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THE SYNTHESIS OF THE MEDICAL AND SOCIAL MODEL OF DISABILITY, WITH SPECIAL REGARD TO THE FIELD OF LABOUR LAW

DOCTORAL THESIS

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1. The research motives and topics

The contemporary Western culture celebrates the perfect body, the labour market prefers the perfectly performing individual, the legal system is based on a notion of liberalized, autonomous, rational human being. The world of persons with disabilities attracted my attention precisely because disability can be a factor which, with regard to the above described cultural environment, gives rise to isolation from the mainstream processes of the society. The mainstream pushes the persons with disabilities, who are not able to fulfil the above mentioned norms, to the margins of the society, forces them to a minority existence. Thus, the majority conceives the critique of disability. However, I am inspired to examine just the opposite point of view: how can the critique of the majority be conceived from the perspective of persons with disabilities? With other words: What kind of values are produced by persons with disabilities, which cannot be produced, or can be contrasted by the success-competitiveness- and perfectionism-oriented majority culture? Simply speaking: What can learn the able-bodied society from persons with disabilities? The research can go even further, since we should not stop at the stage of mutual critiques, expectations. I would not suggest that the proper position of persons with disabilities should be in an antagonistic relation with the able-bodied majority. The intention of mutual cooperation, learning, adaptation can create a social, economic, legal and cultural environment which may integrate the persons both with and without disabilities.

The *disability studies*, as a scientific discipline examining the phenomenon of disability, is a quite new branch of social sciences: it has been existing since the 1960s, 1970s.[1] The generation of disability studies was assisted not only by the independent life movements of persons with disabilities, but also by advocates of other disciplines dealing with other minorities, such as gender studies and race studies.[2] Regarding this fact, disability studies took over the theoretical approach of these latter, according to which minorities are groups arbitrarily segregated, oppressed, discriminated and occasionally abused by the majority. The group of persons with disabilities are at the same position as gender, racial, ethnical, political, religious etc. minorities. The elimination of the harmful consequences of the minority status of persons with disabilities requires the activity of the majority of society: all physical, economic, legal and attitudinal obstacles of the full inclusion of them shall be removed. The ultimate reasons for disability are generated by the society, and the elimination of the harmful consequences thereof falls into the competence of the society. So disability studies finds that disability is social construct. This idea is the core thought of the so called *social model* or *social paradigm* of disability.

The social paradigm deems critically the ideas and attitudes developed on disability before the era of this paradigm, characterizing them as the *medical* or *individual model* or *paradigm* of disability. A core thought within the medical model is that disability is the cause of disability lies in the *individual's impairment* in a medical sense. The impairment results that the person is not able to fully execute some main life activities, so he/she is not able to meet the challenges of social life. Thus he/she remains an outsider from the perspective of the mainstream processes of society.

The social paradigm represents the *antithesis* of the medical paradigm. The former one points out to the failures of the society and not of the individual. It seeks not the different, but the identical characters of able-bodied and disabled persons. It does not spur the healing, the

[1] Hernádi – Könczei 2015, 16-17
[2] See e.g. Wendell 1997, especially 275

rehabilitation of the concerned persons, but the accommodation of them by the societal systems (economy, law, physical environment, attitudes, cultural norms).

The *social model has gradually gained dominance* over the medical model in the whole Western world since the 1990s. This process has been supported by the spreading and the rising influence of the independent life movements of persons with disabilities on both regional and global scene, the development of disability studies, and especially the establishment and the great number of ratifications of the *UN Convention on the Rights of Persons with Disabilities* (hereinafter: UN CRPD) and its *Optional Protocol* in 2006. The social paradigm has also penetrated the disability law-making and policy of the European Union as well. The basic ideas, headlines of the social paradigm have become quasi unquestionable norms of the correct way of thinking and speaking on persons with disabilities. Though the academic literature recently grows to be more and more critical towards the social model, the legal and political thinking seem to reflect an uncritical engagement to this paradigm.

My research position is determined by the presumption that neither the disabled, nor the able-bodied persons are interested in the rigid insistence on the social paradigm. The canon of the legal norms, social and government activities concerning persons with disabilities can be nothing other than the *person with disability*. This means that the ultimate objectives of these activities should be the protection and the respect of *the human dignity* and the *quality of life* of persons with disabilities in an equal way with others, and, such as the accomplishment of their *full social inclusion*, as a community aspect of the referred two values. The uncritical implementation of one or the other paradigm may never be the objective: the paradigms can play an instrument role in achieving the above described objectives. Rather the *critical examination* of both paradigms and the *synthesis of their elements* are required, in compliance with these objectives, in the light of the above specified canon.

It shall be referred that the demand for the critical view of the social paradigm and the requirement of the synthesis with the medical model also emerges in the pieces of the foreign academic literature.[3]

2. <u>The structure of my thesis</u>

Part A) of my thesis (*"Fundamental premises I. – On disability, on the rights of persons with disabilities"*) is devoted to the critical examination of the paradigms and the anchoring of the principles of the synthesis. Regarding the fact that the social model has recently gained predominance, I suggested to execute the synthesis by the revision and under the aegis of this latter, with the acknowledgment and the admission of some elements of the medical model.

The consequences of the synthesis an all areas of life may certainly not be discussed in a single doctoral thesis. Therefore, in Part B) (*"Fundamental premises II – On the central role of labour law"*), I narrowed my focus to employment. Listing and analysing pros and cons, I underpinned my hypothesis, according to which the participation in employment plays a key role in the social inclusion of persons with disabilities, thus the prioritised examination of this field can be justified. Within the field of employment, I further restricted my perspective to the field of labour law. However, I gave a brief interdisciplinary overview to other areas of life, on which the consequences of the synthesis shall be further researched and implemented.

[3] A few examples from the works criticizing the social model (providing also a literature overview): Terzi 2004, Finemann 2008; Satz 2009; Travis 2012; Hadi 2013, 18-23; Waddington 1995, 35; Tucker 2001; Weber 2000, 889-893; Bagenstos 2004, 54-70; Diller 2000, 19, 37-38.

So, in Part C) ("*Persons with disabilities and the labour law*") I dealt only with the labour law aspects of the synthesis. I examined two relevant groups of norms: (1) concerning the employee ability of persons with disabilities and (2) concerning the prohibition of discrimination (especially the regulation on reasonable accommodation).

Ad (1) As for the *employee ability*, I outlined the academic views and legal developments on *legal capacity* of persons with psychosocial disabilities. The acknowledgement of the full legal capacity of these persons is one of the highest priority goals of social paradigm. I suggested the implementation of the synthesis of the two paradigms also in this area, and gave the guidelines for this.

Ad (2) *Non-discrimination law* forms the leading branch of law within in the eye of social paradigm and generally speaking of disciplines in the field of social sciences dealing with the social inclusion of minorities. I focused on a legal construct with a special significance with regard to the inclusion of persons with disabilities: the *reasonable accommodation duty*. This duty, provided in more and more international, EU and national legal sources, requires specific entities getting in touch with persons with disabilities to make all necessary steps which enable these latter to participate in a legal relationship with them on an equal basis with others, so far it does not constitute a disproportionate burden for them.[4] I suggested that the reasonable accommodation duty represents the appropriate synthesis of the two paradigms, and since it fits to the structure of the non-discrimination law, the social model promotes the application and the development of this construct. I highlight in several parts of my thesis that reasonable accommodation can play an eminent role and can be an emblematic construct in a legislation based on the idea of the synthesis of the two paradigms. Because it can be an instrument of the promotion of mutually adaptive, equality-oriented cohabitation of persons with and without disabilities according to the principles of reasonability and proportionality.

Among the final thoughts of my thesis I underlined that *I do not deem my findings as formulations of ultimate and final verities*, I would rather like to invite the readers to a critical thinking and dialogue on the addressed topics. The scientific examination and conceptualisation of the nature of disability is an inexhaustible issue of research, which can improve the principles of the synthesis, or possibly inspire the creation of new paradigms.

3. The research methodology

3.1. Processing the academic literature in the field of disability studies and other relating disciplines

Researching of the paradigms of disability does not mainly fall under the scope of legal sciences. A specific discipline is devoted to research of the nature of disability: the *disability studies*. Since my goal was to contribute to the formulation of the proper guiding principles of legal regulation concerning persons with disabilities, I had to process a large volume of academic literature on the historical, ethical, philosophical, anthropological, economical, psychological aspects of disability, prior to the examination of the legal consequences. These issues are mostly covered by disability studies, which researches the phenomenon of disability with a multidisciplinary approach. However, I occasionally had to go beyond the field of disability studies and address other, relating disciplines, such as economic philosophy or theory of decision-making.

[4] On the abstract concept of reasonable accommodation: Halmos 2014, 121-122.

I should count with a critique concerning my work, suggesting that, though I promise in the title of my thesis that I focus on labour law, I *deal quite shortly with explicit legal or employment legal questions* compared to issues of other disciplines. Nevertheless, I do not find it a failure of right proportions. In my opinion it is a correct way of analysis to treat the guiding principles, falling in other fields of science, as the bottom of an iceberg, and the few, but essential legal consequences, the outlining of which was the precise objective of the finding of the guiding principles, as the tip of it.

One of the most important research centre of disability studies in Hungary is seated at the ELTE Bárczi Gusztáv Faculty of Special Education, with the professional leading of Prof. dr. György Könczei. I found the professional materials of this school, which are usually online available, extraordinarily valuable. Beyond the pieces of the Hungarian academic literature available in periodicals, readers or professional websites, I took special attention to the doctoral theses covering some issues of my research recently defended by Hungarian authors, such as dr. Nóra Jakab, dr. Nikolett Hadi and dr. Sándor Gurbai.[5]

However, the predominant proportion of the processed academic literature is of *foreign* origin, written mainly in English or German. I made efforts to access to the fundamental and the most update pieces of the disability studies. With view to the fact that the birth of disability studies is located in the United Kingdom and North-America, the literature stemming from these states amounts to such a huge volume that it would have been impossible to work with the requirement of full elaboration of the stuff.

My visit in the *Institut für Arbeitsrecht und Arbeitsbeziehungen in der Europäischen Union (IAAEU)* at the University of Trier provided a great help in collecting resources not available in Hungary.

3.2. Analysis of the relevant sources of international and EU law; means of comparative law

In line with the improvement of the social paradigm, the *quantity of international and EU-level sources of law concerning persons with disabilities has been increased*. These sources of law are partly of binding, partly of non-binding nature. So the discretion of the national legislation is more and more restricted in this subject matter. The examination of the international and EU-level sources of law determining the Hungarian legislation and legal practice, and the influence thereof constituted a dominant element of my research. As the most important pieces of international and EU-law, I respectively analysed the relevant provisions of the UN CRPD and the EU Employment Non-Discrimination Framework Directive[6] (hereinafter: Directive), such as the judgements of the European Court of Human Rights.

Furthermore, I endeavoured to give an overview on the relevant *national regulation and case law* of some foreign countries. Generally speaking, I opted for the countries having an advanced body of statutory and case law on the specific issue of disability law, so which have considerable experience with the application of these norms, the studying of which can be useful in Hungary. Moreover, the legislative solutions in these legal systems are often reflected by international or EU-level sources of law, binding for Hungary, so the functioning and the practical application of these legal construct in a national legal environment are also

[5] Hadi 2013, Jakab 2012, Gurbai 2014

[6] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303 , 02/12/2000 P. 0016 – 0022.

worth to research. Among these countries, above all the United States, the United Kingdom, Canada should be mentioned, and, in some aspects, Germany, which has historically a great impact on Hungarian law. Beyond these countries, I occasionally referred to some other national legal systems having some especially inspiring, interesting or surprising solution in a specific subject matter, such as Ireland, Sweden, Australia or Denmark.

3.3. Analysis of the current Hungarian law

As I above mentioned, the analysis of Hungarian law plays a *"tip of the iceberg"* role in the structure of my thesis: as for the volume, these parts are relatively short, but as for the importance, they are of the highest priority. With reflection to the fact that international or EU legal norms determine the main guidelines for the Hungarian legislation is several aspects, I analysed the Hungarian legal developments with respect to these frameworks.

I certainly took attention to the Hungarian *case law* as well. With regard to the fact that the discrimination cases are processed to a great extent not by the courts, but by the *Equal Treatment Authority*, I made efforts to research the practice of this organ such as the position papers of the Equal Treatment Advisory Body, which had earlier assisted the functioning of the Equal Treatment Authority.

I endeavoured to go beyond the descriptive manner of research, and giving several critical and *de lege ferenda* suggestions on the national law in the light of the international and EU-related obligations, the comparative legal and the academic findings.

3.4. Other methods: struggling for an inclusive way of research

Even though I executed no primary empirical researches, I found it extremely important that my researches not only take place at the desk, from books. I completely share the position on the research methodology recommendation of the disability studies saying no research should be conducted concerning persons with disabilities from a fully outsider perspective, which could grant the researcher a kind of authority and the persons with disabilities a kind of object role. Instead efforts should be made to possibly involve the persons with disabilities to the research, in order to make them the subject rather than the object of the process.[7] I gave priority during the full course of the research to the being in professional and personal relationship with persons with disabilities and their supporters, so as to learn their opinions, points of view, way of thinking, personality, problems, claims, and let all these influence the directions, the methods and the findings of my research. I could gain a considerable stuff of experience in cooperation with the *Hand-in-Hand Foundation* in Budapest, which, with the participation of other NGOs, has operated the functioning of the first legal aid service expressly for persons with intellectual and severe, multiple disabilities and autism such as their supporters since 2007. I took part in the functioning of this service in different positions through the years. Through the service I could access to approximately 500 cases, learning extremely much about the typical legal problems of the Hungarian persons with disabilities and their supporters, their attitudes and opportunities of asserting their legal claims, the most severe failures of the relevant legal rules, the surrounding system of institutions. We summarized the knowledge accumulated in the course of the functioning of the legal aid services in three study books.[8]

[7] Könczei 2015, 156-157
[8] Halmos – Gazsi 2008; Halmos (ed.) 2009, Halmos (ed.) 2013

I tried to create links to persons with disabilities, their supporters and NGOs on every possible forum. I participated in organizing camps for persons with intellectual disabilities, in providing legal and self-knowledge trainings for autistic young people, organising or leading legal education for parents with children with disabilities, social work professionals or in the framework of sensitisation seminars for students of different faculties of law. I gained experience in several forms of cooperation with NGOs engaged in disability issues.

Though the above mentioned activities do not belong to the official methods of scientific research, I find them highly important. Namely they provided me a deep *inspiration* and a considerable experience stuff for the research. Above all they *enabled me to filter and assess the processed academic material from the perspective of the practical reality*.

4. The key findings of the thesis

Below I summarize the key findings of my research so far, respective to the structure of chapters.

4.1. Chapter I. The historical development and the models of the legal regulation concerning persons with disabilities in the Western legal system

(1) In the framework of a *historical, descriptive analysis* I overviewed the development of the legal regulation concerning persons with disabilities in some Western legal systems. Through this I identified and defined the two fundamental paradigms of modern and post-modern way of thinking about persons with disabilities: *the medical and the social model.* The era of the medical model can be dated from the late 19th century until the 1970s or 1980s.[9] These latter mentioned decades were the period of emergence of the social paradigm, which has been gradually taking over the role of the leading paradigm.[10] However, the critique of this model is formulated more and more dominantly in the recent pieces of literature.[11] In the course of the historical overview, I analyzed in detail the development of disability law in the United Stated, which played a unique role in the elaboration and the worldwide promotion of the social model. I also described the manifestation of each paradigm in Hungary.

4.2. Chapter II. On the nature of disability – the principles of the synthesis of the historical models

(2) I analyzed the *fundamental views of the medical and the social paradigm*. A core thought within the social model is that disability is the cause of disability lies in the individual's impairment in a medical sense. The impairment results that the person is not able to fully execute some main life activities, so he/she is not able to meet the challenges of social life. This way of thinking places the focus within the "person with disability" to the "disability", so to the differences between the persons with and without disabilities. The division of the society into a disabled and an able-bodied part in physical, legal and social aspects, the establishment of a segregating, subordinating,

[9] See: Kálmán – Könczei 2002, 85.
[10] Hernádi – Könczei 2015, 12-13
[11] A few examples for criticism of social model (including also literature overview): Terzi 2004., Finemann 2008; Satz 2009; Travis 2012; Hadi 2013, 18-23; Waddington 1995, 35; Tucker 2001; Weber 2000, 889-893; Bagenstos 2004, 54-70; Diller 2000, 19, 37-38.

oppressing, discriminatory and often abusive relationship between the two groups are the products of the medical model.[12] The social model was set up with reflection to these harmful developments of the medical model, as an antithesis of it. The fundamental statement of the social model is that the cause of disability lies in the society rather than in the (disabled) individual. Not the individual, but the society is responsible for the fact that persons with disabilities are historically exposed to structural oppression, discrimination, segregation. Therefore the physical, attitudinal and legal structures of the society shall be changed in order to put the persons with disabilities into the position of full citizenship meaning the full inclusion in the society. As opposed to the medical model, the social model focuses in the "person with disability" to the "person", which means it concentrates on the identical features of persons with and without disabilities. This resulted in formulating the legal prohibition of discrimination against persons with disabilities.[13]

(3) After analyzing the paradigms in a descriptive manner, from a historical point of view, I executed the critical analysis of them. I suggest that the canon of any legislation, legal practice or any other state and social activity concerning persons with disabilities can be exclusively the *respect of their human dignity and the improvement of their quality of life.* Since the *social inclusion* is a key community aspect of the experience of human dignity and good quality of life, the improvement of the social inclusion of persons with disabilities shall also count as an element of the above described canon. I established the main hypothesis[14] of my dissertation with view to the relationship between this canon and the historical paradigms of disability, as follows. The respect of the human dignity, the improvement of the quality of life and the social inclusion of persons with disability require the synthesis of the medical and the social paradigms. It means that the aim of any legislation or any other social activity concerning persons with disabilities cannot be the promotion of one or the other paradigm: the *paradigms can play an instrument role in achieving the above described objectives.* Rather the critical examination of both paradigms and the synthesis of their elements compatible with these objectives are required, in the light of the above specified canon. The compatibility depends on *the nature, the essence of disability being realisticly reflected within each paradigm.*

(4) Different views are represented on the nature of disability within the medical and the social paradigm. The medical model supports a so called *impairment-based concept* of disability: the cause of disability lies in the individual's impairment in a medical sense. In contrast, the social model suggests that disability is a *social construct*, meaning that disability is an artificial, *social construct,* resulting in the arbitrary segregation, oppression of a specific social group. In line with this idea, the leading branch of law on the basis of the social model became the *non-discrimination law*, which had been proved as an effective tool in the struggle for equality of other social minorities. In the followings I examined the nature of disability in a very detailed manner, and in the light of this examination I assessed, whether the tools of the struggle for the equality of other social minorities can be used for the same aim related to persons with

[12] Some pieces of the literature on the promotion of the social model provide information on the characterisation of the medical model as well, for example: Degener – Quinn 2002; Waddington 1996; Kálmán - Könczei 2002, 81-119; Waddington 2005, 16.

[13] On the comparison of the medical and the social model: e.g. Waddington 1995, 34; Waddington 2005, 16-17; Stein – Lord 2009, 25; Waddington 2009, 115; Hadi 2013, 16-17.

[14] This hypothesis is characterised as main hypothesis, because other hypotheses in my dissertation are derived from it, and reflect some aspects of it.

disability. So I could point out in this respect to the limits of non-discrimination law, and, in a broader sense, the social model. Thus, I could move on to establish the principles of the synthesis of the social and the medical model.

(5) I concluded, disability *has several different features from other protected characteristics under non-discrimination law*. The medical model, which deems the impairment as the cause of disability, reflects to the nature of disability in a right manner precisely in those situations, where the decrement in function is relevant with respect to the given legal relationship, so where there is an actual difference between a person with and without disability. So the social model provides a framework to acknowledge that disability can result in dependence, vulnerability, detriment, and so may base a claim for an accommodation or extra investments from the concerned persons' environment. The social model works well in those life or legal relationships, where persons with and without disabilities form a homogeneous group, and the goal is the elimination of the arbitrary differential treatment. It can be seen that some aspects of disability are reflected better by the medical, other aspects by the social model. This urges the synthesis of the models. *Thus, the main hypothesis is justified.* The social paradigm has exceeded that earlier period, when it claimed the total denial of the medical paradigm, and has been proved to be sufficiently flexible to take up some valuable elements of the medical model. Therefore in the followings I examine the ways of the synthesis under the aegis of the social model, accepting some important elements of the medical model.

(6) The synthesis of the two models has already been completed in some relevant legal construct. The duty of *reasonable accommodation* can be mentioned as an important example. The medical model reflects to the differences between the disabled and the able-bodied persons, and acknowledges that an impairment, which can cause a decrement in function, is a necessary, but not sufficient condition for disability. Needs for accommodation arises exactly from this acknowledgement. At the same time, the social paradigm highlights that it is the environment, which is primarily responsible for the accommodation of the special needs of persons with disabilities. So the reasonable accommodation bears the characters of both paradigms. This legal construct may become a cornerstone of the legal regulation concerning persons with disabilities.

(7) In order to resolve some conflicts between the anthropological-ethical and the legal approach of disability, I formulated the following principles. It is essential that the law concerning persons with disabilities

a. shall acknowledge the *limited applicability of its means* in regard of the representation of the anthropological features of disability;

b. shall struggle for the improvement of the *quality of life*, and, as a community aspect thereof, *the social inclusion* of persons with disability;

c. shall represent that the *human dignity* of all persons is equal, even if the law constitutes artificial categories and classification of people.

4.3. Chapter III. Defining disability

(8) By means of studying the relevant academic literature, international and EU-level requirements, examples of foreign countries and definitions under Hungarian law, I concluded that in line with the forging ahead of the social model, the disability

definitions, which had earlier contained medical (i.e. impairment-related) elements, have been *supplemented by social (i.e. restricted social participation related) elements.* However, this process led to considerable application problems, because the definitions no longer distinguished between the causes and the consequences of disability. It would be useful, and also in compliance with the UN CRPD and the recent international definition-related tendencies if the disability definitions were based only on the impairments, which are the necessary but not sufficient conditions for disability. The legal definitions should be respectively supplemented by (separate) norms on (reasonable) accommodation, which could ensure the proper reflection to the social impacts of disability.[15]

(9) Most of the legal systems contain more disability or disability-related definitions. I outlined some historical and the cultural reasons for conceptual diversity. In order to classify the legal systems on a range from the conceptual diversity to the unity, I employed the following typology. A *real unity* exists, if there is a single definition of disability used overarching all legal branches. A *nominal unity* exists, if the term "disability" is used in all legal norms, however, with diverse meanings. *Conceptual diversity* exists, if the different legal branches, such as non-discrimination law or special fields of social law apply several terms and definitions relating to disability. Finally there are some legal systems, in which there is *no definition* of disability. The Hungarian legal system corresponds to the features of the third type. I sought the guidelines to elaborate *the appropriate relationship between the conceptual diversity, arising from the medical model, and the conceptual unity, claimed by the social model.* The definition used by the non-discrimination norms in most legal systems encompasses the definitions under social law, however, there are reverse examples as well. I underpinned, why I find the former solution better. I prefer the nominal unity to the diversity, because it provides more clarity for the application about the relationship between the definitions on each field of law. It is also possible to create the system of *real unity*. This could come to exist by a consequent distinction between the conceptual elements and preconditions of claiming of the disability-related services.[16] The aim of a definition is to specify the group of persons with disabilities. In legal norms on special rights and services for persons with disabilities, the mentioned preconditions could be determined. So the term and definition of disability can remain unified, and at the same time the specification of the potential claimants of disability-related services is also viable.

(10) I specified the following problems with regard to the *medical or social determination* of disability definitions under Hungarian law.

a. The disability definition does not distinguish *clearly between the causes and the consequences* of disability.

b. The *society-related elements* are involved in the definition of disability, which should instead exist in the norms on reasonable accommodation.

c. In particular the medical elements of the definitions can be criticised. Some definitions (e.g. categories entitling to disability allowance or some transport allowances) contains of an exhaustive list of diagnoses, which leads not only to

[15] Consenting position: Mikola 2015.
[16] See: Definitions of disability 2002, 25.

an extreme complication of the legal norms, but also to the incompleteness and thus to the discriminatory effects of them.[17]

These problems could be relieved if, according to the guidelines outlined under (8), the core of the disability definition were constituted by the *health condition*. If there were supplementary norms on the reasonable accommodation of the environment of the persons with disability, no problem would arise from the restriction of the disability definition to medical elements.

(11) I specified the following problems with regard to the *diversity of disability definitions* under Hungarian law.

a. The *high degree of diversity* could not be dissolved even through more reforms of the definitions.

b. The persons with *psychosocial disabilities* are referred in some legal norms by outdated, personal rights violating terms.

c. In some disability-related definitions the definition *elements are not distinguished from entitlement preconditions.*

I recommended the following solutions for these problems.

a. *The definitions under non-discrimination law should be inclusive.* I outlined that the term in the ETA Act[18] can be construed, also without an explicit definition, in a very broad notion, involving also other disability-related terms in other legal rules.

b. *Acceptance of the impairment-based definition*: a "central" disability definition, based on the health condition of the individual could dissolve the conceptual diversity. This process could be further applied to other legal norms concerning persons with disabilities, regulating e.g. education or health issues.

c. *The elements of the definition should be divided from the preconditions* for disability-related services, allowances, arrangements.

4.4. Chapter IV. The central role of employment in regard of the social inclusion of persons with disabilities

(12) In the Chapter IV. I established and justified the *following hypothesis. In order to reach the aim of full social inclusion of persons with disabilities, it is essential to guarantee the opportunity to work for them, by abolishing all obstacles of employment.* This hypothesis could not be justified exclusively on the grounds of economical and sociological arguments, however, considering ethical and political arguments, I could conclude that it is right.

(13) This conclusion could be further detailed and supplemented as follows.

a. In the course of promotion of the social inclusion of persons with disabilities, priority shall be given to the creation of *real opportunities* to work as the *main means of subsistence.*

b. In the process mentioned under (a), the *ideas of the welfare state and the neoliberal state should be combined*. Beyond the involvement in the market-

[17] In detail about this problem: Halmos (ed.) 2009, 39-40.
[18] Act CXXV of 2003 on equal treatment and the promotion of equal opportunities, sec. 8(g)

based employment, following the neoliberal ideas, the increased responsibility of the state and society in relation to the individual's responsibility, following the idea of the welfare state, shall be stressed. This increased responsibility covers that the state and the society should create the opportunity for persons with disabilities to work, and, if it is impossible, should ensure the firm subsistence and societal appreciation.

c. Care should be taken on the respect of the human dignity and sufficient quality of life and social inclusion of those persons with disabilities, *who are not able to provide their own subsistence through paid work*, and also cannot be enabled to do this either through occupational rehabilitation or through labour market equal opportunity arrangements.

(14) The involvement of persons with disabilities in employment is a *primary but not the only task* in order to promote their social inclusion, which can be a result of a multidimensional agenda. Therefore I very briefly listed *the areas other than employment*, on which legislative and other social activities are demanded to abolish the social segregation of persons with disabilities.

4.5. Chapter V. Abolishing the legal obstacles of access to and participation in employment: an appropriate regulation on legal capacity

(15) In Chapter V. I drew up and justified by means of primarily the academin literature the following two hypotheses:

a. Legal activity of persons with impaired mental capacity shall be assisted *primarily by means of supported decision-making*. However, *restriction of legal capacity* does not necessarily mean the diminishing of human dignity, thus, it may occur as an ultimate opportunity, flankered by appropriate guarantees.

b. The employee status requires two abilities: *legal capacity*, as capacity to make legal statements, and *working ability*, as fitness for performing a specific job. The legal regulation on these two abilities shall be shaped according to different principles respectively.

(16) With regard to the fact that the Labour Code[19] predominantly follows the Civil Code's[20] regulation on persons without full legal capacity, first of all *I analysed and assessed the Civil Code's relevant norms in the light of the above referred justified hypothesis*, as follows.

a. The Civil Code separates the concept of legal capacity from mental capacity. Restriction of legal capacity may take place in result of a *functional assessment*[21] of mental capacity, however the mental status is also assessed.[22]

b. In the system of the Civil Code, arrangements with *lesser restriction* of individual autonomy shall be applied prior to those with more restriction. However, it can be assessed as a failure of the regulation that neither the rules

[19] Act I of 2012 on the Labour Code
[20] Act V of 2013 on the Civil Code
[21] Functional tests are independent from specific diagnoses of mental health (mental status), and focus on the ability or the degree of disability of the individual's decision-making skills. (Glen 2012, 95-96; Dhanda 431-435).
[22] Civil Code § 2:9(1), § 2:19(2), § 2:21(2); BH. 2007/404., EBH 2007/1597., BH. 2008/265., BH. 2011.247.

on supported decision-making, nor on prior legal statement, nor on restricted legal capacity refer to the aim of *maximisation of individual autonomy*. I recommended that restriction of individual autonomy by means of substitute decision-making should not take place on the grounds of the "best interest" of the individual, but exclusively in two cases. On the one hand, if it is necessary to the possibly fullest expression of the individual's will and preferences according to the principles *'necessity' and 'proportionality'*. On the other hand, as far as the decision has an *impact on others*: if the interests of these other persons require it, according to the principles *'necessity' and 'proportionality' as well*.[23]

c. Restriction of legal capacity may only occur with *due regard to the individual's environment, family and community relationships*. This principle shall be applied in conjunction with the reasonable accommodation requirement, i.e. a greater degree of restriction is only acceptable if the lesser restriction is not sufficient even by reasonable accommodation of the environment.[24]

d. Restriction of legal capacity can concern only specific *branches of cases*. [25] It is only the right to vote that have to be examined in each case of judicial assessment of legal capacity. I recommended that the *judicial examination should be required* also as for the right to enter into an employment relationship or other relations aimed at employment or performing public service.

e. The Civil Code enshrines the *full restriction of legal capacity* (i.e. encompassing all branches of cases). The individual becomes so legally incapacitated, and the guardian is entitled to make legal statements on behalf of him/her, unlike in the case of partial restriction, in which the guardian has a co-decision-making power with the ward. It is unjustified to increase the degree of deprivation of autonomy unconditionally along with the broadening of the concerning branches of cases.[26]

(17) In the followings I analysed the relevant provisions of *labour law*, pointing out to some regulation gaps.

a. It is correct that the Labour Code follows the regulation of the Civil Code with regard to the legal statement making of persons without full legal capacity.[27] However, the Labour Code *does not make a general reference to the relevant norms of the Civil Code*, which results in several application problems.

b. I highlighted that the Labour Code's regulation on incapacitated workers or workers whose legal capacity has been partially limited having regard to employment[28] are based on *totally incorrect theoretical grounds*, since it does not distinguish between the categories of legal capacity and working ability. I recommended the cancellation of these rules. I called the attention to the

[23] Civil Code § 2:19, §§ 2:38-2:40
[24] Civil Code § 2:19(2), § 2:21(2)
[25] Civil Code § 2:19(2)-(5), § 2:21(2)-(3)
[26] Civil Code § 2:19(2), § 2:21(2)
[27] Labour Code § 21(4)-(5)
[28] Labour Code § 212

necessity of setting rules on tort liability of *nonpubishable persons*, following the relevant rules of the Civil Code as well.

c. I wrote about the linkages between the *employment relationship and the supported decision-making*. I recommended the introduction of the construct of *employment supporter.* Appointment of an employment supporter could be a step of reasonable accommodation by the employer. The establishment of the legal construct on the employment support would bring the Hungarian system of supported decision-making closer to the supporting network model, known from some other countries with advanced experiences of the support model.

d. I overviewed the rules of labour law on the legal capacity of *the employer or the person exercising the employer's powers*. I realized that the legislator supposedly did not consider the opportunity of persons with restricted legal capacity for being in the employer's role. I made suggestions to remedy this loophole as well.

4.6. Chapter VI. Participation in employment on an equal basis with others: equal treatment of persons with disabilities, with a special focus on reasonable accommodation

(18) Formal and substantial equality concepts are not excluding, concurrent, but supplementing principles.[29] I linked this idea to the requirement of the synthesis of the two paradigms, since the paradigms have immanent relations to the equality concepts. I highlighted that the dogmatic position of reasonable accommodation is determined by the synthesis of the two paradigms such as the two equality concepts. I underpinned my position to consider the omission of reasonable accommodation duty neither as a *sui generis* case of discriminatory conduct, nor as a sub-category of direct discrimination, but as a sub-category of indirect discrimination.[30]

(19) I explained the concepts of *accessibility* and *positive actions*, and their relationship with the category of reasonable accommodation.

(20) I examined in detail the regulation of the UN CRPD and the Framework Directive on reasonable accommodation, such as the relevant case law of the Court of Justice of the European Union (hereinafter: CJEU). Having compared all this and the conclusions referred under (18) and (19) with the relevant Hungarian norms, I delivered the following findings.

a. The omission of reasonable accommodation should be considered *as a sub-category of indirect discrimination.*

b. I underpinned that reasonable accommodation shall *not be considered as an action of favourable treatment* regulated by the section 11(2) of the ETA Act.

c. I outlined the possible consequences on the personal, material and temporal scope of the Hungarian regulation on reasonable accommodation, if the judicial practice of the Hungarian courts or the CJEU took the position that *the*

[29] Szajbély s.a.., 1

[30] See: the judgement of the Supreme Court of Canada: *Ontario Human Rights Commission and O'Malley v. Simpson-Sears* [1985] 2 S.C.R. 536; Stein 2014, 1054-1055; Bribosia – Rorive 2013, 5, 9, 39; Vickers 2006, 22-24; Lawson 2008, 154; Alidadi 2012, 693, 707.

principle of equality enshrined in the primary law of the EU could be referred as a legal ground for replacing lacking national law.

d. I urged to set up *explicit regulation on reasonable accommodation in the ETA Act* according to the requirements of international and EU guidelines.

(21) Finally I described the *potential sanctions* for omission of reasonable accommodation, such as sanctions for discriminatory conducts, financial sanctions, sanctions under slabour law, sanctions applicable by the labour authority.

5. My publications in the field of the research topic

5.1. Periodicals, study books, chapters in volumes

Halmos, Sz., *Esélyteremtés vagy önkény? – A fogyatékosság fogalma a magyar és a német jogban,* Fundamentum – Az emberi jogok folyóirata, 4/2007, 95-103

Halmos, Sz., *A munkajog akadálymentesítése,* in: OPUSCULA SZEGEDIENSIA, A Munkajogi és Szociális Jogi Doktoranduszok és Pályakezdő Oktatók második konferenciája. Pólay Elemér Alapítvány Könyvtára 25. Szegedi T. Egyetem ÁJK, Szeged, 2008

Halmos, Sz. – Gazsi A., *Esetjogi tanulmányfüzet - Az értelmi fogyatékos, halmozottan fogyatékos és autista emberek számára működtetett antidiszkriminációs jelzőrendszer tapasztalatai*, Kézenfogva Alapítvány, Budapest, 2008

Halmos, Sz., *Fizikai akadálymentesítés a munka világában,* Esély. Társadalom- és Szociálpolitikai Folyóirat, vol. 20, 2/2009, 17-45

Halmos, Sz. (szerk.)., *Esetjogi tanulmánykötet - Az értelmi fogyatékos, autista és halmozottan fogyatékos emberek számára működtetett 'Ne hagyd magad!' antidiszkriminációs jelzőrendszer tapasztalatai*, Kézenfogva Alapítvány, Budapest, 2009

Halmos, Sz., *Mit jelent a fizikai akadálymentesítés a munka világában?,* in: OPUSCULA SZEGEDIENSIA 3, A Munkajogi és Szociális Jogi Doktoranduszok és Pályakezdő Oktatók harmadik konferenciája. Pólay Elemér Alapítvány Könyvtára, Szegedi T. Egyetem ÁJK, Szeged, 2010

Halmos, Sz., *A fogyatékosság mint védett tulajdonság speciális vonásai,* in: OPUSCULA SZEGEDIENSIA 4, A Munkajogi és Szociális Jogi Doktoranduszok és Pályakezdő Oktatók negyedik konferenciája. Pólay Elemér Alapítvány Könyvtára. Szegedi T. Egyetem ÁJK, Szeged, 2011

Halmos, Sz. (szerk.), *Esetjogi tanulmánykötet – Az értelmi fogyatékos, autista és halmozottan fogyatékos emberek számára a Te Jogod Te Életed! című projekt keretében működtetett jogsegélyszolgálat tapasztalatai*, Kézenfogva Alapítvány, Budapest, 2013

Halmos, Sz., *Az ésszerű alkalmazkodás követelménye a magyar munkajogban*, Magyar Munkajog E-folyóirat, 1/2014, 120-148

Halmos, Sz., *Az ésszerű alkalmazkodás követelményére vonatkozó magyar munkajogi szabályok a nemzetközi és európai uniós jog tükrében*, 1st ranked work of the 'Mailáth György' Scientific Competition, National Office for Judiciary, National Academy of Justice, Budapest, 2015 (publication under process)

5.2. Praxis-oriented publications

Halmos, Sz., Aubel, E., Csányi, Zs., Vég, K., *A fogyatékos személyek foglalkoztatásának motiválása – javaslatok a jogszabályi környezet módosítására,* WATCHDOG jogvédelmi kiadvány, a Salva Vita Alapítvány, Budapest, 2008

Csányi, Zs., Halmos, Sz., Szabó, M., Jásper, É., Palkovics, R., Vég, K., Zalabai, P., *Vezető-sáv – a teljeskörű munkahelyi akadálymentesítéshez munkáltatók számára,* Salva Vita Alapítvány, Budapest, 2008

Halmos, Sz., Jónás, T., *Hogyan csináld? Jogsegély elsőkézből. [Jogi eszköztár autista emberek és családtagjaik speciális problémáinak kezeléséhez],* Autisták Országos Szövetsége, Budapest, 2010.

Halmos, Sz., *A rehabilitációs járadékról I-II.*, Munkaügyi Tanácsadó, 12/2010; 1/2011, 4-8

Halmos, Sz., *Az ésszerű alkalmazkodás kötelezettsége I-V.,* Munkaügyi Tanácsadó, 1/2013, 7-10; 2/2013, 9-11; 3/2013, 9-12; 4/2013, 3-9., 5/2014, 10-14

Halmos, Sz., *Egyenlő bánásmód követelménye a foglalkoztatás során – a vonatkozó szabályok és a gyakorlat, in: Munkaügyi ellenőrzés a gyakorlatban - Törvényi előírások, jogok, kötelezettségek, felkészülési segédletek munkáltatóknak;* Menedzser Praxis Szakkiadó és Gazdasági Tanácsadó Kft., 2011.

Halmos, Sz., *Újdonságok az Európai Unió Bíróságának antidiszkriminációs tárgyú ítéleteiből I-III.*, Munkaügyi Tanácsadó, 11/2013, 12-14; 12/2013, 9-11; 1/2014, 10-13

Halmos, Sz., *A közfoglalkoztatásról I-V.*, Munkaügyi Tanácsadó, 6/2013, 1-4; 7/2013, 2-4; 8/2013, 9-12; 10/2013, 12-13

6. Sources referred in this document

Definitions of Disability in Europe; Comparative analysis, a study executed by the University of Brunel, 2002 (2nd ed. (rev.), ELTE BGGYPK, Budapest, 2009) (cited as: „*Definitions of Disability 2002*")

Alidadi, K., *Reasonable Accommodation for Religion and Belief: Adding Value to Article 9 EHCR and the European Union's Anti-Discrimination Approach to Employment?*, European Law Review, vol. 37, 6/2012, 692-715, available: http://www.iuscommune.eu/html/prize/pdf/2013_Alidadi_2013.pdf; last visit: 30 November 2015

Bagenstos, S. R., *The Americans with Disabilities Act as Welfare Reform*, William & Mary Law Review vol. 44, 3/2003, 921-1030, available: http://scholarship.law.wm.edu/wmlr/vol44/iss3/3; last visit: 30 November 2015

Bribosia, E. – Rorive, I., *Reasonable accommodation beyond disability in Europe?*, European Network of Legal Experts in the non-discrimination field, 2013, available: http://www.equalitylaw.eu/search?searchword=bribosia%20rorive&searchphrase=all&areas[0]=documents_search; last visit: 30 November 2015

Degener, T. – Quinn, G.: *A Survey of International, Comparative and Regional Disability Law Reform*, DREDF, Washington DC, s.a.

Dhanda, A., *Legal Capacity int he Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future*, Syracuse Journal of International Law and Commerce, vol. 34, 2007, 429-462

Diller, M.**,** *Judicial Backlash, The ADA, and The Civil Rights Model*, Berkeley Journal of Employment and Labour Law, vol. 21, 1/2000, 19-52

Fineman, M. A., *The Vulnerable Subject: Anchoring Equality in the Human Condition*, Yale Journal of Law and Feminism, vol. 20, 1/2008, 1-23

Glen, K. B., *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond*, Columbia Human Rights Law Review, vol. 44., 2012, 93-168

Gurbai, S., *A gondnokság alá helyezett személyek választójoga a nemzetközi jog, az európai regionális jog és a komparatív közjog tükrében*, PhD-thesis, PPKE JÁK, Budapest, 2014

Hadi, N., *A fogyatékossággal élő személyek alapjogai*, PhD-thesis, PTE ÁJK, Kaposvár, 2013

Halmos, Sz. – Gazsi A., *Esetjogi tanulmányfüzet - Az értelmi fogyatékos, halmozottan fogyatékos és autista emberek számára működtetett antidiszkriminációs jelzőrendszer tapasztalatai,* Kézenfogva Alapítvány, Budapest, 2008

Halmos, Sz. (ed.)., *Esetjogi tanulmánykötet - Az értelmi fogyatékos, autista és halmozottan fogyatékos emberek számára működtetett 'Ne hagyd magad!' antidiszkriminációs jelzőrendszer tapasztalatai,* Kézenfogva Alapítvány, Budapest, 2009

Halmos, Sz. (ed.), *Esetjogi tanulmánykötet – Az értelmi fogyatékos, autista és halmozottan fogyatékos emberek számára a Te Jogod Te Életed! című projekt keretében működtetett jogsegélyszolgálat tapasztalatai,* Kézenfogva Alapítvány, Budapest, 2013

Halmos, Sz., *Az ésszerű alkalmazkodás követelménye a magyar munkajogban*, Magyar Munkajog E-folyóirat, 1/2014, 120-148

Hernádi, I. – Könczei, Gy. (eds.), *A felelet kérdései között – Fogyatékosságtudomány Magyarországon*, ELTE BGGYPK, Budapest, 2015; available: http://www.eltereader.hu/media/2015/07/A_felelet_kerdesei_kozott_READER1.pdf (last visit: 5 December 2015)

Jakab, N., *A cselekvőképesség elméleti háttere és munkajog kérdései; PhD-thesis*, Deák Ferenc Doctoral School of Law, University of Miskolc, 2011

Kálmán, Zs. – Könczei, Gy., *A Taigetosztól az esélyegyenlőségig*, Osiris, Budapest, 2002

Könczei, Gy., Heiszer, K., Hernádi, I., Horváth, P. L., Katona, V., Kunt, Zs., Sándor, A., *Kutatásetikai alapvetés a fogyatékosságtudományhoz*, in: Hernádi, I. – Könczei, Gy. (eds.), *A felelet kérdései között – Fogyatékosságtudomány Magyarországon*, ELTE BGGYPK, Budapest, 2015, 152-157; available: http://www.eltereader.hu/media/2015/07/A_felelet_kerdesei_kozott_READER1.pdf; last visit: 5 December 2015)

Lawson, A., *Disability and Discrimination in Britain – The Role of Reasonable Adjustment*, Oxford and Portland, Oregon, 2008

Mikola, O., *Túlsúly mint fogyatékosság – A Bíróság C-354/13. sz. ügyben hozott ítélete*, blog site of the Institute on Legal Researches of the MTA, 7 January 2015, available: http://jog.tk.mta.hu/blog/2015/01/fogyatekkalelok; last visit: 1 December 2015

Satz, A.: *Disability, Vulnerability, and The Limits Of Antidiscrimination*, Washington Law Review, vol. 83, 2009, 513-567; available: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331748; last visit: 1 December 2015

Stein, M. A. – Lord, J. E., *Future prospects for the United Nations Convention on the Rights of Persons with Disabilities*, in: Arnardóttir, O. M. – Quinn, G., *The United Nations Convention on the Rights of Persons with Disabilities. European and Scandinavian Perspectives*, Martinus Nijhoff Publishers, Leiden, 2009

Stein, A., *Angemessene Vorkehrungen am Arbeitsplatz – auch für Fragen der Religion und Weltanschauung?*, Neue Zeitschrift für Arbeitsrecht, 19/2014, 1053-1057

Szajbély, K., *A pozitív intézkedések fogalma és alkalmazásuk lehetősége a faji diszkrimináció elleni küzdelemben az Európai Unió tagállamaiban*, s.a., available: http://helsinki.hu/wp-content/uploads/Szajbely_pozitiv_intezkedesek.pdf; last visit: 1 December 2015

Terzi, L., *The Social Model of Disability: A Philosophical Critique*, Journal of Applied Philosophy, vol. 21, 2/2004, 141-157

Travis, M. A., *Impairment As Protected Status: A New Universality of Disability Rights*, Georgia Law Review, vol. 46, 2012, 937-1002

Tucker, B. P., *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, Ohio State Law Journal, vol. 62, 2001, 335-340

Vickers, L., *Religion and belief discrimination in employment – the EU law*, European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities, 2006, available: http://ec.europa.eu/social/BlobServlet?docId=2013&langId=en; last visit: 1 December 2015

Waddington, L., *Disability, Employment and the European Community*, Blackstone, London, 1995

Waddington, L., *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws*, Comparative Labour Law Journal vol. 62, 18/1996, 81-99

Waddington, L., *From Rome to Nice in Wheelchair – The Development of a European Disability Policy*, Europa Law Publishing, 2005

Waddington, L., *Breaking new ground: the implication of ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community*, in: Arnardóttir, O. M. – Quinn, G., *The United Nations Convention on the Rights of Persons with Disabilities. European and Scandinavian Perspectives*, Martinus Nijhoff Publishers, Leiden, 2009

Wendell, S., *Towards a feminist theory of disability*, in: Davis, L. J. (ed.), *The disability studies reader*, New York & London: Routledge, 1997, 260-278