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Legal Regulations Relating to the Passive and Active Legal Capacity of 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

ISTVÁN HOFFMAN* & GYÖRGY KÖNCZEI**

I. INTRODUCTION

In order to examine the application of the principle of equality before the law, we must first define the group of people who we regard as persons with disabilities for the purposes of this study. The term "mental" was once used to refer to people with intellectual or psychiatric disabilities.[1] The approach used in this study is the one introduced and adopted in the course of the *travaux préparatoires* of Convention on the Rights of Persons with Disabilities (CRPD or

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1. *Cf.* Kevin K. Walsh, *Thoughts on Changing the Term Mental Retardation*, *in* 40 MENTAL RETARDATION 70, 71–72 (2002) (discussing the changes in terminology referring to disabled people).

Convention),[2] which speaks of persons with intellectual or psychological disabilities.[3]

A. Defining Persons with Intellectual Disabilities

1. The Traditional Civil Law Approach Under the Civil Law System

Traditional civil law, based on Roman law, approaches the issue primarily from the perspective of a person's active legal capacity.[4] As we shall demonstrate below, under traditional civil law, the active legal capacity of a person who lacks the mental or cognitive ability to conduct his own affairs is restricted or denied.

As medical knowledge was limited, this approach was initially based on an assessment of *a person's actual participation in society*.[5] That is to say, if a person's conduct failed to comply with certain religious and moral customs and norms, he or she was regarded as lacking active legal capacity (a capacity to act). Indeed, in many instances, the person's passive legal capacity (a capacity for rights) was also denied.[6]

Nineteenth century developments in medicine (particularly in the fields of neurology and psychiatry), however, established the pre-eminence of the *medical approach* (or social approach) to disability by the beginning of the twentieth century.[7] Under this approach, any person with limited cognitive abilities or a diagnosable neurological or psychiatric condition was defined as a person with disabilities. Intellectual disability and the issue of active legal capacity were viewed as both medical and legal matters.[8]

2. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006) [hereinafter CRPD].

3. *See id.* arts. 1, 16, ¶ 2.

4. *See* Benjamin Brake & Peter J. Katzenstein, *The Transnational Spread of American Law: Legalization as Soft Power*, INST. FOR INT'L L. AND JUST., 14 (June 2010), http://www.iilj.org/courses/documents/HC2010Oct22.Katzenstein.pdf; RHONA K.M. SMITH, TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS 185–86 (3d ed. 2007).

5. *See* Paul Varul et al., *Restrictions on Active Legal Capacity*, 9 JURIDICA INT'L 99, 100 (2004), *available at* http://www.juridicainternational.eu/public/pdf/ji_2004_1_99.pdf.

6. *See id*. at 100; Xinyan Ma & Gouqiang Li, *On Adult Deficiency of Capacity for Conduct and Perfection of Adult Guardianship System: With Consideration to System Arrangement of Civil Code*, 2 U.S.–CHINA L. REV. 27, 30–31 (2005).

7. Julie Mulvany, *Disability, Impairment or Illness? The Relevance of the Social Model of Disability to the Study of Mental Disorder*, *in* RETHINKING OF THE SOCIOLOGY OF MENTAL HEALTH 40–41 (Joan Busfield ed., 2001).

8. *See* SZLADITS KÁROLY, A MAGYAR MAGÁNJOG VÁZLATA [AN OUTLINE OF HUNGARIAN CIVIL LAW] 80–81, 137 (1937) (discussing the medical approach in a major work on Hungarian civil law).

However, because it could not address certain life circumstances, the medical approach was never fully implemented. Moreover, the effects of particular medical conditions on the cognitive abilities of various individuals were not uniform.[9] The civil law system sought to address these circumstances by means of a *general provision*, effectively giving judges a free hand. In our opinion the *general provision* tended to use the following formula: "the lack of cognitive abilities for other reasons."

2. The Human Rights Approach to Disability

In the second half of the twentieth century, the international protection of human rights and fundamental freedoms was enhanced, partly in response to the abuses that had taken place under dictatorial regimes in the 1930s and 1940s.[10] Similarly, national constitutions and basic laws gave increased attention to developing proper safeguards for human rights.[11]

The development of human rights became manifest above all in legal provisions ensuring equality before the law as well as equal opportunities.[12] Other provisions sought to promote the dignity of every human person.[13]

As a result of such legal developments, the safeguarding of the rights of persons with disabilities became a priority as a human right. This, in turn, required a complete reappraisal of the notion of disability.[14]

International human rights norms (such as the CRPD) as well as recent national legal norms (such as Germany's Law on the Equality of People with Disabilities (LEPD))[15] have adopted a complex definition of

9. *See* Mulvany, *supra* note 7, at 39–40.

10. *See* DAVID MORRISON, REALIZING HUMAN RIGHTS 39–40 (1996), *available at* http://www.strathmor.com/assets/pdf/realizing%20human%20rights%20-%20final.pdf. For an example of the so-called "euthanasia" program in Nazi Germany, see Michael Burleigh, *The Legacy of Nazi Medicine in Context*, *in* MEDICINE AND MEDICAL ETHICS IN NAZI GERMANY 112, 113–14 (Francis R. Nicosia & Jonathan Huener eds., 2002).

11. CURTIS F.J. DOEBBLER, INTERNATIONAL HUMAN RIGHTS LAW: CASES AND MATERIALS 8–11 (2004).

12. *See* Raymond Lang, *The United Nations Convention on the Right and Dignities for Persons with Disability: A Panacea For Ending Disability Discrimination?*, 3 EUR. J. DISABILITY RES. 266, 268 (2009).

13. *See* SMITH, *supra* note 4, at 185–86.

14. Ann Macfarlane, *Aspects of Intervention: Consultation, Care, Help and Support*, *in* BEYOND DISABILITY: TOWARDS AN ENABLING SOCIETY 6, 6–8 (Gerald Hales ed., 1996).

15. Behindertengleichstellungsgesetz [BGG] [Law on Equal Opportunities for Disabled People], Apr. 27, 2002, BGBL. I at 1467, last amended by Gesetz [G], Dec. 19, 2007, BGBL. I at 3024, art. 12 (Ger.), *available at* http://www.gesetze-im-internet.de/bundesrecht/bgg/gesamt.pdf.

disability,[16] incorporating medical and social factors.[17] In this holistic definition, intellectual, cognitive, or sensory impairment is just one consideration; each alone is not a sufficient condition.[18] The definition requires the presence of a long-term impairment hindering the individual's full and effective participation in society.[19]

This complex definition, incorporating social elements, has been applied in various national and international documents in the early twenty-first century.[20] Since this notion of disability is capable of expressing the factual nature of disability, that a biological impairment fundamentally limits a person's social involvement, for the purposes of this paper, disability will be understood in accordance with the above complex, or holistic, definition.[21]

B. The Legal Status of Disability in the Various Fields of Law

Concerning the legal status of disability, we shall principally examine provisions in the various fields of law relating to passive legal capacity (a capacity for rights) and active legal capacity (a capacity to act).

The *sedes materiae* of these provisions are to be found in civil law,[22] but in the practice and safeguarding of fundamental rights, legal provisions relating to constitutional rights are also salient. For instance,

16. *See* ANDREAS DIMOPOULOS, ISSUES IN HUMAN RIGHTS PROTECTION OF INTELLECTUALLY DISABLED PERSONS 71 (2010).

17. Thus the CRPD—ratified by Hungary in Act XCII of 2007—contains the following definition: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." CRPD, *supra* note 2, art. 1, ¶ 2; *Hungary: Parliament Reforms Legal Capacity Laws*, MENTAL DISABILITY ADVOCACY CTR. (Sept. 22, 2009), http://mdac.info/hungary-parliament-reforms-legal-capacity-laws.

18. *See* JAVAID REHMAN, INTERNATIONAL HUMAN RIGHTS LAW 611–12 (2d ed. 2010); *see also* Melinda Jones & Lee Ann Basser Marks, *Law and the Social Construction of Disability*, *in* DISABILITY, DIVERS-ABILITY, AND LEGAL CHANGE 1, 4–6 (Melinda Jones & Lee Ann Basser Marks eds., 1999).

19. CRPD, *supra* note 2, art. 1.

20. *See* Varul et al., *supra* note 5, at 101. *But see* Penny Letts, *The Protection of People Without Mental Capacity*, *in* ELDER ABUSE WORK: BEST PRACTICE IN BRITAIN AND CANADA 252, 252–53 (Jacki Pritchard ed., 1999) (emphasizing that United Kingdom legislation adopted in the 1980s and 1990s applies the medical approach in the field of intellectual disabilities).

21. *See* Peter Mittler, *Meeting the Needs of People with an Intellectual Disability: International Perspectives*, *in* THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL 25, 28 (Stanley S. Herr et al. eds., 2003).

22. *See* JOHN PARRY & ERIC Y. DROGIN, MENTAL DISABILITY LAW, EVIDENCE AND TESTIMONY: A COMPREHENSIVE REFERENCE MANUAL FOR LAWYERS, JUDGES AND MENTAL DISABILITY PROFESSIONALS 7–9 (2007).

if a person has restricted electoral rights (a restriction or deprivation of active and/or passive voting rights) owing to her disabilities, this will also reduce his or her effective participation in society, since he or she cannot take part in the making of decisions that affect the community or can do so only in a limited manner.

Through the aforementioned basic institutions, we can review the relationship of the legal system to the life situations of people with disabilities. In order to give a clear answer to this question, however, we must first define the meaning of the terms passive legal capacity (a capacity for rights) and active legal capacity (a capacity to act).

C. Passive Legal Capacity (a Capacity for Rights) and Active Legal Capacity (a Capacity to Act)

1. Passive and Active Legal Capacity in Civil Law Systems

In countries with civil law systems, a sharp distinction is made between passive and active legal capacity.[23] This distinction goes beyond the difference found in classical Roman law between the capacity to sue and the capacity to be sued.[24] Based on the dogmatic results of Roman jurisprudence, in civil law systems passive legal capacity means the capacity of a person to have rights and duties, while active legal capacity means that a person can cause rights and duties to arise through his actions with regard to both himself and others.[25]

In contemporary substantive civil law, a sharp distinction is made between passive and active legal capacity. The two terms are interde-

23. These countries include the countries of the European Continent, Middle and South America (Latin America), the former member states of the USSR, Québec (Canada) and Louisiana (USA). Scotland and South Africa have a mixed (civil law and common law) legal system. *See* HAMZA GÁBOR, AZ EURÓPAI MAGÁNJOG FEJLŐDÉSE: A MODERN MAGÁNJOGI RENDSZEREK KIALAKULÁSA A RÓMAI JOGI HAGYOMÁNYOK ALAPJÁN [THE DEVELOPMENT OF EUROPEAN CIVIL LAW: THE DEVELOPMENT OF MODERN SYSTEMS OF CIVIL LAW BASED ON THE TRADITIONS OF ROMAN LAW] 21–23 (2002) [hereinafter THE DEVELOPMENT OF EUROPEAN CIVIL LAW]; GÁBOR HAMZA, DIE ENTWICKLUNG DES PRIVATRECHTS AUF RÖMISCHRECHTLICHER GRUNDLAGE: UNTER BESONDERER BERÜCKSICHTIGUNG DER RECHTSENTWICKLUNG IN DEUTSCHLAND, ÖSTERREICH, DER SCHWEIZ UND UNGARN [THE DEVELOPMENT OF CIVIL LAW FROM ROMAN LEGAL TRADITIONS: WITH SPECIAL REFERENCE TO LEGAL DEVELOPMENTS IN GERMANY, AUSTRIA, SWITZERLAND, AND HUNGARY] 9–10 (2002) [hereinafter THE DEVELOPMENT OF CIVIL LAW FROM ROMAN LEGAL TRADITIONS].

24. FÖLDI ANDRÁS & HAMZA GÁBOR, A RÓMAI JOG TÖRTÉNETE ÉS INSTITÚCIÓI [THE HISTORY AND INSTITUTIONS OF ROMAN LAW] 228–29 (2001). Similar to traditional common law, Classical Roman law did not recognize the abstract notion of subjective (civil) rights. It treated rights basically as rights of litigation. *Id.*

25. *Id*. at 203, 225. Based on Roman law recognizing slavery, this could also mean that passive and active legal capacity diverged—a competent person could be without active legal capacity, and an incompetent slave could have active legal capacity. *Id.*

pendent, even though since the abolition of the institution of slavery in advanced countries in the mid-nineteenth century, almost everyone has had passive legal capacity. By the mid-twentieth century, this principle had become a universal one, at least at the legal level. Indeed, a ban on slavery is contained in the International Covenant on Civil and Political Rights,[26] adopted under the auspices of the United Nations. Concerning active legal capacity, contemporary private substantive law has preserved the Roman law foundations; thus, a person has active legal capacity where she can, through her own actions, obtain rights for herself or for someone else, or assume obligations.[27]

The situation differs slightly in the field of procedural law, where no such sharp distinction is made between passive and active legal capacity.[28] Thus, similar to codes of procedure in other countries, the Hungarian Code of Civil Procedure (Act III of 1952 on the Code of Civil Procedure) recognizes a person's capacity to sue and be sued, which effectively embodies both passive legal capacity and active legal capacity.[29] The capacity to sue and be sued can be broken down into two elements: first, a capacity for rights in a court of law, which is due to almost all natural persons as well as legal persons and, on occasion, even to entities without legal personality or legal subjectivity (e.g., the county social and guardianship offices in the context of administrative lawsuits);[30] second, the capacity to act in a court of law, which is broader in scope than the civil law capacity to act (e.g., in guardianship suits, a person with limited capacity to act has full capacity to sue).[31]

In the field of constitutional law, we may highlight electoral law. Based on active and passive electoral rights, individuals can take part in the making of decisions that affect the community. Historically, a sharp distinction has been made between electoral rights and active legal

26. REHMAN, *supra* note 18, at 85.

27. For more on the definition of active legal capacity, see BARNABÁS LENKOVICS & LÁSZLÓ SZÉKELY, A SZEMÉLYI JOG VÁZLATA [THE OUTLINE OF PERSONAL RIGHTS] 31 (2000) (Hung.); FÁBIÁN FERENC & SÁGHY MÁRIA, POLGÁRI JOG I. [HUNGARIAN CIVIL LAW, VOL. I], 20–22 (2007); J.M. Thomson, *Private Law Aspects of Parents' and Children's Rights in Scotland*, *in* 1 FRONTIERS OF LIABILITY 191, 197 (P.B.H. Birks ed., 1994).

28. MIKLÓS KENGYEL, MAGYAR POLGÁRI ELJÁRÁSJOG [HUNGARIAN CIVIL PROCEDURE LAW] 133–34 (2001).

29. *Id*.

30. *See* 1 LÁSZLÓ TÖLG-MOLNÁR, POLGÁRI ELJÁRÁSJOG [CIVIL PROCEDURE LAW] 87–88 (2006) (Hung.); A POLGÁRI PERRENDTARTÁS MAGYARÁZATA I–II. [AN EXPLANATION OF THE CODE OF CIVIL PROCEDURE, VOL. I–II] 247–48 (János Németh ed., 1999) (Hung.).

31. AN EXPLANATION OF THE CODE OF CIVIL PROCEDURE, *supra* note 30, at 243, 255–56, 1290.

capacity in civil law.[32] By the twentieth century, however, with the spread of universal suffrage in Europe, the two became interconnected—electoral rights were linked with a person's full active legal capacity in civil law.[33] Modern constitutional law sometimes exceeds this, particularly with regard to the rights of children and young people. Indeed, in some countries, such as Austria, active voting rights have been granted to young people who have not reached the age of full legal capacity in civil law.[34]

In penal law, a sharp distinction is made between passive and active legal capacity as well. Only a person with a capacity for guilt can be held responsible for criminal acts.[35] An age limit is also applied in the case of capacity for guilt, but this age limit is lower than the age limit for active legal capacity in civil law.[36] Furthermore, persons with intellectual disabilities are usually granted exemptions.[37] Here, we should also emphasize that in penal law, the medical model (a person's pathological mental state) is still applied when defining or assessing intellectual disability.[38]

2. Passive and Active Legal Capacity in Common Law Systems

In the private law of common law systems, which resembles in many respects the logic of classical Roman law,[39] no sharp distinction is made between passive legal capacity (a capacity for rights) and active legal capacity (a capacity to act).[40] Indeed, in common law systems, it is only under the influence of civil law systems—and, above all, statute law—that the abstract notion of "subjective right" (or "civil right") has

32. *See* BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD 15 (1993).

33. *See, e.g.*, COUNCIL OF EUROPE, ELECTORAL SYSTEMS AND VOTING PROCEDURES AT LOCAL LEVEL 41 (1999).

34. *Austria First to Lower Voting Age to 16*, USA TODAY (Sept. 25, 2008), http://www.usatoday.com/news/world/2008-09-25-austria-voting-age_N.htm. In federal and most member states' (Länder) elections in Austria, young people aged over 16 have voting rights. Similar to the federal regulation, various provinces have also reduced the age limit for active voting rights in provincial parliamentary elections. The age limit for passive voting rights has not been reduced. Pat Maadi, *Parliament Approves New Laws*, WIENER ZEITUNG (June 5, 2007), *available at* http://www.eduhi.at/dl/2007-06-05_Wiener_Zeitung._Parliament_approves_new_laws.doc.

35. Kristina Karsay, *Criminal Responsibility of Minors in National and International Legal Order*, 75 INT'L REV. PENAL L. 379, 379 (2004).

36. *See id*.

37. *See id*. at 381.

38. JOHN DELANEY, LEARNING CRIMINAL LAW AS ADVOCACY ARGUMENT 30 (2004).

39. Brake & Katzenstein, *supra* note 4, at 14.

40. *See* SMITH, *supra* note 4, at 251 (discussing both active and passive legal capacity, but failing to distinguish between the two).

arisen.[41] In common law systems, legal precedents establish principles and rules, meaning that rights are inevitably linked to their enforceability before a court of law.[42] It is the ability to take a stand before a court of law, an ability that incorporates both passive and active legal capacity, that has traditionally been referred to in English legal speech as *legal capacity*.[43] This term most closely resembles the capacity to sue and be sued of procedural law in civil law systems.

In the fields of penal law and constitutional law, the above conclusions are still applicable despite the differences between the common law system and the civil law system.

II. A SURVEY OF THE PRINCIPAL HISTORICAL MODELS RELATING TO THE PASSIVE AND ACTIVE LEGAL CAPACITY OF PERSONS WITH INTELLECTUAL DISABILITIES

A. Legal Provisions Relating to the Passive and Active Legal Capacity of Persons with Intellectual Disabilities—From Roman Law to the Legal Situation Prevailing in the Mid-Twentieth Century

1. The Pre-Modern Era and Traditional Legal Systems

In the pre-modern classical and medieval eras, the legal status of people with disabilities was poor. *Disability always implied a restriction of a person's active legal capacity*.[44]

According to the law of ancient Rome, a person was deprived of active legal capacity not only by a mental disorder or illness, but also other physical disabilities, such as blindness and especially muteness.[45] In late, post-classical Roman law, however, the beginnings of an attempt to understand disability may be observed. For instance, if a person with a mental disorder or illness was capable of making rational decisions in his "lighter moments" (*lucidum intervallum*), then that person was to be regarded as having full active legal capacity under the decrees of Emperor Diocletian and Emperor Justinian.[46] Thus, under

41. *See* James H. Hutson, *The Emergence of the Modern Concept of a Right in America: The Contribution of Michael Villey*, 39 AM. J. JURIS. 185, 196–97, 205–06 (1994).

42. *See, e.g.*, Harry N. Wyatt, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 883, 887–88, 892–95, 897–98 (1996) (discussing enforceability of inheritance rights).

43. PARRY & DROGIN, *supra* note 22, at 7.

44. However, Hungarian feudal (medieval) law presumed (mental) sanity. *See* BELIZNAY KINGA ET AL., MAGYAR JOGTÖRTÉNET [HISTORY OF HUNGARIAN LAW] 80 (Mezey Marna ed., 1996).

45. *Id.*

46. FÖLDI & HAMZA, *supra* note 24, at 228–29.

these decrees, a person was only defined as disabled if he or she was incapable of effective participation in society.[47]

Even so, disability could have had grave consequences in pre-modern law and continues to have grave consequences in the traditional legal systems of our own era.[48] For instance, during the medieval period, people with intellectual or physical disabilities were often viewed as witches or as being possessed by the devil.[49] In such cases, they were deprived of passive legal capacity and sometimes even murdered.[50]

In certain traditional legal systems, people with disabilities are deprived of their active legal capacity, and occasionally, their passive legal capacity.[51] Since traditional legal systems continue to exist in developing countries, Article 12(2) of the CRPD underlines the need to recognize the legal capacity of persons with disabilities everywhere.[52]

By way of summary, we can state that the legal systems of the pre-modern era almost universally restricted the active legal capacity of people with disabilities; further, in some instances, these systems even deprived them of passive legal capacity.

2. Modern Legal Systems Until the Twentieth Century

With the development of modern legal systems, generally recognition is now given to the fact that legal capacity is due to every person, irrespective of disability. In modern private law, reflecting the dogmatism of Roman jurisprudence, a clear distinction is made between passive and active legal capacity.[53]

Under the civil law codes, restricting a person's active legal capacity was possible on three grounds: the person's age, an inability to express her will (e.g., intoxication), and mental illness or (congenital) mental disability.[54]

Section 489 of the French *Code Civil* of 1804, the first great code of civil law, recognized incompetence based on person's age, an inability to express her will ("*imbécillité*"), and incompetence arising

47. *Id*.

48. *See* BELIZNAY KINGA ET AL., *supra* note 44, at 73, 80.

49. Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, 325 (1997).

50. *Id*.

51. For example, in the People's Republic of China, there is a family-based guardianship system. *See* Yang Shao et al., *Current Legislation on Admission on of Mentally Ill Patients in China*, 33 INT'L J.L. & PSYCHIATRY 52, 56 (2010).

52. CRPD, *supra* note 2, art. 12, ¶ 2.

53. *See* Thomson, *supra* note 27, at 196.

54. For the various grounds, see LENKOVICS & SZÉKELY, *supra* note 27, at 23–25.

from mental illness.[55] Under Section 489 of the *Code Civil*, adults lacking capacity were placed under guardianship.[56] The *Code Civil* also recognized the notion of *diminished legal capacity*; in such cases, a legal statement made by the person under guardianship was subject to the guardian's approval.[57] Based on examples from the Roman law, the *Code Civil* declared unilateral legal statements by persons with diminished active legal capacity as invalid.[58]

The above model was repeated in the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch), proclaimed seven years later in 1811 and entered into force in 1812.[59] Under Section 273 of the Austrian Civil Code, the mentally ill had active legal capacity but were under guardianship.[60] The Austrian Civil Code regulated diminished active legal capacity in a manner similar to that of the *Code Civil*. Thus, the legal transactions of a person with diminished active legal capacity were subject to the approval of a guardian.[61] Furthermore, the Austrian Civil Code also applied the invalidity of unilateral acts in certain areas.[62]

Perhaps the clearest instance of legal incompetence derived from Roman jurisprudence and reflecting the medical advances of the eighteenth and nineteenth centuries is found in the German Civil Code (Bürgerliches Gesetzbuch), which was adopted in 1896 and entered into force in 1900.[63] Under Section 104 of the original German Civil Code, a person of seven years of age or less, or an individual who was unable to express his will or who had been rendered a person under guardianship due to mental illness, had no active legal capacity.[64]

Sections 114 and 115 of the original German Civil Code prescribed restrictions on the active legal capacity of minors aged between seven and eighteen and of individuals with mental disability or illness or addiction (the latter included alcoholism and nicotine

55. *See* 1 ÉMILE ACOLLAS, MANUEL DE DROIT CIVIL: A L'USAGE DES ETUDIANTS [HANDBOOK OF CIVIL LAW FOR STUDENTS] 411 (1869).

56. HENRY CACHARD, THE FRENCH CIVIL CODE, WITH VARIOUS AMENDMENTS THERETO: AS IN FORCE ON MARCH 15, 1895 121 (1895).

57. *Id.* at 111, 125.

58. Varul et al., *supra* note 5, at 104.

59. THE DEVELOPMENT OF CIVIL LAW FROM ROMAN LEGAL TRADITIONS, *supra* note 23, at 103–06.

60. ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] § 273 (Austria).

61. EUGEN BLEULER, LEHRBUCH DER PSYCHIATRIE [TEXTBOOK OF PSYCHIATRY] 674–75 (Manfred Bleuler ed., 15th ed. 1983) (Ger.).

62. *Id.* at 675.

63. THE DEVELOPMENT OF CIVIL LAW FROM ROMAN LEGAL TRADITIONS, *supra* note 23, at 96–97.

64. CHUNG HUI WANG, THE GERMAN CIVIL CODE 23 (1907).

addiction according to the text of the original Code).[65] Similarly, here, active legal capacity was subject to guardianship provisions.[66] In other words, the approval of a guardian was required; legal transactions based on statements made by such persons were subject to the invalidity of the unilateral statements rule, *negotium claudicans*, whereby the incompetence of a person could only be cited as grounds for invalidating a legal transaction in the interest of the person.[67] Moreover, under labor law[68] and inheritance law, some legal statements were still considered invalid even when they had been approved by the guardian.[69]

The great codes of civil law represented an advance in the sense that they recognized and prescribed the general and full passive legal capacity of people with disabilities. Even so, reflecting Roman law and the state of medical knowledge, jurisprudence in the period continued to define persons with intellectual disabilities and the mentally ill as lacking active legal capacity.[70] They were made subject to guardians who represented them fully and in all areas.[71]

Concerning addictions and other disabilities regarded as less serious by medicine, the above great codes of civil law made reference to restricted active legal capacity, thus offering a degree of independence to persons under guardianship.[72] However, in all major legal transactions, the approval of the legal representatives (guardians) was a prerequisite.[73] In the field of labor law and inheritance law, the invalidity of unilateral statements usually applied.[74]

B. Passive and Active Legal Capacity in Hungarian Law

1. Passive and Active Legal Capacity in Feudal Hungarian Law

Until the introduction of the Hungarian Civil Code, Hungarian law was based on common law. That is to say, there were no codified

65. *Id*. at 25.
66. *Id*. at 23, 25.
67. *Id*.
68. HORVÁTH ISTVÁN, MUNKAJOG [LABOR LAW] 32–34 (2007) (Hung.).
69. HANS BROX, ALLGEMEINER TEIL DES BÜRGERLICHEN GESETZBUCHS [GENERAL PART OF THE CIVIL CODE] 105–12 (2., erg. Aufl. 1978) (Ger.).
70. *See* Varul et al., *supra* note 5, at 102.
71. *Id.*
72. *Id*. at 103.
73. *Id*. at 104.
74. *See* RESTATEMENT (THIRD) OF EMPLOYMENT LAW app. B (2009) (discussing the various states' rejection of unilateral statements).

rules.[75] Instead, various documents of common law played a decisive role.[76] Werbőczy's *Tripartitum* was the first major survey of Hungarian common law.[77]

The *Tripartitum* suggests that in principle, disability did not influence the legal capacity of people under feudal status law.[78] Although Werbőczy's *Tripartitum* sought to apply the dogma and terminology of Roman law to Hungarian law, it nevertheless differed dogmatically from works based on traditional Roman law.[79] Under Roman law, the principal distinction between custody and guardianship was that custody served as a replacement for parental authority, while guardianship sought to provide a representative for a person with diminished active legal capacity.[80] In contrast, in customary Hungarian civil law, custody and guardianship were distinguished according to whether there was a requirement to care for the person, in addition to the supervision of property. Where there was such a requirement, the relationship was one of custody; otherwise, it was one of guardianship.[81] Thus, under Hungarian feudal customary law, persons with intellectual disabilities were placed under custody while "wayward fools" were placed under guardianship.[82]

These provisions, however, did not represent a real difference as far as active legal capacity was concerned, since in both instances, the legal regulations of property relating to guardianship were applied. As far as property law was concerned, custody and guardianship status were similar to diminished active legal capacity, since the ward (the person under guardianship) was limited in the extent to which he could make legal statements.[83]

75. Kazimierz Grzybowski, *Reform of Civil Law in Hungary, Poland, and the Soviet Union*, 10 AM. J. COMP. L. 253, 253 (1961).

76. *Id.*; BELIZNAY ET AL., *supra* note 44, at 73–75.

77. IGNÁC FRANK, A KÖZIGAZSÁG TÖRVÉNYE MAGYARHONBAN [HUNGARIAN PUBLIC AND PRIVATE LAW] 64–66, 179, 183–85 (1845).

78. *See* THE DEVELOPMENT OF CIVIL LAW FROM ROMAN LEGAL TRADITIONS, *supra* note 23, at 67.

79. THE DEVELOPMENT OF EUROPEAN CIVIL LAW, *supra* note 23, at 79–80.

80. FÖLDI & HAMZA, *supra* note 24, at 264.

81. ISTVÁN WERBÖCZI, TRIPARTITUM, *translated in* THE CUSTOMARY LAW OF THE RENOWNED KINGDOM OF HUNGARY: A WORK IN THREE PARTS, THE "TRIPARTITUM" (Janos M. Bak et al. eds., 2005).

82. FRANK, *supra* note 77, at 179.

83. *Id.* at 183–85.

2. Civil Law in the Second Half of the Nineteenth Century

In the second half of the nineteenth century, the above rigid regulations restricting the freedom of a ward of custody or a person under guardianship were significantly relaxed, principally as a consequence of the adoption of Act XX of 1877. In addition, the terms custody and guardianship were redefined.[84] In the evolving civil law (which was based on customary law), a differentiation was made between the two legal forms—a differentiation which had come from Roman law into the civil law systems.[85] As a result, adults could now only be under guardianship.[86]

The German and Austrian models were the primary influences on the development of Hungarian civil law.[87] Thus, based on judicial practice, in addition to minors aged under twelve years, "lunatics" (to use the contemporary term) and "those with temporary mental disturbances" were placed under custody with no active legal capacity.[88] Persons aged between twelve and twenty-four years and "the weak-minded, deaf-dumb, and wayward fools" were placed under custody with restricted active legal capacity.[89] Based on the above, one can see that Hungarian law included some of the strictest restrictions in Europe—in Hungary, even a serious hearing or speech disability was considered grounds for restricted active legal capacity.[90] These highly restrictive rules were altered by a civil law bill, whose provisions were applied by the courts even though they were only adopted and not proclaimed by the Lower House of the National Assembly.[91] The new provisions included, almost word for word, the stipulations of the

84. *See* 1877. évi XX. törvény a gyámsági és gondnoksági ügyek rendezéséről [Act XX of 1877 on the Settlement of Guardianship and Guardianship Matters] § 28 (Hung.); SZLADITS, *supra* note 8, at 80–81.

85. SZLADITS, *supra* note 8, at 173 (describing the evolution of the Hungarian system and the influence of Roman and customary Hungarian law).

86. *See* THE HUNGARIAN DISABILITY CAUCUS, DISABILITY RIGHTS OR DISABLING RIGHTS? 148 (2010), *available at* http://mdac.info/sites/mdac.info/files/English_Disability%20Rights%20or%20Disabling%20Rights%20CRPD%20Alternative%20Report.pdf (custody only used to refer to children's being in the custody of their parents; otherwise the "custody" of the adult disabled is referred to as "guardianship").

87. SZLADITS, *supra* note 8, at 173 ("Through the influence of Austrian institutions and doctrine, the spirit of Roman-German law systems begins to penetrate, considerably altering the original character of our private law.").

88. ÁRMIN FODOR, MAGYAR MAGÁNJOG [HUNGARIAN CIVIL LAW] 311 (1903).

89. *Id.* at 310–11.

90. *Id*.

91. *See* Grzybowski, *supra* note 75, at 253.

German Civil Code relating to active legal capacity and restricted active legal capacity.[92]

In the latter half of the nineteenth century and the early years of the twentieth century, Hungarian civil law clearly followed the pattern set by German law.[93] Thus, in Hungary too, the traditional medical approach to active legal capacity was applied. Moreover, the rules of legal protection were also similar.[94]

3. The Operative Hungarian Civil Code

Although prescribed as early as 1848, the codification of Hungarian civil law did not take place until 1959 with the adoption of the operative Hungarian Civil Code.[95] The Code's approach to the regulation of passive and active legal capacity was a modern one.

In line with traditional civil law, the 1959 act made a distinction—with regard to adults—between custody without active legal capacity and custody with diminished active legal capacity.[96] This distinction was based on whether or not a cognitive incapacity was present, which was normally verified by a medical opinion.[97] As far as diminished active legal capacity was concerned, the legal protection measures employed in the nineteenth century codes were used.[98] Even so, reflecting an attempt to respond to the challenges of the era, the Hungarian Civil Code recognized the validity of the everyday legal transactions of persons with diminished active legal capacity.[99]

4. Provisions in Constitutional and Labor Law Relating to Active Legal Capacity

Having surveyed the rules of Hungarian civil law relating to active legal capacity, owing to their special significance, we now examine the

92. *See* 1959. évi IV törvény a Polgári Törvénykönyvről [Act IV of 1959 on the Civil Code] § 14 (Hung.); *see also* THE DEVELOPMENT OF CIVIL LAW FROM ROMAN LEGAL TRADITIONS, *supra* note 23, at 138–39.

93. CATHERINE DUPRÉ, IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS: THE HUNGARIAN CONSTITUTIONAL COURT AND THE RIGHT TO HUMAN DIGNITY 95 (2003).

94. *See* MENTAL DISABILITY ADVOCACY CTR., NATIONAL IMPLEMENTATION PROCESS OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 2 (2008), *available at* http://www2.ohchr.org/english/issues/disability/docs/consultation/Civilsocietyinputs/hungary MDAC.doc [hereinafter MDAC REPORT].

95. THE DEVELOPMENT OF EUROPEAN CIVIL LAW, *supra* note 23, at 177.

96. *See* 1959. évi IV törvény a Polgári Törvénykönyvről [Act IV of 1959 on the Civil Code] § 14 (Hung.).

97. *Id.* § 15(5).

98. *Hungary: Parliament Reforms Legal Capacity Laws*, *supra* note 17.

99. LENKOVICS & SZÉKELY, *supra* note 27, at 27.

development of provisions in constitutional law (electoral law) and labor law relating to the active legal capacity of persons with intellectual disabilities in the twentieth century.

When voting rights became universal, there was no change in the rule that a person under limited or full custody had neither active nor passive voting rights.[100]

As a consequence of its roots in civil law, labor law tended to apply the civil law notion of active legal capacity, which resulted in situations that were difficult to interpret.[101] This was true, above all, in the case of persons under custody with no active legal capacity, which is often the case even today.[102]

By way of summary, we can state that Hungarian legal regulations historically have tended to follow European examples, and that in the modern era, Hungarian law has adopted contemporary regulations which assist the country's modernization.

III. A NEW APPROACH IN MODERN CONSTITUTIONAL AND CIVIL LAW TO THE PASSIVE AND ACTIVE LEGAL CAPACITY OF PERSONS WITH INTELLECTUAL DISABILITIES

A. The Constitutional Legal Basis of Provisions Relating to the Passive and Active Legal Capacity of Persons with Intellectual Disabilities

The constitutional legal approach to the rights of persons with intellectual disabilities appeared in the second half of the twentieth century in industrialized countries.[103] In part, there were historical reasons for this—the dictatorial governments of the first half of the twentieth century had grossly abused the rights of persons with disabilities. In this context, we cite the so-called "euthanasia" program in Germany, whereby the Nazis murdered tens of thousands of persons with moderate or severe intellectual disabilities.[104]

In addition to such historical reasons, the issue also became more salient as persons with disabilities were assisted by technological developments to become active members of society. In view of such

100. *See Hungary: Parliament Reforms Legal Capacity Laws*, *supra* note 17.

101. *See id.*

102. A MAGYAR MUNKAJOG I. [HUNGARIAN LABOR LAW VOL. I] 79–80 (Csilla Kollonay Lehoczyné ed., 2001).

103. *See* Jerome E. Bickenbach, *Disability Human Rights, Law, and Policy*, *in* HANDBOOK OF DISABILITY STUDIES 565, 571 (Gary L. Albrecht et al. eds., 2001).

104. *Mosaic of Victims: An Overview*, U.S. HOLOCAUST MUSEUM, http://www.ushmm.org/wlc/en/article.php?ModuleId=10005149 (last visited Oct. 15, 2011).

developments, the need arose to catalogue the rights of persons with disabilities and establish rules governing their legal protection.[105]

Special legislation guaranteeing the rights of persons with disabilities was first adopted in the common law countries[106] where, due to the aforementioned notion of legal capacity, the legal system offered broader opportunities for actions on behalf of persons with intellectual disabilities.[107] In these countries, the legal system enabled legislation imposing an effective ban on discrimination. In the United States, the United Kingdom, Australia, and New Zealand, disability legislation was aimed primarily at preventing discrimination and ensuring equal opportunities.[108]

In addition to the fight against discrimination, greater emphasis was given to ensuring the human dignity of people with disabilities,[109] which entailed the introduction of provisions addressing the problems of people with disabilities in their complexity. Going beyond the anti-discrimination rules, the aim was to establish a kind of catalogue of rights for persons with disabilities and to ensure the application of these rights in all walks of life and in all areas of legislation. Among such legislations, the Hungarian Act on the Rights and Equal Opportunities of Persons with Disabilities (Act XXVI of 1998) had a pioneering significance, as it was one of the first pieces of legislation in the world to apply the holistic model of disability.[110] A similar model was applied by Germany when drafting its legislation on the equality of people with disabilities.[111]

The process of securing the rights of people with disabilities also significantly influenced the adoption of provisions concerning the active

105. TAMÁS GYULAVÁRI & GYÖRGY KÖNCZEI, EURÓPAI SZOCIÁLIS JOG [EUROPEAN SOCIAL LAW] 10 (2000) (Hung.).

106. *See* Michael L. Perlin, *International Human Rights Law and Comparative Disability Law: The Role of Institutional Psychiatry in the Suppression of Political Dissent*, 39 ISR. L. REV. 69, 75–85 (2006), *available at* http://www.narpa.org/MLP-IHR-ILR.pdf.

107. *See* Bickenbach, *supra* note 103, at 569.

108. *See id*.

109. *See* Mark Priestley, *In Search of European Disability Policy: Between National and Global*, *in* 1 EUR. J. DISABILITY RES. 61, 63–64 (2007).

110. ISTVÁN HOFFMAN, ÖNKORMÁNYZATI KÖZSZOLGÁLTATÁSOK SZERVEZÉSE ÉS IGAZGATÁSA [MUNICIPAL ORGANIZATION AND MANAGEMENT OF PUBLIC SERVICES] 228–29 (2009) (Hung.).

111. The *sedes materiae* for social services for people with disability is the twelfth Book of the German Social Code (*Sozialgesetzbuch*). The German *Bundestag* adopted an independent act on the equality of the persons with disabilities in 2002 (*Behindertengleichstellungsgesetz*). *See* RAINER WAGNER & DANIEL KAISER, EINFÜHRUNG IN DAS BEHINDERTENRECHT [INTRODUCTION TO DISABILITY LAW] 97–98 (2004) (Ger.).

legal capacity of persons with intellectual disabilities.[112] It is now generally accepted that the application of basic rights and the operation of a democratic community are not possible if broad sections of the population are excluded from participation in society because they have been defined as lacking active legal capacity.

B. Changes in Modern Civil Law Affecting the Passive and Active Legal Capacity of Persons with Intellectual Disabilities

The second half of the twentieth century saw changes in the passive and active legal capacity of persons with intellectual disabilities.[113] The departure point was the fundamental rights approach to the rights of persons with disabilities.[114] Following the adoption of legislation in the 1980s and 1990s based primarily on the ban of discrimination and the right to human dignity,[115] there was a reconsideration of the provisions of civil law governing the withdrawal or restriction of a person's active legal capacity.[116]

The process had several phases. First, civil law codifications in the mid-twentieth century—for example, the operative Hungarian Civil Code (Act IV of 1959)—enabled the *everyday transactions*, such as buying food, of persons without capacity to function as valid legal transactions.[117] This model was also applied in the recently enacted Section 105a of the German Civil Code.[118] According to the code, even though the transactions of persons without capacity are invalid under the primary rule contained in Section 105, the transactions of adult persons without capacity that are necessary for satisfying their everyday needs do have legal effect, as long as the value and the consideration are proportionate and the transaction does not jeopardize the interests of the person without capacity.[119] The second change, in the final third of the twentieth century, was the *redefinition of the notion of incompetence*.[120]

112. *See* Varul et al., *supra* note 5, at 99–100, 102–04, 107.

113. *Id.* at 102–04.

114. *See* Lang, *supra* note 12, at 268–70.

115. *Id*.

116. Varul et al., *supra* note 5, at 102–04.

117. 1959. évi IV törvény a Polgári Törvénykönyvről § 14 [Act IV of 1959 on the Civil Code] (Hung.).

118. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT, Teil I [BGBL. I] 42, 2909, as amended, § 105a (Ger.), *available at* http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html.

119. *See* THOMAS ZERRES, BÜRGERLICHES RECHT: EIN EINFÜHRENDES LEHRBUCH IN DAS ZIVIL- UND ZIVILPROZESSRECHT [CIVIL LAW: AN INTRODUCTORY TEXTBOOK IN CIVIL LAW AND PROCEDURE] 79–81 (2005).

120. Jones & Basser Marks, *supra* note 18, at 5.

This primarily entailed a restructuring of the previous threefold division—age, the inability to express one's will, and mental illness or intellectual disability.[121] During this phase, as far as the definition of the notion of incompetence was concerned, the *social approach* became definitive.[122] These provisions defined people who were unable to participate in society for various reasons, including intellectual disability or mental illness, as incapable of expressing free will or making a legal statement.[123]

The third phase in the process was a *redefinition of the notion of diminished active legal capacity*.[124] Under traditional civil law, diminished active legal capacity meant that among persons of limited cognitive reliability (due to age, intellectual disability, or mental illness), the consent of those exercising parental supervision or authority, such as custodians (or guardians, in the case of adults), was required for certain major legal transactions.[125] Until the civil law reforms in the late twentieth century, this restriction applied to all aspects of life.[126] It was in the common law countries that the opportunity first arose for only limited restrictions on legal autonomy of individuals.[127] Where this innovation was applied, the consent of a guardian was necessary only with respect to those activities where the courts had ordered a restriction.[128] In all other transactions, the individual in question had *full active legal capacity*.[129]

The early twenty-first century saw a restructuring of the legal forms of restricted active legal capacity.[130] Several models have arisen in this area as well.

One of the models is based on the notion of *legal capacity* to be found in the common law countries and in English family law.[131] Since legal capacity in the common law system embodies both passive and active legal capacity, the model prescribed the removal of the traditional

121. *Id*; *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 12 cmt. b & c (1981) (discussing capacity to contract, types of incapacity, and inability to assent).

122. Mulvany, *supra* note 7, at 39–40.

123. *See* Varul et al., *supra* note 5, at 100; Jones & Basser Marks, *supra* note 18, at 5.

124. *See* Varul et al., *supra* note 5, at 106.

125. *See id.* at 105–06.

126. *See id*. at 102.

127. Lang, *supra* note 12, at 268; *see, e.g.*, PARRY & DROGIN, *supra* note 22, at 7–9.

128. *See* Varul et al., *supra* note 5, at 107.

129. *See id.* at 101–02. This model is a good example for the theory of spheres of legal capacity (*Sphärengeschäftsfähigkeit*) in German civil law and jurisprudence. *See* JÜRGEN PLATE, DAS GESAMTE EXAMENSRELEVANTE ZIVILRECHT: FÜR STUDENTEN UND RECHTSREFERENDARE [COMPLETE EXAM-TESTED CIVIL LAW: FOR STUDENTS AND LAW CLERKS] 365–66 (2005).

130. *See* Varul et al., *supra* note 5, at 100.

131. *See id*.

notion of legal incompetence.[132] Under this model, which has appeared primarily in the law of former British colonies such as Canada, New Zealand, and Australia, all persons with disabilities have a certain capacity to act.[133] Hence, in various areas and in certain legal matters, they have full capacity or their opinions must at least be taken into consideration. The application of this model assisted the implementation of the fundamental rights of persons with disabilities, mentioned in Subsection A of Part 1 of III. Full incompetence was effectively deemed a restriction of their constitutional rights.[134] Thus, the countries adhering to this model adopted the legal position that it is incompatible with the framework of a democratic State if the active legal capacity of certain persons is restricted to such a degree that fundamental rights cannot be applied.[135] It was also considered necessary in the common law model that there should be legal means of offering assistance to such persons as they make their decisions, and that such means of assistance should respect their integrity and autonomy.[136]

In addition to the common law countries, the model has also appeared in Europe. For example, it was applied in the Estonian draft bill of 2002, which proposed an amendment to the General Provisions of the Estonian Civil Code adopted in 1994.[137] The bill sought the abolition of full guardianship (with no active legal capacity), but it was rejected by the Estonian legislature.[138]

The complete withdrawal of a person's active legal capacity—or a restricted active legal capacity where all legal transactions are subject to the restriction with the exception of everyday transactions—was regarded as incompatible with fundamental constitutional rights in the common law countries.[139] This also became the position under the German model, which expanded the freedom of persons with disabilities to make decisions as well.[140] In the revised German Civil

132. *See id.*

133. *See* Bickenbach, *supra* note 103, at 569.

134. *See* Lang, *supra* note 12, at 268–70.

135. *See* Varul et al, *supra* note 5, at 104; Nancy J. Knauer, *Defining Capacity: Balancing the Competing Interests of Autonomy and Need*, 12 TEMP. POL. & CIV. RTS. L. REV. 321, 347 (2003).

136. *See* Varul et al., *supra* note 5, at 103. Thus, for persons with various psycho-social disabilities, the legal system and administrative practice have elaborated many means of assistance in a variety of areas. For information about assistance granted to people with reading disabilities at the time of elections, see Marcus Redley, *Citizens with Learning Disabilities and the Right to Vote*, 23 DISABILITY & SOC'Y 375, 376–79 (2008).

137. FÖLDI & HAMZA, *supra* note 24, at 249.

138. *See* Varul, *supra* note 5, at 99, 103.

139. *See* DIMOPOULOS, *supra* note 16, at 69.

140. ZERRES, *supra* note 119, at 79.

Code, guardianship without active legal capacity theoretically has not been abolished, even though Section 105a allows for persons without active legal capacity under guardianship to proceed independently in everyday transactions.[141] But the rules on guardianship for persons without active legal capacity were abrogated in the German Code of Civil Procedure (*Zivilprozessordnung* (ZPO)).[142]

Nevertheless, with the abrogation of Sections 113–115, guardianship with diminished active legal capacity was replaced by the institution of assisted decision-making not restricting active legal capacity. Under the amended Section 1897 of the German Civil Code, assisted decision-making can be ordered by a court with responsibility for matters of guardianship, but only in specific spheres of authority, not generally.[143] Courts may also appoint different "supporters" ("carers") for different spheres of authority; another possibility is that the tasks of a supporter are carried out by an association or an official authority.[144] The nomination is subject to the agreement of the supported person, and the German Civil Code regards the relationship between a person with disabilities and his or her supporter as one of trust. The amended sections of the code lay down special procedural rules for major issues, such as choosing where to live, signing a rent agreement, or making certain legal statements pertaining to healthcare.[145]

These models have exerted a major influence on the recent codification of rights of the person, and a consideration of their basic features has also led to the development of mixed models, combining elements of the two concepts.[146]

In modern civil rights, the classical formulas of the nineteenth century that were based on Roman law (or on traditional common law in common law countries) have been replaced by a new approach, owing in large part to changes in the area of constitutional rights.[147] Since the mid-twentieth century, the rigid provisions governing incompetence and diminished active legal capacity have been relaxed by ensuring the right to proceed in everyday transactions and by amending the notions of incompetence and restricted active legal capacity in the sense that active legal capacity is now determined for the

141. *Id*.
142. *See* INTRODUCTION TO GERMAN LAW 268–69 (J. Zekoll & M. Reimann eds., 2d ed. 2005).
143. *Id*. at 269.
144. *See id*.
145. *See id*.
146. *See* Lang, *supra* note 12, at 268–70.
147. HUNGARIAN LABOR LAW VOL. I, *supra* note 102, at 79–80.

various fields of authority. In the civil law legislation of the early twenty-first century, we can distinguish two main models with respect to the above notions: the common law model, which has effectively abolished guardianship without active legal capacity and now only recognizes restricted active legal capacity,[148] and the German model, which has introduced assisted decision-making as a replacement for the institution of guardianship with diminished active legal capacity.[149]

IV. THE UNITED NATIONS' CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND THE OPTIONAL PROTOCOL

In Subsection A of Part III, we noted that at the beginning of the twenty-first century, there was increasing acceptance throughout the international community of the need for national legislation to guarantee the rights of persons with disabilities and of the duty of governments to ensure the application of these rights.

With regard for national legislative efforts and developments in European Community law in this field[150] and, following an initiative by the international disability organizations, work began on drafting a global disability convention under the auspices of the United Nations.[151] As a result of several years of preparatory work, the United Nations General Assembly adopted the CRPD and its Optional Protocol on December 13, 2006.[152] In 2007, Hungary became the second country to ratify the Convention (Act XCII of 2007).[153]

The Convention contains a partial catalogue of the rights of persons with disabilities. Article 12 of the Convention contains provisions relating to legal capacity and the exercising of legal capacity.[154]

For a proper interpretation of Article 12, it is necessary once again to refer to the notion of *legal capacity* as it is understood in common law systems. In common law systems with their procedural legal

148. *See* Varul et al., *supra* note 5, at 104.

149. *See* INTRODUCTION TO GERMAN LAW, *supra* note 142, at 269.

150. *See, e.g.*, Council Directive 2000/78, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16 (EC); Council Regulation 1107/2006, Concerning the Rights of Disabled Persons and Persons with Reduced Mobility When Traveling by Air, 2006 O.J. (L 204) 1 (EC); *see also* Anne Waldschmidt, *Disability Policy of the European Union: The Supranational Level*, 3 EUR. J. DISABILITY RES. 8, 13–14 (2009) (discussing European Union disability policy and its possible disconnect with social policy).

151. Lang, *supra* note 12, at 271.

152. *Convention on the Rights of Persons with Disabilities*, U.N. ENABLE, http://www.un.org/disabilities/default.asp?navid=13&pid=150 (last visited Oct. 15, 2011).

153. MDAC REPORT, *supra* note 94, at 2.

154. CRPD, *supra* note 2, art. 12; DIMOPOULOS, *supra* note 16, at 72.

approach, an entitlement (right) must entail a right to sue.[155] Similarly to the capacity to sue and be sued of the Hungarian Civil Procedure Code,[156] passive legal capacity and active legal capacity are closely linked in common law countries for this reason.

Legal capacity is used in Article 12 of the Convention, which relates to equality before the law.[157] The strong influence of the legal system introduced to many parts of the world under the former British Empire and the incompatibility of this system with the civil law system (including differences of terminology) meant that translators of the Convention were faced with a difficult task. With respect to Article 12, it should be emphasized that the aim was to broaden the decision-making powers of persons with disabilities (in particular, persons with intellectual disabilities) in order to ensure their human dignity, independence, and ability to express opinions.[158]

Having regard for the close connection between the common law notion of legal capacity and the civil law notion of active legal capacity (capacity to act), one should note that Article 12(1) of the Convention provides that persons with disabilities have the right to recognition everywhere as persons before the law.[159] This provision was important because the traditional legal systems in some United Nations member States fail to recognize people with disabilities as persons before the law.[160]

The provisions of Article 12(2)–(5) aim to maximize the decision-making autonomy of persons with disabilities, permitting only necessary and proportional restrictions.[161] In civil law systems, decision-making autonomy indicates the presence of an active legal capacity. Thus, these provisions of the article clearly relate to active legal capacity. Reflecting modern legal development, the Convention seeks to ensure that active legal capacity is restricted only under exceptional

155. FÖLDI & HAMZA, *supra* note 24, at 155, 203, 228–29, 264 (2001).

156. AN EXPLANATION OF THE CODE OF CIVIL PROCEDURE, *supra* note 30, at 252–53.

157. CRPD, *supra* note 2, art. 12, ¶ 2.

158. DIMOPOULOS, *supra* note 16, at 72. Regarding the theoretical background of the paradigm shift of the CRPD, see GERARD QUINN ET AL., HUMAN RIGHTS AND DISABILITY: THE CURRENT USE AND FUTURE POTENTIAL OF UNITED NATIONS HUMAN RIGHTS INSTRUMENTS IN THE CONTEXT OF DISABILITY 29–46 (2002), *available at* http://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf.

159. CRPD, *supra* note 2, art. 12, ¶ 1.

160. *See* KATHERINE GUERNSEY ET AL., CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: ITS IMPLEMENTATION AND RELEVANCE FOR THE WORLD BANK 1 (2007), *available at* http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Disability-DP/0712.pdf.

161. CRPD, *supra* note 2, art. 12, ¶¶ 2–5.

circumstances in order to minimize the possibility of abuse. Furthermore, in place of restrictions, it proposes assisted decision-making wherever possible.[162]

In light of the above, we can state that the Convention aims to extend the results of recent developments in civil law to areas beyond the countries where the model has already been successfully established, thereby promoting the decision-making autonomy of persons with intellectual disabilities. Wherever possible, the Convention seeks to establish means for replacing the institution of guardianship, which restricts or obstructs independent decision-making.

V. HUNGARIAN LAW—WITH SPECIAL REGARD FOR THE PRONOUNCED BUT NOT OPERATIVE PROVISIONS OF THE NEW CIVIL CODE

A. The Laws in Force

Surveying the provisions of the Convention, which have now been incorporated into Hungarian law, we may ask whether the operative domestic Hungarian law satisfies the obligations contained in Article 12. The summary answer is that it does *not*, but it is *attempting* to do so.

The provisions governing active legal capacity have recently undergone substantial changes in order to ensure the human rights of persons with intellectual disabilities as much as possible.

An important change was the 2001 amendment (Act XV of 2001) to the provisions of the Hungarian Civil Code relating to active legal capacity. According to the ministerial argument, the amendment was made in reflection of Council of Europe Recommendation R (99) 4 of February 23, 1999, on Principles Concerning the Legal Protection of Incapable Adults.[163] The amendment to the Hungarian Civil Code altered the rules governing restricted active legal capacity.[164] Under the amendment, a court can only impose a restriction in certain fields of authority.[165] The active legal capacity of an adult remains complete in areas that are not subject to the court-imposed restriction.[166]

162. *Id*. pmbl., (o).

163. KÖRÖS ANDRÁS, „JÓT S JÓL!"—HELYES CÉLOK, ALKALMATLAN MEGOLDÁSOK A CSELEKVÖKÉPESSÉG TERVEZETT SZABÁLYOZÁSÁBAN ["GOOD AND WELL!"—GOOD GOALS, INADEQUATE SOLUTIONS IN THE PROPOSED RULES ON ACTIVE LEGAL CAPACITY] 4, *available at* http://www.efoesz.hu/download/ptk_ koros_cikk.pdf.

164. *Id*.

165. *Id*.

166. Practically, Hungary implemented the German theory of *Sphärengeschäftsfähigkeit* [spheres of legal capacity]. *See* PLATE, *supra* note 129, at 365–66.

In addition to amending the substantive legal provisions of the Hungarian Civil Code, the provisions relating to the procedure for guardianship were also altered.[167] First, guardianships were made subject to compulsory review, in the course of which the subject of guardianship is to be heard unless there are exceptional circumstances.[168] The aim of these provisions is to ensure that restrictions of a person's active legal capacity are indeed necessary and proportional.

Act XV of 2001 resulted in a paradigm shift in the legal provisions relating to active legal capacity, as both the Hungarian Civil Code and the Code of Civil Procedure dispensed with the model of the nineteenth-century codifications.[169]

It should be noted that the change in approach took place only at the level of civil law.[170] Courts rarely make use of the institution of partially diminished active legal capacity; moreover, public legal provisions were not adjusted to this system.[171] This is particularly evident in the area of electoral law. A person without active legal capacity or with diminished active legal capacity has neither active nor passive voting rights, even when the guardianship restricting his or her active legal capacity does not extend to withdrawal of public legal entitlements.[172] Under the Hungarian Civil Code, however, he or she would theoretically be completely capable.[173]

Although they represent a substantial advancement in comparison to previous regulations, the above provisions of the Hungarian Civil Code are not in accord with the provisions of Article 12 of the CRDP. First, the Hungarian Civil Code permits active legal capacity to be restricted or even denied in many instances, thereby obstructing the decision-making autonomy of persons with intellectual disabilities.[174]

167. Körös, *supra* note 163, at 4.

168. *Id*.

169. *Id*. at 5.

170. *Id.*

171. *See Hungary: Parliament Reforms Legal Capacity Laws*, *supra* note 17. In Hungary there are approximately 80,000 people under guardianship, and approximately 40,000 of these people are under guardianship without active legal capacity. *See id.*

172. *See* Art. 70. of the Constitution of the Republic of Hungary [Act XX of 1949], Art. 17 of the Act on Electoral Procedure [Act C of 1997]; MÁRTA DEZSŐ ET AL., ALKOTMÁNYTAN I. [CONSTITUTIONAL THEORY, VOL. I] 189 (István Kukorelli ed., 2003.)

173. *See Hungary: Parliament Reforms Legal Capacity Laws*, *supra* note 17.

174. Körös, *supra* note 163, at 4–7.

Second, it does not provide a direct access to legal assistant, independent of the guardian.[175]

B. The Provisions of the New, Pronounced but Not Operative, Hungarian Civil Code

Hungarian compliance with the Convention was to be achieved through the adoption of a new Hungarian Civil Code, which was pronounced as Act CXX of 2009.[176] This Act is no longer operative—the Hungarian Constitution Court annulled Act XV of 2010 on operation of Act CXX of 2010 on the Hungarian Civil Code because of the violation of legal certainty.[177] The 51st Constitutional Court Resolution of 2010 (28th April) stated that the two-month preparation time for the operation of the first two books of the new Hungarian Civil Code was too short, and annulled the Operation Act of the new Hungarian Civil Code.[178]

In Subsection B of Part III, we briefly examined the main models seeking to extend the decision-making autonomy of persons with intellectual disabilities. Among these, the abolition of guardianship with no active legal capacity was the most common method employed in the common law countries,[179] while in the German-speaking countries, the institution of guardianship with no active legal capacity has been partly retained, but restricted guardianship has been replaced by assisted decision-making, which enhances autonomy by providing appropriate and effective assistance rather than restricting a person's decision-making powers.[180]

In regard to the above models, the pronounced but not operative New Hungarian Civil Code may be regarded as a *mixed system*: first, it

175. 2009. évi CXX törvény a Polgári Törvénykönyvröl [Act CXX of 2009 on the Civil Code] § 2.25 (Hung.).

176. HUNGARIAN ASS'N FOR PERS. WITH INTELLECTUAL DISABILITIES (ÉFOÉSZ), SUPPORTED DECISION-MAKING OR PLENARY GUARDIANSHIP?—HUNGARIAN LEGAL CAPACITY REFORM CAME TO A SUDDEN STOP (May 5, 2010), *available at* http://www.dpiap.org/resources/pdf/Hungarian_legal_capacity_reform_10_05_14.pdf.

177. *The New Civil Code Will Not Enter Into Force as of May 1, 2010*, SALANS NEWS (Salans LLP, Budapest), Apr. 27, 2010, *available at* http://www.salans.com/~/media/Assets/Salans/Publications/2010/NewsletterThe%20new%20Civil%20Code%20will%20not%20enter%20into%20force%20as%20of%20May%201%202010.ashx

178. *See generally* Alkotmánybíróság (AB) [Constitutional Court], Apr. 26, 2010, 436/B/2010, http://isz.mkab.hu/netacgi/ahawkere2009.pl?s1=51/2010&s2=&s3=&s4=&s5=&s6=&s7=&s8=&s9=&s10=&s11=Dr&r=1&SECT5=AHAWKERE&op9=and&op10=and&d=AHAW&op8=and&l=20&u=/netahtml/ahawuj/ahawkere.htm&p=1&op11=and&op7=and&f=G (Hung.).

179. PLATE, *supra* note 129, at 365–66.

180. INTRODUCTION TO GERMAN LAW, *supra* note 142, at 269.

abolishes guardianship with no active legal capacity, recognizing only restricted guardianship.[181] Second, as a replacement for restricted guardianship, it provides other legal forms that do not affect a person's active legal capacity; in this area, it adheres almost word for word to the provisions of the amended German Civil Code, which introduced assisted decision-making, prior legal statement, and guardianship without diminished active legal capacity.[182] The new Hungarian Civil Code lists those matters in respect to which guardianship can be imposed.[183] It also seems to try to address longstanding problems relating to active legal capacity in the field of labor law and employment of workers with intellectual disabilities.

These progressive provisions of the pronounced but not operative Hungarian Civil Code should ensure that Hungarian law more or less conforms to the provisions of the Convention.[184] Owing to the substantial restrictions contained in the provisions, however, certain regulatory elements may lead to results that were not anticipated in the Convention. For instance, where an adult has been placed under a guardianship without a restriction of his or her active legal capacity, theoretically the person would be able to marry even without the consent of the appointed guardian, which is usually the parent.

In connection with the above provisions of the new Hungarian Civil Code, it should be reiterated that when the Code is adopted, the public legal provisions governing active legal capacity would also have to be amended. The enhancement of active legal capacity in civil law will create an ambiguous situation, unless provisions are adopted to enable the person's effective participation in society and involvement in the community.

By way of summary, despite a significant shift in the legislative approach in 2001, current and operative Hungarian law does not comply fully with the provisions of the Convention. The problem could be resolved through the adoption of the new Hungarian Civil Code which has been drafted recently, but even if this new code is adopted, amendments to public legal provisions would still be required.

181. *See* Körös, *supra* note 163.

182. *See id*. at 8; INTRODUCTION TO GERMAN LAW, *supra* note 142, at 269.

183. 2009. évi CXX törvény a Polgári Törvénykönyvről [Act CXX of 2009 on the Civil Code] § 2.25 (Hung.).

184. *See* Sándor Gurbai, A gondnokság alá helyezett személyek választójogának vizsgálata az Emberi Jogok Európai Bíróságának a Kiss v. Magyarország ügyben meghozott ítélete alapján [*Examination of the Right of Persons Placed under Guardianship to Vote According to the European Court of Human Rights' Judgment in the Case of Kiss v. Hungary*], 3 KÖZJOGI SZEMLE [PUB. L. REV.], no. 4, Dec. 2008, at 34, 40 (2010).

VI. CONCLUSION

The aim of this study has been to present the main regulatory framework relating to passive and active legal capacity—a framework that forms the basis for the participation in society of persons with intellectual disabilities.

We tried, firstly, to determine the meaning of passive and active legal capacity. It was underlined that the most important legal effect of intellectual disability is the restriction or complete removal of active legal capacity. We examined the role of active legal capacity (a capacity to act) in the various legal systems and the reasons for restrictions. We found that, initially, restrictions were placed on a person's active legal capacity because of a limited capacity to participate in society and comply with the norms of the era.[185] Then, as medicine developed, the medical-physiological approach to disability became dominant but was replaced in the second half of the twentieth century by the medical or social approach to disability.[186] It was established that a sharp distinction between passive and active legal capacity is made only in civil law systems based on Roman law.[187] In common law systems, the general term *competency* is used.[188] That is to say, no real distinction is made between passive and active legal capacity.

We then surveyed the legislative developments and historical changes in universal and Hungarian history, from the classical period to the mid-twentieth century. Examining the various models employed in the major countries, we concluded that in traditional legal systems, people with disabilities were sometimes denied passive legal capacity and often their active legal capacity was not recognized. An exception to this was the "*lucidum intervallum*" recognized in post-classical Roman law, during which a person with disabilities was considered to have full legal capacity.[189] In the nineteenth century, alongside the medical-physiological approach, there was a general recognition of the passive legal capacity of persons with disabilities.[190] Depending on the gravity of impairment, however, their active legal capacity was restricted partially or fully.[191]

185. *See* Varul et al., *supra* note 5, at 100.

186. Mulvany, *supra* note 7, at 39–40; Jones & Basser Marks, *supra* note 18, at 4–6.

187. THE DEVELOPMENT OF CIVIL LAW FROM ROMAN LEGAL TRADITIONS, *supra* note 23, at 9–10; FÖLDI & HAMZA, *supra* note 24, at 155.

188. *See, e.g.*, PARRY & DROGIN, *supra* note 22, at 7.

189. FÖLDI & HAMZA, *supra* note 24, at 228–29.

190. *See* CODE CIVIL [C. CIV.] arts. 7–8 (Fr.).

191. LENKOVICS & SZÉKELY, *supra* note 27, at 27.

The development of civil law and, in a related sense, constitutional law resulted in substantial changes in the second half of the twentieth century. In light of the inhumanity and grave abuse of the dictatorships in the 1930s and 1940s,[192] in the second half of the twentieth century, various international legal agreements were established with provisions relating to the rights of persons with disabilities.[193] The initial approach was to ensure the application of the ban on discrimination, but in the 1990s, there was an increasing acceptance that regulations should address disability in a holistic manner.[194] Since then, international law has been developing in this direction as reflected in the United Nations Convention of 2007.[195]

Starting in the 1970s, and concurrently with international legal developments, common law countries began to adopt legislation on the rights of persons with disabilities, with an aim to ensure the implementation of the ban on discrimination.[196] Following the example of the common law countries, in the 1990s and the early years of the twenty-first century, similar laws were passed in most advanced democracies.[197] Going beyond the original concept employed in the common law countries, the more recent legislation has tended to be of a complex nature—ensuring not only the application of the ban on discrimination, but also the introduction of specific provisions relating to disability.[198]

The fundamental rights approach of national legislation has influenced civil law, too. Starting from the 1950s onward, persons with diminished active legal capacity became increasingly able to undertake the transactions necessary to address the needs of everyday life.[199] This change did not initially affect the basic elements of the regulatory framework relating to active legal capacity.[200] In the final three decades of the twentieth century, however, the conditions were established for a

192. *See* John H. Noble Jr. & Vera H. Sharav, *Protecting People with Decisional Impairments and Legal Incapacity Against Biomedical Research Abuse*, 18 J. DISABILITY POL'Y STUD. 230, 231 (2008); MORRISON, *supra* note 10, at 39–40.

193. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

194. *See* Lang, *supra* note 12, at 270–71; HOFFMAN, *supra* note 110, at 228–29.

195. *See* CRPD, *supra* note 2, art. 1.

196. Lang, *supra* note 12, at 268–69.

197. *Id*. at 269.

198. *See* HOFFMAN, *supra* note 110, at 228–29; WAGNER & KAISER, *supra* note 111, at 97–98.

199. *See* 1959. évi IV. törvény a Polgári Törvénykönyvről [Act IV of 1959 on the Civil Code] (Hung.); *see also* FÁBIÁN & SÁGHY *supra* note 27, at 31–32.

200. Gurbai, *supra* note 184, at 34.

paradigm shift.[201] The changes initially affected the notion of diminished active legal capacity; in place of a general restriction, there were opportunities for the imposition of a partial restriction—a restriction on certain areas of a person's active legal capacity.[202]

In addition to the above changes, the 1990s saw the development of several models based on the paradigm shift. In common law countries, based on the principle of equality before the law, the complete removal of legal capacity was ruled out; in most cases, diminished legal capacity became the norm.[203] In civil law countries (particularly in Germany after a general revision of the German Civil Code) a full restriction on active legal capacity was still possible so long as there were opportunities for conducting the transactions necessary for everyday life); nevertheless, the use of partial restrictions on active legal capacity was expanded with the introduction of assisted decision-making.[204] When implementing civil law reforms, other countries have applied one of these two models, or a combination of both.[205]

In the second half of the twentieth century, Hungary attempted to develop modern legislation reflecting the interests of people with disabilities.[206] Accordingly, under the Hungarian Civil Code, persons with disabilities with diminished active legal capacity received the ability to proceed in everyday transactions.[207] Hungary was the first country in the world to adopt disability legislation regulating, in a horizontal sense, the rights of persons with disabilities.[208] Hungary was also the second country to ratify the CRPD.[209] In the field of civil law, the partial restriction (restriction according to area of authority) of active legal capacity has been possible since 2001.[210] Even so, Hungarian law has yet to comply fully with the provisions of the United Nations Convention—provisions, which are based on the common law system approach to legal capacity. In Hungary, the right of a person to active legal capacity is still subject to limitations. In this respect, the adoption of a new Hungarian Civil Code would result in a significant

201. Lang, *supra* note 12, at 268–69; Priestley, *supra* note 109, at 62–63.
202. PLATE, *supra* note 129, at 365–66.
203. *See, e.g.*, Varul et al., *supra* note 5, at 104; Knauer, *supra* note 135, at 335.
204. *See* INTRODUCTION TO GERMAN LAW, *supra* note 142, at 269.
205. *See, e.g.*, Joaquin Zuckerberg, *International Human Rights for Mentally Ill Persons: The Ontario Experience*, 30 INT'L J.L. & PSYCHIATRY 512, 521 (2007); Varul et al., *supra* note 5, at 103.
206. *See Hungary: Parliament Reforms Legal Capacity Laws*, *supra* note 17.
207. *See id*.
208. *See id.*
209. MDAC REPORT, *supra* note 94, at 2.
210. *See* Körös, *supra* note 163, at 6.

change. Combining the common law and civil law models will abolish guardianship excluding active legal capacity and it will also introduce several legal institutions that ensure the effective implementation of the rights of persons with psychosocial disabilities while placing no restrictions on active legal capacity. The adoption of the new Hungarian Civil Code will ensure that Hungarian law complies with the provisions of the United Nations Convention, thereby establishing a legal framework that attends to the specific circumstances, interests, and needs of people with disabilities.