

**THE CAPACITY OF ADULTS WITH INTELLECTUAL  
DISABILITIES –  
NEW PERSPECTIVES**

*Supported decision-making  
as  
the legal institution of inclusive private equality*

Theses of the Doctoral Dissertation

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## I. Introduction

In the field of Hungarian civil law, adults with intellectual disability manifest the domain of current Hungarian civil law concerning the issue of legal capacity, primarily through the institution of guardianship, which results in its restrictions. However, the institution of guardianship has faced operational anomalies worldwide for decades, and since the strengthening of international instruments for fundamental rights protection after World War II, it has failed to meet various requirements (Hoffman, 2009<sup>1</sup>; Hoffman & Könczei<sup>2</sup>).

Following Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe (adopted on 23 February 1999, concerning the protection of incapable adults, hereinafter referred to as Recommendation No. 4), significant modifications were implemented in the guardianship system affecting vulnerable adults through the 2001 XV Act amending Act IV of 1959 (hereinafter referred to as the old Civil Code). The 2001 legislative amendment promised progressive change and differentiated regulation, limiting the autonomy of the concerned individuals by guardianship institutions only to the extent and duration strictly necessary. The more “sophisticated” regulation of legal capacity through the so-called “categorization of cases” called for even more careful consideration of the rights of vulnerable adults by legal practitioners.

Recommendation No. 4 conveyed a comprehensive and cross-national shift in approach, emphasizing the realization of the rights of vulnerable adults and the development of the institution of guardianship based on the principles of gradualism and proportionality, while still essentially ensuring substitute decision-making across Europe since the turn of the millennium. Recommendation No. 4 aimed to steer the conceptual shift in the guardianship systems of Council of Europe member states toward a unified direction, albeit at varying speeds (Gurbai, 2015<sup>3</sup>).

Almost simultaneously, the aforementioned changes coincided with substantial negotiations involving governmental representatives, civil organizations, and individuals with disabilities. As a result, a legal development direction emerged, grounded in different ideological principles, prioritizing the rights of adults with intellectual disabilities. The breakthrough in restricting the legal capacity of these adults and the possibility of a significant shift in perspective were facilitated worldwide by the adoption and subsequent enforcement of the United Nations Convention on the Rights of Persons with Disabilities (hereinafter referred to as the CRPD)<sup>4</sup>, which entered into force on 3 May 2008.

Article 12 of the CRPD declares the “equal recognition before the law of persons with disabilities”, i.e. the legal capacity of persons with disabilities to act and enjoy rights on an equal basis with others in all areas of life<sup>5</sup>, which is also the central provision of this

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<sup>1</sup> Hoffman István (2009): Pszichoszociális fogyatékossgal élő személyek jogképességének és cselekvőképességének jogi szabályozása, in: *Fogyatékossg és Társadalom, A fogyatékossgtudomány és a gyógypedagógia folyóirata*, 2009. 3-4., ELTE Bárczi Gusztáv Gyógypedagógiai Kar, ELTE Eötvös Kiadó. 2009.

<sup>2</sup> Hoffman, István; Könczei, György. (2010) Legal Regulations Relating to the Passive and Active Legal Capacity for Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code, *Loyola of Los Angeles International and Comparative Law Review*, Vol. 33. 2010/1. <https://digitalcommons.lmu.edu/ilr/vol33/iss1/5/>

<sup>3</sup> Gurbai Sándor: A gondnokság alá helyezett személyek választójoga a nemzetközi jog, az európai regionális jog és a komparatív közjog tükrében, Doktori értekezés, Pázmány Péter Katolikus Egyetem, Jog- és Államtudományi Doktori Iskola, Budapest, 2015. pp. 64-65.

<sup>4</sup> The Convention on the Rights of Persons with Disabilities was adopted on 13 December 2006 by the United Nations General Assembly at its 61st session by resolution [A/RES/61/106](#). The document was opened for signature by States Parties and regional organisations wishing to accede to it from 30 March 2007.

<sup>5</sup> Cf.: CRPD Article 12(2).

international convention. (Jakab, 2009<sup>6</sup>) This article is of particular importance, as it regards the capacity to act as a fundamental right of persons with disabilities, a kind of “gatekeeper” right<sup>7</sup>, given that the decision-making capacity it provides is a precondition for the exercise of all other civil and political freedoms listed in the international convention on an equal basis with others. Thus, the concept of “legal capacity”<sup>8</sup> in Article 12 of the CRPD, following Hoffman (2009), signifies a kind of “rights-assertive”<sup>9</sup> legal capacity and serves as an expression of the concerned individual’s autonomy, based on human dignity. The introduction of legal capacity as a right equally afforded to persons with disabilities has led many scholarly sources to refer to the CRPD as a paradigm-shifting<sup>10</sup> convention, with Article 12 being divisive among researchers regarding the further applicability of the guardianship institution.

Regarding Article 12 of the CRPD, aside from the interpretation discrepancies related to guardianship, it can be said, that its paragraph 3 calls for calls the participating states to take measures to ensure “the availability of assistance necessary” to exercise legal capacity.

The impact of Article 12 of the CRPD led to what Jakab (2009) refers as “the onset of the second wave of reforms”<sup>11</sup> in the regulation of legal capacity. As a result, legislators have three paths to choose from:

- i) “one possible path is the complete abolition of the guardianship system and the establishment of a supported decision-making model;
- ii) the other path involves the transformation of the guardianship in the spirit of Article 12;
- iii) the third path entails the coexistence of supported decision-making and incapacitating guardianship.”<sup>12</sup>

Currently, the directions marked as the second and third are the most prevalent among the possible paths outlined above. This means that in the majority of states that have signed the CRPD, legislative steps are being taken not only towards the codification of supported decision-making or other supportive measures, but also towards the guardianship as a substitute decision-making institution, which is also undergoing changes and is evolving towards the fuller protection of the rights of the individuals concerned.

This twin-track approach, or as Landi (2021) puts it, a “duel-like”<sup>13</sup> legal development is observable both in legislative and judicial domains.

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<sup>6</sup> Jakab Nóra: A gondnokság mint fogyatékoságpolitika, avagy Maschke másképp, in.: *Fogyatékoság és Társadalom*, 2009/3-4. ELTE Bárczi Gusztáv Gyógypedagógiai Kar, ELTE Eötvös Kiadó, 2009.

<sup>7</sup> Charles O' Mahony and Aisling de Paor: Implementation of Article 12 of the UN Convention on the Right of Persons with Disabilities in Ireland in Maciej Domanski and Boguslaw Lackoronski eds *Models of Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) Private and Criminal Law Aspects*, Routledge, London, New York, 2024 pp. 301, 311.

<sup>8</sup> The concept of legal capacity is "a concept of common law jurisdictions with a procedural approach, where capacity essentially means the right to bring a legal action." in István Hoffman (2009). in István Hoffman (2009): The legal regulation of the legal capacity and capacity to act of persons with psychosocial disabilities, in *Disability and Society, Journal of Disability Studies and Special Education*, 2009. 3-4, pp. 252.

<sup>9</sup> The situation ensuring the enforceability of entitlements is referred to in English legal terminology as "legal capacity", which is most comparable to the concept of procedural capacity in continental legal systems in Hoffman István (2009): The legal regulation of the legal capacity and capacity to act of persons with psychosocial disabilities, in *Disability and Society, Journal of Disability Studies and Special Education*, 2009. 3-4., ELTE Bárczi Gusztáv Faculty of Special Education, ELTE Eötvös Publishers, pp. 246. Legal capacity is broader than civil legal capacity, for example in guardianship proceedings a person with limited legal capacity also has full legal capacity. In Németh, J. 1999. ed. *Introduction to Civil Civil Procedure, Civil Procedure Law, Volume I, Part I, Section I, Part II*.

<sup>10</sup> A search on Google Scholar for the words CRPD and paradigm shift yielded almost 5,000 results up to 4 December 2022 in Alex Ruck Keene, Nuala B. Kane, Scott Y.H. Kim, Gareth S. Owen: Mental capacity - why look for a paradigm shift? *Medical Law Review*, 2023. 31. No. 3. pp. 356. Oxford University Press, 2023. <https://doi.org/10.1093/medlaw/fwac052>

<sup>11</sup> Nóra Jakab (2009): The guardianship as a disability policy, or Maschke in another way, in *Disability and Society*, 2009/3-4. ELTE Bárczi Gusztáv Faculty of Special Education, ELTE Eötvös Kiadó, 2009. pp. 296.

<sup>12</sup> *Ibid.* p. 296.

<sup>13</sup> Landi draws parallels with the „cyclical changes” of the independent pledge within the Civil Code and the civil liability of health care providers outside the Civil Code from the recent history of Hungarian private law. In Balázs Landi. *Property protection and the enforcement of human dignity and proportionality in the field of capacity to act.* *Law Journal*, 2021/2. pp. 85-92.

The aforementioned “dual approach” to legal development is supported by another influential source of international law, the Convention on the International Protection of Adults, signed in The Hague in 2000, and also other non-binding instruments aimed at modernising guardianship, which are also widely supported by CRPD member states, and which also address supported self-regulated decision-making (such as the Yokohama Declaration and the 2017 Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act in the United States).

In summary of the above, it can be said, that due to the shift in perspective induced by the CRPD and the aforementioned “soft legal instruments”<sup>14</sup>, changes can be observed in the realm of the legal capacity of vulnerable adults and its potential limitation that go beyond the binary approach. Advocates from different institutional “circles”<sup>15</sup> with varying perspectives and operational dynamics address the issue of legal capacity of affected adult individuals from different standpoints. As a result of this dual approach, we currently witness a spectrum of practices worldwide, ranging from complete restriction of legal capacity at one end to the possibility of providing maximum support for individuals with high support needs<sup>16</sup> without restricting their legal capacity at the other end (Sándor, 2018).

The trajectory of development mentioned above promised another change, a turning point, in 2014. The UN Committee on the Rights of Persons with Disabilities sought to resolve the divergence regarding the interpretation of Article 12 of the CRPD, which pertains to the institution of guardianship, through its General Comment No. 1 (2014, hereinafter: the Committee’s General Comment No. 1.)<sup>17</sup>. The Committee laid out a detailed argumentation to affirm why guardianship (substitute decision-making) is excluded from the interpretation of the UN Convention.

However, as emphasized by Halmos (2019), the General Comment No. 1 of the Committee is “not legally binding regarding the interpretation of the provisions of the Convention”<sup>18</sup>, therefore, it still does not suffice as a legal and professional declaration to unequivocally impose on member states the obligation to replace the institution of guardianship and bring about a genuine paradigm shift in ensuring the right to legal capacity according to the Kuhn terminology<sup>19</sup>. Periodic country reports submitted by states under Article 35(2) of the CRPD and scholarly publications also indicate that guardianship and supported decision-making are mostly evolving in parallel.

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<sup>14</sup> It is noteworthy that Trubek et al.<sup>14</sup> (2005), although in the context of the functioning of social Europe, describe a so-called “hybrid” constellation of the interaction of soft law and hard law, in which both systems of instruments work together in the same field. in David M. Trubek and Louise G. Trubek: *Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination*, May 2005, *European Law Journal* Vol. 11. No. 3. [https://media.law.wisc.edu/m/ndjkz/pub\\_hardandsoftlaw\\_2005.pdf](https://media.law.wisc.edu/m/ndjkz/pub_hardandsoftlaw_2005.pdf) This is comparable to the disability field of soft law worldwide (soft law includes, for example, Recommendation No. 4 and the Yokohama Declaration).

<sup>15</sup> On the one hand, I refer to guardianship-type institutions (with substitute decision-making), and on the other hand, to models and procedures supporting the exercise of capacity, which is why I refer to them as a “circle” of legal institutions.

<sup>16</sup> Cf. the definition of severely to profoundly disabled persons (referred to as “hard cases” in the international literature), whose support needs are prioritised in the definition of persons with high support needs by Sándor (2018). Anikó Sándor. [https://edit.elte.hu/xmlui/bitstream/handle/10831/62071/sandor\\_aniko\\_disszertacio.pdf?sequence=1](https://edit.elte.hu/xmlui/bitstream/handle/10831/62071/sandor_aniko_disszertacio.pdf?sequence=1) Also Anikó Sándor, “They should be treated as if they were real adults...”. Opportunities and constraints for self-determination of people with high support needs, *Chance* 2017/2/2. [https://www.esely.org/kiadvanyok/2017\\_2/Esely\\_2017-2.pdf](https://www.esely.org/kiadvanyok/2017_2/Esely_2017-2.pdf)

<sup>17</sup> General Comment 1 (2014) Article 12: Equal recognition before the law (19 May 2014) CRPD/C/GC/1, 19 May 2014. <https://documents.un.org/doc/undoc/gen/g14/031/20/pdf/g1403120.pdf?token=6x6rgN814qROosEZ0z&fe=true>.

<sup>18</sup> Szilvia Halmos: *Supported Living and Supported Decision-Making - Possibilities for Consistent Implementation of Articles 12 and 19 of the CRPD in Hungary*, Pázmány Law Working Papers, 2019/3. Pázmány Péter Catholic University Pázmány Péter Catholic University Budapest. <https://plwp.eu/files/2019-03Halmos.pdf>

<sup>19</sup> Alex Ruck Keene, Nuala B. Kane, Scott Y.H. Kim, Gareth S. Owen: *Mental capacity - why look for a paradigm shift?* *Medical Law Review*, 2023. Vol. 2023. 31. No. 3. pp. 356. Oxford University Press, 2023. <https://doi.org/10.1093/medlaw/fwac052>

The implementation of Article 12 of the CRPD, contrary to what is stated in paragraph 30<sup>20</sup> of General Comment No. 1 of the Committee, is at the very least not immediate, and will result in the partial implementation of supportive legal institutions and principles supporting the exercise of legal capacity, which further perpetuates the existence of guardianship and similar institutions worldwide (Then et al., 2018)<sup>21</sup>. Thus, due to the aforementioned twin-tack approach, we can observe various connections, patterns, and divergent developmental trends in the relationship between legal capacity-related issues (guardianship) and supportive legal institutions in CRPD member states.

The past 20-25 years have been particularly sensitive and eventful in terms of the realisation of the rights of adults with disabilities and have been a defining period in the evolution of the concept of legal capacity worldwide, especially in countries with continental legal systems.

The interpretation of Article 12 of the CRPD, clarified in General Comment No. 1 of the Committee, is closely related to the concept of “inclusive equality,” which is discussed in the Comprehensive Comment No. 6<sup>22</sup> of the Committee published on April 26, 2018, under the title “Equality and non-discrimination.” This concept of substantive (inclusive) equality and its relevance to the dissertation can be emphasized as follows:

- i) the dimension of fair overcoming of social and economic disadvantages;
- ii) the dimension of combating stigma, stereotypes, and prejudice, as well as recognizing human dignity at the intersection of the aforementioned;
- iii) the dimension of “participation,” strengthening the social nature of human beings by promoting inclusion in various communities and full recognition as members of society;
- iv) the dimension of “accommodations”<sup>23</sup>, recognizing differences.

The concept of inclusive equality enriches the framework of critical approaches to guardianship or guardianship-type legal institutions and encourages legislators to move towards supportive legal frameworks for exercising legal capacity.

## II. Description of the research task, problem definition

On July 20, 2007, Hungary ratified the CRPD without reservations or explanatory statements, making it a legally binding source of law<sup>24</sup> in Hungary.

The provision of “accessible assistance” for the exercise of legal capacity declared in Article 12(3) of the CRPD, is established in Hungarian law by Section 2:38 of Act V of 2013 on the Civil Code (hereinafter referred to as the Civil Code), and Act CLV of 2013 on Supported Decision-Making (hereinafter referred to as the SDM Act).<sup>25</sup>

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<sup>20</sup> General Comment No. 1. (2014) Article 12: Equal recognition before the law (19 May 2014) CRPD/C/GC/1, 19 May 2014 [30.] <https://documents.un.org/doc/undoc/gen/g14/031/20/pdf/g1403120.pdf?token=6x6rgN814qROosEZ0z&fe=true>

<sup>21</sup> For a description of the concept, see section VI.3. of the dissertation Then, Shih-Ning, - Carney, Terry - Bigby, Christine - Douglas, Jacinta: Supporting decision-making of adults with cognitive disabilities: the role of Law Reform Agencies - Recommendations, rationales and influence International Journal of Law and Psychiatry, 61 (2018) pp. 64-75. in Maléth Anett: Coexistence of systems instead of paradigm shifts. Perlusz Andrea, Cserti-Szauer Csilla and Sándor Anikó (2021) People with disabilities in 21st century Hungarian society. Study book in honour of Csaba Bánfalvy pp. 120-130.

[https://edit.elte.hu/xmlui/bitstream/handle/10831/54881/Fogyat%C3%A9kos\\_szem%C3%A9lyek\\_a\\_21.\\_sz%C3%A1zadi\\_magyar\\_t%C3%A1rsadalomban\\_A.pdf?sequence=1](https://edit.elte.hu/xmlui/bitstream/handle/10831/54881/Fogyat%C3%A9kos_szem%C3%A9lyek_a_21._sz%C3%A1zadi_magyar_t%C3%A1rsadalomban_A.pdf?sequence=1)

<sup>22</sup> Commentary published on 26 April 2018, point III.11

<https://documents.un.org/doc/undoc/gen/g18/119/05/pdf/g1811905.pdf?token=4H8E2dBTgC7R25Zsxy&fe=true>

<sup>23</sup> Cf. CRPD Article 2 Definitions

<sup>24</sup> Act XCII of 2007 on the proclamation of the Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto <https://net.jogtar.hu/jogszabaly?docid=a0700092.tv>

<sup>25</sup> The entry into force of Act CLV of 2013 on assisted decision-making was phased in from 1 January 2014

<https://net.jogtar.hu/jogszabaly?docid=a1300155.tv>

Alongside supported decision-making, like in many other countries, Hungary maintains the institution of guardianship, which continues to play a decisive role in limiting the legal capacity of affected individuals within the Hungarian Civil Code. The two legal institutions concerning the legal capacity of adults are sequentially regulated in the Second Book, titled “The Human as a Legal Entity”, and the Second Part, titled “On Legal Capacity” on the Hungarian Civil Code. It is worth noting, however, that some authors dispute the symbolic representation<sup>26</sup> of the institution of “Supported decision-making not affecting legal capacity” under Title IX of the Civil Code, questioning its codex-level declaration for providing access to legal capacity support for affected individuals as stipulated in Sections 2:38(1)-(2) of the Civil Code.

In the shadow of provisions concerning guardianship, it can be observed, based on the statistical data for 2022<sup>27</sup>, that supported decision-making remains a nearly unviable legal institution in Hungary. While as of December 31, 2022, 56,790 individuals<sup>28</sup> were under guardianship with limited legal capacity, only 257 individuals<sup>29</sup> were appointed with support for decision-making. The statistical data representing this small circle of individuals receiving support may be explained by the fact that over the past decade, the institution of supported decision-making, which originates primarily from Anglo-Saxon roots, has become known and accessible only within a very narrow horizon.

Nevertheless, it can be said that while formally meeting the international obligation stipulated in Article 12 of the CRPD, Hungarian legislators have made supported decision-making available in the Civil Code and the SDM Act, albeit somewhat belatedly, however, in practice, the existence and operation of this legal institution are not significant. Several reasons may lie behind the “lifelessness” of the institution of supported decision-making in Hungary.

Therefore, it is timely to evaluate the regulation of guardianship vs. supported decision-making over the past 15-25 years, especially considering the tendencies in Hungarian legislation and the possibilities for legal development.

The author of the doctoral thesis analyses the current Hungarian civil law regulations from both theoretical and practical perspectives, considering relevant statistics and guardianship litigation.

The author assumes that

- i) in Hungary, significantly fewer people can benefit from the possibility of exercising legal capacity with support compared to neighbouring European countries, indicating that guardianship remains a predominant institution in Hungary even after the adoption of the CRPD;
- ii) possible reasons behind this situation may include partly the restrictive definition of access conditions to the institution as declared in Sections 2:38 (1) and (2) of the Civil Code and
- iii) the problematic nature of the “dual system’s approach” due to the partial implementation of Article 12 of the CRPD.

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<sup>26</sup> Interview with Judge Katalin Makai (by Ágnes Sáriné Simkó, 2 September 2013) <https://ptk2013.hu/interjuk/az-uj-ptk-cselekvokessegre-vonatkozozabalyairol-interju-makai-katalin-kuriai-biroval/2470>

<sup>27</sup> In Hungary, 257 people were in receipt of supported decision-making on 31 December 2022. In: Number of people in receipt of supported decision-making on 31 December 2015-2022, according to the tabular data set of 27 October 2023 compiled by the Hungarian Central Statistical Office ([www.ksh.hu](http://www.ksh.hu)) on “Guardianship and supported decision-making”, upon specific request.

<sup>28</sup> In 2022, we can see that 56,790 people were living under guardianship in Hungary (the data comes from the tabular data set of 27 October 2023 compiled by the Central Statistical Office ([www.ksh.hu](http://www.ksh.hu)) on “Guardianship and supported decision-making”, upon specific request

<sup>29</sup> In Hungary, 257 people were in receipt of supported decision-making on 31 December 2022. In: Number of people in receipt of supported decision-making on 31 December 2015-2022, according to the tabular data set of 27 October 2023 compiled by the Hungarian Central Statistical Office ([www.ksh.hu](http://www.ksh.hu)) on “Guardianship and supported decision-making”, upon specific request.



The dissertation also aims to examine our decade-old legal institution of supported decision-making through the lens of regulatory directions, implementation solutions, and possibly legislative dilemmas of other states, and to consider where our regulation stands today in relation to international reform waves.

For the assessment of the situation, the author fundamentally examines the (innovative) approaches and legal development trends embodied in the written law – both substantive and somewhat procedural – of the states parties, with particular attention to supported decision-making and, within the framework of guardianship, to the facilitative type of self-directed or autonomous decision-making support.<sup>30</sup>

Accordingly, from the perspective of the domestic situation assessment and further exploration of access to supported decision-making, the question arises from an international approach as to how and with what intensity the regulation ensuring the exercise of legal capacity for vulnerable adults has developed in certain states parties to the CRPD over the past 20-25 years.

The author of the dissertation also seeks to answer whether there currently exists a regulation that best aligns with Article 12 of the CRPD – ensuring the exercise of legal capacity on an equal basis with others, thus providing accessible support to all concerned.

During the doctoral research, it was raised how the supportive legal regulation of the exercise of legal capacity has changed over the past 20-25 years in the CRPD-ratifying states parties, systematically examined through certain groups of European countries: how the provision of “access” to supportive models, including supported decision-making, operates at the level of regulation. In this context, the systematic examination of regulatory trends of states parties to the CRPD belonging to the following European country groups was carried out:

- i) Hungarian private law regulation has been significantly influenced for centuries by the legislation of neighbouring Austria<sup>31</sup> and Germany, as well as Switzerland, which partly stems from a common historical past and partly from Roman law roots. Consequently, the states discussed in this circle (Austria, Germany, and Switzerland) traditionally had “strong” guardianship systems, and thus substitute decision-making was a characteristic feature of their regulation, similar to that of our country. It is assumed that, due to these precedents, the regulations of these states were less able to comprehensively implement the supportive solutions ensuring the exercise of legal capacity stipulated in Article 12 of the CRPD compared to other European countries.
- ii) I examined the regulations supporting or restricting the exercise of legal capacity of some Eastern European CRPD states parties (Czech Republic, Estonia, Poland), as I assume that these countries’ shared post-socialist past with our country, and therefore their paternalistic regulatory approach and characteristically large-scale, residential institution-based social care system, results in similar difficulties in implementing Article 12 of the CRPD.
- iii) The institution of supported decision-making fundamentally serves the social participation (inclusive equality) of vulnerable persons, and inclusion, according to the classification describing the basic character (ideal types) of disability policies of individual European states defined by Maschke (2010), typically occurs in countries

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<sup>30</sup> My research methodology is presented in Annex 1 of this dissertation, based on the Comparison of legal systems in access to justice for persons with intellectual disabilities in the following countries: Bulgaria, Finland, France, Hungary, Ireland, (March 2015). Co-funded by the Civil Justice Programme of the European Union, and its table, of which the author was a participant as a delegate of the Kézenfogva Foundation in 2015.

<sup>31</sup> Krisztina Izsó: The Protection of the Incapacitated - A Comparative Analysis of French, Austrian and Hungarian Law, State and Law 2021. (2) (Austria) pp. 32.



pursuing participation-oriented disability policies. Consequently, the author assumes that in European states pursuing participation-oriented disability policies that have ratified the CRPD, the support for the exercise of legal capacity and supportive models is more likely to approach the full legal framework level of implementation of Article 12 of the CRPD (Then et al., 2018).

- i) Considering that the exclusion of the institution of guardianship was clarified by the CRPD Committee's General Comment No. 1 in 2014, it is assumed by the author that states ratifying the CRPD after this date were more consciously able to move towards building legal institutions supporting the exercise of legal capacity.
- ii) Considering that the exclusion of the institution of guardianship was clarified by the CRPD Committee's General Comment No. 1 in 2014, states ratifying the CRPD after that date, the author assumes, could move more consciously towards building legal institutions supporting capacity.

### **III. Description of research methods**

The exercise of legal capacity by individuals with intellectual (or broader: cognitive) disabilities can be viewed from various perspectives, based on the historical evolution of the concept of disability.

The fundamental perspective of the dissertation's author, in investigating access to institutions supporting the exercise of legal capacity for individuals with intellectual disabilities, is determined by the human rights approach stemming from the CRPD.

Starting from the principle of human dignity, autonomy, and the principle of self-determination entitled to adults, the dissertation focuses on the state-level implementation of the provision contained in Article 12(3) of the CRPD. In this regard, the dissertation tracks the last 20-25-year trend of legal changes related to institutions supporting the exercise of legal capacity for the relevant group of individuals.

The dissertation first presents the interconnection between the phenomenon of disability and the law through the CRPD, followed by a multi-layered presentation of the convention's provision represented by Article 12. Subsequently, the dissertation delves into the interpretation of the "legal capacity" concept in Article 12 of the CRPD, the critical approach to restricting legal capacity, and outlines the ideal-typical model and key elements of decision-making included in the concept of legal capacity, based on the study by Bach and Kerzner (2010).

The implementation of Article 12 by states that have ratified the CRPD, an international human rights treaty, was initially examined by the author based on governmental and civil organizational documents submitted to the CRPD Committee under Articles 35(1) and 35(2) of the CRPD, as well as relevant literature and available statistical data. Subsequently, the author narrowed down the research perspective to focus on the principles of recognition and the examination of partial implementation solutions based on the findings of Then et al. (2018) regarding the implementation stages of Article 12 of the CRPD. The individual state investigations, concerning access to support, revealed that, in the case of partial implementation maintaining the institution of guardianship, particular attention should be paid to examining the connection between the two alternative legal institutions. Drawing on Phillips' (2020) research on the accessibility criteria and the nature of the relevant individual group, substantial conclusions can be drawn regarding the policy intent to what extent, both *de iure* and *de facto*, the supportive paradigm tends towards inclusivity.

Following this, the author narrowed down their investigations to European states based on different criteria, analysing the legal development trends induced by Article 12 of the CRPD. All these investigations were conducted using an analytical methodology based on the criteria framework documented in Appendix 1 of the dissertation. The findings regarding the legal development trends of the selected European countries are presented in Appendices 2-5, with tables in the Annex facilitating easier overview and comparison.

The focus of the research, given the partial domestic implementation of Article 12 of the CRPD, lies in examining the accessibility of supported decision-making as a new legal institution, aiming to uncover the associated challenges and opportunities.

In addressing the issue of ensuring access to institutions supporting the exercise of legal capacity, the author directs attention to Phillips' (2020) study, partially using it as a framework to approach the relevant provisions of the Hungarian Civil Code, Sections 2:38(1)-(2), which serve as the core theme of the dissertation.

The dissertation, the primary subject of the research, the provisions of the Civil Code § 2:38 (1)-(2)

- i) from a practical standpoint – through statistical analysis and examination of the Summary Opinions of the Curia's Legal Practice Analysis Group (2023), as well as analysis of guardianship cases conducted within the framework of the "Research on the Legal Capacity of Adults" led by Hoffman (2019-2023) (2021);
- ii) from an international perspective – considering the legal development trends of various European CRPD State Parties;
- iii) through theoretical analysis by systematically studying domestic and international literature.

#### **IV. Summary of the scientific results of the thesis**

1. The legal capacity of adults with intellectual disabilities, currently expressed in the form of either substituted decision-making or supported decision-making, stands at the intersection of civil law, disability policy, and the sciences dealing with mental health law. Due to the lack of a unified conceptual framework and definitions, it is challenging to draw reliable scientific conclusions regarding the assessment of trends in regulation across countries.
2. Over the past 20-25 years, regulatory changes pointing towards less restrictive institution(s) can be identified in accordance with the goals declared in the referenced international documents. At a conceptual level, developmental trends aimed at supporting the exercise of legal capacity can be observed among the states examined by the author.
3. Despite the entry into force of the CRPD as a binding international treaty for the States Parties in 2008, there is no identifiable regulatory convergence among the countries examined, let alone resulting in legal harmonization.
4. Nevertheless, it can be noted that there has been a shift in legislative thinking regarding the legal capacity of adults with intellectual disabilities over the past few decades, particularly in deeply entrenched legal cultures focusing on limiting legal capacity. This shift of approach has sometimes resulted in structural transformations and, in many cases, an increasingly segmented regulation of legal capacity according to legal areas and thus to an increasingly less restrictive character, which has

accelerated since 2008 thanks to the international legal instruments listed in the introduction, but especially the CRPD.<sup>32</sup>

5. Research analysing literature and country reports of States Parties has confirmed that a significant portion of European countries falls into the theoretically supportive model or partial implementation category according to the classification system of Then et al. (2018), as discussed in the dissertation. This means that a complete paradigm shift as outlined in Article 12 of the CRPD has not been identified. In all examined states' regulations – albeit to a significant extent – the possibility of limiting legal capacity/decision-making capacity through substituted decision-making institutions persists, albeit not in a universal manner.
6. Examination of the internal legal regulations of selected European country groups, as highlighted in the dissertation, along with individual states' trends over the past 20-25 years, reflects a shift towards a more nuanced approach to legal capacity. This approach aligns with supporting decision-making principles and adapts regulatory directions to the type of decision-making, with several countries addressing the determination of decision-making statuses and the declaration of criteria necessary to achieve them. The concept of support is interpreted more broadly in some countries. Frameworks that provide regulations closer to the support paradigm are more flexible, facilitating easier transitions between decision-making statuses, thus better accommodating the support needs of individuals involved.
7. States striving towards the support paradigm initiate and introduce terminological changes alongside substantive legal regulation amendments.
8. Procedural changes also occur in parallel with substantive legal regulation amendments.
9. In the framework of legal capacity reforms, the states under review have implemented their changes with fundamentally different codification approaches. In certain states, regulations aimed at supported decision-making are an integral part of their civil codes, meaning that changes were executed through the revision and amendment of their civil law codes, while other states have introduced supplementary, specific legislation that operates in a subsidiary capacity within the legal system, thus reflecting the principle of *lex specialis derogat legi generali*. However, in some cases – arguably, in my view – legislation specifically targeting disability matters has been employed; and lastly, in certain federal systems, the role of judicial lawmaking should be mentioned.

Following the analyses of Then et al. (2018), the Hungarian legislator adopted a position in favour of the partial implementation of Article 12 of the CRPD by introducing the institution of supported decision-making alongside guardianship in the Civil Code. The obligation to implement the provisions of Article 12 of the CRPD regarding civil-political rights is immediate, especially since Hungary did not attach any explanations or reservations to the convention indicating the intention to continue applying guardianship, which restricts legal capacity either fully or partially.

Regarding the main characteristics of the partial implementation of supported decision-making in the Hungarian Civil Code, the following can be noted:

- i)* The current Hungarian regulatory framework concerning the limitation of legal capacity of adults adheres to principles of necessity, proportionality, subsidiarity,

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<sup>32</sup> General entry into force of the CRPD under Article 45(1): 3 May 2008.

and ideally follows the “ultima ratio” principle in the interpretation of guardianship for limiting legal capacity at the level of commentaries<sup>33</sup> on the Civil Code. However, concerning domestic legal institutions not affecting the legal capacity of adults – including supported decision-making and advance directives (Civil Code Section 2:39) – the principles of proportionality, necessity, and subsidiarity in the regulation, and thus, in the case law, are not reflected [relating to the capacity of adults to act].

- ii)* Despite the Hungarian civil law regulation being categorized as partial implementation level in terms of introducing the institution of supported decision-making into domestic law, placing it in the category of states with regulations moving towards the supportive paradigm conceptually<sup>34</sup>, as per Then et al. (2018), statistical data on the subject and analysis of guardianship cases indicate that supported decision-making is hardly considered as an alternative to guardianship in judicial practice. Guardianship remains overwhelmingly prevalent in our legislation and consequently in its application.
- iii)* Therefore, partly due to the logic of the regulation [concerning adults’ legal capacity], and thus the (dis)position<sup>35</sup> of the provision of the Code (Civil Code 2:38 (1)-(2)), which is “indicatively” mentioned and which regulates the accessibility of the legal instrument, and which has been criticised by several authors, can be partly responsible for this. The position of supported decision-making institution not affecting the legal capacity of adults within the Civil Code results in an “upside-down” basic legal system, especially in terms of proportionality, necessity, and ultima ratio, leading to erroneous regulation and subsequently affecting judicial practice (also).
- iv)* It is evident from the analysis of guardianship cases, particularly from the examination by the Curia’s Legal Practice Analysing Group, that the primary focus during civil litigation concerning guardianship placements is on the criteria outlined in Civil Code Section 2:19 (2), (considering the decrease in discernment, along with understanding the individual circumstances and family and social relationships of the defendant). This is supplemented by Civil Code Section 2:19 (4), stating that “partial limitation of legal capacity is not possible if the protection of the individual’s rights can be ensured in other ways not affecting legal capacity.” Consequently, the Civil Code amended in 2001 follows the basic principles influencing the system, treating supported decision-making and advance directives as separate, independent legal institutions from guardianship. This reflects the reluctance of the legislator to effectively implement these legal institutions into domestic law, resulting not in the creation of a framework supporting the legal capacity of adults but rather in the preservation of a system restricting the legal capacity of adults.

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<sup>33</sup> András Osztoivits (ed.): Act V of 2013 on the Civil Code and a major commentary on related legislation. Opten Informatikai Kft., Budapest, 2014.

<sup>34</sup> Given that the institution of assisted decision-making has been introduced into the Hungarian legal system.

<sup>35</sup> Cf.: In this respect, the Czech Civil Code is noteworthy and ahead of the Hungarian Civil Code, and see the criticisms directed at it: Anett Maléth: The social inclusion of persons with intellectual disabilities - Thoughts and proposals on the Hungarian rules concerning the restriction of the capacity to act, *Családi Jog, HVG Orac*, Vol. XVI, 2018/1; Anikó Kussinszky - Ágnes Lux - Péter Stanicz: The latest findings of the UN Committee on the Rights of Persons with Disabilities with regard to Hungary: main conclusions of the special report, *Családi Jog*, 2020/3. <https://szakcikkadatbazis.hu/doc/4556383>

- v) The separate treatment of the provisions in Civil Code Section 2:38 (1)-(2) ensuring access to the supported decision-making institution would not be problematic in itself, as the principles, objectives, and purpose of this institution fundamentally differ from those of guardianship. However, it represents a unambiguous and dogmatically clear legislative intent: if the legislator would substantively separate “Supported Decision-making Not Affecting Legal Capacity” according to Title IX of the Civil Code from regulations governing legal capacity limitation and those regulating access to supported decision-making into a separate law in a subsidiary manner, then there would be no need to apply the concept of decreased discernment, which is foreign to the supportive paradigm.
- vi) However, the legislative intent is ambivalent in the current legislation: supported decision-making is separated from guardianship regulation along the principles – i.e. it is not integrated into the hierarchy of gradualism as described above –, but by applying the concept of “becoming common”, which is the criterion of accessibility of both institutions, it nevertheless combines supported decision-making with the guardianship, which limits the capacity to act, in one system, thus the framework limiting the capacity to act “captures” supported decision making.
- vii) According to my research in international and domestic literature, the concept of discernment applied globally<sup>36</sup> poses multi-level problem sources: a) it presents a challenge, as it “connects” the two alternative legal institutions, b) the legislative-level declaration of the concept of discernment is still lacking, and c) the application of discernment as a deficit-focused, threshold criterion remains problematic. The application of the concept of discernment, understood globally, is evident in the current Hungarian legal regulation, resulting in the inclusion of both legal institutions – contrary to the original legislative intent – within the same framework, essentially creating a framework requiring the existence of decreased discernment in some degree for participation in both guardianship and supported decision-making. Meanwhile, the concept of discernment applied globally, *not* decision- or task-specific, *not* defined along a sliding scale standard, essentially imprisons the possibility of appointing a supportive person enjoying the trust of the person with support needs for decision-making, i.e., the institution of supported decision-making, within the framework of decision-making.
- viii) However, the partial limitation of capacity to act, which can be found in trend studies of the legal development of several European states, points towards an interpretation according to the sliding standard of discretion.
- ix) In the actual shift towards the supportive paradigm, it is not only the embedding in the fundamental hierarchy and thus the disposition of access to supported decision-making provisions that are crucial, but also the interpretation and application of the concept of insight capacity. The Summary Opinion of the

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<sup>36</sup> Cf. Dr. Kovács (2006) says that “the approach of those arguing for a global, so-called threshold standard is often the predominant one, which is typical in the case of the use of substitute decision-making systems”. In contrast, however, the decision- or task-specific nature of the discernment capability makes the argument for a so-called sliding standard a more modern approach. The latter is more in line with a law that “recognises” agency - i.e. based on the support paradigm. Dr József Kovács, Bioethical issues in psychiatry and psychotherapy, Budapest, 2006. pp. 229 and 272. [https://real-d.mtak.hu/347/1/Kovacs\\_Jozsef.pdf](https://real-d.mtak.hu/347/1/Kovacs_Jozsef.pdf)

Curia's Case Law Analysis Group also testifies that expert and judicial competencies regarding the assessment of insight capacity<sup>37</sup> have "merged," with blurred boundaries of competence in recent times<sup>38</sup>, making them not transparently traceable and not uniformly applied in judicial practice.

- x) While the Case Law Analysis Group, during the act review, and consequently, did not deal, or only tangentially addressed supported decision-making in its Summary Opinion, it is still necessary to discuss here the limits of the professional competence and possibilities of the guardianship authority regarding the determination of a minor decrease in insight capacity as provided for in Section 2:38 (1) of the Civil Code. Mentuszné<sup>39</sup> (2018) describes in her study that although the guardianship authority has been granted broader powers in the Civil Code through the renewal of guardianship regulation and the introduction of supported decision-making, acknowledges that they are forced to exercise these tasks in the absence of required competencies.<sup>40</sup> This standpoint is indirectly reinforced by the Summary Opinion of the Curia's Case Law Analysis Group, which states that "the deduction of legal consequences regarding the extent of insight capacity – the necessary and proportionate limitation of personal autonomy – is, however, the task of the court."<sup>41</sup> It is therefore concerning that in the case of supported decision-making accessible through both direct intervention by the guardianship authority and indirectly through the court (via initiating guardianship proceedings but ultimately dismissing the lawsuit), the determination of "a minor decrease in insight capacity" as a fundamental criterion may belong to the competence of the guardianship authority up to what "threshold," especially when there is no determination of the mental disorder causing the decrease in insight capacity by a forensic psychiatrist expert. The above regulatory and judicial practice, along with the critical assessment of insight capacity at the international and domestic scholarly levels, suggests that the global application of this concept raises serious transparency<sup>42</sup> issues, questioning the fairness of the procedure beyond being potentially discriminatory<sup>43</sup>, consistent with some Comprehensive Comments of the CRPD Committee.
- xi) The central elements of the supportive paradigm include: a) the universally exercisable right of decision-making by the individuals concerned, b) ensuring the type and extent of support required for the former, and c) ensuring access to the supporting person. In the supportive framework, merely the exploration and

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<sup>37</sup> Civil Code 2:19 § (2) and (4) and Civil Code 2:21. § (2)-(3) of the Civil Code is not sufficiently understood: On the one hand, the first (mental disorder) and the second condition (loss or lack of insight due to mental disorder), and on the other hand, the third (the existence of the first and second condition due to the individual circumstances of the party, the fourth condition (the protection of the rights of the person concerned cannot be ensured by means which do not affect the capacity to act or by partial restriction of the capacity to act), the examination of the first condition is confused in the course of the taking of evidence and the decision, there is no discernible distinction, there is no presentation or proof of all the conditions, and the first two conditions are extremely biased in favour of the other. [41] Summary opinion [https://kuria-birosag.hu/sites/default/files/joggyak/2019.el\\_ii\\_jgy\\_p.1\\_kivonat.pdf](https://kuria-birosag.hu/sites/default/files/joggyak/2019.el_ii_jgy_p.1_kivonat.pdf)

<sup>38</sup> Cf.: "It is not clear whether only the first or the second condition is also a purely medical expert question. One of the focal points for the proper management of guardianship cases is to clarify the question of how far the competence of the expert extends and where the court's substantive task begins." [41] Summary opinion [https://kuria-birosag.hu/sites/default/files/joggyak/2019.el\\_ii\\_jgy\\_p.1\\_kivonat.pdf](https://kuria-birosag.hu/sites/default/files/joggyak/2019.el_ii_jgy_p.1_kivonat.pdf)

<sup>39</sup> Head of Social and Guardianship Department in Heves County.

<sup>40</sup> Irén Mentuszné Terék: The Practice of Guardianship Proceedings in the Context of the Civil Code, *Family Law*, HVGOrac, 2018/2. <https://szakcikadatbazis.hu/doc/6432709>

<sup>41</sup> [42] Summary opinion [https://kuria-birosag.hu/sites/default/files/joggyak/2019.el\\_ii\\_jgy\\_p.1\\_kivonat.pdf](https://kuria-birosag.hu/sites/default/files/joggyak/2019.el_ii_jgy_p.1_kivonat.pdf)

<sup>42</sup> Dr. József Kovács: Bioethical Issues in Psychiatry and Psychotherapy, Budapest, 2006. [https://real-d.mtak.hu/347/1/Kovacs\\_Jozsef.pdf](https://real-d.mtak.hu/347/1/Kovacs_Jozsef.pdf), and Zoltán Pozsár-Szentmiklósy: The Price of Misunderstood Political Adulthood. <http://www.valasztasirendszer.hu/?p=1942418> (05.04.2019.)

Eszter Bodnár: The Fundamental Rights Content and Limits of the Right to Vote. HVG-ORAC, Budapest 2014. p. 193.

<sup>43</sup> Commission General Comment No 6, point 30

<https://documents.un.org/doc/undoc/gen/g18/119/05/pdf/g1811905.pdf?token=iSpxbiBPq3b9jtnG1H&fe=true>

understanding of the resources of the individuals concerned can be done in providing access to the institution of supported decision-making, which applies equally to the decision-making capacity of persons with disabilities, primarily focusing on their 'remaining abilities', and concerning the form and extent of support, as well as mapping the potential "circle" of support. The approaches, perspectives, viewpoints, and doctrinal foundations are thus fundamentally different between the two legal institutions. Consequently, it arises that with the global application of insight capacity, the Hungarian legislator not only breaks the fundamental approach of the institution of supported decision-making but also entraps the new legal institution within the incapacitating framework of guardianship, hence it cannot fulfil its potential roles and tasks.

- xii)* As a criterion for access to supported decision-making, the declaration of "a minor decrease in insight capacity" in paragraphs 1-2 of Section 2:38 of the Civil Code, with the somewhat detached determination of the level of "deficit" through a medical approach – hardly provable in a transparent manner – somewhat separates the target group intended by the legislator before the introduction of the new legal institution – probably the persons placed under guardianship – however, the circle of beneficiaries of supported decision-making under this restrictive regulatory solution is hardly noticeable in Hungary. Therefore, in my opinion, the current regulation of the Civil Code, although it *de jure* introduced the institution of supported decision-making, *de facto* hardly opens up the possibility of access to support, and mostly achieves a "excluding", "marginalizing" effect on the group of individuals potentially entitled to support. All this has been confirmed, among other things, by Phillips' (2020) vivid depiction.

In light of the above, two codification paths can emerge from the provisions focused on in the dissertation:

- i) only the decrease in decision-specific<sup>44</sup> insight capacity can be linked as a criterion for access to supported decision-making, and as a result, the legislator the legislator does not declare a gradation, so that it is mostly a matter of choice and the existing and potentially available support resources of the person concerned which legal instrument is applied. Thus, by maintaining the concept of discretion, but interpreting it along the lines of the sliding standard, the forum system for access to supported decision-making must be provided by the court for both approaches: directly and indirectly, with the possible intervention of guardianship proceedings. This regulatory approach could also provide a solution for a uniform application of the law by the courts to ensure access to assisted decision-making and to reverse the 'drop-out' of the so-called 'preliminary court procedure' (i.e. the procedure for the opening of the guardianship proceedings, which is currently detected by the court on the basis of the available statistical data, in accordance with Article 2:38(2) of the Civil Code), i.e. the appointment of a support person;
- ii) the other potential path represents a more progressive legislative step towards the supportive paradigm: if an interprofessional understanding<sup>45</sup> is reached regarding the exploration of the support needs for exercising decision-making capacity<sup>46</sup> and

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<sup>44</sup> In contrast to the use of the concept of insight with a global approach

<sup>45</sup> Builds on a broad professional base, involving professionals from different fields.

<sup>46</sup> See Bach and Kerzner (2010), subsection V.3.



mapping decision-making capacity, and as a result, the so-called decision-making status is determined, a shift towards support-centric, solution-seeking cooperation is made – with an alternative procedural option in the framework of voluntary justice, according to the Spanish model.

As supported decision-making offers an “institutionalized” form of assistance distinct from guardianship, my research concludes that the shift towards a supportive direction is twofold: at an individual level, it involves legal consequences regarding the extent of decision-making capacity, thereby assessing legal responsibility, while at a broader legal application level, the responsibility for transforming the existing guardianship system<sup>47</sup> rests largely on the judiciary, as evidenced by statistical data (Fiala-Butora, 2019; Gulya-Hoffman, 2019). The role of judges in guardianship proceedings has been highlighted as pivotal and defining in shaping the concept of legal capacity, underscoring the significance of judicial law development. It is therefore welcome that in recent years several studies<sup>48</sup>, research<sup>49</sup> and case-law analysis<sup>50</sup> have focused guardianship proceedings. However, the study of guardianship litigation and related case law is not in itself sufficient. In order to amend the substantive law, to improve the structure of the supportive framework and to modernise the procedural system, as suggested in the thesis, further analysis of the interconnection and developmental dynamics of the two institutions is necessary, without forgetting the narratives, life stories and experiences of the persons concerned.

Scientific inquiry indicates that the transformation of the Civil Code’s regulations concerning the above is overdue. In Hungary, the diminished capacity to understand, as a decisive issue (or otherwise referred to as “cognitive constraint”), fundamentally determines which institution may be “suitable” for the affected adult individuals. Supported decision-making remains a theoretical alternative to guardianship in Hungary, with the available statistical data suggesting that support for decision-making is barely perceptible. Consequently, even if individuals can directly approach the guardianship authority for the appointment of a supportive person, for various reasons, the outcome of predominantly “preventive” civil legal proceedings (such as a guardianship case<sup>51</sup>) largely determines which decision-making method may be suitable for the individual<sup>52</sup>.

My research confirms that the SDM Act<sup>53</sup> contains several provisions that would require further development within the implementation framework classified by Then et al. (2018). The support-based system recognizes the exercise of legal capacity, including decision-making capacity, as a fundamental right<sup>54</sup> for every individual, regardless of disability (or cognitive impairments), acknowledging the primary importance of decision-making based on trust

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<sup>47</sup> Cf.: the scope of guardianship reviews set out in § 5 (3) and § 6 of Act CLXXVII of 2013 on the Transitional and Enabling Provisions in Connection with the Entry into Force of Act V of 2013 on the Civil Code (hereinafter: the Civil Code) See Mandatory Review of Guardianship Placements and Act V of 2013 on the Civil Code, § 2:29 (Mandatory Review of Guardianship Placements).

<sup>48</sup> Kiss Valéria, Maléth Anett, Tókey Balázs, Hoffman István, Zsille Katalin, Dombrovsky Borbála: An empirical study of custodianship lawsuits, State and Law, Centre for Social Sciences, Institute of Legal Studies, LXII. 2021/2, 2021. pp. 104.; Kiss, Valéria and Maléth, Anett and Tókey, Balázs and Hoffman, István (2021) *An empirical study of actions on custodianship in Hungary*. International Journal of Law and Psychiatry, 78. ISSN 0160

<sup>49</sup> On the issue of the restriction of the capacity of adults Prof. Research FK 132513 funded by the National Research Development and Innovation Fund, led by Professor István Hoffman.

<sup>50</sup> Findings of the Summary Opinion of the Case Law Analysis Group on the Examination of Custody Proceedings <https://kuria-birosag.hu/hu/joggyakorlat-elemzo-csoportok-osszefoglalo>

<sup>51</sup> E.g.: mainly in cases of proceedings for modification of guardianship, termination of guardianship, but guardianship proceedings may also end in dismissal of the action and the initiation of a supported decision.

<sup>52</sup> Cf.: Civil Code § 2:38 (1).

<sup>53</sup> Cf. Act CLV of 2013 on Assisted Decision Making.

<sup>54</sup> Attila Lápóssy - Emese Pásztor - Bernadette Somody - Péter Stánicz (2022/1.): The Dogmatics of the Exercisability of the Fundamental Rights of Man - Part I, Eötvös Loránd Research Network, pp. 38. <file:///D:/Let%C3%B6lt%C3%A9sek/FULCAP.pdf> download date: 09. 11. 2023.

relationships (Láposy et al.<sup>55</sup>, 2022; Fiala-Butora, 2019<sup>56</sup>; Hoffman 2009<sup>57</sup>). This system is sufficiently flexible to allow for the choice and modification of support instruments according to the needs of the person concerned. This model recognises the primacy, almost exclusivity, of a supportive decision-making system based on trust relationships. It offers a clear role for the supporter in providing information on the choices of the person concerned, helping to communicate these choices to third parties. It provides a well thought-out structure for monitoring the means of support to ensure that there is no over-regulation of the lives of those concerned. Its key element is that “third parties” should recognise the disabled person as a legally equal party, even when he or she makes decisions with assistance.

In so-called ‘transitional’ systems following partial implementation, where substitute decision-making and supported decision-making coexist (Maléth, 2021), in line with the Commission’s General Comment No 1 and access to support for the exercise of capacity, there should also be room for facilitated<sup>58</sup> or self-guided<sup>59</sup> decision-making for people with higher support needs. In these systems, the direction of legal development and lawmaking is of crucial importance, especially in terms of how far it is in the direction of an inclusive, so-called inclusive direction, as I have done in the dissertation by presenting the regulation modelled by Phillips (2020).

In my research, facilitated decision-making<sup>60</sup> plays a crucial role in systems characterised by partial implementation. In such cases, legal capacity cannot be subject to limitation; instead, an external decision-maker is appointed. However, the focus remains on the individual's life story, their will and preferences, and assisting in their expression. Rather than emphasising deficits or shortcomings, facilitated decision-making concentrates solely on the remaining decision-making capacity. The emphasis is on formulating specific goals that lean towards supported decision-making. This approach serves as a transitional solution, enabling temporary support (so-called empowerment within an empowering environment<sup>61</sup>) for the individual concerned. Specifically, during this transitional phase, the development and establishment of a supportive network, the facilitation of communication situations and opportunities, and increasing their frequency can occur. It is crucial that the individual spends only a minimal period in this transitional phase, and this option should be available only when it is absolutely necessary and unavoidable before applying the supported decision-making as a legal institution and toolset.<sup>62</sup>

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<sup>55</sup> Attila LÁPOSSY, Emese PÁSZTOR, Bernadette SOMODY, Péter STÁNICZ: The Dogmatics of the Exercisability of the Fundamental Right of Man, Part I., *MTA Law Working Papers*, 2022/1., Eötvös Loránd Research Network. pp. 9.

<sup>56</sup> János FIALA-BUTORA: Evaluation of the rules of capacity from the perspective of international law and domestic experience. *Family Law*. 2019/4. <https://szakikkadatbazis.hu/doc/2677812>.

<sup>57</sup> István HOFFMAN (2009): Legal regulation of the legal capacity and legal capacity to act of persons with psychosocial disabilities, in *Disability and Society*, Journal of Disability Studies and Special Education, 2009. 3-4., ELTE Bárczi Gusztáv Faculty of Special Education, ELTE Eötvös Kiadó, pp. 246.

<sup>58</sup> Facilitated decision-making can be applied to all areas of life. The decision-maker is not considered legally incompetent in this case either. Persons concerned who are in a facilitated decision-making status because of a lack (or thinning) of personal connections are entitled to measures to be provided by the State under Article 12(3) of the CRPD, which are about building relationships in order to maximise the exercise of their capacity to act through a facilitator. Persons concerned who are in a facilitated decision-making status because of a lack (or thinning) of personal connections are entitled to measures to be provided by the State under Article 12(3) of the CRPD, which are about building relationships in order to maximise the exercise of their capacity to act through a facilitator. Michael Bach and Lana Kerzner, 2010. A new paradigm for autonomy and capacity defence. Promoting meaningful equality for persons with disabilities through law, policy and practice, October 2010. Commissioned by the Ontario Law Commission. p. 92.

<sup>59</sup> The Yokohama Declaration calls on states to use so-called “self-directed decision-making”<sup>59</sup> as opposed to the substitute decision-making that characterises the traditional guardianship legal institution, and, as the Declaration puts it, considers the latter to be consistent with assisted decision-making.

<sup>60</sup> Cf. Mental Disability Advocacy Center: Legal Capacity in Europe - A call to Action to Governments ant to the EU, October 2013. [https://www.mdac.org/sites/mdac.info/files/legal\\_capacity\\_in\\_europe.pdf](https://www.mdac.org/sites/mdac.info/files/legal_capacity_in_europe.pdf)

<sup>61</sup> This is also reflected in the use of language, where the “recipient”, the “client”, becomes a participant. Csilla Cserti-Szauer. 36. in. Studies in honour of Csaba Bánfalvy. ELTE Bárczi Gusztáv Faculty of Special Education, Foundation for the Development of Special Education, Budapest, 2021. pp. 137 and 140. [https://edit.elte.hu/xmlui/bitstream/handle/10831/54881/Fogyat%C3%A9kos\\_szem%C3%A9lyek\\_a\\_21.\\_sz%C3%A1zadi\\_magyar\\_t%C3%A1rsadalomban\\_A.pdf](https://edit.elte.hu/xmlui/bitstream/handle/10831/54881/Fogyat%C3%A9kos_szem%C3%A9lyek_a_21._sz%C3%A1zadi_magyar_t%C3%A1rsadalomban_A.pdf) as described in subsection I.6. of this thesis

<sup>62</sup> Cf. Mental Disability Advocacy Center: Legal Capacity in Europe - A call to Action to Governments and to the EU, October 2013. pp. 28. [https://www.mdac.org/sites/mdac.info/files/legal\\_capacity\\_in\\_europe.pdf](https://www.mdac.org/sites/mdac.info/files/legal_capacity_in_europe.pdf)

This approach aligns with the CRPD Committee’s document, “Guidelines on Deinstitutionalization, including in Emergencies,” adopted between 15 August and 9 September 2022, which includes respect for the right to make decisions, individual will, and personal preferences as key elements in the deinstitutionalisation processes.<sup>63</sup>

It is noteworthy that the importance of ensuring access to justice is rarely mentioned in the context of Article 12 of the CRPD. This is because the CRPD fundamentally advocates for the universal exercise of legal capacity for all persons with disabilities, regardless of the severity of their mental disorder, and opposes procedures that declare individuals incompetent, such as litigation procedures that serve as the basis for placing individuals under guardianship, which limits legal capacity.

In order to shift towards a more supportive paradigm, the Spanish regulation, following a legal reform introduced in 2015, regards “voluntary jurisdiction” as the preferred procedural forum. This facilitates the participation of persons with disabilities and the expression of their will and choices. The procedure is impartial and shows a transformation towards a consultative type of justice. Traditional court proceedings are thus moving towards an inter-professional system<sup>64</sup>, a roundtable-like, support-centric, solution-seeking collaboration.<sup>65</sup>

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<sup>63</sup> “Guidelines on deinstitutionalization, including in emergency situations” III C, G, <https://gc-di.org/> According to V.53, “Member States have the responsibility to repeal laws and regulations and to change or abolish customs and practices that deprive persons with disabilities of independent living and integration into community life. The legal and policy framework aims to achieve full inclusion of people with disabilities and to steer the process of exclusion towards the closure of institutions. Such frameworks should allow for the development of inclusive community support systems and universal services, the establishment of redress mechanisms, and the guarantee of availability, accessibility and effectiveness of remedies.

<sup>64</sup> Builds on a broad professional base, involving professionals from different fields

<sup>65</sup> Cf. with recent regulatory reforms in Spain (as described in the annex to this dissertation) Maria José Bravo Bosch and Ines Celia Iglesias Canle: Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in Spain, 2023. pp. In Maciej Domanski and Boguslaw Lackoronski, Models of Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) Private and Criminal Law Aspects, Routledge, London, New York, 2023. <https://www.taylorfrancis.com/books/oa-edit/10.4324/9781003463016/models-implementation-article-12-convention-rights-persons-disabilities-crpdc-maciej-doma%C5%84ski-bogus%C5%82aw-lackoro%C5%84ski>

## V. List of Publications:

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