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**IS DENYING LEGALLY INCOMPETENT
(INCAPACITATED) PERSONS THE RIGHT TO VOTE
COMPATIBLE WITH PRINCIPLES OF DEMOCRACY
IN THE EUROPEAN UNION – AN ANALYSIS BASED
ON THE EXAMPLE OF EUROPEAN PARLIAMENT
ELECTIONS**

Abstract

Epidemiological data concerning persons affected by dementia disorders, including Alzheimer's disease (AD), are alarming. The population affected by dementia disorders may increase by up to three times by the year 2050. Adverse demographic changes remain the underlying reason, the swift ageing of the majority of European societies (all health and economic consequences included) having given rise to the *silver tsunami* phrase coined in scientific literature.

Legal solutions regarding the legal competence of individuals with mental disorders, dementia included, differ across individual European Union Member States, with the disparities arising due to varying legal traditions. While some countries still employ the institution of full or partial incapacitation, others have chosen to replace the latter with more flexible solutions.

The right to vote is a fundamental right in democratic states. As it is, the 27 EU Member States pursue one or more of the following three electoral right-related solutions: (1) exclusion from participating in elections, (2) conditional participation in elections,

(3) full voting rights. Since states applying the first solution comprise over two-thirds of the European Union's population, several hundred thousand constituents are excluded from the voting process. Denying such large groups the right to vote in elections to the European Parliament may gravely impact election results.

The issue of regulations regarding voting rights extended to persons without full legal competence has not been harmonised on the EU level. Electoral law regulations have been designated a Member States' competence, with the proviso that states must respect general EU law principles, including the prohibition of discrimination.

KEYWORDS

incapacitation, the right to vote, fundamental rights, EU joint electoral ordinance

SŁOWA KLUCZOWE

ubezwłasnowolnienie, prawo wyborcze, prawa podstawowe, wspólna ordynacja wyborcza w UE

1. INTRODUCTION

Depending on the type and severity of the illness, individuals affected with various mental disorders may have issues with discerning the consequences of their actions, including actions with legal consequences (legal actions). However, it would be difficult to clearly list the types of mental disorders that could potentially affect the proper functioning of individuals who suffer from specific diseases. Regardless, it is noteworthy that the world is on the verge of an epidemiological calamity caused by dementia disorders, including Alzheimer's disease (AD).

According to the WHO International Statistical Classification of Diseases and Related Health Problems, 10th Revision (ICD-10), dementia is a syndrome caused by a disease of the brain, usually of a chronic or progressive nature, involving a disturbance of multiple higher cortical functions, including memory, thinking, orientation, comprehension, calculation, learning capacity, language, and judgement. Clinical components aside, definitions specified in the Diagnostic and Statistical Manual of Mental Disorders, 4th edition (DSM IV) of the American Psychiatric Association, and 2012 recommendations of the Polish Alzheimer's Association Expert Team emphasise disruptions to previous occupational and

social activities, and impairment of daily activities¹ – the actual direct reasons for patients and/or their families seeking support from legal institutions. WHO has already drafted ICD 11, which European Union Member States are to adopt by the end of 2026. DSM V has also been prepared.

Epidemiological data concerning persons affected by dementia disorders, including Alzheimer's disease (AD), are alarming. Scholars claim dementia disorders may be affecting just under 47 million individuals worldwide, 33 million of whom suffer from AD (AD usually accounts for around two-thirds of the diagnosed dementias). Yet according to forecasts, the population affected with dementia disorders may reach 132 million globally by the year 2050, with as many as 92 million suffering from AD;² in Poland, the number may reach 1.2 million – over twice the number recorded currently.

Alzheimer's disease and similar conditions are a measurable economic burden for the economy. According to alarming reports, the cost of care and treatment for Alzheimer's patients in the United States could exceed one trillion US dollars by 2050,³ the cost accounting for 2/5 of the entire Medicare budget: a federal health insurance programme for people aged 65 or older, and younger people with disabilities.

Furthermore, developed countries have recorded a surge in the population of senior citizens in the 80-plus age group, the upsurge is greater than in other age groups.⁴ The phenomenon has even given rise to a new phrase in English-language reference writings: *silver tsunami*. It is, therefore, obvious that issues experienced by non-self-sufficient individuals – dependent mentally rather than physically – will be on the rise.

Rapid growth in the population of persons suffering from dementia is more than a medical or economic challenge. From the legal standpoint, ensuring that the rights of such individuals are protected to the extent possible – in ways safeguarding their participation in public life – remains the highest priority.

¹ Maria Barcikowska, 'Wprowadzenie do zespołów otępiennych', *Po dyplomie Neurologia* <<https://podyplomie.pl/wiedza/neurologia/079.wprowadzenie-do-zespolow-otepiennych>> accessed 20 June 2025.

² *ibid.*, 3.

³ 'Ta choroba rujnuje budżet Ameryki' *WP Finanse* (5 April 2016) <<https://finanse.wp.pl/ta-choroba-rujnuje-budzet-ameryki-6114859969849473a>> accessed 20 June 2025.

⁴ Piotr Błędowski, 'Potrzeby opiekuńcze' in Piotr Błędowski and others (eds), *POLSENIOR 2. Badanie poszczególnych obszarów stanu zdrowia osób starszych, w tym jakości życia związanej ze zdrowiem* (Gdańsk 2021), 921.

2. PURPOSE AND METHODOLOGY OF THE PAPER

The paper attempts to answer the questions of whether denying persons deprived of legal capacity the right to vote is consistent with the foundations of democracy, and also whether a common electoral law regulating elections to the European Parliament is needed in the European Union.

To answer those questions, the paper analyses respective acts of international law, certain EU members' regulations, and case law.

Dogmatic and comparative law research methods were used. The first method analyses the content and meaning of legal norms that may be relevant to the subject of the article, which will allow for the right to vote to be placed in the hierarchy of fundamental civil rights. On the other hand, a comparison of constitutional and statutory solutions in some EU countries with different legal traditions is helpful in determining whether it is possible to create a uniform European electoral system.

3. INCAPACITATION

Numerous states around the world employ incapacitation as a legal instrument protecting individuals with severe mental disorders, whose self-sufficient functioning is either impossible or hampered. Polish legal literature does occasionally suggest that the incapacitation institution has been most firmly rooted in Soviet law-influenced states.⁵ It seems the belief is not entirely correct: while obviously differing in detail, incapacitation has been and still is employed practically throughout Europe, the USA,⁶ and in numerous other states, including Sharia law countries.⁷

Yet, it is also true that a growing number of states have been reaching for increasingly flexible instruments to establish the legal status of persons incapable of managing their own actions in part or in whole. Lithuania, for example, reformed

⁵ Jacek Gudowski, 'Ubezwłasnowolnienie – relikw normatywny czy przejaw prawnego obskurantyzmu?' (2022) 11–12 *Przegląd Sądowy*, 22.

⁶ Consider the notorious case of the artist Britney Spears having been incapacitated by her father.

⁷ Anicée Van Engeland, 'Legal Incapacity and the Concept of Hajr Under Iranian Law: An Analysis of Civil Code in Relation to Mental Health', *Islamic Law Blog* (22 December 2017) <<https://islamiclaw.blog/2017/12/22>> accessed 3 January 2025; Monika Dimitrowa, 'Kobieta arabska w krajach Maghrebu w świetle ograniczeń nakładanych na nią przez społeczeństwo' (2010) 3071 *Acta Universitatis Vratislaviensis*, 101.

its incapacitation-related legislation in 2015; while the institution as such has remained, in each individual case, a court of law is obliged to determine areas for purposes of which the given person has been incapacitated and afore-ruled incapacitation is subject to annual judicial reviews.

Nonetheless, much remains to be done in the area. According to the Polish Ministry of Justice statistics, over the past twenty years, courts have been annually ruling to the effect of incapacitation in 50–70% of all the cases examined, over 90% of judgements providing for total incapacitation.⁸ Intensive work on the reform has only recently started and it is not certain that it can be implemented in 2025.

It is commendable that legislators, the judiciary and the general public have visibly changed their attitude, because incapacitation (and/or similar instruments) is currently perceived as an implement designed to provide mentally impaired individuals with proper aid while preserving their right to participate in public life to the extent possible. Changes have been brought, which are the effect of tremendous educational efforts of governments and pro publico bono organisations, as well as a transformation of the legal environment that is now forcing authorities to take specific action. Therefore, since incapacitation is designed to provide persons suffering from mental disorders with assistance in managing personal and financial matters, denying such individuals the right to vote a priori seems to be an unfair and undeserved sanction.

4. LEGAL PROTECTION OF PERSONS WITH DISABILITIES IN THE EUROPEAN UNION

The United Nations Convention on the Protection of Rights of Persons with Disabilities⁹ drafted in New York on 13 December 2006, is the most important piece of legislation protecting senior citizens affected by, inter alia, mental disorders against discrimination, and safeguarding their dignity, independence, as well as the right to health and social care. The Convention is of fundamental importance to the worldwide evolution of legislation pivotal to the needs of persons with disabilities. Pursuant to the provisions of Article 12 of the Convention, States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others and ensure that all measures that relate to the exercise of

⁸ Statistical Bulletin of the Judiciary, ‘Ubezwołasnowolnienia w latach 2004–2023’, Ministry of Justice <<https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>> accessed 20 January 2025.

⁹ Convention on the Rights of Persons with Disabilities (2006) Treaty Series, 2515, 3.

legal capacity provide for appropriate and effective safeguards to prevent abuse. The above exercises the principle of equality before the law. Parties to the Convention include individual States as well as the European Union. The Convention on the International Protection of Adults of 13 January 2000 is another piece of legislation of significance to the subject at hand. The purpose of this Convention – negotiated towards the end of the previous century – was to meet the needs of 21st-century mobile populations while responding to demographic changes in Europe and other countries globally.¹⁰

The European Parliament passed two resolutions regarding the aforesaid Convention. European Parliament Resolution 2008/2123 (INI) of 18 December 2008 included recommendations to the Commission on cross-border implications of the legal protection of adults. It encouraged European Union Member States that have not yet done so to ratify the Hague Convention. It also requested the Commission to submit to Parliament a legislative proposal on strengthening cooperation between Member States. The aim was to improve the recognition and enforcement of decisions on the protection of adults, incapacity mandates, and lasting powers of attorney. European Parliament Resolution 2015/2085 (INL) of 1 June 2017 also made recommendations to the Commission regarding the protection of vulnerable adults. It reiterated the call to EU Member States that have not yet done so to sign and/or ratify the Hague Convention. Additionally, it urged Member States to promote self-determination for adults by expanding national legislation to include mandates in anticipation of incapacity.

The rights of the elderly, their independence and dignity are also protected under Articles 25, 26 and 35 of the Charter of Fundamental Rights of the European Union,¹¹ the aforesaid provisions apply, inter alia, to patients suffering from mental disability.

While it is not a piece of legislation recognised as a universally binding source of European Union law – yet referred to by the European Court of Human Rights (ECtHR) in its case law, which in turn significantly influences the level of rights protection extended to persons with disabilities in Europe – another document may prove important: Recommendation R (99)4 of 23 February 1999 of the Committee of Ministers of the Council of Europe on Principles Concerning the Legal Protection of Incapable Adults. The Recommendation advises, inter alia, that domestic legislation be sufficiently flexible to enable a suitable legal response

¹⁰ European Parliament, Directorate-General for Internal Policies, *Memo* (November 2012) <<https://www.europarl.europa.eu/document/activities/cont/201301/20130110ATT58889/20130110ATT58889PL.pdf>> accessed 2 January 2025.

¹¹ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

in each individual case. It was exactly this Recommendation that the ECtHR referenced in the judgement in the case of *Shtukaturv v Russia*,¹² as Russian law only distinguished between full legal competence or total lack thereof when incapacitating a mentally ill person, without consideration for intermediate or borderline health conditions.

On 22 July 2009, the (European) Commission submitted (to the European Parliament and the Council) a supplementary document to the earlier Communication on a European initiative on Alzheimer's disease and other types of dementia.¹³ The document explains that the Commission's Alzheimer's disease-related initiative arises from the importance Member States attach to European-level measures in the field, as duly confirmed by conclusions of the Council¹⁴ adopted during the French Presidency, on 16 December 2008. The Commission further emphasised that Europe does not share a vision on ethical issues regarding adult persons with special needs, which exposes such persons to the risk of discrimination.

Multiple factors can contribute to discrimination: age, exclusion, negligence of the valuable knowledge and experience of the elderly, stigmatisation of dementia, and the hugely complex matter of rights of caregivers to the ill (resolved differently in the domestic law of individual Member States).

5. THE RIGHT TO VOTE AS A FUNDAMENTAL RIGHT

Democracy is a value shared by all European Union Member States. The Preamble to the European Convention on Human Rights points to the association between the profound belief in fundamental freedoms, which are the foundation of justice and peace in the world, and are best maintained by an effective political democracy. The Preamble to the Charter of Fundamental Rights of the European Union similarly reads: 'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law'.

¹² *Shtukaturv v Russia*, App No 44009/05 (ECtHR, 27 March 2008).

¹³ European Commission, *Communication on a European Initiative on Alzheimer's Disease and Other Dementias*, COM(2009) 380 final <<https://eur-lex.europa.eu/legal-content/EN/TX-T/?uri=CELEX%3A52009DC0380>> accessed 5 January 2025.

¹⁴ Council of the European Union, *Council Conclusions on Public Health Strategies to Combat Neurodegenerative Diseases* (16 December 2008). <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/lsa/104778.pdf> accessed 5 January 2025.

Free, pluralist and universal election of representatives to the legislature or president of the state is one of the pillars of democracy. European Union citizens' voting rights have been safeguarded in Articles 39 and 40 of the Charter of Fundamental Rights of the European Union, their provisions mentioning European Parliament elections as well as local elections in individual EU Member States. Furthermore, pursuant to Article 39(2), 'Members of the European Parliament shall be elected by direct universal suffrage (...)'.¹⁵

Article 29 of the United Nations Convention on the Rights of Persons with Disabilities requires ensuring that persons with disabilities have the opportunity to effectively and fully participate in political and public life, on an equal basis with others, directly or through freely chosen representatives, including the right and possibility to exercise active and passive suffrage.

In reports monitoring the process of adapting Member State legislation to this Convention, the European Union Agency for Fundamental Rights recommends that incapacitated persons be granted voting rights to the extent possible. The Agency emphasises that this is the first of the four key components of such individuals' rights to participate in public life (apart from proper adaptation of polling stations and electoral procedures, raising awareness of political rights of persons with disabilities, and backing opportunities for active participation in political life).¹⁵

Equal and universal access to subjective voting rights is a given in democratic countries, a principle protected by a presumption of the existence of these rights. World history lists assorted past examples of introducing electoral censuses, depriving certain groups of citizens of electoral rights: persons with no writing or reading skills and/or individuals not holding assets above a certain value were banned from participating in elections. Furthermore, elections were not always equal: votes cast in elections by persons forming part of a specific category could matter more, for example, than votes cast by others. It did happen that some individuals were granted more votes than others.¹⁶

The actual scope of 'electoral universality' is disputable. Scientists are not in agreement whether the attribute refers to active voting rights only, or to aspects of active and passive electoral rights. Some have been known to point out that the term itself is broader, including the right to nominate candidates. Today, it is most commonly accepted that universal suffrage includes active and passive electoral

¹⁵ European Union Agency for Fundamental Rights, *Who Will (Not) Get to Vote in the 2019 European Parliament Elections?* (Vienna 2019) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-right-vote-ep-elections-legal-capacity_en.pdf> accessed 1 July 2025.

¹⁶ Maciej Koszowski 'Dwadzieścia osiem wykładów ze wstępu do prawoznawstwa' (Warsaw 2019) 343.

rights alike.¹⁷ This, however, does not mean the complete absence of limitations – in particular, that active voting rights are automatically tantamount to the right of the voter running for office themselves. Numerous legislatures have introduced a higher minimum age requirement for potential candidates.

Contemporarily, any state authority decisions – legislative decisions included – to the effect of restricting or denying civic voting rights are subject to control, currently exercised by the ECtHR. Yet, given the fact that electoral law forms part of the Treaty of the European Union law, reviews by the Court of Justice of the European Union (CJEU) cannot be excluded.

Case law of the ECtHR contains declarations to the effect of electoral rights being universal rights, one of the most significant fundamental rights in any democratic society; given the above, electoral rights should not be considered a privilege of any kind. Consequently, a presumption in favour of granting voting rights to all citizens as broadly as possible ought to apply.¹⁸

In the ECtHR's watershed judgement in the case of *Mathieu-Mohin and Clerfayt v Belgium*¹⁹ referred to as 'formative' in legal literature, the Court leaned towards the notion of electoral universality as a civic right (in contrast to an older doctrine, presenting a narrow interpretation of elections in terms of the state's obligation to hold them). The Court found that the institutional aspect aside, the right to free elections carries a subjective aspect as well,²⁰ whereas Article 3 of Protocol 1 to the European Convention on Human Rights gives rise to an individual's rights regarding both the active and passive aspects of voting rights. The Court accentuated that although Article 3 of Protocol No 1 does not enumerate premises for permitted interference with civil rights as specified pursuant to Articles 8–11 of the Convention itself, limitations to electoral rights must meet specific requirements. A restriction shall be introduced on grounds specified in domestic legislation, not affect the essence of the law or deprive it of effectiveness, serve the purpose of protecting a legitimate goal, and be proportionate.²¹ In the 21st century, the right to vote is thus an underlying principle.²²

¹⁷ Tomasz Kowalczyk, 'Charakter i znaczenie zasady powszechności prawa wyborczego – przegląd stanowisk we współczesnej doktrynie polskiej' (2016) *Studia Iuridica Toruniensis* (XVIII) 95, 95–118

¹⁸ *Hirst v United Kingdom* (No 2), App no 74025/01 (ECtHR, 6 October 2005), ECHR 2005-IX.

¹⁹ *Mathieu-Mohin and Clerfayt v Belgium*, App no 9267/81 (ECtHR, 2 February 1987).

²⁰ Ireneusz C. Kamiński, 'Prawo do wolnych wyborów w europejskiej konwencji praw człowieka' [2015] XIII(95) *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 11, 11–13.

²¹ *Mathieu-Mohin and Clerfayt v Belgium*, para 52.

²² *ibid*, para 59.

As duly noted in legal science:

the subjective aspect of the right to free elections, i.e., one concerning an individual with active and passive electoral rights alike, is an area wherein Strasbourg case law has proven incomparably more rigorous than institutional options of the state. This is where most of the judgements referencing violations of Article 3 of Protocol No. 1 have been located.²³

The legal discourse surrounding the voting rights of persons with intellectual disabilities continues globally.²⁴ Israeli scholars have developed the CAT-V tool to assess voting competence among such individuals. This instrument is both simple to administer and demonstrates high reliability. It evaluates four decision-making capacities: understanding, appreciation, reasoning, and choice, in accordance with the so-called ‘Doe standard’, established through U.S. case law. According to this standard, an individual possesses the capacity to vote if they understand the nature and consequences of voting and are able to make a choice. The Israeli researchers advocate for the global use of this test as a screening measure—one that both prevents the stigmatization of the entire population of individuals with severe intellectual disabilities through blanket disenfranchisement and deters third-party manipulation.²⁵ It appears that this recommendation could be implemented at least within care institutions for persons with such disabilities, where closed electoral districts are established (in Poland, for instance). Such a practice could reduce the risk of the formal voting rights of residents, who may lack an understanding of the voting act, being exploited by facility staff or visitors.

Moreover, considering that the granting of voting rights may yield positive therapeutic and pro-social effects – as noted by scholars in the field of psychiatry²⁶ – the principle of *in dubio pro elector* (when in doubt, in favor of the voter) should be created and applied.

²³ Kamiński (n 20) 22.

²⁴ See e.g. Jesse A Okwerekwu and others, ‘Voting by People with Mental Illness’, (2018) 46(4) *The Journal of the American Academy of Psychiatry and the Law*, 513–520; Antoine Bosquet and others, ‘The vote of acute medical inpatients: a prospective study’, (2009) 12(5) *The Journal of Aging and Health*, 699–712.

²⁵ Israel Doron and others, ‘Psychiatric Patients: Compromise of the Integrity of Elections, or Empowerment and Integration into the Community?’ (2014) 51(3) *The Israel Journal of Psychiatry and Related Sciences* 169, 172–174.

²⁶ Michael Nash, ‘Voting as a means of social inclusion for people with a mental illness’ (2002) 9(6) *The Journal of Psychiatric and Mental Health Nursing*, 701–702.

6. LEGALLY INCOMPETENT PERSONS' CAPACITY TO PARTICIPATE IN ELECTIONS TO THE EUROPEAN PARLIAMENT

The electoral rights of incapacitated persons (or persons regarding whom similar legal instruments had been applied) can be discussed in the context of the right to vote in elections to the European Parliament, as in this case, certain countries may display differences in comparison with domestic legislation.

Today, the EU comprises three legal orders concerning options to participate in Parliamentary elections. Some states (and pre-Brexit Great Britain) have guaranteed the right to participate in elections to the European Parliament to incapacitated individuals. It is notable that Croatia reformed its electoral law as early as December 2012, to grant incapacitated Croatian citizens the right to participate in national elections as well as the 2013 European Parliamentary elections. Other states – Hungary, Slovenia, the Czech Republic and Slovakia – allow electoral participation to such persons, pending judicial decision. The largest group of Member States, Poland included, has excluded incapacitated persons from parliamentary elections – pursuant to domestic electoral law or the Constitution (Poland being an example of the latter).²⁷

It should nevertheless be noted that the number of states belonging to the first group is steadily increasing, both through legislative amendments and judicial developments.

In the vast majority of EU Member States, the right to participate in elections to the European Parliament is not subject to separate regulation under national law. Exceptions include Malta, Slovakia, Lithuania, and Latvia. Article 12(a) of the Maltese Act provides that *'no person shall be qualified to be registered in the European Union Electoral Register if he is interdicted or incapacitated for any mental infirmity by a court in a Member State or is otherwise determined in a Member State to be of unsound mind'*.²⁸ In contrast, the legal acts of the remaining three states have been amended to remove such restrictions on electoral rights.

²⁷ European Union Agency for Fundamental Rights, 'Can Persons Deprived of Legal Capacity Vote?' <<https://fra.europa.eu/en/content/can-persons-deprived-legal-capacity-vote>> accessed 20 January 2025.

²⁸ European Parliament Elections Act, Chapter 467 of the laws of Malta, 1 January 2004, <<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8933>> accessed 1 July 2025.

It may further be observed that in some countries (such as Ireland and Finland), the right to vote in national parliamentary elections is subject to stricter conditions than in other types of elections, including those to the European Parliament.²⁹

It is striking that the extension of voting rights to persons deprived of legal capacity, or with such capacity limited, is proceeding unevenly – even among countries with similar legal traditions and cultural backgrounds. For instance, in Italy, legislation governing elections and electoral registers that excluded persons with mental or intellectual disabilities from voting was repealed as early as 1978.³⁰ Spain, by contrast, undertook a similar reform only forty years later,³¹ although it did not require a change to the Constitution, because this act referred to ordinary law for the definition of active suffrage.

The Czech Republic and Slovakia represent examples of reform spurred by case law. In the Czech Republic, in response to numerous complaints and inquiries, the Ministry of the Interior requested the Supreme Court to issue a position harmonizing the divergent decisions of lower courts. While some courts, in ruling on the restriction of legal capacity, held that such restriction also encompassed the right to vote, others made no such reference. The Supreme Court clarified that, in proceedings concerning the restriction of legal capacity, a court may also rule specifically on whether the voting right is affected. In this context, the disenfranchisement of a person may only result from an explicit judicial decision.³² Similarly, in Slovakia, the annulment of a statutory provision that restricted voting rights solely to persons with full legal capacity was brought about by a decision of the Constitutional Court.

In both countries, constitutional provisions concerning the deprivation of electoral rights refer to ordinary legislation. Conversely, implementing reforms is more difficult in states where such matters are regulated at the constitutional level. For instance, in the Netherlands, constitutional reform was required to remove a prohibition that had existed under Article 54 of the Constitution, which barred persons under guardianship due to mental or intellectual disabilities from voting. Although the Council of State had issued an opinion in favour of such a reform in

²⁹ European Union Agency for Fundamental Rights (n 15).

³⁰ Legge 13 maggio 1978, n. 180, Italy <<https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1978-05-16&atto.codiceRedazionale=078U0180>> accessed 2 July 2025.

³¹ Ley Orgánica 2/2018 de 5 de diciembre 2018, Spain <<https://www.boe.es/buscar/act.php?id=BOE-A-2018-16673>> accessed 2 July 2025.

³² Czech Supreme Court, Position of 15 February 2017, Cpjn 23/2016, No. 3/2017 <https://rozhodnuti.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/1C9E8AD9ABF63AD0C12580C9001F-C91E?openDocument> accessed 2 July 2025.

2008, it took five years to effect the constitutional amendment. In Luxembourg, Article 53(3) of the Constitution continues to exclude persons under full guardianship from participating in elections,³³ despite prior plans for reform by 2015.

In Germany, following the judgment of the Federal Constitutional Court in 2019,³⁴ certain federal states amended their legislation to remove restrictions on the voting rights of persons under full guardianship. However, these changes apply only to national and local elections and have no bearing on elections to the European Parliament.³⁵ Since states representing the group prohibiting persons without full legal competence to participate in elections still comprise over half of the European Union's population, several hundred thousand constituents are excluded from the voting process. Poland has excluded a group of around 100,000 voters; in Germany and France, the numbers reach over 81,000 and 65,000, respectively.³⁶ According to a group of MEPs who submitted question E-002211/2023 to the President of the European Parliament, 400,000 people were excluded in the 2019 elections to the European Parliament. Denying such large groups the right to vote may gravely impact election results.

Regarding incapacitated persons' capacity to participate in elections to the European Parliament, an ECtHR judgement of fundamental significance ought to be considered: the judgement of 20 May 2010 in the case of *Alajos Kiss v Hungary*.³⁷ Therein, the Court concluded that an indiscriminate removal of voting rights, without an individualised judicial evaluation of the person's judgement, is a violation of Article 3 of Protocol No 1 to the European Convention on Human Rights. Such line of adjudication, ordering courts to examine the cognitive capacity of individuals in terms of their ability to make free and informed electoral decisions, has been continued in successive judgements, in one of which the Court went as far as to point out that mental disability resulting in a partial incapacitation (guardianship) ruling cannot constitute the sole justification for the removal of voting rights.³⁸ Incidentally, it should be noted that at the time of the ECtHR ruling, Spanish law had been amended by abolishing the ban on voting by incapacitated persons, as mentioned earlier.

³³ Constitution of the Grand Duchy of Luxembourg < https://www.constituteproject.org/constitution/Luxembourg_2009?lang=en >.

³⁴ Order of the Federal Constitutional Court - Second Senate of 29 January 2019, 2 BvC 62/14, <https://www.bundesverfassungsgerecht.de/SharedDocs/Entscheidungen/EN/2019/01/cs20190129_2bvc006214en.html> accessed 2 July 2025.

³⁵ See (n 15).

³⁶ *ibid.*

³⁷ *Alajos Kiss v Hungary* [2010] ECHR 153, 41 EHRR 35 (ECtHR).

³⁸ *Caamaño Valle v Spain*, App no 43564/17 (ECtHR, 11 May 2021), paras 59–60.

Notably, this line is a consequence of previous ECtHR case law. In the aforementioned case of *Hirst v United Kingdom*,³⁹ for example, the Court also found that the potential indiscriminatory removal of voting rights without accounting for differences between individual cases does not meet the requirement of the legal measure's proportionality. The Court further emphasised that the principle of universality of electoral rights established in Article 3 of Protocol 1 to the Convention precludes the exclusion of entire social groups from participating in elections.

The United Nations Convention on the Protection of Rights of Persons with Disabilities sets out an even higher standard for protecting the voting rights of persons with intellectual disabilities. In one of their Communications, the United Nations Committee on the Rights of Persons with Disabilities declared that an exclusion of the right to vote based on a perceived or actual psychosocial or intellectual disability, including a restriction pursuant to an individualised assessment, constitutes discrimination based on disability within the meaning of Article 2 of the Convention.⁴⁰

This is a very far-reaching view. According to the author, it goes beyond the linguistic interpretation of Article 29 (a) of the Convention. It states that ensuring suffrage should be achieved 'inter alia by: (i) ensuring appropriate, accessible and understandable electoral procedures, facilities and voting materials; (ii) protecting the rights of persons with disabilities to vote by secret ballot in elections and public referenda without intimidation, and to stand for election, to hold office effectively and to perform all public functions at all levels of government, facilitating, where appropriate, the use of assistive and new technologies; (iii) guaranteeing the free expression of will by persons with disabilities as voters and, to this end, where necessary, allowing persons with disabilities, at their request, to be assisted when voting by a person of their choice'. Therefore, the Convention does not grant absolute electoral rights, but lists examples of tools to facilitate participation in elections by persons with disabilities, emphasizing in particular the simplification and comprehensibility of the procedure.

It should be noted, however, that the ECtHR in Strasbourg continues to hold that, although in a democratic system there must be a presumption in favour of the inclusion of all citizens in the electoral process, Article 3 of Protocol No 1 to the European Convention on Human Rights does not guarantee persons with intellectual disabilities an absolute right to exercise the right to vote, especially if a given

³⁹ See (n 18).

⁴⁰ UN Committee on the Rights with Disabilities, Communication No 4/2011, CRPD/C/10/D/4/2011 (20 September 2013).

country takes steps to gradually extend voting rights to people with intellectual disabilities.⁴¹ There is, therefore, a certain discrepancy with the restrictive position of the United Nations Committee on the Rights of Persons with Disabilities.

Nonetheless, it does seem that national solutions denying the right to vote may be acceptable if based on individual expert evaluations of the given person's cognitive capacity, and conforming to the international standard set by the case law of the ECtHR.⁴² The participation of a person completely ignorant of the electoral act contents and/or consequences in any elections does not affect the scope of his or her rights. It can well be declared that such circumstances are nothing but an exercise in electoral rights formality, whereas the protection of rights should primarily carry true and tangible meaning.

The potential for differences in national- and European Parliament-related election enfranchisement arises from the fact that while pursuant to a specific judgement of the CJEU,⁴³ Member States shall make provisions in national legislation for those entitled to vote in elections to the European Parliament, such competencies shall be exercised in respect of EU law. Consequently, Member States shall be bound by rights, freedoms and principles specified in the Charter of Fundamental Rights of the European Union (ChFR).⁴⁴ The reconstruction of the right to vote in European Union elections shall thus not only account for the content of Article 39 of the ChFR, but of Article 21(1) as well, the latter prohibiting discrimination for reasons of disability. As mentioned above, EU law includes the United Nations Convention on the Protection of Rights of Persons with Disabilities, especially Article 29(a), directly referencing the 'right to vote and be elected'.

Recognition of the European Union law in terms of assessing the right to vote in elections to the European Parliament has been blatantly illustrated by the ruling of a Polish court of law. The District Court in Nowy Sącz ordered that the constituent register be expanded to include a partially incapacitated person, whose active and passive electoral rights had been removed pursuant to the Electoral Code. Referencing EU law, the Court found that curtailing the electoral rights of such a person automatically without an individualised evaluation of that person's mental health would be defective. The Court referenced, *inter alia*, ECtHR case

⁴¹ *Caamaño Valle v Spain*, para 59.

⁴² Cf. e.g. joined cases of *Strøbye and Roselind v Denmark*, App Nos 25802/18 and 27338/18 (ECtHR, 2 February 2012).

⁴³ Case C-650/13 *Thierry Delvigne v Commune de Lesparre-Médoc and Préfet de la Gironde* [2015] EU:C:2015:648.

⁴⁴ *ibid*, paras 31–33.

law and Article 14 of the Treaty on European Union, which establishes the principle of universality of elections to the European Parliament.⁴⁵

7. SHOULD A JOINT ELECTORAL ORDINANCE BE ESTABLISHED FOR THE EUROPEAN UNION?

The 1992 Treaty of Maastricht on European Union⁴⁶ provided that elections shall be held on the basis of a uniform procedure, and that the European Parliament would be charged with drafting said procedure, the draft requiring unanimous approval by the Council. Since the Council had failed to reach a consensus regarding any of the drafts submitted, the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts⁴⁷ introduced the so-called joint action option. It is noteworthy that while the Treaty of Amsterdam had been designed to expand European Union competencies, a step back was taken in comparison with the Treaty of Maastricht in terms of electoral law uniformity. It may thus be concluded that Member States agreed to leave this area outside the realm of shared and unified regulation.

The European Parliament had made attempts to introduce uniform electoral principles applicable across 27 Member States by establishing joint minimum rules already in the 20th century. The 2022 Legislative Resolution is yet another attempt of this kind.⁴⁸ The Resolution will have to be approved by the Council unanimously (Article 223 of the Treaty on the Functioning of the European Union), following which it will be resubmitted to the Parliament for approval before being adopted by all Member States in line with their respective constitutional requirements. Negotiations with the Council will begin only once all Member States have expressed their positions. Some states have already filed their objections to project components requiring that the electoral system applying to EU-level elections be harmonised.⁴⁹

⁴⁵ Decision of the District Court in Nowy Sącz, I Ns 376/19 (19 April 2019).

⁴⁶ Treaty on the European Union [1992] OJ C191/1.

⁴⁷ Treaty of Amsterdam [1997] OJ C340/1.

⁴⁸ European Parliament, *Legislative Resolution on the Proposal for a Council Regulation on the Election of the Members of the European Parliament by Direct Universal Suffrage* [2022] OJ C465/171.

⁴⁹ Harmonising rules concerning electoral participation of non-nationals, for example, would prove problematic, since European Union Member States follow no less than four systems of establishing residence for voting rights purposes. Furthermore, voluntary or obligatory participation in the electoral process would require some countries to break with tradition, as related regulations vary.

In the draft Council Regulation submitted by the European Parliament as an Annex to the 2022 Legislative Resolution, provisions of Articles 4 and 5 are to regulate the active and passive voting rights aspects. Article 4(1) of the draft Annex reads: ‘Every Union citizen from 16 years of age, including persons with disabilities, regardless of their legal capacity, shall have the right to vote in elections to the European Parliament without prejudice to existing constitutional orders establishing a minimum voting age of 18 or 17 years of age’. Pursuant to Article 5(1), ‘Every Union citizen from 18 years of age shall have the right to stand as a candidate for the elections to the European Parliament in either a national constituency or in the Union-wide constituency, or in both’.

It is observable that the draft provides for full electoral participation of every citizen – regardless of disability or legal competence – in the active voting process only. Full universality has been omitted in the draft regulation concerning the right to stand as a candidate for elections. Therefore, any preceding universality notions notwithstanding, even European Union legislators are in no doubt that the universality of the passive voting rights aspect can be subject to limitations.

The justification for introducing 16 years of age as the voting rights minimum has triggered a number of doubts. Section AF(23) of the draft Resolution proposes age uniformity for reasons of 16 years of age being the recognised minimum required in certain countries: Austria, Germany, Malta and Belgium. It is noteworthy that in multiple Member States, candidates running for office must be older than 18 years of age (21 years of age – Bulgaria, Cyprus, Czech Republic, Estonia, Ireland, Lithuania, Latvia, Poland and Slovakia; 23 years of age – Romania; 25 years of age – Italy and Greece). On the other hand, section G of the Preamble reads, ‘increased turnout is a positive signal and shows that citizens, and in particular the youngest generations of the Union, are taking an increasing interest in the development of the European integration’. This would, therefore, be a measure serving the purpose of increasing the number of constituents voting in favour of greater Union integration. However, the argument that such a solution would warrant greater democratisation seems somewhat unconvincing, since – with regard to the right to propose candidates – Article 10(1) of the draft ostensibly does not⁵⁰ provide for the right to nominate candidates by collecting a specific volume of constituent signatures in support of the given candidate, the measure common across numerous Member States. In terms of that particular electoral process component, the most universal and democratic form has been replaced by a preference for a politicised procedure of candidate selection. On a side note, it might well be concluded that specifying a uniform minimum age for all voters in

⁵⁰ The draft regulation provides that candidatures may be submitted by ‘all political parties, associations of voters, electoral alliances and European electoral entities’.

the draft Resolution does not contribute to establishing electoral law rules, as the age threshold matter does not fit into the principal category.

Rather than amending the electoral structure, the Union ought to convince its citizens to support greater integration through effective policies and economic success. An electoral act is one with momentous consequences, requiring maturity and responsibility alike.

The ECtHR has emphasised in its case law that states parties to the European Convention on Human Rights enjoy extensive competencies in establishing their own electoral systems. The Court has pointed out that numerous states have a history of long-standing traditions in the field, preceding the day of the Convention coming into force. Therefore, for a state to be recognised as not being in breach of Convention-warranted rights, it is sufficient to establish that the way its legislative body is elected observes the principles of democracy, reasonable periodicity (such body following term-of-office limitations), secrecy, and – finally – freedom of electoral opinion expression. Notably, for this very reason, complainants have been rarely successful in challenging domestic electoral laws pursuant to applications filed with the ECtHR.⁵¹

Legal reference literature emphasises that the Court has been referencing its restricted control-related role on a variety of occasions, any review measures obligatorily tying in with acceptance of the considerable diversity of historical developments, cultural traditions and political thought, resulting in individual visions of democracy.⁵² The Court had highlighted it even in judgements affirming breaches of the right to participate in elections, while emphasising that electoral law provisions deemed unacceptable in one state may prove justified in another, since any analysis of legal provisions ought to account for the political evolution of the given state.⁵³

Such exact historical and political differences make any non-controversial uniformity exercise extremely difficult, the minimum voting age being one justified case in point. If imposed top-down with no respect for pluralism or tradition, such a Resolution could only serve to harm the Union's cohesion and internal strength, becoming an argument for Eurosceptical political powers.

It, therefore, seems that there is no need for European Union-level regulations in the area of electoral law concerning elections to the European Parliament, provided that domestic courts of law and state authorities continue following the

⁵¹ Kamiński (n 20) 13.

⁵² *ibid.*

⁵³ *Hirst v United Kingdom* (No 2), para 61 and *Mathieu-Mohin and Clerfayt v Belgium*, para 54.

provisions and principles of European Union law and ECtHR case law, whenever organising elections and/or compiling electoral registers.

8. CONCLUSIONS

Due to the profound differences in the traditions of the individual EU Member States, societies could find it difficult to accept a common electoral law. As a result, it could unnecessarily undermine the unity of the Union. As far as the right to vote by incapacitated persons is concerned, individual court decisions are the most sensible solution. On the one hand, this guarantees the protection of this right which is fundamental to democracy; on the other hand, it will prevent third parties from abusing the formal right of persons with profound mental or intellectual disabilities. It seems that the United Nations Committee on the Rights of Persons with Disabilities' opinion to grant electoral rights without any restrictions is too far-reaching. It does not take into account the public interest in conducting fair elections free from abuses. The position of the Court in Strasbourg is more accurate, provided that the principle of proportionality is observed.

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