

The research report on recognition before the law of persons with disabilities in the Czech Republic

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Prague, August 2020

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EXECUTIVE SUMMARY

This report describes the challenges faced by people with intellectual and psychosocial disabilities in the Czech Republic, especially in the area of equal recognition before the law, the right to independent living, and non-discrimination. The aim is to describe the current legislative situation, both on the international and domestic levels. This section implies that the Czech legislation does not fully meet international human rights standards, especially the Convention on the Rights of People with Disabilities. Despite significant progress, mainly due to guardianship reform, the Czech republic still recognizes partial deprivation of legal capacity of people with intellectual or psychosocial disabilities. Restrictions on legal capacity are linked to violations of the right to live independently and to be included in the community. Insufficient legislation is further reflected in practice as well as official statistics. Data shows that restrictions on legal capacity are still the most widely used measure by courts to address the situation of people with intellectual or psychosocial disabilities.

Building on the current legislative situation, practical experience, and in-depth research, this report makes recommendations to the state authorities and other relevant stakeholders. We recommend more effective protection of people with intellectual and psychosocial disabilities, their supporters, family members as well as guardians. This protection takes various forms, including better access to information, consultations, training, supervision, but also setting clear mechanisms for problematic situations, such as conflicts of interests or non-effective communication.

INTRODUCTION

This report provides an overview of the current development, practice, challenges, and achievements regarding issues of the right to equal recognition before law, the right to independent living, and non-discrimination after the ratification of the Convention on the Rights of Persons with disabilities (hereinafter “the CRPD”).¹ This report outlines the applicable international legal framework as well as the Czech national legal framework including the law of the European Union. The report continues with examples from practice and case studies. It concludes with recommendations, which would contribute to overcoming challenges people with disabilities and their supporters currently face. We believe that these recommendations have the potential to move the current practice towards a more accurate response to the individual needs of people with disabilities and ultimately, to the fulfillment of their rights. Due to the limited scope, this paper focuses primarily on people with learning disabilities and mental illnesses, as stumbling in implementation of the above-mentioned rights enshrined in the CRPD afflicts them the most.

Our expertise and information provided below come from the following sources. First, QUIP cooperates directly with people with disabilities on various issues related to legal capacity. For instance, our team of social workers and lawyers provide counseling and support to people with disabilities and their supporters within the whole proceedings on legal capacity and other relevant proceedings. Further, our organization provides training to professionals. This training includes person-centred thinking and planning, support, and rights of people with disabilities and other related legal issues. Honest feedback from many participants is a valuable source of information.

¹ *International Convention of the Rights of Persons with Disabilities and its Optional Protocol*, U.N. GAOR, 61st Sess., Item 67(b), U.N. Doc. A/61/611 (Dec. 6, 2006) [CRPD].

Thanks to our activities, we have created a broad portfolio of contacts with judges, state attorneys, lawyers, and guardians. Our organization became a partner to relevant bodies and authorities in analyzing and defining pressing issues in the concerned topic. In particular, we cooperate with representatives of relevant ministries, the Office of the Government of the Czech Republic, and the Public Defender of Rights. We also cooperate with SPMP (Inclusion Czech Republic). As part of this project, we plan to take interviews with individual stakeholders mentioned above during November 2020 (after the establishment of a special working group on the issue of disability under the Government Council for People with Disabilities).

INTERNATIONAL LEGAL FRAMEWORK

Convention on the rights of people with disabilities

Legal capacity is not just the capacity to have rights and duties and the capacity to act upon those rights. It is the basic human right itself. The right to legal capacity on an equal basis with others can be found in the Universal Declaration of Human Rights² and the International Covenant on Civil and Political Rights.³ It was also regulated in the 1979 Convention to Eliminate all Forms of Discrimination Against Women.⁴ However, it is the CRPD that projects the emerging consensus in international human rights discourse on the notion that all human persons, regardless of their decision-making abilities, should enjoy legal capacity on an equal basis with others (Article 12).

Article 12 of the CRPD promotes the complete abolishment of any restrictions on legal capacity and corresponding substituted decision-making mechanisms.⁵ This paradigm shift from substituted decision-making towards supported decision-making involves a parallel shift from what is believed to be in the objective “best interest“ of the person concerned to the person's own “will and preferences“ principle. It is the new CRPD guiding principle for all decision-making support.⁶

The Czech Republic has ratified the CRPD in 2009, but many provisions of the convention remain to be unimplemented and not respected in practice. Contrary to the clear opinion of the Committee on the Rights of Persons with Disabilities, the Czech Republic still allows for restriction of legal capacity, after an individualized assessment, of persons with intellectual and psychosocial disabilities. Further, the right to live independently and be included in the community (Article 19) remains unfulfilled. Social care services are still mostly provided in segregated institutional settings.

General Comments of the CRPD Committee

The Committee on the Rights of Persons with Disabilities (“CRPD Committee“), which monitors the state parties' fulfillment of their obligations under the CRPD and provides authoritative interpretations of its provisions. In its General Comment no. 1, the CRPD

² *Universal Declaration of Human Rights* 1948, GA Res 217A (III), A/810 (1948), art. 6.

³ *International Covenant on Civil and Political Rights*, 1966, 999 UNTS 171, art. 16(1).

⁴ *Convention on the Elimination of All Forms of Discrimination Against Women*, GA Res 34/180, A/34/46 (1979), art. 15(2)(3).

⁵ Břila kniha k implementaci článku 12 Úmluvy o právech osob se zdravotním postižením: Rovnost před zákonem, November 2014, Quip, Online <
<https://www.kvalitavpraxi.cz/res/archive/026/002977.pdf?seek=1418153326>> at 4.

⁶ Committee on the Rights of Persons with Disabilities, General Comment No. 1. (11th Sess., 2014), U.N. Doc. CRPD/C/GC/1.

Committee stated that article 12 includes a new paradigm of universal legal capacity, possessed by all persons “regardless of disability or decision-making skills“, that cannot be limited on grounds of disability or mental incapacity.⁷

The Committee emphasized the connection of right to full legal capacity and the right to live independently and being included in the community in its General Comment No. 5⁸ According to the Committee, the denial of legal capacity whether formal or practical is one of the main barriers of independent living.⁹ Moreover, equal recognition before the law ensures that all persons with disabilities “have the equal right to exercise choice and control over their own lives by choosing where with whom and how they want to live and to receive support following their will and preferences.”¹⁰

In the latest General Comment No. 6,¹¹ The Committee clearly stated that promoting equality and non-discrimination are obligations of immediate realization.¹² Denial of decision-making based on disability as well as institutionalization demonstrating a failure to create support and services in the community for persons with disabilities is discriminatory. Thus, state parties must refrain from any action that discriminates against persons with disabilities. Specifically, the Committee gave examples such as guardianship laws and other rules infringing upon the right to legal capacity, forced institutionalisation and forced treatment, inaccessible housing, and institutionalization policy.¹³

Moreover, the CRPD Committee’s position is evident in almost all of its Concluding Observations following regular examinations of particular State parties’ implementation of the CRPD. The CRPD Committee repeatedly and almost unchangingly calls for amends to the relevant laws to abolish restrictions on the legal capacity of persons with disabilities, and replace the guardianship regime with a supported decision-making mechanism.¹⁴

European Court of Human Rights and relevant case-law

The European Convention is the most relevant international mechanism in the European context of human rights protection. The European Convention, interpreted by the European Court of Human Rights (hereinafter “ECHR“), is part of the Czech constitutional order. Although the ECHR does not include any reference to disability rights,¹⁵ a new sensitivity towards the implementation of the rights of persons with disabilities has led to an increasing number of cases being litigated before the European Court of Human Rights (hereinafter

⁷ *Ibid* at para 25.

⁸ Committee on the Rights of Persons with Disabilities, General Comment No. 5. (18th Sess., 2017), U.N. Doc. CRPD/C/GC/5.

⁹ *Ibid* at para 15.

¹⁰ *Ibid* at para 80.

¹¹ Committee on the Rights of Persons with Disabilities, General Comment No. 6. (2018), U.N. Doc. CRPD/C/GC/6.

¹² *Ibid* at para 12.

¹³ *Ibid* at para 30.

¹⁴ See, e.g., UN Committee on the Rights of the Child, *Concluding observations: Turkey*, 1 October 2019, July 2007, CRPD/C/TUR/CO/1, para. 35; UN Committee on the Rights of the Child, *Concluding observations: Spain*, 13 May 2019, CRPD/C/ESP/CO/2-3, para. 23; UN Committee on the Rights of the Child, *Concluding observations: Slovenia*, 16 April 2018, CRPD/C/SVN/CO/1, para. 19.

¹⁵ See e.g. Silvia Favalli, “The United Nations Convention on the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017–2023: ‘from Zero to Hero’” (2018) 18:3 Human Rights Law Review 517 at 522.

ECHR).¹⁶ Also, the Council of Europe Human Rights Commissioner referred to the CRPD to support the implementation of the right to legal capacity.¹⁷ In case of *Shtukaturv v. Russia*,¹⁸ the Court stated that depriving individuals of their legal capacity constitutes a serious interference with the individual's right to respect for private life protected by Article 8.¹⁹ The Court stated that the state did not provide tailor-made responses to the applicant's need and concluded that his rights were limited more than strictly necessary.²⁰ This proportionality principle²¹ was confirmed in *Salontaji-Drobnjak v. Serbia* where the Court held that full incapacitation does not meet the European Convention's restrictions criteria.²²

In the case of *Stanev v. Bulgaria*,²³ the applicant was under partial guardianship which, as he claimed, was not geared towards his individual needs but entailed restrictions automatically imposed on everyone under guardianship. As a result of his partial guardianship, he was detained in a social care home. He was even prevented from accessing the courts to challenge his incapacitation and detention. The Court in its reasoning mentioned the growing importance of the CRPD and stated that the deprivation of applicant's liberty is unlawful and the impossibility to challenge his detention and to seek restoration of his legal capacity amount is a violation of Articles 5 (right to liberty) and 6 (right to a fair trial) under the Convention.²⁴ Although the Court did not examine applicant's claims related to the right to respect for private life, which according to the CRPD standards, includes the right to live in the community, the following decisions have done so. For example in the case of *X and Y v. Croatia*,²⁵ the Court stated that „divesting one of legal capacity amounts to serious interference with that person's private life.“²⁶ Not every restriction of legal capacity, however, is a violation of the right to private life, restrictions that meet strict scrutiny test²⁷ are, according to the Court, justifiable.²⁸

¹⁶ Keys M. (2017) Article 12 [Equal Recognition Before the Law]. In Valentina Della Fina, Rachele Cera & Giuseppe Palmisano, eds, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer International Publishing, 2017).

¹⁷ Anna Nilsson, *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities* (Council of Europe, Commissioner for Human Rights, 2012) at 2.

¹⁸ *Shtukaturv v. Russia*, No. 44009/05, [2008], ECHR, at para 90.

¹⁹ „Everyone has the right to respect for his private and family life, his home and his correspondence.“ Article 8 of Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5. (The ECHR repeated this for example in case of *Salontaji-Drobnjak v. Serbia*, No. 36500/05, [2010], ECHR, at para 144.)

²⁰ *Shtukaturv v. Russia*, *supra* note 32, at para 90, 93-95.

²¹ The right to respect of private and family life is not absolute and may be subject to limitations. In laying down such regulations, the States enjoy a certain margin of appreciation. The limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible if it does not pursue a legitimate aim and if it does not comply with a proportionality test, that is, if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. (See e.g., *Saviny v. Ukraine*, No. 39948/06, [2009], at para 47.)

²² *Salontaji-Drobnjak v. Serbia*, *supra* note 33, at para 144.

²³ *Stanev v. Bulgaria*, No. 36760/06, [2012], VII ECHR 1.

²⁴ *Ibid* at paras 250-252.

²⁵ *X. And Y. v. Croatia*, No. 5193/09, [2012], ECHR.

²⁶ *Ibid*, at para 102.

²⁷ Under the strict scrutiny test, restrictions are only justified if they are necessary to promote a compelling government interest. Under the rational basis test, a distinction is justified if it has a rational connection to a legitimate aim.

²⁸ *X. And Y. v. Croatia*, *supra* note 39, at para 109.

The Court considered once again the CRPD interpretation of Article 12 in the case of *A-MV v. Finland*²⁹ but rejected the CRPD standards, particularly that the will and preferences of an individual should be always determinative of any decision. Also, the latest decision from November 2019 concerning the restriction of legal capacity, does not include any shift in the standards of the Court. In the case of *Nikolyan v. Armenia*³⁰, the Court reiterated that deprivation of someone's legal capacity needs to meet strict scrutiny and found a violation of Article 8 as the domestic law did not provide for such a requirement.

In none of its judgments, the Court recognized the right to the legal capacity of persons with disabilities in its entire dimension. Contrary to the CRPD standards affirmed in its Concluding Observations, the analysis of the ECHR decisions concerning issues of legal capacity and decision-making, shows in comparison with the CRPD Committee approach rather hesitant region-specific direction of its understanding and implementation. The Court has never gone beyond the procedural aspects to challenge the possibility to restrict a legal capacity itself.³¹ The Court recognizes mental disorder as a possible justification for limiting legal capacity if such a limitation fulfills the requirement of the strict scrutiny test and is a measure of last resort. Although the CRPD has become the starting point to provide a higher standard of scrutiny for decisions on legal capacity issues,³² the Court has not yet taken to necessary steps towards the recognition of the legal capacity of persons with disabilities in its entirety.

European Social Charter

The Czech Republic ratified the European Social Charter (non-revised version) on 3 November 1999, accepting 52 of the Charter's 72 paragraphs, including Article 15. It also ratified the Additional Protocol providing for the system of collective complaints before the European Committee of Social Rights.

EUROPEAN UNION

The Czech Republic became the Member States of the European Union on 1 May 2004. European Union primary law explicitly regulated the rights of people with disabilities already in the Amsterdam Treaty that entered into force on 1 May 1999. Article 13 enabled the EU Council to take appropriate actions to combat discrimination including discrimination on grounds of disability. The new Treaty on the Functioning of the European Union strengthens this provision in Article 19 and adds Article 10 that obliges European Union to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. The Charter of Fundamental Rights of the European Union contains several references to disability as well.

The European Union adopted Directive 2000/78/EC that establishes a general framework for equal treatment in employment and occupation. This Directive aims to remove obstacles that prevent people with disabilities from enforcing their rights and integrating them fully into society. The Directive prohibits any discrimination. Concerning disability, the Directive also considers insufficient adaptation of the workplace to be discrimination. Besides, indirect discrimination on grounds of disability means refusal or failure to take measures which are

²⁹ *A-MV v. Finland*, No. 53251/13, [2013], ECHR.

³⁰ *Nikolyan v. Armenia*, No. 74438/14, [2019], ECHR.

³¹ Favalli, *supra* note 1 at 534.

³² *Ibid* at 520.

necessary in a particular case to enable a person with a disability to have access to rights under special laws, unless such a measure would impose a disproportionate burden on a natural or legal person.

European Disability Strategy 2010-2020³³ is the umbrella document covering the EU's policy towards people with disabilities. It aims to promote a barrier-free Europe and empower people with disabilities so that they can enjoy their rights and participate fully in society and economy. The strategy is currently being evaluated and is expected to be published for the next period.

NATIONAL LEGAL FRAMEWORK AND POLITICAL SITUATION

The Czech Republic is a constitutional democracy. The two most important constitutional laws are the Constitution of the Czech Republic (constitutional law no. 1/1993 Coll.) and the Charter of Fundamental Rights and Freedoms (introduced by constitutional law no. 23/1991 Coll. and again by a parliamentary decision no. 2/1993 Coll.). The Constitution contains the relation between national and international law. According to Article 10, ratified and published international treaties become part of national law.

The Charter of Fundamental Rights and Freedoms³⁴ is the basic domestic instrument of/for human rights protection. It guarantees a wide spectrum of human rights, including civil and political rights, economic, social and cultural rights, the right to a fair trial, and some specific rights of national and ethnic minorities. Relevant articles to disability matters are Article 3 of the Charter that prohibits discrimination in the enjoyment of one's fundamental rights and freedoms. Art. 7(1) and Art. 10 protect the right to privacy and private life (the latter article guarantees respect for human dignity, personal honour, good reputation, and name; protection from any unauthorized intrusion into one's private and family life. The Charter specifically mentions disability in provisions concerning social welfare rights and the right to labour (Article 29).

Civil Code

The new Civil Code in force since 2014, has reformed to a certain extent the guardianship system. It abolished plenary guardianship and it incorporated some elements of supported decision-making as an alternative. Further, the law allows people to write advance directives, a planning document that sets out a person's wishes about finances and daily life.

The new tools that can be used as alternatives to restrictions on legal capacity enable people with intellectual and psychosocial disabilities to retain their full legal capacity to act upon their will and preferences. The most progressive is the Agreement on support in decision-making and the Representation by a household member. However, the Czech Republic still recognises partial restriction of legal capacity. The restriction is meant to serve as a last resort intervention. It can be used only if (1) the individual would be otherwise subject to a risk of substantial harm and (2) any of the less restricting measures was not sufficient to prevent the risk. In practice, the dominant way of thinking is still in terms of previous legislation. There is a lack of understanding of how to use the new tools in the judicial and social system and society. The result is that courts still opt for extensive restriction of legal capacity impacting on most of the areas of life as prevailing practice.

³³ Available in English at <<https://ec.europa.eu/social/main.jsp?catId=1484&langId=en>>.

³⁴ Available in English at <<http://www.psp.cz/en/docs/laws/listina.html>>.

Besides, the Guardianship Act foreseen by the Civil Code has not yet been finalised. The first draft of the law published by the Ministry of Justice contained only regulations concerning administrative rules for public guardians. It did not include any of the measures civil society has been advocating for, such as clear rules for guardians, control and evaluation mechanism, methodological support, or training.

Agreement on support in decision-making

Agreement on support in decision-making is a contract between the concerned person and one or more supporters. This agreement has to be approved by the court, but it does not restrict the concerned person's legal capacity. The supporter is entitled to support the concerned person with his opinion and necessary information, and by his optional consensual presence to legal acts of the concerned person. However, the supporter does not represent the supported person and cannot act on the supported person's behalf. The supporter is only entitled to claim for nullity of the supported person's legal acts performed without or contrary to the support, while, at the same time, causing serious harm to the supported person.

Representation by a household member

Representation by a household member is another institute introduced by the new Civil Code. Likewise the Agreement on support, it is a consensual institute, subjected to court approval. This institute does not restrict the legal capacity of the concerned person while enabling representatives to perform everyday tasks for a supported person.

Guardianship without any restriction on legal capacity

Guardianship without any restriction on legal capacity was the only suitable provision in the former Civil Code that enabled people to be represented by a chosen person. The new Civil Code includes this provision as well. The court appoints a guardian to a person who experiences difficulties with the administration of his property or difficulties in defending his rights as a result of his state of health. The court appoints a guardian on the proposal of the concerned person and determines the scope of the guardianship. The court also dismisses the guardian at the request of the concerned person.³⁵

Guardianship with restrictions of legal capacity

While the new Civil Code does not allow for the full denial of legal capacity, it still allows for partial guardianship, a practice that violates Article 12 of the CRPD. In doing so, it introduces several safeguards, such as time-limits. Any restrictions on legal capacity are subject to obligatory 3 years period review by the court. Moreover, restrictions on legal capacity are meant to be used as a last resort in situations where none of the other less restrictive measures can be applied and where there is a risk of serious harm. In practice, however, these judicial decisions lack proper assessment and identification of these two above mentioned conditions. The Czech Constitutional Court regularly criticizes this practice.³⁶

Every guardianship, whether with or without restrictions on legal capacity is controlled by the court that appointed the particular guardian. The control of the guardian might be carried out also by a guardianship board, the Public Defender of Rights, or an administrative authority. The judicial control mechanism is based on brief annual reports and obligatory court approval of the important decisions regarding financial matters and personal integrity. Another type of guardian control is supervision by the guardian board. While this regulation might seem precise and generally in compliance with the CRPD (except for the guardianship with

³⁵Article 469 of the Civil Code.

³⁶ See Judgement of the Czech Constitutional Court, II.ÚS 934/16 (13 December 2016).

restrictions on legal capacity) the practice is different. In reality, the courts are not effective in finding whether the obligations of guardians are followed. This ineffectiveness becomes problematic especially in decisions regarding the concerned person's way of living, housing, personal integrity, or use of the support services. Generally, poor awareness of the obligation to focus on a concerned person's will and preferences and preference of the safety (often only from the guardian's point of view) is combined with a general lack of community-based support services.

Another type of guardian control is supervision by the guardian board. Its very existence, if established, is proof that a group of people (or an individual) has an interest in ascertaining whether the concerned person's rights, will and preferences are being fulfilled. However, since 2014, there are only a few guardian boards. The reason is probably poor awareness and lack of social relations, especially in the case of people living in residential care facilities. The lack of appropriate social services offered within the community was criticized already in 2018 by the Czech Constitutional Court.³⁷ The Court stated that the right to live independently and being included in the community (Article 19 of the CRPD) is a social right of a more general nature, which corresponds to the obligation of the public authorities to ensure the availability of appropriate social services for people with disabilities.

Court proceedings on legal capacity

The change in substantive law is reflected in the regulation of proceedings on legal capacity – a concerned person is no longer a mere object. Her role is significantly strengthened, for example, the law always makes the person with restrictions on legal capacity actively legitimized to file a motion to initiate proceedings. However, these positive changes are undermined by the often formal approach to communication with a person with disability in proceedings, which does complicate her access to justice. The CRPD is setting standards for access to justice but everyday practice does not meet the required standards. For instance, the person with an intellectual or psychosocial disability must be obligatorily represented by a procedural guardian appointed by the court in proceedings on legal capacity, but this representation is often very formal and might result in denial of justice.³⁸

Medical expertise

The effects of difficult access to justice are strengthened by the prevailing overestimation of medical expertise in proceedings on legal capacity. Medical expertise given by a certified expert psychiatrist (or clinical psychologist) is the only obligatory form of evidence that has to be used in proceedings on legal capacity. Although medical expertise has not formally higher value than any other evidence and is fully subject to discretionary weighing, medical findings and even opinions outside the field of their expertise are being uncritically adopted and preferred by courts. This practice is subject to regular concerns of higher courts.³⁹

Restrictions on legal capacity in specific areas

Specific provisions provide for a possibility to restrict someone's legal capacity in specific areas. There are some safeguards in place (such as the restriction must be on a personalized assessment of a real risk the person would be exposed to if the legal capacity would not be restricted), but it is still possible to restrict a person's legal capacity to marry,⁴⁰ parental rights, entering into labour contracts, requests for social benefits, testamentary wills or

³⁷Judgement of the Czech Constitutional Court, I.ÚS 2637/17 (23 January 2018).

³⁸ See Judgement of the Czech Constitutional Court, II ÚS 2020/18 (28 March 2019).

³⁹See Judgement of the Czech Constitutional Court, II ÚS 194/11 (22 November 2012).

⁴⁰This has been, inter alia, criticized by the Committee on the Elimination of Discrimination Against Women. See CEDAW Concluding Observations of 14 March 2016, CEDAW/C/CZE/CO/6.

providing informed consent with medical treatment, including interference with physical integrity.

In particular, the Czech elections code⁴¹ provides expressly for the possibility to restrict someone's right to vote and to stand for elections on the grounds of his or her disability. Article 673 of the Civil Code allows for restriction of legal capacity in the right to marriage, and Article 23 § 3, e), 2 of the Health-Care Act provides for the possibility to restrict a person's capacity to provide informed consent in health matters.

People with disabilities are still forcefully detained in social care homes (based on provisions allowing for so-called social detentions) or psychiatric hospitals. Such involuntary institutionalization may also be concluded by the guardian; in such case, the law considers the psychiatric institutionalization as voluntary. The treatment of people in psychiatric institutions still often amounts to ill-treatment and the institutions are still by law allowed to use cage-beds to restrain the clients, contrary to repeated criticism by international bodies (see latest Concluding Observations of the Committee Against Torture of 2018, § 33⁴²). Specifically, the Health Care Act still includes 'placing the patient in a net bed' as one of the possible restraints which can be applied by health care providers in psychiatric settings.

Criminal code

The Criminal Code⁴³ states that in case the crime against life and health is committed to the detriment of a person with disability it is considered as a general aggravating circumstance. The problematic issue lies in the fact, that Czech criminal law does not have adequate provisions that criminalise torture and other forms of ill-treatment which would ensure the effective investigation, prosecution, and punishment, where appropriate, of perpetrators of torture and other forms of ill-treatment, especially against persons with disabilities.

The wording in the existing definition of the crime provided for under Article 149 of the Criminal Code mixes up different forms of ill-treatment (torture, inhuman and degrading treatment and punishment) and fails to provide any definition of the elements of torture, and fails to acknowledge discrimination as one of the possible purposes. Besides, it fails to distinguish acts of torture from other forms of ill-treatment on the grounds of *mens rea*. Thus, the intent is required even for cases of degrading treatment, which substantively limits the provision's applicability in the practice, e.g. in relation to bad conditions in large residential institutions or psychiatric hospitals. This situation has resulted in *de facto* impunity for acts of torture, cruel, inhuman, and degrading treatment.

In the case of a person deprived of personal liberty whose legal capacity has been restricted, the police have a duty to notify the legal representative. Special procedure is then determined in an action against a person with an obvious intellectual or psychosocial disability. In case of doubt about the mental state of the person against whom proceedings are being conducted, expert opinions concerning the sanity of the person are carried out, so that person's right to a fair trial is not violated. However, practice shows that law enforcement authorities do not know how to treat people with disabilities suspected of having committed a crime.

⁴¹Article 2 (b) and Article of the Parliamentary Code on Elections no. 247/1995, Article 4 (2)(b) of the Code on Elections to the Regional Parliaments no. 130/2002, Article 4 (2)(b) of the Code on Elections to the Communal Parliaments no. 491/2001 and Article 5 (2)(b) of the European Elections Code no. 62/2003.

⁴² UN Committee against Torture, *Concluding Observations: The Czech Republic* (6 June 2018), CAT/CZE/CO/6.

⁴³ Act no. 40/2009.

Antidiscrimination law

The Czech Republic has transposed the European Union anti-discrimination directives (the Framework Directive and the Racial Discrimination Directive) into the Antidiscrimination Act no. 198/2009 and civil procedure codes. Article 2 includes discrimination based on disability as a violation of the right to equal treatment. The legislation, however, does not fully comply with the international commitments (for instance the definition of the obligation to provide reasonable accommodation is not compliant with the CRPD; and it does not include segregation as a forbidden form of discrimination) and particularly proofs not to be effective in practice. The report of the Public Defender of Rights from 2015 shows that 74 % of victims of discrimination consider it to be difficult to get access to justice. Lack of knowledge or assistance is among the most cited reasons. The procedure is considered costly and demanding in terms of evidence, and often too emotionally distressing for the victim.⁴⁴ Various human rights bodies consistently recommend the country to strengthen the protection against discrimination for example by introducing *actio popularis* into the domestic system.

Other relevant bodies and government measures

Government Council for People with Disabilities

The Council is a permanent consultation body of the Government, coordinating and proposing policies and legislative amendments concerning the rights of people with disabilities. The Council collaborated on the preparation of the National Action Plan for Equal Opportunities for Persons with Disabilities (current one for period 2015-2020), oversees the implementation of different measures and responds to initiatives from citizens. In the past year, the Council has been dealing with the situation of families with children with autism and the lack of appropriate support and services for them. A special working group (that we should be a member of) focused directly on the issue of legal capacity should be set up in September 2020.

The National Plan for the Promotion of Equal Opportunities for Persons with Disabilities 2015 - 2020

The National Plan for the Promotion of Equal Opportunities for Persons with Disabilities 2015–2020⁴⁵ seeks to promote and support the integration of persons with disabilities and to implement the CRPD through the measures defined. It determines strategic areas of support of persons with disabilities, based on the articles of the Convention, sets objectives and particular measures to meet the latter. The strategic areas include equal treatment and protection against discrimination, accessibility of buildings and transport, equality before the law and access to justice, independent living, personal mobility, education, employment, social security and social protection, and others. The targets have been fulfilled only in part; even the Government admits gaps in the implementation of measures in some areas, such as accessibility of buildings, equality before the law, employment in public administration, or social security and social protection systems. The National Plan for 2021 and the following years is to date still not approved.

⁴⁴ Veřejný ochránce práv. Diskriminace v ČR: oběť diskriminace a její překážky v přístupu ke spravedlnosti. 2015 Online (pdf)

<https://www.ochrance.cz/fileadmin/user_upload/ESO/CZ_Diskriminace_v_CR_vyzkum_01.pdf>.

⁴⁵ Available in English <<https://www.vlada.cz/cz/ppov/vvzpo/dokumenty/narodni-plan-podpory-rovných-prilezitosti-pro-osoby-se-zdravotnim-postizenim-na-obdobi-2015-2020-130992/>>.

The Public Defender of Rights

The competences of the Public Defender of Rights are regulated by the Act on Public Defender of Rights (Law no. 349/1999 Coll.). The Defender is elected by the Chamber of Deputies for six years from candidates proposed by the President (two candidates) and the Senate (two candidates) and can only serve two consecutive terms. The main competence of the Defender is to protect persons against the conduct of authorities, which is unlawful or amounts to maladministration, and to help protect human rights.

Since January 2018, the Public Defender of Rights monitors the fulfillment of rights of persons with disabilities in Czechia. In particular, the Public Defender conducts research, publishes the annual reports, and makes recommendations to protect the rights of persons with disabilities.

OFFICIAL STATISTICS

The Czech Republic ratified the CRPD in 2009, introducing the right to full legal capacity and the right to live independently and be included in the community for all people with disabilities. Despite that, people with disabilities are still partially deprived of their legal capacity (see more detailed info above). Although the Czech legal system declares that the restriction on legal capacity is a measure of the last resort – can be used only under strict conditions stipulated by law - the reality is different. It is the most widely used measure by courts to address the situation of people with intellectual or psychosocial disabilities.

According to the latest available data, there are 35 666 people with the restricted legal capacity to some extent.⁴⁶ Between 2014 and 2016, the courts issued 29 012 decisions restricting people on their legal capacity, changing or extending restrictions. In the same period, legal capacity was restored only in 2 154 cases.⁴⁷ The most frequently used institute of supported decision-making is guardianship without restrictions on legal capacity – applied already in 5 572 cases. According to the Ministry of Justice, the popularity of this institute lies in its similarity with the guardianship with restrictions on legal capacity and in the possibility to set specific powers of the guardian according to the needs of the supported person.⁴⁸ Interestingly, the private guardian without restrictions on legal capacity was appointed by 88 % whereas the public guardian only in 12 % of these cases. On the other hand, in the cases of guardianship with restrictions on legal capacity, a public guardian was appointed in 28 % of these decisions – thus 2.3 times more frequent than in the case of no restrictions. These data refute the premise that relatives and closed persons are not interested in guardianship.

Representation by a household member has been since its introduction until the end of 2016 approved only in 1 338 cases and dismissed in 15 cases. The low application consists mainly of a vague interpretation of the responsibilities and powers of the supporter, difficulties in dealing with social benefits, or insufficient interrelation with the health law. Moreover, family members often do not have the necessary information and therefore, do not propose this institute. These practical aspects can considerably affect the usability.⁴⁹

⁴⁶ Rozhodování o svéprávnosti: Statistická data z období 2014 – 2016 s komentářem. Ministerstvo spravedlnosti (Court proceedings on legal capacity: Statistical data from the period 2014 – 2016 with commentary. Ministry of Justice) at 7.

⁴⁷ *Ibid* at 10.

⁴⁸ *Ibid* at 14.

⁴⁹ *Ibid* at 19.

Another new institute - The Agreement on support in decision-making is the least used one. Courts issued only 155 approving decisions in three years. However, the annual numbers of approved agreements are increasing. Discussions showed that the reason for minimal use is the absence of a person willing to perform the function of a supporter. Another significant reason might be the general public and even professionals' ignorance of this institute.

Similar to the right to full legal capacity, also the right to live independently and be included in the community (Article 19 of the CRPD) is often violated. Although the Act on Social Services requires all social care providers to ensure the autonomy, independence, and inclusion of persons with disabilities into society, social care services are still mostly provided in institutional settings. These institutions are characterized by a regimented culture, segregation from family and community, and confinement.

Concretely, about 12 000 adults were living in institutions for persons with disabilities in 2018.⁵⁰ 20 075 people were living in homes for special arrangements.⁵¹ The average capacity for both institutions for persons with disabilities and homes for special arrangements is 59 clients, and even 71 clients in institutions for elderly people. While the number of people living in institutions for persons with disabilities is slowly declining – since 2009 the number has decreased by 2 533, the number of people living in homes for special arrangements is rapidly increasing – since 2009 the number has increased by 11 852. Hypothetically, this increase might be related to the growing number of people restricted in their legal capacity due to the fact that the communication with the guardian is perceived as easier than with the client of such a social service.

Another 37 000 people live in institutions for elderly people.⁵² Only 520 persons with disabilities live in community-based provision.⁵³ Comprehensive data on children with disabilities living in institutions are not available, however, Lumus (NGO) states that there were 411 institutionalized children with disabilities.⁵⁴

FINDINGS FROM CASE STUDIES

Most people who turn to our organization, wish to use the positive changes brought by the new Civil Code and seek to restore their legal capacity, avert its possible limitations, or seek to establish one of the possible supported decision-making mechanisms. In January 2020, we carried out the research by using in-depth interviews with both supported persons and their

⁵⁰ Statistická ročenka z oblasti práce a sociálních věcí. Ministerstvo práce a sociálních věcí. 2019 at 58, online (pdf) https://www.mpsv.cz/documents/20142/975025/Statisticka_rocenka_z_oblasti_prace_a_socialnich_veci_2018+%281%29.pdf/a060f8db-abc6-6713-e0d1-9da7f606b983.

⁵¹ *Ibid.*

⁵² There are no comprehensive data on how many of those people have some form of disability, but, according to the United Nations, more than 46 % of elderly people worldwide have disabilities. See United Nations, “Ageing and disability“, online: <https://www.un.org/development/desa/disabilities/disability-and-ageing.html>.

⁵³ Jednota pro deinstitucionalizaci, z. s. (2018), “O lidech žijících v ČR v pobytových zařízeních“, (Report on Persons Living in the Residential Care Facilities in the Czech Republic.), online: http://jdicz.eu/wp-content/uploads/jdi_70vyroci.pdf?fbclid=IwAR1ToxGpFJruCz1DW-DLHeBOKyVy8w8iSxsEBd0B9gdlFmquXgmfhXH_uiU.

⁵⁴ “Czech Republic - Lumos“, online: <https://www.wearelumos.org/where-we-work/czech-republic/>.

supporters. We aimed to map the impacts of the use of new legislation, identify its benefits and barriers, and make recommendations for further practice.

The research has revealed the following positive side of the new supported decision-making mechanisms. Above all, it is regaining the supported person's dignity. The supported person feels more integrated into society – more like any other person. This stems from the greater independence but also the responsibility that the new institutes offer.

Conversely, the most frequently mentioned negative is the lack of information. State institutions, but also private entities often do not have sufficient information about supported decision-mechanisms. Another mentioned negative is the approach of judges towards supported persons and their families – often perceived as degrading. The apparent reluctance of the courts to change the form of the legal arrangement is also mentioned.

Another issue is the performance of the guardian function. Guardians still often make decisions based on the best interest principle instead of the supported person's will and preferences. However, Czech law and practice do not yet have sufficient protection against it. Also, providing the existence of supported decision-making institutes or guardianship is problematic. Currently, it is evidenced by court decisions. However, it is not an appropriate solution; court decisions contain sensitive personal information that should not be shared with a third party. Besides, it is not very practical as it forces the supporter to carry with him the court decision.

CONCLUSION

This report demonstrates significant progress the Czech Republic has made since the ratification of the CRPD in 2009, especially by the adoption of the new Civil Code in 2014. The Civil Code has reformed to a certain extent the guardianship system, it abolished plenary guardianship and incorporated some elements of supported decision-making. However, it still allows for partial guardianship; practice which violates Article 12 of the CRPD. Moreover, this report shows that the current situation violates even the less strict ECHR standards, which allows for restrictions on legal capacity if such a limitation fulfills the requirement of the strict scrutiny test and is a measure of last resort.

The right to full legal capacity is pivotal also for other rights enshrined in the CRPD such as the right to live independently and be included in the community. People with restricted legal capacity often do not have the freedom to choose, on an equal basis others, with whom and where to live, because to exercise this right, they need their decisions to be respected.

These unsatisfactory conclusions are also supported by official statistics. Data shows that restrictions on legal capacity are still the most widely used measure by courts to address the situation of people with intellectual or psychosocial disabilities. As follows from research conducted by our organization, the supported decision-making mechanisms are used insufficiently. The main reason is the lack of information, a vague interpretation of the responsibilities and powers of the supporters.

Better informed key actors might be enough to improve the current situation in many cases. In other areas, however, we come across the fact that while we know what would be needed, no entity can provide it. We would like to open the discussion about the possibility of setting up an Institute for decision-making support. In the first place, however, a detailed analysis of the functioning of similar institutes in other states is needed. This institute should provide information and consultations, educational events for supporters and supported persons, and methodological guidance. It would also create awareness for the public, authorities, financial

institutions, or doctors. Last but not least, according to our proposal, the Institute would have the power to control activities of guardians and supporters.

In addition to the proposal of the Institute for supported decision-making, we make other specific recommendations to address and improve the current situation.

RECOMMENDATIONS

Based on the report's findings, we propose the following recommendations.

- ❖ State authorities should adjust the rules for the use of medical expertise in a court proceeding on legal capacity. A person's ability to handle her affairs should be rather based on the full picture of each individual's circumstances.
- ❖ State authorities should raise awareness of the new supported decision-mechanisms, in particular among judges and other officials, and cultivate their conduct with people with disabilities.
- ❖ State authorities should set up rules, control mechanisms, and procedures to protect supporters.
- ❖ State authorities should set up rules, control mechanisms, and procedures to protect supported persons. Judicial control of private guardians is usually only formal, focused on financial issues.
- ❖ State authorities should set up rules and mechanisms to avoid conflicts of interest in the role of the supporter (for instance accumulation of the role of a social service provider and supporter, or parent and supporter).
- ❖ State authorities should set up rules and mechanisms in case of several supporters for one supporter person (for instance when the supporters do not communicate constructively).
- ❖ State authorities should set up rules and mechanisms in case the supported person gets into a problematic situation, especially if she concludes an unfavorable contract.
- ❖ State authorities and other relevant stakeholders should focus on the increase of the supporter's proficiency through better access to information, consultations, training, sharing experiences, and supervision.
- ❖ State authorities should set up rules and mechanisms for formal proof of supported decision-making institutes and guardianship.
- ❖ State authorities should set up rules and procedures for law enforcement authorities regarding the treatment of people with disabilities suspected of having committed a crime.