

# Adult Guardianship System in the Czech Republic in Comparison with Selected European Union Countries<sup>1</sup>

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## **Adult Guardianship System in the Czech Republic in Comparison with Selected European Union Countries.**

In ageing societies, questions of participation of elderly people in social life and the possibilities of a self-determined life in old age are of high importance. The state increasingly is confronted with the task of protecting personal rights of older and incompetent persons. In various societies, the way of protection ranges from paternalistic interventions to approaches stressing autonomy and support of those persons. The article is concerned with the phenomenon of guardianship of incompetent elderly (i.e. persons over 60 years of age) in the Czech Republic. It is based on the international project Advocacies for Frail and Incompetent Elderly in Europe (ADEL) aimed at comparing adult guardianship systems in five European countries (Austria, Czech Republic, Denmark, Germany and Spain). The findings inspired a national study a part of which is presented in the article. The essential aims of the national study were: (a) to identify socio-demographic and epidemiologic data on incompetent elderly; (b) to identify socio-demographic data on their guardians. The method was study of documents (court records) and the data collection technique was content analysis. The first and second parts outline the theoretical and methodological framework of guardianship. The third part presents research results. The final part compares the empirical reality in the Czech Republic and selected EU countries participating in the ADEL project. Sociológia 2011, Vol. 43 (No. 3: 266-285)

**Key words:** adult guardianship system; autonomy; Esping-Andersen's welfare state typology; incompetent elderly; guardian; data on guardianship

## **Introduction**

Guardianship is a legal relationship established by a court process between an adult<sup>3</sup> who is deemed to lack the requisite legal capacity to make personal decisions and the person appointed to make decisions on that adult's behalf<sup>4</sup>. (MDAC 2007: 10) The term "guardianship" was similarly defined by Teaster et al. 2005; Wood 2006; or Moye et al. 2007. While adult guardianship by definition is not only about the elderly, there is strong empirical evidence suggesting that the subjects in the vast majority of guardianship cases in fact

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<sup>3</sup> An adult is a person who has reached the legal age of majority. In the Czech Republic the age of majority is 18. Some authors use the term "the ward" (e.g. Wood 2006; Wright 2010).

<sup>4</sup> Different jurisdictions use different terminology to define the legal inability to act on one's own behalf, such as, for instance, "incapable" or "incompetent" (MDAC 2007: 10). Terminology concerning guardianship is not consistent (Engels – Köller – Pilgram et al. 2009).

are elderly persons (Doron 2003: 131), i.e. persons over 65 years of age (Wood 2006; O'Sullivan – Hoffmann 1996; Uekert – Schauffler 2010). Generally, the phenomenon of guardianship may be understood as acts (and thinking) on behalf of someone else with consent from society. It is a social institution concerned with protecting persons found unable (incompetent) to make decisions about their matters by the society. It is based on the premise that to act and make decisions, incompetent individuals need help from either other persons or institutions considered suitable for the protection based on social (mostly legal) decisions. The form of this institution results from society's attitude to mentally handicapped people which changed throughout the last century. There was a shift from a caring approach (the so-called paternalistic approach) to an approach stressing autonomy and support for these persons. (Marečková – Matiaško 2010). In international law, the change was reflected by the Convention on the Rights of Persons with Disabilities adopted by the UN<sup>5</sup>.

The Convention, different values and varied practical approaches to adult guardianship in different EU countries were used as a methodological framework for the international project *Advocacies for Frail and Incompetent Elderly in Europe (ADEL)*<sup>6</sup> which this article is based on. The ADEL project is a comparative study in five European countries (Austria, the Czech Republic, Denmark, Germany and Spain) that describes the current system of protection of frail and incompetent elderly. The countries were chosen according to Esping-Andersen's welfare state typology (Esping-Andersen 1990). The project concluded that differences in the institutions of guardianship in the selected countries are essentially influenced by legal tradition/system of guardianship and welfare regime. In countries with a conservative type of welfare regime (Austria, Germany, Spain), a paternalistic (state, public, family) approach to incompetent elderly prevails. On the other hand, an approach respecting autonomy of incompetent elderly is typical for a social democratic type of welfare regime (Denmark). The Czech Republic was labelled as representing a transitional, ambivalent type (Köller – Pilgram 2010). This conclusion was evidenced not only by comparison of demographic situations and legal systems of the participating countries, their key documents and case studies of "typical" incompetent persons but also by interviews with experts in adult guardianship. In the Czech Republic, the interviews were characterized by apparently varied opinions on approaches to protection of incompetent elderly as expressed by both experts on ethical, legal and medical issues related

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<sup>5</sup> Available at: <<http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>>

<sup>6</sup> The ADEL project was initiated by the Institute of Social Research and Social Policy (Cologne, Germany) and the Institute for the Sociology of Law and Criminology (Vienna, Austria). The project was launched in September 2008 and completed in August 2010.

to incompetent elderly and policy-makers responsible for this area (Špatenková – Olecká – Ivanová 2011).

In addition, the ADEL study showed that the Czech Republic lacks relevant data necessary for making key decisions such as the further development of adult guardianship (socio-demographic data on wards and guardians, conditions of private and public guardians, data from geriatric psychiatric facilities etc.). Court statistics only show that the numbers of incompetent persons are increasing (Ministry of Justice of the Czech Republic 2011). Thus, it may be stated that the lack of detailed analyses concerning incompetent elderly and their guardians is a serious problem. The essential aims of a national study in the Czech Republic were: (a) to identify socio-demographic and epidemiologic data on incompetent elderly (that is persons aged 60 and more); (b) to identify socio-demographic data on their guardians. The method was study of documents (court records) and the data collection technique was content analysis. The following hypotheses were formulated: Hypothesis 1: The number of incompetent persons in the age category over 60 years increased between 2006 and 2008. Hypothesis 2: There are more females than males in the over-60 age category. Hypothesis 3: In the over-60 age group, the most frequent reason for deprivation of legal capacity is dementia. Hypothesis 4: In most cases, the guardians for incompetent persons over 60 years of age are private guardians. Hypothesis 5: Most private guardians of incompetent persons over 60 years of age are females. Hypothesis 6: Most public guardians of persons over 60 are municipalities.

The first and second parts outline the theoretical and methodological framework of guardianship. The third part presents research results. The final part compares the empirical reality in the Czech Republic and selected EU countries participating in the ADEL project.

### **Autonomy of incompetent persons as a dilemma**

Population ageing brings social changes and places enormous and completely new demands on the existing social institutions, necessitating the formation of new institutions. The changes occur mainly in social structure, relations between individuals and society and in family structures. The situation requires solutions throughout society, particularly in social politics and social work (Barry – Yuill 2008). The process of ageing always threatens an individual's autonomy (Sýkorová et al. 2003). In this context, Laan (1999) draws attention to new questions related to legitimization of various traditional solutions in social work, including legitimacy of guardianship. However, the question is not about the essence of guardianship, that is, whether to care for helpless or mentally disabled persons. There is urgent need to ask to what extent and under what conditions it is possible to act on behalf of someone else.

When performing basis analysis, the legitimacy of social work may be viewed from two perspectives (paradigms), from a system perspective and from a perspective of action. To a great extent, systematically theoretical and structural approaches are based on external perspective whereas in theory of action perspectives, social reality arises from an internal view (Laan 1999). System perspective assumes normative control of both the process and structure of the system, related to a certain protective (or socially beneficial) institute. According to Parsons (1965), the system perspective defines action outside the accepted norms as a threat to the system and departure from the norms requires official social regulation. Through a control (or protective) organ, society legitimizes the status of a person that has to be helped and defines how it will be helped. Autonomy of persons who have to be protected based on social decision is significantly limited. The basic prerequisite for a social system is that society (and its representatives), as a provider of protection, knows best what is most beneficial for persons needing help. Beauchamp and Childress (2001) refer to such approach as to paternalistic.

By contrast, internal perspective is concerned with how an individual perceives and interprets everyday life events, tries to maintain his or her internal integrity and feeling of dignity in roles imposed on him or her. Approach to care for persons breaking social norms was studied by Foucault (2003) and approach to them by Goffman (2003). From this point of view, only social help that an individual needs and demands based on his or her life experiences is legitimate. Such an approach puts more emphasis on respect for autonomy<sup>7</sup> of persons in need for protection as well as on their rights and desire to take part in society.

The answer to the question on the level of autonomy when protecting incompetent persons is not clear, with the opposite solutions having their advantages as well as disadvantages. Thus, determining the level of guardianship may be seen as a dilemma. In societies, the dilemma of acting for another has changed throughout the history, with more dramatic turns being brought about by social revolutions. In the Czech Republic, other approaches began to emerge after the 1989 overthrow of the political system, but the changes were rather long-lasting. The Civil Code passed in 1964 and the Civil Procedure Code passed in 1963 are still valid. Despite amendments to the acts, the provisions concerning guardianship have remained practically unchanged. There was a significant change to legal terminology. The stigmatizing term “incapable” was replaced by “deprived of legal capacity” in 1964 (Marečková – Matiaško 2010). When looking into the history, we see that already Roman

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<sup>7</sup> Respect for autonomy is established as one of the fundamental principles of bioethics (Beauchamp – Childress 2001). See also Richardson G.: 2002. Autonomy, Guardianship and Mental Disorder: One Problem, Two Solutions. *Modern Law Review* 65 (5): 702-723.

law provided incapable citizens with two forms of help – *tutela* and *cura* (Kincl – Urfus – Skřejpek 1995).

The development of international documents in the 20th century shows how attitude to incompetent persons slowly changed from a paternalistic approach to an approach stressing autonomy. This shift in international law resulted in adopting the UN Convention on the Rights of Persons with Disabilities, ratified by the Czech Republic on 28 September 2009. The Convention was a continuation of a 1971 UN General Assembly resolution expressing the need for equal rights of mentally disabled persons. The Convention is a common basis for national institutions of adult guardianship. In individual countries, the forms of institutions vary according to specific political, legal and social systems, as well as religious and family traditions associated with caring for the helpless or disabled. Thus, in a particular society, the final form of guardianship is produced by its cultural system as a general expression of the shared values.

The level of autonomy of incompetent persons is complementary to the extent of their disability. The fact that a person suffers from a certain level of intellectual disability does not automatically mean that he or she is incapable of making any decisions. This may be supported by empirical studies showing that people with severe mental disorders such as psychoses are not less competent to make decisions about their treatment than healthy individuals (see e.g. Grisso – Appelbaum 1995). Therefore, the process of capacity assessment is very important. It is a human effort and as such, it is based on expert evidence and ultimately court decisions. Ability to make decisions, support of autonomy and its legal foundation are a matter of respect to the dignity of disabled people (Marečková – Matiaško 2010).

### **Guardianship as a system**

Similar to Marečková and Matiaško (2010), the authors do not perceive capacity to legal acts and guardianship merely as a legal institution primarily aimed at protecting people with disabilities but as an institution with much broader impact on their world, determining their attitudes to themselves, their loved ones and friends, and society as a whole. It is a complex issue (Engels – Köller – Pilgram et al. 2009; Wright 2010). Guardianship can be understood as a puzzle (O'Sullivan – Hoffmann 1996) or as a model (Blankman 1997) or as a system (Mizuno – Nanba 2003; Engels – Köller – Pilgram et al. 2009; Ivanová – Bužgová – Kurfürst 2010).

The system of guardianship inputs are: (1) persons who need help from others when acting in their interest or in the interest of their family or society, that is, most frequently persons with mental disorder; it is essential to know the

demographic structure of these persons and reasons for deprivation of legal capacity; (2) persons and institutions taking care of them, that is private and public guardians; it is necessary to know the ratio of private and public guardians and the demographic structure of private guardians; (3) representatives of social institutions responsible for assessing the situation and making decisions in the process, that is, psychiatrists, legal experts, judges, lawyers; expert opinions of these persons must be known; (4) the country's official policy concerning the process and system of guardianship; official documents must be analyzed; and (5) financial limitations of the country; it is necessary to analyze the costs of the system.

The following processes are crucial for the system of guardianship: (1) the process of deprivation of legal capacity; it is essential to know the content of court records; (2) the process of continuous guardianship of the ward; the work and care of both public and private guardians must be assessed; and (3) the process of termination of guardianship; once again, the content of court records must be known. The output of the system of guardianship should be persons who are cared for when mentally disabled, people who are treated – together with their property – with respect to their potential interest, and people who live as dignified lives as possible. This is what a society is committed to after adopting the institution of guardianship.

In individual countries, the systems of guardianship are mainly influenced by the national legal systems. According to the ADEL interim report (Engels – Köller – Pilgram et al. 2009) the Czech Republic and Spain have “traditional” systems of legal representation but there are debates on reforms in both countries which will be partially realised in a timely manner. Both countries still up to now witness a two-step-procedure. In the Czech Republic, there are two proceedings that interfere with each other and lead to the establishment of a guardianship. In the case of frail and incompetent elderly, they cannot exist one without other. To appoint a guardian, it is necessary that the court first decides that a person shall be restricted in<sup>8</sup> or deprived<sup>9</sup> of capacity to legal acts (Act No. 99/1963 Coll., Civil Procedure Code, Sections 186-191) and then there shall be a decision made again by the court on appointing a guardian (Act No. 99/1963 Coll., Civil Procedure Code, Sections 192-193). The main philosophy of the legislator as regards the regulation of guardianship in the

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<sup>8</sup> The court shall restrict an individual's legal capacity in two cases: (1) in cases of mental health problems or intellectual disabilities, when: a) an adult has a mental disorder; b) this mental disorder is not only temporary; c) due to this mental disorder the individual possesses only limited capacity to undertake acts in law. (2) in cases of excessive consumption of alcohol, narcotics or intoxicants, when: a) an adult excessively consumes alcoholic beverages, narcotics or intoxicants; c) due to this, the adult possesses only limited capacity to undertake acts in law (Act No. 40/1964 Coll., Civil Code, Section 10; MDAC 2007).

<sup>9</sup> An adult may be deprived of legal capacity only if the following legal requirements are met: a) the adult has a mental disorder; b) this mental disorder is not only temporary; c) due to this mental disorder the individual is incapable of undertaking acts in law (Act No. 40/1964 Coll., Civil Code, Section 10; MDAC 2007).

1960s was a paternalistic one. The legislation was conceptualized as a protection of both society and individuals against mentally ill people, who could be also “dangerous” for the society. Institutional care provided to such people was the most common instrument during the entire socialist period and, to a great extent, it has remained so until today. History also helps to explain some features of the current Spanish and Catalan systems. In Spain, regionally different civil law regulations have a long tradition. Dating back to 1983, only a few years after the political change, the guardianship law is characterized by strong efforts towards a juridification taming patriarchal family structures. However, if one looks for example at the legally preferred group of people who can be guardians, it becomes clear that the family still plays an important role.

Austria and Germany have similar systems but different application. The basic idea of both systems is to substitute the legal capacity of an allegedly incompetent person by a representative. However, there are also significant differences between Germany and Austria. The Austrian system was put into force in 1984 and is therefore older than the German law (1992). Developed on a rather paternalistic welfare-oriented idea, it used to heavily rely on professional guardianship. Although the situation is different now, this is maybe one reason why in Austria, persons under guardianship automatically lose their ability to conclude a valid contract while the German system knows a “dual competence”: in principle, the ward remains fully legally competent. On the other hand, Austrian guardians have less power than German guardians when it comes to compulsory measures: Austrian guardians are not allowed to decide on any restrictions of personal freedom of movement. For this purpose, a system of special advocacies was established. Equal again in both countries is the strong tendency to promote alternatives to guardianship such as lasting powers of attorney, approved in Germany long time ago (Engels – Köller – Pilgram et al. 2009).

Denmark is a representative of the Nordic legal system. Germany, Austria, Spain and the Czech Republic have a common history since the traditional systems currently still existing in the Czech Republic and Spain also existed in Austria and Germany in a similar way in the past. Denmark does not share this history. The Danish guardianship system is the youngest of all countries. Denmark is the only country where not only courts, but also regional authorities are responsible for guardianship. The Danish system looks also unique with regard to contents. It stresses self-determination and personal autonomy. Basically, people under guardianship remain legally capable. The Danish legal concept of guardianship mainly has to do with economic matters. The main idea is to make legal guardianship more up-to-date, flexible and adapted to more specific personal needs. The aim is to preserve personal autonomy as much as possible. It is estimated that approximately 40,000

elderly people might need legal guardianship in one form or the other. Human rights are an important element in this regulation. Autonomy should be maximized and the old paternalistic style minimized. Background for the regulation was also the concept of welfare. It may be concluded that maintaining legal competence as long as possible will be one of major future trends in all countries. Furthermore, alternatives to state-regulated guardianship will be of growing importance (Engels – Köller – Pilgram et al. 2009).

### **The national study of the adult guardianship system in the Czech Republic**

We are presenting selected data obtained from the national study of the adult guardianship system in the Czech Republic. The study sample of the survey comprised 307 court records concerning living persons over 60 years of age (out of 1,092 records) who had been deprived of legal capacity by district courts in 2006-2008 and who had been appointed guardians in the same years. The survey was held in 11 district courts in two regions – the Olomouc Region and the Moravian-Silesian Region – in 2009 – 2010<sup>10</sup>. For each court record<sup>11</sup>, a separate form was filled in, which contained the following categories<sup>12</sup>: (1) age of the incompetent adult at the moment of appointing the guardian, (2) sex of the incompetent adult, (3) marital status, (4) reasons for deprivation of legal capacity, (5) the proposer (i.e. the person who initiated the guardianship procedure), (6) costs of an authorized expert, (7) type of the guardian (private or public), (8) age of the private guardian, (9) sex of the private guardian, (8) the relationship between the ward and the private guardian (i.e. family relations), (10) the verdict (judicial decision), (11) type of the public guardian.

The frequencies of the studied categories were filled in the forms. Subsequently, the categories were quantified and, after obtaining the overall characteristic of the contents, analyzed<sup>13</sup>. The data were statistically processed using the SPSS 15 software. The group was described using relative and absolute frequencies of all the studied parameters. Statistical significance of dependence for individual parameters was verified by the chi-square test.

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<sup>10</sup> The Czech Republic has been divided into 14 self-governing regions since 2000. Details of the Olomouc Region are available at: <http://www.kr-olomoucky.cz/>. Details of the Moravian-Silesian Region are available at: <http://www.kr-moravskoslezsky.cz/>.

<sup>11</sup> A court record generally contained these basic documents: a proposal on deprivation or restriction of legal capacity, doctor's approving recommendation, a decree on initiation of a procedure on capacity changes, a decree on appointing a representative, a decree on appointing a psychiatric expert, an expert's report, a record of a guardian oath, a record of financial resources disposal and personal estate alternatively, etc.

<sup>12</sup> The categories were defined by the Institute of Social Research and Social Policy in Germany (Köller – Pilgram 2009).

<sup>13</sup> For more details about content analysis see for example: Weber, R. P. (1990). Content Analysis. An Introduction to Its Methodology; Krippendorff, K. (2004). Basic Content Analysis.



### ***Numbers of incompetent persons***

Table 1 presents the numbers of incompetent persons in the selected regions of the Czech Republic. Between 2006 and 2008, all eleven district courts in the selected regions deprived a total of 1,092 persons of legal capacity, of which 28.1% were aged 60 or more. The chi-square test showed a significant increase in the number of incompetent persons over 60 years of age between the years 2006 and 2008,  $p = 0.0001$ .

Table 1: **Numbers of incompetent persons (2006 – 2008)**

			Incompetent persons		Total
			18-59	60+	
Year	2006	Count	187	38	225
		%	83.1%	16.9%	100.0%
	2007	Count	286	126	412
		%	69.4%	30.6%	100.0%
	2008	Count	312	143	455
		%	68.6%	31.4%	100.0%
Total	Count	785	307	1092	
	%	71.9%	28.1%	100.0%	

### ***Sex of incompetent persons in individual age categories***

Table 2 shows the sex of incompetent persons in individual age categories. In the Czech Republic, 307 persons aged 60 or more (from the total number of 1,092) were deprived of legal capacity by district courts in the selected regions from 2006 to 2008. Those were 84 men (out of 592) and 223 women (out of 500). The chi-square test showed dependence between the age and sex of the incompetent persons. In younger age groups (18-39 and 40-59), males were statistically significantly more prevalent (64.7%) whereas females prevailed (72.2%) in older age groups (over 60 years of age),  $p < 0.0001$ .

### ***Reasons for deprivation of legal capacity***

As seen from Table 3, dementia was the most frequent reason for deprivation of legal capacity in the selected regions of the Czech Republic in 2006-2008. The chi-square test revealed that the 60+ age group is characterized by a significant difference in deprivation of legal capacity due to dementia between women (79.8%) and men (60.7%;  $p = 0.001$ ). The other reasons for deprivation of legal capacity in persons aged 60 or more were schizophrenia (12%), addiction (7.2%), mental retardation (4.2%) and mood disorders (2%).

Table 2: Sex of incompetent persons in individual age categories

			Sex of incompetent persons		Total
			Male	Female	
Age categories (incompetent persons)	18-39	Count	352	192	544
		%	64.7%	35.3%	100.0%
	40-59	Count	156	85	241
		%	64.7%	35.3%	100.0%
	60-64	Count	27	30	57
		%	47.4%	52.6%	100.0%
	65-69	Count	17	22	39
		%	43.6%	56.4%	100.0%
	70-74	Count	18	32	50
		%	36.0%	64.0%	100.0%
	75-79	Count	13	46	59
		%	22.0%	78.0%	100.0%
	80-84	Count	5	54	59
		%	8.5%	91.5%	100.0%
	85+	Count	4	39	43
		%	9.3%	90.7%	100.0%
Total		Count	592	500	1092
		%	54.2%	45.8%	100.0%

Table 3: Reasons for deprivation of legal capacity (2006 – 2008)

			Reasons for deprivation of legal capacity		Total
			Dementia	Others	
Sex	Male	Count	51	33	84
		%	60.7%	39.3%	100.0%
	Female	Count	178	45	223
		%	79.8%	20.2%	100.0%
Total		Count	229	78	307
		%	74.6%	25.4%	100.0%

### ***Types of guardians***

Table 4 presents two types of guardians of incompetent elderly (persons over 60 years of age) in the selected regions of the Czech Republic between 2006 and 2008. The proportion of private guardians (individuals) is higher (83.1%) than the number of public guardians (16.9%).

**Table 4: Types of guardians (2006 – 2008)**

		Types of guardians		Total
		public	private	
2006	Count	3	35	38
	%	7.9%	92.1%	100.0%
2007	Count	26	100	126
	%	20.6%	79.4%	100.0%
2008	Count	23	120	143
	%	16.1%	83.9%	100.0%
Total	Count	52	255	307
	%	16.9%	83.1%	100.0%

### ***Sex of private guardians***

The sex of private guardians in the selected Czech regions in 2006-2008 is shown in Table 5. Most typically, private guardians are women aged 40-59 (68.4 %). The overall proportion of female private guardians is two thirds (65.5%).

### ***Types of public guardians***

Table 6 provides information on public guardians in the selected regions of the Czech Republic from 2006 to 2008. Public guardians are mostly municipalities according to the place of residence (84.6%). The other reported public guardians were residential homes and social care institution (15.4%).

### **Empirical Reality: Comparison between the Czech Republic and selected EU countries**

Analysis of data on guardianship in five European countries (Austria, the Czech Republic, Denmark, Germany and Spain) revealed a steady increase in guardianships. The rates of guardianship established in 2006 are available. In Germany, there were 28 new (permanent) cases per 10,000 population while in the other four countries, there were fewer than 10 new cases per 10,000 people. The ADEL interim report (Engels – Köller – Pilgram et al. 2009) showed a rise in new guardianship cases during the previous five years, with a relatively small increase in Germany (7%), moderate increase in Austria (22%) and major

increase in Denmark (52%), the Czech Republic (67%) and Spain (96%; here, it was even only within a two-year period). This can be explained by the number of existing cases. Whereas Germany has a long tradition of guardianship, the numbers of cases were much smaller in the other countries.

**Table 5: Sex of private guardians (2006 – 2008)**

			Sex of private guardian		Total
			Male	Female	
Age categories (guardian)	18 - 39	Count	11	19	30
		%	36.7%	63.3%	100.0%
	40 - 59	Count	49	106	155
		%	31.6%	68.4%	100.0%
	60 - 64	Count	14	24	38
		%	36.8%	63.2%	100.0%
	65 - 69	Count	9	11	20
		%	45.0%	55.0%	100.0%
	70 - 74	Count	2	1	3
		%	66.7%	33.3%	100.0%
	75 - 79	Count	2	4	6
		%	33.3%	66.7%	100.0%
	80 - 84	Count	1	2	3
		%	33.3%	66.7%	100.0%
Total		Count	88	167	255
		%	34.5%	65.5%	100.0%

**Table 6: Types of public guardians (2006 – 2008)**

		Public guardians		Total
		Municipality	Other institutions	
2006	Count	1	2	3
	%	33.3%	66.7%	100.0%
2007	Count	22	4	26
	%	84.6%	15.4%	100.0%
2008	Count	21	2	23
	%	91.3%	8.7%	100.0%
Total	Count	44	8	52
	%	84.6%	15.4%	100.0%

These countries are now experiencing a catch-up effect due to new legal regulations and demographic development. In the selected regions of the Czech Republic, a significant increase in the number of incompetent persons over 60 years of age between the years 2006 and 2008 was noted (Table 1). Statistical reports from the Ministry of Justice of the Czech Republic (2011) show that in the Czech Republic, a total of 33,567 persons were deprived of legal capacity as of 31 December 2009.

Over the same period in the Czech Republic, more men were deprived of legal capacity in younger age groups (18-39 and 40-59) and more women in older age groups (over 60 years of age), as seen in Table 2. This distribution is similar to that in Germany in 2006. The age distribution of incompetent persons was quite similar among younger and middle-aged persons: around 30% were younger than 39 years, another 30% were between 40 and 59 years of age, and 40% of incompetent persons were older than 60 years (Engels – Köller 2009). When comparing the age structure of incompetent persons, we see differences in particular between Austria and the Czech Republic. In Austria, 42% of incompetent persons are 70 years old or more while in the Czech Republic, almost 50% of incompetent persons are younger than 40 years. In Germany and Spain (Madrid), the proportion of incompetent persons over 70 years of age is relatively similar (approximately 31%). Especially the age distribution in Austria and the Czech Republic is striking and cannot be explained by the age distribution of the population since there are not such large differences between the countries (Engels – Köller – Pilgram et al. 2009). One can only assume that the differences in distribution are caused by different policies concerning advocacies for incompetent persons.

According to Jiráček – Holmerová – Borzová et al. (2009), age is a major risk factor for dementia. Dementia is characterized by decrease of cognitive abilities which negatively determines a person's capability of coping with requirements of their life environment (Pidrman 2007). In the selected regions of the Czech Republic in 2006-2008, the most common reason for deprivation of legal capacity in the 60+ age group was dementia (229 cases out of 307), more frequently in females (79.8%) than in males (60.7%), see Table 3. We found that the increase rates in incompetent persons with dementia in the 80+ age group were 30% in the Czech Republic, 37% in Austria and 53% in Germany (Ivanová – Juričková – Kliment 2010). According to Jiráček – Holmerová – Borzová et al. (2009), the prevalence of dementia is about 5% in the population older than 65 years and 30-50% in those over 85 years of age.

In the Czech Republic, care for the elderly is divided between their families and institutions (social care institutions, psychiatric hospitals, long-term care institutions). We found that in persons over 60 years of age, the percentage of private (individuals) guardians (83.1%) significantly exceeded the number of

public guardians (16.9%), see Table 4. The Preliminary National Report on Health Care and Long-term Care in the Czech Republic (2005) stated that more than 80% of care for the elderly in need was provided by the family, with the average length of such care being 4 to 5 years. In the selected Czech regions between 2006 and 2008, private guardians were mostly women aged 40-59 years (68.4%), as seen in Table 5. The Preliminary National Report on Health Care and Long-term Care in the Czech Republic (2005) confirms that persons who most often provide care about their relatives are women, 80% of whom are employed. Dependent elderly persons are typically looked after by adult children (53%). However, as a result of the continuing social transformation and the changing socio-economic situation of families, as well as due to high unemployment, commuting to work and housing shortage, there has been a decline in the number of families that are willing and have the capacity to take care of a dependent family member. Traditionally, Czech people have required that the state plays an important role in providing social security. In the Czech Republic, similar to Austria, Germany and Spain, the majority of guardians are private guardians, mostly family members (61% in Austria, 66% in Germany, approximately 75% in Spain; no data available for Denmark). The ADEL project showed that in the Czech Republic, incompetent elderly are cared for by family guardians more frequently than in Spain (by approximately 3%), although according to Esping-Andersen's welfare state typology, Spain was selected to represent the family-oriented type (Ivanová – Juríčková – Koldinská 2010).

According to Jeřábek (2009), the extent and intensity of care provided to the elderly by their families are proportional to the needs of the elderly. Family solidarity and cohesion are manifested especially in situations of personal care under pressure. Results of the research project Seniors in Society showed that adult children who have experience with caring for their parents who cannot take care of themselves expressed fear for their parents and feelings of helplessness, and experienced psychological burden. When caring for their parents, they use various strategies. These include, for example, an interruption of employment, a balanced division of responsibilities among adults, children and their families, use of health and care services, or cleaning services. What seems to be very important for the provision of care is support from both the guardian's family – his/her partner's understanding or participation of relatives willing to help – and those outside the family, such as friendly employers (Sýkorová 2007).

Until the year 1989, strong social networks were considered a form of protest against the ruling ideology in the Czech society (Možný 2009). At present, the original approach to the status of a family persists, especially in small towns. The concept of an active old age was not accepted unambiguously

by the Czech society (Možný 2010). Currently, long-lasting dependence of children on their parents is still evident. In big cities, it is possible to observe social anomie, especially in relation to family stability and care for the elderly. In the Czech Republic, most people over 70 years live alone or in big families. Most frequently, seniors live together with their children in Spain (45.7%), as compared with the Czech Republic (31.1%), Austria (18.0%), Germany (12.2%) and Denmark (4.9%); the same is true for the elderly living with other relatives (Ivanová – Juričková – Koldinská 2010).

The need for institutional care increases with age. It is estimated that between 60 and 74 years of age, 0.8% of the elderly live in residential homes, as compared with 4.3% in the 75+ age group (Ivanová et al. 2009). Bednárik (2010) described the conditions and working activity of carers in Slovakia. He called attention to specialization of professions within the system of long-term care. According to Lužný and Ivanová (2010), the elderly with mental disorders dependent on institutional care are usually on the edge of the society and even research does not pay adequate attention to them. As for financial resources, geriatric psychiatry is incredibly underpaid. There is a lack of money for both reconstruction and modernization of geriatric departments in psychiatric hospitals.

We found municipalities to be the most common public guardians (84.6%), see Table 6. A natural person as a guardian and a representative of a legal person as a guardian have different approaches to an incompetent person. However, it is desirable that both types of guardians are incorporated in a team of carers. Family members as guardians have different motivation for care. Their mere presence satisfies the need for safety of a more or less disoriented elderly person. Such a guardian knows in detail all individual needs of the person who he/she looks after and whose ability to communicate with others is decreased. If the guardian is a representative of a legal person, such a person provides more formal types of care and is more socially distant in comparison with family members (Juričková – Kliment – Ivanová 2009).

Nowadays in the Czech Republic, guardianship is being decided from the system perspective where standards are set from the point of view of professional and statistical classifications. If the reason for deprivation or restriction of legal capacity is a diagnosis according to the International Statistical Classification of Diseases and Related Health Problems (ICD-10), the procedure is lawful and socially acceptable. From the point of view of the society, a person deprived of legal capacity is found irrational and is in opposition to rational individuals (Foucault 1994). An irrational person is found dangerous in his/her manifestation to himself/herself and to his/her surroundings. Social power is then applied to such a person and dependence on others is adjudged to him/her. Legal order appoints such persons a guardian

whose task is to represent this person and defend his/her interests (Ivanová – Juričková – Kliment 2010).

In general, the question of guardianship in the Czech Republic is characterized mostly by absence of information and cohesion of particular acts within the system of care (MDAC 2007). The problem of guardianship is also dealt by researchers abroad<sup>14</sup>. The experts on guardianship and on care for the elderly in interviews claim that in the Czech Republic there is no discussion in progress (Špatenková – Olecká – Ivanová 2010), but it is necessary to distinguish the types of discussion. The scientific discussion is in progress (Alzheimer's Society, autonomy of the elderly, conferences on taking care of people with dementia, discussions concerning quality of life of the elderly, etc.). This is how the issue evolved into a public document called Quality of Life in the Old Age. However, fundamental information concerning structure of incompetent elderly people and their opinions on the work of public and private guardians, as well as concerning experience of carers, lawyers and judges are missing. Given this lack of information, the problem remains vague and politically difficult to solve. Furthermore, the level of status of de-commodification especially for the family guardians is not established.

The comparison of guardianship data in Austria, the Czech Republic, Denmark, Germany and Spain shows more differences than similarities. One common development is the increase of incompetent persons in all the selected European Union countries. Further differences are found in the age structure of the incompetent persons, the number of public guardians and in the share of private guardians. As shown above, further analysis is necessary in order to explain differences. This contains, for instance, a closer inspection of the social and health systems and policies in the five countries where explanations for differences might be found.

## Conclusion

Results of the national study of the system of guardianship in the Czech Republic showed rising numbers of incompetent persons in the 60+ age category and thus increasing importance of the system of guardianship. Given the fact that according to Esping-Andersen's typology of welfare-state regimes, the Czech Republic belongs to the transitional types, social discourse should be initiated to define functions of the Czech guardianship system.

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<sup>14</sup> For example Dudley, K. C. – Goins, R. T., 2003. Guardianship Capacity Evaluations of Older Adults: Comparing Current Practice to Legal Standards in Two States. *Journal of Aging & Social Policy* 15 (1): 97-115; Melamed, Y. – Doron I. – Shnait, D., 2007: Guardianship of people with mental disorders. *Social Science & Medicine* 65 (6): 1118-1123; Moye et al. 2007: Clinical Evidence in Guardianship of Older Adults is Inadequate: Findings from a Tri-State Study. *The Gerontologist* 47 (5): 604-612; Karp, N. – Wood, E., 2008: Guardianship Monitoring: Promising State and Local Court Practices to Protect Incapacitated Older Adults. *Generations* 32 (3): 22-26, etc.



The basic idea of Esping-Andersen is that when defining and assessing a particular form of the welfare state, it is necessary to take into account the varieties of history of the political classes and their coalitions in the individual states that is the individual economical social traditions (Esping-Andersen 1991). This principle should be acknowledged by society when social institutions are changed and new ones are developed. Historically, a normative approach to protection of incompetent persons has been used in the Czech Republic. As part of the ADEL project, the Palacký University research team proposed the following innovations in the Czech system of guardianship that would take into account the age, diagnosis and level of autonomy of incompetent persons (Ivanová 2010):

- a) in young adults (18 to 39 years of age), their autonomy should be respected as much as possible (only things they cannot do should be defined);
- b) in middle-aged persons (40 to 59 years), alternative ways of dealing with the level of autonomy should be sought, with respect to their current abilities and to other persons dependent on them (things they can do should be defined);
- c) for the elderly (over 60 years), adequate guardians should be found, able to ensure their dignified life using the normative approach to protection.

And what are conclusions of the ADEL project? In order to design an adequate and sustainable legal and organisational system to secure the legal participation of the elderly and people with disabilities, it is necessary that (Köller – Pilgram 2010): (1) all the participating countries (Austria, the Czech Republic, Denmark, Germany and Spain) reassess their legal framework regarding the Convention on the Rights of Persons with Disabilities, (2) all the countries start discussing legal participation on a political level, (3) environmental conditions are taken into account by all the countries, and (4) legal support and protection is focused on the individual's needs.

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