

Written submission on the right to equal recognition before the law Based on the case of Hungary

**Submitted to the Committee on the Rights of Persons with Disabilities
by the Mental Disability Advocacy Center and the Hungarian Association for
Persons with Intellectual Disability**

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Prepared by:

- Gábor GOMBOS, senior advocacy officer, MDAC
- Boglárka BENKÓ, legal monitor, MDAC
- Melinda KOVÁCS, executive director, HAPID

The *Mental Disability Advocacy Center* and the *Hungarian Association for Persons with Intellectual Disability*, two of the leading NGOs of a Hungarian Civil Society Coalition working on the implementation of CRPD Article 12 in Hungary, on the strength of, *inter alia*, our technical and experiential expertise, are herewith submitting the following communication in response to the Committee's request to contribute to the Day of General Discussion on the right to equal recognition before the law.

A) The legal contents of the right to equal recognition before the law

(Construction of legal capacity –Identity and Agency - Universal legal capacity – Reservations to article 12 – Scope of right to equal recognition before the law)

1. The concept of legal capacity, as envisaged by Article 12 including a person's capacity to have rights and capacity to exercise these rights, is not reflected anywhere in Hungarian legislation. Rather, the provisions of the Civil Code, responsible for regulating citizens' legal status in general, focus on the two dimensions of legal capacity separately, namely on the capacity to have rights (jogképesség) and on the capacity to act (cselekvőképesség). The content of the latter is clarified only in as much as the Civil Code establishes that all adults have full capacity to act who are not deprived of such capacity by a court decision. Also, the Civil Code entitles everyone of full capacity to conclude contracts and make other legal statements.

2. Legal personality or the capacity to have rights and obligations operates differently from the right to exercise such rights. Legal personality forms part of the unalienable rights of each person, and shall be equal regardless of age, sex, race, ethnic background or religious affiliation. The provision does not mention disability as protected value, but allegedly the regulation was intended to forbid discrimination on all grounds. Thus, under current Hungarian laws, all persons with disabilities have their identity as persons before the law recognized.

3. Capacity to act is not recognized as a universal right of all citizens. Intellectual disability, addiction and mental disorder justify the restriction and, for as long as the new Civil Code does not enter into force (presumably on 1 May 2010), the deprivation of the capacity to exercise rights. Consequently it is impossible to say that persons with disabilities (pwds) have an equal standing before the law with others, in terms of their agency.

4. This question cannot be isolated from the current lack of any kind of instruments or measures supporting the exercise of legal capacity. In the absence of any mechanisms pwds could make use of to enhance the exercise of their rights, it is more likely that they will be placed under guardianship with the restriction of their capacity to act and that their decisions and opinions will be substituted by those of their guardians.

5. The strongest case of the Members of the Civil Society Coalition was the abolition of such substituted decision-making, going hand-in-hand with the introduction of new mechanisms that endorse the exercise of legal capacity.

6. The introduction of a new Civil Code has been on the governmental agenda for the past 11 years without any special attention given to the re-codification of the rights of pwds. A substantial change in the legislative procedure arrived with the coalition of about 10 NGOs advocating for the implementation of the Convention on the rights of persons with disabilities (CRPD) and for the participation of pwds in decision-making that affects their rights and life. After more than 2 years of argument, Parliament is likely to enact legislation, in the form of a new Civil Code, which is more in line with the equal recognition before law, and therefore the autonomy and independence of pwds.

7. At the re-codification process of the Civil Code human rights began to be paraded as a central pillar of changing legal order. However, the CRPD did not play a central role in governmental rhetoric.

8. In our view the awareness of how the Convention shall affect the legal status of pwds was considerably weakened by the ambiguous translation of Article 12 into Hungarian. The mistranslation, not considered as amounting to a reservation, wittingly or unwittingly constituted a backlash compared to the developments in international human rights and a remarkable obstacle to the proper implementation of Article 12. The official Hungarian version does not make clear that legal capacity encompasses the Hungarian concept of both the capacity to act and the capacity to have rights. Legal capacity in Article 12 (2) is translated as ‘capacity to have rights and/or capacity to act’, while legal capacity in Article 12(3) is translated as ‘capacity to act’.

9. In fact, translating Article 12 with such inconsistencies does not reflect the aim and spirit of the provision itself but political considerations and the actual state of Hungarian legislation. Despite the dubious translation the more recent experience is that due to the strong advocacy work of civil society legislators were willing to fill the significant gap in the support needed to exercise legal capacity by introducing the model of supported

decision making within the new draft Civil Code and to proceed with the abolition of substituted decision making.

10. A fundamental step towards the recognition of legal capacity on an equal basis with others is the elimination of plenary guardianship and of partial guardianship in its general form, two legal instruments that have caused the complete denial of pwds' legal capacity and that have realized substituted decision making.

11. Measures needed for the support of exercising legal capacity, but without restricting in any way the person's capacity to act, are introduced in the forms of supported decision making and advanced directives.

12. We trust that new legal provisions can be vehicles for the delivery of changes, but we consider it striking that we are unable to identify any measures the Government is about to put into practice to ensure access to these supportive instruments. These measures would mean the encouragement of societal changes, including but not limited to, awareness raising among pwds, the provision of appropriate information for guardians and judges who are responsible for the interpretation and implementation of legal provisions, as well as building up the necessary infrastructural background.

13. The remaining form of guardianship (in its itemized form) requires courts to assess a person's capacity in all matters, and allow restriction only in affairs where less restrictive (and more supportive) measures are insufficient to protect the person concerned. Even though in such cases a joint decision-making process is envisaged with the mutual agreement of the person with disability and his guardian, we still affirm that such measure is a restriction of legal capacity and is in contradiction with the principle of equal recognition before the law.

14. The right to equal recognition before the law is a right of itself, but it is also the prerequisite for the equal enjoyment of all the other rights enshrined in the CRPD. This double nature of Article 12 calls for a twin track approach in its implementation: Universal legal capacity of pwds needs to be clearly stated in an adequate piece of law (in Hungary this law is the Civil Code) and in every other piece of legislation where it is relevant. This seems to be an urgent matter particularly regarding the right to participate in political decision making, as by virtue of the provisions of the Constitution only persons of full legal capacity are entitled to vote and stand for elections. The Constitution itself denies equal recognition of the capacity to promote interests through political representation, which, in itself, is a denial of certain citizens' autonomy.

15. Moreover, restriction of legal capacity is an obstacle to taking up certain occupations or participating in certain communities, making the right to work, as well as the right to participate in public life a mockery.

16. It is a mistake not to recognize that the denial of legal capacity on an equal basis with others in certain matters will not leave the exercise of other rights, which are deemed to constitute and enforce citizenship, unaffected.

B) Practical measures necessary to implement the obligation to promote the right to equal recognition before the law

General considerations

17. The specific aspects of legal capacity (e.g. right to informed consent; criminal responsibility; contractual capacity; marriage and family issues; education; employment etc.) shall be dealt with in a non-discriminatory manner in the thematic specific laws, and in conjunction with the right to access the specific support for decision making (informed consent may require a different framework of support to an employment contract). This twin track approach requires an effective co-ordination between the various ministries, Government bodies and the legislature. In the absence of an effective coordination mechanism (under Article 33 (1)) it is unlikely that the right to equal recognition before the law shall be practically enjoyable in all areas of life.

18. While the adoption of enabling legislations is a *sine qua non* condition for the effective implementation, laws alone will not bring about the paradigm shift envisaged under Article 12. At least the following types of activities are required:

- Policy and advocacy activities including pilot projects of supported decision making for various groups of pwds;
- Well-designed and multi-level societal discourse on legal capacity and support.

These areas of non-legislative measures are necessary to raise awareness (among pwds, their families, the judiciary, the public administration, disability service providers, mainstream service providers and society at large). Without eliminating the prevailing prejudice that pwds are incapable, universal legal capacity remains a dream. Experiential training may be also required for various societal actors (judges, social welfare and health care professionals etc.), where they can participate in the pilot supported decision projects. Pwds including self-advocates shall play a leadership role in these areas of implementation and monitoring the implementation, hence an effective implementation of Article 33 (2) and (3) is crucial.

19. While Article 33 (3) obligates States to involve and consult with civil society and DPOs particularly, our experience in Hungary clearly demonstrates that such consultations on complex issues like legal capacity and supported decision making may easily become a formalistic exercise unless prior capacity building is provided. Domestic practical implementation of Article 12 requires a pool of self-advocates who are prepared to substantively contribute to the implementation.

20. It is our experience that often problems of a social or economic nature are dealt with as if they were problems of legal capacity. When pwds for example do not regularly pay their electricity bill, it is technically easier to “protect them from the harm (caused by the termination of the power service)” through placing them under guardianship (or using an alternative to guardianship) than to address the underlying socio-economic issue. Equal access to mainstream socio-economic services can often prevent the need to invoke measures which affect legal capacity.

21. Social isolation and exclusion make access to support networks difficult for many persons with psychosocial and intellectual disabilities. This is even more problematic for persons living in large residential institutions where many of the residents have only dependent relationships. Without the active promotion of de-institutionalisation, peer support, access to mainstream services and employment on the labour market it is unrealistic to expect that people will easily develop social networks and relationships of trust which can be the basis for a supported decision making arrangement. This is why in Hungary the Civil Society Coalition working on the legislative and policy reforms to implement Article 12 had to agree on a legal institution of “professional support person”. While receiving support from a professional support person to reach one’s own decision shall not affect the disabled person’s legal capacity, this arrangement does not qualify a genuine supported decision making as the element of trust may be missing.

Specific considerations

(challenges of the normative incorporation of Article 12; technical problems within the normative framework; disability neutral laws and reasonable accommodation; challenges of effective implementation of Article 12 obligations)

22. As explained in 1. there is no single concept in the Hungarian law that covers the meaning of “legal capacity”. The situation is further complicated by the fact that the same term, such as “capacity to act” may have different meanings in different laws. In the Health Care Act the “capacity to give informed consent” is not directly derived from the Civil Code’s “capacity to act” concept. Following the doctrine of *Lex specialis derogat legi generali* in relation to health care treatment decisions, the Health Care Act’s provisions prevail. While we expect that by mid-September Parliament adopts the new Civil Code which makes an important step in redefining legal capacity, there is no guarantee that the same paradigm shift will be reflected in the Health Care Act. The latter requires further advocacy effort.

23. The relationship between the Civil Code’s “legal capacity” and the Criminal Code’s “criminal responsibility” is another example for complex technical difficulties which has not yet been addressed in the Hungarian implementation process.

24. In Hungary it is unclear under the current legislation if legally incapacitated persons are entitled to be employed under an employment contract or they are relegated to “special”, segregated occupation schemes. As a consequence of the foreseen paradigm shift and technical changes in the Civil Code, a related amendment is needed to resolve this uncertainty. The Ministry of Social Affairs’ proposal was to exclude from mainstream employment those pwds who will be under partial guardianship in employment related areas of affairs under the new Civil Code. They justified this on the ground that those pwds who were found to have difficulties in making work related decisions need extra protection from work related liability. This can be best provided in “special” occupation arrangements. The Civil Society Coalition and the Ministry of Justice disagreed and proposed that the protection shall be provided through the

recognition of the right to reasonable accommodation in the disability neutral Labor Code. Such reasonable accommodations may include access to job coaching, access to an easy to read description of the work process, regular follow up and supervision. It is expected that such an amendment will be drafted by mid-September.

25. Throughout the consultations on the draft new Civil Code we experienced strong resistance on behalf of the judiciary, in particular by the Supreme Court to abolish the deprivation of legal capacity (plenary guardianship) and partial guardianship which limits legal capacity in all areas of life. If there is no change to the attitudes of the judiciary, the effective implementation will be hindered in the court rooms.

26. There is a danger that the new legal institutions of support will be disguised forms of substituted decision making. In order to prevent such a misinterpretation, in Hungary we opine that the infrastructure and institutions for supported decision making should be independent of the institutions and infrastructure responsible for the operation of the guardianship system.

27. The Government's decision on the implementation of Article 33 has been criticized by civil society as ineffective. The lack of effective coordination and monitoring may mean that the enabling innovations in the new Civil Code will not be followed by corresponding specific legislative reforms in thematic special laws that fall under the competence of different ministries. In this case in all those areas of life which are regulated by thematic special laws, persons with disabilities will not enjoy their legal capacity on an equal basis with others.

Annex I

Suggestions on the right to equal recognition before the law

**Submitted to the Committee on the Rights of Persons with Disabilities
by the Mental Disability Advocacy Center and the Hungarian Association for
Persons with Intellectual Disability**

4th September 2009

The *Mental Disability Advocacy Center* and the *Hungarian Association for Persons with Intellectual Disability*, two of the leading NGOs of a Hungarian Civil Society Coalition working on the implementation of CRPD Article 12 in Hungary, on the strength of, *inter alia*, our technical and experiential expertise, are herewith submitting the following Suggestions with the aim to assist the Committee in their work to develop and adopt their recommendations on the right to equal recognition before the law.

1. CRPD is an international human rights treaty as well as a developmental instrument. **We suggest** the Committee recommend that States Parties pay special attention to this hybrid nature of the Convention when they implement Article 12. The effective implementation of the right to equal recognition before the law requires that social developmental interventions complement the appropriate legislative and policy measures. Without addressing the developmental dimension of the treaty, persons with disabilities who are currently not only perceived as incapable but who may also be legally incapacitated cannot be brought to the forefront of the paradigmatic changes envisaged under Article 12. Setting up of new infrastructures and institutions which promote and co-ordinate supported decision making and the access to support networks by persons with disabilities; technical and financial assistance extended to peer support and self-advocacy groups and organisations; creation of fora for mutual learning on various ways to achieve an effective implementation of equality before the law; awareness raising of various groups including persons with disabilities, their families, professionals working with persons with disabilities; mobilisation of community resources towards the implementation of the aspirations of the Convention are examples of developmental interventions which may be necessary.
2. **We suggest** the Committee recommend that States Parties, as part of the implementation, immediately abolish every law, legal institution and intervention which may result in disability based deprivation of a person's legal capacity including the capacity to act. Legal disqualification to contract; the institution of of plenary guardianship and the procedure of disability based compulsory commitment exemplify such like laws, legal institutions and interventions. Such abolition would be in accordance with Article 4 (1 b). Along with such abolition of laws, States Parties should enact enabling legislation on alternatives to substituted decision making (as also mandated by Article 4 (1 a) read in conjunction with Article 12 (3)). These alternatives should not affect the person's

- legal capacity but respect the rights, will and preferences of the person, be free of conflict of interest and undue influence, but proportional and tailored to the person's circumstances, as required under Article 12 (4). Equally importantly, along with the law reform measures the State must immediately reallocate financial and other community resources in a manner that is consistent with the shift of the legal paradigm from guardianship towards supported decision making.
3. Article 12 (3) obligates States Parties to „take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”. **We suggest** the Committee encourage States Parties to give due consideration to the accessibility of such support. Accessibility requires the removal of existing attitudinal barriers (the existence of which is recognized in the Preamble under (e)) that may prevent persons with disabilities, who are still stereotypically seen as incapable, from effectively accessing support to make their own decisions. Negative attitudes of families, public administration, judiciary and society at large may hinder any effective implementation of Article 12 (3). The necessary attitude changes cannot be achieved without the application of measures of social development (including the obligations under CRPD Article 8). Positive portraying of persons with disabilities as capable people in the media; self-advocates as role models for others; participation of self-advocates as trainers in the professional training of the key professional stakeholders are all examples for possibly effective measures which can make access to supported decision making a reality.
 4. When adopting and implementing measures necessary for the exercise of legal capacity as required under Article 12 (3), special focus shall be given to those persons with disabilities who, due to their long-term social isolation, do not have the social networks that would enable them to access supported decision making. Such special focus would be in accord with the recognition that clause (t) of the Preamble accords to the inevitable link between poverty and disability. Here, **we suggest** the Committee call States Parties to pay special attention to persons who have been living in total institutions. Temporary measures may be needed to be established which do not necessarily meet all the principles of supported decision making (such as trust based relationships), but which assist persons with disabilities in their right to exercise legal capacity. The need for such temporary measures shall not justify legal incapacitation. One example for such a temporary measure can be a court appointed “professional supporter” whose duties include the provision of assistance to the person with disability before the latter makes his/her legally binding decision. Equally important duty is to assist the person with disability to build up his/her support network through an active facilitation of social interactions between the person with disability and individuals from the community.
 5. **We suggest** the Committee remind States Parties to comply with their obligations under CRPD Article 4 (3) to actively involve and closely consult with persons with disabilities in the implementation of the right to equal recognition before the

law. This involvement and consultation need to be extended to persons with disabilities who are currently under guardianship and/or live in institutions. Capacity building would be required to ensure meaningful involvement of these groups. Provision of access by persons with disabilities and their organizations to such capacity building shall be seen as part of the States Parties' obligations (also in accordance with Article 8). We emphasize that such involvement is necessary from the earliest stages of legislative and policy planning through the practical implementation till the monitoring of the process (the latter as required under 33 (3)).

Annex II.

The Mental Disability Advocacy Center (MDAC) is an international non-governmental organization promoting the rights of children and adults with actual or perceived psycho-social disabilities. MDAC's main areas of concern are autonomy and legal capacity of people with mental health disabilities, institutions and community living as well as ill-treatment and death. MDAC has been working in Hungary since 2001 in areas such as litigation, research, law reform and advocacy on behalf of people with disabilities. Currently, MDAC is involved in an extensive lobbying related to the implementation of the CRPD in Hungary.

Contact details for MDAC:

Mental Disability Advocacy Center (MDAC)

Rákóczi út 27/B, H-1088 Budapest, Hungary

Tel: +36 1 413 2730 / fax: +36 1 413 2739

email: mdac@mdac.info / web: www.mdac.info

The Hungarian Association for Persons with Intellectual Disability is an umbrella body for organizations concerned with the care and rehabilitation of people with intellectual disability in Hungary. At the present time our organization represents 50 member associations, 25 local branches and 22.000 individual members all over the country and we run 9 community based settings. The organisation's main goal is to represent the interests of the people living with intellectual disability and their families in national level and also in international organisations. The organisation's objective is to support persons with intellectual disability in the field of having equal rights, equal opportunities and leading a life without having to rely on others, while actively participating in social life as visible citizens.

Contact details:

Piroska Gyene

President of EFOESZ

H-1356 Budapest, Pf. 705.

Phone/fax: +36 1 411 1356

e-mail: efoesz@efoesz.hu

homepage: www.efoesz.hu