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## **Dilemmas in the legal treatment of the status of people living with disabilities**

### **Synopsis**

The legal treatment of disability affairs carries in itself an inherent contradiction due to the nature of modern society and free-market economy. On the one hand both the historically developed notions of essentialism and on the other the particular-functional definition of manhood drawing its roots from the established democratic order and market economics are present simultaneously. However, within the current order of things there is an unbridgeable divide between them. Nevertheless, with the progression of time there is a slow gradual shift discernible away from the functional definition with the parallel strengthening of the essentialist approach. This shift is further exaggerated by the more widespread acceptance of the rights of self-determination and the provision of opportunities for the disabled, the emergence of social self-determination in case of a population subgroup living under special conditions. For the proper interpretation of the currents in the evolution of legal treatment of disabled people it would be indispensable to institute a proper social-discourse analysis, which, however, exceeds in scope its narrowly defined task.

**Keywords: disabilities, social dilemmas, legal questions, integration strategies**

### **Introduction**

In the legal treatment of the condition of people living with disabilities we can find an inherent contradiction. While as a result of social progress the individual is viewed as a distinct and unique being, however, its definition does not extend beyond a social-utilitarian approach. Therefore, the legal treatment of disabilities does not aim to support the realization of the fullness of life for all individuals it merely delineates those segments that have direct relevance to the proper functioning of society. From a legal point of view the entire issue of disability affairs is characterized by the dichotomy between man as an individual for its own ends and self-realization and as a socially relevant and valuable building block of society.

The ontological basis of this duality is found in modern society and free-market economy which for Marx<sup>1</sup> meant the differentiation between the use-value and value of a commodity.

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<sup>1</sup> Karl Marx (1948): *A tőke (Capital)*. Volume 1. Budapest, Szikra, pp. 43–159.

Use-value is the actual utility of a thing whereas value in itself is some kind of quantitative property, the amount of labour required for its reproduction, which only gains its true importance when put into actual use in the social organism. In brief, the commodity both as a quality and as a quantity is present. The same duality appears in Georg Simmel as the contrast between hypothetical value and the individuality of objects.<sup>2</sup> He arrives at the notion that money, as measure of value, terminates uniqueness.<sup>3</sup> Thus, what has utility for the whole society in its uniqueness is valuable only to the particular individual. As long as quantity is socially important, quality tends to be irrelevant and only manifests any measure of importance if combined with quantity that is with value or social utility.

Certainly it is not insinuated that prior to the advent of capitalism society did not extricate itself of those elements that had no utility or could not be integrated into its fabric.<sup>4</sup> However, it was with the dawn of pluralistic democracy and modern-day capitalism that the now prevalent utilitarian approach to social organization and the concomitant social welfare and public health services, which ingrained in daily discourse the categories of socially valuable and useless; the distinction between those worthy and unworthy to receive care. **The entire conceptual understanding of disability affairs, its institutional system and necessarily its legal treatment is based on the division between valuable and redundant individuals, individuals fulfilling socially useful functions, but sacrificing their independence and the self-serving type, which nevertheless demonstrates a more multifaceted characteristics.**

The examination of the legal treatment of people living with disabilities must exceed the mere enumeration of the pertaining laws and regulations. All the progress achieved in this area is the result of a continuous struggle and compromise among the groups involved, which often have rather diverse narrow interests. In this struggle, based on the values of the bourgeois-democratic tradition here the impulse for selfless help, these rights are in constant conflict with the interests of a multitude of actors in the sense that in a given particular situation what are assumed to be the most advantageous or at least acceptable requirements for social integration from the viewpoint of a group. Or the type of disability and to what measure it should be remedied to make the disabled person in a functional sense a valuable member of society. It is inescapable not to have a divergence between the attributes of people living with disabilities as human beings and the assumed criteria for social utility. Social discourse i.e.

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<sup>2</sup> Georg Simmel (2004): *A pénz filozófiája (The Philosophy of Money)*. Budapest, Osiris, pp. 108–154.

<sup>3</sup> Ibid., Georg Simmel (1973): *A nagyváros és a szellemi élet (The Metropolis and Mental Life)*. In Iván Szelényi Iván ed.: *Városshociológia (Urban Sociology)*. Budapest, KJK, pp. 251–266.

<sup>4</sup> Michel Foucault (2004): *A bolondság története (Madness and Civilization)*. Budapest, Atlantisz.

Foucault's discourse theory<sup>5</sup> settles to what extent should be the disabled helped to either attain their full human potential or contribute positively to the fulfilment of actual social needs as a consequence of the support received. Therefore, **in addition to the detailed listing of the attained rights, the analysis of the legal framework of the decision-making mechanism pertaining to disability affairs is also necessary as it may shed light on the opportunities the disabled may have not only to be subjects of but genuine contributors to the decisions directly affecting them.** As part of the proposed study there should be a discourse analysis examining the topics that the various involved parties employ during the various stages of the disability related legislative processes, e.g. the public parliamentary and media debate on the National Programme of Disability Affairs; however, the detailed treatment of this topic far exceeds the scope of the current paper.

### **The root problem of the legal treatment of disability affairs**

In the legal treatment of the condition of people living with disabilities one primary problem needs to be overcome by every legislative body. On the one side in western civilization<sup>6</sup> the developing individualistic value system and the notion of equality emerging from the old system feudal privileges, and the ideal of complete equality as enumerated in the Declaration of Independence and the Declaration of the Rights of Man and of the Citizen consider individuals strictly qualitatively or view man in an **essentialist** model. On the other the profit-oriented logic of capitalism favours a functionalist criterion, whereby the individual must serve as a productive member of society, meaning he should actively contribute to or at least not hinder the smooth functioning of the profit driven social-economic-political system; this is seen as the **utilitarian or functionalist** view of man. The area of disabilities may be one of the major flashpoints between the ideologically motivated and profit oriented philosophies; the disabled are entitled to the same rights as the non-disabled members of society, however, their integration into mainstream society due to their presumed "uselessness" requires the outlay of substantial social and material resources. The principle of equality demands that any society should attempt to remedy the outstanding disadvantages, but it does not necessarily mean that it attempts to transform disabled people into socially valuable members for its own benefit. As we lack any semblance of an eternal human essence what should be applied to all members of society is the opportunity of self-realization, though personal aspirations may go

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<sup>5</sup> Michel Foucault (1991): A diskurzus rendje (The Order of Things). *Holmi*, issue no. 7, pp. 868–899.

<sup>6</sup> Samuel P. Huntington (1998): *A civilizációk küzdelme és az új világrend kialakulása (Clash of Civilizations and the Remaking of World Order)*. Budapest, Gondolat, 101–105.

far beyond what is considered as socially conducive in a particular society. Compensation for disadvantages suffered must come with the provision of opportunities to live a full life, which necessarily requires integration, in other words, in any age in any given society “useful” functions must be found for the disabled, though by doing so the essentialist model may be compromised.

The approach to equal treatment and equal opportunities must necessarily entail that in a viable social setting the peculiar conditions of the disabled are only remedied with a functional goal in mind, with results that are beneficial to the entire community. However, such an approach naturally sacrifices a measure of the ideals and expectations the disabled may have concerning what perfect human life may entail theoretically.

When examining the legal treatment of this area it is apparent that only a general framework system is present, the wording of the particular laws and regulations is broad enough to be applicable to each individual case. Still, the logic behind such legislation is not simply its wide applicability, but also its usefulness as a tool for the realization of the profit-oriented philosophy of capitalism. The dreams, expectation, and desires, though can be viewed as social constructs, nevertheless constitute some form human essence as a concrete historical totality, which often cannot fit into functionalist utilitarian benefit-oriented systems. There is a simultaneous need to provide accessibility to the disabled, as they are full-fledged human beings, but also to expend resources for such goals only when the attendant benefits are observable for the entire social organism. The primary goal of the legal treatment of disabilities is the simultaneous attainment of inherent human fullness and completeness valuable for the capitalist system. Such duality necessarily leads to theoretical declarations of equality for the disabled, nevertheless, in practice a wide array of obstacles appears as soon as facing assumedly “worthless” cases or disabilities, which cannot be remedied through integration. In practice the target is not to help the disabled to achieve their inherent self-actualization, but only the attainment of a functionalist or integrated human existence. Human beings as self-defined measures of value, essentialism, and as socially valuable units, utilitarianism or functionalism, do not necessarily overlap; furthermore, due to the limited amount of available resources the latter becomes more dominant in normal practise. Any social endeavour beyond this narrow scope is viewed as untenable. The criteria for social “utility” are defined through a dialogue among the various actors involved. The four primary factors characterizing this discourse are 1. basic human rights (core values); 2. the profit-driven nature of capitalism (the reinvestment of the highest possible share of profits); 3. the basic attitude of individuals toward the profit-driven lifestyle for possession and gain, and 4.

“dysfunctional” values and demands which may appear during the operation of the system and considered to be a hindrance to its operation. Society handles the “utilitarian” value of disabilities by having various agents (individuals, groups, expert organizations etc.) arguing their case and engaging in a discourse according to their specific values and agendas.

The complexity of this duality is well-represented in Act XXVI of 1998 on the rights and safeguarding of equal opportunities of disabled persons, which in Article 4 defines a person living with disabilities for the purposes of this Act as someone who does not at all or only partially possesses his sense organs, especially sight, hearing, motor skills, and mental abilities. Furthermore, he may be debilitated in his communication skills, which results in an **enduring disadvantage in his social interactions and active participation in social life.**

The wording of the act insinuates that exclusion from social life, barring active participation, is a disadvantage affecting the individual. Thus, the impression is made that people living with disabilities can make the decision whether the lack of active participation is indeed disadvantageous for them and if so since when and to what measure. With the 2007 amendment of the act on disabilities the valid criticism was made that the President of the Republic in the previously adopted legislation, while acknowledging its merits, considered the 2010 and subsequently the 2013 final deadline for the realization of the target of the act as too distant and the resources to be allocated for it inadequate and proposed a shorter deadline and higher budget outlays. It seems that there is a persistent dichotomy between the listed goals and the available resources; however, it is also apparent that the definition of what the targets should be, which should be necessarily beneficial on the societal level and are adjusted to the actual possibilities present, is arrived at as the outcome of a discourse between the Parliament, and the government on one pole and the President of the Republic on the other. Unfortunately the affected disabled people by and large seem to be excluded from the process. With the adoption of Act LXII of 2013 the pertinent article defines more clearly the rights of people living with disabilities and also the important terms employed are better enumerated.

Therefore, one of the central questions of every study should be the analysis of the interaction between the disabled and their representative advocacy groups and between such organizations and the public or state decision-making bodies. The major issue is to what measure the **disabled have the legal and institutional means and opportunities to realize their own goals.** It must be emphasized that the assumed self-interests are also social constructs, which are generated by society itself, which is both democratic and capitalistic,

thus any aspirations necessarily also trace their roots to capitalism. There are two major possible points of contention between the self-interests and the publicly recognized legitimate expectations. First when the public expense for remedying the special conditions of the disabled is deemed excessive; in the negotiation process concerning the price the affected are left out completely or are involved in a limited fashion. Second when the socially generated demands of the disabled run contrary to social utility. Regrettably, this latter conflict is impossible to resolve. The previously mentioned general human needs from an analytical angle can be actualized as the disabled very own requirement; concurrently the question of inquiry should be whether this own demand is able to articulate itself and if so with what chances of conversion into actual legislation or regulations.

Consequently the legal treatment of disability affairs in Hungary has three main vantage points:

1. the opportunities the current treatment of disability affairs offers to the disabled to become “active members in social life” or the steps taken to offer equal opportunities with the non-disabled to become valuable members of society, which are the essential points of legal rights concerning disabilities;
2. the type of conflicts (advocacy groups, aims, and divergent values), which are clearly discernible in the current laws and regulations in place (these form the subject of a separate study, here a mere few essential points are mentioned);
3. the opportunities the disabled have for self-organization and whether these bodies are able to and to what extent articulate and realize their own agendas; the level of involvement they demonstrate in decision-making or its delegation to other bodies, the system of demand articulation and its legal treatment.<sup>7</sup>

## **The legal treatment of disability rights**

### **International treaties and conventions**

Among international treaties the primary legal foundation of disability affairs rests on the Convention on the Rights of Persons with Disabilities and Optional Protocol<sup>8</sup>, which was adopted by the UN General Assembly on 13 December 2006 in New York and entered into Hungarian law as Act XCII of 2007.

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<sup>7</sup> The study is based on legislation in force as of 30 September 2012 (Komplex Jogtár).

<sup>8</sup> Came into force on 3 May 2008

*The Convention solves with ingenious simplicity the contradiction between universal human rights (essentialism) and social usefulness (utilitarianism, functionalism)* when it states in the *Preamble* that: “h) Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person”.

At the same place it is stated that “e) Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others;” thus approaching disabilities from functionalist angle.

However, at first it is declared that

“a) Recalling the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world,

b) Recognizing that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, has proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind,” which is an essentialist interpretation of human rights.

*In the already mentioned Paragraph h) of the Preamble disabilities are linked with the “inherent dignity and worth of the human person” while at the same they are also seen as barriers that hinder full and effective participation in society.* Unless the same opportunities are extended for the disabled for participation in the life of societies or the persisting disadvantages are not remedied, thus discrimination based on disabilities endures then the “inherent dignity and worth of the human person” is violated. The rectification of the condition stemming from disabilities therefore is to ensure human dignity and value. As a consequence one’s “inherent dignity and worth of the human person” acquires a functionalist meaning, which is realized with one’s “full and effective participation in society on an equal basis with others”. By balancing the essentialist and functionalist approaches makes irrelevant any claims in disability affairs which are not indispensable preconditions for participation in the life of society.

## **Achievements of European Community Law**

### **Council Directive 2000/78/EC about equal treatment**

Council Directive 2000/78/EC of 27 November 2000 - Establishing a general framework for equal treatment in employment and occupation in its Preamble sets down the principles for the treatment of disabled people:

Paragraph 6: “recognizes the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of elderly and disabled people.”

Paragraphs 11-12: “Discrimination based on [...] disability [...] may undermine the achievement of [...] the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.”

Paragraph 16: “The provision of measures to accommodate the needs of disabled people [...] plays an important role in combating discrimination on grounds of disability.”

Paragraph 20: “[...] effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.”

Paragraph 23: “In very limited circumstances, a difference of treatment may be justified where a characteristic related to [...] disability constitutes a genuine and determining occupational requirement, when the objective is legitimate and requirement is proportionate.”

Paragraph 26: “The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of [...] a disability [...] and such measures may permit organisations of persons of a [...] disability [...] where their main object is the promotion of special needs of those persons.”

Paragraph 27: “In its Recommendation 86/379/EEC of 24 July 1986 [...] the Council established a guideline framework setting out examples of positive action to promote the employment and training of disabled people [...] in its Resolution of 17 June 1999 [...] affirmed the importance of giving specific attention *inter alia* to recruitment, retention, training and lifelong learning with regard to disabled persons.”

Paragraph 29: “Persons who have been subject to discrimination based on [...] disability [...] should have adequate means of legal protection. To provide a more effective level of protection, association or legal entities should also be empowered to engage in proceedings [...].”

Paragraph 31: “The burden of proof must shift back to the respondent when evidence of [...] discrimination is brought.”



The text aims to negate the effects of discrimination in employment to promote social and economic integration. Furthermore, it calls for a high level of social protection, the elevation of standard of living, improvement of quality of life, economic and social cohesion and solidarity with exclusion to be averted even outside the workplace, as well as the provision of freedom of movement. Such wide array of complexity covers every facet of social life and is in complete accord with the UN Convention on the Rights of Persons with Disabilities and Optional Protocol adopted by the General Assembly on 13 December 2006 in New York and entered into Hungarian law as Act XCII of 2007, which defines discrimination based on disability as offense against the “inherent dignity and worth of the human person.”

Council Directive 2000/78/EC introduces the divergence between the terms direct and indirect discrimination in Article 2 Paragraph 2 sections a) and b) where it states that direct discrimination “shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation [...]”; whereas indirect discrimination “shall be taken to occur where an apparently neutral, provision, criterion or practice would put persons having a particular [...] disability [...] at a particular disadvantage compared with other persons.”

Article 5 specifically mentions protection against unfair treatment of disabled people to “guarantee compliance with the principle of equal treatment in relation to persons with disabilities [...] This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.” At first glance the text seems reasonable as it requires from employers taking reasonable and appropriate measures, while simultaneously exempting them if such measures would impose disproportionate burden on them. *The main point of contention is not the appropriate-disproportionate paradigm, rather the specific interests and bargaining positions of the various actors involved in its formulation.* Naturally, it is in the employers’ interests to minimize their costs and burdens, while employees aim to maximize their remuneration and benefits. By stripping away the euphemistic formulas we are left with the basic disagreement between labour and employers over profit-sharing or what portion of revenue above the overhead should be distributed among the employees. Obviously the position of the employers in this intercourse is much stronger than that of labour. *The emphasis on appropriate measures merely serves to disguise the essential cleavage between*

*labour and capital*. The reference to the disability policies of the concerned Member States rests on the tenet of the state's neutrality, whereby it appears in the dialogue process seemingly as an equal partner with the involved parties; however, the state's bargaining position far exceeds both of labour's and capital's.

To somewhat offset this, Paragraph 26 of the Preamble declares that disabled people may organize themselves, thus fulfilling in theory the principle of equality. Nevertheless it does not elaborate on the actual power relations, from which it is prevented by the fear of nullifying the basic legal principles of modern societies based on free-market capitalism.

For settling disputes the Directive mentions in Article 13 the process of the "dialogue between social partners." The text by using the term "social" admits the existence of conflicting sides, but it fails to elaborate on what methods it deems fit to qualify to be applied during this "dialogue." In Paragraph 1 it mentions appropriate workplace practices including strike action while in Paragraph 2 it proposes the conclusion of agreements at the appropriate levels. In Paragraph 14 it emphasizes dialogue with appropriate non-governmental organizations, thereby including in the fight against discrimination such advocacy groups which have legitimate interests; naturally, the term legitimate is rather difficult to define.

In general the Council Directive on equal treatment unequivocally fulfils the formal criteria for equality and recommends making actual decisions in the framework of social dialogues through the negotiation of all involved sides, while noting their uneven bargaining powers.

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Act CXXV of 2003 on equal treatment and the promotion of equal opportunities

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Act LXII of 2013 on the amendment of Act XXVI of 1998 on rights of persons with disabilities and the promotion of equal opportunities