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An empirical study of actions on custodianship in Hungary

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ABSTRACT

Our research on the operation of legal institutions related to the restriction of the legal capacity of adults (custodianship and supported decision-making) started in December 2019. Our present analysis of case law on custodianship and supported decision-making is based on cases published in the Collection of Court Decisions. The adoption of the new Hungarian Civil Code has clearly had a significant effect on the court decisions, as it made it compulsory to designate the categories of decisions to which a partial restriction on legal capacity applies. However, the change in regulation also implies a change of attitude that is considerably less apparent in the cases. In the context of international human rights expectations, any limitation of legal capacity should be applied as circumspectly as possible, and only in the most necessary cases. In the examined cases, the efforts of the Curia (the Hungarian Supreme Court) to reinforce this change of attitude in court practice may be detected but they are not extensive. At the same time, the spirit of the UN Convention on the Rights of Persons with Disabilities (CRPD) is not clearly reflected in court practice, and supported decision-making is not seen by courts as a real alternative to custodianship. Regarding the processes of the analyzed disputes, we found that the procedures in the published cases are relatively short, the higher courts in most cases upholding the decision of the lower courts, and that there is no legal or critical evaluation of any expert opinion. In a number of cases, the dominant function of custodianship is not the protection but the restriction of the rights of the given person and - against its declared goal - it serves to protect the interest of others. For example, property issues and the protection of the financial interests of family members are given priority in the published cases. In addition, there were several cases in which the authorities themselves sought to be 'protected' by limiting the capacity of the person to initiate official and judicial proceedings.

1. Introduction

Our research on the operation of legal institutions related to the restriction of the legal capacity of adults in Hungary started in December 2019. In addition to custodianship, we also consider supported decision-making to be a significant topic for research, as no comprehensive research has been conducted on it in Hungary since it was introduced in 2014. As for the operation of custodianship, apart from a small amount of macro-statistical data, we also have little empirical knowledge of the day-to-day operation of this legal institution.

We use the term 'custodianship' regarding our research about the Hungarian legal system because this is the official translation of this legal institution in Hungary, but this term includes the same substitute decision-making mechanism for adults with limited legal capacity that is known in the international literature as 'guardianship'.

In Hungary, the current civil law regulations declare two degrees of the legal institution of guardianship/custodianship system, which is accompanied by the restrictions of legal capacity: plenary and partially limited guardianship of the legal capacity. The introduction of supported decision-making in Hungary has opened a new way, an alternative which supports practicing of legal capacity by appointing a supporting person, so in these cases, there can be no restriction of rights. One can see at first sight that this regulation does not comply fully with the strict reading of the CRPD Article 12. But the main hypothesis of our

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research is that even this remains mostly black-letter law: supported decision-making has not become a living institution in the Hungarian legal practice yet.

In the course of our research, we prepare tripartite case studies based on narrative life story interviews with people who are either under custodianship or who participate in supported decision-making, and persons they can trust informally, either in everyday life or in making more serious decisions, as well as professional career story interviews with their custodians or professional supporters. The narrative interview research has only begun in August 2020, in response to the COVID-19 pandemic precautions.

In this study we undertake a review of publicly available information on custodianship. We briefly describe and evaluate the macro-statistical data already mentioned, and in addition, we analyse in detail case law regarding the restriction of legal capacity of adults in Hungary. In the next part we describe the methodology, main questions and hypothesis of our case law analysis. After that we will summarize the current knowledge on which our study is based: we review the international literature about supported and substitute decision-making systems and the CRPD, and describe the Hungarian situation in more detail based on domestic literature. Among the results we present our research findings about our main research questions.

2. Methodology and hypotheses of the research

The case law analysis presented in this paper is part of a more comprehensive research on the operation of legal institutions related to the restriction of the legal capacity of adults in Hungary. In addition to custodianship, we also consider supported decision-making to be a significant topic for research, as no comprehensive research has been conducted on it in Hungary since it was introduced in 2014. As for the operation of custodianship, apart from a small amount of macro-statistical data, we also have little empirical knowledge of the day-to-day operation of this legal institution. The main undertaking of the research is to get to know the living law regarding legal capacity restrictions, the everyday operation of custodianship and supported decision-making through tripartite sets of interviews. The rationale of this specific case law analysis is that judicial practice is the link between black-letter law and living law. Besides, supported decision-making in Hungary is a young law and its judicial practice remains under-researched.

Our case law analysis is based on a public database which is not complete therefore its structure obviously puts obstacles to the way of our research. But one cannot ignore that the lack of transparency is a notable characteristic of the Hungarian custodianship law. This database contains only the cases which reached the highest level of the Hungarian judiciary system while most of the custodianship cases end before first instance courts. The database is designed to inform the low level courts about the direction of judgement of the Supreme Court, satisfying public and scientific interest is just an additional benefit of its existence. So, our research is not directly about the complete Hungarian judicial practice on cases concerning the limitation of legal capacity of adults but rather about a specific reflection of this practice, a hand-picked set of cases which try to represent the desired judicial trend in this field.

In preparation for the research in the autumn of 2019, we reviewed the available statistical data on custodianship and supported decision-making procedures. The range of available official statistics was relatively narrow. The Hungarian Central Statistical Office collects data on the number of persons affected by custodianship, and certain reasons for placing an individual under custodianship. Data collected on supported decision-making was even more scarce, and official statistics on territorial distribution were difficult to obtain. Processing the data was also complicated, since data collections related to those placed under custodianship approach the issue from two different perspectives.

The collection of judicial statistics is fundamentally focused on the form of custodianship. However, the Hungarian Central Statistical Office focuses on institutional placement. Hence, very few conclusions regarding case law could be drawn from analysis of official statistical data. This situation is contrary to the Article 31 of the CRPD, which asserts that 'States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention'.

As a basis for our research, we performed an analysis of the judgments published in the Collection of Court Decisions (hereinafter: the CCD) in the spring of 2020 (April–May).

The database was created on 1 January 2006 in accordance with Act XC (2005) on the Electronic Freedom of Information. The aim of the regulation was to make the operation of the Hungarian judicial system more transparent by making the final decisions of the higher courts known. This serves the unity of the court decisions as well as allowing the unified judicial interpretation of the legislation to be made known to citizens seeking rights.

The judgments of the two upper levels of the four-tier Hungarian court system, that is, the final decisions of the regional courts of appeal and the Curia, appear primarily in the CCD. These are the judgments given in the Curia's special extraordinary appeal procedure, the so-called review procedure, aimed at eliminating any violations of the law committed by the lower courts, and to some extent standardising the jurisprudence. In addition, final judgments in actions relating to the review of administrative decisions that become final at first instance (administrative actions) are also publicised. The lower-level (district court, tribunal) judgments on which these final decisions are based also appear in the CCD. Based on the above legislation, it is clear that only judgments affected by appeal appear in the system, except judgments in administrative actions (given that, as a general rule, there is no appeal against them). Since the Act V (2013) on the Civil Code (hereinafter: the new Civil Code) and Act CXXX (2016) on Civil Procedure Rules (hereinafter: CPR) – similarly to the regulations before 2014/2017 – refers custodianship lawsuits to the jurisdiction of the district courts (prior to 1 January 2012, the city courts), the CCD includes only those custodianship lawsuits in which the Curia (or the Supreme Court, prior to 1 January 2012) makes a decision in a review procedure, which is a relatively narrow group of judgments, as will be explained in more detail later.

Moreover, not all of these appear in the database, since the rules, precisely because of the sensitivity of the decisions, allow anonymised publication to be dispensed with if the litigant objects. However, custodianship also appears in other ways in Hungarian judicial practice, primarily in disputes related to legal transactions, as limited capacity to act also represents a reason for the contract or the will being rendered invalid. The tribunals (until 31 December 2011, the county courts) have competence in the event of the value of the subject matter of the action reaching 5 million HUF, and, later, 30 million HUF in property law actions. As these first instance decisions may be appealed to the regional courts of appeal, these cases necessarily appear more widely in the CCD. Therefore, analysis of the CCD essentially does not show the entirety of Hungarian case law, rather only those cases leading to a review procedure, as well as property law cases – primarily inheritance cases – in which the subject value of the action was relatively high. We needed to consider all these factors when analysing and evaluating judgments.

We found the relevant judgments using a keyword search. Based on the keyword 'custodianship' we found 1, 162 results. Since there were judgments that appeared more than once in the database, we processed a total of 948 judgments. In the first phase, we created a database of these judgments, in which we recorded each case number, the court hearing the case, the subject matter of the case, and the case number of the related first and second instance judgments, where relevant. Based on the database, only those actions related to placement under custodianship, and review and termination of placement under custodianship were further examined, which accounted for 10.7% of all cases.

The subject matter of the other cases varied considerably, the most

significant other groups being: tort cases (3.2%), contract invalidity in general (15.6%), and specifically maintenance (5.1%), annuity (1.2%), inheritance (3%), sale (2.2%), gift (1.3%) and gift reclaim (1.4%), and invalidity of a will (10%). They accounted for more than half of all cases (53.7%), but a total of more than two hundred types of cases appeared. Fig. 1

The actual custodianship cases in the database – with two exceptions – all reached the Curia, which means the CCD also includes the first and second instance judgments of the given cases besides the review judgments. We compiled these judgments to give a total of 36 cases.

Based on the above mentioned analysis of the judgments in the CCD, one of our most important research questions concerned *the degree to which the new Civil Code has affected judicial practice*. This question implies a classic 'gap study': we wanted to get better understanding of the functioning of this relatively new legislation. To answer this, it was an important question whether cases were judged on the basis of Act IV (1959) on the Civil Code of the Republic of Hungary (hereinafter: the old Civil Code) or the new Civil Code. A similar fundamental consideration was the nature of each case (for instance, initiating, terminating or reviewing custodianship) and who initiated the proceedings.

Our next research question concerned *the degree to which court proceedings are ritualized or substantive*. There is a classic study in Hungarian legal sociology about legal cases concerning Roma people which introduced the concept of ritualized court proceedings (H. Szilágyi & Loss, 2012). The researchers used it to describe the phenomenon that if Roma people are concerned, no real legal argumentation unfolds before the court, the proceeding becomes an empty sequence of legally prescribed actions, a 'legal ritual'. This phenomenon is a legal reflection of the social vulnerability of Roma people in Hungarian society. We considered this concept useful in this case, because custodianship affects other extremely vulnerable groups in society, people with psychosocial and intellectual disabilities, or dementia, which entails the danger of ritualization.

This is a complex question, and in this study we only had limited tools to answer it. We have examined both quantitative and qualitative aspects of the cases to answer it. In terms of their quantitative aspects, we examined how long it took for the first and second instance and review decisions to be made, and the length of the substantive reasoning for each decision. We also considered the decisions each court made in the cases, and whether they differed from the lower court decisions. Another aspect of the study was how many forensic psychiatric experts were appointed by the courts in a given case, and whether the court found it necessary to hear any other experts if requested by the parties.

A softer, qualitative aspect of this problem was the extent to which the courts accept or critically evaluate psychiatric expert opinions. We noted whether the forensic expert only dealt with the psychiatric aspects

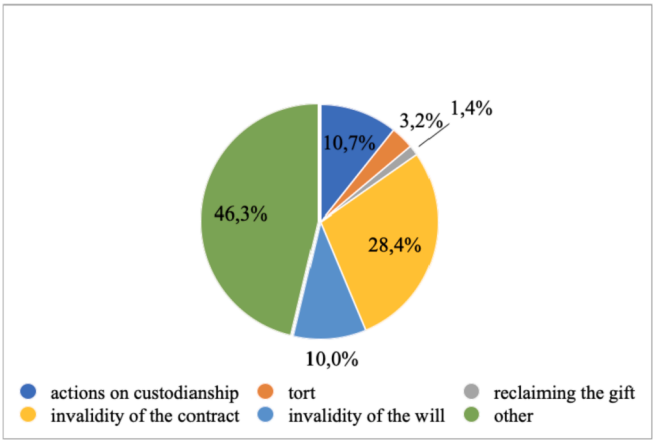

Fig. 1. Distribution of judgments in the CCD containing the term 'custodianship' by type of case.

of the case or also proposed to limit legal capacity in some aspects, which is already a matter of law, and therefore falls within the competence of the court. Similarly to the practice of other countries (Kapp, 2007, p. 12–13, 18–19), psychological concepts (such as mental illness and its effect on the ability required by individuals to attend to their own affairs) are incorporated in Hungarian law, yet there are no adequate guidelines for courts to evaluate the opinion of psychiatric experts (Fiala-Butora, 2019; Maléth, 2018). We also examined whether any mention was made of a need for institutional placement or psychiatric treatment in the cases.

In addition, we examined whether the affected persons claimed to have been seriously harmed during the proceedings, including, for example, psychiatric examinations being conducted forcefully or under pharmacological influence.

As a first step in a later, in-depth, qualitative study, we asked the members of the research team to summarize the story behind each case and evaluate the wording and style of the judgments, which included how analytical the texts seemed to be and whether they contained offensive terms with pejorative, negative connotations (such as emotional desolation, emotional colourlessness, or lack of self-esteem). As a second phase of the research, we plan to conduct a discursive analysis of these judgments later. The results of this research could be the starting points of that second phase.

Our fundamental question is how the institution of custodianship works in practice. During the processes of the judgments, we provided a number of aspects that were relevant in this regard. One of our main research questions was that of *whose interest would be protected by the institution of custodianship*. Our initial hypothesis in this regard was that in practice the institution of custodianship is not primarily used for its declared purpose, to protect the interests of the individual under custodianship, but for the protection of the interests or simple convenience of another party. One of our hypotheses was that often the purpose of preserving family property and inheritance is the main cause behind a decision to place an individual under custodianship. In these cases, prospective heirs initiate or support placement under custodianship in order to ensure that the prospective testator does not 'waste' family property. Our other hypothesis was that it is a common phenomenon to restrict the legal capacity of adults who constantly seek out authorities and official bodies with submissions, which the authorities consider harassment ('litigation madness'), and restrain them by initiating their placement under custodianship.

3. The guardianship system and how it has changed in the light of international literature

The roots of thinking about the capacity of adults, as well as the centuries/millennium-old 'solution', stem from a mostly restrictive approach that leads to the prevalence of guardianship systems worldwide which today is called substitute decision-making (Wood, 2005). In this part of the study we examine the CRPD regulation, especially Article 12 and how it is interpreted in the literature. After that we represent the Hungarian situation in detail.

3.1. CRPD

Substitute decision-making is incompatible with the approach and actual regulations of the CRPD. This is especially true with regard to Article 12, the clear 'key' of the Convention, which ensures the equal recognition of people with disabilities before the law, as well as these persons enjoying legal capacity on an equal basis with others in all aspects of life. According to Dhanda (2007), the full legal capacity emphasised in Article 12 also serves as a basis for interpretation of the additional rights formulated in the CRPD. At the same time, it is clear from the explanation provided by Kanter (2015) among others that this is the very article that, prior to the ratification of the CRPD, sparked the most heated debates: the interpretation and translation of the concept of

'legal capacity' divided the representatives of the states discussing it because of their differing legal systems. Despite reservations regarding the meaning of legal capacity and of the compromises reached, it can be said that Article 12 focuses on the model that assists and supports the practice of legal capacity. This modell replaces the custodianship system, because its smashing power presents issues that repeatedly occupy scientists representing a variety of fields. Article 12 is the most progressive, and at the same time, the most controversial article of the CRPD (Fiala-Butora, 2017; Lord & Stein, 2013) Many commentators consider it as a paradigm shift in the process of approaching legal capacity that requires significant changes in the existing guardian systems ((Lawson, 2007); Keys, 2009; Quinn & Arstein-Kerslake, 2012). Based on Article 12, some go even further, arguing that it is necessary to abolish all guardianship schemes, based on their practice of the legal capacity' limitation, and it requires the introduction of measures supporting the practice of legal capacity (Fiala-Butora, 2017; Minkowitz, 2007). Regarding Article 12, (Turnbull, 2019) calls the implementation process taking place in the countries ratifying the CRPD – palpably and very aptly – 'the emancipation from the Dead Hand of Paternalism'. It is not surprising that (Lawson, 2007) referred to guardianship as 'civil death', and persons subject to it as 'legally missing' (Quinn, 2010).

The UN Committee on the Rights of Persons with Disabilities in its General Comment No. 1. (2014) made it particularly clear that Article 12 rejects all forms of surrogate decision-making, and as such, every form of guardianship (UN Committee on the Rights of Persons with Disabilities, 2014). Based on this, guardianship cannot be considered as a measure that can assist a person with any disability in practicing their legal capacity. Therefore, the Commission's position is that any form of restricting legal capacity is a violation of the Convention, and only such forms of supporting the decision making of a person with disabilities can be accepted that does not limit their legal capacity (Fiala-Butora, 2019).

However, it is not at all clear, how far exactly the wording of Article 12 extends. Largely, two conflicting views have emerged in the legal literature about its limits, which differ mainly in the question of how it applies to persons with the most severe disabilities. (Fiala-Butora, 2019) names the two conflicting views the Absolutist and the Constricted Position, but of course not all authors represent these clear positions.

Hereinafter we invite the reader to peruse the literature related to what is implied in the CRPD and Article 12, which lies at the essence of our research.

According to Arstein-Kerslake & Flynn, 2016, and Arstein-Kerslake and Black (2020), the right to legal capacity means that every person, including those with disabilities, is considered as a decision-maker recognised on an equal basis with others, and that his or her decisions are also honoured in a way declared by law. Dhanda already suggested in 2007 that due to the discriminative nature of disenfranchisement under guardianship, it is necessary to have a universal paradigm of legal capacity (Dhanda, 2007).

As a legal alternative to guardianship, the CRPD introduced a construction assisting the practice of legal capacity of people living with certain disabilities (primarily an intellectual or cognitive disability), which has become mainly known as 'supported decision-making' (hereinafter SDM). SDM enables people living with disabilities to enjoy their rights as active players, that is, to make their own decisions about their own lives, through reasonable accommodation, while observing individual needs (Browning, Bigby, & Douglas, 2020; Donelly, 2019; Harding & Tasciouglu, 2018; Salzman, 2010).

Although certain researchers (Then, Carney, Bigby, & Douglas, 2018) attempted to draft the internationally known SDM models according to specific criteria, they also determined that as yet no uniform (legal) definition describing SDM has been accepted.

They cited a number of conceptual definitions as examples, and based on their references they specified that irrespective of the lack of a uniform definition, the legal essence of SDM is the following: *providing support for a concerned person who needs help in making his or her own decisions.*

Returning to the CRPD as the first international human rights catalogue of the 21st century, Kanter (2015) stated that although at first glance, it fundamentally includes rights declared in previously ratified human rights documents, it may still be considered a milestone as – precisely due to its recognition of legal capacity – it throws new light upon these rights.

At the same time, Kanter (2015), in her book, *The development of disability rights under international law: from charity to human rights,* which is considered compulsory reading for professionals in this field, emphasizes precisely the new human rights implied in the CRPD, such as living in a community and the right to support and accommodation, while also discussing the new interpretation of human rights that had also existed previously (such as liberty, security, integrity and access to justice). Turnbull, Beegle, and Stowe (2001) emphasize two fundamental concepts of disability policy as positive rights in connection with liberty: the autonomy of people with disabilities and their empowerment to participate in decision-making processes (Shogren et al., 2019). At the same time, regarding with the latter, it is worth referring to Harding's relationship focused theory ((Harding et al., 2017)), which will be expounded later.

Kanter (2015) also stresses that the CRPD is a convention of crucial significance, not only for persons with disabilities, but also in terms of the development of international human rights.

Although the CRPD does not define the meaning of disability, but rather opts for an illustrative list and draws attention specifically to the rights that can be practised by the concerned circle, this is probably also why it is the first international document in which, behind the concept of 'a person with a disability', an active, equal citizen is described, who can and is able to undertake various social roles (Kanter, 2015). Thus, as also stated by Dhanda (2008) and Quinn (2009), the Convention shifts from the previously defining priority of care to the supremacy of rights with respect to the approach to disability and people with disabilities.

At the same time, taking the above into consideration, Article 12 also concerns the fundamental question whom we regard as human beings. As Quinn (2010) also asserts, there can be no doubt in the case of people with disabilities regarding their humanness. Since one of the reservations about the Article was that it is impossible or difficult to reconcile the needs of people with intensive support needs and their ability to exercise various rights, Quinn (2010) considers Point 3 of Article 12 the key to the shift in paradigm. According to this Point, 'States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity', which is of special significance as it can be reasonably assumed and expected regarding the necessary measure to be taken by the states that it should also be able to extend the possibilities for empowerment to the most extreme cases. Confirming the above, Gooding (2013) in accordance with the above mentioned 'Absolutist Position' also emphasizes that even if a person requires maximum support, it must be ensured that this person can fully exercise his or her legal capacity.

Following the above, Article 12 seems to break the hegemony of traditionally 'ensuring' legal capacity with various custodianship systems once and for all, in addition to which certain regional international documents, such as the Recommendation of the Committee of Ministers of the Council of Europe (1999), and the Yokohama Declaration on Adult Guardianship (2010) – this latter also being in accordance with the recommendations of the CRPD Committee – also emphasize the principles of equal recognition before the law. It is worth mentioning that the Yokohama Declaration additionally calls for the exercise of self-directed decision-making options, rather than the institution of traditional guardianship, as well as including so-called substituted proxy decision-making in the latter. At the same time, according to this Declaration, the substitute decision-making systems are still consistent with the principles of SDM.

It is stated in the Declaration that guardianship law should provide primary opportunity for consideration, and give significance to individual will and choices, as well as the wishes of the individual, and this

principle should be implemented in such a way that it supports individual self-determination, and prevents harm to the person (Dinerstein, Grewal, & Martinis, 2016) and Shogren et al., 2019).

At the same time, in 2009 Dhanda – contrary to what is implied in the Yokohama Declaration published somewhat later – stated her position, according to which the prolongation of the institution of guardianship, even if it exists alongside the practice of SDM, would contradict the approach and principles of the full text of the CRPD. Since one of the main principles of the CRPD is one of respect for the innate dignity and autonomy of the individual, consequently – according to Dhanda (2009) – every substitute decision-making system contradicts Article 12. Therefore, Dhanda's views are definitely in accordance with the UN Committee on CRDP's General Comment No. 1 (2014) – Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014.

In recent years, Dhanda (2009) and several other authors have addressed the characteristics of substitute decision-making systems, and likewise those of declarations of incapacity, and they have thus described the discriminative nature of legal systems, which in this respect have primarily narrowed the circle of people with intellectual and psychosocial disabilities (Bach, 2007; Quinn, 2010). In relation to guardianship, several authors have raised the topic of the deficit-based model, while on the other hand SDM was characterized as a strength-based approach (Shogren et al., 2019).

There is relatively extensive literature on the meaning of the concepts of capacity and competency from their field of the concept of capacity (Appelbaum, Mirkin, & Bateman, 1981; Winick, 1995; Glass, 1997; Verma & Silberfield, 1997; Hale, 1997; Kapp, 2007; Grisso, 2003; Moye & Marson, 2007; Bach & Kerzer, 2010). According to Jakab (2011), research on capacity and how it is measured serve as an important base from which to understand the institution of SDM. The difference between cognitive and non-cognitive capacities has relevance with regard to decision-making capacity (Wilber & Reynolds, 1995), as well as to the theory of full legal capacity.

According to Then et al. (2018), the diverging aspects – those for the parallel existence of substitute decision-making and SDM, and those for the full elimination of substitute decision-making – mostly concern the conceptual difference of 'capacity': *in one version, SDM is a spectrum of decision-making alternatives* that co-exist with substitute decision-making mechanisms applied as a final solution, *in which the legal procedure itself determines which decision-making method may be suitable. The other approach considers SDM as a full shift of paradigm*, a solution that entirely takes the place of substitute decision-making models, and not depriving the affected person of his or her legal capacity to act. This latter is also coinciding with the CRPD Committee's General Comment No. 1.

Although it cannot be said that SDM is not, in general, legally recognised worldwide, it is becoming increasingly accepted, and is, for example, typical in various provinces and territories of Canada, even if to varying degrees, as well as in Ireland, in certain states of the USA, in South-American countries such as Peru, Argentina, Costa Rica or Columbia, in Europe, including Eastern European countries such as Croatia, Latvia and Hungary (Then et al., 2018), and in certain federal states of Australia.

The practice of legal capacity and Article 12 are widely discussed in the context of disability laws by the following; Dhanda, 2007; Lewis, 2010; Quinn, 2010; Carney, 2012; Dinerstein, 2012; Gooding, 2015; Kanter, 2015; Arstein-Kerslake, 2016; Szmukler, 2019.

Several research studies on SDM focus on the experience of specific groups of affected people: the decision-making of people with traumatic brain surgery is addressed by Harding & Tasciouglu, 2018; Knox, Douglas, & M., & Bigby C., 2015; that of people with dementia by Fetherstonhaugh, Tarzia, Bauer, Nay, & Beattie, 2016; Sinclair et al., 2018; that of people with a disability with high support needs by Watson, 2016; Watson, Voss, & Bloomer, 2019; in respect to family members the research of Sinclair et al., 2018 is conclusive, while in respect to people working in services supporting individuals with disabilities that of Harding & Tasciouglu, 2018, and Bigby, Whiteside, & Douglas, 2017 is conclusive.

In their 2019 research study, Shogren et al. identified several contextual and environmental factors that shape the decision-making process for the people concerned, such as experience of decision-making, emotions, the characteristics of the given disability, access to information, the complexity of the decision, the relationship with service providers, the decision-making situations and the attitude of the family with regard to the way of decision-making (Shogren et al., 2019).

Harding, Fletcher, and Beasley (2017) takes up the challenge of exploring the conceptual links between care, relationality and supported decision-making of people with cognitive disabilities. Harding et al. (2017) tries to bring into focus that different relationality of care (formal and informal, personal and professional), with the social and legal norms, shapes the everyday experiences of people with cognitive disabilities.

Harding's theory (2017) is verified by numerous empirical studies (Nunnelley, 2015; Wallace, 2012), saying that the personal support network serves as a very rich basis during the supported decision-making. The latter mentioned research's narrations show that with the supported decision-making, stakeholders are more involved in the community as their network of supporters is being expanded, and finally, supported decision-making was found to be a viable, quality alternative for those who were under guardianship previously (Sándor & Katona, 2021).

It is also worth mentioning that the right of legal capacity is also of high priority in the field of therapeutic jurisprudence, the legal trend of which has rapidly gained importance in the past thirty years, according to Perlin (2019). The right to legal capacity is fundamental according to therapeutic jurisprudence, due to the close connection between individual autonomy and well-being, considering that therapeutic goals may also be jeopardised if the concerned individual cannot make decisions about his or her own life, or even about the form and method of his or her rehabilitation (Winick, 1992, 1997). Wexler (2000) sees it as a criticism of more recent literature on therapeutic jurisprudence that the fundamental commitment to individual autonomy is missing. It has been suggested that the rift between the right to legal capacity and therapeutic jurisprudence may originate from the distancing of the latter from critical disability theory. According to Siebers (2008), critical disability theory emphasizes the importance of departing from 'therapy', as the word 'therapy' suggests that the disability needs to be cured. It criticizes the reliability of the professional judgement of the given therapeutic method, which in many cases may supersede the will or wishes of the concerned persons. The person's wishes, however, are important as it is he or she who can control the therapeutic procedure themselves, including the aim of the therapy, which may be of a curative nature or, for example, 'intervention' to combat social obstacles (Shakespeare, 2006). In the interpretation of the CRPD Committee, the emphasis on autonomy requires respect and recognition with regard to the persons' legal capacity, including the right to individual decision-making regarding therapy. Although these objections were worded by schools of critical disability studies, with the word 'therapy' being applied primarily in the context of health care, according to Arstein-Kerslake and Black (2020), it is debatable whether the critical judgement of something as being 'therapeutic' may equally be valid for a legal procedure, as therapeutic jurisprudence also belongs to this area(Winick and Wexler, 2003).

Owing to the recognition of the CRPD and the SDM implementation processes taking place in the world, and based on the research of (Then et al., 2018) – conducted in the milieu of certain Law Reform Agencies – it may, as we have already indicated, be determined that the following legal models exist based on the degree to which SDM is implemented:

1. Limited recognition in principles
2. Partial legal implementation
3. Complete legal scheme

3.2. Position in Hungary

In light of the above classification, it is clear, regarding the effective Hungarian regulatory framework of legal capacity, that although two laws were passed in 2013 in Hungary on the implementation of the SDM-model (the new Civil Code and Act CLV (2013) on Supported Decision-Making), with both coming into force in 2014, due to various codification reasons and in light of the specific legislative environment – considering the situation outlined in the research of (Then et al., 2018) – *we are in the phase of the partial legal implementation of these laws, and what is more, this implementation is in its infancy.*

In the international literature review chapter (3.1.) of our article, we use the term 'guardianship' that is well-known in the countries that have ratified the CRPD, and even beyond, which is, in fact, also fully interchangeable with the term 'custodianship'. We use the term 'custodianship' in the section about the findings of our research of the Hungarian legal system according to the official translation of this legal institution in Hungary. This term includes the same substitute decision-making mechanism for adults with limited legal capacity that is known in the international literature as 'guardianship'. The usage of the Hungarian terminology was strongly influenced by the difference between the cura (tutela) and the custodia in the Roman law, and in the Hungarian law the concept of guardianship, unlike the original common law usage, was rather used for the concept of cura (tutela), based on the Roman legal traditions. In Hungary, the current civil law regulations declare two degrees of the legal institution of guardianship/custodianship system, which is accompanied by the restrictions of legal capacity: plenary and partially limited guardianship of the legal capacity. The introduction of supported decision making in Hungary — on the level of regulation — has opened a new way, an alternative, which supports practicing of legal capacity by appointing a supporting person, so in these cases, there can be no restriction of rights.

In Hungary the SDM-model is considered – in light of the effective regulation – specifically as an alternative to appointing a custodian. Since SDM is not restricting, it may offer institutionalised substitute to the appointment of the custodian. But the responsibility of using this new legal instrument (meaning, on an individual level, the responsibility of correctly assessing decisinon making ability, and on the general level of legal application, calling for transformation of the system) is mostly entrusted to the courts. In Hungary the judges are not in an institutional position to fulfill this potential which is reflected by statistical data (Fiala-Butora, 2019; Gulya & Hoffman, 2019). *Therefore, judges presiding over custodianship lawsuits would play an outstanding and markedly decisive role in the transformation of thinking about the concept of legal capacity.* Thus, in Hungary – due to the reduced existence of insight as a decisive 'standard' and through naming and applying the central consideration criterion as a law – it is primarily a legal procedure (that of custodianship lawsuits and their outcome) that continues to determine which decision-making method may be suitable for the concerned individual.

At the same time, while assessing a given person's decision-making capacity, the individual judges attitudes, are influenced by several factors: their former experience, assumptions (perhaps prejudices), and attitudes towards the topic are not irrelevant, the quality and quantity of their communication with the concerned individual is also decisive in their approach to shaping the final judgement. In addition to this, custodianship lawsuits are of primary significance among actions concerning personal status, and besides considering the so-called interest of the individual (in these cases, the rights of persons with a disability) a priority, to be specially protected, the judges should have special expertise in the field of augmentative and alternative modes, means and formats of communication, including accessible information and communication technology.

The fact that Act CLV (2013) on Supported Decision-Making includes several provisions and emphasizes regulatory points, which may include the above described recognition of SDM at a so-called full legal framework level, is not contradictory to the above.

In Hungary, SDM continues to be only one of various possible decision-making alternatives, and in the light of the available referred statistical data, the weakest of those alternatives (Gulya & Hoffman, 2019). SDM in Hungary – looking at the entire spectrum of the effective legal capacity regulation – co-exists as a perforce born step-child with substitute decision-making mechanisms. Both of them can be found in the new Civil Code, but in the practice the possibility of SDM not consistently weighed in every case, although on a theoretical level, custodianship would be only applicable as a so-called final solution, according to the principle of necessity and proportionality. Consequently – even if the concerned person can directly turn to the court of custodians in order to draw on the SDM service, and may request the appointment of a supporting person – for several reasons a civil action (some custodianship or guardianship lawsuit) according to CPR predominantly and decisively continues to determine which decision-making method may be suitable for the given person.

According to Könczei (2019), "if we pay attention well, here (and not only in Hungary, according to the authors) – in connection with supported decision-making – a philosophical vicious circle is outlined in front of our eyes that is closed from each direction, and which is made up of the following: 'you look from there and I look from here, and we don't get through". However, several kinds of tools can be used to confront this vicious circle. Könczei considers the method stemming from the main idea of supported decision-making to be the method most suitable for solving this 'vicious circle': a comparative analysis of the empirical narrative, including the narratives of the concerned people and their own groups. For this, it will be also necessary for the personal experiences to be incorporated into evidence-based practice, and not remain merely objectives, for which initiatives exist.

4. Results

Our research questions were as follows: firstly we examined the impact of the recodification of the Civil Code on judicial practice. Our most comprehensive, most complex question was how substantive or ritualized the issues related to custodianship were. Finally, we examined whether the declared and real purpose of placing under custodianship corresponded. Our main findings related to these research questions are described as follows.

4.1. The effect of the recodification of the Ccivil Ccode on judicial practice

An important issue in the codification of the new Civil Code was how to integrate the relevant requirements of the CRPD, ratified in 2007, into the renewable regulation of legal capacity. Article 12 of the CRPD addresses the issue of equal recognition before the law and states that States Parties shall recognize that persons with disabilities should enjoy legal capacity on an equal basis with others in all aspects of life, and that States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. This wording of the CRPD is often interpreted as a shift of paradigm: it becomes necessary to remove the legal institutions of substitute decision-making and to introduce supported decision-making.

Act CXX of 2009 on the Civil Code (hereinafter: the Civil Code (2009)), which finally did not enter into force, would have abolished the possibility of placement under general custodianship in the Hungarian Republic, in accordance with the CRPD. If someone lacked the ability to take care of their own affairs, the Civil Code (2009) would have introduced or maintained the following three legal institutions: the prior judicial act, supported decision-making and custodianship that partially limits capacity. With these legal tools, it would have introduced a more differentiated system, which also included less restrictive solutions.

The Civil Code (2009) was approved by Parliament, but it did not enter into force, following the decision of the Constitutional Court, so

the recodification process continued. The new Civil Code, which finally came into force, retained the legal institution of the prior judicial act and supported decision-making, but the structure and content of the regulation differ significantly from the Civil Code (2009). The new Civil Code still considers substitute decision-making as a primary tool in the field of 'assistance' for adults with limited ability to take care of their own affairs. Custodianship fully limiting capacity to act is a last resort, but it still exists as a possible option (Fiala-Butora, 2019, p. 9)(Kiss, 2018) (Hoffman & Könczei, 2010). Once this has all been settled in the new Civil Code, it contains some basic rules for supported decision-making and finally provides for the possibility of a prior judicial act. Overall, the regulation of the new Civil Code remains restrictive. The whole structure of the regulation suggests that the most important legal measure to tackle these issues is that of surrogate decision-making. This is further strengthened by the central importance of the concept of limited capacity to act, as well as the resulting examination of the individual being of sound mind, without a clear legal definition of what a sound mind is.

In the autumn of 2012, the Hungarian national report of the CRPD was revised. At that time, the CRPD Committee explained that, as is clear from the wording of the Convention, the national rules in conformity with the Convention would ensure that every person has a say and final decision-making power over the decisions that determine his or her life. Therefore, substitute decision-making mechanisms, that is, partial or total restrictions on the capacity to act, are incompatible with the Convention (Gurbai, 2012).

With regard to the above, an important question for our study was how the shift of paradigm required by the Convention, which the new Civil Code was able to transpose into Hungarian law only with some restraint, would appear in judicial practice.

The new Civil Code had a significant impact on case law in at least one way. In cases in which the court partially restricted the legal capacity of the person concerned, it had to identify the categories of cases to which the restriction applied. However, in half the cases decided under the new Civil Code, the court identified so many categories of cases that it could almost be considered a general restriction. There was only one case in which the Curia completely overruled the first instance decision in the review decision, and justified this, at least in part, by compliance with the CRPD. In paragraphs 29 and 30 of the judgement, the court clearly separated the assessment of the expert's opinion from the decision on the issue of legal capacity:

> The expert opinion attests the litigant's mental disorder as evidence, and it is the task of the court to decide on the scope of the litigant's capacity to act independently in his own case, which may involve a necessary and proportionate restriction of personal autonomy. The court thus assesses the administrative capacity of the person concerned and the need for legal restriction together with other facts of the case. Based on the expert opinion, the hospital documentation and the personal interview conducted by the court, it can be clearly stated that the litigant understands the questions addressed to him, gives adequate answers, is aware of his circumstances, and is informed about the issue concerning the right to vote. He is able to recognize his own interests in money management, his addiction, and his daily care, in addition to which he has determined that he needs help, which he also uses. [...] (Judgement No. Pfv.II.20.198/2019/7.)

The final conclusion of the Curia was that fully limiting custodianship in this case did not comply with the principles of necessity and proportionality, but it stated in paragraph 39 of the judgement that 'there is no legal impediment to the applicant bring an action for custodianship of the litigant in respect of certain specific categories of cases'.

Supported decision-making usually does not appear as a realistic alternative to surrogate decision-making in court practice. In one case, the possibility of appointing a supporter was raised as a solution to the situation of the person concerned. In this case, the court rejected this argument:

> The control and provision of regular medication is not considered to be one of the possible tasks of the supporter. The stable condition of the applicant's mental well-being is based on regular medication, which is hampered by a lack of acknowledgement of mental illness. Due to the lack of acknowledgement of the mental illness, the protection of the plaintiff's rights would not be ensured by the supported decision-making, due to its voluntary nature, so the appellate court made a correct decision when the plaintiff was placed under custodianship regarding decisions about health care, and it initiated the appointment of a supporter who can help the plaintiff in other categories of cases such as property issues, the administration of official procedures and the choice of residence (provided that the plaintiff agrees). (Judgement No. Pfv.II.21.953/2014/5.)

Overall, in the published cases closed on the basis of the new Civil Code, there is an intention to suppress the tendency of general limitation and restrict limitation to more thoughtfully selected categories of cases. In the case presented above, the Curia has made visible efforts to orient the courts in this direction, to encourage a legal, substantive evaluation of the expert opinion, to separate legal issues from psychiatric evaluation, and to ensure that courts only limit self-determination when it is inevitable, based on the facts of the case, that is, in the most necessary circumstances.

However, while it is emphatically stated in this Curia judgement that there is no room for judicial automation based on expert opinion, we have frequently encountered cases in which a forensic psychiatric expert has proposed case categories, according to which the court should limit legal capacity, and besides considering all the evidence available, the court has accepted this proposal. A typical example is described as follows:

> According to the the opinion of the expert, due to the litigant's lack of sound mind, incipient mental decline and overall state of mind, he lacks the ability required to take care of his own affairs in those cases related to the right of disposal over property, including movable property, real estate and matrimonial property, to make decisions related to maintenance obligations, to make a housing declaration (concluding or terminating a tenancy contract) and the exercise of rights related to health care, therefore, according to the expert, placing him under the custodianship of legal capacity in these categories of cases is medically justified and recommended. [...] [The court, according to the expert opinion] places the litigant under partially limiting custodianship in the following respects: the right of disposal over property, including movable property, real estate and matrimonial property, to make decisions related to maintenance obligations, to make a housing declaration (concluding or terminating a tenancy contract) and the exercise of rights related to health care. (Judgement No. 4.P.20.746/2007/39.)

Thus, it is not yet clear from the examined cases whether the spirit of the CRPD would permeate judicial decisions, the shift in paradigm mentioned above did not appear. Although the Convention is mentioned by the courts in four cases, in no single case did it result in a rejection of the surrogate decision-making solution.

4.2. Do court proceedings provide a substantive remedy in matters of custodianship?

Our next research question concerned the degree to which court proceedings were ritualized in legal capacity-related cases. The following criteria were used to assess this: the length of the procedures, the length of the substantive reasoning of the judgments, and the

agreement between the courts of different levels. However, perhaps the most important data in judging this issue is not that concerning trends in the published cases, but the insignificant proportion of cases that reach the Curia.

As previously mentioned, only thirty-six cases have been published in the CCD since 2006. This means approximately three cases per year. Unfortunately, there is no exact data on how many custodianship cases go to domestic courts in a year, but we can gauge this number as follows. Between 2007 and 2017, the number of people placed under custodianship increased by more than 6, 000 so the yearly average is 600 cases per year (Hoffman, Gulya, & Tőkey, 2020). Fig. 2

However, while assessing the number of custodianship actions we must also take into account the deaths of persons under custodianship. According to the Hungarian Central Statistical Office data, the number of deaths per 1, 000 people in Hungary was around 13 during the studied period. Considering their age and health status, the mortality rate among persons under custodianship should be at least as high as in the entire Hungarian population, and their number was consistently over 50, 000, so we can expect more than 600 to die each year. If we allow for 600 people under custodianship to die every year, and add it to the ten-year average increase of 600 more people living under custodianship every year, we arrive at the conclusion that more than 1, 200 people are placed under custodianship each year. Thus, the number of actions ending in custodianship alone is in the order of thousands per year, and by implication, the total number of all custodianship-related actions per year is even higher, including cases where an action for custodianship is dismissed, actions for termination of custody, and mandatory reviews. Thus, from the fact that on average only three cases out of thousands of lawsuits per year appear in the CCD, we can conclude that there is a negligible number of appeals.

It can also be seen from the cases that we have examined that often these appeals do not constitute a real or substantive remedy, as in practice the second instance 'disappears'. In twenty-nine cases, the decisions made on appeal upheld the judgement of the court of first instance in its entirety, which constitutes more than 80% of the published cases. Fig. 3

However, in the remaining seven cases, only twice did the appellate court change the first instance decision in such a way that it resulted in a greater limitation of legal capacity. This trend is not reversed in review proceedings either, with the Curia (or the Supreme Court) leaving the decision of the appellate court in its entirety in thirty-one cases. Two cases were not reviewed, so these cases represent 91% of all published

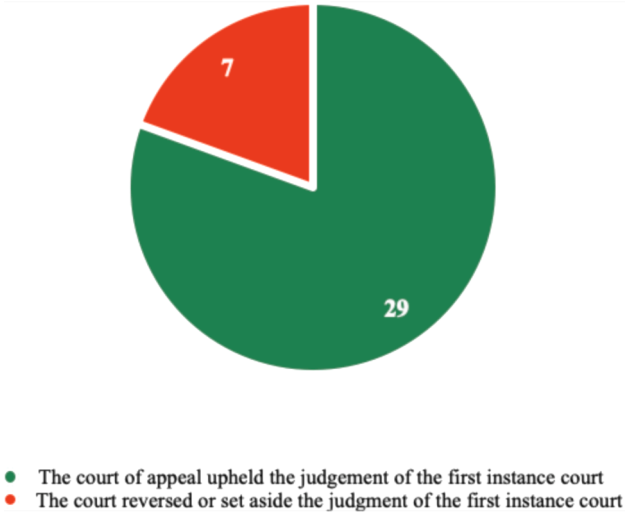

Fig. 3. Appellate Court Decisions in Custodianship Cases in CCD (Edited by the authors).

review decisions. In the remaining three cases, the Curia, without exception, reached a decision which resulted in a lesser limitation of the person's capacity to act than in the second instance decision.

The length of the proceedings also supported this hypothesis: while first instance judgments were delivered in only seven cases in the year the action was brought, an average of 6.5 months was sufficient to reach a second instance decision in published cases. By comparison, review decisions were made in an average of one year.

Another aspect was the length of the text of the substantive reasoning of the judgement. The text of the reasoning for first instance decisions averaged 13, 884 characters, while that for second instance decisions was 5, 675, meaning that the reasoning for first instance decisions was 2.4 times longer on average. The substantive reasoning for the review decisions fell between the two: an average of 8, 104 characters. Fig. 4

Another important aspect is the issue of expert judgement. In 72% of the published cases we examined (twenty-six cases), the courts fully accepted the opinion of the (mostly) single forensic psychiatric expert, and in most cases the need for the opinion of an additional forensic expert did not arise. Fig. 5

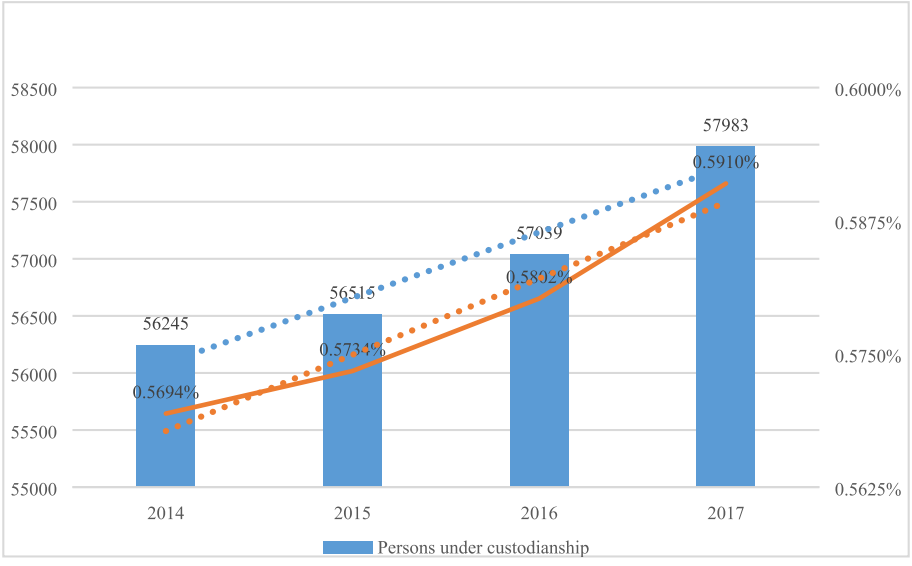

Fig. 2. Change in the number of persons under custodianship in Hungary between 2014 and 2017 (Edited by the authors. Source: Hungarian Central Statistical Office).

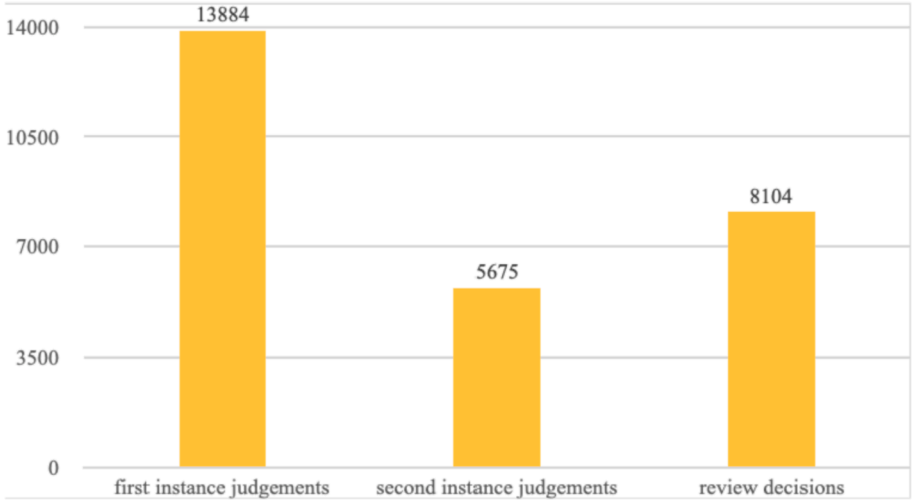

Fig. 4. Length of substantive reasoning for court judgments (in characters, including spaces).

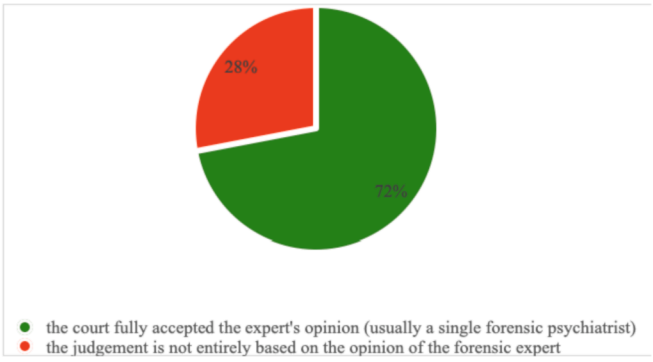

Fig. 5. Consideration of forensic expert opinion in cases published in the CCD.

Where this need arose, the appointment of additional experts was initiated in 27% of cases by the parties, but was rejected by the trial court. In many cases, this phenomenon manifested itself in the use of the term 'clear expert opinion'. In the other cases, at least one level of the judicial system differed from the expert opinion or stated that the medical expert opinion of the mental state of the individual concerned was not in itself decisive in the case. One of the clearest formulations of this was given by the Curia in its decision cited earlier.

It can be concluded that these actions are comparatively brief, especially when the weight of the limitation is also taken into account. Naturally, we do not argue for the extension of proceedings, but taking into account other aspects, the picture emerges that in most proceedings no substantive dispute arises, in many cases the higher courts uphold the judgement of the lower court in its entirety, and in the vast majority of cases - as exemplified by the passage cited above, there is no legal, critical assessment of the expert's opinion. This all serves to illustrate an oiled system that is not constrained by the human rights considerations intrinsic to the CRPD. In the remaining part of our research, we will attempt to examine the extent to which this system serves the protection of the rights of those concerned by other methods.

4.3. *Whose interests are served by ordering or maintaining custodianship?*

The supposed goal of custodianship is the *protection of the legal interests of the persons concerned.* If a person with passive legal capacity does not have, or only has in part, the ability to deal with their own affairs, then the deficit in their capacities has been filled by an external person, that is, by the custodian (Fiala-Butora, 2019; Maléth, 2018). This *protective nature* of the custodianship is emphasised by the supporter of the use of that legal institution (Kőrös, 2009). There is another approach to the nature of custodianship, that of the fundamental human rights approach, which emphasizes the restrictive nature of custodianship. External persons, namely the custodians, are responsible for making the most important decisions concerning the persons under custodianship, thus the personal autonomy of the latter is significantly restricted (Fiala, 2009).

The restrictive nature of custodianship can be observed in publicised judgments. Property issues play a very significant role in public judgments, especially in issues of inheritance and maintenance. (As we have mentioned earlier, this is partially related to the regulations on the publicity of judgments in Hungary.) In these cases, the major issue of the procedures is the validity of wills, inheritance contracts, maintenance contracts, and life annuity contracts, since the testator's or contractor's ability to act has been challenged – mainly by the claimant. Several procedures on custodianship have served as tools for smoothing conflicts between the given person (mainly the litigant) and their environment. This issue is significant in those procedures that are based on the 'litigation madness' of the litigants. These issues represent a significant share: 11.1% of the publicised judgments on ordering and maintaining custodianship have been related to 'litigation madness'. In these cases, one of the major arguments of the claimant was the lack of 'disease awareness' on the part of the litigant, hence the passive legal capacity of the litigants was mainly restricted in decisions concerning health issues. The justifications of these judgments stated that the litigants refused those therapies by which their health status could be improved. The argumentation of the justifications was based on the statements of the forensic experts (mainly psychiatrists) in which the litigant was diagnosed with a paranoid personality disorder. These cases were based on conflicts between the litigants and the authorities, the courts, the public prosecutors and other persons in contact with the litigants. To provide these therapies for the litigants, the restriction of the independent decision of these persons – the custodianship – was ordered by the courts. The judicial practice of the Hungarian courts is consistent, that the 'high number of the litigations started by the litigant is not enough (on its own) to state the abnormal tendency to litigate, the judicial examination of the former litigations and other documents is expected.' The justifications of the courts are mainly based on a *paternalistic approach*: the litigants shall be protected by ordering custodianship against their negative actions, which can harm their interest, as significant and unnecessary financial burden on the litigant has been involved by the initiating of unfounded litigations.

In these cases – which were based on 'litigation madness' – ordering custodianship was interpreted by the litigants as a restriction of their

rights (and not as an act of protection), so they filed appeals. Extraordinary appeals (review procedures in the Curia) were also filed by the litigants. These elements of the procedure can impact the high share (more than 10%) of the procedures based on 'litigation madness' among the publicised custodianship judgments. However, there is a possibility that the share of these actions is lower among the first instance (district) court judgments.

Property interests can also be observed in custodianship lawsuits. In several cases the preservation of family property also appeared as an issue, but in the practice of the Curia property issues do not have a higher share of actions on custodianship, rather, they play a more significant role in contractual and testamentary disputes that are related to custodianship and to the ability to act of the persons concerned. However, 77.7% of publicised custodianship cases (twenty-eight of thirty-six cases) are related – at least partly – to property issues. In twelve of these twenty-eight cases (one-third of all cases) the protection or the improvement of the protection of the property of the litigant is emphasised by the courts. The harm to their property interests – caused by custodianship – was raised up as an important issue by the litigants of the procedures on ordering custodianship or the persons who are under custodianship. In eight cases (22.2% of the cases) they stated that they were 'turned out' of their possessions by the custodianship or the temporary custodianship (or, in their view, the procedure was aimed at achieving this). In three cases (8.33% of the cases) the litigants and the persons under custodianship requested that the action be dismissed (or the termination of the custodianship should be ordered by the court) in order to keep their property for their own purposes. These issues also arose when the persons concerned did not possess significant property. In five cases (13.9% of the cases) the justification for ordering custodianship was cited as the defense of the incomes of the litigant (or the person under custodianship) (Fig. 6).

The *institutional interest*, that of appropriate care for persons who are in the care of a residential social care institution, appeared in the judgments, but only as a minor issue. The exercise of institutional power, the need for residential care as one of the reasons for ordering or maintaining custodianship, can be observed in seven cases (19.7% of the cases). The reason for this relatively modest significance can be attributed to the regulation on the publication of the judgments. Since the number of the appeals is relatively low in the field of custodianship litigation, the practice of the Hungarian higher courts (the Court of Appeals and the Curia) diverges in part from the practice of the first instance (district) courts.

It can be stated that the protection of society, the communities and the interests of the authorities and public bodies are given significant emphasis – partly directly, partly indirectly – *by the judgments*, rather than consideration of the protection of the interests of persons with an intellectual or psychosocial disability. This can be observed in the previous research studies conducted by Verdes and Tóth: an important issue of these procedures is to serve the interests of the welfare system (Verdes & Tóth, 2010).

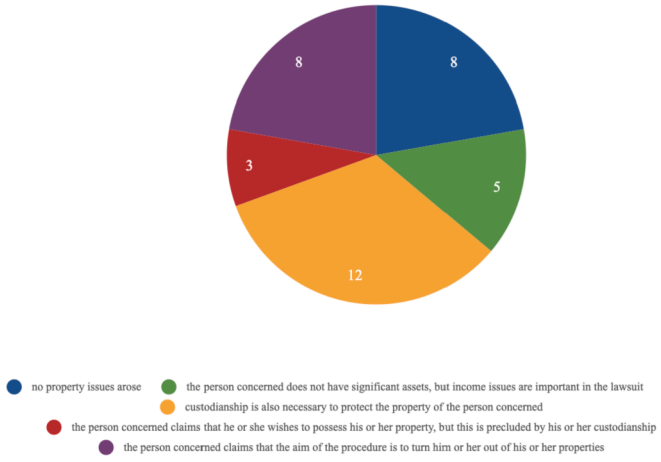

Fig. 6. Property issued in cases on custodianship (publicised by the CCD) (Source: Collection of Court Decisions – Bírósági Határozatok Gyűjteménye, BHGY, https://birosag.hu/birosagi-hatarozatok-gyujtemenye – edited by the authors.)

In Hungary, there is a possibility of exclusion from the right to vote because of the person's limited legal capacity. This regulation does not comply with the rules of the CRPD, but the judicial practice has been changed in the last decade. An important element of these procedures is that this exclusion should be justified independently by the judges, and may not constitute part of the general justification for custodianship (Gurbai, 2012).

Several patterns can be observed by analysis of the judgments related to exclusion from the right to vote. Firstly, if the court changes the restriction of the passive legal capacity from one of full limitation of capacity to act or from custodianship precluding legal capacity to one of partial limitation of capacity to act, exclusion from the right to vote is typically waived by the courts. The ability to exercise the right to vote shall be examined separately by the courts. Judicial practice has varied. The courts related the ability to exercise the right to vote to the basic knowledge of the individual concerned. Another type of testing was used by other courts, which focused on the person's awareness of public affairs in everyday life. Thus, the restrictions were used by the courts as an *ultima ratio* tool in these cases. This awareness of public affairs in everyday life has become a major testing criterion in judicial practice over the last decade. The rights to vote and to initiate proceedings were not restricted – although even the right to capacity in property issues was restricted – if it was stated by the court that the person has awareness of public affairs in everyday life. The decision on these rights did not represent an issue in several judgments.

The regulation has been modified during the last decade. Formerly the right to vote was automatically excluded by a judgement on the restriction of active legal capacity. It is now stated in paragraph 1 of Article 13/A of Act XXXVI of 2013 on Election Procedure that the courts should decide separately on exclusion from the right to vote, and it should not be directly linked to judgments on the restriction of active legal capacity. After the transformation of the regulation, sixteen judgments were decided by the courts. In nine cases, the right to vote was not excluded by the judgments, while in three cases the right to vote was excluded by every (first instance, second instance, review decision) judgement. Fig. 7

The last decisions were made in 2018. The judgments of the lower courts were overturned by the Curia (in two cases) and by the regional courts (in two cases), and the cases of exclusion from the right to vote – ordered by the lower courts – were terminated.

These results can be interpreted differently. First of all, the restraint of lower courts – related to the exclusion from the right to vote – is positive and the relative activity of higher courts in reducing restrictions on the right to apply also represents a progressive change. However, it would only be compatible with the CRPD if the right to vote were never restricted on account of the person's disability and if the courts consistently enforced the fundamental right that persons with disabilities are also members of the political community and should have the right to vote.

4.4. *Who are the 'concerned people' that we have discussed?*

It can be stated that in 27% of the studied judgments, the custodianship lawsuit (with the purpose of modification, and annulment) was initiated by the person under custodianship, that is, usually the adult with a psychosocial or intellectual disability. It can be presumed from the point of view of those under custodianship that with the lawsuit that they initiated they wished to shift in a less restrictive direction. They wished to reduce the exclusion of legal capacity, with its fully or partly restrictive nature, and 'win' wider freedom for themselves, or in certain

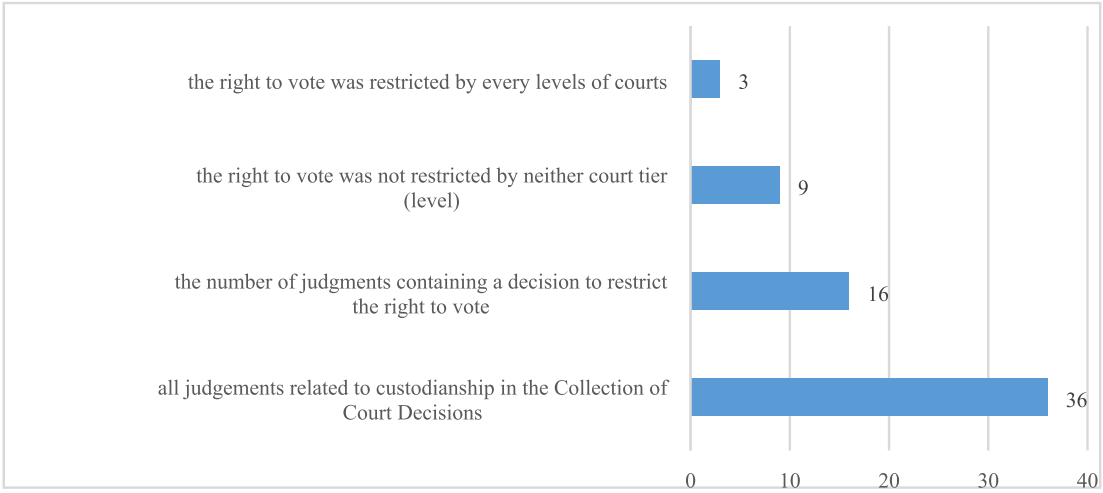

Fig. 7. Right to vote in in cases on custodianship (publicised by the CCD) (Source: Collection of Court Decisions – Bírósági Határozatok Gyűjteménye, BHGY, https://birosag.hu/birosagi-hatarozatok-gyujtemenye – edited by the authors.)

cases fully free themselves from previous restrictions by terminating the effect of custodianship. Their substantive aim, therefore, is to 'win back' wider decision-making autonomy, and more extensive right to self-determination in their lives. 18.9% of the cases aimed to terminate custodianship partially limiting legal capacity, and 8.1% to terminate conservatorship (when a guardian or a protector is appointed to manage the financial affairs or daily life of another person) fully limiting custodianship.

Although there has been some shift in legal regulation in Hungary to facilitate the access of the concerned people to justice (for example, the summons and the handout delivered during the lawsuit have to be adapted to the mental condition of the individual, and there is an opportunity for the requisition and the presence of a supporting party among others, besides which if, during a civil action, the concerned person submits a request for a supporting party prior to the lawsuit). However, these are far from being changed to such an extent that they would result in a mass initiation of lawsuits to shift in a less restrictive direction.

Briefly, we have the following information about the lifestyles of the concerned people: in 67.5% of the examined judgments, the individuals that we have studied are not placed in institutions (this may be related to the fact that in terms of enforcement – since all legal remedy forums were employed in these cases – the group under custodianship with the worst situation and status was not the focus of our study). At the same time, however, it is worth noting that almost 50% receive psychiatric treatment. It can be somewhat explained, with regard to the above, that 'only' some 30% of the people concerned in this case file live in permanent residential institutions, and more than a third of the latter do not receive psychiatric treatment or refuse it.

Based on the available data on these judgments, it can be observed that the most common reason for placing an individual under custodianship on the grounds of a psychiatric opinion is that the individual has either paranoid personality disorder or paranoid schizophrenia.

5. Final remarks

In our analysis of publicly available custodianship cases, we drew the following conclusions regarding the research questions. The shift in paradigm envisaged by the CRPD is not sufficiently reflected in published case law. It is clear from the reasoning of the courts that they do not view supported decision-making as a realistic alternative to custodianship. The courts formally follow the system of case category restriction as prescribed by the new Civil Code in all cases, but sometimes they revert to the old ways, and the categories are so extensive that they cover almost all aspects of life, resulting in the same degree of general limitation as was available and preferred under the old Civil Code. At the same time, the Curia's guidelines also seek to encourage a reflected application of the legal institution and prevent the hidden survival of the previous general limitation. However, it is doubtful whether the Curia alone can achieve a substantial change of attitude in the jurisdiction of the lower courts on the basis of the regulations in force (Fiala-Butora, 2019, p. 9).

In the majority of cases, the higher courts upheld both the first instance decision and, at least indirectly, accepted the expert opinion upon which it was based. Together with previous research findings, besides the relatively short duration of cases and the length of reasoning of the judgments, these findings suggest that court proceedings do not provide substantive legal protection for those concerned. We attempt to verify this finding with qualitative studies at a later stage of the research.

Examination of the published judgments confirmed our hypothesis that the declared goal of the legal institution of custodianship, that of the protection of the rights of the concerned person, is usually not the only one and sometimes not even the main function of limitation of legal capacity in the practice. Property issues played an important role in a significant number of the cases we examined, and in only 21.6% of the cases did they not appear. In these cases, the protection of the property of the person concerned was intertwined with the property interests of family members and the disposition of income with the material interests of those living in the same household. In 10.8% of the cases, those affected complained that being placed under custodianship prevented them from enjoying their property and income freely. In addition, in the published cases, the interests of the authorities were protected relatively often by restricting the opportunity for persons with 'litigation madness' to initiate proceedings.

However, in addition to the main findings outlined above, we have, most importantly, identified an urgent need for custodianship authorities and courts to provide significantly more data on custodianship proceedings in the form of publicly available statistics and anonymized judgments. This would ensure that the institutions of supported and surrogate decision-making, which are of paramount importance with regard to fundamental rights, operate in a transparent manner.

As we have mentioned, the research is based on the publicly available decisions of the Hungarian higher tier courts, thus only the practice of these higher fora are analyzed by our paper. However, it is an analysis of a higher court practice of a small Eastern Central European country, but it can be interesting for a broader community. Hungary has a continental (civil law) legal system, and the Democratic Transition of Hungary started around 30 years ago. The restricted influence of the

international human rights legislation and the democratic patterns can be observed by the analysis of this judicial practice: how the actual practice has not been transformed by the amended - human rights based - legislation.

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