002). See e.g. Arlene Kanter & Rebecca Russo, 'The Right of People with Disabilities to Exercise Their Right to Vote Under the Help America Vote Act', *Mental and Physical Disability Law Reporter*, Vol. 30, Issue 6, 2006, pp. 852–857.

70 Bodnár 2014, p. 199.

71 Id. p. 204.

72 For an analysis of the text of the Convention, see Sándor Gurbai, *A gondnokság alá helyezett személyek választójoga a nemzetközi jog, az európai regionális jog és a komparatív közjog tükrében*, Pázmány Press, Budapest, 2016, pp. 29–74.

73 Implementation of the International Convention on the Rights of Persons with Disabilities. Initial report submitted by Tunisia. 14 July 2010, CRPD/C/TUN/1.

mittee recommended the adoption of legislation to grant voting rights to persons with disabilities, including those under guardianship, on an equal basis with others.<sup>74</sup> In doing so, the CRPD Committee has expressed the view that restricting or denying the right to vote on the basis of disability results in discrimination in the area of political participation.<sup>75</sup> In September of the same year, the CRPD Committee also evaluated Spain and in its concluding observations recommended that the Spanish Government review all relevant legislation to ensure that all persons with disabilities, regardless of impairment, legal status or place of residence, have the right to vote and participate in public life on an equal basis with others.<sup>76</sup> In September 2013, the Committee also came to the same conclusion with respect to Hungary. They therefore called on Hungary to review Article XXIII(6) of the Fundamental Law, which – based on a court decision – allows for the exclusion of a person on the grounds of lack of ability of discernment, as it violates Article 29 CRPD.<sup>77</sup>

The practice of organizations operating under the aegis of the Council of Europe is also quite varied. In its Opinion No. 190/2002 the Venice Commission identified a lack of discretion as a legitimate ground for deprivation. This means that the grounds for disqualification must be laid down by law, the requirement of proportionality must be respected and exclusion must be based on a judicial decision.<sup>78</sup> Following the publication of this opinion, however, the ECtHR ruled in *Alajos Kiss versus Hungary* that

“disenfranchisement has an impact on the social status and personal identity of individuals. The loosening and severing of ties to the community of constituents acts as a stigma, diminishing the self-worth of the individual, while serving as evidence to the community of the inferiority of the other.”

The case was based on the fact that the complainant, Alajos Kiss, had been placed under a guardianship order restricting his capacity to act, and had therefore automatically lost his right to vote. The ECtHR found the

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74 Charles P. Sabatino, ‘Guardianship and the Right to Vote’, *Human Rights*, Vol. 45, Issue 3, 2020, pp. 16–17.

75 Gurbai 2016, p. 54.

76 Id. p. 55.

77 For the UN position, see Tamás Verdes, “Tekintet nélkül a károsodásra” – Az ENSZ fogyatékkossággal élő személyek jogai bizottságának álláspontja a fogyatékos emberek választójogának korlátozásáról, *Fundamentum*, 2011/ 3, pp. 92–94.

78 Point I.1.1(d) of Venice Commission Opinion No. 190/2002.

purpose of the challenged measure to be legitimate, namely, to ensure that only voters capable of weighing the consequences of their decisions and make an informed and considered choice participate in public affairs. It also accepted that this is an area where the national legislator should be given wide discretion to decide whether restrictions on the right to vote can be justified in modern times. However, the ECtHR could not accept the argument that the exclusion of persons under guardianship from the elections, irrespective of their actual ability of discernment, would still be acceptable. Indeed, if a restriction of fundamental rights affects a particularly vulnerable group of society (such as people with mental disabilities) that has suffered significant discrimination in the past, the discretion of the state is significantly narrower. According to the ECtHR, deprivation of the right to vote without individual judicial assessment, based solely on the fact of guardianship on grounds of mental disability, is incompatible with the ECHR.<sup>79</sup> In the wake of the case of *Alajos Kiss* and the international human rights developments that have taken place in the meantime (see the CRPD, analyzed above), the Venice Commission's position has evolved, and in 2011 the body added to its Opinion No. 190/2002 that the principle of general suffrage implies that there is no discrimination against persons with disabilities, and that they can exercise their right to vote under the same conditions as other citizens.<sup>80</sup>

In addition to the *Alajos Kiss case*, it is worth reviewing the practice of the ECtHR in other cases related to the capacity of discernment. In *Hirst versus the United Kingdom*,<sup>81</sup> the court held that the purpose of the right to vote is to ensure that as many voters as possible participate in elections and that the state must endeavor to guarantee this. In this context, the judgment also ruled that the right to vote is not a privilege, *i.e.* it cannot be considered exceptional. This is also true for persons who are incapacitated or disqualified from voting. Also, in a judgment in the case of a person serving a prison sentence, the ECtHR ruled that exclusion from voting

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79 *Alajos Kiss v Hungary*, No. 38832/06, 20 May 2010; Bodnár 2014, p. 106.

80 According to Venice Commission Report No. 584/2010 (Revised interpretative declaration to the Code of Good Practice in Electoral Matters in the participation of people with disabilities in election): "People with disabilities should therefore be able to exercise their right to vote and participate in political and public life as elected representatives on an equal basis with other citizens. The participation of all citizens in political and public life and the democratic process is essential for the development of democratic societies."

81 *Hirst v the United Kingdom*, No. 74025/01, 6 October 2005.

must be based on a judicial decision and must take account of individual circumstances.<sup>82</sup>

Following this overview of the practice of international organizations and courts, let us now take a look at the practice of individual countries.<sup>83</sup> We can distinguish the following approaches: in some European countries, political participation is conditional upon full capacity and their legal systems include automatic or quasi-automatic exclusion.<sup>84</sup> In this case, exclusion is the consequence of incapacity, *i.e.* courts do not specifically examine whether the person concerned would otherwise be able to exercise their right to vote. This is also the case in Germany, where people who have been placed under guardianship are excluded from the right to vote, and guardianship covers all their affairs.<sup>85</sup> The other extreme is when the right to vote is not restricted at all on grounds of ability of discernment. But this approach characterizes only a small number of states.<sup>86</sup> The middle ground solution is represented by states that decide by examining whether a person is capable of participating in the election. In some countries, legislation provides for general exclusion, but with the possibility of individualized assessment (*e.g.* Estonia, Malta), while in others, the rule is that everyone has the right to vote, but there is a specialized assessment that can result in exclusion (in Spain and in France<sup>87</sup>).<sup>88</sup> In this context, it is

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82 *Frodl v Austria*, No. 20201/04, 8 April 2010. In this case the ECtHR also established a test, according to which it is important for the proportionality of the exclusion that the judge decide on a case-by-case basis.

83 For country practices, see also Anna Maria Neagoe, 'The Right to vote of Persons with Disabilities', *Journal of Law and Administrative Sciences*, 2015/Special Issue, pp. 715–726.

84 Such countries are *e.g.* Belgium (Article 61 of the Belgian constitution regulates the grounds for exclusion in a special law), Denmark (Article 29 of the Danish constitution states that "Every Danish citizen [...] shall have the right to vote in parliamentary elections unless they are declared incapacitated. [...]"), Greece (according to Article 51(3) of the Greek Constitution: "The law may not restrict the right to vote, except [...] for the case of persons who are incapacitated [...]"), Lithuania (Article 56(2) of the Constitution excludes persons who are incapacitated), Poland (Chapter IV of the Polish Constitution) and Portugal (Part III of the Constitution entrusts the regulation to a special law).

85 Bodnár 2014, p. 207.

86 *E.g.* Austria, Finland, Italy.

87 In France, being placed under guardianship automatically entails exclusion from voting, but the courts supervising the electoral roll have the right to register the person under guardianship in a special procedure if it is not established that they are incapable of voting. Bodnár 2014, p. 209.

88 Gurbai 2016, pp. 161–249.

also worth highlighting a decision of the Czech Constitutional Court from 2010, where it ruled that the right to vote can only be restricted on the basis of an individualized assessment of mental disability, and that a general rule that those incapacitated have no right to vote cannot be applied.<sup>89</sup> The Hungarian legislation, as described in the next section, can be classified among the latter group of states. Giving an overview of national practices, in 2010 the Fundamental Rights Agency of the EU (FRA) analyzed the legislative restrictions of the right to vote on grounds of guardianship in the 27 Member States. It shows that only a few countries (e.g. Austria, Finland, Sweden, the Netherlands, Italy, the UK, etc.) ensure an unconditional and unrestricted right to political participation for people with mental health problems and intellectual disabilities. However, most Member States allow for the exclusion of persons with disabilities from the right to vote, either automatically or on the basis of an individualized assessment.<sup>90</sup>

### 3.3. Critical Analysis of the Hungarian Practice

In light of the international practice described above, it is worth examining the extent to which Hungarian regulation is in line with this apparently non-uniform and ever changing international trend – which is currently tending towards full openness on the main point. A further question to be answered is whether the protection of the integrity of the electoral system can be considered a legitimate aim of the restriction of the right to vote due to a lack of ability of discernment.

#### 3.3.1. Hungarian Legislation in Relation to Guardianship Proceedings and the Right to Vote

The Electoral Procedures Act of 2013 introduced significant changes to the previous legislation on exclusion for lack of ability of discernment,<sup>91</sup>

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<sup>89</sup> Id. p. 190.

<sup>90</sup> Enikő Gothárdi, 'A gondnokság alá helyezett személyek választójogáról', *Magyar Jog*, Vol. 64, Issue 6, 2017, pp. 331–332.

<sup>91</sup> For more on the Hungarian regulatory history of the right to vote for persons with disabilities, see Péter Komlós, 'A fogyatékkal élő személyek szavazati jogának korlátozása a választójogi (és más) törvények tükrében Magyarországon', *Kultúra és közösség*, 2013/1, pp. 33–42.

since the earlier rule (automatic exclusion) could no longer be upheld. The current legislation therefore provides that the court must make a separate provision for exclusion in guardianship proceedings. This means that the court can decide to place someone under guardianship, but not deprive them of their right to vote,<sup>92</sup> and the exclusion from voting on grounds of incapacity can also be repealed even if the person in question remains under guardianship.<sup>93</sup> If we compare this Hungarian legislation with the international principles detailed above, we can conclude that it is in line with ECHR rules and ECtHR practice, however, it contravenes provisions of the CRPD.<sup>94</sup>

### 3.3.2. The legitimacy and proportionality of Hungarian legislation

The most common argument justifying exclusion from voting on the grounds of ability of discernment, and accepted by the ECtHR as a legitimate aim,<sup>95</sup> is that the state has the right to protect the integrity of its electoral system. Indeed, participation in the democratic life of a society presupposes a certain intellectual capacity, and therefore the right to vote can be restricted on this basis. With regard to the right to vote as a fundamental right, this also means that the state may, under strict conditions, exclude persons from exercising the right to vote, even on the grounds of limited ability to discern. The legitimate aim of the restriction will therefore be to maintain a fair electoral system, free of electoral abuses, and the necessary means of achieving this will be to ensure the possibility of exclusion. It is questionable, however, whether the proportionality requirement is met when applying the fundamental rights test.

Bodnár holds that the biggest problem with a system based on automatic exclusion is that it makes the right to vote entirely dependent on the existence of full capacity. However, persons placed under guardianship do

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92 According to the guidelines for applying the law, the court shall exclude from the right to vote a person who has reached the age of majority and whose capacity to exercise the right to vote is (i) permanently or periodically severely reduced or periodically and recurrently impaired due to a mental state, mental retardation or addiction, or (ii) permanently and completely lacking due to a mental state or mental retardation.

93 Eszter Párkányi, 'A cselekvőképességet érintő eljárások dilemmái', *Esély*, 2014/5, p. 12.

94 Cf. Ákos Cserny & Attila Péteri, *Választójogi és népszavazási kommentárok*, Wolters Kluwer, Budapest, 2017, pp. 26–27.

95 *Alajos Kiss v Hungary*, cited above.

not form a homogeneous group (a person who does not know the concept of money can be placed under guardianship just as well as a person who has been lying in a coma for years). In other words, such a system does not individualize. Another major problem, she argues, is that many people without the ability of discernment are not placed under guardianship.<sup>96</sup> For my part, I fully agree with this position. However, it must also be seen that the Hungarian legislation does not follow this direction. The Fundamental Law and Hungarian legislation are nevertheless subject to criticism, claiming that they do not comply with the CRPD.<sup>97</sup> Those who oppose the exclusion of people with intellectual disabilities for any reason argue mainly that people with intellectual disabilities are equal members of society and that their intellectual disability alone is not a reason to exclude them from the most important fundamental political right. In my view, however, this view is as one-sided as the view of those who might argue for automatic exclusion. The state's duty to protect constitutional institutions clearly requires the protection of the integrity of the electoral system: that is, to avoid any abuse of the right to vote. Indeed, if all people with an intellectual disability had the right to vote, a great number of people with severe disabilities would need such assistance that there would be a risk others would in effect vote for them.

With regard to the proportionality of the restriction of the right to vote of persons placed under guardianship, it is important to underline that Hungarian legislation only allows for restriction based on an individualised assessment. It is this individual court decision that guarantees the proportionality of the restriction, since deprivation of the right to vote is not automatic. The possibility of an individualized assessment and its separability from the guardianship review ensure, at the legislative level, that only those persons whose intellectual disability (reduced ability of discernment) effectively prevents them from exercising their right to vote are excluded from the suffrage. Thus, the restriction can be considered proportionate.

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96 Bodnár 2014, p. 205.

97 Cserny & Péteri 2017, p. 158.

### 3.3.3. Methodology and Practical Experience of Electoral Restrictions in Guardianship Legal Proceedings in Hungary

The Hungarian Electoral Procedures Act is implemented by the national courts. In guardianship proceedings the decision on exclusion from voting is a matter for experts. The court of first instance deciding on exclusion relies primarily on the medical expert opinions, also taking into account the findings of a personal interview with the person under guardianship and the testimony of witnesses.<sup>98</sup> During the personal interview, the person assessed must be asked questions to substantiate the expert's opinion, from which it is possible to determine the existence or lack of an ability of discernment necessary for exercising the right to vote.<sup>99</sup> For example, "Do you follow public events?", or "When was the last election in Hungary?", or "Do you know who is the current Prime Minister of Hungary?"<sup>100</sup> Thus, besides the expert's opinion (which is also shaped by the interview), the questions put to the defendant during the procedure are of particular importance.

A number of standards have been developed in international practice to measure electoral capacity. In the US, a test was developed as early as the 1980s, in which the person was asked to provide only minimal data, such as name, address and nationality, in order to be included on the electoral roll.<sup>101</sup> Then, in 2007 a US working group published a study stating that exclusion from voting can take place if the court finds that the person cannot, with or without reasonable accommodation, express a specific intention to participate in the electoral process.<sup>102</sup> On this basis, and taking into account, among other things, the above considerations, psychiatrists have developed a tool to measure capacity to vote. This Competence Assessment Tool for Voting (CAT-V) includes questions measuring the abilities of a potential voter. For example, "What will the people of this state do today

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98 Nóra Kerekné Jakó & Tünde Vida-Sós, 'Választójog a gondnokság alá helyezési perek tükrében' in Judit Tóth (ed.), *Ünnepi kötet Dr. Tóth Károly címzetes egyetemi tanár 70. születésnapjára*, SZTE ÁJTK, Szeged, 2015, p. 108.

99 Kerekné Jakó & Vida-Sós 2015, p. 108.

100 Id. p. 109.

101 Paul S. Appelbaum, 'I vote. I count: Mental Disability and the Right to Vote', *Psychiatric Services*, Vol. 51, Issue 7, 2000, p. 850.

102 American Bar Association Recommendation and Report, from Symposium: Facilitating Voting as People Age: Implications of Cognitive Impairment. Approved by the ABA House of Delegates on August 13, 2007, p. 1.

to elect a new Governor?” or “When the election for Governor is over, how will they decide who the winner is?” and, referring to an imaginary situation, “If you had to decide based on the information you know, who would you vote for?” To assess these questions, the CAT-V test developed a scoring system to measure the person’s ability to vote to decide whether it is justified to exclude them. However, alongside this test, a number of other trends have emerged, showing great diversity.<sup>103</sup> The situation is further complicated by the different standards applied by the UN Commission on Human Rights and the CRPD Committee; the different requirements of the Council of Europe structure of the Venice Commission and the ECtHR *vis-à-vis* the Council of Europe Commissioner for Human Rights and the Committee of Ministers of the Council of Europe and the Parliamentary Assembly; and the different direction taken by the European Commission and the FRA. It is clear that it is very difficult to formulate questions in court proceedings in such a way that it is possible to draw conclusions with a high degree of certainty as to the capacity of the person under assessment.

Given the difficulty of measuring the capacity to vote, it is worth taking a look at the statistical data gleaned from judgments rendered in such cases. I asked the National Office for the Judiciary<sup>104</sup> (NOJ) to provide me with the relevant data, from which it can be concluded that, when aggregated over the years 2014–2017, 98 % of persons with totally incapacitated were also excluded from exercising their right to vote. The figure is 66 % for partially incapacitated persons. From these numbers we can conclude, that in almost all cases of guardianship proceedings in which the capacity to act is completely restricted, the court also deprives the person under assessment of their right to vote. However, the same claim also holds true for guardianship proceedings where the capacity to act is only partially restricted – here the rate is over 66 %.

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<sup>103</sup> Gurbai 2016, pp. 270–283.

<sup>104</sup> The NOJ is the administrative body of the Hungarian judicial system. In Hungary, there is a model of so-called judicial self-administration, *i.e.* the courts perform administrative tasks independently of other state bodies. Since 2012, this task is carried out in Hungary by the NOJ, which is also responsible for the statistical analysis of sentencing practices.

### 3.4. Conclusions

The above statistics also show that in most guardianship proceedings, courts also deprive the defendant of their right to vote. However, in my view, these statistics and the questions used as examples (which may easily be considered as inadequate measures of voter capacity) do not in themselves lead to the conclusion that the legislation must be changed – in a fully permissive direction, free of any restrictions. As I emphasized earlier, the state must guarantee the integrity of the electoral system as part of its duty to protect the institutions, which would be difficult to imagine at present other than by providing the possibility of exclusion. In my view, the above statistics and the questions asked in the procedure demonstrate that the fault lies in the application of the law. Indeed, if the courts were able to develop a uniform test of eligibility that could measure eligibility for voting in an effective and more objective way, the quasi-automatic disenfranchisement that is still very often observed in practice could be avoided. Contrary to current practice, this aptitude test, in my view, should not be primarily aimed at assessing the person's knowledge of electoral law and political life<sup>105</sup> – in many cases this can lead to erroneous conclusions. Indeed, an effective aptitude test should seek to successfully assess the capacity of the person tested to become a subject of people's sovereignty, *i.e.* to participate in the expression of political will. In other words, it is primarily a way of assessing whether the person concerned understands what the election is about. Laying down the test questions should be the result of a complex, expert exercise. In my opinion, the CAT-V test, as described in the US practice, could be used as a starting point. The questions asked should therefore be primarily designed to effectively measure the ability of the respondent to understand the purpose of the elections. Such a question could be, for example, “What do people/voters have to do to elect representatives?” or “What will be the basis for deciding who wins the election?”. A test with questions of this or similar content and an associated scoring system would, in my view, be an effective way of screening those who really lack the ability of discernment to participate actively in elections.<sup>106</sup>

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<sup>105</sup> The questions (such as “*When was the last election in Hungary?*”) point strongly in this direction.

<sup>106</sup> It is worth noting that for countries that apply full extension, there is also the possibility of organizing an education session for voters with intellectual disabilities to help them exercise their right to vote. See: Martin Agran *et al.*, “I Never Thought

Therefore, in my view, it would not be necessary to amend the Hungarian Fundamental Law and the legislation to solve the problem, instead, a uniform test and practice in applying the law should be established, which would allow for an effective application of individualized assessment.

#### *4. A Double Standard in 'Awareness Constraints'? – Conclusions*

As we have seen above, 'awareness constraints' still raise important questions and dilemmas concerning the generality of the right to vote. It is striking, however, that while the exclusion of minors from voting is presented as a necessary and justified restriction, in the case of persons with reduced capacity to act, there are stronger voices that reject any such restriction. This, however, is a double standard: were we to accept that even the most severely mentally handicapped should have the right to vote, then all minors should also be granted the right to vote. The arguments against the full extension of the right to vote to minors are, in my opinion, no different from the arguments in favor of granting the right to vote to persons with intellectual disabilities.<sup>107</sup> If we accept as a legitimate argument that persons with intellectual disabilities are also full members of the political community (*i.e.* they are subjects of people's sovereignty), and this membership cannot be restricted in any way merely because of their lack or limited capacity of discernment (*i.e.* in their case, we do not consider it justified that their reduced or totally lacking capacity of discernment could be grounds for restricting their fundamental legal capacity), then it is no longer justified to maintain the presumption that only citizens who have reached the age of majority, or a certain age, may become members of the political community. Therefore, if we do not even allow for the possibility of individual assessment and exclusion of persons with intellectual disabilities, we cannot credibly argue for the automatic exclusion of minors from the right to vote. In other words, if arguments put forward for the exclusion of minors are accepted, the possibility of individualized assessment cannot be rejected in the case of the persons with intellectual disabilities.

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About It": Teaching People with Intellectual Disability to Vote', *Education and Training in Autism and Developmental Disabilities*, Vol. 50, Issue 4, 2015, pp. 388–396.

107 Similar points are raised by András Jakab, who argues that children's voting rights are a 'side effect' of the right to vote for the mentally disabled. Jakab 2017, p. 497.

On this basis, it can be concluded that the issue of ‘awareness constraints’ of the right to vote is still topical today – the only question is whether the international community as well as the constitutional and legislative bodies of the individual countries will reconsider the scope of these restrictions and take another step towards ensuring actual general suffrage.