

# HUNGARY

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# Executive Summary

## Convention on the Rights of Persons with Disabilities and Anti-Discrimination

- [1]. Hungary was among the first countries of the World to ratify the Convention on the Rights of Persons with Disabilities (CRPD). However, with the exception of the ongoing reform of the guardianship legislation, the ratification was neither preceded nor followed by the amendment of the domestic laws violating the Convention. Persons with mental disorders are not covered by the Act on Equalisation of Opportunities of Disabled Persons, the main act implementing the CRPD's obligations, and are not represented in the National Council for the Affairs of the Disabled, the main body monitoring the CRPD's implementation in Hungary.
- [2]. The country's anti-discrimination framework in general protects persons with intellectual disability and mental disorders. However, the failure to provide reasonable accommodation is not expressly prohibited under the Equal Treatment Act, and does not at all extend to persons with mental disorders, which are deficiencies in effectively combating discrimination based on disability.

## Specific Fundamental Rights

- [3]. The Hungarian legal framework provides very little specific protection to fundamental rights of persons with intellectual disability and persons with mental disorder. As a result, their rights compared to other persons are often compromised by specific legislation applying to them, or by the lack of support structures that would eliminate the disadvantages stemming from their disability.
- [4]. The country's inflexible guardianship system is responsible for a lot of the identified interferences with fundamental rights. Persons placed under plenary guardianship (which is the most commonly used measure) automatically lose the right to vote, to work, to marry, parental rights, procedural rights, consent to treatment, property rights, etc. without regard to the fact whether they actually are competent to make decisions on these questions. Persons with mental disorder and intellectual disability do not receive the necessary assistance to participate in court proceedings. Persons with mental disorders are also vulnerable to ill-treatment and to violation of their right to liberty due to involuntary medication and coercive measures applied in psychiatric hospitals.

## Involuntary Placement and Involuntary Treatment

- [5]. Hungarian law regulates two involuntary placement measures, *mandatory treatment* and *emergency treatment*. Mandatory treatment is ordered by a court after a regular court procedure with an ordinary appeal. It is a measure of indeterminate duration, which is reviewed by a court periodically.
- [6]. The vast majority of involuntary patients are admitted to hospitals in an emergency procedure. Emergency treatment can be ordered by a doctor, and is reviewed by a court within 24+72 hours from admission. If the court orders the patient's continued stay in the hospital, the measure is reviewed periodically.
- [7]. The criteria for involuntary placement are based on dangerousness. However, because in practice there is little basis for the court to question the forensic psychiatrist's opinion, deference to medical professionals is widespread, and dangerousness is rarely assessed.

- [8]. There is no separation of involuntary placement and treatment – all patients placed in hospitals involuntarily lose their right to refuse treatment. Although there are specific provisions regulating the treatment of persons under guardianship, the legal standards applicable to them are much less strict than to other persons.

## Competence, Capacity and Guardianship

- [9]. Hungarian law provides for two basic types of measures to protect the interests of persons with disabilities in legal transactions: *plenary guardianship* and *partial guardianship*. Partial guardianship can be of general limitation, or applying to specific types of legal acts only.
- [10]. A person can be placed under guardianship if he/she is unable to take care of his/her interests because of his/her disability or mental disorder. Because of the unclear legal standard and the courts' deference to medical professionals, often the existence of a disability or a mental disorder becomes the main justification of placement under guardianship. The assessment of necessity and proportionality are thus in general absent from the process.
- [11]. Most persons are placed under plenary guardianship, which is the most restrictive measure. All decisions are made on their behalf by their guardian. Persons under partial guardianship make decisions with the approval of their guardian. Because of the lack of safeguards and less restrictive alternatives, guardianship seriously compromises the rights and interests of persons with intellectual disability and mental disorder.

# 1. Definitions

- [12]. The Hungarian term for intellectual disability is *értelmi fogyatékoság*. This term does not cause complications in practice, as it is widely used by medical and pedagogic professionals, organisations of persons with intellectual disability and the law. Act no. XXVI of 1998 on Equalisation of Opportunities of Disabled Persons defines a person with intellectual disability as a person who does not possess his/her intellectual ability entirely or to a substantial degree, and this represents a permanent disadvantage for him/her in active participation in the society.<sup>1</sup>
- [13]. The Hungarian term for mental disorder is more problematic. Persons with mental disorders are not covered by the Act on Equalisation of Opportunities of Disabled Persons, as they are not recognised to be disabled. The Healthcare Act uses the term *pszichiátriai beteg* [psychiatric patient] with reference to the 10th revision of the World Health Organisation's International Classification of Diseases (ICD-10). Psychiatric patient is defined as a person whose treating doctor established any of the diagnosis of Mental or Behavioural Disorders (F00-F99) or Intentional Self-harm (X60-X84).<sup>2</sup> Since the Healthcare Act is the only law providing a definition of mental disorders, persons with mental disorders are referred to as *psychiatric patients* in other context as well, which is emphasising the medical approach to these persons.
- [14]. Organisations of persons with mental disorders often use the term *pszichoszociális fogyatékoság* [psychosocial disability] to refer to mental disorder.<sup>3</sup> The National Council for the Affairs of the Disabled accepted this term, and used it in its decision recommending amending the Act on Equalisation of Opportunities of Disabled Persons to expand the definition of disability to cover *persons with psychosocial disability*.<sup>4</sup> While this term seems to be more appropriate, it is not used and understood widely yet by the general public. Therefore it is yet to be seen whether and when it will replace the currently used term *psychiatric patient* in legal documents.
- [15]. There is no relevant case law contributing to the definition of the national terminology available.

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1 Hungary/1998. évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról/Article 4 a) (01.04.1998).

2 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 188 a) (15.12.1997).

3 Mental Disability Advocacy Center (MDAC) (2008) *Tanulmány a pszicho-szociális fogyatékosággal élő személyek jogairól a „Fogyatékosággal élő személyek jogairól szóló Egyezmény” tükrében.*

4 See the minutes of the Council's meetings from 30.10.2007 at <http://www.fogyatekosugy.hu/main.php?folderID=16256> (30.10.2009).

## 2. Anti-discrimination

### 2.1. Incorporation of United Nations standards

- [16]. Hungary was among the first countries to sign the *United Nations Convention on the Rights of Persons with Disabilities* (hereinafter CRPD) on 30.03.2007. It was the second country to ratify the CRPD - and the first to ratify the Optional Protocol on 20.07.2007.
- [17]. The Convention's ratification was neither preceded nor, in general, followed by amendments of the relevant domestic laws and policies. One major exception is the country's guardianship system. In other areas, the legislative work is significantly delayed.

#### 2.1.1. Amendment of the Civil Code

- [18]. The Hungarian official translation of the CRPD recognises that the term "legal capacity" in Article 12 includes both *capacity to have rights* and *capacity to act* (*jogképesség* and *cselekvőképesség* in Hungarian).<sup>5</sup> The country's present framework on legal capacity and guardianship is in severe violation of the CRPD. After ratification, the guardianship part of the draft Civil Code was significantly amended in order to bring it in line with the CRPD. The draft Civil Code, adopted by the National Assembly on 21.09.2009 – but still pending signature by the President - is an important step in this direction, although it is unclear at the moment when and whether at all it will enter into force.<sup>6</sup>

#### 2.1.2. Bodies responsible for implementation and monitoring of the CRPD

- [19]. The government did not designate a body responsible for monitoring the CRPD's implementation until 14.10.2008. That day, the *Országos Fogyatékosügyi Tanács* [National Council for the Affairs of the Disabled], a body supervised by the Ministry of Social Affairs and Labour, was appointed.<sup>7</sup>
- [20]. While organisations of persons with disabilities are members of the Council, this does not include organisations of persons with mental disorders.<sup>8</sup> They are not considered "disabled" under Hungarian legislation, and are therefore not covered by the Act on Equalisation of Opportunities of Disabled Persons, the main legislation regulating rights covered by the CRPD.<sup>9</sup> This law has not been brought in line with the CRPD yet, therefore persons with mental disorders remain excluded from the monitoring of the CRPD's implementation, contrary to the requirements of Article 33 of the CRPD.

#### 2.1.3. The domestic implementation process

- [21]. In October 2007, the National Council for the Affairs of the Disabled requested domestic non-governmental organisations to prepare studies on domestic laws' compliance with the CRPD.<sup>10</sup> These reports should have been compiled by the Council and presented to the Government with

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5 Hungary/2007. évi XCII. törvény a Fogyatékosokkal élő személyek jogairól szóló egyezmény és az ahhoz kapcsolódó Fakultatív Jegyzőkönyv kihirdetéséről (06.07.2007).

6 For more details, see part 5.11 below.

7 Hungary/251/2008. (X. 14.) Korm. Határozat a Fogyatékosokkal élő személyek jogairól szóló egyezmény végrehajtását ellenőrző szerv felkéréséről (14.10.2008).

8 Hungary/1998. évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról/Article 25 (1) (01.04.1998).

9 Hungary/1998. évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról/Article 4 a) (01.04.1998).

10 Hungary/4./2007.(X.30.) OFT határozat a fogyatékosokkal élő személyek jogairól szóló ENSZ Egyezmény hazai végrehajtásával kapcsolatos feladatokról és javaslatokról (30.10.2007).

recommendations on legislative amendments. At the time of writing this report, the studies prepared by NGOs have not been discussed by the Council.<sup>11</sup> No suggestions have been presented to the Government, although meanwhile the Council was officially appointed as the body monitoring the CRPD's implementation.<sup>12</sup> As a result, the Government has not discussed yet the legislative steps necessary to implement the CRPD.

- [22]. The Mental Disability Advocacy Center (MDAC), although not a member of the Council, was invited to prepare a study on behalf of persons with mental disorders. The study was submitted to the Council on 30.03.2008. It identified a number of shortcomings relating to almost all provisions of the CRPD.<sup>13</sup> At the time of writing this report, the study has not been discussed by the Council and the Government, and no steps have been taken to bring the identified laws in compliance with the CRPD.

## 2.2. The Anti-Discrimination National Framework

- [23]. Article 70/A (1) of the Constitution provides that human and citizen's rights are guaranteed to every person without discrimination.<sup>14</sup> Various grounds of discrimination are prohibited; although disability is not among the explicitly mentioned grounds, the list is open-ended, including "other status". The Constitutional Court has interpreted Article 70/A to apply to persons with disabilities as well.<sup>15</sup>
- [24]. The main piece of legislation regulating the anti-discrimination framework and transposing the Employment Equality Directive is Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (hereafter: ETA).<sup>16</sup> The act covers a wide range of grounds on which discrimination is prohibited. These include disability and health status, although none of these grounds are defined in the ETA.<sup>17</sup> Given that mental disorder is not considered as a "disability" under the Act on Equalisation of Opportunities of Disabled Persons<sup>18</sup>, neither does the Equal Treatment Authority interpret it as disability in its practice, all that is certain is that the ETA without doubt covers mental disorder as "health status".<sup>19</sup>
- [25]. The ETA lists a number of bodies which have to abide by the requirement of equal treatment in their activities. The obligation extends to a number of public bodies, and to private bodies which provide goods and services to the public, and which make a public proposal for contracting.<sup>20</sup> Public education institutions, social care and healthcare providers are covered, as well as private employers.<sup>21</sup> However, private providers of education, housing, health and social care are covered only to the extent they make their services available to the "public". There is therefore a legislative loophole.
- [26]. The obligation to provide reasonable accommodation is not expressly covered by the ETA.<sup>22</sup> This can be regarded as the ETA's shortcoming, as persons with disabilities' access to employment and services is often hindered by the inability and unwillingness to accommodate their specific needs.

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11 See the minutes of the Council's meetings at <http://www.fogyatekosugy.hu/main.php?folderID=16256> (30.10.2009).

12 Hungary/251/2008. (X. 14.) Korm. Határozat a Fogyatékosággal élő személyek jogairól szóló egyezmény végrehajtását ellenőrző szerv felkéréséről (14.10.2008).

13 Mental Disability Advocacy Center (MDAC) (2008) *Tanulmány a pszicho-szociális fogyatékosággal élő személyek jogairól a „Fogyatékosággal élő személyek jogairól szóló Egyezmény” tükrében*

14 Hungary/1949. évi XX. törvény a Magyar Köztársaság Alkotmánya/Article 70/A (20.08.1949).

15 Hungary/Alkotmánybíróság/462/B/2002. AB határozat (12.2002).

16 Hungary/2003. évi CXXXV. tv. az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról (28.12.2003).

17 Hungary/2003. évi CXXXV. tv. az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról/Article 8 g) and h) (28.12.2003).

18 Hungary/1998. évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról/Article 4 a) (01.04.1998).

19 The Authority has found special education needs, hyperactivity, dyslexia and autism as falling under health status, see case No. 227/2009, 474/2009, 1126/2008 and 651/2009, available at [www.egyenlobanasmod.hu/zanza/227-2009.pdf](http://www.egyenlobanasmod.hu/zanza/227-2009.pdf) (29.10.2009), [www.egyenlobanasmod.hu/zanza/474-2009.pdf](http://www.egyenlobanasmod.hu/zanza/474-2009.pdf) (29.10.2009), [www.egyenlobanasmod.hu/zanza/1126-2008.pdf](http://www.egyenlobanasmod.hu/zanza/1126-2008.pdf) (29.10.2009) and [www.egyenlobanasmod.hu/zanza/651-2009.pdf](http://www.egyenlobanasmod.hu/zanza/651-2009.pdf) (29.10.2009).

20 Hungary/2003. évi CXXXV. tv. az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról/Article 4 and 5 (28.12.2003).

21 Hungary/2003. évi CXXXV. tv. az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról/Article 4 g), h) m k) and 5 d) (28.12.2003).

22 For obligations to respect equal treatment see Hungary/2003. évi CXXXV. tv. az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról/Article 7-10 (28.12.2003).

Provision of reasonable accommodation [*akadálymentesítés*] is mandated by the Act on Equalisation of Opportunities of Disabled Persons.<sup>23</sup> However, this does not apply to persons with mental disorders.<sup>24</sup> Moreover, the scope of reasonable accommodation under this Act is arguably narrower than the duty of reasonable accommodation under the Employment Equality Directive.<sup>25</sup> The former is a general duty of foreseeing disabled needs and taking on disabled candidates if they are able to perform the job. The latter is a concrete duty to accommodate a given disabled job seeker or employee, even if he or she is only able to perform essential functions of a job, and reorganise tasks, working time and method according to the disabled person's abilities.

- [27]. The Equal Treatment Advisory Board has issued two opinions on reasonable accommodation, in which it has interpreted the relevant provisions of the ETA, the Act on Equalisation of Opportunities of Disabled Persons and construction norms in conjunction with each other. In 2006 the Advisory Board stated that the failure to provide reasonable accommodation was a violation of binding legal duties and therefore also amounted to direct discrimination justifiable only if reasonable. The ETA protects within its personal and material scope (as explained in para. 24) from violations arising from the failure to reasonably accommodate disabled persons.<sup>26</sup> In 2008 the Advisory Board reinterpreted the duty in light of amended provisions and deadlines. Drawing attention to state subsidies available to provide reasonable accommodation and referencing the Employment Equality Directive, it specifically stressed that a duty to reasonably accommodate disabled job seekers and employees also existed in Hungarian law.<sup>27</sup>
- [28]. Article 5 of the Employment Equality Directive, requiring the reasonable accommodation of specific disabled job seekers or employees, has not been directly transposed into Hungarian law. Instead, there exists the above mentioned general duty on certain – mainly public - entities to secure accessibility to persons with disabilities [*akadálymentesítés*]. This duty does not only extend to the accessibility of the physical environment, but also to communication, transportation and public services.<sup>28</sup> However, the deadline for public entities to fulfil this duty has constantly been extended by the law.<sup>29</sup> Also, in the context of employment, securing general accessibility for persons with disabilities mainly in the public sphere falls short of reasonably accommodating the needs of a concrete job seeker with intellectual disability in both public and private employment.<sup>30</sup>
- [29]. Article 70/A (3) of the Constitution provides for positive action in general.<sup>31</sup> This provision has been interpreted by the Constitutional Court in the context of providing tax benefits to families with children.<sup>32</sup> Detailed regulation on preferential treatment (positive action) is provided for under Article 11 of the ETA. Preferential treatment does not violate the principle of equal treatment if it aims to alleviate the objectively assessed lack of equality of opportunities of a specific group, is based on law, governmental decree authorised by law or collective agreement, and is temporary or lasts until a specified condition is fulfilled.<sup>33</sup> Preferential treatment cannot violate a fundamental right, cannot provide an unconditional advantage, and cannot exclude an assessment of individual circumstances.<sup>34</sup>

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23 Hungary/1998. évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról/Article 15 (01.04.1998).

24 Hungary/1998. évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról/Article 4 (1) (01.04.1998).

25 Council Directive 2000/78/EC (27.11.2000).

26 Equal Treatment Advisory Board Opinion No. 10.007/3/2006. TT. on the duty to provide reasonable accommodation, available at [www.egyenlobanasmod.hu/index.php?g=hirek/TTaf\\_200610.htm](http://www.egyenlobanasmod.hu/index.php?g=hirek/TTaf_200610.htm) (29.10.2009).

27 Equal Treatment Advisory Board Opinion No. 384/1/2008. (L23.) TT. on the duty to provide reasonable accommodation, available at [www.egyenlobanasmod.hu/index.php?g=hirek/TTaf\\_200802-2.htm](http://www.egyenlobanasmod.hu/index.php?g=hirek/TTaf_200802-2.htm) (29.10.2009).

28 Hungary/1998. évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról/Article 5-11 (01.04.1998).

29 Hungary/1998. évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról/Article 7/B and 29 (01.04.1998).

30 Hungary/1998. évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról/Article 15 (2) (01.04.1998).

31 Hungary/1949. évi XX. törvény a Magyar Köztársaság Alkotmánya/Article 70/A (3) (20.08.1949).

32 Hungary/Alkotmánybíróság/9/1990. AB határozat (04.1990).

33 Hungary/1998. évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról/Article 11 (1) (01.04.1998).

34 Hungary/1998. évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról/Article 11 (2) (01.04.1998).



[30]. The body responsible for enforcing the ETA is the *Egyenlő Bánásmód Hatóság* [Equal Treatment Authority] (hereinafter Authority). The Authority is competent to decide on complaints of discrimination based on intellectual disability, given that it is considered “disability” under the Act on Equalisation of Opportunities of Disabled Persons.<sup>35</sup> For example, in case no. 527-2007 the authority considered a complaint of a person with intellectual disability, who claimed that he was unfairly treated in administrative proceedings before the guardianship authority.<sup>36</sup> As the claimant failed to substantiate his complaint and to provide additional information, the ETA discontinued the proceedings. However, persons under guardianship (a significant number of persons with intellectual disability) cannot lodge a complaint without the permission of their guardian.<sup>37</sup>

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35 Hungary/1998. évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról/Article 4 a) (01.04.1998).

36 Hungary/Egyenlő Bánásmód Hatóság/No. 527/2007, available at <http://www.egyenlobanasmod.hu/zanza/527-2007.pdf> (29.10.2009).

37 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 15/A (1) (11.08.1959). For the figures see below at 5.10.

### 3. Specific Fundamental Rights

- [31]. In Hungary, the enjoyment of fundamental rights is guaranteed by the Constitution.<sup>38</sup> The subjects of these guarantees are citizens, residents, or “everybody”. There are very few provisions specific to persons with intellectual disability or mental disorder. Article 70/A (1) specifically provides that human and citizen’s rights are guaranteed to every person without discrimination.<sup>39</sup> Various grounds of discrimination are prohibited; although disability is not among the explicitly mentioned grounds, the list is open-ended, including “other status”. The Constitutional Court has interpreted Article 70/A to apply to persons with disabilities as well.<sup>40</sup>
- [32]. Persons with intellectual disabilities or mental disorder are in principle entitled to the same degree of protection of their fundamental rights as other persons in Hungary. However, specific laws often limit their rights in certain areas. Also, the legal framework often fails to accord them protection in areas where they are especially vulnerable to violation of their rights.
- [33]. The guardianship system provides a good example of both problems.<sup>41</sup> Some fundamental rights can be exercised only by persons with full legal capacity. Once placed under guardianship, persons with disability lose, for example, their right to vote. Due to the lack of safeguards in the guardianship system, they also become vulnerable to abuses by their guardians, which can lead to a violation of, for example, their parental rights. Not being placed under guardianship may also present difficulties – persons with intellectual disability would be vulnerable to fraud, which could lead to the violation of their right to property. Balancing the competing interests and the possible dangers, and making the protective measure proportionate to the specific abilities and situation of the person is a very delicate exercise. The Hungarian legal framework often fails to provide a proportionate response to the person’s needs. Since less restricting alternatives are missing, guardianship is the only measure of protection provided by the law to persons with intellectual disability and mental disorder. This often results in unnecessary and disproportionate restriction of their fundamental rights. In addition, guardianship is also a main cause of courts not playing a major role in protecting the rights of persons with intellectual disability or mental disorder. Persons under guardianship lack procedural capacity, they cannot submit court applications without the permission of their guardian.<sup>42</sup> The guardianship system thus not only causes many substantive violations of fundamental rights, it also deprives persons with disability of their ability to protect their rights through litigation. This is evidenced by the scarcity of published court decisions concerning the violations of fundamental rights of persons with intellectual disability and mental disorders.<sup>43</sup>

#### 3.1. The right to life<sup>44</sup>

- [34]. There is no legislation specifically affecting the right to life of persons with disabilities. Anecdotal evidence suggests that persons with intellectual disability have limited access to healthcare, and as a

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38 Hungary/1949. évi XX. törvény a Magyar Köztársaság Alkotmánya (20.08.1949); see especially Articles 54–70/K.

39 Hungary/1949. évi XX. törvény a Magyar Köztársaság Alkotmánya/Article 70/A (20.08.1949).

40 Hungary/Alkotmánybíróság/462/B/2002. AB határozat (12.2002).

41 For a general critique of the Hungarian guardianship system see Mental Disability Advocacy Center (MDAC) (2007) *Guardianship and Human Rights in Hungary*.

42 Hungary/1952. évi III. törvény a polgári perrendtartásról/Article 49 (1) (06.06.1952).

43 In fact the only area where such decisions exist is involuntary placement, a legal institution which applies mainly to persons who do have legal capacity. Case law related to involuntary placement is analysed in Chapter 4. of this report.

44 Hungary/1949. évi XX. törvény a Magyar Köztársaság Alkotmánya/Article 54 (1) (20.08.1949).

result have shorter life expectancy than the rest of the population,<sup>45</sup> this has however remained an extra-legal matter; it has not yet been the subject of regulation or court proceedings.

## 3.2. The right to freedom from torture or cruel, inhuman and degrading treatment or punishment<sup>46</sup>

- [35]. Persons under guardianship, and persons subject to mandatory psychiatric treatment, can be subject to medical interventions against their will. Such treatment with psychotropic medication can in certain instances amount to inhuman treatment, and it certainly interferes with bodily integrity and thus the right to private life. This issue is discussed below in the part about the right to privacy.
- [36]. Another obvious interference with the right to be free from ill-treatment is the use of coercive measures in psychiatric and social care institutions, which are large, residential institutions. Their use in psychiatric institutions is discussed in Part 4.3.10. of this report (below). Their use in social care institutions is regulated by the same rules applicable in psychiatric institutions.<sup>47</sup>

## 3.3. The right to freedom from exploitation and the right to work<sup>48</sup>

- [37]. The only specific provision related to freedom from exploitation of persons with disability relates to persons subject to psychiatric treatment. According to Section 195 of the Health Act, psychiatric patients have a right to therapeutic activities, but cannot be compelled to perform therapeutic or other work.<sup>49</sup> They can voluntarily participate in works related to the maintenance of the psychiatric institution, for which they have to be remunerated.<sup>50</sup>
- [38]. Much more problematic is the situation of job seekers with mental disorders or intellectual disability. The Labour Code prohibits persons under plenary guardianship from signing employment contracts, excluding them from the labour market.<sup>51</sup> While arguably this measure aims to protect persons with disability from exploitation, it constitutes an unnecessary interference with the right to work. The same aim could have been achieved by other means, for example by conditioning the validity of the employment contract on the consent of the guardian or the guardianship authority.
- [39]. Persons under plenary guardianship can only participate in the *work-rehabilitation* employment scheme, which is a form of sheltered employment.<sup>52</sup> It is provided only in social care institutions, therefore persons living in the community (with their family or alone) do not have access to it. Its purpose is to prepare persons for another type of sheltered employment, *developing-preparing* employment, which has a purpose of preparing persons for the open labour market.<sup>53</sup> However, persons under plenary guardianship cannot participate in the *developing-preparing* scheme or in the open labour market, and are therefore stuck in the limited *work-rehabilitation* employment, regardless of how much their ability to work progresses.

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45 Gruiz Katalin (08.11.2007). A fogyatékossgal élő személyek egészségügyi ellátáshoz fűződő jogai, presentation delivered at the conference „The Convention on the Rights of Persons with Disabilities and Hungary” (08.11.2007).

46 Hungary/1949. évi XX. törvény a Magyar Köztársaság Alkotmánya/Article 54 (2) (20.08.1949).

47 Hungary/1993. évi III. törvény a szociális igazgatásról és szociális ellátásokról/Article 94/G (1) (27.01.1993).

48 Hungary/1949. évi XX. törvény a Magyar Köztársaság Alkotmánya/Article 70/B (20.08.1949).

49 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 195 (1) (15.12.1997).

50 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 195 (3) (15.12.1997).

51 Hungary/1992. évi XXII. törvény a Munka Törvénykönyvéről/Article 72 and 193/S (1) (04.05.1992).

52 Hungary/1993. évi III. törvény a szociális igazgatásról és szociális ellátásokról/Article 99/D (1) (27.01.1993).

53 Hungary/1993. évi III. törvény a szociális igazgatásról és szociális ellátásokról/Article 99/E (1) (27.01.1993).

- [40]. The existence of sheltered employment as such is not objectionable. However, the fact that persons under guardianship are prohibited from pursuing other types of employment is highly problematic. In effect they are at best segregated to sub-standard workplaces (in terms of remuneration, working conditions, type and availability of work), and are often prohibited from participating in any meaningful occupation.

### 3.4. The right to liberty and security<sup>54</sup>

- [41]. Persons with mental disorders in Hungary can be subject to involuntary psychiatric hospitalisation, which is an interference with their right to liberty. This measure is described in more detail in part 4. of this report.
- [42]. Persons under guardianship, whether with mental disorders or intellectual disability, can be admitted to all types of hospitals upon the request of their guardian, and can be prohibited from leaving the hospital unless their guardian consents to their departure.<sup>55</sup> They can thus be de facto detained, without the law recognising the restriction of their right to liberty.
- [43]. Many thousands of persons with mental disorders or intellectual disability live in social care institutions.<sup>56</sup> Admission is in principle voluntary. However, persons under plenary guardianship can be placed there on the request of their guardian, despite their objections.<sup>57</sup> In effect they are thus detained, without any judicial guarantees. Only their guardian is entitled to request their release from such an institution, the person under plenary guardianship does not have this right.<sup>58</sup>
- [44]. Persons with mental disorders can be placed in such institutions also by court decision through a procedure regulated by the Social Services Act on the condition that such placement is “justified” [indokolt].<sup>59</sup> This is a very vague standard for deciding on restrictions of the right to liberty, especially when taking into account the often life-long nature of such a placement.

### 3.5. The right to a fair trial<sup>60</sup>

- [45]. Persons with disabilities can participate in court proceedings only if they possess full legal capacity,<sup>61</sup> with a few specific exceptions (guardianship proceedings, lawsuits concerning personality rights, etc.). If their legal capacity is limited, they are represented by their guardian.<sup>62</sup> Since they have no control over their guardian’s actions, and no direct access to the proceedings, the law deprives them of their right to access to court instead of providing them with the necessary assistance to participate in court proceedings.
- [46]. In guardianship and divorce proceedings, the court may decide not to hear the person under guardianship even if he/she is a party to that proceeding.<sup>63</sup> In criminal proceedings, the court also has a power (and sometimes an obligation) not to hear a person as witness “due to his physical or mental

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54 Hungary/1949. évi XX. törvény a Magyar Köztársaság Alkotmánya/Article 55 (1) (20.08.1949).

55 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 12 (5) (15.12.1997).

56 Társaság a Szabadságjogokért, *Press release – Bort isznak és vizet prédikálnak - Civil szervezettek tiltakoznak a tömegintézmények konzerválása ellen*, 09.10.2009. Data of the Statistical Office is available only until 2003, see Hungary/Központi Statisztikai Hivatal, *Bentlakásos szociális intézményi ellátás*, database FT1B01\_W, 2003, <http://statinfo.ksh.hu/Statinfo/themeSelector.jsp?page=2&szst=FSI> (05.11.2009).

57 Hungary/1993. évi III. törvény a szociális igazgatásról és szociális ellátásokról/Article 93 (2) (27.01.1993).

58 Hungary/1993. évi III. törvény a szociális igazgatásról és szociális ellátásokról/Article 101 (1) (27.01.1993).

59 Hungary/1993. évi III. törvény a szociális igazgatásról és szociális ellátásokról/Article 94 (2) b) (27.01.1993).

60 Hungary/1949. évi XX. törvény a Magyar Köztársaság Alkotmánya/Article 57 (20.08.1949).

61 Hungary/1952. évi III. törvény a polgári perrendtartásról/Article 49 (1) (06.06.1952).

62 Hungary/1952. évi III. törvény a polgári perrendtartásról/Article 49 (2) (06.06.1952).

63 Hungary/1952. évi III. törvény a polgári perrendtartásról/Article 285 (1), 309 (3) (06.06.1952).

condition”.<sup>64</sup> Instead of providing the disabled person assistance in making their testimony, the law excludes persons with disabilities from the proceedings.

- [47]. The procedural codes contain no measures which would assist a person with intellectual disability or mental disorder in participating in court proceedings. The courts are under no obligation to use easy-to-read materials or assistants to facilitate the communication with the person with disability. Civil courts have a general obligation to assist persons in access to court by informing them about their rights, but this provision is not specific to persons with disabilities.<sup>65</sup> There is no specific provision mandating the accommodation of a disabled person’s communication and other needs in the proceedings.
- [48]. Persons with disabilities have some assistance only with respect to access to legal representation. Persons with intellectual disability or mental disorder must be appointed an attorney in criminal proceedings.<sup>66</sup> Persons with disabilities can also be provided free legal aid in civil proceedings under the provisions of the Act on Legal Aid.<sup>67</sup> This aid, however, does not cover costs specific to persons with disabilities (interpretation, assistance).

### 3.6. The right to privacy, including the access to one’s own confidential medical records<sup>68</sup>

- [49]. The right to privacy of persons under plenary guardianship is seriously compromised by the fact that their guardians have complete power over their affairs, and can take all decisions on their behalf regardless of their wishes or objections. Guardians can for example choose where the adult should live, with whom they should associate, etc.
- [50]. An important power of the guardian is to consent to medical treatment on behalf of the adult.<sup>69</sup> The person under guardianship thus loses the right to consent to or refuse medical treatment, regardless of their ability to do so. Similarly, persons subject to mandatory psychiatric treatment lose their right to consent to treatment.<sup>70</sup>
- [51]. Concerning access to one’s own medical records, persons under plenary guardianship are excluded from exercising this right.<sup>71</sup> Their guardians are entitled to access their records, regardless of their objections.
- [52]. Psychiatric patients’ (including voluntary patients’) right to access their medical documents can be restricted by doctors if it would endanger the treatment process or the personality rights of third persons.<sup>72</sup>

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64 Hungary/1998. évi XIX. törvény a büntetőeljárásról/Article 81 (1) c), 86 (2) (23.03.1998).

65 Hungary/1952. évi III. törvény a polgári perrendtartásról/Article 7 (06.06.1952).

66 Hungary/1998. évi XIX. törvény a büntetőeljárásról/Article 46 c) (23.03.1998).

67 Hungary/2003. évi LXXX. törvény a jogi segítségnyújtásról/Article 8 (1) b) (06.11.2003).

68 Hungary/1949. évi XX. törvény a Magyar Köztársaság Alkotmánya/Article 59 (20.08.1949).

69 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 16 (15.12.1997).

70 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 191 (1) (15.12.1997).

71 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 24 (6) (15.12.1997).

72 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 193 (15.12.1997).

### 3.7. The right to marry, to found a family and to respect of family life<sup>73</sup>

- [53]. Persons placed under plenary guardianship are prohibited from marrying under Hungarian law.<sup>74</sup> This blanket prohibition is an unnecessary intrusion on disabled persons' rights. If persons are placed under guardianship for reasons different than concerns about their marital status, their competence to marry are not assessed. The authorities have no discretion to allow persons under guardianship to marry, even if the marriage was clearly in their interest, and it could be established that they had competence to enter into it. The right to marry is thus a clear example of an absolute legal ban unnecessarily restricting the rights of persons with disabilities. Protection of persons with disabilities could have been achieved by less restrictive measures as well – for example, by requiring permission of the guardianship authority for persons under guardianship to marry.
- [54]. If married adults are placed under plenary guardianship, they lose the right to institute divorce proceedings.<sup>75</sup> Divorce claims can be filed on their behalf by their legal guardians. Neither the Act on Marriage, Family and Custody of Children,<sup>76</sup> nor guardianship legislation contains safeguards over the exercise of this very personal right. The guardian can thus act without taking into account the adults' wishes, even against his/her clear objections.

### 3.8. The right to have children and maintain parental rights<sup>77</sup>

- [55]. Persons with mental disorders and intellectual disability are in principle entitled to have children on an equal basis with others. However, their rights can be seriously restricted in some related areas.
- [56]. Persons under guardianship are excluded from the possibility to have children by artificial insemination, regardless of their ability to consent to such treatment and their ability to raise children. Only persons having full legal capacity are allowed to participate in this medical procedure.<sup>78</sup>
- [57]. Persons under guardianship are also prohibited from adopting children.<sup>79</sup> The authorities have no discretion to take into account their ability to raise children or other characteristics. The prohibition applies even if the scope of restriction of legal capacity is unrelated to parental matters – only persons having full capacity are entitled to adopt children.
- [58]. Concerning his/her own biological children, the person under plenary guardianship automatically loses the exercise of parental rights over them.<sup>80</sup> Parental rights are also listed by the old Civil Code as an example of rights over which legal capacity can be limited.<sup>81</sup>
- [59]. The most severe consequence of the loss of parental rights is that the parent's consent is not required anymore to the adoption of his/her children by other persons. The need to obtain consent of a parent under guardianship is also specifically excluded by the adoption regulation.<sup>82</sup> The parent's opinion is

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73 Hungary/1949. évi XX. törvény a Magyar Köztársaság Alkotmánya/Article 67 (20.08.1949).

74 Hungary/1952. évi IV. törvény a házasságról, a családról és a gyámságról/Article 9 (1) (06.06.1952).

75 Hungary/1952. évi IV. törvény a házasságról, a családról és a gyámságról/Article 19 (06.06.1952).

76 Hungary/1952. évi IV. törvény a házasságról, a családról és a gyámságról/Article 19 (06.06.1952).

77 Hungary/1949. évi XX. törvény a Magyar Köztársaság Alkotmánya/Article 67 (20.08.1949).

78 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 168 (5) (15.12.1997).

79 Hungary/1952. évi IV. törvény a házasságról, a családról és a gyámságról/Article 47 (1) (06.06.1952).

80 Hungary/1952. évi IV. törvény a házasságról, a családról és a gyámságról/Article 91 (1) (06.06.1952).

81 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14 (6) (3) (11.08.1959).

82 Hungary/1952. évi IV. törvény a házasságról, a családról és a gyámságról/Article 48 (5) e) (06.06.1952).

thus irrelevant in the adoption proceedings, he/she does not even have to be consulted or informed. This measure can be regarded as absolutely unnecessary. If the parent under guardianship is unable to take care of his/her child, this is a factor which the authorities should duly take into account in the adoption proceedings. Completely excluding the parent from the proceeding serves no useful purpose, and deprives the person of an important safeguard. A very similar regulation was already criticised by the European Court of Human Rights with regard to Croatia.<sup>83</sup>

### 3.9. The right to property

- [60]. The inability to manage property is often a major concern behind placing persons with intellectual disability or mental disorder under guardianship. However, in Hungary, problems are often created rather than solved by placement under guardianship. Guardians have wide powers over the management of the adult's assets.<sup>84</sup> The person under guardianship has no possibility to influence the guardian's decisions, or to challenge them.<sup>85</sup> There are no safeguards to make sure that the guardian is managing their property in line with their wishes or needs. The only supervisory mechanism is the guardianship authorities' yearly control over the guardian's accounts; this however cannot be considered adequate.<sup>86</sup> In the absence of effective legal safeguards, all persons under plenary guardianship are in a vulnerable position viz. their guardians, and are potential victims of abuse of their right to property.

### 3.10. The right to vote<sup>87</sup>

- [61]. The Constitution itself provides an exception from the universal right to vote – only persons with full legal capacity can exercise it.<sup>88</sup> Persons placed under plenary or partial guardianship, even if in an unrelated area (e.g. parental rights, or consent to treatment) are excluded from the political participation. The automatic and complete exclusion of persons under guardianship can be regarded as unnecessary and disproportionate interference with their right to vote. If any restriction was necessary, that should certainly take into account the person's specific abilities and conditions.

### 3.11. Concluding observations on guardianship and fundamental rights

- [62]. As it is apparent from the above analysis, many restrictions on disabled persons' fundamental rights are caused by the guardianship system.<sup>89</sup> Placement under plenary guardianship automatically results in the loss of the right to vote, right to work, parental rights, consent to (and refusal of) treatment, participation in court proceedings, control over one's property, etc. A common root of these problems is the guardianship regulation's inflexibility. This regulation is unable to reflect on the fact that some persons might require significant assistance in some areas of their life, while they are still able to vote for instance. There is no legal basis for a court or guardianship authority to restore a person's right to decide on these specific issues. Partial guardianship, which restricts legal capacity over certain types of legal acts only, is somewhat more flexible, but still inadequate. Some general restrictions

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83 European Court of Human Rights, *X. v. Croatia*, No. 11223/04 (17.07.2008).

84 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 20 (1) (11.08.1959).

85 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 15/A (1) (11.08.1959).

86 See part 5.10 below.

87 Hungary/1949. évi XX. törvény a Magyar Köztársaság Alkotmánya/Article 70 (20.08.1949).

88 Hungary/1949. évi XX. törvény a Magyar Köztársaság Alkotmánya/Article 70 (5) (20.08.1949).

89 For detailed examples see Mental Disability Advocacy Center (MDAC) (2007) *Guardianship and Human Rights in Hungary*.

automatically apply even in these cases (consent to treatment, right to vote, participation in court proceedings, etc.). Moreover, the vast majority of persons under guardianship are subject to plenary guardianship, the most restrictive measure.<sup>90</sup> The sheer number of such persons shows that these problems are significant, affecting the daily life of a large mass of persons with disabilities.<sup>91</sup>

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<sup>90</sup> See part 5.10 below.

<sup>91</sup> See data in part 5.10 below.



## 4. Involuntary placement and involuntary treatment

- [63]. The Council of Europe's Committee for the Prevention of Torture (CPT) has visited Hungary six times. It visited Psychiatric Units I & II of the Balassagyarmat General Hospital and the Ludanyhalaszi Care Home for Psychiatric Patients during its second periodic visit from 5.12. to 16.12.1999.<sup>92</sup> The *Igazságügyi Megfigyelő és Elmegyógyító Intézet* [Forensic Observation and Psychiatric Institute] (hereinafter IMEI) and the Bács-Kiskun County Home for Persons with Psychiatric Disorders and Mental Disabilities were visited during the Committee's fourth visit from 30.03. to 8.04.2005.<sup>93</sup>
- [64]. In the psychiatric institutions, the CPT noted with concern that no written procedures for the use of restraints and electroconvulsive therapy (ECT) existed (these problems have been remedied since then).<sup>94</sup> It criticised the use of net beds (they have been banned and withdrawn since the visit).<sup>95</sup> It also recommended that written information materials setting out patients' rights and obligations were distributed to patients on admission.<sup>96</sup> The CPT also recommended setting up formal complaints mechanisms for patients,<sup>97</sup> and that psychiatric establishments should be regularly visited by an external inspection body.<sup>98</sup> Concerning IMEI, the CPT criticised the very fact of it being placed within a prison. It also noted the lack of therapeutic activities.<sup>99</sup> It also noted with concern that some patients remain at IMEI after their forced treatment measure is cancelled due to the absence of external placement options.<sup>100</sup>
- [65]. The CPT was very concerned about the operation of the safeguards of involuntary treatment in psychiatric institutions. While it noted that in theory the legislation regulating court review of involuntary hospitalisation seemed to be adequate, in practice patients were subject to "concerted persuasion" by hospital personnel, court staff and attorneys assigned to represent them to give consent to treatment. Due to this pressure, eventually virtually all patients signed the consent to treatment form, by which they waived their right to court review and other safeguards.<sup>101</sup>

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92 Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 16 December 1999, CPT/Inf (2001) 2, Strasbourg, 29 March 2001.

93 Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 8 April 2005, CPT/Inf (2006) 20, Strasbourg, 29 June 2006.

94 Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 16 December 1999, CPT/Inf (2001) 2, Strasbourg, 29 March 2001, § 147 and § 155.

95 Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 16 December 1999, CPT/Inf (2001) 2, Strasbourg, 29 March 2001, § 156.

96 Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 16 December 1999, CPT/Inf (2001) 2, Strasbourg, 29 March 2001, § 160.

97 Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 16 December 1999, CPT/Inf (2001) 2, Strasbourg, 29 March 2001, § 162.

98 Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 16 December 1999, CPT/Inf (2001) 2, Strasbourg, 29 March 2001, § 164.

99 Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 8 April 2005, CPT/Inf (2006) 20, Strasbourg, 29 June 2006, § 139.

100 Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 8 April 2005, CPT/Inf (2006) 20, Strasbourg, 29 June 2006, § 164.

101 Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 16 December 1999, CPT/Inf (2001) 2, Strasbourg, 29 March 2001, § 168.

- [66]. The reports of the United Nations' Committee against Torture (CAT) concerning Hungary do not contain findings specific to involuntary placement and treatment.

## 4.1. Legal Framework

- [67]. Involuntary placement and treatment of persons with mental disorders is regulated in Hungary by Act no. CLIV of 1997 on Healthcare (hereinafter Healthcare Act). Chapter X., Articles 188-201/A, regulate *The Treatment and Care of Psychiatric Patients*. The Healthcare Act was adopted on 15.12.1997, and entered into force on 1.07.1998. Although it has been amended several times, the provisions concerning involuntary placement and treatment have not changed. Currently no proposal to change these provisions is debated publicly, although disabled people's organisations submitted their concerns after the entry into force of the Convention on the Rights of Persons with Disabilities, with which the Act is not in compliance according to their opinion.<sup>102</sup>
- [68]. The Healthcare Act does not distinguish between involuntary placement and involuntary treatment of psychiatric patients. The provisions authorising involuntary placement authorise involuntary treatment as well.<sup>103</sup> According to Article 191 (1) of the Act, psychiatric patients' right to consent to treatment shall be governed by the general provisions on consent to treatment, except patients treated under the involuntary treatment and emergency treatment provisions. However, healthcare providers should make an attempt to provide information about the treatment even to patients treated involuntarily.<sup>104</sup>
- [69]. The close relationship between involuntary placement and treatment was also affirmed by the Supreme Court in case no. EBH 2004.1130. The applicant complained that while subject to involuntary placement and having full capacity, she should not be subject to treatment against her will. The Supreme Court held that the patient loses the right to refuse treatment when subjected to involuntary placement. The court decision ordering involuntary placement constitutes a sufficient guarantee to respect the patient's rights.<sup>105</sup>
- [70]. The Hungarian legal framework does not recognise involuntary placement of psychiatric patients without treatment. The only modification to this rule is contained in the *emergency treatment* procedure in Article 199 of the Healthcare Act. According to Article 199 (4) of the Act, until the involuntary treatment is approved by the court (within 72 hours), the treatment of patients admitted in an emergency procedure should focus on eliminating the actions constituting danger or imminent danger, and should refrain from altering the patients' psychic condition before the court hearing, if this is medically possible.<sup>106</sup>
- [71]. The legal framework specifies that the aim of involuntary psychiatric treatment is to protect the patient and other persons from harm to life, health and personal integrity.<sup>107</sup>
- [72]. The legal framework does not contain any regulation on aftercare following involuntary psychiatric treatment. Nor is there any specific regulation for involuntary psychiatric care of children.
- [73]. Persons with addictive behaviour (or substance abuse problems) are not considered as a specific category of patients subject to involuntary psychiatric care. They can be treated involuntarily under

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102 Mental Disability Advocacy Center (MDAC) (2008) *Tanulmány a pszicho-szociális fogyatékkal élő személyek jogairól a „Fogyatékkal élő személyek jogairól szóló Egyezmény” tükrében.*

103 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 200 (15.12.1997).

104 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 191 (1) (15.12.1997).

105 Hungary/Legfelsőbb Bíróság/2004.1130 (02.2004).

106 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (4) (15.12.1997).

107 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 191 (1) and 188 (15.12.1997).

the criteria established for psychiatric patients to the extent their substance abuse problems qualify as psychiatric disorders according to the International Classification of Diseases.<sup>108</sup>

#### 4.1.1. Treatment of persons under guardianship

- [74]. No specific provisions exist for the involuntary psychiatric treatment of persons under guardianship – if they satisfy the criteria of dangerousness, they can be treated involuntarily the same way as persons with full legal capacity. However, specific provisions exist for the voluntary treatment of persons under guardianship.
- [75]. According to Article 197 of the Healthcare Act, only persons with full legal capacity can validly consent to psychiatric treatment.<sup>109</sup> Persons deprived of their legal capacity and persons with restricted legal capacity can be taken to voluntary care only with the consent of the person specified in Article 16 (1)-(2) of the Act (person specified by the patient in advance; the guardian; the patient's partner, child, parent, etc.).<sup>110</sup> According to Article 197 (3) of the Healthcare Act, if the consent of this person cannot be obtained, either because he/she is unavailable or has contrary interests with the patient, the patient under guardianship can be taken to voluntary care by a psychiatric institution if it is *justified*.<sup>111</sup> The law does not specify what the criteria of *justified* treatment are, it only specifies that the court has to hear the patient, the hospital's representative and commission a psychiatric opinion, without providing guidance as to what such an opinion should establish or assess.<sup>112</sup>
- [76]. If the person under guardianship is admitted to hospital without the consent of the person specified in Article 16 (1)-(2) of the Act, and the consent of this person cannot be immediately obtained, the psychiatric institution notifies the guardianship authority<sup>113</sup> and the court.<sup>114</sup> The court automatically reviews within 72 hours of receipt of notice whether the conditions of voluntary treatment of the person under guardianship are present.<sup>115</sup> If the court finds that treatment is justified and consent was given validly, it approves the treatment of the person under guardianship. If it finds that treatment is not justified, it orders the patient to be released from the institution within 24 hours from the decision.<sup>116</sup> If the court finds that consent to treatment was not given validly but treatment is justified, it orders the involuntary treatment of the patient.<sup>117</sup>
- [77]. If the patient was admitted to hospital by the consent of the person specified in Article 16 (1)-(2) of the Act, the patients or the persons specified in Article 16 (1)-(2) can also ask the court to review whether the conditions of voluntary treatment are present.
- [78]. If the court approves the voluntary treatment of a patient under guardianship, it reviews the treatment periodically.<sup>118</sup> In psychiatric healthcare institutions the court review takes place every 30 days, in psychiatric rehabilitation institutions every 60 days.<sup>119</sup>
- [79]. With regard to the regulation of voluntary treatment of persons under guardianship, it can be welcomed that the Hungarian legal framework does recognise that persons under guardianship require special attention, and does recognise and provide some significance to the person's own wishes as

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108 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 188 d) (15.12.1997).

109 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 197 (1) (15.12.1997).

110 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 197 (2) (15.12.1997).

111 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 197 (3) (15.12.1997).

112 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 197 (7) (15.12.1997).

113 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 197 (3) (15.12.1997).

114 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 197 (6) (15.12.1997).

115 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 197 (7) (15.12.1997).

116 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 197 (8) (15.12.1997).

117 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 197 (8) (15.12.1997).

118 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 198 (1) (15.12.1997).

119 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 198 (1) (15.12.1997).

opposed to the ones of his guardian. However, the safeguards are aimed only at making sure that these patients receive the necessary treatment if they want to be treated but their guardian fails to give consent. The regulation does not provide effective protection in situations where the person under guardianship does not want to be treated in a hospital, but his/her guardian consents to such treatment on his/her behalf. In this situation the person under guardianship can initiate a court review (which is commendable, because in most countries of Central and Eastern Europe even such a possibility does not exist),<sup>120</sup> but the scope of this review is very limited. The court decides whether consent (by the guardian or other specified person, not by the patient in this specific scenario) was validly given, and whether treatment is “justified”. This standard is considerably lower than that required for involuntary treatment, as no dangerous conduct on the part of the patient forms part of it. The law is unclear about when such a treatment is “justified”. It does not require the courts to review whether the patient lacks actual capacity to decide on treatment, and accept his/her decisions if he/she doesn’t. The law in this regard fails to provide adequate protection to persons under guardianship who have actual capacity to consent to or refuse treatment, contrary to the requirements of Principle 3(2) and Principle 22 of *Council of Europe Recommendation R(99)4 of the Committee of Ministers to member states on principles concerning the legal protection of incapable adults*.

#### 4.1.2. Treatment of offenders with mental disorders

- [80]. Psychiatric treatment of all persons in the criminal system takes place in Hungary’s only high-security mental institution, IMEI, placed within the Budapest Jail and Prison. IMEI provides psychiatric treatment to convicted prisoners suffering from psychiatric problems,<sup>121</sup> persons not convicted due to diminished responsibility but ordered to undergo forced psychiatric treatment,<sup>122</sup> and criminal defendants subject to temporary forced treatment.<sup>123</sup> It also performs forensic observation of criminal defendants.<sup>124</sup> The institution’s highly isolated and prison-like nature raises doubts about its ability to provide individualised psychiatric care and therapy generally available in civilian hospitals.<sup>125</sup>

### 4.2. Criteria and Definitions

- [81]. Hungarian law provides for two types of involuntary treatment measures: *mandatory treatment* [kötelező gyógykezelés] under Article 200 of the Healthcare Act and *emergency treatment* [sürgősségi gyógykezelés] under Article 199 of the Healthcare Act. The term “involuntary treatment” is used in this text when referring to both types of measures.
- [82]. Emergency treatment can be ordered by a doctor who observes that the psychiatric patient presents *imminently dangerous behaviour*, which can be averted only by committing the person to institutional psychiatric care.<sup>126</sup> *Imminently dangerous behaviour* is defined as behaviour presenting imminent and grave danger to the life, health, or physical integrity of the patient or other persons due to the person’s acute mental disorder.<sup>127</sup>
- [83]. Mandatory treatment can be ordered by a court if the patient presents *dangerous behaviour*, but emergency treatment is not justified.<sup>128</sup> Dangerous behaviour is defined as behaviour which *could*

120 Mental Disability Advocacy Center (MDAC) (2007) *Guardianship and Human Rights in Hungary*.

121 Hungary/36/2003. (X. 3.) IM rendelet a kényszergyógykezelés és az ideiglenes kényszergyógykezelés végrehajtásáról, valamint az Igazságügyi Megfigyelő és Elmegyógyító Intézet feladatairól, működéséről/Article 23 (03.10.2003).

122 Hungary/1978. évi IV. törvény a Büntető Törvénykönyvről/Article 74 (31.12.1978).

123 Hungary/1998. évi XIX. törvény a büntetőeljárásról/Article 140 (23.03.1998).

124 Hungary/1998. évi XIX. törvény a büntetőeljárásról/Article 107 (23.03.1998).

125 Mental Disability Advocacy Center (MDAC) and Hungarian Helsinki Committee (2004) *Prisoners or Patients: Criminal Psychiatric Detention in Hungary*.

126 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (1) (15.12.1997).

127 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 188 c) (15.12.1997).

128 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 200 (1) (15.12.1997).

present substantial danger to the life, health, or physical integrity of the patient or other persons due to the person's mental disorder.<sup>129</sup>

- [84]. Besides the criteria of dangerous (or imminently dangerous) behaviour, involuntary treatment can be ordered only if such behaviour is the consequence of a mental disorder. Such disorder is defined with reference to the 10th revision of the World Health Organisation's International Classification of Diseases (ICD-10). A psychiatric patient is defined as a person whose treating doctor established any of the diagnosis of Mental or Behavioural Disorders (F00-F99) or Intentional Self-harm (X60-X84).<sup>130</sup>
- [85]. One of the conditions of ordering emergency treatment is that the imminently dangerous behaviour can be averted only by committing the patient to institutional psychiatric care.<sup>131</sup> It is implicit in this criterion that if danger can be averted by other, less intrusive means, the person should not be committed to a psychiatric institution. The law, however, does not specify what alternatives must be considered and exhausted before resorting to institutional care, therefore the practical relevance of this provision is minimal. Among the criteria of mandatory (non-emergency) treatment the law does not refer to less restrictive alternatives even implicitly.
- [86]. The opinion of the patient is irrelevant for the purposes of ordering emergency treatment. For ordering mandatory treatment, the court needs to hear the patient, but it does not need to take into account his/her opinion at all.<sup>132</sup> The patient's opinion is thus not a criterion in ordering involuntary treatment.
- [87]. The Healthcare Act does not provide examples of what constitutes dangerous behaviour. From the legal definition it can be inferred that a wide range of actions directed against oneself or others satisfy the criteria for mandatory treatment, except probably actions dangerous to property. The dividing line between dangerous and imminently dangerous behaviour is that the latter presents *imminent and grave* danger, while the former is behaviour that *could* present *substantial* danger.<sup>133</sup> The law provides no guidance on how to differentiate between grave and substantial danger. For the purposes of practical application, action which would inevitably lead to harm is considered imminently dangerous, while behaviour which potentially could lead to harmful consequences in the future can be considered dangerous behaviour. The borders of the latter are very unclear.

### 4.3. Assessment, Decision, Procedures and Duration

- [88]. The Hungarian legal framework provides for two types of involuntary treatment measures: *mandatory treatment*, a court-ordered measure and *emergency treatment*, effected by doctors on the spot.<sup>134</sup>

#### 4.3.1. The role of medical professionals in the emergency placement procedure

- [89]. Emergency medical treatment can be ordered by a doctor, who observed the patient's imminently dangerous behaviour.<sup>135</sup> This person does not necessarily have to be a psychiatrist, but needs to be a

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129 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 188 b) (15.12.1997).

130 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 188 a) (15.12.1997).

131 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (1) (15.12.1997).

132 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 200 (4) (15.12.1997).

133 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 188 (15.12.1997).

134 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (5) (15.12.1997).

135 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (1) (15.12.1997).

physician [“*orvos*”].<sup>136</sup> Police assistance may be sought for implementing the emergency treatment order.<sup>137</sup>

- [90]. After the patient is admitted to a psychiatric institution, the director of the institution notifies the court within 24 hours about the placement.<sup>138</sup>
- [91]. The court reviews the patient’s emergency admission within 72 hours from receipt of the institution’s notice.<sup>139</sup> The court hears the patient, the institution’s director or a doctor specified by the director, and orders one psychiatric report to be prepared by an independent forensic psychiatrist [*igazságügyi elmeorvosi szakértő*].<sup>140</sup> The forensic psychiatrist must not take part in the patient’s treatment, but the law does not specify that he/she could not be an employee of the psychiatric institution.<sup>141</sup>
- [92]. At the same time when approving the patient’s emergency admission, the court can order the patient’s continuing mandatory treatment in the psychiatric institution.<sup>142</sup> This mandatory treatment is than reviewed in intervals of 30 days.<sup>143</sup>

#### 4.3.2. The role of medical professionals in the mandatory treatment procedure

- [93]. Non-emergency mandatory treatment can be initiated by a psychiatrist who established its necessity.<sup>144</sup> The psychiatrist must initiate a court proceeding by submitting an application with the court and recommending a psychiatric institution where the patient should be placed.<sup>145</sup>
- [94]. The court decides on the mandatory treatment by hearing the patient and the psychiatrist who initiated the procedure, and by commissioning a psychiatric report by an independent forensic psychiatrist, who does not take part in the patient’s medical treatment.<sup>146</sup>
- [95]. The court must decide within 15 days from receipt of the application whether to order the patient’s mandatory treatment. If it orders the treatment, the patient must report within three days of receipt of the final decision in the psychiatric institution specified in the judgment.<sup>147</sup> If he/she does not appear at the hospital, the psychiatrist initiating the treatment must take steps to execute the order, in case of need with the assistance of the police.<sup>148</sup>
- [96]. In summary, there are two basic ways to involuntarily admit a patient to a psychiatric hospital: mandatory treatment can be ordered by a court on an application of a psychiatrist using the procedure under Article 200 of the Healthcare Act, or the emergency treatment of the patient can be ordered under Article 199 of the Healthcare Act by a doctor who observed the patient’s imminently dangerous behaviour. This emergency admission is reviewed by the court within 24+72 hours, which can then order the patient’s further mandatory treatment.

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136 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (1) (15.12.1997).

137 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (1) (15.12.1997).

138 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (2) (15.12.1997).

139 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (3) (15.12.1997).

140 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (6) (15.12.1997).

141 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (6) (15.12.1997).

142 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (5) (15.12.1997).

143 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (8) (15.12.1997).

144 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 200 (2) (15.12.1997).

145 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 200 (2) (15.12.1997).

146 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 200 (4) (15.12.1997).

147 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 200 (6) (15.12.1997).

148 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 200 (6) (15.12.1997).

### 4.3.3. Review and termination of the involuntary placement / treatment

- [97]. The patient's mandatory treatment in the psychiatric institution is reviewed by the court in periodic intervals. If the patient was admitted to the institution through an emergency procedure, mandatory treatment is reviewed every 30 days.<sup>149</sup> If the patient was admitted by a court order, mandatory treatment is reviewed every 30 days in psychiatric healthcare institutions and every 60 days in psychiatric rehabilitation institutions.<sup>150</sup> The court terminates the mandatory treatment if it is no longer *necessary [szükséges]*<sup>151</sup> which is a reference to the criteria required for ordering mandatory treatment – the presence of dangerous behaviour caused by a mental disorder.<sup>152</sup>
- [98]. According to Article 199 (9) and Article 200 (8) of the Healthcare Act the patient must be released from the institution if his/her mandatory treatment is no longer justified.<sup>153</sup> These provisions give power to the institution's director to release the patient anytime between the mandatory court review hearings if the treating doctors decide that the patient does not need to be treated in the institution anymore.

### 4.3.4. Transition from voluntary to involuntary status

- [99]. If a person was admitted to a psychiatric institution as a voluntary patient, he/she can leave the institution anytime by his/her own decision. However, if the treating doctors consider that he/she presents a dangerous or imminently dangerous behaviour which justifies mandatory treatment, the patient must be considered an involuntary patient.<sup>154</sup> He/she cannot be released, and the institution must initiate a procedure for the patient's involuntary treatment under Article 199 of the Healthcare Act.<sup>155</sup> The hospital thus must announce the patient's involuntary admission to the court within 24 hours, which has to review it within 72 hours. The procedure followed is the same as the procedure for the review of the emergency admission.<sup>156</sup>

### 4.3.5. Time lapse between psychiatric assessment and beginning of compulsory placement

- [100]. In case of emergency treatment, the doctor observing the patient's imminently dangerous behaviour must commit the patient to a psychiatric institution immediately.<sup>157</sup> The hospital announces the admission to the court within 24 hours, which orders a forensic psychiatric report and reviews the admission within 72 hours from receipt of notice from the institution.<sup>158</sup> The patient is examined by the forensic psychiatrist before the hearing; therefore the time period between the assessment and the court review ordering further mandatory treatment is less than 72 hours.
- [101]. In case of mandatory treatment ordered by a court under Article 200 of the Healthcare Act, the court must decide within 15 days from receipt of application from the patient's treating psychiatrist.<sup>159</sup> The court orders a forensic psychiatric report, which is prepared during this period. Therefore the time

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149 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (8) (15.12.1997).

150 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 200 (7) (15.12.1997).

151 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (8) and 200 (7) (15.12.1997).

152 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (5) and 200 (1) (15.12.1997).

153 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (9) and 200 (8) (15.12.1997).

154 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 197 (11) (15.12.1997).

155 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 197 (11) (15.12.1997).

156 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 197 (11) (15.12.1997).

157 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (1) (15.12.1997).

158 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 199 (3) (15.12.1997).

159 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 200 (3) (15.12.1997).

period between the psychiatric assessment and the hearing is less than 15 days. However, the court does not necessarily deliver a decision at the hearing. It can be prepared after the hearing and served on the patient by post. The patient can appeal the decision. If the appeal court rejects the appeal, the decision becomes final and is delivered to the patient by post. The patient has to report in the institution within three days from receipt of the final decision. If he/she does not appear there, he/she can be apprehended by the police on the request of the psychiatrist initiating the court procedure. Significant time can thus lapse between the forensic psychiatric assessment and the beginning of the mandatory treatment due to delays in the appeal and enforcement proceedings.

#### 4.3.6. Emergency admissions

- [102]. The Hungarian legal framework does not contain specific provisions for persons admitted to psychiatric institutions in emergency procedures outside of working hours. The “regular” emergency rules apply. The hospital has 24 hours to report the admission to the court, and the court has 72 hours to review the admission. This time period allows for at least one working day for hearings even if the emergency admission would be announced shortly before the weekend. Courts must organise their work-schedules in a way that there is always at least one judge on duty to conduct emergency admission review hearings even if these took place during national holidays.

#### 4.3.7. Appeal proceedings

- [103]. Patients are entitled to file a regular appeal against the decisions of the reviewing courts within 8 days from delivering the decision in both emergency and non-emergency involuntary treatment proceedings. In the (non-emergency) mandatory treatment proceedings, the decision is delivered to the patient by post. If he/she files an appeal against it within 8 days, the decision will not enter into force and cannot be executed until the decision of the appeal court.<sup>160</sup>
- [104]. In emergency treatment proceedings, the patient’s possibilities to submit an appeal are more limited. The decision approving the emergency admission and ordering mandatory treatment is announced orally during the hearing at the psychiatric institution. The patient has to submit an appeal within 8 days from the hearing, while he/she typically is still in the institution and his/her ability to communicate with the outside world is limited. If an appeal is submitted, it does not affect the enforceability of the first instance decision – while the appeal is pending, the hospital is entitled to keep the patient in the institution.<sup>161</sup>

#### 4.3.8. Legal support

- [105]. The Healthcare Act requires that the patient receives free legal support in the court review proceedings. The patient or his/her statutory representative (e.g. guardian, parent) can appoint a legal representative for the proceedings.<sup>162</sup> Besides attorneys and other persons specified by the Civil Procedure Code,<sup>163</sup> the hospital’s *betegjogi képviselő* [patient’s rights advocate] can also be appointed.<sup>164</sup> If the patient does not have a representative, the court must appoint him an *ügygondnok*

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160 Hungary/1952. évi III. törvény a polgári perrendtartásról/Article 236 (06.06.1952) and Hungary/1997. évi CLIV. törvény az egészségügyről/Article 201 (9) (15.12.1997).

161 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 201 (9) (15.12.1997).

162 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 201 (4) (15.12.1997).

163 Hungary/1952. évi III. törvény a polgári perrendtartásról/Article 67 (1) (06.06.1952).

164 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 201 (4) (15.12.1997).



[case-representative] for the proceedings.<sup>165</sup> Courts appoint almost exclusively attorneys as case-representatives.

#### 4.3.9. Specific mental health care interventions

- [106]. The Hungarian legal order does not contain specific provisions on specific mental health care interventions. Measures such as pharmaceutical interventions and electroconvulsive therapy (ECT) are regulated only by medical protocols prepared by the *Pszichiátriai Szakmai Kollégium* [Psychiatric Medical College] and issued by the Ministry of Health, which however do not have a force of law.
- [107]. The medical protocol on the use of electroconvulsive therapy<sup>166</sup> specifies that ECT should be used only with the consent of the patient. However, if the patient does not have full legal capacity, the consent of the guardian is sufficient, although consent of the patient's relative should be sought as well.<sup>167</sup> According to section 5.3 of the protocol, patients committed to involuntary treatment do not have capacity to consent to ECT, therefore to them ECT could be provided without their consent.<sup>168</sup> The protocol advises providers to seek the consent of the patient's relative or the opinion of an independent psychiatrist in these occasions as well, this is however not a mandatory requirement.<sup>169</sup>

#### 4.3.10. Coercive measures

- [108]. The Healthcare Act regulates the conditions of applying coercive measures to psychiatric patients. The Act permits the use of physical, chemical, biological and psychological tools and measures.<sup>170</sup> These can be applied for the purpose of restraining a psychiatric patient from dangerous or imminently dangerous conduct,<sup>171</sup> or to prevent an involuntarily treated patient to leave the psychiatric institution.<sup>172</sup> The duration, degree and nature of coercive measures must be strictly necessary to avert the dangerous conduct.<sup>173</sup> The patient must be monitored during the time when the measures are applied to him, and his physical, hygienic and other needs must be assessed and adequately satisfied.<sup>174</sup>

#### 4.3.11. Practical problems with the application of rules on involuntary treatment

- [109]. To evaluate the Hungarian legal regulation of involuntary treatment, one must look not only to the legal provisions, but also to their application. From the available scarce sources it is apparent that the vast majority of involuntary patients get admitted to psychiatric hospitals through the emergency treatment procedure, not by court order.<sup>175</sup> The fact of the emergency admission itself seriously jeopardises their prospects in the court review proceedings. As a result, in the examined court

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165 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 201 (4) (15.12.1997).

166 Hungary/Pszichiátriai Szakmai Kollégium (2008) Az Egészségügyi Minisztérium szakmai protokollja – Az ECT kezelés.

167 Hungary/Pszichiátriai Szakmai Kollégium (2008) Az Egészségügyi Minisztérium szakmai protokollja – Az ECT kezelés, Section 5.2.

168 Hungary/Pszichiátriai Szakmai Kollégium (2008) Az Egészségügyi Minisztérium szakmai protokollja – Az ECT kezelés, Section 5.3.

169 Hungary/Pszichiátriai Szakmai Kollégium (2008) Az Egészségügyi Minisztérium szakmai protokollja – Az ECT kezelés, Section 5.3.

170 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 192 (1) (15.12.1997).

171 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 192 (1) (15.12.1997).

172 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 192 (2) (15.12.1997).

173 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 192 (1) (15.12.1997).

174 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 192 (4) (15.12.1997).

175 Mental Disability Advocacy Center (MDAC) (2008) *Kézikönyv a nem önkéntes pszichiátriai gyógykezelés bírósági felülvizsgálatának problémáiról.*

statistics emergency admissions were approved by courts in 100 per cent of the cases!<sup>176</sup> This seriously undermines the legitimacy of the court review proceedings.

- [110]. Another shortcoming of the review proceedings is the courts' wide deference to medical opinion. The 72 hours available for the court review are too short to gather evidence or to summon witnesses. The only basis for the court decisions is thus the psychiatric opinion, which the court has no basis to question, because the time limit does not even allow for a new opinion to be prepared in case of doubt.
- [111]. The wide deference to the psychiatrists was highlighted by the decision of the European Court of Human Rights in the case of *Gajcsi v. Hungary*. Mr. Gajcsi's court review of his mandatory treatment by the domestic court was based on a one sentence opinion of his psychiatrist that his treatment is necessary. This was uncritically accepted by the court, and later approved by an appeal court and the Supreme Court. The European Court of Human Rights found that the 'domestic court decisions in the present case were devoid of any assessment of the applicant's alleged or potential "dangerous conduct"', although this is a mandatory legal requirement of ordering involuntary treatment.<sup>177</sup>
- [112]. The domestic court's deference to psychiatrists is not caused by the unclarity of legal criteria which seem to be in line with international standards. It is rather an institutional failure of the judiciary to apply the law correctly and to develop an acceptable interpretative practice, which will be much harder to remedy.

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<sup>176</sup> Mental Disability Advocacy Center (MDAC) (2008) *Kézikönyv a nem önkéntes pszichiátriai gyógykezelés bírósági felülvizsgálatának problémáiról*.

<sup>177</sup> European Court of Human Rights, *Gajcsi v. Hungary*, No. 34503/03 (03.10.2006), § 21.

## 5. Competence, Capacity and Guardianship

- [113]. Persons with mental disorders and persons with intellectual disability unable to manage their affairs can be appointed a *guardian* [*gondnok*] in Hungary. Guardianship is the only legal institution the Hungarian legal framework provides to assist and protect persons with disabilities in legal transactions.
- [114]. A guardian can be appointed only in areas where the person's legal capacity is limited. In other words, appointment of a guardian automatically leads to the limitation (full deprivation or partial restriction) of the adult's legal capacity; it is not possible to appoint a guardian while preserving the adult's legal capacity. This is reflected in the legal institution's full name: *guardianship depriving legal capacity*,<sup>178</sup> and *guardianship restricting legal capacity*.<sup>179</sup>
- [115]. The main body of guardianship regulations is contained in the old Civil Code, Act IV of 1959,<sup>180</sup> Act III of 1952 on the Civil Procedure Code,<sup>181</sup> and Governmental Decree no. 149/1997 on Guardianship Authorities, Child Protection and Guardianship Procedures.<sup>182</sup>
- [116]. All minors, with a few exceptions,<sup>183</sup> are restricted or deprived of their legal capacity automatically by the Civil Code, and their legal representation is governed by the rules on custodianship.<sup>184</sup> Only adults can be limited on their legal capacity and can have a guardian appointed by a court decision. In the following analysis we will neglect the rules concerning custody of minors and will concentrate on guardianship of adults. The age of majority is 18 years in Hungary.<sup>185</sup>

### 5.1. Criteria of placement under guardianship

- [117]. The Civil Code regulates the criteria under which the legal capacity of adults can be limited. Every person is presumed to have full legal capacity on reaching the age of majority, unless his/her legal capacity is deprived or restricted by a court decision.<sup>186</sup> "Legal capacity" contains two distinct legal institutions: *jogképesség* [capacity to have rights] and *cselekvőképesség* [capacity to exercise rights], which is defined as the ability of the person to conclude contracts or make other legal declarations by his/her own actions.<sup>187</sup> The capacity to have rights cannot be limited,<sup>188</sup> and therefore this analysis is not concerned with it. Hereinafter we will refer to the capacity to exercise rights (*cselekvőképesség*) as *legal capacity*.
- [118]. The criteria for *deprivation* and *restriction* of legal capacity are very similar. Both consist of two main elements: a medical determination of disability, and the inability to manage one's affairs.

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178 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 15 (11.08.1959).

179 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14 (11.08.1959).

180 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről (11.08.1959).

181 Hungary/1952. évi III. törvény a polgári perrendtartásról (06.06.1952).

182 Hungary/149/1997. (IX. 10.) Korm. Rendelet a gyámhatóságokról, valamint a gyermekvédelmi és gyámügyi eljárásról (10.11.1997).

183 With the exception of those who are over 16 years of age and get married with a permission of a guardianship authority – compare Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 12 (11.08.1959).

184 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 12-13/B (11.08.1959).

185 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 12 (11.08.1959).

186 Compare with Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 11 (11.08.1959).

187 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 11(2) (11.08.1959).

188 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 8 (11.08.1959).

- [119]. Adults' legal capacity can be restricted if their competence to manage their affairs is limited due to their "psychic state, intellectual degradation or addiction disorders".<sup>189</sup> This slightly outdated terminology does not cause problems in practice, as it is used consistently by courts and forensic psychiatrists to refer to mental health problems, intellectual disability and substance abuse problems. Therefore the two main groups subject to guardianship are persons with mental disorders and persons with intellectual disabilities. Persons with substance abuse problems form a sub-group of persons with mental health problems, as "addiction behaviours" are considered a mental illness.<sup>190</sup>
- [120]. The other main criteria for limiting legal capacity is the adults' limited *competence* to manage their affairs due to the above defined disability or disorder. The term *belátási képesség*, translated as *competence* here, does not have a proper English equivalent; it is used only in the context of guardianship. The law contains no definition of *competence*, which can be regarded as a major shortcoming. In practice courts often consider competence a medical issue, and defer to forensic psychiatrists in its determination. However, the term does not have a definition in psychiatric protocols either, therefore often the mere existence of a disability or mental illness leads to placement under guardianship. Thus, the two legal criteria, disability and competence, in practice merge into a single, predominantly medical definition.
- [121]. The Supreme Court's recent jurisprudence attempted to clarify the concept of competence as a separate, non-medical criterion distinct from disability. In its decision no. BH2006.46, the Supreme Court held that for placement under guardianship two separate conditions must be met: the medically certified mental disorder and its impact on the persons' inability to manage their own affairs.<sup>191</sup> In decisions no. BH2007.404 and BH2008.265 the Supreme Court went further, emphasising that the scope of guardianship is not limited to a medical question: courts must decide on the basis of the persons' circumstances and their real need for assistance.<sup>192</sup> Therefore, courts are at fault when assessing these issues on the basis of the medical reports, in effect deferring the decision to the medical experts. Despite these decisions, it is yet to be seen whether the Supreme Court will have an impact on the practice of lower courts. In guardianship matters the Supreme Court's role is limited by the fact that the number of appeals in guardianship matters is very small, and the degree of deference to medical practitioners is high.<sup>193</sup>

## 5.2. Degrees of incapacity

- [122]. The Civil Code principally defines two degrees of incapacity, guardianship *depriving* legal capacity<sup>194</sup> and guardianship *restricting* legal capacity.<sup>195</sup> Restriction of legal capacity is further divided into general restriction and restriction to specific types of legal acts.
- [123]. Persons who *fully and permanently* [*tartósan és teljes mértékben*] lack competence to manage their affairs due to their disability are placed under *guardianship depriving legal capacity*,<sup>196</sup> or *plenary guardianship*, as it is widely referred to in English. All their legal actions, with few exceptions,<sup>197</sup> are conducted by their legal guardians.
- [124]. Persons whose competence to manage their affairs is *permanently or on recurrent basis* [*tartósan vagy időszakonként visszatérően*] *restricted to a great degree* [*nagymértékben csökkent*] are placed

189 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14 (4) (11.08.1959).

190 Hungary/1997. évi CLIV. törvény az egészségügyről/Article 188 d) (15.12.1997).

191 Hungary/Legfelsőbb Bíróság/2006.46 (02.2006).

192 Hungary/Legfelsőbb Bíróság/2007.404 (12.2007) and 2008.265 (10.2008).

193 Mental Disability Advocacy Center (MDAC) (2007) *Guardianship and Human Rights in Hungary*, p. 72.

194 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 15 (4) (11.08.1959).

195 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14 (4) (11.08.1959).

196 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 15 (4) (11.08.1959).

197 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 15/A (2) (11.08.1959).

under *guardianship restricting legal capacity*<sup>198</sup> or *partial guardianship*, as it is referred to in English. The law distinguishes between competence being restricted *generally* [*általános jelleggel*], leading to the restriction of legal capacity of general nature (restriction with regard to all legal actions, with few exceptions),<sup>199</sup> also called *partial guardianship of general limitation*, and to *specific types of legal acts* [*egyres ügycsoportok vonatkozásában*]. If a person's legal capacity is restricted only to specific types of legal acts, he/she is considered to have capacity in all other areas.<sup>200</sup>

[125]. Section 14 (6) of the old Civil Code lists 9 types (or areas) of legal acts [*ügycsoportok*] where the person's legal capacity can be restricted. These are:

- applying for social security, unemployment and other benefits and disposition with income from these benefits or from employment relationships;
- disposition with movable and immovable property;
- family-law related legal actions (concerning matrimonial property, paternity declarations, naming one's child and consent with adoption of one's child);
- legal actions related to alimonies;
- legal actions related to the rent of apartments;
- inheritance matters;
- legal actions related to placement into social care institutions;
- legal actions related to healthcare;
- determination of the place of residence.<sup>201</sup>

[126]. While these types of legal actions are listed as examples only, and courts are in principle free to limit an adult's legal capacity in areas and to a degree they see most fit to the adult's specific condition, in practice this list is followed as a taxative enumeration of areas where legal capacity can be restricted. The review of jurisprudence provides only one example of a type of legal action created by the courts for the purpose of restriction of legal capacity: "procedural capacity", all legal actions related to initiate and conduct proceedings before courts and administrative authorities.<sup>202</sup>

## 5.3. Different guardianship measures and their basic features

### 5.3.1. Plenary guardianship

[127]. *Guardianship depriving legal capacity* or *plenary guardianship* results in the adult lacking legal capacity in all areas of life. His/her guardian is entitled to manage the adult's property and take legal actions on behalf of the adult in all areas of life.<sup>203</sup> The adult is only entitled to make "contracts of

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198 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 15 (4) (11.08.1959).

199 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14/B (2) (11.08.1959).

200 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14 (5) (11.08.1959).

201 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14 (6) (11.08.1959).

202 Hungary/Legfelsőbb Bíróság/2007.404 (12.2007).

203 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 15/A (1) (11.08.1959).

small importance, which appear on a mass basis in everyday life, and do not require specific consideration”.<sup>204</sup>

- [128]. When making decisions on the adult’s behalf, the guardian is required to consult the adult if he/she is capable to form an opinion, and take into account his/her opinion if possible.<sup>205</sup> Systemic violation of this obligation can lead to the guardian being replaced, but not to the nullification of the transactions and decisions made by him/her.<sup>206</sup> The law does not provide guidance to guardians about what they should take into account when deciding issues on behalf of the adult. It is therefore unclear whether they should follow a “best interest” or different standard, and what the criteria should be. The law also does not provide any safeguards for the person under plenary guardianship to challenge the decisions of their guardians. This allows guardians to make decisions on behalf of the adult without even consulting adults about their wishes. That this is not only a theoretical problem is underlined by a report of the Mental Disability Advocacy Center, which found that in a social care institution in Western Hungary two persons were appointed as guardians of 350 adults deprived of legal capacity, despite the legal limit of 30 adults per guardian.<sup>207</sup> It was practically impossible for the guardians under these conditions to consult the adults for their wishes, and it is unclear on what basis they made important decisions concerning property, family affairs or important medical interventions in the absence of any legal guidelines.

### 5.3.2. Partial guardianship

- [129]. The consequence of *guardianship restricting legal capacity*, or *partial guardianship*, is that all legal actions of the adult are valid only with the approval of his/her guardian.<sup>208</sup> In practice thus both the adult and his/her guardian must sign legal transactions. In case of disagreement, the dispute between the adult and the guardian is decided by the guardianship authority.<sup>209</sup>
- [130]. The adult under partial guardianship is allowed to make some legal transactions alone, without the consent of his guardian. These are:
- legal actions of a personal nature for which the adult is authorised by law;
  - contracts of small importance relating to satisfying everyday needs;
  - disposal with 50 per cent of social security and employment income;
  - and concluding transactions which result only in advantages for an adult.<sup>210</sup>
- [131]. *Partial guardianship of general limitation* affects all other legal actions of the adult; he/she can make other transactions only with the approval of his/her guardian. If the adult’s legal capacity is restricted only for certain types of legal acts, he/she requires his/her guardian’s consent for making transactions in these areas, and can make legal actions alone in all other areas.<sup>211</sup>
- [132]. The guardian can act alone on behalf of the adult if the adult authorises him/her to do so,<sup>212</sup> in cases requiring immediate action,<sup>213</sup> or if the law authorises him/her to do so (e.g. giving consent to medical treatment<sup>214</sup>).<sup>215</sup>

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204 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 15/A (2) (11.08.1959).

205 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 15/A (1) (11.08.1959).

206 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 15/A (1) (11.08.1959).

207 Mental Disability Advocacy Center (MDAC) (2007) *Guardianship and Human Rights in Hungary*, p. 72.

208 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14/B (1) (11.08.1959).

209 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14/B (1) (11.08.1959).

210 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14/B (2) (11.08.1959).

211 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14 (5) (11.08.1959).

212 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14/B (3) (11.08.1959).

- [133]. Certain transactions involving immovable property or other property of high value can be made by the guardian (or by the guardian and the adult in case of partial guardianship) only with the approval of the guardianship authority.<sup>216</sup>

### 5.3.3. Temporary guardianship and property guardianship

- [134]. Besides the above described guardianship measures the Civil Code provides for two other means of protection, *temporary guardianship [ideiglenes gondnokság]*<sup>217</sup> and *property guardianship [zárgondnokság]*.<sup>218</sup> These are temporary measures serve to protect the adult's interest until the court decides on the limitation of his/her legal capacity. Temporary guardians and property guardians are appointed by the guardianship authority if it considers it necessary to initiate proceedings to limit the adult's legal capacity and the adult or his/her property requires immediate protection.<sup>219</sup> The guardianship authority must initiate the court proceeding to limit the adult's legal capacity within eight days from appointing a temporary or property guardian;<sup>220</sup> the court must review the appointment of the temporary or property guardian within 30 days of submitting the application. The temporary or property guardian is in place until the end of the court proceeding determining the adult's legal capacity.

### 5.3.4. Lack of legal capacity without placement under guardianship

- [135]. Another measure to protect the interests of persons lacking competence to manage their affairs is *lack of legal capacity without placement under guardianship [cselekvőképtelenség gondnokság alá helyezés nélkül]* according to Article 17 of the Civil Code. Under this provision, legal action of a person not placed under guardianship (and thus having full legal capacity) can be declared void if the court determines that he/she did not have competence to make the specific legal action due to his/her "condition". This measure can be applied only retrospectively, and only with regard to specific transactions.

## 5.4. Duration and review of guardianship

- [136]. Guardianship limiting legal capacity is in principle a measure of unlimited duration. It lasts until the court decides that it is no longer necessary.<sup>221</sup> Its necessity must be, however, regularly reviewed by courts. When placing an adult under guardianship, the court must specify when the court review will take place.<sup>222</sup> This time period cannot be longer than 5 years.<sup>223</sup>
- [137]. In case of plenary guardianship, however, the court can decide (based on the opinion of a forensic psychiatrist) that the adult's lack of competence is definitive, and no review should take place.<sup>224</sup>

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213 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14/B (5) (11.08.1959).

214 See Hungary/1997. évi CLIV. törvény az egészségügyről/Article 16 (15.12.1997).

215 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14/B (5) (11.08.1959).

216 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 16 (11.08.1959).

217 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 18/A (11.08.1959).

218 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 18 (11.08.1959).

219 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 18, 18/A (11.08.1959).

220 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 18/B (11.08.1959).

221 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 21(1) (11.08.1959).

222 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14/A (1) and 15 (5) (11.08.1959).

223 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14/A (1) (11.08.1959).

224 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 15(5) (11.08.1959).

- [138]. Court proceedings to review the necessity of guardianship can be initiated anytime by the persons entitled to do so (see part 5.5 below), irrespective of the periodicity and timing of regular court reviews.<sup>225</sup>

## 5.5. Initiation of proceedings

- [139]. Persons entitled to initiate the court proceedings leading to the placement of an adult under guardianship are the adult's spouse, parent, child, grandparent, grandchild, sibling, the guardianship authority and the prosecutor.<sup>226</sup> If the guardianship authority learns about circumstances which would necessitate the placement of the guardianship, and the relatives listed above do not initiate the court proceeding within 60 days, the guardianship authority is under an obligation to initiate the court proceedings.<sup>227</sup> In practice any person who learns about circumstances requiring placement under guardianship can report these to the guardianship authority, which will be under an obligation to initiate the court proceedings. Placement under guardianship thus can be *de facto* initiated by neighbours, distant relatives, business partners, physicians, or other persons having adverse interests to the adult.
- [140]. The same group of persons entitled to initiate court proceedings, plus the guardian and the person under guardianship are entitled to initiate court proceedings to review the necessity and terminate guardianship.<sup>228</sup> Regular court review proceedings must be initiated by the guardianship authority within the time limit specified in the court decision.<sup>229</sup> The right of the person under guardianship to initiate proceedings to restore his/her legal capacity is seen as an important safeguard ensuring that guardianship does not last longer than necessary.

## 5.6. Appeal proceedings

- [141]. Parties to the guardianship proceedings (the person who initiated the court proceedings and the adult whose legal capacity is in question) can submit a regular appeal against the decision of the first instance court deciding on the adult's legal capacity. The placement under guardianship will take legal effect after the final decision of the appeal court.<sup>230</sup>

## 5.7. The role of national authorities in the guardianship system

- [142]. Only a court can limit an adult's legal capacity.<sup>231</sup> Similarly, only a court is entitled to restore an adult's legal capacity.<sup>232</sup> If the court decides to limit the adult's capacity with regard to disposal of immovable property, it notifies the registry of immovable property to make the necessary entries in the register.<sup>233</sup> Most other competences rest with the guardianship authorities.

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225 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 21 (3) (11.08.1959).

226 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14 (2), 15(2) (11.08.1959).

227 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14 (3), 15 (3) (11.08.1959).

228 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 21 (2) (11.08.1959).

229 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14/A (2) (11.08.1959).

230 Hungary/1952. évi III. törvény a polgári perrendtartásról/Article 311 (1) (06.06.1952).

231 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 14 (1), 15(1) (11.08.1959).

232 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 21 (1) (11.08.1959).

233 Hungary/1952. évi III. törvény a polgári perrendtartásról/Article 311 (3) (06.06.1952).



- [143]. The guardianship authority is required to take steps to protect the interests of persons in need by initiating court proceedings to limit their legal capacity, and to appoint temporary and property guardians if needed. After the court decides to limit the adult's legal capacity, the guardianship authority is implementing the measure by appointing a guardian for the adult.<sup>234</sup> The guardianship authority has power to monitor the activities of the guardian, to review reports submitted by the guardian, and to displace the guardian and appoint a new one if necessary.<sup>235</sup>
- [144]. The *Országos Igazságszolgáltatási Tanács Hivatala* [National Justice Council's Office] maintains a register of all persons placed under guardianship.<sup>236</sup>

## 5.8. Appointment of the guardian

- [145]. After the court has decided to place the adult under guardianship, the decision is transferred to the guardianship authority for implementation.<sup>237</sup> The guardianship authority appoints a guardian for the adult.<sup>238</sup>
- [146]. Any person with full legal capacity can be appointed as a guardian.<sup>239</sup> The guardianship authority shall give preference to persons who were specified by the adult while he/she had full legal capacity.<sup>240</sup> If there are no such persons, the adult's spouse is appointed if living in the same household.<sup>241</sup> If that is not possible or it would endanger the adult's interests, the adult's parents, or, if they are already deceased, persons specified by them in their testament shall have preference.<sup>242</sup> In the absence of such persons the adult's other relatives, who can provide personal care to the adult, shall be appointed.
- [147]. If there is no suitable person who can be appointed as guardian, the guardianship authority appoints a professional guardian.<sup>243</sup> Professional guardians are required to possess certain qualifications and have a clean criminal record.<sup>244</sup> Members of non-governmental organisations can also be appointed as professional guardians.<sup>245</sup> Professional guardians are typically employees of guardianship authorities,<sup>246</sup> which creates a conflict of interest in monitoring their actions. A professional guardian can be a guardian of maximal 30 adults,<sup>247</sup> although this requirement is often violated in practice.<sup>248</sup> Exceptionally, two or more persons can be appointed as guardians to the same adult.<sup>249</sup>
- [148]. The adult can raise an objection against the person of the guardian, in which case a different person must be appointed.<sup>250</sup> However, a professional guardian can be appointed despite the adult's objections.<sup>251</sup>

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234 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 19 (1) (11.08.1959).

235 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 20/A (11.08.1959).

236 Hungary/1952. évi III. törvény a polgári perrendtartásról/Article 311 (5) (06.06.1952).

237 Hungary/1952. évi III. törvény a polgári perrendtartásról/Article 311 (2) (06.06.1952).

238 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 19 (1) (11.08.1959).

239 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 19 (2) (11.08.1959).

240 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 19/A (1) (11.08.1959).

241 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 19/A (1) (11.08.1959).

242 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 19/A (2) (11.08.1959).

243 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 19/A (3) (11.08.1959).

244 Hungary/1952. évi III. törvény a polgári perrendtartásról/Article 134 (3) (06.06.1952).

245 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 19/A (3) (11.08.1959).

246 Hungary/1952. évi III. törvény a polgári perrendtartásról/Article 134 (2) (06.06.1952).

247 Hungary/1952. évi III. törvény a polgári perrendtartásról/Article 134 (4) (06.06.1952).

248 Mental Disability Advocacy Center (MDAC) (2007) *Guardianship and Human Rights in Hungary*, p. 72.

249 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 19/B (1) (11.08.1959).

250 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 19/A (4) (11.08.1959).

251 Hungary/1952. évi III. törvény a polgári perrendtartásról/Article 134 (7) (06.06.1952).

- [149]. The guardianship authority can replace the guardian on the guardian's request, upon the complaint of the adult or for other reasons.<sup>252</sup>

## 5.9. The guardian's duties and obligations

- [150]. The guardian is the adult's legal representative, and is managing the adult's property.<sup>253</sup> He/she can also provide personal care to the adult.<sup>254</sup>
- [151]. If the adult is deprived of his/her legal capacity, the guardian can take decisions on his/her behalf despite the adult's objections. As the adult has no remedy against these decisions, and the law contains no guidance as to how the guardian should take his/her decisions, the guardian's power over the adult's life is immense.
- [152]. The guardianship authority monitors the guardian's actions, and specifically the guardian's disposal with the adult's property. The guardian is required to submit accounts about his/her actions to the guardianship authority on a yearly basis, or upon the guardianship authority's request.<sup>255</sup>

## 5.10. Guardianship in practice – a critical overview

- [153]. The Hungarian guardianship system demonstrates serious shortcomings. Most evidently, the power of guardians over adults placed under guardianship is almost unlimited, subject only to the yearly financial reports to the guardianship authority. Given the conflict of interest on the part of the guardianship authority (it typically serves as the employer of the professional guardian), the supervision of public guardians is inadequate. This is often aggravated by the shortage of guardians, which on occasions results in the same guardian being appointed to more than 30 persons (the legal limit), and the practical inability of guardianship authorities to replace guardians even if they find their actions objectionable.<sup>256</sup>
- [154]. Another shortcoming of the Hungarian guardianship system is its lack of less restrictive alternatives to guardianship. Guardianship without the limitation of legal capacity, enduring powers of attorneys, advance directives, supported decision-making, and other legal measures already used in other countries do not exist in Hungary at present. Guardianship is the only measure at the disposal of authorities to help persons in need, which often results in unnecessary limitation of the person's rights.
- [155]. Another deficiency of the guardianship system is revealed by the statistics on guardianship. As of 01.01.2009, there were 66,955 persons under guardianship in Hungary.<sup>257</sup> This is a very high number, representing 0.84 per cent of the adult population.<sup>258</sup> Even more importantly, 43,478 persons or 65 per cent of all persons under guardianship were under plenary guardianship, the most severe form of guardianship. From those under partial guardianship, 8,625 persons or 13 per cent were under partial guardianship with general limitation, and only the remaining 14,715 or 22 per cent were under partial guardianship restricted to specific legal areas.<sup>259</sup> Plenary guardianship is a very serious measure,

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252 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 19/C (11.08.1959).

253 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 20 (1) (11.08.1959).

254 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 20 (2) (11.08.1959).

255 Hungary/1959. évi IV. törvény a Magyar Köztársaság Polgári Törvénykönyvéről/Article 20/A (11.08.1959).

256 Mental Disability Advocacy Center (MDAC) (2007) *Guardianship and Human Rights in Hungary*, p. 72.

257 Letter of the National Judiciary Council's Office, No. 8001/2009/3. OIT Hiv., 18.03.2009.

258 According to the 2001 census, there were 10,198,315 people living in Hungary, 7,984,770 over 18, see <http://www.nepszamlalas.hu/> (02.11.2009).

259 Letter of the National Judiciary Council's Office, No. 8001/2009/3. OIT Hiv., 18.03.2009.

depriving adults of their full legal capacity, therefore it should be only exceptionally used. However, the statistics show that the courts prefer this severe intervention over less restrictive measures.

- [156]. The most plausible explanation of this unfortunate state of affairs is the lack of clear legal criteria for limiting legal capacity, and the resulting deference of courts to the opinion of medical professionals. As a study conducted by the Mental Disability Advocacy Center (MDAC) showed, in 82 out of 85 randomly selected guardianship cases (96.5 per cent), courts uncritically accepted and applied the opinion of the court-appointed psychiatrists without the psychiatrists ever being present and questioned.<sup>260</sup> Forensic psychiatrists, again due to the absence of clear legal criteria, can only establish whether the person suffers from a mental illness or has an intellectual disability, and make this determination the basis for recommending placement under guardianship. The courts have no basis upon which to review the medical opinion, therefore the principles of necessity and proportionality are fully absent from the process of placement under guardianship. These distorted procedures result in the existence of a diagnosis becoming the best proxy for placement under guardianship, without the adult's actual capacity playing any role.
- [157]. Another serious feature of guardianship is that once imposed, it is very difficult to remove. According to the statistics, while there were 4,169 persons placed under guardianship in 2008, only 156 had their legal capacity restored, a ratio of 1:26.7.<sup>261</sup>

## 5.11. Current legal reform

- [158]. Hungary is currently in the process of re-codifying its Civil Code. The new Civil Code was adopted by the Parliament on 21.09.2009. At the time of writing this report it has not been signed by the President yet, who has expressed objections to certain provisions. It is not known when it will enter into force.
- [159]. The new Civil Code has the potential to dramatically change the Hungarian guardianship system. Plenary guardianship and guardianship with general limitation will cease to exist. The only form of guardianship will be limited to specific areas of legal actions. The control over guardians will be strengthened. The law also introduces less restrictive alternatives to guardianship, such as advance directives and supported decision-making.<sup>262</sup>

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<sup>260</sup> Mental Disability Advocacy Center (MDAC) (2007) *Guardianship and Human Rights in Hungary*, p. 76.

<sup>261</sup> Letter of the National Judiciary Council's Office, No. 8001/2009/3, OIT Hiv., 18.03.2009.

<sup>262</sup> Mental Disability Advocacy Center, *Press Release – Hungary: Parliament Reforms Legal Capacity Laws*, 22.09.2009.

## Annex – Case Law

<b>Case title</b>	EBH 2004.1130
<b>Decision date</b>	Published in 02.2004 court reporter
<b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available])	Hungary/Legfelsőbb Bíróság [Supreme Court]/EBH 2004.1130
<b>Key facts of the case</b> (max. 500 chars)	The applicant was ordered to mandatory hospitalisation by a court order. She complained to the Supreme Court that despite being involuntarily placed in a psychiatric hospital, as a person with full legal capacity she should be able to refuse psychiatric treatment. The Supreme Court rejected her complaint, and held that she can be compelled to receive treatment against her will.
<b>Main reasoning/argumentation</b> (max. 500 chars)	The Supreme Court considered that the court procedure ordering the applicant's mandatory hospitalisation provides sufficient guarantees for the patient to object to treatment. The criteria for involuntary placement and involuntary treatment are essentially the same, therefore if the court establishes the need for involuntary placement, involuntary treatment is authorised as well.
<b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)	The decisions clarified the relationship between involuntary placement and involuntary treatment – once involuntarily placed into a hospital, the patient loses the right to refuse treatment, and can be treated against his/her will.
<b>Results (sanctions) and key consequences or implications of the case</b> (max. 500 chars)	The Supreme Court rejected the applicant's complaint. She had to undergo involuntary treatment.
<b>Proposal of key words for data base</b>	Involuntary placement; involuntary treatment; relationship between involuntary placement and involuntary treatment.

<b>Case title</b>	BH 2006.46
<b>Decision date</b>	Published in 02.2006 court reporter
<b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available])	Hungary/Legfelsőbb Bíróság [Supreme Court]/BH 2006.46
<b>Key facts of the case</b> (max. 500 chars)	The 85 year old applicant was placed under partial guardianship of general limitation due to her old-age dementia and reliance on care. She requested her legal capacity not to be limited. The Supreme Court found that from the circumstances of the case it can be established that the applicant was able to take care of her interests, and her condition was satisfactory compared to her age. It held that the applicant should not be placed under guardianship.
<b>Main reasoning/argumentation</b> (max. 500 chars)	The Supreme Court argued that for placement under guardianship two separate criteria should be met: deterioration of the applicant's medical condition, and its impact on her ability to manage her affairs. The presence of both conditions must be proven by the party wishing to place the applicant under guardianship.
<b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)	The Supreme Court clarified the relationship between the criteria of placement under guardianship. The second criterion is separate from the medical condition, and can be established by the court from the circumstances of the case.
<b>Results (sanctions) and key consequences or implications of the case</b> (max. 500 chars)	The Supreme Court ordered the applicant's legal capacity to be restored.
<b>Proposal of key words for data base</b>	Criteria of placement under guardianship; Role of forensic psychiatric opinion in placement under guardianship.

<b>Case title</b>	BH 2007.404
<b>Decision date</b>	Published in 12.2007 court reporter
<b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available])	Hungary/Legfelsőbb Bíróság [Supreme Court]/BH 2007.404
<b>Key facts of the case</b> (max. 500 chars)	The applicant was placed under partial guardianship with regard to healthcare decisions, placement into social care institution and procedural capacity. These legal areas were recommended by the psychiatric opinion, and were approved by the court. The applicant complained about his placement under guardianship. The Supreme Court restored the applicant's procedural capacity, and affirmed the restriction of his capacity in the other areas.
<b>Main reasoning/argumentation</b> (max. 500 chars)	The Supreme Court held that the scope of guardianship is not a medical question. The forensic psychiatrist correctly diagnosed the applicant's paranoid disorder, which is one of the criteria for placement under guardianship. However, it is beyond the psychiatrist's competence to assess in which areas of life causes the mental disorder problems for the applicant to manage his own affairs. This should be established by the court from the circumstances of the case.
<b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)	The Supreme Court clarified the relationship between the criteria of placement under guardianship. The second criterion is separate from the medical condition, and it is beyond the competence of the medical experts to establish it. The court has to decide based on the circumstances of the case on the scope of guardianship by assessing the difficulties the adult is facing in managing his/her affairs.
<b>Results (sanctions) and key consequences or implications of the case</b> (max. 500 chars)	The Supreme Court restored the applicant's procedural capacity, and affirmed the restriction of his capacity in the other areas.
<b>Proposal of key words for data base</b>	Criteria of placement under guardianship; Role of forensic psychiatric opinion in placement under guardianship.

<b>Case title</b>	BH 2008.265
<b>Decision date</b>	Published in 10.2008 court reporter
<b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available])	Hungary/Legfelsőbb Bíróság [Supreme Court]/BH 2008.265
<b>Key facts of the case</b> (max. 500 chars)	The applicant was placed under partial guardianship with regard to management of immovable property, movable property, renting apartments and placement into social care institution. These legal areas were recommended by the psychiatric opinion, and were approved by the court. The applicant complained about his placement under guardianship. The Supreme Court restored the applicant's capacity to manage immovable property and renting apartments, and affirmed the restriction of his capacity in the other areas.
<b>Main reasoning/argumentation</b> (max. 500 chars)	The Supreme Court held that the scope of guardianship is not a medical question. The forensic psychiatrist correctly diagnosed the applicant's alcohol abuse disorder, which is one of the criteria for placement under guardianship. However, neither the psychiatrist nor the court decision contained justification why exactly in the suggested areas should the applicant's legal capacity be restricted. The court has to decide this question based on the applicant's circumstances, and justify all limitation of his legal capacity.
<b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)	The Supreme Court clarified the relationship between the criteria of placement under guardianship. The second criterion is separate from the medical condition. The courts have to decide on the scope of placement under guardianship, and they have to justify every limitation of the applicant's capacity. In this case, nothing justified the applicant's placement under guardianship with regard to management of immovable property and renting apartments.
<b>Results (sanctions) and key consequences or implications of the case</b> (max. 500 chars)	The Supreme Court restored the applicant's capacity to manage immovable property and rent apartments, and affirmed the restriction of his capacity in the other areas.
<b>Proposal of key words for data base</b>	Criteria of placement under guardianship; Role of forensic psychiatric opinion in placement under guardianship.