

SENTENCED TO LEGAL DEATH: PEOPLE WITH DISABILITIES CAN BE STRIPPED OF THEIR RIGHT TO DECIDE IN HUNGARY.



The new Civil Code of Hungary sentences thousands of disabled people to legal death. The institution of plenary guardianship in the new law sustains an ancient and outdated practice that ignores the rights of individuals. By enacting the new Civil Code, Hungary does not only marginalise its citizens who live with disabilities but also breaches its obligations under international human rights law.



The new Civil Code of Hungary entered into force on 15 March 2014. The new law changed the previous rules on guardianship and introduced new categories such as supported decision making and advance directive. Legal capacity is a core issue in regards to the citizenship and equality of citizens living with disabilities. However, the new Civil Code fails to provide rules that respect the rights of disabled people and does not protect them when entering into legal contracts. Instead, the new law sustains rules that will maintain their exclusion and strips them of their rights.



Introduction

The legal capacity of people with disabilities is often restricted by court decisions – the subjects of these decisions are mostly those having intellectual or psychosocial disabilities. The rationale behind guardianship is that disabled people may lack the necessary mental capacity to make decisions. The aim of the court judgments is to protect people from being exploited by malicious legal contracts and to stop them from making unwise decisions. However, experience shows that guardianship often results in the involuntary admission of people into long-term care facilities such as institutions, elderly homes or psychiatric wards. Experience also shows that the institution of guardianship is unable to protect people from making contracts that may be contradictory to their interests. Another problem is that guardianship hinders people ability to make decisions that are crucial for their self-determination: it prevents citizens from marrying,

having children, and refusing or applying for medical treatments without the agreement of their guardian. Furthermore, people under guardianship are usually not entitled to vote and cannot run for office. Guardianship is also criticised for its impact on people's autonomy and sense of self-determination. In fact, guardianship creates a new and separate legal status specific for disabled people.

The above-mentioned serious pitfalls were recognised and led to a global change when governments started to develop new policies replacing guardianship: new models of *supported decision-making*. For example, states parties to the United Nations Convention on the Rights of Persons with Disabilities (including Hungary) agreed to gradually abandon guardianship and develop new support systems that implement supported decision-making.

Guardianship in Hungary

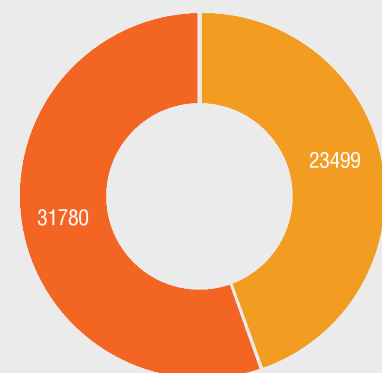
The previous legislation on guardianship in Hungary, enshrined in the Civil Code that entered into force in 1959, remained almost totally unchanged until 2014. The law set up two categories: partial and plenary guardianship. Individuals placed under *plenary* guardianship were unable to make any important decisions in their lives, except for some minor issues necessary for one's everyday routine such as buying groceries. On the other hand, *partial* guardianship gave more power to people, especially after an amendment in 2001: thereafter courts could differentiate between areas of life where restrictions apply and could enable people to act on certain issues. Nonetheless, ever since the democratic changes in 1990, Hungarian courts have always favoured plenary guardianship over partial guardianship.

The number of people under guardianship has doubled since 1989. In 2012, we found 55,000 people under some form of guardianship, more than half of them under plenary guardianship. Available data¹ suggests that Hungary has an excep-

¹ We have only scarce information about the number of people living under guardianship in Europe. Rules on guardianship vary and national databases may not give exact data at all. For further information on international practices see: Gurbai et al. (2013): Legal Capacity in Europe. A Call to Action to Governments and to the EU. Budapest, Mental Disability Advocacy Center, 41-81. and Kozma & Petri (2013): Mapping Exclusion. Institutional and Community-based Services in the Mental Health Field in Europe. Brussels, Mental Health Europe, 29-117.

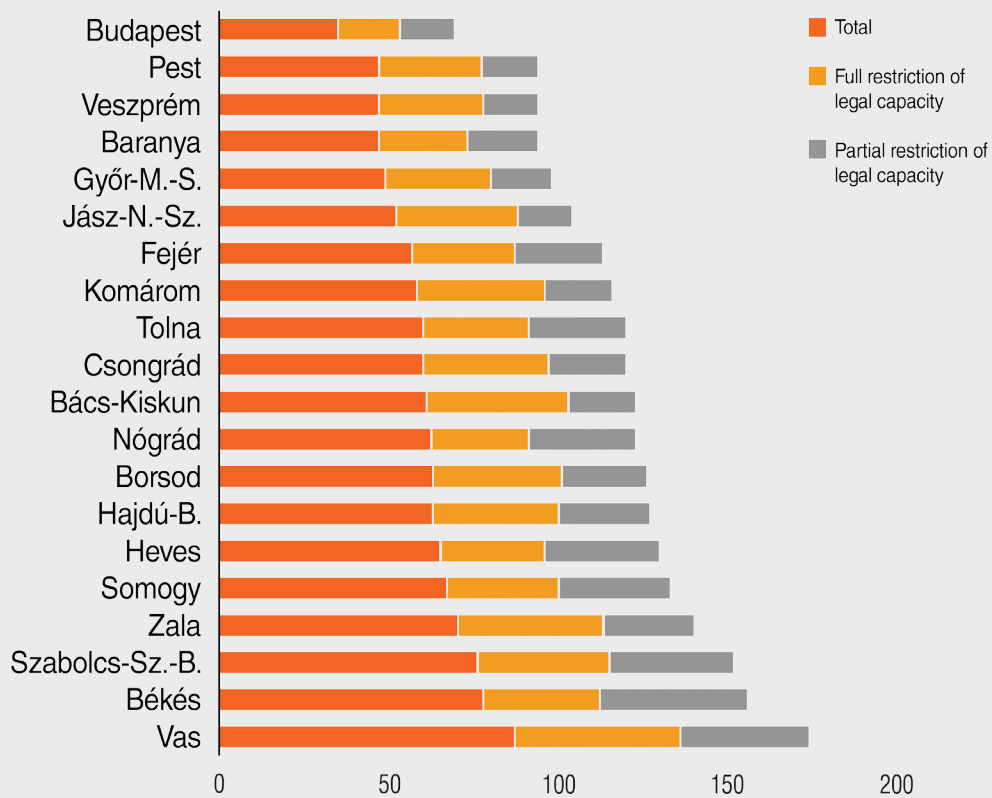
tionally high proportion of its population under guardianship in comparison to the rest of Europe. Furthermore, there is also an explicit difference between regions of the country: while in Budapest we find 35/10,000 people under guardianship, in Tolna and Csongrád county we found 60/10,000, and 87/10,000 in Vas county. The differences suggest that several factors shape why and how people lose their legal capacity: societal background, the local labour market, practices of local courts and state authorities can each play important roles that explain regional differences.

NUMBER OF THOSE UNDER GUARDIANSHIP, 2012

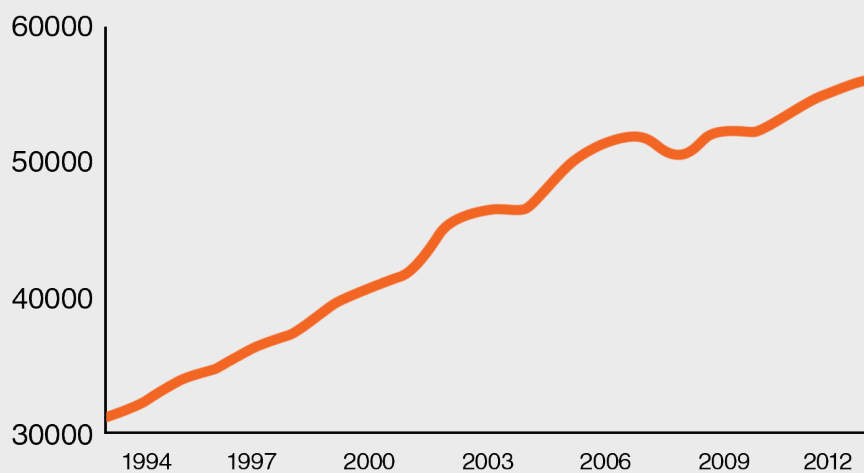


- Number of those under full restriction of legal capacity
- Number of those under partial restriction of legal capacity

NUMBER OF THOSE UNDER GUARDIANSHIP BY COUNTY, 2012
(PER 10 THOUSAND HABITANTS)



NUMBER OF THOSE UNDER GUARDIANSHIP, 1993-2013



Critical voices against restricting legal capacity – societal, legal and rehabilitation issues

The limitation of legal capacity received strong criticism from three different disciplines: medical-psychological, sociological and human rights.

The *medical-psychological* concerns suggest that the limitation of someone's legal capacity is, in fact, contradictory to the rehabilitation process, especially because guardianship perpetuates the dependency of the person on their guardian. Evidence shows that one of the main prerequisites of someone's recovery is to be able to make decisions about personal issues.² Guardianship, however, hinders people when making such decisions.

Sociological inquiries suggest similar contradictions. A recent study³ provided evidence that there is a clear correlation between involuntary admissions, court decisions on guardianship, and social deprivation. Available data also shows a high proportion of people under guardianship live in residential institutions. Around 90% of residents of large insti-

² Mancini, M. A. (2007): Narratives of Recovery from Serious Psychiatric Disabilities. A Critical Discourse Analysis. *Critical Approaches to Discourse Analysis across Disciplines*, 1,2, 35-50. and Johnstone, L. (2006): Users and Abusers of Psychiatry. *A Critical Look of Psychiatric Practice*. Routledge, London.

³ Verdes & Tóth (2009): A per tárgya. Gondnokság alá helyezett személyek társadalmi kirekesztődésének mozgásformái a rendszerváltás utáni Magyarországon. Budapest, ELTE Eötvös Kiadó, 23-34 (in Hungarian)

tutions for disabled people have limited legal capacity⁴ and estimates suggest similar proportions in psychiatric institutions⁵. People under guardianship experience a diminishing of their social networks, isolation and marginalisation. Placing someone under guardianship is often initiated not primarily to protect the person but rather in order to admit them to residential institutions. Restricting one's legal capacity also results in a severe worsening of the person's societal status. It is significant that among those living under guardianship we find people living with learning disabilities, mental health problems, autism, and also elderly people, alcohol or drug addicts and homeless people.

From a *human rights perspective* there is an explicit criticism against the institution of guardianship, both in its rationale and practice. Contemporary understandings of human rights cannot justify the

⁴ Kozma, Á. (2008): Az intézetben élő értelmi fogyatékos emberek helyzete. In Bass (szerk.): *Amit tudunk és amit nem az értelmi fogyatékos emberek helyzetéről Magyarországon*. Budapest, Kézenfogva Alapítvány, 157-177.; Verdes, T. (2008): Jogok a jóléti présben. In Bass (ed.): *Amit tudunk és amit nem az értelmi fogyatékos emberek helyzetéről Magyarországon*. Budapest, Kézenfogva Alapítvány, 133-156. and Verdes, T. (2009): „A ház az intézet tulajdona.” A totális intézmények lebontásáról, humanizálásáról és modernizálásáról. *Esély*, 4, 92-114.

⁵ Gombos et al. (2001): Az ellátottak emberi jogai a pszichiátriai betegek otthonaiban. Budapest, Pszichiátriai Érdekvédelmi Fórum.

restriction of legal capacity. According to Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), states' parties to the agreement must ensure that persons with disabilities can exercise their rights equally. The Convention sees guardianship as a means of 'substitute decision making' which imposes the restriction of legal capacity on the person with a disability. The restriction results in a hindrance of decision-making, because their guardian is entitled to make decision for them. Guardians can even make decisions against the will of the person concerned. The CRPD discards guardianship (in particular: plenary guardianship) and makes it mandatory for States to implement supported decision-making systems. In contrary to traditional model of guardianship, supported decision-making means support methods that provide help in decision-making without restricting one's legal capacity⁶. The Committee on the Rights of Persons with Disabilities has condemned certain states for failing to implement such support systems, including Tunisia, Spain, Hungary, Argentina, China, Paraguay,

⁶ Committee on the Rights of Persons with Disabilities (2011): General Comment on Article 12 of the Convention - Equal Recognition before the Law. Geneva, UN. And Council of Europe Commissioner for Human Rights (2012): Who Gets to Decide? Right to Legal Capacity for Person with Intellectual and Psychosocial Disabilities. Strasbourg, Council of Europe. [CommDH/IssuePaper(2012)2]

Australia, Austria, and El Salvador. In its General Comment on Article 12 of the CRPD, the CRPD Committee states:

“Systems that deny legal capacity based on status violate article 12 because they are prima facie discriminatory, as they permit the imposition of substitute decision-making solely on the basis of the person having a particular diagnosis. Similarly, functional tests of mental capacity or outcome-based approaches that lead to denial of legal capacity violate article 12 if they are discriminatory or if they disproportionately affect the right of persons with disabilities to equality before the law.”⁷

The European Court of Human Rights (ECtHR) has also made decisions in cases concerning legal capacity, specifically in the right to private life, the right to a fair trial, the right to freedom and safety of the person, and the right to launch complaint procedures (e.g. *Shtukaturov v. Russia*, the *X. and Y. v. Croatia*, the *Stanev v. Bulgaria* and the *Lashin v. Russia*). Judgments of the ECtHR show that the Court increasingly adopts the understanding of legal capacity enshrined in the CRPD and references to the Convention are increasingly included in court decisions.

⁷ Committee on the Rights of Persons with Disabilities (2013): General Comment on Article 12: Equal recognition before the law. Geneva, UN, 3.

The provisions on guardianship in the new Hungarian Civil Code

The new Civil Code maintains the restrictive approach of the previous law of the 1950s. Even though many representative organisations voiced strong criticism before the new law's approval⁸, the Hungarian Parliament ignored those concerns and approved the law that ignores the latest paradigms in the support of people with disabilities. Hence, instead of giving disabled people adequate support, the new law sustains an outdated system and maintains the restriction of rights for those concerned.

In the new law, there are four types of support: *plenary* and *full restriction* of legal capacity, *supported decision-making* and *advance directives*. The two levels of restrictions of legal capacity are, in fact, equal to plenary and partial guardianship. Under partial restriction of legal capacity, the court decides in which areas of life a person may not make their own decisions.

⁸ See for example: Értelmi Fogyatékosok és Segítőik Országos Érdekvédelmi Szövetsége (2007): A gondnoksági rendszer módosításának javasolt alapelvei. Budapest, ÉFOÉSZ. – Országos Fogyatékosügyi Tanács (2010): Az Országos Fogyatékosügyi Tanács közleménye az Új Polgári törvénykönyv hatályba lépését érintő Alkotmánybírósági döntésről. Budapest, OFT. – Autisták Országos Szövetsége és mások (2012): Alulírott szervezetek és személyek közös véleménye a Polgári Törvénykönyvről szóló T/7971. Számú törvényjavaslatnak a nagykorúak cselekvőképességét érintő V-X. fejezetekről. Budapest, AOSZ.

In full restriction, all areas of life belong to the responsibilities of the guardian (except for minor decisions such as the buying of a bus ticket or purchasing of food). Whereas the previous law gave an indicative list of areas of life where restrictions may apply (which was often taken by judges as a list where restrictions *should* be made), the new law avoids doing so. This may allow for courts to make more tailored decisions appropriate to the person's specific situation. A major pitfall of the new law is that even in full restriction of legal capacity, the revision of the court decision can be prolonged for as long as 10 years.

The new legislation also sets limitations on supported decision-making, in a separate law⁹. Supported decision-making means a support system that puts no legal restriction on the disabled person. Such systems are based on trust and must be developed and maintained according to the will and preferences of the disabled person¹⁰.

⁹ Law 2013. / CLV. Criticism was voiced by Gombos et al. (2013): Vélemény a támogatott döntéshozatalról szóló törvénytervezetről és a kapcsolódó törvénymódosítások első szövegváltozatairól. Budapest, TASZ. (in Hungarian)

¹⁰ Gombos et al. (2009): A támogatott döntéshozatal elmélete és gyakorlata. Budapest, Eötvös Lóránd Tudományegyetem Bárczi Gusztáv Gyógypedagógiai Kar. – Jakab, N. (2011): A támogatott döntéshozatal elméleti és gyakorlati kérdései. *Sectio Juridica et Politica*, 32, 2, 447-458. (in Hungarian) and Devi et al. (2011):

However, the new Hungarian legislation – despite its use of the same term – fails to provide supported decision-making for those concerned, especially because it is only available for persons with a moderate level of disability. Another problem with the law is that it entitles state authorities to be solely responsible for these networks of support: just like guardians in the previous system, the new “support person” will also be appointed by the state. Hence, we can assume the paternalistic approach to supporting disabled people will continue. Under the new law, one disabled person can have at maximum two official support people, and each support person can have as many as 45 disabled people whom they can support. Yet another provision of grave concern is that people who receive these new types of support will not be able to function as foster parents: they will be unable to adopt children and, should they be placed under the supervision of support persons, they will have to step down from parenting children they previously adopted. Finally, supported people, according to the new law, cannot take up public offices e.g. they cannot work as judges or within the judiciary. These provisions all impinge on the ability of people with disabilities to live equally and to be recognised by the law on the same level as everyone else.

Moving towards substituted or supported decision-making? Article 12 of the Convention on the Rights of People with Disabilities. European Journal of Disability Research, 5, 249-264.

The new Civil Code also introduced a new category: advance directives aim to ensure that a person can have their legal capacity recognised even in situations where no expression of their will is possible. For example, if the advance directive describes what type of medical interventions can be carried out on someone, then even in a coma or a similar situation such a statement should be viewed as the written will and decision of a person with full legal capacity. Unfortunately, the new Civil Code fails to provide such progressive frames: it only sees advance directives as an *indication* of someone’s will – hence authorities will not have to respect advance directives as legally binding legal statements¹¹. Therefore, the new Hungarian Civil Code does not provide people with the option of advance directives as they are understood by organisations advocating for the rights of people with disabilities.

¹¹ Written Comments submitted jointly by European Disability Forum, European Network of (ex)Users and Survivors of Psychiatry, International Disability Alliance and World Network of Users and Survivors of Psychiatry to the European Court of Human Rights in the case of Genadijs Mihailovs v. Latvia, 2012., Art. 21.

Suffrage

The Fundamental Law (formerly Constitution) of Hungary states (Article XXIII (6)) that it is possible to restrict voting rights of people with limited legal capacity. This provision of the law breaches Article 29 of the CRPD, the recommendations of both the Council of Europe¹² and the Venice Commission¹³. The UN

¹² Recommendation CM/Rec(2011)14 of the Committee of Ministers to member states on the participation of persons with disabilities in political and public life.

¹³ Revised interpretative declaration to the code

Committee on the Rights of Persons with Disabilities also condemned Hungary for failing to ensure voting rights for people with disabilities (*Bujdosó et al. v. Hungary*). International human rights law strongly emphasises that everyone, including people with severe intellectual disabilities, should be provided with the right to vote and to be elected.

of good practice in electoral matters on the participation of people with intellectual disabilities in elections. Study No. 584/2010.

Summary

The new Civil Code failed to establish a new legal system that ensures the full and equal participation of people with disabilities within society. Instead, the new law will perpetuate the marginalisation of disabled people in many areas of life, including the labour market. Any new law should provide citizens with options to integrate and live a full life in our societies, on a legally equal footing with everyone else. However, the new Hungarian Civil Code implements serious and exclusionary legal restrictions on disabled Hungarian citizens.

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