

OVERVIEW OF THE CHANGES IN THE NEW CZECH CIVIL CODE *CONCERNING THE DEPRIVATION OF LEGAL CAPACITY*

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Historical development of civil law in the Czech Republic

The new Czech Civil Code 89/2012 Sb.¹ (“CC”) which is strongly influenced by the ABGB (Austrian Civil Code),² went into effect in the Czech Republic on 1st January 2014. This codex has been used in the Austrian part of the Austro-Hungarian Empire since 1812 and in Austria it is still (but with many amendments) in force. In the Kingdom of Hungary the ABGB was prevailed only indirectly and just near the Austrian border. However, in 1853 it came into effect in the whole country for almost 10 years.³ In the Czech Republic this codex was invalidated and replaced by “the Middle Code of Civil Law”⁴ in 1950. This followed the political change in Czechoslovakia in 1948, when the Communists’ party became the main political power. In addition to social, political and cultural changes, the law was also created in compliance with the Communists’ regime.

After the revolution of 1989, the main principles in civil law were changed.⁵ The most important amendment No. 509/1991 Sb. claimed in § 1 paragraph 1 that “regulation of civil legal relationships shall contribute to the realisation of civil rights and freedoms, in particular to the protection of personhood and inviolability of ownership.”⁶ This principle gives an aim to civil law and makes it a tool to achieve higher purposes, thus, regulations of civil law cannot be self-serving any more.

If you take a look at civil laws in eastern post-socialist countries, you can see that there are still a lot of similarities resulting from socialism which controlled peoples’ daily lives and limited their personal privacy. This is the reason why the Communists’ government made a lot of changes in this field of law to support its power.

Deprivation of people of their legal capacity in the past

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¹ Act No. 89/2012 Sb., Civil Code as amended. Accessible at: <http://www.zakonyprolidi.cz/cs/2012-89>

² Act No. 946/1811 JGS., Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code)

³ NESCHWARA, Christian. Geltung und Ausstrahlung des österreichischen ABGB im CEE-Raum. *Jus-alumni Magazin – 200 Jahre ABGB* [online]. 2011, no. 1, p. 15 [cit. 26. 8. 2015]. Accessible at: http://www.jus-alumni.at/media/jusa_1300084433.pdf

⁴ Act No. 141/1950 Sb., Civil Code

⁵ HURDÍK, Jan et al. *Občanské Právo Hmotné, Obecná část, Absolutní Majetková Práva*. 1st ed. Plzeň: Vydavatelství a Nakladatelství Aleš Čeněk, 2013.p. 26. 308 p. ISBN 978-80-7380-377-3.

⁶ § 1para 1 Act No. 509/1991 Sb.



First of all, I would like to mention that during the Communists' era it was very often used to deprive people of their legal capacity. It means that all legal acts of people were invalid. Even buying an ice-cream or a loaf of bread was a legally wrongful act. § 10 paragraph 1 of the previous Civil Code said: "If an individual is completely unable to perform legal acts due to a permanent mental illness, the court shall deprive him or her of the capacity to act legally."⁷ All legal acts were performed by the guardian instead of being performed by disabled people.⁸ If the person performed a legal act, it was absolutely invalid and permission from the guardian afterwards was impossible. The Highest Court in decision R 7/1979 claimed that the person whose legal capacity was limited was able to enter into everyday contracts because those contracts did not endanger him and his rights and it was impossible for these contracts to be performed by other people (e. g. guardian).⁹ The new Civil Code confirmed it. According to § 65 of the CC, such a legal act is only invalid if it causes harm to a person. The Czech organization League of Human Rights, which protects rights of people, estimates that before 2014 there were over 35 thousand people deprived of their legal capacity.¹⁰

The official reason was due to mental disease and to the desire to protect those disabled people from con artists. This mental disease does not have to be only temporary caused for example by drug or alcohol abuse.¹¹ In many cases the judge's decision was based on correct expert opinions because these people were really ill. But there were also some people who were unwanted or who fought against the regime. The deprivation of their legal capacity was the best way to punish them. It actually means that the civil law was politically abused.¹² After the fall of the Communists' regime we have had rule of law again, so nobody is deprived of his legal capacity for political reasons. Nevertheless, we also have to consider the rights of mentally disabled people. They are still people living in our society who have the right to a peaceful life. To be independent in basic contract law, in my opinion, is part of this right. It is incredible that this is still possible in many eastern countries, for example in Slovakia.¹³ The Czech Republic and Slovakia used to be one country (Czechoslovakia) with a common legislative body. After the break-up in 1993 many laws have remained in force but both countries have had the right to modify them. The Civil Code from 1964 was in fact the same codex in both countries also containing mostly the same socialist principles. In Slovakia this Civil Code No. 40/1964 Z. z. is still in force.

The new legal adjustment

⁷ § 10 para 1 Act No. 40/1964 Sb., Civil Code

⁸ ŠVESTKA, Jiří et al. *Občanský Zákoník, Komentář*. 10th ed. Prague: C. H. Beck, 2006. p. 91. 1465 p.

⁹ LAVICKÝ, Petr et al. *Občanský zákoník: komentář*. 1st ed. Prague: C.H. Beck, 2014, p. 290, 2380 p. ISBN 9788074005299.

¹⁰ Soudy musí vyřešit více než 35 tisíc případů lidí, kteří v minulosti přišli o svéprávnost. In: *llp.cz* [online]. [cit. 27. 4. 2015]. Accessible at: <http://llp.cz/2014/01/soudy-musi-vyresit-vice-nez-35-tisic-pripadu-lidi-kteri-v-minulosti-prisli-o-svepravnost/>

¹¹ Lavicky et al.: op. cit. p. 289.

¹² Švestka et al.: op. cit. p. 91.

¹³ § 10 para 1 Act No. 40/1964 Z. z., Civil Code.

Nowadays, according to § 55 paragraph 1 of the CC, only the limitation of legal capacity is possible and the explanatory memorandum highlights the temporariness of this legal restriction (no more than 3 years but extension is possible).¹⁴ When something changes, i.e. the seriousness of the illness, the judge must revise his decision immediately.¹⁵ It must only be made in the interests of the concerned person and with full recognition of his personal rights. It is an extraordinary provision and it can only be used when milder and less restrictive measure would not be enough. The milder measure could be for example assistance with decision making (§ 45 CC) or representation by a household member (§ 49 CC). However, this instrument should only be used in cases concerning the ordinary daily matters of the concerned person (for example utility payments). In more difficult cases the guardian named by the court must act.¹⁶

The guardian should be a person, who is a close relative or someone who is interested in the well-being of the disabled person.¹⁷ The court cannot issue the decision regarding to the limitation of the legal capacity before naming the guardian for this person. The Communists' regime did not do this because it was a very useful instrument for restraining political opponents.¹⁸ The guardian has the duty to inform the disabled person in due time of intended important measures relating to himself or his assets and also has to comment in relation to such measures as well as to other measures within a reasonable period of time.¹⁹

Only courts are authorized to limit the legal capacity of people considering their opinion. The CC also changed that the expert's opinion is not enough and the judge should "see the person", for example via interrogation. Although the expert's opinion is really important evidence in legal proceedings regarding the limitation of a person's legal capacity, it cannot be the only evidence and shall not replace facts.²⁰ In addition, it is also necessary to become familiar with the behaviour of the person in question regarding how he lives, how he cares for his property, etc.²¹

The judge can decide about the limitation of legal capacity using negative enumeration. In this case the judge may specify which legal acts performed by this person are legally invalid. The performance of other legal acts by this person is not limited. It means that if the court does not specify anything concerning the entering into marriage, the person has full freedom to use this right.²² It is forbidden to respect the so called *lucidum intervallum*, which is the situation, when the person is temporarily given the capacity to decide sensibly because his mental disease has some gap.²³

¹⁴Důvodová zpráva k zákonu č. 89/2012 Sb. p. 59, 598 p. Accessible at:

<http://obcanskyzakonik.justice.cz/fileadmin/Duvodova-zprava-NOZ-konsolidovana-verze.pdf>

¹⁵ § 60 Act No. 89/2012 Sb., Civil Code

¹⁶ Lavicky et al.: op. cit. p. 277.

¹⁷ Svestka et al.: op. cit. p. 250.

¹⁸Judgement of the Czech Constitutional Court from 7. 12. 2005 Nr. IV. ÚS 412/04. Accessible at:

<http://nalus.usoud.cz/Search/ResultDetail.aspx?id=48373&pos=1&cnt=1&typ=result>.

¹⁹ § 466 Act No. 89/2012 Sb., Civil Code

²⁰Judgement of the Czech Constitutional Court from 18. 8. 2009 Nr. I. ÚS 557/09. Accessible at:

<http://nalus.usoud.cz/Search/ResultDetail.aspx?id=63411&pos=1&cnt=1&typ=result>.

²¹ Svestka et al.: op. cit. p. 90.

²² Lavicky et al.: op. cit. p. 291.

²³ Svestka et al.: op. cit. p. 238.

Because of the Communists' legal history of abusing limitation of legal capacity and human rights, the limitation of personal legal capacity is a very controversial encroachment on human integrity. Fundamentally, the aim of this legal institution is to help people, not to limit them. It is created for people with deficiencies, in comparison with healthy people. Therefore, the law compliments this deficiency with guardianship in order to safely take part in civil law relations, instead of leaving them alone and vulnerable.

The Czech Constitutional Court ("CCC") declared that it can only be used considering human rights, especially Article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights."²⁴ The CCC highlighted that the focus of the Czech legal system is the individual and the state should protect his rights and especially his dignity. The Czech Republic was founded on respect for human rights and on principles of civil society.²⁵ According to Art. 10 paragraph 2 of the Charter of fundamental rights and freedoms, everyone has the right to be protected from any unauthorized intrusion into her private and family life.²⁶ The most important thing, which has influence on the decision, is the interest of the person.²⁷

Legal acts which can be made with or without guardians, with the example of judgments in courts of the Czech Republic

Decision No. IV.ÚS 1499/13 (The Constitutional Court)²⁸ – avoiding material and financial harm

The limitation of legal capacity is allowed if the main purpose is to avoid material and financial harm caused to a disabled person. Ms. Landštofová was a pensioner with mild cognitive impairment. She spent a lot of money and although her pension was about 12.000 CZK (≈ 444 EUR), her debts were more than 230.000 CZK (≈ 8.518 EUR). Because of these reasons the court limited her legal capacity with the specified amount of 1.500 CZK (55 EUR) a week. However, her other private and public rights were not affected by this decision. Therefore, she could for example take part in the elections or get married without permission issued by a guardian.

Decision No. IV. ÚS 3102/08 (The Constitutional Court)²⁹- suffrage of people deprived of their legal capacity

²⁴Article 1 of the Universal Declaration of Human Rights. Accessible at: <http://www.un.org/en/documents/udhr/#atop>

²⁵ Judgement of the Czech Constitutional Court from 7. 12. 2005 No. IV. ÚS 412/04. Accessible at: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=48373&pos=1&cnt=1&typ=result>.

²⁶ Art. 10 paragraph 2 RESOLUTION of the Presidium of the Czech National Council of 16 December 1992 on the declaration of the CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS as a part of the constitutional order of the Czech Republic No. 2/1993 Coll. Accessible at: <http://www.usoud.cz/en/charter-of-fundamental-rights-and-freedoms/>

²⁷ Lavicky et al.: op. cit. p. 275.

²⁸ Judgement of the Czech Constitutional Court from 23. 7. 2013 No. IV. ÚS 1499/13. Accessible at: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=80046&pos=1&cnt=1&typ=result>.

A plaintiff deprived of his legal capacity was complaining that all people in his position did not have suffrage. It is the basic human right to vote for our representatives and to be voted for. According to his opinion, it is unjust when all people deprived of their legal capacity are in general unable to take part in elections, although the plaintiff has been interested in politics for a long time and he regularly reads newspapers.

The Constitutional Court claimed that it is necessary to guarantee electors with the ability to understand the meaning, purpose and impact of elections and the capacity to make an intellectual decision. On the other hand, there were over 23 000 people deprived of their legal capacity in 2007 but only 3 900 were limited. It shows the sweeping decision making by courts. The Constitutional Court summarized that the deprivation of legal capacity is still a legal reason for deprivation of suffrage, however, courts should use this instrument less frequently and the limitation of legal capacity should be preferred.

Decision No. 9 Ads 23/2014 (The Supreme Administrative Court)³⁰- obligatory legal guardianship for doing some procedural acts

According to § 3032 CC, all people who were deprived of their legal capacity before 2014, now have, without any judicial decision, i.e. ex lege, the capacity of doing everyday legal acts. However, the old age pension is mostly the only source of money that pensioners have, although, it is not a large amount of money. Dealing with that is not an everyday legal act and disabled people need to have legal guardian to do procedural acts and start the proceeding against the provider of their old age pension.

Conclusion

To ensure rights of disabled people and avoid nonsense in legal theory, § 64 of the CC was adopted, claiming that the decision to limit the legal capacity of a person does not relate to doing everyday legal acts.³¹ They can have for example some pocket money which they can spend on whatever they want.³²

This is basically the same as in the Austrian Civil Code (ABGB). If a disabled person in Austria enters into a legal transaction within the scope of the guardian's sphere of influence, but it is relating to a minor matter of daily life, such a legal transaction is effective.³³

I personally believe that the new regulation of depriving people of their legal capacity reflects individuality of a person and supports his rights against abuse or the

²⁹ Judgement of the Czech Constitutional Court from 12. 7. 2010 No. IV. ÚS 3102/08. Accessible at: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=66800&pos=1&cnt=1&typ=result>

³⁰ Judgement of the Czech Supreme Administrative Court from 26. 3. 2014 No. 9 Ads 23/2014.

Accessible at:

http://www.nssoud.cz/files/SOUDNI_VYKON/2014/0023_9Ads_14_20140327110106_prevedeno.pdf.

³¹ § 64 Act No. 89/2012 Sb., Civil Code

³² Judgement of the Czech Constitutional Court from 23. 7. 2013 No. IV. ÚS 1499/13. Accessible at: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=80046&pos=1&cnt=1&typ=result>.

³³ § 280 para 2 Act No. 946/1811 JGS., Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code)

sweeping decision adopting by courts more. However, the Czech non-governmental organisation “League of Human Rights” criticizes the decision making of courts, when they limit the legal capacity of people in the way of using some form. In consequence of that form the disabled people are not allowed to do almost any kind of legal act, which is the same situation as before.³⁴ I suppose that the courts should get used to new legal regulation and take more account of individual need of legal protection.

³⁴ Komplexní úprava opatrovnictví a podpůrcovství pořád chybí. In: *llp.cz* [online]. [cit. 11. 9. 2015]. Accessible at: <http://llp.cz/2015/03/komplexni-uprava-opatrovnictvi-a-podpurcovstvi-poradchybi/>