

CZECH REPUBLIC

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Contents

Executive summary	4
1. Definitions.....	7
1.1. Terminology	7
1.2. National Context.....	7
2. Anti-discrimination.....	10
2.1. Incorporation of United Nations standards	10
2.2. The anti-discrimination national framework	12
3. Specific Fundamental Rights	17
3.1. The Right to life.....	17
3.2. The right to freedom from torture or cruel, inhuman or degrading treatment or punishment 18	
3.3. The right to freedom from exploitation	19
3.4. The right to liberty and security.....	19
3.5. The right to fair trial	19
3.6. The right to privacy, including the access to one's own confidential medical records	20
3.7. The right to marry, to found a family and to respect of family life	20
3.8. The right to have children and maintain parental rights	21
3.9. The right to property	21
3.10. The right to vote	22
4. Involuntary placement and Involuntary Treatment.....	23
4.1. Legal Framework.....	25
4.1.1. Treatment of persons under guardianship	26
4.1.2. Treatment of offenders with mental disorders	27
4.2. Criteria and Definitions	27
4.3. Assessment, Decision, Procedures and Duration.....	29
4.3.1. The role of medical professionals in the involuntary admission procedure	29
4.3.2. The role of medical professionals in the procedure reviewing the continuation of hospitalisation	30
4.3.3. Review and termination of the involuntary treatment.....	30
4.3.4. Transition from voluntary to involuntary status.....	31
4.3.5. Time lapse between psychiatric assessment and beginning of compulsory placement	31
4.3.6. Emergency admissions.....	32
4.3.7. Appeal proceedings.....	32
4.3.8. Legal support	32
4.3.9. Specific mental health care interventions	33
4.3.10. Coercive measures	33
4.3.11. Practical problems with the application of rules on involuntary treatment	34
5. Competence, Capacity and Guardianship.....	36
5.1. Criteria of placement under guardianship.....	36
5.2. Degrees of incapacity	37
5.2.1. Restriction of legal capacity.....	38
5.2.2. Deprivation of legal capacity	39
5.3. The guardianship system	40
5.3.1. Duration of guardianship and review of guardianship	41
5.3.2. Initiation of guardianship proceeding	42
5.3.3. National authorities and guardians.....	42
5.3.4. Appeal procedure	43
5.4. Proposed reform of guardianship system.....	44
6. Miscellaneous	47

Annexes-Case Law.....48

Executive summary

Definitions

- [1]. In the Czech legislation there is neither uniform definition of disability in general, nor specifically for mental disorders and intellectual disability. With regard to the specificities in definition and understanding of the term mental impairment under Czech law, no exact translation of mental disorder and intellectual disability can be provided.
- [2]. Mental impairment is defined by Czech legal doctrine as an obvious anomaly from the state of mental health and stability which can influence intellectual and voluntary abilities of an individual. It is a general category that comprises
- *mental illness* as a long-term disease which shows characteristic symptoms (i.e. beginning, progress and end of the disease); it is known as the senile dementia
 - *state of unsound mind* as a chronic mental disorder within which no clear-cut stages can be defined (i.e. mental retardation, psychopathy)
 - *acute mental impairment* as a pathological effect (pathological intoxication) or as a periodic result of a chronic nervous disorder (epileptic seizure).
- [3]. The Constitutional Court has recently modified the concept discussed above stating that a slight mental retardation is not to be subsumed under the term of mental impairment as it is not a mental impairment *stricto sensu*.
- [4]. Regardless of doctrinal and jurisprudential concepts, the Criminal Code of 2009, which takes effect as of the 1st of January 2010, provides a legal definition of mental impairment that will apply at the very least within criminal law.

Anti-discrimination

- [5]. The process of ratification of the UN Convention on the Rights of Persons with Disabilities (CRPD) in the Czech Republic was concluded only recently, on 28 September 2009. The Explanatory report of the Ministry of Labour and Social Affairs states that most of the relevant rights provided by the Convention have already been granted under the Czech law in various laws and regulations.
- [6]. The Czech legislation contains specific constitutional provisions on equality. The Employment Framework Directive 2000/78, as well as other EU anti-discrimination directives were originally implemented by number of national laws. At the present, the new and comprehensive Anti-discrimination Act, which entered into force on 1 September 2009, provides comprehensive protection against discrimination, covering *inter alia* discrimination based on mental disability in various areas of life, including for example employment, access to public goods and service.

Specific fundamental rights

- [7]. According to the Article 6 of the Charter of Fundamental Rights and Freedoms every individual has an intrinsic right to life.

- [8]. The right to freedom from torture or cruel, inhuman or degrading treatment or punishment is guaranteed by Article 3 ECHR, as well as by the constitutional law of the Czech Republic
- [9]. Neither constitutional law, nor civil, criminal or administrative law states the prohibition of exploitation explicitly. However it could be implied from the constitutional protection of dignity and privacy complemented by the criminal offence of human trafficking.
- [10]. The right to liberty is guaranteed by the Czech legal order.
- [11]. The right to fair trial is protected by provisions to be found at the constitutional, as well as legislative level.
- [12]. The right to privacy is recognized in the Charter of Fundamental Rights and Freedoms and it is also protected by civil, criminal and administrative law.
- [13]. The right to marry, to found a family and to respect of family life is protected by provisions of the ECHR and provisions in civil law. An incompetent woman, an incompetent man can not marry. A woman or a man with limited legal capacity, as well as a woman or a man suffering from a mental impairment which could serve as a ground to limit their legal capacity, can enter into a marriage only with the prior court's approval.
- [14]. As to the right to have children and maintain parental rights, under the Czech law every person has the right to have children, regardless of her/his mental condition. However, only a legally competent parent enjoys parental rights.
- [15]. Article 10 of the Charter of Fundamental Rights and Freedoms protects everyone's right to own property.
- [16]. The subjective right to vote is closely linked to the legal capacity of an individual. Therefore, an incompetent patient does not enjoy either the active or the passive right to vote.

Involuntary placement and involuntary treatment

- [17]. The Council of Europe's Committee for the Prevention of Torture (CPT) has visited the Czech Republic four times. CPT was critical to different aspects of involuntary placement and treatment of persons with mental disabilities. This report describes main findings and conclusions of the CPT reports.
- [18]. The Czech Republic does not have a specific law on mental health care. Involuntary placement and treatment of persons with mental disorders is regulated by Act no. 20/1966 Sb. *o péči o zdraví lidu* [Healthcare Act],¹ and by Act no. 99/1963, the Civil Procedure Code.² Both Acts are rather outdated. This report addresses main problems concerning legal framework of involuntary placement and involuntary treatment.
- [19]. This report closely describes the assessment, decision, procedure and duration of involuntary placement and treatment. Especially the role of medical professionals in the involuntary admission procedure and in the procedure reviewing the continuation of

¹ Czech Republic/*Zákon č. 20/1966 Sb., o péči a zdraví lidu* [Act No. 20/1966 Coll., People's Health Care Act], available at: http://portal.gov.cz/wps/portal/_s.155/701?number1=20%2F1966&number2=&name=&text= (in Czech, last accessed on 2 November 2009).

² Czech Republic/*Zákon č. 99/1963 Sb., občanský soudní řád* [Act No. 99/1963 Coll., Civil Procedure Code], available at: http://portal.gov.cz/wps/portal/_s.155/701?number1=99%2F1963&number2=&name=&text= (in Czech, last accessed on 3 November 2009).

hospitalisation, review and termination of the involuntary treatment, the transition from voluntary to involuntary status time lapse between psychiatric assessment and beginning of compulsory placement, emergency admissions and appeal proceedings. Then legal support, using of coercive measures, specific mental health care interventions and finally practical problems with the application of rules on involuntary treatment.

Competence, Capacity and Guardianship

- [20]. Persons with mental disorders and persons with intellectual disabilities unable to manage their affairs can be appointed a *guardian (opatrovník)* in the Czech Republic. Guardianship is the only system of protection of persons with disabilities. There is no special code on guardianship. The main body of guardianship regulations is contained in Act no. 40/1964 Civil Code³ and Act no. 99/1963 Civil Procedure Code⁴.
- [21]. There is no exact definition of “competence” and “capacity” in Czech law. Nor is there a distinction in the Czech legal language between “competence” and “capacity”. The Czech Civil Code, Act No. 40/1964, differentiates between capacity to have rights and obligations (*způsobilost k právům a povinnostem*)⁵ and capacity to exercise rights (*způsobilost k právním úkonům*).⁶ This report closely address the criteria of placement under guardianship, the degrees of incapacity (restriction of legal capacity and deprivation of legal capacity), the guardianship system, especially duration of guardianship and question of review of guardianship, specific aspects of guardianship proceeding, the position of national authorities and guardians and appeal procedure.
- [22]. In 2009 Czech Government submitted proposal of the new civil code to the Parliament. The proposal incorporated most of the comments from NGOs, known as “guardianship reform”. This report closely describes the procedure of proposed reform and its final content based on supported decision-making paradigm and art. 12 of the Convention on the Rights of Persons with Disabilities (CRPD).

Miscellaneous

- [23]. The Czech Public Defender of Rights (Ombudsman) is obliged by law to visit annually institutions providing accommodation to mentally disabled persons. The reports from such visits describe in detail *inter alia* deficiencies, as well as examples of good practice in this field.

³ Czech Republic/Zákon č. 40/1964 Sb., *Občanský zákon* [Act No. 40/1964 Coll., the Civil Code], available at <http://portal.gov.cz/wps/portal/.s.155/701?number1=40%2F1964&number2=&name=&text=> (in Czech, last accessed 27 October 2009).

⁴ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád.

⁵ Czech Republic/Zákon č. 40/1964 Sb., občanský zákon, Article 7 (1); Czech Republic/*Listina základních práv a svobod*, vyhlášená pod č. 2/1993 Sb. [Charter of Fundamental Rights and Freedoms, published as No. 2/1993 Coll.], Article 5, available on <http://www.psp.cz/cgi-bin/eng/docs/laws/1993/2.html> (in English, accessed on 27 October 2009).

⁶ Czech Republic/Zákon č. 40/1964 Sb., občanský zákon, Article 8 (1).

1. Definitions

[24]. Due to national specificities in defining and understanding the term of mental impairment neither mental disorder (especially due to its connotation of being long-termed), nor intellectual disability (with respect to the established jurisprudence of the Constitutional Court) are included in the list of terms below.

1.1. Terminology

- duševní porucha – mental impairment
- duševní choroba, duševní nemoc – mental illness
- chorobný duševní stav – state of unsound mind
- krátkodobé duševní poruchy – acute mental impairment
- mentální retardace – mental retardation
- hluboká porucha vědomí – serious impairment of consciousness
- těžká asociální porucha osobnosti – serious dissocial personality disorder
- jiná těžká duševní nebo sexuální odchylka – another serious mental or sexual abnormality (not to be specified further)
- způsobilost k právům – legal personality
- způsobilost k právním úkonům (svéprávnost) – legal capacity
- zbavení způsobilosti k právním úkonům (svéprávnosti) – incapacity
- omezení způsobilosti k právním úkonům (svéprávnosti) – limited capacity
- osoba zbavená způsobilosti k právním úkonům (nesvéprávná osoba) – an incompetent individual
- nepřičetnost – insanity
- zmenšená přičetnost – diminished responsibility

1.2. National Context

[25]. Mental impairment is defined by Czech legal doctrine as an obvious anomaly from the state of mental health and stability which can influence intellectual and voluntary abilities of an individual. It is a general category that comprises

- *mental illness* as a long-term disease which shows characteristic symptoms (i.e. beginning, progress and end of the disease); it is known as the senile dementia
- *state of unsound mind* as a chronic mental disorder within which no clear-cut stages can be defined (i.e. mental retardation, psychopathy)
- *acute mental impairment* as a pathological effect (pathological intoxication) or as a periodic result of a chronic nervous disorder (epileptic seizure).

- [26]. The Constitutional Court has recently modified the concept discussed above stating that a slight mental retardation is not to be subsumed under the term of mental impairment as it is not a mental impairment *stricto sensu*.⁷
- [27]. Regardless of doctrinal and jurisprudential concepts, the Criminal Code of 2009, which takes effect as of the 1st of January 2010, provides a legal definition of mental impairment that will apply at the very least within criminal law. Under the Criminal Code 2009, a mental impairment involves
- mental impairment which arises out of a mental illness,
 - serious impairment of consciousness,
 - mental retardation,
 - serious dissocial disorder of the personality,
 - another serious abnormality of mind or a sexual abnormality.⁸
- [28]. Czech constitutional law respects the legal personality of every individual.⁹ However, not every individual can act with legal effects. Therefore, Czech civil law has introduced the category of legal capacity as opposed to the legal incapacity, as well as the concept of limited capacity.
- [29]. The term of the legal incapacity signifies a total legal incapacity to act with any legal effects due to a mental impairment. Civil law defines two preconditions of the legal incapacity: the lack of ability to recognize the character and/or consequences of one's acts and the lack of ability to control one's behaviour. According to the Civil Code, an individual is legally incompetent
- if she/he is a minor and her/his age, intellectual and voluntary maturity does not allow her/him to carry out a particular legal act with any legal effects¹⁰
 - or if her/his incapacity has been declared by a court due to her/his mental impairment that is not only temporary,¹¹
 - or if she/he acts in state of a mental impairment that disqualifies her/him from acting with legal effects.¹²
- [30]. On the other hand, a limited capacity comes into consideration when an individual suffers from a mental impairment or intoxication that generally disqualifies her/him from acting with legal effects. However, she/he is able of carrying out certain legal acts all of which have to be specified in a court decision. Apart from them, she/he is represented in her/his legal dealings by a guardian. The fact that a person is competent merely in certain limited extend could be reflected by another provision and in compliance with limited competence as well the procedural competence or the active or passive right to vote could be limited.
- [31]. The statistics relevant to 30 July 2007 showed that there is competence of individual is by court rather declined fully than just limited – there were 3 893 individuals with limited competence compared to amount of 23 283 completely incompetent individuals although the institute of establishment of incompetence should be *ultima ratio*. Furthermore, there is a

⁷ Ústavní soud ČR/Nález I. ÚS 557/09 (18.08.2009).

⁸ Czech Republic/Zákon č. 140/1961 Sb., *Trestný zákoník* [Act No. 140/1961 Coll., Criminal Code], Section 123, in the version, which is due to come into force on 1 January 2010.

⁹ Czech Republic/*Listina základních práv a svobod*, vyhlášená pod č. 2/1993 Sb. [Charter of Fundamental Rights and Freedoms, published as No. 2/1993 Coll.], Article 5.

¹⁰ Czech Republic/Zákon č. 40/1964 Sb., *Občanský zákon* [Act No. 40/1964 Coll., the Civil Code], Section 9.

¹¹ Czech Republic/Zákon č. 40/1964 Sb., *Občanský zákon* [Act No. 40/1964 Coll., the Civil Code], Section 10.

¹² Czech Republic/Zákon č. 40/1964 Sb., *Občanský zákon* [Act No. 40/1964 Coll., the Civil Code], Section 38 (2).

great difficulty to advocate the establishment of (total) incompetence from the constitutional point of view at all as it supposed to be an unwanted relict of socialistic regime and till present has had vanished from advanced foreign legal system (Germany, Austria, France).¹³

- [32]. Seemingly similar is the situation in criminal law. To plead guilty the criminal liability must be established. Criminal law recognizes the defence of insanity and as a partial defence diminished responsibility. Both must be caused by mental impairment. Then, insanity must be accomplished (alternatively) by total lack of ability to recognize the illegality of one's action or by total lack of ability to control one's behaviour at the crucial time. Were at that time either the ability to foresee or the ability to control merely reduced the defendant could plead the diminished responsibility.
- [33]. However, the state of incompetence (limited competence) does not imply automatically the state of insanity (diminished responsibility), as the latter is to be judged *ad hoc* for every each action defendant did. The fact that defendant is incompetent is meaningless as their potential insanity is concerned.¹⁴

¹³ As referred by the Constitutional Court of the Czech Republic in its decision Ústavní soud ČR/Nález I. ÚS 557/09 (18.08.2009).

¹⁴ Nejvyšší soud ČR/Rozsudek 6 Tz 315/2001 (3.4.2002).

2. Anti-discrimination

2.1. Incorporation of United Nations standards

- [34]. The main principles regarding “the fundamental rights concerning mental health” in the Czech Republic are granted directly by the Constitution of the Czech Republic.¹⁵ The integral part of the Constitution is Article 3, which declares, that: ‘The Charter of Fundamental Rights and Freedoms forms a part of the constitutional order of the Czech Republic’.
- [35]. Article 1 of the Charter of Fundamental Rights and Freedoms stipulates that: „All people are free, have equal dignity, and enjoy equality of rights. Their fundamental rights and basic freedoms are inherent, inalienable, unprejudiced, and not subject to repeal“.
- [36]. Next, Article 3 of the Charter declares that: “Everyone is guaranteed the enjoyment of her fundamental rights and basic freedoms without regard to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status“.
- [37]. Concerning anti-discrimination and the right to fair proceedings, the Charter in Article 8 declares: “No one may be prosecuted or deprived of his/her liberty except on the grounds and in the manner specified by law. No one may be deprived of her liberty merely on the grounds of inability to fulfil a contractual obligation. A person may be placed in custody only on the grounds and for the length of time laid down in a law, and only on the basis of a judicial decision. The law shall specify the cases in which a person may be committed to or kept in a medical institution without her consent. A court must be notified within twenty-four hours that such a measure has been taken, and it shall decide within seven days whether the placement was proper”.
- [38]. The Czech Republic, as EU member state, participates in the work of the UN and the EU structures on protection of rights and freedoms of persons with mental disorder and persons with mental disability. The

¹⁵ Czech Republic/*Zákon č. 1/1993 Sb., Ústava České republiky* [Act No. 1/1993 Coll., Constitution of The Czech Republic], available at http://angl.concourt.cz/angl_verze/constitution.php (in English, last accessed 14 October 2009).

Czech Republic participated actively in the process of adoption of the Convention on the Rights of Persons with Disabilities, signed in New York on 30 March 2007.

- [39]. Expert negotiations was participated by Czech representatives from the Ministry of Foreign Affairs, the Ministry of Labour and Social Affairs and the Government Board for People with Disabilities. The Czech Republic has been also a member of the Ad Hoc Committee. Also Czech non-governmental organizations participated in negotiations.
- [40]. The process of ratification of the Convention in Czech Republic was concluded only recently, on 28 September 2009.¹⁶ The Explanatory Report submitting report of the Ministry of Labour and Social Affairs states that most of the relevant rights provided by the Convention have already been granted under the Czech law in various laws and regulations.¹⁷
- [41]. Implementation and monitoring of the Convention at national level is, according to the Act on establishment of Ministries and other central state administration bodies [Zákon o zřízení ministerstev a jiných ústř. orgánů státní správy ČSR], the Ministry of Labour and Social Affairs.¹⁸ Under the Ministry of Labour and Social Affairs the issues of people with disabilities are in responsibility of the Department on social integration.
- [42]. In connection with the adoption of the Convention, the Government Board for People with Disabilities was entitled as a coordination and advisory body at the interdepartmental level. The Government Board is composed of the governmental experts as well as of representatives of people with disabilities (the NGO's). This gives concerned NGO's possibility for their involvement in the enforcement processes and monitoring of the rights of persons with disabilities within the meaning of Article 3 of the Convention. For this purpose, the Government Board has already established the Special Working Group on the implementation of the Convention.

¹⁶ More information is available at <http://www.psp.cz/sqw/historie.sqw?o=5&t=812> (in Czech, last accessed on 28 October 2009).

¹⁷ Ministerstvo práce a sociálních věcí ČR/ Předkládací zpráva MPSV pro Parlament ČR [Explanatory Report of the Ministry of Labour and Social Affairs for the Parliament of the Czech Republic], available at <http://www.psp.cz/sqw/text/orig2.sqw?idd=54439> (in Czech, last accessed on 2 November 2009).

¹⁸ Czech Republic/Zákon č. 2/1969 Sb., o zřízení ministerstev a jiných ústř. orgánů státní správy ČSR [Act No. 2/1969 Coll., on establishment of Ministries and other central state administration bodies], Section 9, available at: http://portal.gov.cz/wps/portal/_s.155/701?number1=2%2F1969&number2=&name=&text= (in Czech, last accessed on 2 November 2009).

- [43]. Significance of the adopted Convention can be also seen on actual activity of the governmental together with the non-governmental institutions concerned with the rights of persons with mental disabilities. In connection with the completion of the ratification process of the Convention, the League of Human Rights (Liga lidských práv) invited to an expert seminar which will be held on 23 November 2009. One of the main topics to discuss is the status of the Convention on the Rights of Persons with Disabilities in the jurisdiction of the Czech Republic.

2.2. The anti-discrimination national framework

- [44]. At the constitutional level, the Charter of Fundamental Rights and Freedoms [*Listina základních práv a svobod*] provides the principles of equality and non-discrimination in Article 1: “Human beings are free and equal in dignity and rights.” and in Article 3 (1): “Fundamental rights and freedoms shall be secured to all without discrimination on ground of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national or ethnic minority, property, birth or other status.” These are general equal treatment clauses at the constitutional level covering the aspect of equality in respect of persons with mental disorders and persons with intellectual disability, even though not *expressis verbis*.
- [45]. At the legislative level, no special act on antidiscrimination/equality in respect of persons with mental disorders and persons with intellectual disability exists in the Czech Republic. However, the Employment Framework Directive 2000/78, as well as other EU anti-discrimination directives (such as the Equal Treatment Directive 2006/54) was implemented through a new and comprehensive national act on anti-discrimination, Antidiscrimination Act,¹⁹ which entered into force on 1 September 2009. Before the adoption of Anti-discrimination Act, anti-discrimination provisions covering *inter alia* discrimination based on mental disability were spread in a number of national laws.²⁰

¹⁹ Czech Republic/Zákon č. 198/2009 Sb., o rovném zacházení a o právních prostředcích ochrany před diskriminací a o změně některých zákonů (antidiskriminační zákon) [Act No. 198/2009 Coll., on equal treatment and on legal means for protection against discrimination and on change of certain acts (Antidiscrimination Act)], available at http://portal.gov.cz/wps/portal/_s.155/701?number1=198%2F2009&number2=&name=&text= (in Czech only, last accessed on September 10, 2009).

²⁰ For example the following Czech laws prohibit discrimination: Act No. 262/2006 Coll., Labour Code, as amended; Act No. 435/2004 Coll., Employment Act, as amended; Act No. 143/1992 Coll., on Remuneration in Budgetary Organizations, as amended; Act No. 251/2005

- [46]. Most important provisions, which remain in force despite the existence of the Anti-discrimination Act, ensured the prohibition of discrimination in labour law and employment and other areas of the law. The Employment Act [*Zákon o zaměstnanosti*]²¹ defines the basic terms (direct and indirect discrimination), establishes certain remedies and explicitly prohibits both direct and indirect discrimination also on the basis of health condition, even though not mentioning explicitly mental disorder or intellectual disability. The Labour Code [*Zákoník práce*]²² is not detailed and does not prohibit explicitly the discrimination on the basis of mental disability, but still generally prohibits discrimination in labour relations. Employers are inter alia obliged to ensure equal treatment with all employees in terms of working conditions, remuneration for work and the provision of other financial benefits vocational training and opportunities for functional or other promotion in employment.
- [47]. There is no relevant case law yet with regard to the rules in respect of persons with mental disability.
- [48]. As in regard to preferential treatment, the Czech Charter of Fundamental Rights and Freedoms entails a provision making an explicit reference to health and disability (Article 29). This provision concerns however only the employment of disabled persons:
- (1) Women, adolescents, and persons with disabilities have the right to increased protection of their health at work and to special work conditions.
 - (2) Adolescents and persons with disabilities have the right to special protection in labour relations and to assistance in vocational training.
 - (3) Detailed provisions shall be set by law.

Coll., Labour Inspection Act, as amended; Act No. 634/1992 Coll., Consumer Protection Act, as amended; Act No. 561/2004 Coll., Act on Education, as amended; Act No. 111/1998 Coll., Act on University Education, as amended; Act No. 221/1999 Coll., Act on Professional Soldiers, as amended; Act no. 361/2003 Coll., Act on Service Relationships of Members of the Service Corps, as amended; Act no. 218/2002 Coll., Act on Service of Public Servants, as amended; Act No. 100/1988 Coll., on Social Security, as amended; Act No. 117/1995 Coll., on State Social Support, as amended; Act. No. 108/2006 Coll., Social Services Act; Act. No. 111/2006 Coll., Assistance in Need Act; Act No. 586/1992 Coll., Income Tax Act, as amended.

²¹ Czech Republic/*Zákon č. 435/2004 Sb., o zaměstnanosti* [Act No. 435/2004 Coll., Employment Act], available at

http://portal.gov.cz/wps/portal/_s.155/701?number1=435%2F2004&number2=&name=&text

= (Czech only) (opened on 19 October 2009).

²² Czech Republic/*Zákon č. 262/2006 Sb., zákoník práce* [Act No. 262/2006 Coll., Labour Code], available at

http://portal.gov.cz/wps/portal/_s.155/701?number1=262%2F2006&number2=&name=&text

= (Czech only) (opened on 19 October 2009).

- [49]. At the legislative level, preferential treatment arrangements stipulated by Article 29 Charter of Fundamental Rights and Freedoms are specified by the Employment Act. Section 4 (2) and (4) of the Employment Act provides that “When exercising the right to employment, both direct and indirect discrimination are prohibited, based on ... health condition ...” and “measures stipulated by law, the aim of which is to prevent or compensate the disadvantage of belonging to a group of physical persons determined on the basis of grounds named in Subsection 2...shall not be considered as discrimination”.
- [50]. The employment for persons with disability is encouraged through various measures, for example through: right to physiotherapy paid by the State, with the aim that the disabled person gains and maintains employment suitable for him/her²³; tax relief to employers;²⁴ increased legal protection of employees with reduced working ability; a system of compulsory quotas of employees with disability;²⁵ financial subsidies to entrepreneurial entities offering jobs to persons with reduced working ability; and the setting up of sheltered workplaces.²⁶ However, no specific provisions for the conclusion or termination of labour contracts with disabled persons exist.
- [51]. The new Antidiscrimination Act contains a similar provision to Section 4 (4) Employment Act - Section 7 (2) Antidiscrimination Act provides: “Measures, which aim at prevention or compensation of disadvantages resulting from belonging to a group of persons determined on the basis of one of the reasons stated in Section 2 (3) and aim to ensure equal treatment and equal opportunities, shall not be considered as discrimination”. This provision, however, is not restricted anymore to the area of employment and covers therefore also positive actions in other areas, such as housing, education, health care etc.
- [52]. To the best knowledge of the authors of this study, no case law concerning preferential treatment exists yet.
- [53]. As to the use of the term „disability“, no uniform definition in the Czech legislation existed prior the entry into force of the

²³ Czech Republic/*Zákon č. 435/2004 Sb., o zaměstnanosti* [Act No. 435/2004 Coll., Employment Act], Section 69.

²⁴ Czech Republic/*Zákon č. 435/2004 Sb., o zaměstnanosti* [Act No. 435/2004 Coll., Employment Act], Sections 73 and 78.

²⁵ Section 81 (1) of the Employment Act lays down the duty of employers with more than 25 employees to employ persons with a disability. The prescribed quota is 4 per cent of all employed persons. However, this duty might be fulfilled by other means, for example by compensation payments to the State (Section 81 (2)).

²⁶ Czech Republic/*Zákon č. 435/2004 Sb., o zaměstnanosti* [Act No. 435/2004 Coll., Employment Act], Sections 67 and the following.

Antidiscrimination Act. Several laws provided different notion of „disability“. The notion of disability in the Employment Act covers also persons with mental disorder.²⁷

- [54]. Currently, the Antidiscrimination Act provides a definition in Section 5 (6): „ ... disability means physical, sensory, mental or any other disability, which restrains or may restrain persons in exercising their rights to equal treatment in areas determined by this law; the notion of disability has to be understood as disability, which lasts or shall last according to the medical knowledge for at least one year. “ The Antidiscrimination Act is understood as a comprehensive law on anti-discrimination in the Czech Republic and covers thus several areas, including *inter alia* health care, education, social protection, access to goods and services.²⁸ There is no relevant case law yet.
- [55]. As to the obligation to provide „reasonable accommodation“, the Anti-discrimination Act provides in Section 3 (2) that „Indirect discrimination on the basis of disability means also the refusal or omission to introduce reasonable accommodation in order to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, or to use services available to the public, unless such measures would impose a disproportionate burden on the employer.” Thus by this provision the concept of reasonable accommodation has been implemented.
- [56]. On the one hand, it might be argued that Section 3 (2) Antidiscrimination Act goes beyond the standard set by the Directive 2000/78/EC - the Directive does not expressly state that non-compliance with the obligation to provide “reasonable accommodation” shall be qualified as “indirect discrimination”, whereas the Czech Anti-discrimination Act does. On the other hand, the provision of Section 3 (3) Antidiscrimination Act seems not to comply with the standards set in the Directive, as among the aspects to be taken into account when considering the proportionality of the burden for the employer, the provision names “the degree of advantage”, which the disabled person takes from the measure. This aspect, however, is not encompassed in the Directive, which provides only that “the 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”. No relevant case law exists yet.

²⁷ For example the notion of disability in Section 67 of the Employment Act (used also in the same way in the Labour Code) differs from the notion of Section 3 g) of the Act No. 108/2006 Coll., on Social Services (Zákon č. 108/2006 Sb., o sociálních službách).

²⁸ Czech Republic/*Antidiskriminační zákon* [Antidiscrimination Act], Section 1.

- [57]. In the Czech Republic, the Public Defender of Rights (Ombudsman) is an independent authority appointed by the Parliament with the aim to counteract discrimination and promote equal rights. The Ombudsman activities shall cover all grounds of discrimination stipulated by the Antidiscrimination Act, thus covering also discrimination on the grounds of intellectual disability.²⁹ He/she exercises observance of the Act, provides guidance to alleged victims of discrimination (in filling proposals to commence proceedings), provides advice in response to questions regarding discrimination, carries out independent research and informs the public.
- [58]. In the Czech Republic, the Public Defender of Rights is competent to deal with individual complaints as the only independent public body. He/she may deal not only with individual complaints addressed to him directly, but also with individual complaints, which were addressed originally to a Member of the Chamber of Deputies, a Senator or either of the Houses of Parliament
- [59]. However, the Ombudsman can neither issue a decision in a case nor he has direct means of enforcement at his disposal. He/she also does not possess the power to change judgments or decisions of public authorities. The Czech Ombudsman can request the body of state administration responsible for malpractice or error to remedy the situation. Should the relevant body fail to provide remedy, the Ombudsman may eventually pass the matter to the Government. Therefore, the individual complaint procedure addressed to the Ombudsman can not be regarded as a non-judicial procedure enabling to obtain redress.

²⁹ Section 1 (5) of the Public Defender of Rights Act (*Zákon č. 349/1999 Sb., o Veřejném ochránci práv* [Act No. 349/1999 Coll., Public Defender of Rights Act], available at http://portal.gov.cz/wps/portal/_s.155/701?number1=349%2F1999&number2=&name=&text= [in Czech, last accessed 28 October 2009]).

3. Specific Fundamental Rights

- [60]. All the fundamental rights discussed hereunder are protected by constitutional law, in particular by the Charter of Fundamental Rights and Freedoms [*Listina základních práv a svobod*]. Should any of the fundamental rights of an individual be infringed either by a statutory provision, executive provision or by an individual state act, the individual involved is entitled to appeal to the Constitutional Court as to the guardian of the Czech constitution.
- [61]. The Human Rights Governmental Council Report of 2002 denominates the imperfections in Czech procedural law together with virtually total absence of legal provisions regulating the legal status and rights of mentally impaired, involuntary treated (individuals without legal capacity or those with a limited capacity) as alarming. The effective legislation is obsolete and unsatisfactory, which becomes enormously obvious in light of other developed legal orders. Even in 1918 the legislation on the rights of those extremely vulnerable members of the society used to be more detailed and more progressive.³⁰

3.1. The Right to life

- [62]. According to the Article 6 of the Charter of Fundamental Rights and Freedoms every individual has an intrinsic right to life.
- [63]. However, Czech law does not impose a duty to live. Hence, suicide is not a criminal offence. On the other hand, anyone who witnesses a suicide attempt of an individual who might suffer from a mental impairment has a duty to prevent it.
- [64]. Active euthanasia (mercy killing) is strongly forbidden. However, an explicit rejection of life sustaining or life prolonging medical treatment by a competent patient should be respected by treating doctors who are expected to let her/him die. In case of an incompetent patient the guardian consents or rejects the medical care subject to the court approval in key matters (typically life prolonging and life sustaining treatment).

³⁰ Human Rights Governmental Council, *Report 2002*, at page 8, 32 at seq., as cited by the Czech Constitutional Court in its judgment IV. ÚS 412/04 (7.12.2005).

- [65]. Abortion is not a criminal offence provided it is undertaken under the conditions laid down by the Abortion Act [Zákon o umělém přerušení těhotenství].³¹ A pregnant woman is allowed to request the abortion in writing up to the 12th week of her pregnancy (the first trimester), the only restriction being her own health. Afterwards, the abortion can be carried out only if there is a suspicion of a genetic impairment (incl. mental impairment) of the foetus or if the life or the health of the pregnant woman is jeopardized by her pregnancy or the delivery.³² Similarly the prenatal diagnostics could be used in assisted-reproduction cases to exclude a genetic impairment of an embryo (which shall not be used to artificial insemination if the genetic impairment has been diagnosed).³³
- [66]. The Czech concept of the right to live as depicted above enjoys a relatively broad consensus within the Czech society. Hence, there is no case law discussing its facets available.

3.2. The right to freedom from torture or cruel, inhuman or degrading treatment or punishment

- [67]. The Article 7 of the Charter of Fundamental Rights and Freedoms provides that “nobody shall be subject to torture and cruel, inhuman or degrading humiliating treatment or punishment. People are equal in their dignity.”
- [68]. Courts must strictly observe the provisions of the Civil Code including the grounds for the restriction of the legal capacity and for incapacitation when they decide on this issue. Therefore, it is inadmissible to restrict one’s capacity merely because her/his claims are obnoxious for the state authorities. Such decision would show a deep disrespect of the litigant’s personality and would be considered as a humiliating treatment.³⁴
- [69]. Likewise, a *per curiam* disqualification to sue on the grounds that “by doing so already twice in the period of nine years she [the plaintiff]

³¹ Czech Republic/Zákon č. 66/1986 Sb., o umělém přerušení těhotenství [Act No. 66/1986 Coll., Abortion Act],

³² Czech Republic/Zákon č. 66/1986 Sb., o umělém přerušení těhotenství [Act No. 66/1986 Coll., Abortion Act], Sections 5 and 6.

³³ Czech Republic/Zákon č. 20/1966 Sb., o péči a zdraví lidu [Act No. 20/1966 Coll., People’s Health Care Act], Section 27d.

³⁴ Ústavní soud ČR/Nález II. ÚS 303/05 (13.09.2007).

has burdened the court” constitutes a fundamental breach of the constitutional right to dignity.³⁵

3.3. The right to freedom from exploitation

[70]. Neither constitutional law, nor civil, criminal or administrative law states the prohibition of exploitation explicitly. However it could be implied from the constitutional protection of dignity and privacy complemented by the criminal offence of human trafficking.

3.4. The right to liberty and security

[71]. If a court is petitioned to decide on the legal capacity or the sanity of an individual, it orders an examination of the mental state of the person concerned by expert appointed by the court. Depending on the circumstances of the case the person concerned the court can order her/his detention in a specialized clinic for the duration of the examination. This is a serious interference with her/his personal liberty which should be ordered only if the outpatient examination failed (the subsidiary nature of the detention). Such prudence is warranted by the deepest respect for the dignity and other fundamental rights of an individual.³⁶

3.5. The right to fair trial

[72]. The right of an incompetent individual to a fair trial involves an effective protection of her/his interests. This is done by the appointment of a guardian. However, the mere formal act of appointing a court’s employee to serve as the guardian of the incompetent individual does not safeguard her/his right to a fair trial.³⁷

[73]. Furthermore, the right to a fair trial protects an incompetent plaintiff from being charged with a burden of proof that the defendant must have known about her/his mental impairment and about its legal consequences (specifically that plaintiff’s “legal acts” were null and void). Such requirement would in its consequences imply that the defendant must have known all the facts that are discovered only in

³⁵ Ústavní soud ČR/Nález II. ÚS 263/07.

³⁶ Ústavní soud ČR/Usnesení III. ÚS 289/2000 (21.05.2003), Nález I. ÚS 493/05 (23.05.2006), Nález I. ÚS 563/06 (01.02.2007).

³⁷ Ústavní soud ČR/Nález IV. ÚS 273/05 (11.01.2007).

course of the trial and that she or he has the erudition of the judge to draw the appropriate legal conclusions from them.³⁸

3.6. The right to privacy, including the access to one's own confidential medical records

- [74]. The right to privacy is recognized in the Charter of Fundamental Rights and Freedoms (Listina základních práv a svobod) and it is also protected by civil, criminal and administrative law. In a broad sense it includes right to live, right to health protection, right to privacy, protection of the family life and right to dignity. Lately Czech courts decided many disputes over the disclosure of confidential medical information and over the access to one's own medical records. The disputes were due to a statute according to which the medical records were possession of health care providers. The resulting case law was inconsistent and did not settle the issue. The legislator responded by introducing a new pragmatic solution in the statutory regulation – even if there is no doubt that under the Convention on Biomedicine the medical records belong to health care providers, the right of disclosure of one's own medical information is indisputable and everybody has the right to a copy of her/his medical records.

3.7. The right to marry, to found a family and to respect of family life

- [75]. An incompetent woman, an incompetent man can not marry; her/his marriage is null and void. The same holds true for the marriage of an individual who suffers from a mental impairment which could be a ground for incapacitation. In these cases courts declare the nullity *ex officio*.
- [76]. A woman or a man with limited legal capacity, as well as a woman or a man suffering from a mental impairment which could serve as a ground to limit their legal capacity, can enter into a marriage only with the prior court's approval; failure to which the marriage is voidable. Courts declare the nullity upon application of one of the spouses. However, if the mental condition of the spouse at issue is compatible with the purpose of the marriage at the time of court's

³⁸ Ústavní soud ČR/Nález I. ÚS 437/02 (26.08.2003).

decision, the court will not interfere with the marriage and it will reject the petition.³⁹

3.8. The right to have children and maintain parental rights

[77]. Every person has the right to have children, regardless of her/his mental condition. The law offers no basis for paternalistic family planning regarding persons with a mental impairment. However, the fertility of most severely mentally handicapped people could be regulated as a part of the protection of their best interest since they are not able to understand the process of pregnancy and the significance of the parenthood. Today, the Czech courts hear with several cases that concern involuntary sterilisations of women belonging to the Roma minority.

[78]. Only a legally competent parent enjoys parental rights. If a court restricts the legal capacity of a parent of a minor child, it notifies the court specialized in the judicial care of minors of its decision. This specialized court notifies in its turn the other parent that she or he is the only holder of parental rights in the family or – if both parents are restricted in their legal capacity – it appoints a guardian.

3.9. The right to property

[79]. Article 10 of the Charter of Fundamental Rights and Freedoms protects everyone's right to own property. This right consists of two components: the protection of the ownership and the right to freely dispose of one's property. An individual can be deprived of her/his ownership or restricted in it only on the grounds of a specific public interest and she/he must be given an adequate compensation. The right to freely dispose of one's property could only be limited only as a consequence of one's limited legal capacity or incapacity to the extent necessary for an effective protection of third parties rights and freedoms and of the constitutional values.

[80]. Since the right to own property is a fundamental human right, a judicial decision limiting an individual's right to own property must be carefully drafted: the limitation cannot be worded as a permission

³⁹ Czech Republic/*Zákon č. 94/1963 Sb., o rodině* [Law No. 94/1963 Coll., Family Act], Section 14, available at http://portal.gov.cz/wps/portal/_s.155/701?number1=94%2F1963&number2=&name=&text= (in Czech, last accessed 27 October 2009).

(for example “the plaintiff is allowed to dispose of the property which value does not exceed 500 crowns in consequence of her limited legal capacity”). Instead, the court has to frame the limitation as a restriction (for example “the plaintiff is NOT allowed to dispose of the property which value exceeds 500 crowns in consequence of her limited legal capacity”).⁴⁰

3.10. The right to vote

[81]. The subjective right to vote is closely linked to the legal capacity of an individual.⁴¹ Therefore, an incompetent patient does not enjoy either the active or the passive right to vote. The Constitutional Court observed that only the legal incapacity constitutes *ipso iure* an impediment to the right to vote. If the capacity of an individual is merely limited, all the circumstances of the case have to be considered to determine if she/he enjoys the right to vote and other political rights (right to petition, freedom of association).⁴²

⁴⁰ Ústavní soud ČR/Nález I.ÚS 557/09 (18.08.2009).

⁴¹ Czech Republic/*Zákon č. 247/1995 Sb., volební zákon* [Act No. 247/1995 Coll., Election Act], Section 2, available at <http://portal.gov.cz/wps/portal/s.155/701?number1=247%2F1995&number2=&name=&text> = (in Czech, last accessed 29 October 2009).

⁴² Ústavní soud ČR/Nález I.ÚS 557/09 (18.08.2009).

4. Involuntary placement and Involuntary Treatment

- [82]. The Council of Europe's Committee for the Prevention of Torture (CPT) has visited the Czech Republic four times. It visited the Opava Psychiatric Hospital and the Ostravice Social Care Home for Mentally Handicapped Juveniles during its second periodic visit on 21 to 30 April 2002.⁴³ The Brno Psychiatric Hospital, the Dobřany Psychiatric Hospital, the Acute Psychiatric Assessment and Detoxification Unit of the Ostrava Municipal Hospital, the Střelice Social Care Home and the Brandýs nad Labem Social Care Home were visited during the Committee's third periodic visit from 27 March to 7 April 2006 and from 21 to 24 June 2006.⁴⁴ On its visit of 25 March to 2 April 2008 the Committee visited the Bohnice Psychiatric Hospital and the Havlíčkův Brod Psychiatric Hospital.⁴⁵
- [83]. The CPT noted with concern the lack of staff⁴⁶ and therapeutic opportunities,⁴⁷ which result in increased reliance on pharmacotherapy. It considered the regulation and recording of the use of ECT⁴⁸ and biomedical research⁴⁹ to be inadequate. The Committee was highly concerned by the use of coercive measures, especially net-

⁴³ Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 30 April 2002, CPT/Inf (2004) 4, Strasbourg, 12 March 2004.

⁴⁴ Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006 and from 21 to 24 June 2006, CPT/Inf (2007) 32, Strasbourg, 12 July 2007.

⁴⁵ Report to the Government of the Czech Republic on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 March to 2 April 2008, CPT (2008) 38, Strasbourg, 23 July 2008.

⁴⁶ Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 30 April 2002, CPT/Inf (2004) 4, Strasbourg, 12 March 2004, § 116.

⁴⁷ Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 30 April 2002, CPT/Inf (2004) 4, Strasbourg, 12 March 2004, § 117.

⁴⁸ Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 30 April 2002, CPT/Inf (2004) 4, Strasbourg, 12 March 2004, § 118.

⁴⁹ Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 30 April 2002, CPT/Inf (2004) 4, Strasbourg, 12 March 2004, § 119.

beds and cage-beds,⁵⁰ and recommended their withdrawal.⁵¹ It also criticised the lack of information of patients about their rights⁵² and the inadequacy of complaint procedures.⁵³

[84]. The CPT was also critical about the involuntary treatment review proceedings, noting that patient were typically not heard by the courts,⁵⁴ the decision was not delivered to them,⁵⁵ they were not adequately represented,⁵⁶ and persons under guardianship were deprived of all legal safeguards because they were treated as voluntary patients.⁵⁷ The CPT noted its serious concerns regarding surgical castration of sex offenders (2007 103).⁵⁸ It devoted its last visit entirely to the issue of treatment of sex-offenders, and was highly critical of the practice of surgical castration.⁵⁹

⁵⁰ Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006 and from 21 to 24 June 2006, CPT/Inf (2007) 32, Strasbourg, 12 July 2007, § 114, § 140.

⁵¹ Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 30 April 2002, CPT/Inf (2004) 4, Strasbourg, 12 March 2004, § 125-128.

⁵² Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006 and from 21 to 24 June 2006, CPT/Inf (2007) 32, Strasbourg, 12 July 2007, § 126.

⁵³ Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006 and from 21 to 24 June 2006, CPT/Inf (2007) 32, Strasbourg, 12 July 2007, § 127.

⁵⁴ Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006 and from 21 to 24 June 2006, CPT/Inf (2007) 32, Strasbourg, 12 July 2007, § 121.

⁵⁵ Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 30 April 2002, CPT/Inf (2004) 4, Strasbourg, 12 March 2004, § 135.

⁵⁶ Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 30 April 2002, CPT/Inf (2004) 4, Strasbourg, 12 March 2004, § 136.

⁵⁷ Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 30 April 2002, CPT/Inf (2004) 4, Strasbourg, 12 March 2004, § 137.

⁵⁸ Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006 and from 21 to 24 June 2006, CPT/Inf (2007) 32, Strasbourg, 12 July 2007, § 103.

⁵⁹ Report to the Government of the Czech Republic on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading

- [85]. The reports of the United Nations' Committee Against Torture (CAT) concerning the Czech Republic do not contain findings specific to involuntary placement and treatment.

4.1. Legal Framework

- [86]. The Czech Republic does not have a specific law on mental health care. Involuntary placement and treatment of persons with mental disorders is regulated by Act no. 20/1966 Sb. *o péči o zdraví lidu* [Healthcare Act],⁶⁰ and by Act no. 99/1963, the Civil Procedure Code.⁶¹ The Healthcare Act entered into force on 01.07.1966. The provision on involuntary treatment has not been amended since then. The Civil Procedure Code entered into force on 01.04.1964, and the provisions concerning involuntary proceedings have been amended a number of times since the fall of communism, last time on 11.12.2008 (effective since 01.06.2009).
- [87]. Currently there is no proposal to change involuntary treatment provisions debated publicly. A completely new Healthcare Act, which would have dramatically changed the system of involuntary treatment, was submitted by the government to the Parliament on 17.12.2008.⁶² However, the proposal was withdrawn by the next government on 28.04.2009.⁶³
- [88]. The domestic legal framework does not distinguish between involuntary placement and involuntary treatment. In fact the applicable provisions of the Healthcare Act concern involuntary *treatment* (when is it possible to treat somebody against his will),⁶⁴ while the Civil Procedure Code regulates involuntary *placement* in healthcare institutions.⁶⁵ In practice the courts make no difference about the two notions, and use them interchangeably, or use a neutral term *hospitalizace* [hospitalisation] encompassing both.⁶⁶ The issue

Treatment or Punishment (CPT) from 25 March to 2 April 2008, CPT (2008) 38, Strasbourg, 23 July 2008.

⁶⁰ Czech Republic/Zákon č. 20/1966 Sb., o péči o zdraví lidu (01.07.1966).

⁶¹ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád.

⁶² Czech Republic/Sněmovní tisk 688, Vládní návrh zákona o zdravotních službách (17.12.2008).

⁶³ Czech Republic/ Usnesení vlády České republiky č. 449 o zpětvzetí některých vládních návrhů zákonů z dalšího projednávání v Poslanecké sněmovně Parlamentu České republiky (20.04.2009).

⁶⁴ Czech Republic/Zákon č. 20/1966 Sb., o péči o zdraví lidu, Section 23 (4) (01.07.1966).

⁶⁵ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Section 191a.

⁶⁶ Czech Republic/Ústavní soud/IV.ÚS 273/05 (11.01.2007).

that a person involuntarily placed to hospital loses his right to refuse treatment has never been considered by the courts.⁶⁷

- [89]. The legal framework does not regulate involuntary placement without treatment. The opposite (involuntary treatment without placement) is possible in the context of criminal proceedings,⁶⁸ but not in civil proceedings.
- [90]. The legal framework does not mention expressly the aim of involuntary psychiatric treatment. From the substantive legal basis it can be deduced that the aim is to protect the patient or his environment from harm.⁶⁹
- [91]. The legal framework does not contain regulation on aftercare following involuntary psychiatric treatment. Nor is there specific regulation for involuntary psychiatric care of children.
- [92]. Persons with addictive behaviour (or substance abuse problems) can be treated involuntarily under the criteria established for psychiatric patients. The legal criteria apply to persons with mental disorder or “intoxicated” persons.⁷⁰

4.1.1. Treatment of persons under guardianship

- [93]. No specific provisions exist for the *involuntary* psychiatric treatment of persons under guardianship – in case they satisfy the criteria of dangerousness, they can be treated involuntarily the same way as persons with full legal capacity. However, the *voluntary* treatment of persons under guardianship causes concern due to the lack of specific regulation of their situation.
- [94]. Persons under guardianship cannot consent to treatment validly under Czech law. All their legal declarations are made by their court appointed guardian.⁷¹ Therefore a guardian can validly consent to treatment on behalf of a person under guardianship even against his/her objections. In such a case the person under guardianship is considered a voluntary patient in the hospital, the provisions on involuntary treatment do not apply, and he/she does not have access to a court review of his/her hospitalisation.

⁶⁷ Czech Republic/Nejvyšší soud/Cpjn 29/2006 (14.01.2009).

⁶⁸ Czech Republic/Zákon č. 140/1961 Sb., trestní zákon/Article 72 (4) (29.11.1961).

⁶⁹ Czech Republic/Zákon č. 20/1966 Sb., o péči o zdraví lidu/Article 23 (4) b) (01.07.1966).

⁷⁰ Czech Republic/Zákon č. 20/1966 Sb., o péči o zdraví lidu/Article 23 (4) (01.07.1966).

⁷¹ Czech Republic/Zákon č. 40/1964 Sb., občanský zákon/Article 27 (2).

- [95]. Neither the Healthcare Act nor the Civil Code contains specific provisions on the capacity and procedure for persons under guardianship to consent to treatment. The general rule (the guardian is entitled to give consent on their behalf) thus applies even if their placement under guardianship had nothing to do with their capacity to consent to treatment, and even if it is established by the treating doctors that they are in fact capable to consent to/refuse treatment in the given circumstances.
- [96]. It is thus fair to conclude that persons under guardianship, who are hospitalised on the basis of consent of their guardian, are deprived of legal safeguards and are subject to arbitrary deprivation of liberty due to the absence of special regulation reflecting on their specific situation.

4.1.2. Treatment of offenders with mental disorders

- [97]. Psychiatric treatment of persons who were ordered to undergo “protective treatment” under Article 72 of the Criminal Code is carried out together with other involuntary patients in the same psychiatric institutions. Since 01.01.2009, the law authorises to place persons under protective treatment to so-called “forensic detention”, which is carried out in a specially built institution under the authority of the Czech prison service. The aim of forensic detention is the protection of society from the mentally ill offenders if it cannot be expected that the protective treatment would provide sufficient protection.⁷² Since 01.01.2010 new criminal code⁷³ will be in force. There is no change concerning treatment of offenders with mental disorders.

4.2. Criteria and Definitions

- [98]. The Healthcare Act provides for the substantive legal basis of involuntary treatment. According to Article 23 (4) b) of the Act, a patient can be treated against his will “if the person appearing to have signs of mental illness or intoxication is endangering him/her-self or his/her environment”.⁷⁴
- [99]. The criterion thus rests on two components: the presence of a mental illness and danger to self or others. Both must be present for

⁷² Czech Republic/Zákon č. 129/2008 Sb., o výkonu zabezpečovací detence a o změně některých souvisejících zákonů (19.03.2008).

⁷³ Czech Republic/Zákon č.40/2009 Sb., trestní zákoník (08.01.2009)

⁷⁴ Czech Republic/Zákon č. 20/1966 Sb., o péči o zdraví lidu, Section 23 (4) b) (01.07.1966).

involuntary treatment to be authorised. It must be noted that the medical component is very weak: the law does not require the presence of a mental illness, only “*signs*” of a mental illness, and the person does not need to objectively possess these signs, only “*appear to have*” them.⁷⁵ The threshold is thus so low to be meaningless. Every resident of the Czech Republic can appear to have signs of a mental illness, and it is practically impossible to challenge an opinion of a treating doctor who claims that despite the person not having any mental illness at the given time he subjectively perceived that he/she *appeared* to have *signs* of it. That these words have significant meaning in reviewing involuntary hospitalisation is emphasised by the case law of the domestic courts, which practically never overrule the treating doctor’s opinion about the presence of a mental illness.⁷⁶

- [100]. The low medical threshold for authorising involuntary treatment is especially unreasonable in light of the fact that the above mentioned criterion is the only substantive one the legal framework provides. Therefore if a person’s initial detention is prolonged beyond three months, this is the substantive criteria against which the courts will have to review the continued detention.⁷⁷
- [101]. We would like to note that the Czech involuntary treatment criteria were assessed by the United Nations’ Human Rights Committee, which, probably due to the erroneous translation provided by the Czech government, considered that the law allows involuntary treatment of persons “*obviously suffering from a mental illness*”. The term “*obviously*” in this context perhaps suggested the presence of a mental illness “*without doubt*”. This interpretation has however no basis in Czech law. The correct translation of the Czech term “*osoba jevící známky duševní choroby*” is “*a person appearing to have signs of a mental illness*”.
- [102]. The medical component being unreasonably low, the only real criteria of involuntary treatment is danger to self or others. The law does not detail what kind of danger is required. There are no thresholds of dangerousness set by the laws or the courts. In practice, often the simple presence of a mental illness is considered to satisfy the dangerousness requirement.⁷⁸
- [103]. The opinion of the patient is irrelevant for the purposes of deciding on involuntary treatment. Nor are less intrusive alternatives required to be adopted before deciding on involuntary treatment. The patient’s

⁷⁵ See first sentence of Czech Republic/Zákon č. 20/1966 Sb., o péči o zdraví lidu, Section 23 (01.07.1966).

⁷⁶ Czech Republic/Městský soud v Praze/12 Co 16/2005-21 (03.03.2005).

⁷⁷ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Section 191d.

⁷⁸ Czech Republic/Městský soud v Praze/12 Co 16/2005-21 (03.03.2005).

opinion and the existence of less intrusive alternatives are thus not a criterion in ordering involuntary treatment.

4.3. Assessment, Decision, Procedures and Duration

[104]. The Czech legal framework differentiates between involuntary admission to hospital (involuntary hospitalisation) and continuing involuntary hospitalisation. After the patient is admitted to the hospital, a court must review and authorise the involuntary admission within seven days.⁷⁹ If the court approves the admission, the patient can be detained in the hospital up to three months.⁸⁰ If hospitalisation is to continue beyond three months, a new court review and court order are necessary to authorise it.⁸¹ Different procedural standards apply to these reviews, therefore we consider them separately.

4.3.1. The role of medical professionals in the involuntary admission procedure

[105]. After a patient is involuntarily admitted to a hospital, the hospital must notify the courts within 24 hours about the admission.⁸²

[106]. The court reviews the patient's placement within seven days from admissions.⁸³ The court hears the patient and the treating doctor, but no forensic psychiatric expert opinion is prepared.⁸⁴ The only medical evidence at this stage of the proceedings is thus the statement of the treating doctor. The law specifies that typically no court hearing is ordered.⁸⁵ The court thus hears the patient outside of the hearing. The patient is not present when the doctor's testimony is provided, and therefore does not know its content.

[107]. The court must decide on the lawfulness of involuntary placement within seven days of the patient's admission to the hospital.⁸⁶ The

⁷⁹ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Section 191b (4).

⁸⁰ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Section 191d (4).

⁸¹ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Section 191d (4).

⁸² Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Section 191a (1).

⁸³ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Section 191b (4).

⁸⁴ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Section 191b (3).

⁸⁵ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Section 191b (3).

⁸⁶ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Section 191b (4).

court can decide not to deliver the decision to the patient if the treating doctor considers that the patient would not be able to understand it.⁸⁷

4.3.2. The role of medical professionals in the procedure reviewing the continuation of hospitalisation

[108]. After the court approves the patient's involuntary admission to the hospital, it initiates the proceedings to review the continuation of the patient's hospitalisation.⁸⁸ It must decide within three months whether the patient can be detained further in the hospital, and for how long.⁸⁹

[109]. For the decision reviewing continued hospitalisation the court commissions a forensic psychiatric opinion.⁹⁰ The opinion must be prepared by a psychiatrist who does not work in the institution where the patient is held.⁹¹ The court holds a hearing, where the representative of the institution, the patient and his/her representative are heard.⁹² The psychiatrist preparing the expert opinion is not present at the hearing. The court can decide not to invite the patient if the treating doctor suggests that he/she is unable to participate in the proceedings.⁹³

[110]. The court decides within three months whether the patient's continued hospitalisation is justified or whether he/she should be released from the institution.⁹⁴

4.3.3. Review and termination of the involuntary treatment

[111]. The decision authorising the continuation of the patient's hospitalisation expires in one year.⁹⁵ The hospitalisation must be reviewed and a new decision on its continuation must be taken before this time limit.⁹⁶ The court can specify a shorter time limit for the next review.⁹⁷ The patient and his/her representative can ask for a review of

⁸⁷ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191c (1).

⁸⁸ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191d (1).

⁸⁹ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191d (4).

⁹⁰ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191d (2).

⁹¹ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191d (2).

⁹² Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191d (3).

⁹³ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191d (3).

⁹⁴ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191d (4).

⁹⁵ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191e.

⁹⁶ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191e.

⁹⁷ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191e.

hospitalisation before the time limit for the mandatory review expires.⁹⁸

- [112]. The institution is entitled to release the patient anytime without regard to the court orders and timing of court reviews.⁹⁹

4.3.4. Transition from voluntary to involuntary status

- [113]. If a person was admitted to a psychiatric institution as a voluntary patient, but his/her movement was restrained during hospitalisation or prevented from contacting the outside world, he/she becomes an involuntary patient. The psychiatric institution must notify the court within 24 hours and trigger the same review proceedings available for patients admitted involuntarily.¹⁰⁰

4.3.5. Time lapse between psychiatric assessment and beginning of compulsory placement

- [114]. Under Czech law, there is no possibility to order involuntary treatment by a court in civil proceedings. This possibility exists only in criminal proceedings. In the civil proceedings system, the courts can only *ex post facto* review whether the involuntary admission was lawful or not. It thus follows that there is no psychiatric assessment prepared before the admission.

- [115]. After the involuntary admission the person must be examined by a psychiatrist, but no psychiatric opinion is prepared for the review of involuntary hospitalisation within seven days of admission.¹⁰¹ A psychiatric opinion is prepared only for the court review of the continuation of the hospitalisation, which must take place within three months from the decision on involuntary admission.¹⁰² The person thus can spend maximum seven days and three months involuntarily treated in the hospital until the psychiatric opinion is considered by the court.

⁹⁸ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191f.

⁹⁹ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191e (2).

¹⁰⁰ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191a (2).

¹⁰¹ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191b (3).

¹⁰² Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191d (2).

4.3.6. Emergency admissions

[116]. As explained above, the only legal institution provided by Czech law for involuntary treatment (outside of the criminal system) is the procedure described above, which is in its nature an emergency admission procedure. The time limits are not different for nights, weekends or urgent cases: the institution must notify the court within 24 hours,¹⁰³ which must review and approve the admission within seven days.¹⁰⁴

4.3.7. Appeal proceedings

[117]. In line with Article 25 of Recommendation (2004)10,¹⁰⁵ patients are entitled to file an appeal against the decisions of the reviewing courts within the regular 15 day time-limit.¹⁰⁶ If an appeal is submitted, it does not suspend the enforceability of the decision – while the appeal is pending, the hospital is entitled to keep the patient in the institution.¹⁰⁷

[118]. The patient's real possibilities to submit an appeal are seriously limited by the fact that he/she has to submit an appeal while he/she is typically still in the institution and his/her ability to communicate with the outside world is limited. This is multiplied by the fact that the court can decide not to deliver the decision to the patient,¹⁰⁸ and exclude him from the hearings,¹⁰⁹ in which case he/she does not even know that a legal review proceeding is taking place.

4.3.8. Legal support

[119]. The patient is entitled to choose his/her own legal representative for the proceedings. If he/she does not choose anyone, the court appoints an attorney to represent him/her.¹¹⁰ The state covers the cost of

¹⁰³ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191a (1).

¹⁰⁴ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191b (4).

¹⁰⁵ Council of Europe Recommendation (2004)10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder (22.09.2004).

¹⁰⁶ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191c (2).

¹⁰⁷ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191d (4).

¹⁰⁸ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191c (1).

¹⁰⁹ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191d (3).

¹¹⁰ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191b (2).

representation in case of court-appointed attorneys, but not in case of representatives of the patient's own choosing.¹¹¹

4.3.9. Specific mental health care interventions

[120]. The Czech legal order does not contain specific provisions on specific mental health care interventions. An involuntary patient can be subject to any measure the treating doctor sees fit, including pharmaceutical interventions and electroconvulsive therapy (ECT).

4.3.10. Coercive measures

[121]. The Czech Republic became notorious for the use of cage-beds in its psychiatric institutions, which are banned in all other countries of the European Union except Slovakia.¹¹² Another serious issue concerning coercive measures is that they are not regulated by law, which makes their use unconstitutional.¹¹³

[122]. Coercive measures are regulated by a decree of the Ministry of Health,¹¹⁴ which allows the use of physical manual control of the patient, leather straps, net beds, seclusion rooms, straitjackets, acute doses of pharmaceuticals, and the combination of the above.¹¹⁵ They can be ordered by a doctor or other healthcare worker if a doctor is not present.¹¹⁶ Coercive measures can be used to avert danger to the life, health or security of the patient or others, for the necessary time period.¹¹⁷ They can be used only if less restrictive alternatives have been exhausted.¹¹⁸

[123]. There is no provision on court or other independent review of the use of restraints, or on the maximum duration of their application. The decree does not have the force of law, it simply recommends hospitals

¹¹¹ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191g.

¹¹² Mental Disability Advocacy Center (2003) Cage Beds: Inhuman and Degrading Treatment in Four EU Accession Countries.

¹¹³ Czech Republic/Zákon č. 2/1993 Sb., Listina základních práv a svobod/Article 4 (2) (16.12.1992).

¹¹⁴ Czech Republic/Věstník Ministerstva zdravotnictví č. 7/2009, Zn: 37800/2009 (30.09.2009).

¹¹⁵ Czech Republic/Věstník Ministerstva zdravotnictví č. 7/2009, Zn: 37800/2009/Article 1 (1) (30.09.2009).

¹¹⁶ Czech Republic/Věstník Ministerstva zdravotnictví č. 7/2009, Zn: 37800/2009/Article 1 (4) (30.09.2009).

¹¹⁷ Czech Republic/Věstník Ministerstva zdravotnictví č. 7/2009, Zn: 37800/2009/Article 1 (2)-(3) (30.09.2009).

¹¹⁸ Czech Republic/Věstník Ministerstva zdravotnictví č. 7/2009, Zn: 37800/2009/Article 1 (2) (30.09.2009).

to enact their own regulations in line with it, but it creates no legal rights or obligations.¹¹⁹

4.3.11. Practical problems with the application of rules on involuntary treatment

- [124]. To evaluate the Czech legal regulation of involuntary treatment, one must look not only to the legal provisions, but also to their application. As the study of the Liga lidských práv [League of Human Rights] and the Mental Disability Advocacy Centre - MDAC shows, it is apparent that the fact of the emergency admission itself seriously jeopardises the prospects of patients in the court review proceedings.¹²⁰ In 2007, the examined court statistics (no inclusive of the whole country) showed that from the 14,678 involuntary admissions the courts decided that the admission was unlawful only in 21 cases (0.15 per cent of all admissions)! In 10,968 cases the courts approved the admission, in the remaining 3,689 cases they discontinued the proceedings without delivering the decision either because the hospital had managed to convince the patient to sign a voluntary consent form,¹²¹ or the patient had already been released or died.¹²² A patient is thus released due to the court review only in the most exceptional circumstances.
- [125]. One reason of this state of affairs is the courts' wide deference to medical opinion. The seven days available for the court review are too short to gather evidence or to summon witnesses. Besides the very low legal threshold, the courts also lowered the burden of proof and the obligation to produce evidence of meeting the threshold. Courts limited evidencing on questioning of patient (if she/he is capable to give a statement) and his treating doctor.¹²³ The statistics show that in a significant number of cases the courts did not even hear the patient, and the decision was not delivered to them.¹²⁴ The only basis for the court decisions is thus the statement of the treating psychiatrist, which the court has no grounds to question or review.
- [126]. Another shortcoming of the domestic system is the inadequacy of legal representation. Until 2007, court clerks and other court

¹¹⁹ Czech Republic/Věstník Ministerstva zdravotnictví č. 7/2009, Zn: 37800/2009/Article 3 (30.09.2009).

¹²⁰ Liga lidských práv – Mental Disability Advocacy Center (2008) *Umístování do psychiatrických zařízení*.

¹²¹ Czech Republic/Ústavní soud/II.ÚS 2559/08 (05.03.2009).

¹²² Czech Republic/Nejvyšší soud/Cpjn 29/2006/Article II. (1) (14.01.2009).

¹²³ Czech Republic/ Nejvyšší soud/Cpjn 29/2006/Article II. (1) (14.01.2009).

¹²⁴ Liga lidských práv – Mental Disability Advocacy Center (2008) *Umístování do psychiatrických zařízení*.

employees were appointed to “represent” the patients in the proceedings. After the Constitutional Court criticised this practice,¹²⁵ the Civil Procedure Code was amended to mandate representation by attorneys.¹²⁶ However, this has not resulted in increased quality of representation. Since hearings are not held, the representatives play no role in the proceedings. The decision must be delivered to them, but they rarely take any further steps, which is evidenced by the low number of appeal. In 2007, there were only 93 appeals submitted against the 10,968 decisions approving involuntary admission (0.85 per cent), and some (or most) of these were submitted by the patients themselves.¹²⁷

- [127]. The Czech legal framework thus fails to provide effective safeguards to persons with mental disorders against arbitrary hospitalisation. This is caused partly by the unclear legal standard, and also by the lack of substantive case law reflecting dignity of psychiatric patients in the Czech psychiatric hospitals.

¹²⁵ Czech Republic/Ústavní soud/IV.ÚS 273/05 (11.01.2007).

¹²⁶ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 191b (2).

¹²⁷ Liga lidských práv – Mental Disability Advocacy Center (2008) Unistřování do psychiatrických zařízení.

5. Competence, Capacity and Guardianship

- [128]. Persons with mental disorders and persons with intellectual disabilities unable to manage their affairs can be appointed a *guardian* (*opatrovník*) in the Czech Republic. The guardian makes decisions on behalf of the person under guardianship. It is the only legal institution the Czech legal framework provides to assist and protect persons with disabilities in legal transactions.
- [129]. The main body of guardianship regulations is contained in Act no. 40/1964 Civil Code¹²⁸ and Act No. 99/1963 Civil Procedure Code.¹²⁹ There is no special code on guardianship.
- [130]. All minors, with a few exceptions,¹³⁰ are restricted or deprived of their legal capacity automatically by the Civil Code, and their legal representation is governed by the rules on custodianship.¹³¹ Only adults can be limited on their legal capacity and can have a guardian appointed by a court decision. Therefore in the following analysis the authors of the study will neglect the rules concerning custody of minors and will concentrate on guardianship of adults. The age of majority is 18 years in the Czech Republic.¹³²

5.1. Criteria of placement under guardianship

- [131]. There is no exact definition of “competence” and “capacity” in Czech law. Nor is there a distinction in the Czech legal language between “competence” and “capacity”. The Czech Civil Code, Act No. 40/1964, differentiates between capacity to have rights and obligations (*způsobilost k právům a povinnostem*)¹³³ and capacity to exercise rights (*způsobilost k právním úkonům*).¹³⁴ Legal capacity means that every person has rights and capacity to be subject of these rights, that is person before the law, on the other hand, capacity to act means capacity by own transactions gain rights and oblige her/himself to

¹²⁸ Czech Republic/Zákon č. 40/1964 Sb., občanský zákon.

¹²⁹ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád.

¹³⁰ With the exception of those who are over 16 years of age and get married with a permission of a court.

¹³¹ Czech Republic/Zákon č. 94/1963 Sb., o rodině (26.02.1964).

¹³² Czech Republic/Zákon č. 40/1964 Sb., občanský zákon, Article 8 (2).

¹³³ Czech Republic/Zákon č. 40/1964 Sb., občanský zákon, Article 7 (1); Czech Republic/Ústavní zákon č. 2/1993 Sb., Listina základních práv a svobod, Article 5 (16.12.1993)

¹³⁴ Czech Republic/Zákon č. 40/1964 Sb., občanský zákon, Article 8 (1).

obligations. The definition of legal act (*právní úkon*) is: *Legal act means expression of will directed to creation, change or termination those rights or obligations, which are associated according to the law with such an expression.*¹³⁵

- [132]. Incapacity is based on the legal concept of “mental disorder” (*duševní porucha*). This term covers different mental health conditions. Usually forensic psychiatrists¹³⁶ and scholars¹³⁷ differentiate: a) Mental illness¹³⁸, b) Pathological mental conditions¹³⁹ and c) Short term mental disorder. In practise this does not cause problems, courts and forensic psychiatrists refer to mental health problems, intellectual disability and substance abuse problems. Therefore the two main groups subject to guardianship are persons with mental disorders and persons with intellectual disability. Persons with substance abuse problems form a sub-group of persons with mental disorder.

5.2. Degrees of incapacity

- [133]. The Civil code recognises deprivation of legal capacity¹⁴⁰ (*zbavení způsobilosti k právním úkonům*) or plenary guardianship as it is widely referred to in English and restriction of legal capacity¹⁴¹ (*omezení způsobilosti k právním úkonům*) or partial guardianship. The criteria for *deprivation* and *restriction* of legal capacity are very similar. Both consist of two main elements: a medical determination of mental disorder, and the inability to manage one’s affairs.
- [134]. The Constitutional Court¹⁴² introduced a test of proportionality in guardianship proceedings based on 3 steps: a) Is there a legitimate aim? Is this aim necessary in free democratic society? b) Is there rational connection between aim and measures chosen for its enforcement? c) Do alternative measures exist which would reach the aim with less intensive interference with human rights, respectively without interference? Every court deciding about guardianship should follow this test and choose the least intrusive measure.

¹³⁵ Czech Republic/Zákon č. 40/1964 Sb., občanský zákon, Article 34.

¹³⁶ Dufek, M. a kol. (1976) *Soudní psychiatrie*. Praha: Orbis.

¹³⁷ Knappová, M. (1961) *Právní subjektivita a způsobilost k úkonům v československém občanském právu*. Praha: Nakladatelství československé akademie věd, p. 19.

¹³⁸ E.g. psychosis, affective disorders etc.

¹³⁹ Typically intellectual disability.

¹⁴⁰ Czech Republic/Zákon č. 40/1964 Sb., občanský zákon, Article 10 (1).

¹⁴¹ Czech Republic/Zákon č. 40/1964 Sb., občanský zákon, Article 10 (2).

¹⁴² Czech Republic/Ústavní soud/IV. ÚS 412/04 (07.12. 2005).

[135]. In 2009, the Constitutional Court went much further¹⁴³ and claimed that the deprivation of legal capacity is a very problematic institute from the perspective of constitutional law; it is obviously a relict of the old regime. The Constitutional Court referred to reforms in Germany, Austria and France and called on courts not to resort to deprivation of legal capacity. According to the Court, the restriction of legal capacity should be the measure of last resort.

5.2.1. Restriction of legal capacity

[136]. Persons who are not competent (*způsobilá*) to manage only some affairs (*jenom některé úkony*) a) due to the mental disorder (*duševní porucha*) which is not only temporary (*pouze přechodná*) or b) because of excessive alcohol consumption or consumption of toxic agents or poisons, can be placed under partial guardianship (restriction of legal capacity).¹⁴⁴ The conditions for restriction of legal capacity are: a) the presence of mental disorder which is not temporary or substance abuse, b) the incompetence to exercise some legal acts, c) caused by mental disorder or substance abuse.

[137]. A person's legal capacity can be restricted only in a) certain scope (quantitative aspect)¹⁴⁵ and only for b) some legal acts (qualitative aspect)¹⁴⁶.

[138]. Courts are obliged to define the scope of restriction, positive determination (e.g. person is capable to manage some legal affairs) or negative determination (e.g. person is not capable to manage some legal affairs). Positive determination means that the person is not capable of any other acts than determined by the court in its decision.

[139]. The restriction of legal capacity is limited to some legal acts. Courts can not restrict the person's legal capacity in these areas: a) procedural capacity, b) right to vote, c) family law and d) other areas.¹⁴⁷

[140]. Courts can not restrict a person's legal capacity in procedural matters. This practise was widespread before 1989 as the totalitarian regime protected itself from constant legal actions of particular citizens. The Constitutional Court strongly criticized this practice¹⁴⁸ and considered it unconstitutional. In practice we can still find decisions restricting

¹⁴³ Czech Republic/Ústavní soud/No. I. ÚS 557/09 (18.08. 2009).

¹⁴⁴ Czech Republic/Zákon č. 40/1964 Sb., občanský zákoník, Article 10 (2).

¹⁴⁵ Czech Republic/Zákon č. 94/1963 Sb., o rodině, Article 10 (2) (04.12.1963).

¹⁴⁶ See below.

¹⁴⁷ Czech Republic/Ústavní soud/IV. ÚS 412/04 (07.12.2005).

¹⁴⁸ Czech Republic/Ústavní soud/IV. ÚS 412/04 (07.12.2005).

procedural legal capacity based on the notion of vexatious litigation.¹⁴⁹

- [141]. Courts can not restrict a person's legal capacity to exercise her/his right to vote. There is no connection between decision-making under the Civil Code and the Code on Elections. The only link is that the decision on deprivation of legal capacity is a legal obstacle to the right to vote. The legal order automatically excludes persons under plenary guardianship from exercising their right to vote.¹⁵⁰ The same argument applies to the question of restriction of person's legal capacity within the scope of family law. The decision on restriction of legal capacity, no matter what the scope is, automatically results in loss of certain rights according to family law, particularly a) parental rights¹⁵¹, b) right to adopt a child¹⁵², c) right to marriage¹⁵³.
- [142]. Separate rules apply to some other areas, such as accessing competence to drive a car or competence to hold a weapon. According to the Supreme Court's standpoint decision¹⁵⁴ these areas are independent, the assessment is not based on the concept of capacity to exercise rights under the Civil Code.¹⁵⁵

5.2.2. Deprivation of legal capacity

- [143]. Persons who are not competent to manage their affairs at all (*vůbec*) due to mental disorder (*duševní porucha*) which is not only temporary (*pouze přechodná*), are deprived of legal capacity. *Guardianship restricting legal capacity* or *plenary guardianship* results in the adult lacking legal capacity in all areas of life. His/her guardian is entitled to manage the adult's property and take legal actions on behalf of the adult in all areas of life.¹⁵⁶ Deprivation of legal capacity has grave legal consequences. The person can not exercise any legal acts, including every day life acts or legal acts of small importance.¹⁵⁷ The decision on deprivation automatically results in loss of different rights: a) parental rights¹⁵⁸, b) right to adopt a child¹⁵⁹, c) right to

¹⁴⁹ Czech Republic/Okresní soud Znojmo/Nc 781/2003 (30.11.2007).

¹⁵⁰ Czech Republic/Zákon č. 247/1995 Sb., volbách do Parlamentu České Republiky, Article 2b (27.09.1995).

¹⁵¹ Czech Republic/Zákon č. 94/1963 Sb., o rodině, Article 34 (2) (04.12.1963).

¹⁵² Czech Republic/Zákon č. 94/1963 Sb., o rodině, Article 64 (2) (04.12.1963).

¹⁵³ Person under partial guardianship can enter into a marriage only with the court's consent. Czech Republic/Zákon č. 94/1963 Sb., o rodině, Article 14 (2) (04.12.1963).

¹⁵⁴ Czech Republic/Nejvyšší soud/ Cpj 301/77 (23.05.1977).

¹⁵⁵ Czech Republic/Nejvyšší soud/Cpj 301/77/1979 (23.05.1979).

¹⁵⁶ Czech Republic/Zákon č. 40/1964 Sb., občanský zákon, Article 26, 27 (2).

¹⁵⁷ Czech Republic/Zákon č. 40/1964 Sb., občanský zákon, Article 38 (1).

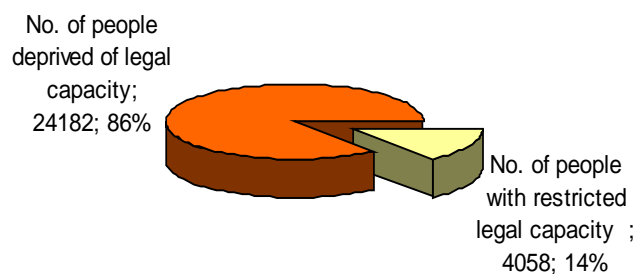
¹⁵⁸ Czech Republic/Zákon č. 94/1963 Sb., o rodině, Article 34 (2) (04.12.1963).

¹⁵⁹ Czech Republic/Zákon č. 94/1963 Sb., o rodině, Article 64 (2) (04.12.1963).

marriage¹⁶⁰, d) right to vote¹⁶¹, e) right to consent to treatment¹⁶², f) procedural rights¹⁶³.

[144]. In the Czech Republic courts overuse deprivation of legal capacity. According to statistic data provided by the Mental Disability Advocacy Centre¹⁶⁴, there is a huge difference in deprivation and restriction, in favour of deprivation of legal capacity.

Graph No. 1: The comparison of numbers of people under plenary and partial guardianship in Czech Republic, August 2008.



5.3. The guardianship system

[145]. The only system of protection of persons with disabilities is guardianship.

¹⁶⁰ Czech Republic/Zákon č. 94/1963 Sb., o rodině, Article 14 (1) (04.12.1963).

¹⁶¹ Czech Republic/Zákon č. 247/1995 Sb., volbách do Parlamentu České Republiky, Article 2b (27.09.1995).

¹⁶² Consent to treatment is recognised in Czech legal order as legal act (právní úkon). See Šustek, P., Holčapek, T. (2007) *Informovaný souhlas. Teorie a praxe informovaného souhlasu ve zdravotnictví*. Praha: Aspi, 2007, p. 28. Czech legal order as well as case law does not recognise de facto capacity to consent to treatment.

¹⁶³ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Article 20 (1).

¹⁶⁴ These data were provided by Mental Disability Advocacy Center, Burešova 6, 602 00 Brno, mmatiasko@mdac.info. They are based on information of Ministry of the Interior on numbers of persons under plenary and partial guardianship with permanent residence permit in the Czech Republic in August 2008.

- [146]. We must distinguish incapacitation proceeding or guardianship proceeding (*řízení o způsobilosti k právním úkonům*)¹⁶⁵ and proceeding on appointment of the guardian (*opatrovnické řízení*)¹⁶⁶. These two proceedings are separate. Once the court decided on the restriction/deprivation of legal capacity, it must initiate special proceeding on appointment and appoint a guardian. This separation has only one advantage, that the court can flexibly appoint a guardian according to Article 29 of the Civil Code to a person without limiting her/his legal capacity for concrete act or group of actions¹⁶⁷.
- [147]. In guardianship proceeding the court is deciding whether a person suffer from mental disorder and if so, whether such a disorder affects the person's capacity to manage her/his legal affairs and to what extent. The assessment of a person's mental disorder is based on expert opinion, mostly psychiatric.
- [148]. In special proceedings on appointment of the guardian the court is looking for a suitable guardian. Only court can decide who will be appointed as guardian. The appointment of private guardians (relatives) has usually priority before public guardians.¹⁶⁸

5.3.1. Duration of guardianship and review of guardianship

- [149]. There are not any minimum or maximum time limits. The guardianship lasts till the court decides otherwise, very often for life. Once a person is placed under guardianship, the court can decide: a) to change quantitative or qualitative aspects of restriction, b) to change restriction to deprivation or vice versa, c) to cancel decision on guardianship due to improvement of mental conditions¹⁶⁹ or d) cancel its own decision from the time it was issued (*ex tunc*) because it was incorrect¹⁷⁰ at the time it was issued.
- [150]. The decision on guardianship is not periodically reviewed, there must be initiative to start guardianship proceeding. Nor is the decision on appointment (separate decision) reviewed periodically. There must be again initiative to start this proceeding.

¹⁶⁵ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Articles 186-191.

¹⁶⁶ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Articles 192-193.

¹⁶⁷ Czech Republic/Zákon č. 40/1964 Sb., občanský zákoník, Article 29 (26.02.1964).

¹⁶⁸ Czech Republic/Zákon č. 40/1964 Sb., občanský zákoník, Article 27 (3) (26.02.1964).

¹⁶⁹ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Article 163.

¹⁷⁰ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Article 190.

5.3.2. Initiation of guardianship proceeding

- [151]. It is necessary to distinguish request (*návrh*)¹⁷¹ to initiate and incentive to initiate guardians proceeding (*podnět*)¹⁷². Courts are obliged to start proceeding upon request, but not upon incentive. Request can be submitted by anyone. Usually it is a relative, local authority or institution for disabled people. The only safeguard from abusive requests is that the court can ask the petitioner to submit a medical report, otherwise the proceeding will be discontinued. As a sanction for abusive requests can be considered the possibility of the court to decide to oblige the petitioner to cover all expenses in the proceeding¹⁷³.
- [152]. The same group of persons entitled to initiate court proceedings, plus the guardian and the person under guardianship are entitled to initiate court proceedings to review the necessity and terminate guardianship. There is no regular court review proceeding. The right of the person under guardianship to initiate proceedings to restore her/his legal capacity is seen as an important safeguard ensuring that guardianship does not last longer than necessary. However while deciding on guardianship (plenary or partial), the court can also decide that the person under guardianship can not exercise this right for a year.

5.3.3. National authorities and guardians

- [153]. In the Czech Republic there are no special guardianship authorities. Courts are declaring the incapacity of an adult and appointing guardians. The proceeding on appointment of the guardian is initiated when the decision on legal capacity enters into legal force. Existence of these two separate proceedings can be considered a problem, because almost every time there is a time lapse between the decision on guardianship, which is already in legal force, and appointment of the guardian.¹⁷⁴
- [154]. In the Czech Republic there is no special code on guardians. We can theoretically distinguish a) private guardians and b) public guardians. Private guardians are typically relatives. They have to agree before appointment with this appointment and they swore before judge. Public guardians do not have to agree, court appoint public guardian

¹⁷¹ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Article 186.

¹⁷² Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Article 81 (1).

¹⁷³ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Article 191 (2).

¹⁷⁴ Liga lidských práv - Mental Disability Advocacy Center (2009) *Řízení o způsobilosti k právním úkonům. Systémové doporučení Ligy lidských práv č. 8*, available at: http://www.llp.cz/_files/file/systemova%20doporučení/Systemove_doporučení_8.pdf

when there is no private guardian. Public guardians are local authorities.

- [155]. Courts are appointing and monitoring guardians. In appointing decision the Court defines the scope of guardian's rights and duties.¹⁷⁵ Court can ask the guardian to submit regular reports about guardian's activities¹⁷⁶ and guardian is obliged to submit final report when the guardianship ceases to exist¹⁷⁷. Court is dealing with announcements, complaints and requests to appoint guardian when there is a collision of interests between guardian and person under guardianship and requests to remove particular guardian.
- [156]. The guardian is the legal representative of the person under guardianship. In case of plenary guardianship, the adult is excluded from the decision-making process altogether once guardianship is established. A person under partial guardianship is excluded from the decision-making in those areas specified by the court. The guardian takes decision on behalf of the person under guardianship in common property transactions. Uncommon property transaction must be approved by court.¹⁷⁸ It is unclear whether the guardian can decide uncommon personal transactions, e.g. request to divorce, or there must be court approval as well.¹⁷⁹ The Czech legal order does not recognize de facto competency which can be considered as a shortcoming in relation to very personal affairs. Guardians are not obliged to respect the wishes, beliefs or will of the person under guardianship. Guardians have to follow the instruction of the court and duties specified in the appointing decision.¹⁸⁰

5.3.4. Appeal procedure

- [157]. The person with disabilities must be represented in guardianship proceeding. The court has to inform this person that she/he has a right to choose his/her own representative.¹⁸¹ If he/she does not choose anyone, the court appoints a representative from family members. If there is a possible conflict of interests or no such person exists, the court appoints an attorney at law as a legal representative.

¹⁷⁵ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Article 192 (2).

¹⁷⁶ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Article 193 (2).

¹⁷⁷ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Article 193 (2).

¹⁷⁸ Czech Republic/Zákon č. 40/1964 Sb., občanský zákoník, Article (28).

¹⁷⁹ Švestka, J., Spáčil, J., Škárková, M., Hulmák, M. et al. (2009) *Občanský zákoník. Komentář*, 2. vydání., Praha: C.H.Beck.

¹⁸⁰ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Article 180 (1).

¹⁸¹ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád, Article 187 (1).

- [158]. The court is obliged to inform the person with disabilities that she/he must be heard by the court if she/he asked the court to do so.¹⁸² In practice courts are not informing people with disabilities, or use such a way of communication that they do not understand this¹⁸³. Once courts do not have a response from persons with disabilities, they simply ignore them. Courts can decide not to deliver the final decision on guardianship to the person with disability if it can cause, according to the expert opinion, health problems.¹⁸⁴ This is a very widespread practise and we can consider it as a violation of right to a fair trial.¹⁸⁵
- [159]. The District court judgment (*rozsudek*) on restriction/deprivation of legal capacity has to be delivered to parties, respectively to their representatives.¹⁸⁶ The party is a person who/which requested the incapacitation proceeding¹⁸⁷, the person with disability and her/his representative¹⁸⁸. If the court decides not to deliver the decision to the person with disability, the appeal can be lodged to the Regional court only by the petitioner, usually someone who wants the person with disability to be under guardianship, or the representative. In practice legal representatives (attorneys at law) are not often in touch with persons with disabilities and do not appeal final decisions.¹⁸⁹
- [160]. On the other hand, the court has to deliver the decision on appointment of the guardian to the person with disability.¹⁹⁰ Sometimes it is the first time when the person with disability finds out that she/he was incapacitated. The person can appeal such a decision of the District court to the Regional court.

5.4. Proposed reform of guardianship system

- [161]. In April 2008, NGOs organised a roundtable which initiated a discussion about legal reform of the guardianship system in the Czech Republic. It followed-up activities of other civil society organisations which have worked on legal capacity issues in the past few years. Members of the NGO coalition agreed on basic principles by which the reform should be guided, and in the meantime the Ministry of

¹⁸² Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 187 (2).

¹⁸³ Liga lidských práv - Mental Disability Advocacy Center (2009) *Řízení o způsobilosti k právním úkonům. Systémové doporučení Ligy lidských práv č. 8.*

¹⁸⁴ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 187 (3).

¹⁸⁵ Liga lidských práv - Mental Disability Advocacy Center (2009) *Řízení o způsobilosti k právním úkonům. Systémové doporučení Ligy lidských práv č. 8.*

¹⁸⁶ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 158 (2).

¹⁸⁷ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 186 (1).

¹⁸⁸ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 186 (3).

¹⁸⁹ Liga lidských práv - Mental Disability Advocacy Center (2009) *Řízení o způsobilosti k právním úkonům. Systémové doporučení Ligy lidských práv č. 8.*

¹⁹⁰ Czech Republic/Zákon č. 99/1963 Sb., občanský soudní řád/Article 50b (4c).

Justice published a draft Civil Code. At roundtables held in June and July 2008 the NGO coalition focused on preparing comments on the draft Civil Code.

- [162]. The NGOs' comments were developed into a 15-page commentary which was signed by 13 NGOs, social services providers and academic institutions.¹⁹¹ The written comments were submitted to the Minister of Justice in August 2008. At the same time, the comments of the coalition were adopted and submitted to the Minister of Justice by the Government Commissioner for Human Rights, the Minister for Human Rights and National Minorities and the Central-Bohemian Regional Government.
- [163]. After negotiations with NGOs (mostly Mental Disability Advocacy Centre - MDAC), the Ministry of Justice introduced a revised proposal which incorporated most of the NGO coalition's proposals and submitted it to the Government in January 2009. Several alternatives to guardianship were added or elaborated: general advance directives (not only directives regarding the identity of the future guardian), supported decision-making, representation by next-of-kin in common affairs of daily life and guardianship without limitation of legal capacity.
- [164]. The issue of plenary guardianship became the most controversial. The NGO coalition strongly advocated for plenary guardianship to be deleted from the draft law, and the Government eventually agreed.
- [165]. The provisions of the draft Civil Code regulating the conduct of guardians were broadened to include, for example, the obligation of a guardian to keep in touch with the person under guardianship, to explain to her in an appropriate manner the nature and consequences of decisions taken by the guardian, and to take into account her/his opinions (including any advance directives which have previously been made), and manage her affairs accordingly. The draft Civil Code envisions that provisions regarding public guardians be regulated by a separate law.
- [166]. As for the control mechanism, the draft Civil Code provides for the establishment of a 'guardianship council' as a safeguard, and establishes a right for the person under guardianship to participate in the meetings of his or her guardianship council, to appeal its decisions, and to receive (together with the court and the guardianship council) annual and *ad hoc* financial accounts of her/his property. Under certain circumstances, organisations providing services to persons with disabilities may participate in the meetings of the

¹⁹¹ All documents are available in Czech at www.reformaopatrovnictvi.cz and some documents in English at <http://www.mdac.info/en/Czech-Republic>.

guardianship council, to become members, and to appeal its decisions.¹⁹²

- [167]. In March 2009, the Czech government lost a vote of no confidence. In spite of this, the Ministry of Justice submitted the draft Civil Code to the Lower Chamber of the Parliament. In June 2009, during the last Lower Chamber session before the elections scheduled in autumn 2009, the Parliament removed the Civil Code proposal from parliamentary debate. The future of the draft Civil Code remains unclear.

¹⁹² Final version of the new civil code proposal is available at: <http://obcanskyzakonik.justice.cz/cz/navrh-zakona.html> (in Czech, last accessed on 2 October 2009).

6. Miscellaneous

- [168]. The Czech Public Defender of Rights (Ombudsman) is obliged by law to visit annually institutions providing accommodation to mentally disabled persons. The reports from such visits describe in detail *inter alia* deficiencies, as well as examples of good practice in this field.¹⁹³

¹⁹³ The latest report of the Czech Ombudsman is available at: <http://www.ochrance.cz/dokumenty/dokument.php?back=/cinmost/ochrana.php&doc=1543> (in Czech, last accessed 28 October 2009).

Annexes-Case Law

In different Sections of the Guidelines, experts have been asked to refer to case law. Please present the case law reference in the format below

Case title	Examination of limited capacity.
Decision date	18 August 2009
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Nález Ústavního soudu České republiky: I. ÚS 557/09. Judgement of the Constitutional Court of the Czech Republic: I. ÚS 557/09.
Key facts of the case (max. 500 chars)	A mentally retarded petitioner who had been declared incompetent and therefore subsequently for years detained in a specialized institution demanded by Constitutional Court the reversal of all former judgements enunciating her legal incapacity and the acknowledging her as competent.
Main reasoning/argumentation (max. 500 chars)	Even if an individual suffers from mental impairment this fact alone does not imply automatically his or her fundamental rights should be infringed. For any limitation of legal capacity regardless whether fully or just partial the subsidiarity of this measure must be strictly respected and the question must be asked for whom or for which value would a capacity of mentally impaired person pose a danger. The recognition of incapacity shall be considered as ultima ratio as it is an institute hardly tenable from constitutional point of view.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	A slight mental retardation shall not be considered as a mental impairment stricto sensu. Even an incompetent individual has the right to property and this only should be limited in order to protect rights of other persons. This limitation means that the individual will not be allowed to dispose of property more worthy that stated by court. Only the (total) incapacity shall be regarded as a barrier to right to vote, not automatically the limited capacity. According to factual situation not only the concrete individual with limited capacity could have the right to vote, he or she also could be acknowledged as having another political rights (right to petition, freedom of association).
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Former judgements declaring incapacity of an individual with mental retardation were reversed.

Proposal of key words for data base	Mental retardation, incapacity, right to property, right to vote.
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Case title	Involvement of psychology expert. The term of sanity. The question of insanity.
Decision date	3 April 2002
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Rozsudek Nejvyššího soudu České republiky: 6 Tz 315/2001. Judgement of the Supreme Court of Czech republic: 6 Tz 315/2001.
Key facts of the case (max. 500 chars)	A defendant who had been declared incompetent from the according to the area of civil law committed repeatedly the offences of robbery and the offence of battery.
Main reasoning/argumentation (max. 500 chars)	Even if a person suffers from serious mental retardation and therefore is declared to be incompetent in civil law this does not ipso jure predict his or her insanity in criminal law. The former describes a more or less stable condition of mental state in general, the latter a concrete an acute mental relation to a particular criminal action.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The state of incapacity (limited capacity) does not imply automatically the state of insanity (diminished responsibility), as the latter is to be judged ad hoc for every each action defendant did. The fact that defendant is incompetent is meaningless as their potential insanity is concerned.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	An expertise on incapacity already applied in civil procedure should not be automatically used for the purpose of pleading insanity.
Proposal of key words for data base	Incapacity, insanity.

Case title	Judicial proceeding on declaration of incapacity– appointed guardian, questioning of the participant, delivery of the judgement.
Decision date	13 September 2007
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Nález Ústavního soudu České republiky: II. ÚS 303/05. Judgement of Constitutional Court of the Czech Republic: II. ÚS 303/05.
Key facts of the case (max. 500 chars)	As response to impressive amount of petitions towards state bodies, the individual suffering from serious mental impairment was declared incompetent. As a guardianship an employee of the court was appointed who fail in taking any action to protect the legal position of the petitioner.
Main reasoning/argumentation (max. 500 chars)	A judicial decision by which an individual with mental impairment is declared to be incompetent only because of the argument that the state bodies supposed themselves to be bothered by the (sometimes illogical) petitions constitutes a breach of the right to dignity. As these judgements show no respect for the personality of the petitioner it is to be interpreted as a degrading treatment. By appointing an active and protective guardian the right to fair trial is to be ensured for an incompetent, therefore the court shall be particular whether the guardianship is not merely a facade.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	There is no power for court to declare incapacity only for the purpose of preventing itself from applications made by mentally impaired individual to reduce one's capacity for the reason that in virtue of mental impairment he or she bothers the state bodies with his or her claims. Such a decision point to no respect for the personality of the litigant and could be clearly considered as a degrading treatment. The right to fair trial is not ensured by appointing an employee of court as the guardian who does not act on behalf the incompetent at all.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Strict duty for courts was introduced to control whether the guardian act independently and in the interest of the incompetent individual. (Confirmed by the judgement of the Constitutional Court II. ÚS 263/07.)
Proposal of key words for data base	Mental impairment, degrading treatment, dependent guardian, right to fair trial.

Case title	Right to liberty. Rights of defendant in criminal procedure.
Decision date	27 November 2000
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Nález Ústavního soudu České republiky: IV. ÚS 289/2000. Judgement of the Constitutional Court of the Czech Republic: IV. ÚS 289/2000.
Key facts of the case (max. 500 chars)	The petitioner was a defendant in criminal procedure where a question of his insanity came into consideration. The expertise was required; however, the applicant did not cooperate with the experts and did not attend the ambulance. Thus an examinatory detention was ordered.
Main reasoning/argumentation (max. 500 chars)	An examinatory detention represents a serious intervention to the right of liberty. It only should be allowed when the ambulatory check up did not lead to satisfactory results.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	An examinatory detention shall be considered as an extraordinary measure and used only with respect to its subsidiary nature.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Rareness and subsidiarity of examinatory detention. (Confirmed by judgements of the Constitutional Court I. ÚS 493/05, I. ÚS 563/06.)
Proposal of key words for data base	Examinatory detention, right to liberty.

Case title	Right to fair trial.
Decision date	26 August 2003
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Nález Ústavního soudu České republiky: I. ÚS 437/02. Judgement of Constitutional Court of the Czech Republic: I. ÚS 437/02.
Key facts of the case (max. 500 chars)	Due to his mental impairment, the petitioner did not possess sufficient capacity to dispose with his property. Although the second party knew about petitioner's mental condition they pled according to the law then they could not have known about the fact that the transaction was due to the incompetence void. The main argument was <i>bona fide</i> of the second party as the validity of the transaction was concerned.
Main reasoning/argumentation (max. 500 chars)	Should the plaintiff prove that not only that the defendant must have known about applicant's mental impairment but also that the defendant must have known that the transaction is therefore void it would reject the applicant's right to fair trial. The plaintiff obviously can hardly ever prove that the defendant operates with knowledge belonging both to the psychiatrist and to the judge who in addition are in fact supposed to evaluate the whole situation <i>ex post</i> .
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The burden of proof should be required realistically upon the plaintiff.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Constitutional Court reversed the previous judgements and criticised the substantial legal provision. The legal provision on void transaction due to mental impairment with connection to <i>bona fide</i> of the second party of the contract has been changed in order to protect more the incompetent involved.
Proposal of key words for data base	Fair trial, burden of proof, incompetent individual.

Case title	sp. zn. Cpj 301/77
Decision date	23. May 1979
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Stanovisko Nejvyššího soudu ČR sp. zn. Cpj 301/77/Supreme Court Standpoint decision No. Cpj 301/77
Key facts of the case (max. 500 chars)	A standpoint decision reflects on the case law in a particular area of law. Its aim is to unify the courts' practice.
Main reasoning/argumentation (max. 500 chars)	This standpoint decision clarified and unified legal practice in guardianship proceedings.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	According to this standpoint decision, the restriction of legal capacity is not possible for procedural acts, and acts according to the family code, e.g. entering into marriage, and adopting a child. Separate rules apply to some other areas, such as accessing competence to drive a car or competence to hold a weapon.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Lower courts are obliged to follow this standpoint decision; however, the Czech system is not based on legal precedents.
Proposal of key words for data base	Unlawful restriction of legal capacity in different areas, standpoint decision, Supreme Court

Case title	IV. ÚS 412/04
Decision date	7. December 2005
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Nález ústavního soudu ČR sp.zn. IV. ÚS 412/04/The Constitutional Court decision No. IV. ÚS 412/04
Key facts of the case (max. 500 chars)	Complainant's legal capacity was restricted so that he is capable to manage property transactions. According to the reasoning of the District Court, the restriction of the complainant was directed on procedural rights because complainant was "bothering" courts by his legal actions.
Main reasoning/argumentation (max. 500 chars)	The Constitutional Court stressed that the restriction of legal capacity was very broad and excluded complainant from basic legal acts. In the Court's opinion, the restriction of procedural rights is violating basic human rights and freedoms, in a democratic society it is unacceptable that courts are defending themselves by restricting procedural capacity of prospective petitioners.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	In this decision the Constitutional Court clearly stated that the restriction of legal capacity over procedural rights is violating basic human rights and freedoms. Another importance of this decision is that court described the test of proportionality in guardianship proceedings.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Constitutional Court abolished the decision of the district court and asked all courts deciding on guardianship to apply the test of proportionality.
Proposal of key words for data base	Restriction of legal capacity, procedural rights, test of proportionality

Case title	II. ÚS 2630/07
Decision date	13 December 2007
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Nález ústavního soudu ČR sp.zn. II. ÚS 2630/07/The Constitutional Court decision No. II. ÚS 2630/07
Key facts of the case (max. 500 chars)	The complainant was under plenary guardianship and requested the court to restore her legal capacity. The district court rejected her request and the regional court affirmed this decision. She claimed that her rights to the inviolability of a person, protection of her private and family life, capacity to possess rights and right to vote have been violated by the courts. These interventions have occurred due to the fact that her proposal for restoring the legal capacity was not granted.
Main reasoning/argumentation (max. 500 chars)	The Constitutional Court concluded that the procedures of the lower courts in this case violated the right to a fair trial. The procedure of the courts in the present case bears the features typical for judicial proceedings in these cases. It is characterized by a formal, schematic view of examined cases, without any attempt of an individual approach to each individual case and by an absolutely uncritical acceptance of the conclusions of the expert's opinions; in which the answers to courts' inquiries exceed the limits of expert assessments and which directly intervene in the judicial decision-making by providing direct instructions as to how the court should decide the case.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Constitutional Court stressed that the deprivation of legal capacity is always a serious intervention in any citizen's personal integrity. The Court criticized the lower courts for schematic view in guardianship cases and for uncritical acceptance of the expert's conclusions. The Constitutional Court pointed out that the court decision cannot then be attributable to the decision of an independent court but that of a certified expert. This decision is challenging formal proceedings where person with disability is in fact only object and not subject of rights.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Constitutional Court annulled the court decisions and returned the case to the lower courts.
Proposal of key words for data base	Criteria of placement under guardianship; Role of forensic psychiatric opinion in placement under guardianship

Case title	sp. zn. II. ÚS 303/05
Decision date	13. September 2007
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	nález Ústavního soudu sp. zn. II. ÚS 303/05/The Constitutional Court decision No. II. ÚS 303/05
Key facts of the case (max. 500 chars)	Court appointed as a representative for guardianship proceeding to complainant its own employee. She was absolutely inactive, did not ask any questions, did not lodge any statement, and did not appeal the final decision. The court in guardianship proceeding did not hear the concerned person with disability and did not deliver a final judgment.
Main reasoning/argumentation (max. 500 chars)	The Constitutional Court stressed that courts are responsible for appointed representatives. It is unacceptable formalism when courts appoint inactive representatives and afterwards tolerate this inactivity. The Constitutional Court consequently stressed that the possibility not hear a concerned person and not to deliver a judgment must follow a legitimate aim.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Constitutional Court clarified that courts can not appoint as a representative their own employees. The government consequently amended the Civil Procedure Code. According to this decision, it is possible not hear a person in guardianship proceeding and not deliver the judgment to her/him, but only if this is following a legitimate aim. According to this decision, any judgment on capacity without hearing the person would violate human rights.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Constitutional court annulled the decision of the district court.
Proposal of key words for data base	Guardianship proceeding, representative, hearing, delivery of decisions

Case title	sp.zn. I. ÚS 557/09
Decision date	18. August 2009
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Nález ústavního soudu ČR sp.zn. I. ÚS 557/09/The Constitutional Court decision No. I. ÚS 557/09
Key facts of the case (max. 500 chars)	The complainant's legal capacity was restricted in 2002 so that she was capable of managing property transactions up to 500 Czech crowns (approximately 20 €). Her guardian asked in 2006 for restoration of her legal capacity. The Court reflected only on one expert opinion and did not take into account the second expert opinion nor appointed a new expert. The court did not reflect on the opinion of the complainant and her guardian and did not restore her legal capacity but changed the scope of restriction to 1000 Czech crowns (approximately 40 €).
Main reasoning/argumentation (max. 500 chars)	The Complainant argued that the courts did not reflect that she is doing very well with her family that her skills developed and there is no need for such a restrictive protection over her. She pointed out that the court did not reflect her opinion, opinion of her guardian and the second expert opinion. The second expert was not even heard. The Constitutional court stressed that restriction of legal capacity should be used as a measure of last resort and should reflect functional abilities.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Constitutional Court claimed that the deprivation of legal capacity is very problematic institute from the perspective of constitutional law, it is obviously a relict of the old regime. The Constitutional Court referred to reforms in Germany, Austria and France and called on courts not to decide on deprivation of legal capacity. According to the Constitutional Court, the restriction of legal capacity should be the measure of last resort.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Constitutional court annulled all decisions. The key consequence is that the Constitutional Court pointed out the necessity to reform the current guardianship system based on substitute decision-making with symptomatic overuse of legal capacity deprivation.
Proposal of key words for data base	Deprivation of legal capacity as outdated institute, restriction of legal capacity as a measure of last resort

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Case title	12 Co 16/2005-21
Decision date	11. January 2007
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Rozhodnutí Městského soudu v Praze sp.zn. 12 Co 16/2005-21/Decision of the Prague City Court No. 12 Co 16/2005-21
Key facts of the case (max. 500 chars)	The applicant was involuntarily hospitalised upon the complaint of her son-in-law. The decision deciding on the lawfulness of her admission did not rest on any evidence, it relied only on the treating doctor's statement concerning her dangerousness.
Main reasoning/argumentation (max. 500 chars)	The applicant claimed that the hospital failed to prove that she was dangerous, and therefore she should be released.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The City Court decided that the burden of proof in involuntary hospitalisation cases is lower than the regular civil standard. Due to the shortage of time and the already low legal threshold of involuntary hospitalisation the hospital does not have to prove that the criteria are met, it is enough if it "shows" (<i>osvědčit</i>) that the criteria are present. The patient can be released only if it proves that the doctor's allegations are unfounded and incorrect.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The City Court rejected the patient's appeal.
Proposal of key words for data base	Involuntary placement, involuntary treatment, burden of proof, criteria of involuntary placement

Case title	sp.zn. IV. ÚS 273/05
Decision date	11. January 2007
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Nález ústavního soudu ČR sp.zn. IV. ÚS 273/05/The Constitutional Court decision No. IV. ÚS 273/05
Key facts of the case (max. 500 chars)	The complainant was involuntarily hospitalised upon the complaint of her son-in-law. She was represented by a court clerk in the court review proceeding. The decision deciding on the lawfulness of her admission did not rest on any evidence, it relied only on the treating doctor's statement concerning her dangerousness.
Main reasoning/argumentation (max. 500 chars)	The complainant claimed that the unclear legal standard and the courts' deference to the psychiatrist's statements made it impossible for her to avoid hospitalisation, and thus subjected her to an arbitrary deprivation of liberty.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Court clarified the standard regarding legal representation. The concept of to what extent involuntary hospitalisation engages constitutional norms and thus falls into the jurisdiction of the Constitutional Court was not clarified by the decision.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Constitutional Court held that representation by an employee of the court cannot be regarded as adequate, and the applicant's rights were breached on that account. It however rejected the complainant's other complaints on the grounds that consideration of those issues falls to the competence of ordinary courts.
Proposal of key words for data base	Involuntary placement, legal representation

Case title	sp.zn. II. ÚS 2559/08
Decision date	05. March 2009
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Nález ústavního soudu ČR sp.zn. II. ÚS 2559/08/The Constitutional Court decision No. II. ÚS 2559/08
Key facts of the case (max. 500 chars)	The applicant was involuntarily placed to a psychiatric hospital. Shortly after she signed consent with treatment form. The district court discontinued the review of her hospitalisation on the grounds that she became a voluntary patient.
Main reasoning/argumentation (max. 500 chars)	The applicant complained to the Constitutional Court that she signed the consent with treatment for under duress, and the court should have had continued in the review of her hospitalisation regardless of her consent.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Constitutional Court decided that a consent signed by the patient is a ground for discontinuing the review proceedings, and the courts do not have to inquiry into whether the consent was given under duress.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Constitutional Court rejected the complaint.
Proposal of key words for data base	Involuntary placement, consent with treatment

Case title	sp. zn. Cpj 29/2006
Decision date	14. January 2009
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Stanovisko Nejvyššího soudu ČR sp. zn. Cpj 29/2009/Supreme Court Standpoint decision No. Cpj 29/2009
Key facts of the case (max. 500 chars)	A standpoint decision reflects on the case law in a particular area of law. It aims at unifying court practice.
Main reasoning/argumentation (max. 500 chars)	This standpoint decision clarified and unified the legal practice in involuntary hospitalisation review proceedings.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The court review must be discontinued if the patient dies, is released or gives consent to hospitalisation. The court decision must state whether it will be delivered to the patient or whether the court decided not to deliver it. If the court cannot decide on the lawfulness of the continuation of hospitalisation within the legal time limit, this does not mean that the patient can be released; the court can decide on a later date, and the patient can be kept in the hospital until then.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Lower courts are obliged to follow this standpoint decision; however, the Czech legal system is not based on legal precedents.
Proposal of key words for data base	Involuntary placement review, standpoint decision, Supreme Court