

Czech Republic
Prof. Zdeňka Králíčková

International obligations and recent development

1. Regarding international obligations of the Czech Republic, the Convention on the Rights of Persons with Disabilities (CRPD) was signed in 2007 and was ratified in 2009. It was published under No. 10/2010 Sb. m. s. Its Optional Protocol was signed in 2007. The Convention on the International Protection of Adults (CIPA) was signed in 2009 and was ratified in 2012. It was published under No. 68/2012 Sb. m. s.

The regulation of adult protection has undergone a radical reform in 2012 (Act No. 89/2012 Sb., Civil Code) that has entered into force in 2014.¹ The new regulation replaces old ones (Act No. 40/1964 Sb., Civil Code and Act No. 94/1963 Sb., On Family) that were considered rather restrictive and cruel towards people with mental decisis as was typical for totalitarian states (and “a step back” in comparison with the Acts passed after the Second World War). The old rules from 60’s enabled even deprivation of legal capacity which used to be misused in special cases. People whose legal capacity was modified needed court permission for concluding marriage. Parental responsibility (or its legal predecessor) used to belong only to the parents with full legal capacity. Only parents with full legal capacity were allowed to give consent to adoption of their children. Others were not even “asked”. There were amendments after 1989, however not sufficient ones.

Thanks not only to international obligations, but also to the case law of the Constitutional Court of the Czech Republic,² the new regulation can be characterized as modern and respecting European human right standards. It is based on *the principles of necessity, subsidiarity and proportionality and on autonomy of will*.

In relation to passing new Civil Code, new processual provisions were passed (Act No. 292/2013 Sb., Act on Special Court Proceedings).

Besides that, acts from the field of Labor, Health and Social law provide special protection.

Statistics on measures of protection

2. Regarding rather new data, there were 2683 court limitations of legal capacity in 2014, 5578 ones in 2015 and 4902 ones in 2016.³

Current regulation: General

3. The protection of vulnerable adults is comprehensively regulated in the Civil Code (Book I: General Provisions, Title II: Persons, Chapter 2: Natural Persons, Division 2: Subsidiary measures in the case of disrupted capacity of an adult⁴ to make juridical acts). Subsidiary measures are divided into 2 categories as follows.

¹ The English translation of the original text is available at: <http://obcanskyzakonik.justice.cz/index.php/home/zakony-a-stanoviska/preklady>. Even though the Civil Code has been amended, the amendments are not much relevant to the issue in question.

² See for instance case No. IV. ÚS 412/04 available at the web page of the Constitutional Court of the Czech Republic, see <https://nalus.usoud.cz/Search/ResultDetail.aspx?id=48373&pos=1&cnt=1&typ=result> (only in Czech).

³ Statistical data regarding court decisions available at the web page of the Czech Ministry of Justice, see https://www.justice.cz/documents/12681/724488/Zpr%C3%A1va+ke+sv%C3%A9pr%C3%A1vnostem_finalpro+web.pdf/82964de5-60af-4a24-bb78-ba6c0ed48586 (only in Czech).

⁴ An individual acquires full legal capacity upon reaching the age of majority. The age of majority is reached upon reaching eighteen years of age. Before reaching the age of majority, full legal capacity is acquired by being granted legal capacity or by entering into marriage. Legal capacity acquired by entering into marriage is not terminated upon termination or invalidation of marriage (Section 30 CC).

3.1 Three measures aiming to solve the situation of people in anticipation of lack of capacity

3.1.1. Declaration in anticipation of incapacity (Section 38 ff. CC)

In anticipation of one's own lack of capacity to make juridical acts, *an individual may express the will* to have his matters managed in a certain way or by a certain person, or to have a specific person become his or her *guardian/curator*.⁵

Regarding the form, unless the declaration has the form of a public instrument, it must be made by a private instrument dated and acknowledged by two witnesses; in the acknowledgement, the witness shall provide his personal information that allows the witness to be identified.

If the circumstances evidently change in such a substantial way that, under such circumstances, the declarant would not have made the declaration or would have made a declaration with different contents, a court shall amend or cancel the declaration if the declarant were otherwise under a threat of serious harm. Before making any decision, the court shall make the necessary effort to obtain the opinion of the individual, whose declaration is subject to the court's decision, also using the way of communication of the individual's choosing.

If the declaration or its revocation is invalid, the court shall take it into account, unless there is cause to doubt the will of the declarant.

3.1.2. Assistance in decision-making (Section 45 ff. CC)

If an individual needs assistance in decision-making due to complications resulting from his mental disorder, even where his legal capacity has not been limited, *he or she and the assisting person may agree on the provision of assistance*; there may be multiple assisting persons.

By concluding *a contract for assistance*, the assisting person undertakes, subject to the consent of the person receiving assistance, to be present at his legal proceedings, provide him or her with the necessary information and communications and assist him or her by giving advice. The contract becomes effective on the date on which it is *approved by a court*. Unless the contract has been executed in writing, the parties are required to express their will to execute the contract before a court. If the interests of the assisting person are contrary to the interests of the person receiving assistance, the court shall not approve the contract.

The assisting person must not jeopardize the interests of the person receiving assistance by exerting improper influence or unjustly enrich himself or herself at the expense of the person receiving assistance. In carrying out his duties, the assisting person shall proceed in accordance with the decisions of the person receiving assistance. If the person receiving assistance makes a juridical act in writing, the assisting person may affix his signature, indicating his or her position and, where applicable, the support provided to the person receiving assistance; the assisting person may also invoke the invalidity of the juridical act made by the person receiving assistance.

On the application of the person receiving assistance or the assisting person, a court shall remove the assisting person; the court shall also remove him or her, even of his or her own motion, if the assisting person commits a substantial breach of his or her duties.

3.1.3. Representation by a household member (Section 49 ff. CC)

If a mental disorder prevents an adult who has no other representative to make juridical acts, he or she may be represented by his or her *descendant, ancestor, sibling, spouse or partner, or a person who had lived with the person represented in a common household before the creation of representation for at least three years*. *The representative shall inform* the person represented that he or she will represent him or her, and shall clearly explain to him or her the nature and

⁵ Regarding minors without legal parents (a child from baby-box etc.), *tutors* must be appointed to them by the court (Section 928 CC).

consequences of representation. If the person to be represented refuses that, the representation is not created; the ability to make a wish is sufficient to express the refusal.

The creation of representation must *be approved by a court*. Before making any decision, the court shall make the necessary effort to obtain the opinion of the person represented, also using the way of communication chosen by the person represented.

The representative shall ensure the protection of the interests of the person represented and the exercise of his or her rights as well as make sure that his or her way of life is not in conflict with his abilities and that, unless it can be reasonably challenged, it corresponds to the specific ideas and wishes of the person represented.

Representation covers *ordinary matters*, as is consistent with the life circumstances of the person represented. However, the representative may not give consent to an interference in mental or physical integrity of the individual with permanent consequences. The representative may dispose of the income of the person represented to the extent necessary to arrange ordinary matters, as is consistent with the life circumstances of the person represented; however, the representative may dispose of the funds deposited in the account of the person represented only to the extent which does not exceed the amount of monthly level for an individual under another legal regulation.

Representation is extinguished if waived by the representative, or if the person represented refuses to be further represented by the representative; the ability to make a wish is sufficient to express the refusal. Representation is also extinguished if a court appoints a guardian of the person represented. If a contract for assistance in decision-making is concluded, representation is extinguished on the effective date of the contract to the extent in which the person represented is capable of making juridical acts.

3.2. Measures aiming to solve the situation of people with a mental disorder which is not only temporary: Limitation of legal capacity and appointing the guardian/curator (Section 55 ff. CC)

An individual's legal capacity may only *be limited* if he or she were otherwise under *a threat of serious harm* and unless *milder and less restrictive measures* suffice to protect his or her interests.

Legal capacity may only be limited *in the interests* of the individual concerned, after he or she has been seen by a court and with full recognition of his rights and his personal uniqueness. In so doing, the extent and degree of the individual's inability to take care of his own matters must be carefully taken into account. The court shall take all the necessary steps to obtain *the opinion* of the individual whose legal capacity is subject to the court's decision also using the way of communication of the individual's choosing.

A court may limit the legal capacity of an individual to the extent to which the individual is unable to make juridical acts due to *a mental disorder which is not only temporary*, and shall define the extent to which it has limited the capacity of the individual to make independent juridical acts. A court may limit legal capacity in connection with a certain matter *for a period necessary to arrange such matter*, or for an otherwise defined definite period not exceeding *three years*. According to the amendment, if it is evident that a person's condition will not improve at this time, the court may limit his or her legal capacity to *five years*. If the circumstances change, a court shall, even of its own motion, *change or cancel* its decision without delay.

In its decision to limit the legal capacity of an individual, a court shall appoint *a guardian/curator* for the individual. When choosing a guardian, the court shall take into account *the wishes of the ward*, his or her needs as well as the suggestions of close persons of the ward, provided that they pursue his or her well-being, and ensure that by choosing a guardian the court does not establish a relationship of mistrust of the ward towards the guardian. A person

lacking legal capacity, or a person whose interests are contrary to the interests of the ward, or the operator of a facility where the ward stays or which provides him with services, or a person dependent on such a facility, may not be appointed as a guardian.

The decision to limit the legal capacity *does not deprive* an individual of the right to individually make juridical acts in *ordinary matters of everyday life*. If the ward acted on his or her own without being allowed to act without a guardian, his or her juridical act may only be declared invalid if it has caused him harm. However, if a change of scope of the duties of the ward is sufficient as a remedy, the court shall do so without being bound by the parties' motions. If the ward acted on his own without being allowed to act without a guardian, the act of the former is considered to be valid if approved by the guardian. This also applies if the person acting approved such a juridical act himself or herself after acquiring legal capacity.

4. Beside above mentioned there are **provisions on legal representation and guardianship** (Section 457 ff. CC) and **on main grounds of invalidity of a juridical act** (Section 580 ff. CC). It is stated that if a person lacks full legal capacity, a juridical act, which he is not eligible to make, is invalid (*ex lege*). Also invalid is the juridical act of a person acting under a mental disorder that makes him unable to make juridical acts (Section 581 CC). A court shall, even of its own motion, take into account the invalidity of a juridical act which is manifestly against good morals or which is contrary to a statute and manifestly disrupting public order (*ex offio*). This also applies in cases where a juridical act requires the provision of a performance, which was impossible from the beginning (Section 588 CC).

5. The procedure is regulated in the Act on Special Court Proceedings (Section 31 ff. ASCP) as follows.

5.1. Proceeding on some subsidiary measures

5.2. Proceeding on limitation of legal capacity

5.3. Proceeding on appointing a guardian/curator.

Current regulation: Family Law

6. Special protection of vulnerable adults regarding their family life is regulated in the Civil Code as well (Book II: Family Law).

The law provides that a person whose legal capacity to enter into *marriage* has been limited may not enter into marriage (Section 673 CC).

As regard as *assuming parentage of a child (becoming a legal father)*, if the statement is made by a person lacking full legal capacity, it may only be made before a court. A court shall, according to the circumstances of the case, assess whether the person lacking full legal capacity is able to act on his own, or whether a guardian will act on his behalf (Section 780 CC).

Regarding *parental responsibility*, according to the Principles on European Family Law by the CEFL, every parent has parental responsibility, unless he or she has been relieved of it. If a court decides on limiting a parent's legal capacity, it shall also decide on his parental responsibility (Section 865 CC and Section 486a ASCP). The exercise of parental responsibility of a parent whose legal capacity has been limited in this area is suspended for the duration of such limitation, unless a court decides that the exercise of the parent's rights and duties relating to the care for the child and personal contact with the child is to be retained with regard to his personality (Section 868/2 CC).