



## **HOW JUDGES DECIDE?**

*Objectivity of Judicial Decisions in Mental Disability Cases  
in Hungary and the United Kingdom*

by Judit Torma

MA thesis  
Human Rights  
Prof. Oliver Lewis  
Central European University  
1051 Budapest Nádor u. 9.  
Hungary

## Table of Content

Executive Summary.....	3
Introduction.....	5
1. The problem of Mental Disability decisions.....	7
1.1 Description of the problem.....	8
1.2 Roots of the problem.....	10
2. Psychology and judicial decision making.....	12
2.1 Psychological theories of decision-making.....	13
2.1.1 General information-processing.....	14
2.1.2 Value based information-processing.....	16
2.1.3 The protecting function of the Self.....	18
2.2 Objectivity of judicial decisions.....	20
2.2.1 Models of judicial decision-making.....	21
2.2.2 Role of extra-legal factors in judicial decision-making.....	23
3. Objectivity and prejudices in Mental Disability cases.....	27
3.1 “Who takes me seriously?” – The Case of Legal Capacity.....	28
3.1.1 Assessing Capacity.....	30
3.1.2 Consequences of deprivation of legal capacity.....	33
3.2 Guardianship and its alternatives – Hungary and the UK.....	36
3.2.1 Statutory background.....	38
3.2.2. Case law.....	41
4. Integrating psycho-legal theories into Mental Disability decisions.....	45
4.1 Legal Capacity and judicial objectivity.....	45
4.2 The role of consciousness in judicial decision-making.....	48
Conclusion.....	51
Bibliography.....	53

## Executive Summary

Evolution of prejudices and the development of social norms are not independent from legal practice and legal change. Also the mind of a judge is not capable of processing data completely neutrally. A judge's decision will similarly be subject to his/her background, in-group stereotypes and unconscious attitudes, as of any other human being. Accordingly, stable stereotypes exist in judicial decisions and legal treatment of persons living with mental disability. In their cases prejudice conscious attitudes of judges and legislators would result more prudent decisions, a life with more dignity and more inclusive attitude of society.

Mental disability law tends to be a specific part of law in almost every jurisdiction where strong traditional prejudices against persons with mental or intellectual disability are still present. One of the legal areas of mental disability law is related to legal capacity decisions which are applied for a protective purpose and in the 'best interest' of the individual. This justification, is not only paternalistic and reflects a 'sanist' attitude of legal systems, but does not take into consideration broader human rights aspects and the underlying philosophy of international covenants. In legal systems descending from Roman law traditions a form of total legal deprivation exists in the form of 'guardianship'. Although the consequences of such deprivation are almost definite for the individual and raises serious human rights issues, judges dealing with guardianship cases rarely use their discretionary power to question evidence before them. The hypothesis of the present work is the assumption that such reluctance to use discretionary power to overcome serious human rights shortcomings of guardianship cases may come from an interplay between the legal system and the personal attitudes of the judge.

In the first chapter the roots of sanism shall be described in connection with mental disability decisions. The second chapter gives a summary of core psychological theories of how unconscious mechanisms influence human thinking in everyday life. The chapter also assesses the main findings of interdisciplinary researches directed at analyzing psycho-legal models and extra-legal factors of judicial decision-making. The third chapter gives an overview of the mechanism of guardianship system in Hungary and its alternatives according to the principles of international covenants. In the second part of the chapter an assessment of court decisions is described in order to demonstrate the effect of different legal principles on judicial decision-making. The last chapter attempts to integrate the different approaches to judicial decision-making in order to improve human rights aspects of mental disability legal capacity decisions and judicial accountability in general.

## Introduction

In order to make a better and more inclusive society, the interdependence of law and social changes must not be neglected. As Anleu argues in his book social changes do relate to law and legal reforms. Although the change may be seen as too slow by some social scientists, it is inevitably there.<sup>1</sup> The same way as social policy making, legal reforms are also important in enforcing social changes in order to protect vulnerable groups. As Anleu shows for example, significant changes had been achieved in feminist movements through legal mobilization and rights claims.<sup>2</sup> Sajo also supports this idea in his earlier work, where he states, that since law is an integral part of society, the social change is inevitably hard to be achieved without a change in the law.<sup>3</sup> But he goes further in saying that legal change actually represents social changes and a conscious government uses legislation as a means of initiating social change.<sup>4</sup>

In Vago's view the reciprocity and interdependence between law and social change is not only an impact on the development of legal institutions, but also on the changes of social norms.<sup>5</sup> Vago argues that social change is an outcome of multiple factors where law is only one of the different social institutions that implement the change.<sup>6</sup> In Vago's book, however the cause and effect is handled with certain care. He says that even legal change could precede society the question is rather to what extent the interplay may work.<sup>7</sup> Posner, E. also argues for the power of law to be able to change certain norms of society and he addresses

---

<sup>1</sup> Anleu, S., L., R. Law and Social Change. SAGE Publications. London. 2000. p.vii.

<sup>2</sup> Ibid. p. 170.

<sup>3</sup> Sajó, A. Társadalmi-Jogi Változás (Socio-Legal Change) Akadémia Kiadó. Budapest. 1988. p. 7.

<sup>4</sup> Ibid. p. 7.

<sup>5</sup> Vago, S. Law and Society. Saint Louis University. Oakland Publishing, 1997, p. 286.

<sup>6</sup> Ibid. p. 286.

<sup>7</sup> Ibid. p. 287.

the question through the analysis of different social spheres, such as family values, racial discrimination, commercial behavior or political rights.<sup>8</sup> He does not just assess the possible impacts of anti-discrimination laws but asks the question why people do discriminate.<sup>9</sup> Perhaps anti-discrimination laws are the best examples of law triggered change in society, where a slow working social changing process may be accelerated by legal recognition and support. It also follows from Vago's argument what Posner, E. says, that the existence of anti-discrimination law is an actual revelation of the fact that discrimination is not only harmful to social morals but to social and economic developments, too.<sup>10</sup> Therefore legislative intervention is needed to enforce the majority of society into the right pattern of behavior.<sup>11</sup>

The realization of social change supported by law, however, can not be successful without a progressive judiciary. They are one of the mediums of law, they "transmit" legal principles by court decisions, and therefore their role in the implementation of social improvement is crucial. The present work is about judicial decision-making. As in many other parts of life – in management profession, or medical science – decisions are consciously made according to the regulations of the profession. But decisions are also made unconsciously according to personal traits, experiences and biases. Judges, just like any other human are not exempt from these unconscious mechanisms that may influence their decisions. Although social change and human rights movements have diminished the effects of various long lasting prejudices – such as related to gender or racial stereotypes - in many legal systems, other prejudices are still relevant and prevail.

---

<sup>8</sup> Posner, E., A. Law and Social Norms. Harvard University Press. 2000. p. 3.

<sup>9</sup> Ibid. p. 133.

<sup>10</sup> Ibid. p. 140.

<sup>11</sup> Ibid. p. 140-143.

## 1. The problem of Mental Disability decisions

In the United States Michael L. Perlin made significant contributions to the recognition of judicial attitudes in mental disability cases. In his book, *“The Hidden Prejudice: Mental Disability on Trial”* he concentrated on the invisible prejudices against people with mental disability.<sup>12</sup> Incorporating “sanism”<sup>13</sup> into the argument of mental disability law Perlin tries to explain the discrepancies and cognitive dissonances of mental disability legislation and ruling. He describes “sanism” as a biased term that tends to classify mentally disabled persons as insane or incapable to decide or be responsible.<sup>14</sup>

Peay’s work also deals with the legal treatment of persons with mental disability in the United Kingdom.<sup>15</sup> She describes a research on the decision making of non-legal practitioners who deal with mental health patients under the 1983 Mental Health Act in psychiatric homes.<sup>16</sup> The findings of the empirical research clearly show a need for clearer legislation and more precisely described limits on the duties and tasks of the practitioners.<sup>17</sup> In the research the possible discrepancies and inconsistencies of the legislation exhibited themselves when different practitioners had to make decisions about the same three cases.<sup>18</sup> According to Peay, the outcomes varied on a wide range.<sup>19</sup> This research, however does not say much about the decision making process of judges, but it has rather alarming result. It raises the question on experts’ credibility on which judges rely exclusively in many mental disability cases.

<sup>12</sup> Perlin, M., L. *The hidden prejudice: Mental disability on trial*. Washington DC.: American Psychological Association, 2000

<sup>13</sup> *Ibid.* p. xviii.

<sup>14</sup> *Ibid.* p. xviii-xix.

<sup>15</sup> Peay, J. *Decisions and Dilemmas. Working with Mental Health Law*. Hart Publishing. Oxford. 2003

<sup>16</sup> *Ibid.* p. 117.

<sup>17</sup> *Ibid.* p. 159.

<sup>18</sup> *Ibid.* p. xiii.

<sup>19</sup> *Ibid.* p. 159-160.

The European Court of Human Rights' jurisprudence is assessed and analyzed in relation with mental disability in the book of Bartlett et al.<sup>20</sup> The writers emphasize the importance of the participation of people with mental disability in society, because through participation individuals could not only be able to conduct proper life, but also the widespread practice of isolation and physical exclusion from society would gradually end. In Bartlett et al., the writers admit that social inclusion through participation has a speculative character in the present "and merely suggests the range of human rights consequences of being diagnosed with an intellectual disability or a mental health problem".<sup>21</sup> What they mean is that it is not sure whether being included into the society can be regarded as a human right.<sup>22</sup>

### ***1.1 Description of the problem***

Perlin suggests in his book, that mental disability law and court cases are both "neither rational, neutral, nor objective".<sup>23</sup> This leads to constant right violations both by legislators and legal and medical personnel.<sup>24</sup> One of the symptoms is routinely decided cases in involuntary civil commitment or right-to-refuse treatment cases.<sup>25</sup> With regard to insanity defence, Perlin cites shocking data. According to studies from the mid-1990s "insanity acquittees spend almost double amount of time in maximum security forensic settings that defendants convicted of like charges serve in prison".<sup>26</sup> And even more

---

<sup>20</sup> Bartlett, P., Lewis, O., Thorold, O. Mental disability and the European Convention on Human Rights., Martinus Nijhoff Publishers. Boston. 2007

<sup>21</sup> Ibid. p. 178.

<sup>22</sup> Ibid. p. 178.

<sup>23</sup> Perlin, M., L. The hidden prejudice: Mental disability on trial. Washington DC.: American Psychological Association. 2000. p. 305.

<sup>24</sup> Ibid. p. 305.

<sup>25</sup> Ibid. p. xxi.

<sup>26</sup> Ibid. p. xxiii.



shocking that insanity acquittees of nonviolent offences tend to be confined “for nine times as long as individuals found guilty of similar offences”.<sup>27</sup>

The predisposed handling of mental disability cases is not unique to the United States. While technical differences may occur in different jurisdictions, the psychological underpinnings of social and personal stereotypes are similar. Although expert testimony is dealt with significantly differently in common law and civil law jurisdictions<sup>28</sup>, a fear from what is different, the simplification of information processing, and the protection of personal value systems may all result in similar anomalies in mental disability cases.

Moving to Europe, in an assessment of the European Court of Human Rights’ case law in relation to persons with mental disability Article 5 (right to liberty and security) violations appear. The practice of unlimited detainment combined with the burden of proof was found to establish right violation in *Reid (Hutchinson)*.<sup>29</sup> Similarly, in *Thynne* a “discretionary life sentence” combined with the lack of “judicial procedure to challenge the continuing lawfulness of his detention” violated Article 5.<sup>30</sup> Although, the general principle of non-discrimination towards mentally disabled persons in legislation was introduced in the 1990s, the practical application remained problematic.

In another assessment of the Mental Disability Advocacy Center’s 2004 research about “Hungary’s only high-security psychiatric hospital for persons convicted of criminal offences”<sup>31</sup> right violations are related to Articles 5 (right to liberty and security) and 6 (right

---

<sup>27</sup> Ibid. p. xxiii.

<sup>28</sup> Perlin, M., L., Birgben, A. and Gledhill, K., ‘The Witness Who Saw/He Left Little Doubt’: A Comparative Consideration of Expert Testimony in Mental Disability Law Cases in Common and Civil Law Systems. *Journal of Investigative Psychology and Offender Profiling*, 6, 2009, pp. 59-88, p. 64.

<sup>29</sup> *Reid (Hutchinson) v. The United Kingdom*, ECtHR, 50272/99, judgment 20 February 2003, in Fiala, J., Francis, M. and Lewis, O., *Summaries of Mental Disability Cases Decided by the European Court of Human Rights*. prepared by the Mental Disability Advocacy Center (MDAC). 2007. p. 58.

<sup>30</sup> *Thynne v. The United Kingdom*, ECtHR, 11787/85, 11978/86 and 12009/86, judgment 25 October 1990, in Fiala, J., Francis, M. and Lewis, O., “Summaries of Mental Disability Cases Decided by the European Court of Human Rights”, prepared by the MDAC, 2007, p. 63.

<sup>31</sup> Lewis, O. and Roberts, H., *Liberty Denied. Human Rights Violations in Criminal Psychiatric Detention Reviews in Hungary*. a report by Mental Disability Advocacy Center (MDAC). 2004. p. 9.

to a fair trial) of the European Convention on Human Rights.<sup>32</sup> According to the report the presence of patients at annual court hearings was not guaranteed or was directly denied by the director of the institution. In these court hearings the legal criteria were unclear, judges regularly followed expert opinion and did not apply standard test in the decision making.<sup>33</sup> Moreover, where ever the court appointed an expert, his/her opinion always followed the opinion of the treating psychiatrist, and neither of them was present, which made questioning the experts' opinion impossible.<sup>34</sup>

## ***1.2 Roots of the problem***

Perlin identified two major elements that influence mental disability law, “sanism” and “pretextuality”. Pretextuality is when “courts accept (either implicitly or explicitly) testimonial dishonesty” especially from expert witnesses who tend to shape their testimony in favor of reaching “desired ends”.<sup>35</sup> To some extent, this practice is a result of predominant ideas that underlies mental disability decisions.<sup>36</sup>

These predominant ideas can be summarized under the concept of “sanism”. As mentioned before, Perlin introduced “sanism” to mental disability debate in order to describe a certain kind of prejudice. Sanism, like other type of –isms, refers to a certain characteristics of a group of people, with the same irrational element that other type of prejudices have.<sup>37</sup> According to Perlin, sanism is greatly hidden and deeply rooted in contemporary societies, though widely accepted and regularly practiced.<sup>38</sup> Probably one of the reasons for that is that

---

<sup>32</sup> Ibid. p. 36.

<sup>33</sup> Ibid. p. 36.

<sup>34</sup> Ibid. p. 37.

<sup>35</sup> Perlin, M., L. The hidden prejudice: Mental disability on trial. Washington DC.: American Psychological Association, 2000., p. xix

<sup>36</sup> Ibid. p. 24.

<sup>37</sup> Ibid. p. xviii.

<sup>38</sup> Ibid. p. 22.

sanism is not a widely recognized –ism, and until it shall be tamed and transformed first into its politically correct form, it has to go through the same process as racism, sexism or ageism.

The assumptions about mental disability and mentally disabled people are irrational and constructed around the same way as racism or sexism. They are signs of fear, non-comprehension and aversion of abnormal behavior.<sup>39</sup> Moreover, sanism is often combined with other irrational stereotypes, like race, gender, ethnicity or economic class.<sup>40</sup> The reflection of public attitudes towards outgroups is often characterized by sanism. For example, Black students in the United States were traditionally more easily sent to classes for the “mentally retarded” than White students.<sup>41</sup> The similar trend can be found in Hungary and Romania affecting Roma students at the beginning of their primary studies.

The third phenomenon that complements sanism and pretextuality is “teleology”. Perlin describes this concept as a way of selecting information similar to ‘cherry picking’.<sup>42</sup> By addressing the concept as teleological, Perlin refers to the way how courts pick social sciences data that support their predominant ideas. Data that would be suitable to question such ideas and views are subordinated or disregarded.<sup>43</sup>

A similar trend was described above in the MDAC report of the Hungarian courts annual hearing practices in relation to the high-security psychiatric hospital’s patients. The report showed that psychiatric experts were never questioned by the court or even by court appointed independent experts.<sup>44</sup>

---

<sup>39</sup> Ibid. p. 23, and p. 36.

<sup>40</sup> Ibid. p. 38.

<sup>41</sup> Ibid. p. 39.

<sup>42</sup> Perlin, M., L., Birgben, A. and Gledhill, K. ‘The Witness Who Saw/He Left Little Doubt’: A Comparative Consideration of Expert Testimony in Mental Disability Law Cases in Common and Civil Law Systems. *Journal of Investigative Psychology and Offender Profiling*, Vol. 6. 2009. pp. 59-88. p. 60.

<sup>43</sup> Ibid. p. 60

<sup>44</sup> Lewis, O. and Roberts, H., *Liberty Denied. Human Rights Violations in Criminal Psychiatric Detention Reviews in Hungary*. a report by Mental Disability Advocacy Center (MDAC). 2004. p. 36-37.

## 2. Psychology and judicial decision making

According to Posner, E., social changes may be triggered or strengthened by legislation and the careful use of law. In the view of this thesis, judges are human beings and as such none of them can be free from certain stereotypes, prejudices and influential attitudes. Indeed, just as all human beings they are likely to possess attitudes that help them processing social information<sup>45</sup>, stereotypes that help them categorizing and storing these information<sup>46</sup> and prejudices that are unconscious responses to the values of their in-groups.<sup>47</sup> As Posner, R. phrases it, “judges are not moral or intellectual giants”, just humans.<sup>48</sup>

In his speech at the Planned Parenthood Conference in July 2007, referring to a recent Supreme Court decision, President Obama declared: *“We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'll be selecting my judges.”*<sup>49</sup> By this statement he admitted that law is not independent from the personality of its employer. In the same time he recognized the need for a more sympathetic and more diverse Supreme Court for the United States.

Also on the occasion of changing a moderately conservative Supreme Court judge to a very conservative one Posner R. raised the question prior to the above speech: “If changing judges changes the law, it is not even clear what law is.”<sup>50</sup> Posner R. in his work tries to establish what he calls the “positive decision theory of judging”.<sup>51</sup> He assesses the existing

<sup>45</sup> Hewstone, M., Stroebe, W., Codol, J., Stephenson, G., M. ed. Introduction to Social Psychology, Kozgazdasagtani es Jogi Konyvkiado., Budapest, 1995, p. 175.

<sup>46</sup> Ibid. p. 115.

<sup>47</sup> Ibid. p. 420 and see p. 424-440 on in-group – out-group theories and group membership attributes

<sup>48</sup> Posner, R., A. How Judges Think, Harvard University Press. 2008. p. 7.

<sup>49</sup> Crowe, C. “Videri quam esse”: the role of empathy in judicial discourse. Law and Psychology Review. 20 Sep, 2011.

<sup>50</sup> Posner, R., A. How Judges Think, Harvard University Press, p. 1.

<sup>51</sup> Ibid. p. 19.

theories of judicial behavior in the fields of strategy, sociology, psychology, and economy and arrives at the conclusion that no matter how honestly judges think that their decisions are impartial and non-influenced by their background, they are just human beings after all.<sup>52</sup> Posner, R.'s assessment of judicial behavior is certainly one of the most multidisciplinary works in this field. However, he focuses rather on political attitudes when listing influential factors in a judge's decision than on deeper personality related factors.<sup>53</sup> In fact, political attitudes are only socially accepted manifestations of other, deeper rooted personality structures.<sup>54</sup>

## ***2.1 Psychological theories of decision-making***

The overall problem that Perlin writes about is not unique for psychologists. Information processing and decision making are two of the most researched areas in contemporary psychology and findings are used to form theories in almost every part of social life<sup>55</sup> ranging from therapeutic use, through management theories, to information technology and artificial intelligence.<sup>56</sup>

Perlin addresses the problem of processing complex information by describing the characteristics of heuristics in human thinking.<sup>57</sup> He lists several components used by the human mind for simplifying information processing in a complex world. The elements listed are ranging from 'representativeness' through 'illusion of validity' to 'illusory correlation' and generalization.<sup>58</sup> Perlin blames heuristics and 'ordinary common sense' – another

---

<sup>52</sup> Ibid. p. 370-371.

<sup>53</sup> Ibid. p. 93.

<sup>54</sup> Hewstone, M., Stroebe, W., Codol, J., Stephenson, G., M. ed. Introduction to Social Psychology. Kozgazdasagtani es Jogi Konyvkiado. Budapest. 1995. p. 180.

<sup>55</sup> Zoltayné, P. Z. et al., Döntésmélet (Decision-making theories). Alinea Kiadó. Budapest. 2002. p. 17.

<sup>56</sup> Eysenck, M., W., and Keane, M. T. Kognitív pszichológia (Cognitive psychology) Nemzeti Tankönyvkiadó. Budapest. 1997. p.22.

<sup>57</sup> Perlin, M., L. The hidden prejudice: Mental disability on trial. Washington DC.: American Psychological Association. 2000. p. 4.

<sup>58</sup> Ibid. p. 5-9.

generalizing and stereotyping thinking pattern – to be taken into account for the sanist features and functioning of the US legal system.<sup>59</sup>

However, what Perlin does not seem to appreciate is that these mind functions are not only responsible for biased thinking, but inherent for the adequate information processing function of the brain.<sup>60</sup> Completely neutral and objective human judgments do not exist. Aspiration for objectivity may characterize the human thinking, but the context of reference can not be avoided.

### 2.1.1 General information-processing

The classical theory of information processing and problem solving was first described by Allan Newell and Herb Simon.<sup>61</sup> In their book about “Human problem solving” they unfolded their theory of *problem-space*. When dealing with a problem (such as decision making) humans place their problems into an intellectual space. The space itself embraces all relevant information needed for solving the problem and arriving at a solution (or decision), but the amount and outline of these information may form an immense labyrinth. There are several different routs for arriving at a solution and the navigation in this labyrinth is conducted by different strategies, such as heuristics and stereotyping.<sup>62</sup>

#### *Heuristics*

The complexity of the information field of certain decision makings may result uncertainty and anxiety for the actor. In order to cope with this uncertainty, good-enough decision are acceptable for the individual who follows limited rationality in his/her

<sup>59</sup> Ibid. p. 20.

<sup>60</sup> Eysenck, M., W., and Keane, M. T. Kognitív pszichológia (Cognitive psychology). Nemzeti Tankönyvkiadó. Budapest. 1997. p.23.

<sup>61</sup> Ibid. p. 391.

<sup>62</sup> Newell, A. and Simon, H. The Human Problem Solving. Prentice-Hall, Englewood Cliffs, NJ. 1972 in Eysenck, M., W., and Keane, M. T., Kognitív pszichológia (Cognitive psychology). Nemzeti Tankönyvkiadó. Budapest. 1997. p. 392.

decisions. Heuristics are simplifying mechanisms that help creating short cuts and detours in the process of thinking.<sup>63</sup> As a result individuals may not only *know* the solution of a problem by computing precisely all the available information, but also - or rather - *sense* it. (Although this “sensing” is uniform to all human thinking, popular public opinion tend to attribute it more to women.)

Heuristics represent several different information processing strategies, which were first listed in the article of Amos Tversky and Daniel Kahneman. These strategies differ in the representativeness and availability of information and the adjustment and anchoring nature of the information.<sup>64</sup> These processing strategies themselves are not biased per se, but may be a basis for biased thinking. When value judgments are attached to information processing the result will always be somehow distorted.

### *Stereotypes*

Another intellectual aid for problem solving and decision making is stereotyping. Stereotypes themselves are also value neutral. Their primary function is to help information processing by creating larger categories for a better overview and understanding of information. However, categorization is also a part of heuristics and limited information processing, stereotyping is related to social information.<sup>65</sup> The basis for categorization of physical objects is similarity, proximity, symmetry, continuity and joint motion.<sup>66</sup>

As a next step we tend to name our category, thus forming a group of similar (social or physical) objects out of them. As a result similarity between the members of the category (ingroup) and difference between members of other categories (outgroups) and members of

<sup>63</sup> Eysenck, M., W., and Keane, M. T. Kognitív pszichológia (Cognitive psychology). Nemzeti Tankönyvkiadó. Budapest. 1997. p. 184.

<sup>64</sup> Tversky, A. and Kahneman, D. Judgment under Uncertainty: Heuristics and Biases. Science. New Series. Vol.185, No. 4157, 27 September 1974, pp. 1124-1131

<sup>65</sup> Hewstone, M., Stroebe, W., Codol, J., Stephenson, G., M. ed. Introduction to Social Psychology. Kozgazdasagtani es Jogi Konyvkiado., Budapest, 1995, p. 110.

<sup>66</sup> Csepli, Gy. A szociálpszichológia vázlata. (Briefing social psychology). Jászöveg Műhely Kiadó. Budapest. 1997. p. 31.

our own category seem to increase.<sup>67</sup> This disproportionate perception of groups' members leads to exaggeration, generalization and over simplifying opinions and value judgments.<sup>68</sup> And upon these opinions and judgments an illusion of familiarity is developing which means that we tend to believe that we actually *know* the characteristics of members of a certain group. These oversimplified pictures "that are based on generalized exaggerations" are called *stereotypes*.<sup>69</sup>

### 2.1.2 Value based information-processing

As described above, information processing strategies both exist in the material and social world. These strategies help us guide through immense amount of information impossible to process in limited time and generally save us from making serious mistakes. On the other hand this information processing can be affected by certain values that derive from the circumstances, past experiences and group membership of the individual. Some of these influences may make either positive, negative or neutral changes in our cognition, while others have only negative impact.<sup>70</sup>

#### *Attitudes*

In everyday social interactions information is only one element of cognition. Our knowledge of the world is also formulated according to our emotions, and the reflections of others.<sup>71</sup> Moreover, if one is expected to know and understand the world in limited time and be able to react to its present requirements, he/she is also expected to be prepared for future

---

<sup>67</sup> Ibid. p. 31.

<sup>68</sup> Ibid. p. 33-35.

<sup>69</sup> Ibid. p. 35.

<sup>70</sup> Hewstone, M., Stroebe, W., Codol, J., Stephenson, G., M. ed. Introduction to Social Psychology. Kozgazdasagtani es Jogi Konyvkiado. Budapest. 1995. p. 164.

<sup>71</sup> Ibid. p. 164-165.



events.<sup>72</sup> Fishbein described first the value based information processing in terms of attitudes in his “expectancy-value theory”. In this approach the attitude of an individual towards a certain object, event or person is dependent from the *evaluation* of the properties attributed to the object and the *expectancy* that these properties do characterize the object.<sup>73</sup>

Individuals’ desire for a comprehensible and predictable world can easily be satisfied by developing several attitudes. Based on evaluation and expectancy attitudes guide our information seeking, decoding and recalling process in favor of attitude relevant information.<sup>74</sup> The good news is that attitudes do not predict behavior reliably. According to an early empirical research by La Piere, individuals do not react to the specific situation according to their previously expressed attitudes.<sup>75</sup>

The bad news is that attitudes are very hard to change. They resist effectively to rationality and data, and only hard, persistent and consequent persuasion may alter them. One of the most effective forms of modifying attitudes is when the individual is placed into the information field and becomes a part of the communication process. It is called “participatory observation”.<sup>76</sup>

### *Prejudices*

Although prejudices technically may be either positive or negative by definition, they are widely known for their negative feature.<sup>77</sup> Prejudices combine aspects of both stereotypes and attitudes. They are formed according to social categorization and attribution and serve a

<sup>72</sup> Csepeli, Gy. A szociálpszichológia vázlata (Briefing social psychology). Jászöveg Műhely Kiadó. Budapest, 1997, p. 39.

<sup>73</sup> Fishbein, M. An Investigation of the Relationships Between Beliefs About an Object and the Attitudes Toward that Object. *Human Relations*, 16(3). 1963. pp. 233-239.

<sup>74</sup> Hewstone, M., Stroebe, W., Codol, J., Stephenson, G., M. ed. *Introduction to Social Psychology*. Közgazdasági és Jogi Könyvkiadó, Budapest, 1995, p. 175.

<sup>75</sup> *Ibid.* p. 180.

<sup>76</sup> *Ibid.* p. 490.

<sup>77</sup> Aronson, E., *A társas lény (The Social Animal)*. Közgazdasági és Jogi Könyvkiadó. Budapest. 1980, p. 184.

self protective function – to produce a comprehensive world – similarly to attitudes.<sup>78</sup>

Prejudices translate attitudes and stereotypes into everyday life. When individuals discuss their or others' attitudes toward ethnic groups, modern art or even Facebook, they do not talk about attitudes, categorization or attributions, but about prejudices. Some forms of prejudices are well known, such as racism, sexism or ageism. These prejudices trigger strong emotionally heated attitudes themselves. Even the word 'prejudice' may evoke value judgments.

Similarly to attitudes and stereotypes prejudices have protective function. But this function not only protects the individual from mounts of information un-comprehensiveness, but also from the Self itself. As Aronson describes, prejudices help to fulfill individuals' need for self-justification.<sup>79</sup>

### *2.1.3 The protecting function of the Self*

The different strategies of information processing all have the same Self protecting function, to create a comprehensible and predictable environment. On the other hand, attitudes have a different protective function, as mentioned above in the context of prejudices. Information processing strategies have their advantages in saving time and impossible efforts in getting to know the world, but have their disadvantages in oversimplifying information and value judgments. As a result, our judgments do not always correspond to our current experiences, or even to our behavior, which may result in serious doubts or anxiety.

<sup>78</sup> Tajfel, H. Az előítéletek gyökerei: néhány megismeréssel kapcsolatos tényező (The Roots of Prejudice: Cognitive Aspects) in Csepeli, Gy., ed. Előítéletek és Csoportközi Viszonyok (Prejudices and Inter-group Behaviour). Közgazdasági és Jogi Könyvkiadó. Budapest. 1980. pp. 40-69

<sup>79</sup> Aronson, E., A társas lény (The Social Animal). Közgazdasági és Jogi Könyvkiadó. Budapest. 1980. p. 193.

### *Cognitive dissonance*

As mentioned above, La Pierre conducted a simple research in the early 1930s in America. He had sent the similar letter to several North American Hotel owners inquiring whether they would accept Chinese guest to their hotels. The responses reflected contemporary strong negative prejudices towards Asian nations. One year later La Pierre traveled through America in the company of a Chinese couple and was accepted in the majority of the hotels that refused theoretically Asian guests one year earlier. La Pierre made the assumption that although individual tend to believe in the solidity of their value judgments, their behavior may just be the opposite of their predispositions.<sup>80</sup>

Leon Festinger described this phenomenon by the theory of cognitive dissonance.<sup>81</sup> Dissonance may occur when the individual experiences discrepancy between his/her behavior and the information that has led to the decision about the behavior.<sup>82</sup> In this case strong justification processes begin and remain until tension between the judgment and the behavior decreases. In this process the individual become particularly receptive t those information that help decreasing the tension and therefore the dissonance.<sup>83</sup> It follows that attitude changes may be triggered by creating consciousness and directing attention to tension between value judgments and apparent behavior, and may be completed by offering additional information on the value subject.

### *Cognitive consistence*

Consistency theories have the same assumption that individuals tend to organize their cognitive functions in order to create the least possible tension.<sup>84</sup> Discrepancies between

<sup>80</sup> Hewstone, M., Stroebe, W., Codol, J., Stephenson, G., M. ed. Introduction to Social Psychology. Kozgazdasagtani es Jogi Konyvkiado., Budapest, 1995, p. 180.

<sup>81</sup> Festinger, L., A kognitív disszonancia elmélete (The Theory of Cognitive Dissonance). in Hunyady, Gy., ed. Szociálpszichológia (Social Psychology). Gondolat Könyvkiadó. Budapest. 1973. pp. 75-83. p. 75

<sup>82</sup> Ibid. in Hunyady, p. 77.

<sup>83</sup> Ibid. in Hunyady, p. 81.

<sup>84</sup> Hewstone, M., Stroebe, W., Codol, J., Stephenson, G., M. ed. Introduction to Social Psychology. Kozgazdasagtani es Jogi Konyvkiado. Budapest. 1995. p. 177.

stable attitudes and new experiences or prejudices and apparent behavior or expressed opinion may result in cognitive unbalance. Since this state is uncomfortable and creates anxiety, the individual attempts either to avoid one or more part of the despairing information or start strong justification actions in order to adjust to the new frame of understanding.<sup>85</sup>

In a study by Charles Osgood strong connection is described between the level of cognitive inconsistency and the receptivity of the individual for change.<sup>86</sup> The little changes - in opinion forming or new information processing – that emerge from the tension of inconsistency add up and decrease overall tension of value judgment. The result will be similar to attitude changing processes described in cognitive dissonance theories.<sup>87</sup>

## 2.2 Objectivity of judicial decisions

The decision of judges should be prejudice free. As Australian federal judge Justice Dowsett suggests, judges are not exempt from or immune to prejudices, but they “know that [they] have to put aside prejudice and emotions” because they also “know that [they] will not be able to justify [their] decisions” if they allow themselves to be influenced by subjective psychic process.<sup>88</sup> They know it, because in his opinion there are no other areas of decision making, where the “level of importance attached to reasons” would be as high as in legal reasoning<sup>89</sup>. The reason for that is probably the high and unique social expectation towards legal systems – of which judicial process is a particular component – in countries of rule of

---

<sup>85</sup> Ibid. p. 177.

<sup>86</sup> Osgood, C. E., *Kognitív dinamika az emberi ügyek irányításában* (Cognitive dynamics in the Conduct of Human Affairs), in Hunyady, Gy., ed. *Szociálpszichológia* (Social Psychology), Gondolat Könyvkiadó, Budapest, 1973. pp. 84-115., p. 97.

<sup>87</sup> Ibid. in Hunyady, p. 105.

<sup>88</sup> Dowsett, J. A. “Prejudice – the judicial virus”. Federal Court Australia, Brisbane, Australia. *Australian Journal of Forensic Sciences*, Vol. 42, No. 1, March 2010, pp. 37-48, p. 39.

<sup>89</sup> Ibid. p. 38.

law. As referred to earlier, changes in society are expected to be both triggered and supported by legal changes or processes.<sup>90</sup>

Analysis of decision-making processes is not unique in psychological theories of management science, although decision-making processes in legal decisions were probably considered to be a more delicate field. While managers in the business world recognized that their efficiency as a leader may be increased by using psychological models of decision-making, the same methodology of revealing hidden motives and unconscious influences may compromise the integrity of judge. However, despite of fears and methodological barriers on the part of the judges,<sup>91</sup> psychological studies and researches into the judicial domain took place from the mid '70s and early '80s of the last century. Although a considerable amount of first researches were focusing on jury decision-making and influence, the spotlight slowly turned on the decisions of the judge.<sup>92</sup>

### *2.2.1 Models of judicial decision-making*

The first judicial decision-making models were based on elements of the above described social attitudes and cognitive functions.<sup>93</sup> Later other factors, such as judicial values, individual penal philosophies, uncertainty level of the situation and the complexity of available information<sup>94</sup> or specific contextual factors of the case – known as the ‘anchoring effect’<sup>95</sup> - formed theories about judicial decision-making.

<sup>90</sup> Anleu, S., L., R. Law and Social Change. SAGE Publications. London. 2000. p.vii.

<sup>91</sup> Goodman-Delahunty, J. and Sporer, S., L. Unconscious influences in sentencing decisions: a research review of psychological sources of disparity. Australian Journal of Forensic Sciences. Vol. 42, No. 1. March 2010. pp. 19-36. p. 22.

<sup>92</sup> Bennett, H. and Broe, G. A. Judicial decision-making and neurobiology: the role of emotion and the ventromedial cortex in deliberation and reasoning. Australian Journal of Forensic Sciences. Vol. 42, No. 1. March 2010. pp. 11-18. p. 11-12.

<sup>93</sup> Wrightsman, L., S. Judicial decision making: Is psychology relevant? Kluwer Academic / Plenum Publishers. 1999

<sup>94</sup> Engel, C., Gigerenzer, G. eds. Heuristics and the Law. Dahlem Workshop Report 94. Cambridge (MA): The MIT Press. 2006. in Goodman-Delahunty, J. and Sporer, S., L. Unconscious influences in sentencing decisions: a research review of psychological sources of disparity. Australian Journal of Forensic Sciences. Vol. 42, No. 1. March 2010. pp. 19-36. p. 21.

<sup>95</sup> Englich, B. Blind or biased? Justitia's susceptibility to anchoring effects in the courtroom based on given numerical representations. Law and Policy. 2006 no. 28. pp. 497-514. in Goodman-Delahunty, J. and Sporer,

*Attitudinal model*

The ‘attitudinal model’ reflects to cognitive consistence models as described above. In relation to judicial decision-making it predicts the rejection of a challenged behavior which is in conflict with the judge’s ideological viewpoint.<sup>96</sup> This theory assesses consequences of interpreting trial facts by the judge according to his/her own value systems while he/she relies on intuition and tend to “work backward to ensure that [his/her] decision is logically consistent”.<sup>97</sup>

*Cognitive model*

The classical ‘cognitive model’ does not consider such direct relationship between attitudes and behavior as the ‘attitudinal model’. It relies on ‘schemas’, which are cognitively organized structures of knowledge construct upon past and present experience, information and facts. This model considers emotions and attitudes as ‘filters’ to schemas that help better organize and remember.<sup>98</sup>

*Attributional model*

The ‘attributional model’ is built on Heider’s early work, where he explored the modes how people attributed qualities, motives or emotions to other people, objects or even to events.<sup>99</sup> The model indicates that a person makes differences in perceiving responsibility

---

S., L. Unconscious influences in sentencing decisions: a research review of psychological sources of disparity. *Australian Journal of Forensic Sciences*. Vol. 42, No. 1. March 2010. pp. 19-36. p. 21.

<sup>96</sup> Rowland, C., K. and Carp, R., A. *Politics & Judgment in Federal District Courts*. University Press of Kansas. 1996. in Wrightsman, L., S. *Judicial Decision Making – Is Psychology Relevant? Perspectives in Law and Psychology – Vol. 11*. Kluwer Academic / Plenum Publisher, New York. 1999. p. 20-22

<sup>97</sup> Ibid. in Wrightsman, p. 20-22

<sup>98</sup> Wrightsman, L., S. *Judicial Decision Making – Is Psychology Relevant? Perspectives in Law and Psychology – Vol. 11*. Kluwer Academic / Plenum Publisher, New York. 1999. p. 22-23 and in Kapardis, A. *Psychology and Law: A Critical Introduction*. 3<sup>rd</sup> ed. Cambridge University Press. 2010 p. 218

<sup>99</sup> Heider, F. *The Psychology of Interpersonal Relations*. Wiley. New York. 1958.

of another person over his/her behavior according to the supposed locus of control over the behavior. In an early research judges were ready to apply more moderate sentences in case where they attributed external factors to the offender's behavior than in cases where the criminal behavior was clearly seen to be under the offender's control.<sup>100</sup>

### *Interplay of emotions*

In 'affect-control theory' emotions are incorporated into the attributional model by paying attention to the emotional assessment of the offender's behavior. In this regard the manifestation of apparent or supposed regret or remorse could raise sympathy of the judge towards the offender.<sup>101</sup> The interplay of emotions in the process of decision-making is supported by neurobiological researches as well. As Bennett and Broe points out that emotional responses and decision-making are processed in the same part of the brain, in the ventromedial cortex. Therefore it may be assumed that decision-making processes are facilitated by emotional responses to the actual situation.<sup>102</sup>

### *2.2.2 Role of extra-legal factors in judicial decision-making*

The role of extra-legal factors in judicial decision-making was examined from the social attitudes theories through functions of judicial values to cognitive complexity – or in other terms the 'heuristics' - approaches.<sup>103</sup> The problem with 'extra-legal factors' is that there is no common understanding of the term by scholars. Race, gender and ethnicity are commonly regarded as 'extra-legal factors', but recent studies also count contextual elements

---

<sup>100</sup> Carroll, J., S. and Payne, J., W. Crime seriousness, recidivism risk, and causal attributions in judgments of prison term by students and experts. *Journal of Applied Psychology*, 1977. Vol. 62. pp. 595-602. in Kapardis, A. *Psychology and Law: A Critical Introduction*. 3<sup>rd</sup> ed. Cambridge University Press. 2010 p. 219.

<sup>101</sup> Kapardis, A. *Psychology and Law: A Critical Introduction*. 3<sup>rd</sup> edition. Cambridge University Press. 2010 p. 219-120.

<sup>102</sup> Bennett, H. and Broe, G. A. Judicial decision-making and neurobiology: the role of emotion and the ventromedial cortex in deliberation and reasoning. *Australian Journal of Forensic Sciences*. Vol. 42, No. 1. March 2010. pp. 11-18. p. 14-15.

<sup>103</sup> Goodman-Delahunty, J. and Sporer, S., L. Unconscious influences in sentencing decisions: a research review of psychological sources of disparity. *Australian Journal of Forensic Sciences*. Vol. 42, No. 1. March 2010. pp. 19-36. p. 21.

of a case or even pre-trial press publicity.<sup>104</sup> On the other hand, Goodman-Delahunty and Sporer propose a definition that comes from a psychological perspective. They understand ‘extra-legal factors’ as ones that are unconsciously influence the decision-maker in his/her decisions.<sup>105</sup> The main influencing factors are related to the characteristics of persons: the judge, the offender, the victim<sup>106</sup> or the applicant and the respondent. The main traits considered in extra-legal factors race, gender, or socio-economic status.<sup>107</sup>

### *Characteristics of the judge*

The first extra-legal factor is the characteristics of the judge.<sup>108</sup> Regarding researches about jurors’ decision-making measurable traits for authoritarian attitudes showed correlation with favoring conviction.<sup>109</sup> Comparative researches show that judges tend to be more conservative, and thus more authoritative than law students or social workers.<sup>110</sup> The assumption among these theories is that the belief in a just world, the respect for law, hierarchy and authority may influence judges’ character.<sup>111</sup> On the other hand, other researches show that attitudes of law students during university training may change along the continuum of authoritarian and liberal values. According to Fleck, Hungarian law students became more tolerant towards minority groups, especially towards Roma

<sup>104</sup> Sporer, S., L. and Goodman-Delahunty, J. Disparities in sentencing decisions. in Oswald M. E., Bienbeck, S., Hupfeld-Heinemann, J. eds. Social psychology of punishment of crime. Chichester (UK), Wiley-Blackwell, 2009. pp. 379-401. p. 380.

<sup>105</sup> Ibid. p. 380.

<sup>106</sup> Ibid. p. 380

<sup>107</sup> Goodman-Delahunty, J. and Sporer, S., L. Unconscious influences in sentencing decisions: a research review of psychological sources of disparity. Australian Journal of Forensic Sciences. Vol. 42, No. 1. March 2010. pp. 19-36. p. 20. and in Goodman-Delahunty, J. and Sporer, S., L. Disparities in sentencing decisions. In: Oswald M. E., et al eds. Social psychology of punishment of crime. Chichester (UK), Wiley-Blackwell, 2009. pp. 379-401.

<sup>108</sup> Sporer, S., L. and Goodman-Delahunty, J. Disparities in sentencing decisions. in Oswald M. E., Bienbeck, S., Hupfeld-Heinemann, J. eds. Social psychology of punishment of crime. Chichester (UK), Wiley-Blackwell, 2009. pp. 379-401. p. 382-386

<sup>109</sup> Ibid. p. 383

<sup>110</sup> Ibid. p. 383

<sup>111</sup> Ibid. p. 382-383



minority.<sup>112</sup> On the other hand, other scholars believed that beside social status it is the training that could be held responsible for conservative attitudes.<sup>113</sup> The gender of the judge can also be a factor for different judicial decisions. In a research scholars found that male judges were more likely to give harsher sentences to women who did not correspond to gender stereotypes than female judges.<sup>114</sup>

### *Characteristics of the offender*

Influential characteristic features of the offender include gender, attractiveness and facial appearance, race or even “emotional display”.<sup>115</sup> Comparative archival researches of cases revealed that the gender of the offender was not at all neutral to judges. In a large number of cases analyzed female offenders were likely to receive more lenient sentences than their corresponding male offender.<sup>116</sup> Another phenomenon called the ‘attractiveness-leniency bias’ describes how offenders with attractive appearance receive less severe sentences than their less attractive counterparts.<sup>117</sup> Judges may also be influenced by the emotional display of an offender. Comparative researches show that those offenders who openly show their emotions in court room are likely to receive less strict sentences than those who are less emotional in the same situation.<sup>118</sup>

<sup>112</sup> Fleck, Z., Krémer, F., Navrátil, Sz., Uszkiewicz, E. Technika vagy érték a jogállam? - A jogállami értékek átadása és az előítéletek csökkentése a jogászok és a rendőrtisztek képzésében. L'Harmattan Kiadó, 2012. Budapest. available: [http://galamus.hu/index.php?option=com\\_content&view=article&id=141447](http://galamus.hu/index.php?option=com_content&view=article&id=141447)

<sup>113</sup> Goodman-Delahunty, J. and Sporer, S., L. Unconscious influences in sentencing decisions: a research review of psychological sources of disparity. Australian Journal of Forensic Sciences. Vol. 42, No. 1. March 2010. pp. 19-36. p. 24

<sup>114</sup> Ibid. p. 25

<sup>115</sup> Ibid. p. 25

<sup>116</sup> Ibid. p. 25

<sup>117</sup> Ibid. p. 26

<sup>118</sup> Heath, W., P., Grannemann, B., D., Peacock, M., A. How the defendant's emotion level affects mock jurors' decisions when presentation mode and evidence strength are varied. Journal of Applied Social Psychology. 2004. no. 34. pp. 624-664. in Goodman-Delahunty, J. and Sporer, S., L. Unconscious influences in sentencing decisions: a research review of psychological sources of disparity. Australian Journal of Forensic Sciences. Vol. 42, No. 1. March 2010. pp. 19-36. p. 26

Although the original definition of Goodman-Delahunty and Sporer deals only with sentencing disparities in judicial decisions the present work assumes that such unconscious extra-legal factors may influence judgments in civil litigation cases as well. According to Perlin mental disability calls on one of the most fundamental prejudices for legal personnel which may manifest in legal capacity cases as well.<sup>119</sup>

---

<sup>119</sup> Perlin, Michael L., *The hidden prejudice: Mental disability on trial*. Washington DC.: American Psychological Association, 2000. p. 48

### 3. Objectivity and prejudices in Mental Disability cases

The term mental disability is a collective term in human rights discourse. It includes a wide range of mental handicap, like mental illness, mental instability, personality disorder, intellectual impairment or dementia. The common feature of all these mental conditions is that people who possess one or more of them are regarded differently by others. They are regarded “abnormal” by most of “normal” people.<sup>120</sup>

The previous chapters the connection between the act of judicial decision-making and psychological processes underlying decision-making actions in general was presented. Judicial decision-making is specific in all decision-making actions as it is an integral part of justice systems and thus should remain unbiased and equally accessible for all. Objectivity in mental disability cases was questioned seriously by Perlin’s works, where a specific form of prejudice, “sanism” was addressed.<sup>121</sup> Sanism is specifically important in the course of unconscious influences and biases in judicial decision-making, because while “in many areas of the law in which stereotypes, prejudice, and “ismic” behavior have long dominated legal discourse there is now a substantial counterweight. This counterweight, though, is largely missing in the area of sanism, and the pathology of oppression still dominates legal discourse involving persons with mental disabilities.”<sup>122</sup>

According to the underlying assumption of the previous chapters, unconscious biases easily influence decision-making and are quite difficult to detect or change without the personal involvement and commitment of the person. In this sense sanism is an old-new

<sup>120</sup> Perlin, M., L., Kanter, A., S., Treuhart, M., P., Szeli, É., Gledhill, K. International human rights and comparative mental disability law. Carolina Academic Press. 2006. p. 294

<sup>121</sup> Perlin, M., L., The hidden prejudice: Mental disability on trial. Washington DC.: American Psychological Association, 2000. p. 21-58

<sup>122</sup> Ibid. p. 35.

stereotyping phenomenon. It is old because it dates back as far as human civilization goes. The insane was historically regarded as the advocate of the devil. And it is new, because battles that won equal rights for women and national, ethnic, or sexual minorities turned just recently to this field of human rights. The term sanism indicates such behavior when people demonize, distance and infantilize mentally disabled people.<sup>123</sup> Judges are not exempt from sanism as well. Their sanist behavior manifests in their language (using words like “lunatics” or “crazy”), or in avoiding “difficult choices in mental disability law cases”.<sup>124</sup> Regarding the right to refuse treatment cases “judges simply ‘rubber stamp’ hospital treatment recommendations”<sup>125</sup> and decisions often “reflect ‘textbook’ sanist attitudes” in cases involving mentally disabled litigants.<sup>126</sup>

### 3.1 “Who takes me seriously?” – The Case of Legal Capacity

One of the manifestations of infantilizing mentally disabled people is the legal possibility of placing an adult person under guardianship. This institutionalized form of depriving someone from his/her legal capacity and thus from enjoying his/her rights equally to others contradicts the philosophy of the United Nations Convention on the Rights of Persons with Disabilities (CRPD).<sup>127</sup>

The main philosophy is reflected in Article 12 that can be read along with the principles of Article 1, and the principle of Article 2. Article 12 sets forth the right of “equal recognition before the law”.<sup>128</sup> Article 12 (2) and (3) together guarantees “legal capacity on

<sup>123</sup> Perlin, M., L., Kanter, A., S., Treuhart, M., P., Szeli, É., Gledhill, K. International human rights and comparative mental disability law. Carolina Academic Press. 2006. p. 295

<sup>124</sup> Ibid. p. 297

<sup>125</sup> Ibid. p. 298

<sup>126</sup> Ibid. p. 298

<sup>127</sup> United Nations Convention on the Rights of Persons with Disabilities. full text is available at: <http://www.un.org/disabilities/default.asp?id=150>

<sup>128</sup> CRPD Article 12

an equal basis with others”<sup>129</sup> for disabled people and ensures reasonable accommodation by providing access “to the support they may require in exercising their legal capacity”.<sup>130</sup> These provisions are translated into “supported decision making” for legislators and legal practitioners by the UN Committee on the Rights of Persons with Disabilities.<sup>131</sup> Article 2 makes provisions on the obligation of “reasonable accommodation” which includes the “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden”.<sup>132</sup> Article 1 emphasizes the purpose of the Convention and promotes respect for the inherent dignity of all persons with disabilities. This article also sets the stage for an important conceptual framework. It refers to persons with disabilities as people who have one or more bodily impairments “which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.<sup>133</sup>

Legal capacity deprivation – commonly referred to as “guardianship” – is apparent in many jurisdictions. However, it is different in its form and effect on the person (differences of guardianship in under common law and civil law systems shall be discussed in chp. 3.1.2.).<sup>134</sup> Social and legal justifications for depriving a person from legal capacity frequently state that it is “in the best interest of the person” or that this measure is “absolutely necessary”.<sup>135</sup> If this legal institution meets the biased attitudes of the participants – the judge, the legal representative and the expert – the result will be what is described in the Mental Disability Advocacy Center’s (MDAC) assessment about Hungary: where judges

---

<sup>129</sup> CRPD Article 12 (2)

<sup>130</sup> CRPD Article 12 (3)

<sup>131</sup> UN Committee on the Rights of Persons with Disabilities, Concluding Observations: Tunisia, Fifth session April 11-15, 2011. in Lewis, O., *Advancing Legal Capacity Jurisprudence*. EHRLR, 2011/6. pp. 700-714, p. 8

<sup>132</sup> CRPD Article 2. 4<sup>th</sup> paragraph

<sup>133</sup> CRPD Article 1

<sup>134</sup> Callard, F., Sartorius, N., Arboleda-Flórez, J., Bartlett, P., Helmchen, H., Stuart, H., Taborda, J., Thornicroft, G. *Mental Illness, Discrimination and the Law: Fighting for Social Justice*. Wiley-Blackwell. 2012. p. 71-76

<sup>135</sup> “Out of Sight”. Human Rights in Psychiatric Hospitals and Social Care Institutions in Croatia by MDAC and SHINE, 2011, p. 75

rarely question expert opinions of psychiatrists and tend to decide according to these recommendations in the vast majority of guardianship cases.<sup>136</sup>

### *3.1.1 Assessing Capacity*

As mentioned earlier legal capacity appears differently in different jurisdictions. Roman law based legal systems uses guardianship as the only means for assisting a person with mental disability in his/her decisions. As a result the legal personhood of the person is completely removed.<sup>137</sup> Interim measures are available in some jurisdictions, like in Hungary, where partial guardianship exists. Under this provision the individual is only partially deprived of his/her legal capacity, for example only in the area of handling his/her own finances, but remains capable to enter into contracts, and thus does not lose entirely the legal ability to live independently. Despite the articulated national and international civil recommendations<sup>138</sup> the recent draft of the new Civil Code still contains heavily restricting provisions about legal capacity of adults.<sup>139</sup> This practice is not unprecedented in central and eastern Europe where “guardianship law continues to reflect the overarching approach of its Roman law precedents”.<sup>140</sup> Guardianship cases are often supported by nothing more than records of the mental disorder or intellectual disability of the individual<sup>141</sup> and cases are decided without really testing the ability of the individual to make decisions by him/herself,

---

<sup>136</sup> Mental Disability Center. Guardianship and Human Rights in Hungary. Analysis of Law, Policy and Practice. MDAC. 2007. p. 79

<sup>137</sup> Callard, F., Sartorius, N., Arboleda-Flórez, J., Bartlett, P., Helmchen, H., Stuart, H., Taborda, J., Thornicroft, G. Mental Illness, Discrimination and the Law: Fighting for Social Justice. Wiley-Blackwell. 2012. p. 71

<sup>138</sup> Gurbai S., Jónás T., Kálozi M., és Kapronczay S. Magyarországi Civil szervezetek és személyek közös véleménye a Polgári Törvénykönyv tervezetének (Tervezet) a nagykorúak cselekvőképességét érintő V.-X. címéről. TASZ. 2012

<sup>139</sup> A Polgári Törvénykönyv tervezetének (Tervezet) a nagykorúak cselekvőképességét érintő V.-X. fejezetei

<sup>140</sup> Callard, F., Sartorius, N., Arboleda-Flórez, J., Bartlett, P., Helmchen, H., Stuart, H., Taborda, J., Thornicroft, G. Mental Illness, Discrimination and the Law: Fighting for Social Justice. Wiley-Blackwell. 2012. p. 72

<sup>141</sup> Mental Disability Center. Guardianship and Human Rights in Hungary. Analysis of Law, Policy and Practice. MDAC. 2007. p. 79

resulting in the blanket removal of all - legal, financial, or even private and personal - decision-making rights of the individual.<sup>142</sup>

Following a comparative assessment of legal capacity laws in different national jurisdictions Indian law professor, Dhanda, A. found three different existing approaches in assessing legal capacity in courts.<sup>143</sup> The first approach is “status attribution” where the mere establishment of the condition of disability results in a presumption by law of lack of capacity.<sup>144</sup> In jurisdictions that follow status attribution approach the medical diagnosis issued by a mental health professional establishes the ground for depriving the individual from legal capacity.<sup>145</sup> According to Dhanda this approach does not necessarily mean statutory restriction on legal capacity of people with disability<sup>146</sup>, but may be routinely applied by courts as in the majority of guardianship cases in Hungary.<sup>147</sup>

Another approach to assessing legal capacity in court is the “outcome test”. This test assesses incapacity based on the outcome of the individual’s decision. The classic example of this test is when a person psychiatric illness tries to terminate his/her voluntary treatment against the advice of his/her doctors is seen incapable. Even though the same was not questioned when the same person agreed to treatment by him/herself.<sup>148</sup> In these examples the basis of incapability verdict is the “reasonableness” of the individual’s decision<sup>149</sup> which

<sup>142</sup> Callard, F., Sartorius, N., Arboleda-Flórez, J., Bartlett, P., Helmchen, H., Stuart, H., Taborda, J., Thornicroft, G. *Mental Illness, Discrimination and the Law: Fighting for Social Justice*. Wiley-Blackwell. 2012. p. 72

<sup>143</sup> Dhanda, A. “Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future”. *Syracuse Journal of International Law & Commerce*. Vol. 34. 2007. pp. 429-462. p. 431

<sup>144</sup> *Ibid.* p. 431

<sup>145</sup> Lewis, O., *Advancing Legal Capacity Jurisprudence*. EHRLR, 2011/6. pp. 700-714, p. 1 and Nilsson, A. *WHO GETS TO DECIDE? Right to legal capacity for persons with intellectual and psychosocial disabilities*. Issue Paper of the Commissioner for Human Rights (2012)2, Strasbourg, 20 February 2012, p. 8

<sup>146</sup> Dhanda, A. “Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future”. *Syracuse Journal of International Law & Commerce*. Vol. 34. 2007. pp. 429-462. p. 431. see footnote 6.

<sup>147</sup> Mental Disability Center. *Guardianship and Human Rights in Hungary. Analysis of Law, Policy and Practice*. MDAC. 2007. p. 79

<sup>148</sup> Dhanda, A. “Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future”. *Syracuse Journal of International Law & Commerce*. Vol. 34. 2007. pp. 429-462. p. 431-432

<sup>149</sup> Nilsson, A. *WHO GETS TO DECIDE? Right to legal capacity for persons with intellectual and psychosocial disabilities*. Issue Paper of the Commissioner for Human Rights (2012)2, Strasbourg, 20 February 2012, p. 8.

is evaluated according to others – medical personnel, legal representative, or a relative – personal views of the outcome (whether it is perceived rational or not).<sup>150</sup> Alarming arbitrariness of this approach was expressed by the MDAC’s report about Hungary.<sup>151</sup>

The third approach is the “functional test”. In this method not the outcome of the decision of the individual is tested but the fact whether he/she is capable of performing a certain function<sup>152</sup>, like making an informed decision. In this test mental disability is regarded as a “threshold condition” which either allows or prevents the individual from understanding the consequences of his/her decisions.<sup>153</sup> Moreover, the functional approach “does not take into account the wisdom of the decision made”, and does not require professionals to make a declaration about the reasonableness of the decision.<sup>154</sup> In one of the Hungarian cases analyzed by the MDAC the judge – undertaking a uniquely active role - ordered a second hearing where she assessed the individuals’ decision-making abilities and decided contrary to expert’s opinion.<sup>155</sup>

Among the above described models of approaching to assessment of capacity the first two – ‘status attribution’ and ‘outcome test’ - are based on the “assumption that the right to legal capacity is dependent upon, or equitable with, requisite mental/functional capacity”.<sup>156</sup> The ‘functional test’, however is the approach that corresponds to the principles set forth in the 1999 Recommendation of the Committee of Ministers of Council of Europe on Principles Concerning the Legal Protection of Incapable Adults, and it is the closest one to the philosophy of the 2006 CRPD.<sup>157</sup> On the other hand, human rights lawyers express

<sup>150</sup> Lewis, O., *Advancing Legal Capacity Jurisprudence*. EHRLR, 2011/6. pp. 700-714, p. 1-2.

<sup>151</sup> Mental Disability Center. *Guardianship and Human Rights in Hungary. Analysis of Law, Policy and Practice*. MDAC. 2007. p. 79

<sup>152</sup> Lewis, O., *Advancing Legal Capacity Jurisprudence*. EHRLR, 2011/6. pp. 700-714, p. 2

<sup>153</sup> Dhanda, A. “Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future”. *Syracuse Journal of International Law & Commerce*. Vol. 34. 2007. pp. 429-462. p. 431

<sup>154</sup> Lewis, O., *Advancing Legal Capacity Jurisprudence*. EHRLR, 2011/6. pp. 700-714, p. 2.

<sup>155</sup> *Guardianship and Human Rights in Hungary. Analysis of Law, Policy and Practice*, MDAC, 2007, p. 80

<sup>156</sup> Lewis, O., *Advancing Legal Capacity Jurisprudence*. EHRLR, 2011/6. pp. 700-714, p. 1

<sup>157</sup> Committee of Ministers of the Council of Europe (1999), Recommendation No.R(99)4 on principles concerning the legal protection of incapable adults, adopted on February 23, 1999. full text is available at: [http://www.coe.int/t/dg3/healthbioethic/texts\\_and\\_documents/Rec%2899%294E.pdf](http://www.coe.int/t/dg3/healthbioethic/texts_and_documents/Rec%2899%294E.pdf)



concerns about the functional approach. It still does not provide safeguards against the subjective evaluation of outcomes of decisions of the individual while assessing his/her capability,<sup>158</sup> and still purports the notion that “legal recognition of another's right to legal capacity is dependent on their demonstrating their rationality.”<sup>159</sup>

### 3.1.2 *Consequences of deprivation of legal capacity*

According to contemporary legal discourse legal capacity is not an ordinary privilege or benefit that can be simply taken away according to a routinely conducted assessment of a person's mental capacities. It is the most important vehicle that makes the enjoyment of other fundamental rights possible.<sup>160</sup> As a result of the institution of full guardianship, the person placed under it becomes invisible for the legal system, because his/her legal personhood seems to exist.<sup>161</sup> With loss of legal personhood the individual shall be unable to enter into simple legal contracts necessary for conducting an independent life, such as a work contract, buying or renting a property to live in, contact public suppliers, open a bank account or sign a mobile subscription.<sup>162</sup> Moreover, the individual can be easily and voluntarily institutionalized if the consent was given by the guardian who is the full decision-maker on behalf of the individual. Therefore CRPD Article 19 on independent living and social inclusion<sup>163</sup> shall be complemented by Article 12, because without legal capacity or legal personhood it is impossible to live independently in the community. According to MDAC's human rights reports about central and eastern European psychiatric

<sup>158</sup> Lewis, O., *Advancing Legal Capacity Jurisprudence*. EHRLR, 2011/6. pp. 700-714, p. 2.

<sup>159</sup> *Ibid.* p. 3.

<sup>160</sup> *Ibid.* p. 1.

<sup>161</sup> Callard, F., Sartorius, N., Arboleda-Flórez, J., Bartlett, P., Helmchen, H., Stuart, H., Taborda, J., Thornicroft, G. *Mental Illness, Discrimination and the Law: Fighting for Social Justice*. Wiley-Blackwell. 2012. p. 72

<sup>162</sup> Lewis, O., *Advancing Legal Capacity Jurisprudence*. EHRLR, 2011/6. pp. 700-714, p. 1

<sup>163</sup> CRPD Article 19.

institutions this is a practical threat, where legal restriction of legal capacity produces life-long institutionalization.<sup>164</sup>

Human rights consequences of deprivation of legal capacity can be demonstrated through the decisions of the European Court of Human Rights (ECtHR). Significant landmark decisions influence legislations and legal practices in European jurisdictions related to legal capacity of persons with mental disability. The Court handles legal capacity cases under Article 6, right to fair trial, and Article 8, right to private life, while it deals with independent living and living in the community cases under Article 5 (1) and (4), right to liberty, in conjunction with Article 8 and Article 6 of the European Convention on Human Rights.<sup>165</sup>

In the case of *Shtukaturv v. Russia*<sup>166</sup> Mr. Shtukaturv who has a diagnosed mental disorder, was placed under the guardianship of his mother and sent to a psychiatric hospital upon her consent. As a result of the guardianship procedure, which took place without the presence and even the knowledge of Mr. Shtukaturv, he lost his legal capacity and the possibility to challenge the institutionalization decision. The Court held that the rights of Mr. Shtukaturv have been violated under Articles 6, 8, 5(1) and (4) of the Convention. The Court also stated that “a person of unsound mind must be allowed to be heard either in person or, where necessary, through some form of representation” and that the outcome of the domestic procedure interfered with Mr. Shtukaturv’s “personal autonomy in almost all areas of life (...), including the eventual limitation of his liberty”.<sup>167</sup> The Court also found that even though Mr. Shtukaturv was deprived of his legal capacity, his “own behaviour at the moment of his confinement” proved that he was able to understand his situation.<sup>168</sup> The

<sup>164</sup> “Out of Sight”. Human Rights in Psychiatric Hospitals and Social Care Institutions in Croatia by MDAC and SHINE, 2011, p. 51-55.

<sup>165</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms

<sup>166</sup> *Shtukaturv v. Russia*, (Application no. 44009/05) ECtHR, 27 June 2008

<sup>167</sup> *Shtukaturv*, para. 71.

<sup>168</sup> *Shtukaturv*, para 108.

court referred the three minimum conditions of “the lawful detention of a person of unsound mind”<sup>169</sup> that was established in the case of *Winterwerp*.<sup>170</sup>

In the case of *Stanev v. Bulgaria*<sup>171</sup> Mr. Stanev also had a diagnosis of schizophrenia and was placed under partial guardianship by Bulgarian court. He was sent to a psychiatric home for indefinite time period upon the consent of his new guardian. In his application to the ECtHR he complained about his placement to the home, the living conditions in the home and his legal incapacity to challenge the guardianship decision in domestic courts.<sup>172</sup> In the Grand Chamber decision the Court held that there had been a violation of Articles 5 (1), (4), (5), 3 and 6 (1). In the judgment the Court found that the act of placing Mr. Stanev under partial guardianship led directly to his institutionalization,<sup>173</sup> which was unlawful without his joint consent even under Bulgarian law.<sup>174</sup> According to the cited case law the Court specified three conditions under which a “mentally disordered person (...) (can) be deprived of his liberty as being of “unsound mind” (...): firstly he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder”<sup>175</sup>

In the case of *H.L. v. The United Kingdom*<sup>176</sup> Mr. H.L. who was an autistic patient from early childhood and lacked the capacity to consent or object to his hospital treatment, after 30 years he was released to community living under day care. After 4 years he was again referred to infinite hospital care by his doctors following a self-destructive incident, and finally released back to the community only after three months. The Court held that, even though Mr. H.L. was not able to consent or object to his treatment, he was also not able

<sup>169</sup> *Shtukurov*, para. 114.

<sup>170</sup> *Winterwerp v. the Netherlands*, (Application no. 6301/73) ECtHR, 24 October 1979, para 39

<sup>171</sup> *Stanev v. Bulgaria*, (Application no. 36760/06), ECtHR, 17 January 2012

<sup>172</sup> *Stanev*, para 3.

<sup>173</sup> *Stanev*, para 154.

<sup>174</sup> *Stanev*, para 150.

<sup>175</sup> *Stanev*, para 145.

<sup>176</sup> *H.L. v. The United Kingdom* (Application no. 45508/99) ECtHR, 5 October 2004

to leave the hospital on his own will, and therefore the applicant was “deprived of his liberty” during this time under Article 5(1) of the Convention.<sup>177</sup> The Court also expressed, that “the distinction between a deprivation of, and a restriction upon, liberty is merely one of degree or intensity and not one of nature or substance”<sup>178</sup> and that “the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention”.<sup>179</sup>

In the case of *Kiss v. Hungary*<sup>180</sup> Mr. Kiss had a diagnosis of manic depression and was placed under partial guardianship. As a result of this act according to the then effective national constitution he lost his right to vote. The Court held that there had been a violation of Article 3 of the Protocol No. 1 of the Convention. The blanket ban to vote for every individual under full or partial guardianship that is in the constitution was considered to be unacceptable for the Court,<sup>181</sup> and that a more specifically tailored measure should be put in place in order to decide whether a person under partial guardianship could be entitled to vote or not.<sup>182</sup> The Court stressed that “if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled” the State must have very well-founded justification to restrict their capacity.<sup>183</sup>

### 3.2 Guardianship and its alternatives – Hungary and the UK

The movement that promotes supported decision-making instead of substituted decision-making, or in other terms guardianship, is based on the notion that at least once or

<sup>177</sup> *H.L. v. The United Kingdom*, para. 89-94.

<sup>178</sup> *H.L. v. The United Kingdom*, para. 89

<sup>179</sup> *H.L. v. The United Kingdom*, para. 90

<sup>180</sup> *Alajos Kiss v. Hungary*, (Application no. 38832/06), ECtHR, 20 August 2010

<sup>181</sup> *Kiss*, para 42

<sup>182</sup> *Kiss*, para 43-44.

<sup>183</sup> *Kiss*, para 42

more times in our life everybody feels the need for support in making an important decision.<sup>184</sup> In supported decision-making system the decision is made by the individual and not the guardian, and he/she receives support and assistance to formulate and communicate the decision.<sup>185</sup> Safeguards for avoiding arbitrary and substituted decision making under the provisions of supported decision-making are listed in Article 12 (4) of the CRPD.<sup>186</sup>

Following the decision of the ECtHR the Hungarian Parliament incorporated its proposal into the newly formulated constitution and erased the blanket ban of individuals under partial guardianship from the provision of voting rights. According to the new provision an exclusion from voting may be ordered by court upon the establishment of limited mental capacity of the individual.<sup>187</sup> Further considerations of the judgment, however does not seem to be reflected upon by the Hungarian legislation. In the new draft of the Civil Code (to enter into force by 1 January 2014) the provisions of guardianship still contains the option of full guardianship. Although the draft refers to ‘supported decision-making’ as an alternative to substituted decision-making critiques express serious concerns about its future practical application.<sup>188</sup>

In the UK the aftermath of the H.L. decision also motivated legislators to amend the newly formulated 2005 Mental Capacity Act. In order to provide full protection against arbitrary decisions on behalf of incapacitated mental patients the British Parliament amended the Act with the provisions called the “Deprivation of Liberty Safeguards (that) came into force on 1 April 2009”.<sup>189</sup> The principles of the Mental Capacity Act, its original 2005

---

<sup>184</sup> Mental Disability Advocacy Center. Supported Decision-Making: An Alternative to Guardianship, MDAC, 2006. p. 7.

<sup>185</sup> Ibid. p. 8.

<sup>186</sup> Ibid. p. 9-10.

<sup>187</sup> The Fundamental Law of Hungary 2011, Article XXIII. (6)

<sup>188</sup> Gurbai S., Jónás T., Kálozi M., és Kapronczay S. Magyarországi Civil szervezetek és személyek közös véleménye a Polgári Törvénykönyv tervezetének (Tervezet) a nagykorúak cselekvőképességét érintő V.-X. címéről. (Joint opinion of Hungarian NGOs and individuals about chapters V-X on the legal capacity of adults in the draft of the new Civil Code). TASZ. 2012. p. 3

<sup>189</sup> Zigmond, A. Deprivation of liberty safeguards and the Mental Capacity Act. British Medical Journal. 2009. no.338b1888 p. 1284-1285

provisions and the newly enacted 2009 parts are clear statutory examples how supported decision-making should work in order to provide the strongest possible safeguard for human rights of persons with mental disability.<sup>190</sup>

### *3.2.1 Statutory background*

In Hungary the mere establishment of the mental status does not lead automatically to the deprivation of legal capacity. The expert has to evaluate whether the individual is capable to make informed decisions and understand their consequences. If the person is not capable to form decisions or can not entirely comprehend the consequence of the outcome, the expert may advice the court to place him/her under full or partial guardianship. Expert opinions usually rely on medical data, psychiatric examinations and anamnesis, and medical observation. During the procedure the judge or the case guardian has the role to challenge the expert's opinion and the judge may decide on the contrary. The decision in these cases rely on the personal hearing of the individual him/herself, and if the judge presumes that the individual is capable to make informed decisions and understand their consequences may not place him/her under guardianship.<sup>191</sup> Such active approach of Hungarian judges is not very common, although judges have significant discretionary power in the Hungarian judicial system compared to common law countries.<sup>192</sup> They tend to accept expert opinion in almost every case, and decide according to it.

In Hungary there is no separate act regulating rights of people with disability. The provisions are incorporated in the 1959 Civil Code and in the draft of the new version of the

<sup>190</sup> Callard, F., Sartorius, N., Arboleda-Flórez, J., Bartlett, P., Helmchen, H., Stuart, H., Taborda, J., Thornicroft, G. *Mental Illness, Discrimination and the Law: Fighting for Social Justice*. Wiley-Blackwell. 2012. p. 75

<sup>191</sup> *Guardianship and Human Rights in Hungary. Analysis of Law, Policy and Practice*, MDAC, 2007, p. 79

<sup>192</sup> Perlin, M., L. *International Human Rights and Mental Disability Law: When the Silenced Are Heard*. Oxford University Press. 2012. p. 120 and see also Wirthz, J., ed. *Rendszerbe zárva. Hogyan kezeli az igazságügyi rendszer a nők és gyermekek elleni férfierőszak jelenségét ma Magyarországon*. (Trapped in the System. How does the legal system handle male violence against women and children in Hungary). NANE and Patent Foundations, Tűzhely Füzetek, 2009, p. 21-22

Civil Code.<sup>193</sup> Guardianship is regulated under sections 14-21 of the Civil Code. According to these provisions an individual may be placed under guardianship if his/her “mental capacity to manage his/her own life is permanently or temporarily majorly restricted – generally or only in respect of certain tasks - due to mental state, intellectual retardation or pathological addiction”.<sup>194</sup> Explicit reference to the best interest or the protection of the individual as a reason for guardianship can not be found in the cited text.

If the individual is found to be able to demonstrate that he/she understands the consequences of his/her decisions in one or more issues the court may render him/her under partial guardianship. In this case the individual is allowed to make valid legal statements in every issue where his/her legal capacity was not restricted by the court.<sup>195</sup> Partial restriction of legal capacity is usually based on individual assessment of the person’s capability in a list of areas set forth by the act, which touch upon core human rights such the right to family life, right to property or right to consent to medical treatment.<sup>196</sup> Guardianship may be terminated if the reasons for its initial order cease to exist. Among others, the individual him/herself is eligible to apply for terminating his/her guardianship by him/herself<sup>197</sup>, but a periodical revision for possibility of termination has to take place at least five years after the guardianship verdict.<sup>198</sup>

The Hungarian legislation shows amazing shortcomings in the protection of human rights of persons with mental disability. The system of guardianship and partial guardianship lacks safeguards against extreme deprivation of legal capacity and interference with personal

<sup>193</sup> 1959. évi IV. törvény a Polgári Törvénykönyvről 14. § - 21. § (1959 Act IV. about the Civil Code. Sections 14-21). full text is available at: [http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=95900004.TV#ljb26param](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=95900004.TV#ljb26param) and Polgári Törvénykönyv tervezetének V.-X. címe (Civil Code draft vers. Chapters V-X.) full text is available at: <http://www.kormany.hu/download/0/d7/70000/%C3%9Aj%20Polg%C3%A1ri%20T%C3%B6rv%C3%A9ny%C3%B6nyv%20-%20a%20Kodifik%C3%A1ci%C3%B3s%20F%C5%91bizotts%C3%A1g%20Javaslat%20-%20k%C3%B6zz%C3%A9t%C3%A9telre.pdf>

<sup>194</sup> 1959. évi IV. törvény a Polgári Törvénykönyvről 14. § (4) (1959 Act IV. about the Civil Code. Section 14 (4))

<sup>195</sup> Ibid. Section 14 (5)

<sup>196</sup> Ibid. Section 14 (6)

<sup>197</sup> Ibid. Section 21 (2)

<sup>198</sup> Ibid. Section 14/A (1)

autonomy. This lack of human rights perspectives in the proceedings of guardianship cases was experienced by researchers in court room cases as well.<sup>199</sup>

In England, before the 2007 adoption of the 2005 Mental Capacity Act<sup>200</sup>, a similar system of ‘deputies’ was in place where the individual could preserve the legal capacity to take legal action to overturn incapacity decision of the Royal Prerogative powers, but lost all other possibilities to sign any legal contract on his/her own.<sup>201</sup> This situation changed considerably by the adoption of the 2005 Mental Capacity Act which reflects to the 1999 Recommendation of the Committee of Ministers of Council of Europe, hence corresponds with the philosophy of the CRPD. In the first part the principles of the act underline that nobody can be treated incapable “unless all practical steps to help him to do so have been taken without success”.<sup>202</sup> Moreover, the assessment of the individual’s ability to make decisions must not rely on reasonableness or seeking “wise decisions”<sup>203</sup> and in case if an act has or decision still has to be taken on behalf of another person it has to be in the best interest of the individual<sup>204</sup> and “regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action”.<sup>205</sup> The positive aspect of these principles is that they not only take into account assisted decision making as the only alternative for incapable adults but it also sets for two very important conditions. The first is that capability must not be regarded as one blanket ability that the person either has or does not have, and the second one that the personally tailored assistance has to be carried out with the fullest respect for the individual’s other rights and autonomy.

<sup>199</sup> Guardianship and Human Rights in Hungary. Analysis of Law, Policy and Practice, MDAC, 2007, p. 76

<sup>200</sup> Mental Capacity Act 2005. full text is available at: <http://www.legislation.gov.uk/ukpga/2005/9/contents>

<sup>201</sup> Callard, F., Sartorius, N., Arboleda-Flórez, J., Bartlett, P., Helmchen, H., Stuart, H., Taborda, J., Thornicroft, G. Mental Illness, Discrimination and the Law: Fighting for Social Justice. Wiley-Blackwell. 2012. p. 72

<sup>202</sup> Mental Capacity Act 2005. Part 1. 1. Principles (3)

<sup>203</sup> Mental Capacity Act 2005. Part 1. 1. Principles (4)

<sup>204</sup> Mental Capacity Act 2005. Part 1. 1. Principles (5)

<sup>205</sup> Mental Capacity Act 2005. Part 1. 1. Principles (6)



### 3.2.2 Case law

The weakness of the 2005 Mental Capacity Act is noted in its procedural outcomes. During the first five years of the act there was potential uncertainty how its progressive provisions would be interpreted and turned into action.<sup>206</sup> The second part of the Act makes provisions about the Court of Protection and the Public Guardian.<sup>207</sup> The Court of Protection is the competent court for all cases related to any person “who lacks, or is alleged to lack, capacity”<sup>208</sup> and has the same power as the High Court within this jurisdiction.<sup>209</sup> The Court appoints ‘deputies’ for persons who lack certain capacities and the Public Guardian supervises their performance.<sup>210</sup>

In order to understand better the mechanism of the Mental Capacity Act and the Court of Protection an assessment of selected cases was carried out. The criteria for selection was to find the latest cases, presumably they would represent an accumulated synthesis of procedural, professional and attitudinal experience that the Court gathered during the first five years of its operation. The second criteria was that the cases are related to assessment of capacity and assisted decision-making. In the end there were six eligible cases to be analyzed. The cases varied according to the type of mental disability and the mental capacity of the individual, therefore a wide range of assisted decision-making methods were observed.

The cases concerned important decisions regarding the individuals’ lives, where a decision could not be reached by the people who were involved in the individuals’ lives (deputies, family members, authority representative, medical staff, etc.) on the first place. In every case the capacity of the person was assessed individually and a statement by the court

<sup>206</sup> Callard, F., Sartorius, N., Arboleda-Flórez, J., Bartlett, P., Helmchen, H., Stuart, H., Taborda, J., Thornicroft, G. *Mental Illness, Discrimination and the Law: Fighting for Social Justice*. Wiley-Blackwell. 2012. p. 75

<sup>207</sup> Mental Capacity Act 2005. Part 2

<sup>208</sup> Mental Capacity Act 2005. Part 2. 50 (1) (a)

<sup>209</sup> Mental Capacity Act 2005. Part 2. 47. (1)

<sup>210</sup> Mental Capacity Act 2005. Part 2. 58. (1) (c)

was made about the level of capacity related to the specific decision the case required. In the assessment judges referred to a two steps process, where a “diagnostic test” and a “functional test” would be carried out subsequently to assess whether the individual is first incapacitated in any way and second, whether the impairment hinders the person’s decision-making capacity in the specific decision.<sup>211</sup> Lengthy expert opinions were presented from both sides. These experts’ opinions were considered very important in the assessment of the individual’s capacity, though judges expressed concerns and limitations of that sort of evidence in judicial reasoning.<sup>212</sup> Among the six hearings – out of which two referred to the same case of *Mrs Clarke*<sup>213</sup> - the court found in the majority of the cases that the individual did not pass the “functional test” and would be unable to make the actual decision or understand its consequences. Only in the case of *Mrs Clarke* did the Court find her capable to make decision in one of the questions pending before it.<sup>214</sup>

In questions where the individual lacked capacity for the decision to be made the Court had the task to decide the problem on behalf of the person in his/her best interest. Personal hearings in the course of deciding what is the best interest of the individual was an general option, though it happened only in the case of *KK*<sup>215</sup> and even there it was considered to be unusual by the judge<sup>216</sup>. In the other three cases where, with due regard to previous diagnoses, the capacity of the individual was not assessed on the merits of the case – in the case of *DD*<sup>217</sup>, *SK*<sup>218</sup> and *K*<sup>219</sup> - the best interest of the person had to be determined.<sup>220</sup>

<sup>211</sup> *CC and KK and STCC*, [2012] EWHC 2136 (COP), 26. July 2012. para 19

<sup>212</sup> *CC and KK and STCC*, [2012] EWHC 2136 (COP), 26. July 2012. para 24

<sup>213</sup> *Mrs Ann Clarke* [2012] EWHC 2256 (COP), 31 July 2012 and *Mrs Ann Clarke* [2012] EWHC 2714 (COP), 9 October 2012

<sup>214</sup> *Mrs Ann Clarke* [2012] EWHC 2256 (COP), 31 July 2012, para. 36

<sup>215</sup> *CC and KK and STCC*, [2012] EWHC 2136 (COP), 26. July 2012

<sup>216</sup> *CC and KK and STCC*, [2012] EWHC 2136 (COP), 26. July 2012. para 44

<sup>217</sup> *XCC and AA and BB and CC and DD* [2012] EWHC 2183 (COP), 26 July 2012

<sup>218</sup> *Re SK* [2012] EWHC 1990 (COP), 9 July 2012

<sup>219</sup> *A NHS TRUST and K and Another Foundation Trust* [2012] EWHC 2922 (COP), 15 October 2012

<sup>220</sup> *XCC and AA and BB and CC and DD* [2012] EWHC 2183 (COP), 26 July 2012. para 93

In Hungary legal capacity can only be limited by a court. The process of placing someone under guardianship has two steps. In the first step the court establishes the individual's incapacity. After it is the responsibility of the guardianship authority to appoint a guardian.<sup>221</sup> During the court hearing the individual is assumed to have full capacity unless proven otherwise and is "entitled to all the procedural rights enjoyed by any other litigant in Hungarian courts".<sup>222</sup>

As electronic database of legal capacity and guardianship cases are not available in Hungary the guardianship related cases from the general anonym database of courts were selected.<sup>223</sup> These cases regularly involve individuals who have a history in incapacity decision or seeking to have one in order to attempt the annulment of legal commitment. Though these cases do not reflect the original nature of incapacity court proceedings, judicial attitudes towards vulnerable individuals may clearly be mapped upon. The indicators for case selection were that either the petitioner or the appellant had to have a history of mental problems. According to Hungarian legislation the status of incapacity to take action may be a reason for annulment legal action without the appointment of a guardian.<sup>224</sup> In the selection attempt was made to find the latest cases as well, but Hungarian administration has bigger gap in time elapsing between a decision and its electronic processing. Altogether four cases were analyzed both in first instance and appellate court

The assessment of the cases corresponds to previous research on court practice in guardianship cases.<sup>225</sup> The individual assessment of individual capacity was absent in every case. Where reference was made to previous court decisions a routinely made removal of legal capacity was revealed. Even in the case of a chronic alcoholic patient<sup>226</sup> where expert

<sup>221</sup> Guardianship and Human Rights in Hungary. Analysis of Law, Policy and Practice, MDAC, 2007, p. 19

<sup>222</sup> Guardianship and Human Rights in Hungary. Analysis of Law, Policy and Practice, MDAC, 2007, p. 20

<sup>223</sup> <http://www.birosag.hu/engine.aspx?page=anonim>

<sup>224</sup> 1959. évi IV. törvény a Polgári Törvénykönyvről 14. § (5) (1959 Act IV. about the Civil Code. Section 17.

<sup>225</sup> Mental Disability Advocacy Center. Guardianship and Human Rights in Hungary. Analysis of Law, Policy and Practice, MDAC, 2007

<sup>226</sup> App. No. 14.P.24.841/2008/54. Pest Megyei Bíróság, 15 June 2011

opinion indicated that certain cognitive functions to manage and comprehend simple everyday issues were more or less intact, an incapacity decision was made and a guardian was appointed.<sup>227</sup> Another usual aspect that is often quoted by international human rights observers is that the appointed guardians are usually one of the closest relatives of the person – his son in the case of the alcoholic patient<sup>228</sup> or his wife in the case of a car accident victim who suffered permanent brain damage.<sup>229</sup> Interestingly, this conflict of interest was not considered as part of the two previously mentioned cases, even though the financial matters in question did affect economically the guardians as relatives.<sup>230</sup>

In three cases the petitioners were seeking an annulment of legal contracts with financial aspect, while in one case the petitioner was seeking additional compensation from an insurance company. In the annulment cases the courts found only one eligible claim – in the case of the alcoholic patient where the time between the incapacity diagnosis and the annulled act was relatively short.<sup>231</sup> In the two other cases either there was a very long time between incapacity diagnosis and the questioned act,<sup>232</sup> or there was not an incapacity decision at all, although the petitioner claimed to have been incapacitated from time to time according to his condition.<sup>233</sup>

<sup>227</sup> App. No. 14.P.24.841/2008/54. Pest Megyei Bíróság, 15 June 2011, p. 3

<sup>228</sup> App. No. 14.P.24.841/2008/54. Pest Megyei Bíróság, 15 June 2011, p. 4

<sup>229</sup> App. No. 11.P.20.174/2010/41. Jász-Nagykun-Szolnok Megyei Bíróság, 1. December 2011, p. 4

<sup>230</sup> App. No. Pf.I.20.023/2012/4 Debreceni Ítéltábla, 9 May 2012

<sup>231</sup> App. No. 5.Pf.21.946/2011/3. Fővárosi Ítéltábla, 14 February 2012

<sup>232</sup> App. No. 1.Pf.21.528/2011/5. Fővárosi Ítéltábla, 17. April 2012, p. 8 and App. No. 11.P.24.374/2010/20 Pest Megyei Bíróság, 25 May 2011, p. 5

<sup>233</sup> App. No. 6.Pf.21.018/2011/8. Fővárosi Ítéltábla, 29 February 2012, p. 2 and App. No. 39.P.26.651/2008/30 Fővárosi Bíróság 1 March 2011

## 4. Integrating psycho-legal theories into Mental Disability decisions

The previous two chapters presented the central psychological information processing functions of the human psyche, a summary of research areas and theories in the domain of psychology and law, with special regard to judicial decision making and an overview of different existing mental capacity decisions. As stated in the introductory chapters, the intention of this thesis is to map possible interactions of legal and other extra-legal factors in judicial decision-making, especially in the field of legal capacity decisions. The purpose of understanding the influence of extra-legal factors in judicial decision making and court proceedings is two fold. One is to be able to improve judicial systems in general, and to increase their receptivity capacity for contemporary principles and interpretations of human rights. The other purpose is to help judicial reforms by contributing with a special methodology to the training of the judiciary.

### 4.1 Legal Capacity and judicial objectivity

The first assumption that can be made upon the analysis of the case studies is that there is a considerable difference in judicial behavior in civil and common law systems. However, discussion of procedural differences of civil and common law countries is not a scope of this analysis, it has to be noted that many of the distinctions in the judges' behavior in the cited cases can be explained by this dichotomy.<sup>234</sup> The legal framework of interpretation can be regarded as determinative cognitive framework which forms strong unconscious influence on decision-making as it was shown in the second chapter. As Justice

<sup>234</sup> see e.g. in Zweigert, C. and Kötz, H.-J. *Statutory Interpretation – Civilian Style*. Tulane Law Review. Vol. 44. 1970. pp. 705-719

Dowsett explains, in a precedent based common law system “the high level of importance attached to reasons in the judicial process is (...) almost unique.”<sup>235</sup> On the other hand judges in civil law systems concentrate on the statutory interpretation for deciding a case and enjoy quite large freedom in doing so.<sup>236</sup>

The second difference in the presented cases is the role of the Court. The specialized English Court of Protection had great advantage in dealing with mental capacity cases in a precisely regulated form laid down by the 2005 Mental Capacity Act. The case law that concentrates on persons with mental disability and persons planning incapacity results in valuable experience regarding mental capacity and legal recognition. In Hungary ordinary courts are dealing with mental and legal capacity cases, although a specialized body, the guardianship office is dealing with appointing guardians for incapacitated people. The manner and experience of the courts is therefore divergent with judges who are less specialized in dealing with vulnerable groups than their UK colleagues.

The third difference sets in principles of the statutory background and the social climate it presumes. In the 2005 Mental Capacity Act the philosophy of Article 12 of the CRPD is represented and safeguards against total deprivation of legal capacity and arbitrary decision-making on behalf of the best interest of the incapacitated person are at place. The motive of the Act and its practical application as the cases revealed correspond to the “social model of disability”. This approach that is also expressed by Article 1 of the CRPD regards persons with disabilities who does not have a problem with living in the society him/herself, but to whom society attributes the problem and thus creates barrier for him/her to effectively

<sup>235</sup> Dowsett, J. A. “Prejudice – the judicial virus”. Federal Court Australia, Brisbane, Australia. Australian Journal of Forensic Sciences, Vol. 42, No. 1, March 2010, pp. 37-48, p. 38.

<sup>236</sup> Zweigert, C. and Puttfarken H-J. Statutory Interpretation – Civilian Style. Tulane Law Review. Vol. 44. 1970. pp. 705-719. p. 708. and in Wirthz, J., ed. Rendszerbe zárva. Hogyan kezeli az igazságügyi rendszer a nők és gyermekek elleni férfierőszak jelenségét ma Magyarországon. (Trapped in the System How does the legal system handle male violence against women and children in Hungary). NANE and Patent Foundations, Tűzhely Füzetek, 2009, p. 21-22

participate.<sup>237</sup> In Hungary a certain mixture of the functional approach and the outcome-based approach exist. A slow shift from the total exclusion of disabled people could be observed during the last decades, but a considerable trend of separation still a norm in society. Separate schools, separate homes, separate buses do not help the notion of inclusion, nor does the planned articles in the new version of the Civil Code about guardianship and community living. The preservation of the possibility for someone to loose total legal capacity and handing “over the decision-making power to a third party”<sup>238</sup> is coupled with the provisions that allow the operation of care homes up to 50 persons and call this option “community living”. The alternative of assisted decision-making to guardianship is only named in the text, but no procedural safeguards are included for practical application. The only upside of the Hungarian system is the existence of partial guardianship which allows the judge to incapacitate a person only in certain fields of legal capacity (e.g. finance or marriage) and this partial incapacitation is based on individual assessment. However this assessment is restricted to the a general fields of life management issues and does not take into consideration the possible fluctuation of mental capacity over time and over specific problems.

The above listed differences tried to advance an explanation for the fourth difference between the analyzed two case laws. In the reasoning of the UK cases judges used a surprisingly emotional tone when they spoke about the circumstances or participants of the case. Their attitudes were more than sympathetic they and handle the cases with significant empathy. They mentioned their feelings<sup>239</sup> and attributed recognizable emotions to the parties of the case.<sup>240</sup> But they not only expressed their feelings and empathy but also recorded the

<sup>237</sup> Mental Disability Advocacy Center. Supported Decision-Making: An Alternative to Guardianship, MDAC, 2006, p. 8.

<sup>238</sup> Nilsson, A. WHO GETS TO DECIDE? Right to legal capacity for persons with intellectual and psychosocial disabilities. Issue Paper of the Commissioner for Human Rights (2012)2, Strasbourg, 20 February 2012, p. 9.

<sup>239</sup> *A NHS TRUST and K and Another Foundation Trust* [2012] EWHC 2922 (COP), 15 October 2012, para 4

<sup>240</sup> *XCC and AA and BB and CC and DD* [2012] EWHC 2183 (COP), 26 July 2012. para 9

attempt to overcome these emotions and not to let them be influenced by them.<sup>241</sup> In the Hungarian courts such emotional approach was completely absent (though empathy was not in one case<sup>242</sup>). The judges' inner position according to the reasoning of the decisions was distant. Their attitude towards the parties was rather instrumental and they tried not to get involved in the emotional part of the case.

#### 4.2 The role of consciousness in judicial decision-making

As Perlin summarizes, in the United States “judges most frequently come from the middle- and upper-classes. They are disproportionately male, White, Protestant, middle-aged, and well-educated. This privileged background has been looked on as one of the reasons that such judges (...) fail to acknowledge the significance of their own perspective, and readily accept a model of an economically efficient, rational human.”<sup>243</sup> This lack of sufficient insight appears in other researches as well. In a 1981 research decision-making behavior of judges was analyzed in open court cases. The researchers found that judges' own description of their decision-making process was very different from their actual behavior and they mostly relied on the “recommendation of the probation officer” or the prosecutors. These results not only showed that judges were disposed to their own biases but that they were easier to be influenced than they thought, therefore the researchers concluded that judges “lacked insight into their own behavior”.<sup>244</sup> In the UK similar researches were

<sup>241</sup> *CC and KK and STCC*, [2012] EWHC 2136 (COP), 26. July 2012. para 25 and *Mrs Ann Clarke* [2012] EWHC 2256 (COP), 31 July 2012, para 21

<sup>242</sup> App. No. 11.P.20.174/2010/41. Jász-Nagykun-Szolnok Megyei Bíróság, 1. December 2011, p. 6

<sup>243</sup> Perlin, Michael L., “The hidden prejudice: Mental disability on trial.” Washington DC.: American Psychological Association, 2000. p. 34

<sup>244</sup> Ebbesen, E., E., Konecni, V., J. The process of sentencing adult felons. 1981. Konecni, V., J., Ebbesen, E., E. The criminal justice system: A social-psychological analysis. In: Konecni, V., J., Ebbesen, E., E. eds. An analysis of the sentencing system. San Francisco: WH Freeman & Co., 1982. p. 293-332. in Goodman-Delahunty, J. and Sporer, S., L. Unconscious influences in sentencing decisions: a research review of psychological sources of disparity. Australian Journal of Forensic Sciences. Vol. 42, No. 1. March 2010. pp. 19-36. p. 23



conducted in order to analyze bail decisions. There the researchers found “no significant correlation between the types of bail conditions imposed and the reasons cited by the magistrates for imposing them”.<sup>245</sup>

These findings are problematic, because judges are regarded to be very “sensitive about their public role” who wish to keep distance from any “additional sources of personal scrutiny” other than review in the course of appeal.<sup>246</sup> As presented in the second chapter in researches that observed judicial decisions scholars found that “articulated reasons” by judges often proved unreliable and the decision were influenced “by factors outside the conscious awareness of the judge”.<sup>247</sup> As Justice Dowsett concludes in his paper the only extra-legal safeguard against unconscious influences “is the development in each judge of a healthy degree of insight into his or her own self and a degree of skepticism about his or her own motivations”.<sup>248</sup>

Having an insight into our own motives, emotions and, in case, prejudices is exactly what UK judges demonstrated in their reasoning in mental capacity cases. Although, not expressing such concerns does not necessarily mean that the person is unaware of his/her own motives. It is simply easier to presume the motives of judge when it is told expressly. Judicial consciousness, on the other hand, may become an important element in promoting human rights in national legal systems on the judicial level. The core values of international human rights – such as dignity, equal rights, anti-discrimination and social inclusion<sup>249</sup> - may evoke strong prejudices in case of clash of values. These feelings are not necessarily bad or

---

<sup>245</sup> Raine, J., W., Wilson, M., J. Conditional bail or bail with conditions? The use and effectiveness of bail conditions. Birmingham. Birmingham University School of Public Policy. 1994. in Goodman-Delahunty, J. and Sporer, S., L. Unconscious influences in sentencing decisions: a research review of psychological sources of disparity. Australian Journal of Forensic Sciences. Vol. 42, No. 1. March 2010. pp. 19-36. p. 23

<sup>246</sup> Goodman-Delahunty, J. and Sporer, S., L. Unconscious influences in sentencing decisions: a research review of psychological sources of disparity. Australian Journal of Forensic Sciences. Vol. 42, No. 1. March 2010. pp. 19-36. p. 22

<sup>247</sup> Ibid. p. 24

<sup>248</sup> Dowsett, J. A. “Prejudice – the judicial virus”. Federal Court Australia, Brisbane, Australia. Australian Journal of Forensic Sciences, Vol. 42, No. 1, March 2010, pp. 37-48, p. 47.

<sup>249</sup> Preamble of the United Nations Universal Declaration of Human Rights. 1948.

harmful initially, but later - according to the cognitive processes described in the second chapter - they may become strong barriers of the enjoyment of human rights for everyone. One way to overcome of these harmful inner processes is to gain better access to our own mind.

## Conclusion

As Justice Dowsett writes “judging is, inevitably, a very personal thing. (...) We are a cottage industry, producing hand-crafted products, all of which are “one off” and of varying quality. Judging is labour-intensive and therefore quite expensive.”<sup>250</sup> The hard work put into it may involve personal insight into judges own motives in decision-making.

Judicial decision-making may not stay for ever immune to psychological findings. Although as Perlin phrases “judges express discomfort with social science (or any other system that may appear to challenge law’s hegemony over society) and skepticism about new thinking”<sup>251</sup> a certain need for better understand unconscious backgrounds of judicial decision-making is arising. The example of judges who are specializing in dealing with vulnerable – and do it so perhaps not with total efficiency but in their best intention – allows optimists to disagree with the other half of Perlin’s sentence: “this discomfort and skepticism allows them to take deeper refuge in heuristic thinking and flawed, non-reflective “ordinary common sense”, both of which continue the myths and stereotypes of sanism.”<sup>252</sup>

Moreover, heuristic thinking and stereotypes are not at all the worst things that can happen to the human mind. The use of psychological shortcuts, schemas, and categories are inherent attributions of the mind that makes us capable to assess complex information quickly and come up with more or less coherent solutions. The problematic part is when human lack insight into their own mind processes, when they lack the psychological capacity to comprehend one or more of their prejudices and harmful stereotypes.

<sup>250</sup> Dowsett, J. A. “Prejudice – the judicial virus”. Federal Court Australia, Brisbane, Australia. Australian Journal of Forensic Sciences, Vol. 42, No. 1, March 2010, pp. 37-48. p. 40

<sup>251</sup> Perlin, M., L., Kanter, A., S., Treuhart, M., P., Szeli, É., Gledhill, K. International human rights and comparative mental disability law. Carolina Academic Press. 2006. p. 296-297.

<sup>252</sup> Ibid. p. 296-297.

The introduction of consciousness to judicial decision making may contribute to the wider social recognition of persons with mental disability through judgments with considerable human rights concern. As referred to in the introductory chapters, changes in society are expected to be both triggered and supported by legal changes or processes.<sup>253</sup> Real of social inclusion of persons with mental disabilities does not only lie in the hand of the legislator alone but in the judiciary as well.

---

<sup>253</sup> Anleu, Sharyn L. Roach, “Law and Social Change”, London, SAGE Publications, 2000., p.vii.

## Bibliography

1. Anleu, S., L., R. Law and Social Change. SAGE Publications. London. 2000
2. Aronson, E. A társas lény (The Social Animal), Közgazdasági és Jogi Könyvkiadó. Budapest. 1980
3. Bartlett, P., Lewis, O., Thorold, O. Mental disability and the European Convention on Human Rights. Martinus Nijhoff Publishers. Boston. 2007
4. Bennett, H. and Broe, G. A. Judicial decision-making and neurobiology: the role of emotion and the ventromedial cortex in deliberation and reasoning. Australian Journal of Forensic Sciences. Vol. 42, No. 1. March 2010. pp. 11-18
5. Callard, F., Sartorius, N., Arboleda-Flórez, J., Bartlett, P., Helmchen, H., Stuart, H., Taborda, J., Thornicroft, G. Mental Illness, Discrimination and the Law: Fighting for Social Justice. Wiley-Blackwell. 2012
6. Carroll, J., S. and Payne, J., W. Crime seriousness, recidivism risk, and causal attributions in judgments of prison term by students and experts. Journal of Applied Psychology, 1977. Vol. 62. pp. 595-602
7. Committee of Ministers of the Council of Europe (1999), Recommendation No.R(99)4 on principles concerning the legal protection of incapable adults, adopted on February 23, 1999
8. Crowe, C. "Videri quam esse": the role of empathy in judicial discourse. Law and Psychology Review. 20 Sep, 2011
9. Csepeli, Gy. A szociálpszichológia vázlata. (Briefing social psychology) Jászöveg Műhely Kiadó. Budapest. 1997

10. Dhanda, A. "Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future". *Syracuse Journal of International Law & Commerce*. Vol. 34. 2007. pp. 429-462
11. Dowsett, J. A. "Prejudice – the judicial virus". Federal Court Australia, Brisbane, Australia. *Australian Journal of Forensic Sciences*, Vol. 42, No. 1, March 2010, pp. 37-48
12. Ebbesen, E., E., Konecni, V., J. The process of sentencing adult felons. 1981. Konecni, V., J., Ebbesen, E., E. The criminal justice system: A social-psychological analysis. In: Konecni, V., J., Ebbesen, E., E. eds. *An analysis of the sentencing system*. San Francisco: WH Freeman & Co., 1982. p. 293-332
13. Engel, C., Gigerenzer, G. eds. *Heuristics and the Law*. Dahlem Workshop Report 94. Cambridge (MA): The MIT Press. 2006.
14. Englich, B. Blind or biased? Justitia's susceptibility to anchoring effects in the courtroom based on given numerical representations. *Law and Policy*. 2006 no. 28. pp. 497-514
15. European Convention for the Protection of Human Rights and Fundamental Freedoms
16. Eysenck, M., W., and Keane, M. T., "Kognitív pszichológia" (Cognitive psychology), Nemzeti Tankönyvkiadó, Budapest, 1997
17. Festinger, L., "A kognitív disszonancia elmélete" (The Theory of Cognitive Dissonance), in Hunyady, Gy., ed. "Szociálpszichológia" (Social Psychology), Gondolat Könyvkiadó, Budapest, 1973. pp. 75-83.
18. Fiala, J., Francis, M. and Lewis, O. *Summaries of Mental Disability Cases Decided by the European Court of Human Rights*. prepared by the Mental Disability Advocacy Center (MDAC). 2007
19. Fishbein, M. "An Investigation of the Relationships Between Beliefs About an Object and the Attitudes Toward that Object", *Human Relations*, 16(3), 1963, pp. 233-239.

20. Fleck, Z., Krémer, F., Navratil, Sz., Uszkiewicz, E. “Technika vagy érték a jogállam? - A jogállami értékek átadása és az előítéletek csökkentése a jogászok és a rendőrtisztek képzésében. (“The rule of law – value or technique?” – Transferring values of rule of law and lessening prejudices **via training of law students and police officers.**) L’Harmattan Kiadó. Budapest. 2012
21. The Fundamental Law of Hungary 2011
22. Goodman-Delahunty, J. and Sporer, S., L. Unconscious influences in sentencing decisions: a research review of psychological sources of disparity. Australian Journal of Forensic Sciences. Vol. 42, No. 1. March 2010. pp. 19-36
23. Gurbai S., Jónás T., Kálozi M., és Kapronczay S. Magyarországi Civil szervezetek és személyek közös véleménye a Polgári Törvénykönyv tervezetének (Tervezet) a nagykorúak cselekvőképességét érintő V.-X. címéről. (Joint opinion of Hungarian NGOs and individuals about chapters V-X on the legal capacity of adults in the draft of the new Civil Code). TASZ. 2012
24. Heath, W., P., Grannemann, B., D., Peacock, M., A. How the defendant’s emotion level affects mock jurors’ decisions when presentation mode and evidence strength are varied. Journal of Applied Social Psychology. 2004. no. 34. pp. 624-664
25. Heider, F. The Psychology of Interpersonal Relations. Wiley. New York. 1958
26. Hewstone, M., Stroebe, W., Codol, J., Stephenson, G., M. ed. “Szociálpszichológia” (Introduction to Social Psychology), KJK., Budapest, 1995
27. Irwin, J., F. Hon. and Real, D., L. Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity. McGeorge Law Review, Volume 42, Issue 1, 2010, pp. 1-18
28. Kapardis, A. Psychology and Law: A Critical Introduction. 3<sup>rd</sup> ed. Cambridge University Press. 2010

29. Konecni, V., J., Ebbesen, E., E. eds. An analysis of the sentencing system. San Francisco: WH Freeman & Co., 1982.
30. Lawson, A. "The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?". *Syracuse Journal of International Law & Commerce*. Vol. 34. 2007. pp. 563-619
31. Lewis, O. and Roberts, H., "Liberty Denied. Human Rights Violations in Criminal Psychiatric Detention Reviews in Hungary.", A report prepared for the Mental Disability Advocacy Center, 2004
32. Lewis, O. Advancing Legal Capacity Jurisprudence. *European Human Rights Law Review*, 2011/6. pp. 700-714
33. Lewis, O. The expressive, educational and proactive roles of Human Rights: An analysis of the United Nations Convention on the Rights of Persons with Disabilities. In McSherry, B. and Waller, P. eds. *Rethinking Mental Health Laws*. 2010. pp. 97-128
34. Mental Disability Advocacy Center. *Guardianship and Human Rights in Hungary. Analysis of Law, Policy and Practice*, MDAC, 2007
35. Mental Disability Advocacy Center. *Supported Decision-Making: An Alternative to Guardianship*, MDAC, 2006
36. Mental Disability Advocacy Center. "Out of Sight". *Human Rights in Psychiatric Hospitals and Social Care Institutions in Croatia* by MDAC and SHINE, 2011
37. Newell, A. and Simon, H. *The Human Problem Solving*. Prentice-Hall, Englewood Cliffs, NJ. 1972
38. Nilsson, A. WHO GETS TO DECIDE? Right to legal capacity for persons with intellectual and psychosocial disabilities. Issue Paper of the Commissioner for Human Rights (2012)2, Strasbourg, 20 February 2012



39. Osgood, C. E., “Kognitív dinamika az emberi ügyek irányításában” (Cognitive dynamics in the Conduct of Human Affaires), in Hunyady, Gy., ed. “Szociálpszichológia” (Social Psychology), Gondolat Könyvkiadó, Budapest, 1973. pp. 84-115
40. Oswald M. E., Bienbeck, S., Hupfeld-Heinemann, J. eds. Social psychology of punishment of crime. Chichester (UK), Wiley-Blackwell, 2009
41. Peay, Jill, “Decisions and Dilemmas. Working with Mental Health Law”, Hart Publishing, Oxford, 2003
42. Perlin, Michael L., “The hidden prejudice: Mental disability on trial.” Washington DC.: American Psychological Association, 2000
43. Perlin, M., L. International Human Rights and Mental Disability Law: When the Silenced Are Heard. Oxford University Press. 2012
44. Perlin, Michael L., Birgben, A. and Gledhill, K., ‘The Witness Who Saw,/He Left Little Doubt’: A Comparative Consideration of Expert Testimony in Mental Disability Law Cases in Common and Civil Law Systems. Journal of Investigative Psychology and Offender Profiling. Vol. 6. 2009. pp. 59-88
45. Perlin, M., L., Kanter, A., S., Treuhart, M., P., Szeli, É., Gledhill, K. International Human Rights and Comparative Mental Disability Law. Carolina Academic Press. 2006
46. Polgári Törvénykönyv tervezetének V.-X. címe (draft version of the new Hungarian Civil Code. Chapters V-X.) (in effect from 1st of January 2014.) full text is available at: <http://www.kormany.hu/download/0/d7/70000/%C3%9Aj%20Polg%C3%A1ri%20T%C3%B6rv%C3%A9ny%C3%B6nyv%20-%20a%20Kodifik%C3%A1ci%C3%B3s%20F%5C%91bizotts%C3%A1g%20Javaslat%20-%20k%C3%B6zz%C3%A9t%C3%A9telre.pdf>
47. Posner, Eric A., “Law and Social Norms”, Harvard University Press, 2000
48. Posner, Richard, A., “How Judges Think”, Harvard University Press, 2008

49. Raine, J., W., Wilson, M., J. Conditional bail or bail with conditions? The use and effectiveness of bail conditions. Birmingham. Birmingham University School of Public Policy. 1994
50. Rowland, C., K. and Carp, R., A. Politics & Judgment in Federal District Courts. University Press of Kansas. 1996
51. Sajó, András, “Társadalmi-Jogi Változás” (Socio-Legal Change), Budapest, Akadémia Kiadó, 1988
52. Szőnyi, G., Füredi, J. eds. A pszichoterápia tankönyve. (The textbook of psychotherapy) Medicina Könyvkiadó. Budapest. 2000
53. Tajfel, H. The Roots of Prejudice: Cognitive Aspects. in Csepeli, Gy., ed. “Előítéletek és Csoportközi Viszonyok” (Prejudices and Inter-group Behaviour), Közgazdasági és Jogi Könyvkiadó, Budapest, 1980, pp. 40-69
54. Tversky, A. and Kahneman, D., “Judgment under Uncertainty: Heuristics and Biases”, Science, New Series, Vol.185, No. 4157, 27 September 1974, pp. 1124-1131
55. United Nations Committee on the Rights of Persons with Disabilities, Concluding Observations: Tunisia, Fifth session April 11-15, 2011
56. United Nations Convention on the Rights of Persons with Disabilities. full text available at: <http://www.un.org/disabilities/default.asp?id=150>
57. United Nations Universal Declaration of Human Rights. 1948.
58. Vago, Steven, “Law and Society”, Saint Louis University, Oakland Publishing, 1997
59. Wirthz, J., ed. Rendszerbe zárva. Hogyan kezeli az igazságügyi rendszer a nők és gyermekek elleni férfierőszak jelenségét ma Magyarországon. (Trapped in the System How does the legal system handle male violence against women and children in Hungary). NANE and Patent Foundations, Tűzhely Füzetek, 2009

60. Wrightsman, L., S. “Judicial Decision Making – Is Psychology Relevant?” Perspectives in Law and Psychology – Vol. 11. Kluwer Academic / Plenum Publisher, New York. 1999
61. Zigmond, A. Deprivation of liberty safeguards and the Mental Capacity Act. British Medical Journal. 2009. no.338:b1888
62. Zoltayné, P. Z. et al., “Döntéelmélet” (Decision-making theories), Alinea Kiadó, Budapest, 2002
63. Zweigert, C. and Puttfarken H-J. Statutory Interpretation – Civilian Style. Tulane Law Review. Vol. 44. 1970. pp. 705-719
64. 1959. évi IV. törvény a Polgári Törvénykönyvről 14§-21§ (1959 Act IV. about the Hungarian Civil Code. Sections 14-21). full text is available at: [http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=95900004.TV#lbj26param](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=95900004.TV#lbj26param)

#### **Cited cases:**

ECtHR:

65. *H.L. v. The United Kingdom* (Application no. 45508/99) ECtHR, 5 October 2004
66. *Alajos Kiss v. Hungary*, (Application no. 38832/06), ECtHR, decision 20 August 2010
67. *Reid (Hutchinson) v. The United Kingdom*, ECtHR, 50272/99, judgment 20 February 2003
68. *Shtukurov v. Russia*, (Application no. 44009/05) ECtHR, First Section decision 27 June 2008
69. *Stanev v. Bulgaria*, (Application no. 36760/06), ECtHR, Grand Chamber decision.17 January 2012
70. *Thynne v. The United Kingdom*, ECtHR, 11787/85, 11978/86 and 12009/86, judgment 25 October 1990

71. *Winterwerp v. the Netherlands*, (Application no. 6301/73), ECtHR, decided 24 October 1979

UK:

72. *CC and KK and STCC*, [2012] EWHC 2136 (COP), 26. July 2012

73. *Mrs Ann Clarke* [2012] EWHC 2256 (COP), 31 July 2012

74. *Mrs Ann Clarke* [2012] EWHC 2714 (COP), 9 October 2012

75. *A NHS TRUST and K and Another Foundation Trust* [2012] EWHC 2922 (COP), 15 October 2012

76. *Re SK* [2012] EWHC 1990 (COP), 9 July 2012

77. *XCC and AA and BB and CC and DD* [2012] EWHC 2183 (COP), 26 July 2012

Hungary:

78. App. No. 14.P.24.841/2008/54. Pest Megyei Bíróság (County Court of Pest), 15 June 2011

79. App. No. 5.Pf.21.946/2011/3. Fővárosi Ítéltábla (Appellate Court of Budapest), 14 February 2012

80. App. No. 11.P.20.174/2010/41. Jász-Nagykun-Szolnok Megyei Bíróság, (County Court of Jász-Nagykun-Szolnok), 1. December 2011

81. App. No. Pf.I.20.023/2012/4 Debreceni Ítéltábla (Appellate Court of Debrecen), 9 May 2012

82. App. No. 39.P.26.651/2008/30 Fővárosi Bíróság (Town Court of Budapest), 1 March 2011

83. App. No. 6.Pf.21.018/2011/8. Fővárosi Ítéltábla (Appellate Court of Budapest), 29 February 2012

84. App. No. 11.P.24.374/2010/20 Pest Megyei Bíróság (County Court of Pest), 25 May 2011

85. App. No. 1.Pf.21.528/2011/5. Fővárosi Ítéltábla (Appellate Court of Budapest), 17.

April 2012