

Child-Friendly Justice – Czech Perspective

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ABSTRACT

The perception of a child as an object of the rights of others and an object of protection by law has shifted to treating a child as an active subject endowed with their own legal rights since the Convention on the Rights of the Child. This change has been reflected in legal orders of the signatory countries, including the Czech Republic, which recognises the right of children to participate in any proceedings which concern them. This contribution presents various aspects of children's participation and practical issues of enforcement of the child's procedural rights from the point of view of the current legislation and the corresponding case-law.

KEYWORDS

participation rights, legal proceedings, minor, right to be heard, right to information, representation, children, child-friendly justice

1. Are the Participation Rights of Children Guaranteed on the Level of the Constitution?

Ever since the ratification of the Convention on the Rights of the Child (hereinafter: “CRC”), the perception of a child within the legal system has shifted from a paternalistic view of the child as an object of protection towards the child as an active legal subject with his/her own rights and obligations. Influenced by international attitudes and the CRC, the approach in the Czech Republic has changed as well, reflected in many provisions within the Czech legal system. One of the most important and most emphasised rights of the child brought by the CRC is the child's right to participation. The signatory countries of the CRC are obliged to ensure the rights of children to participate in every proceeding that concerns them are respected.

The Czech Republic is a signatory to several international treaties and human rights conventions that establish or strengthen the protection of the rights of children. This has made an impact on the protection of the rights of children in the

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Czech legislation. According to Article 10 of the Czech Constitution¹, ‘promulgated international treaties ratified with consent of the Parliament and by which the Czech Republic is bound form part of the legal order; if an international treaty provides for something different from the law, the international treaty shall apply’, international treaties are legally binding themselves.

The Czech legal system has many levels. The highest of them is the constitutional level, meaning all other legislation needs to be in accordance with provisions within the constitutional regulation. There is, however, no provision within the Czech constitutional law directly stipulating the participation rights of children. According to Article 36 et seq. of the Charter of Fundamental Rights and Freedoms², everyone has a right to judicial protection. According to Article 37 of the Charter, everyone is equal in legal proceedings. Moreover, Article 38 para 2 of the Charter stipulates that everyone has the right to have their case heard in public, without undue delay, in their presence, and to be heard on all evidence. These provisions apply to everyone equally.

In accordance with the case-law of the Czech Constitutional Court, all constitutionally guaranteed fundamental rights, including the right to a fair trial and corresponding procedural rights, apply to minors equally as to any other individuals. The Constitutional Court concludes that infringement of a child’s rights to participation set forth in Article 12 of the CRC means the child’s rights stipulated by the Charter are also infringed.³ The abovementioned requirements set forth by the constitutional law are then reflected onto different provisions across the Czech legal system, elaborated on in the following subchapters.

2. What Legal Instruments Guarantee the Right of Children to Participate in Judicial Proceedings?

The foundation of the right of children to participate in judicial proceedings follows, as mentioned in the previous subchapter, from the constitutional requirement of fundamental procedural rights of every human being stipulated by the Charter. In the Czech legal system, the provisions of legal documents on levels below the constitutional level must comply with constitutional law. The specific legal instruments guaranteeing the right of children to participate in judicial proceedings then differ depending on the branch of law.

1 Constitutional Act No. 1/1993 Sb., the Constitution of the Czech Republic, as amended.

2 Constitutional Act No. 23/1991 Coll., the Charter of Fundamental Rights and Freedoms, re-adopted under No. 2/1993 Coll., as amended; hereinafter “Charter”.

3 See for example Case No. II. ÚS 725/18 from 8. 10. 2018, No. IV. ÚS 1328/20 from 28. 7. 2020 (N 157/101 SbNU 98), No. IV. ÚS 2611/20 from 22. 12. 2020 (N 235/103 SbNU 398), No. III. ÚS 484/23-2 from 25. 4. 2023, No. III. ÚS 409/23 from 30. 5. 2023, No. II. ÚS 1751/23-2 from 25. 7. 2023, No. II. ÚS 859/23-2 from 23. 8. 2023, No. II. ÚS 2355/22 from 24. 1. 2023.

2.1. Civil Proceedings

In respect to civil law, provisions relevant to the right of children to participation can be found within both substantive and procedural law. Prior to when the Civil Code⁴ came into effect in 2014 – within substantive law – the relevant provision could be found in the Act on Family from 1963⁵, according to which a child capable of forming their own opinion and of assessing the impact of decisions concerning him/her shall have the right to receive necessary information and to express themselves freely on all decisions of their parents regarding the child and to be heard in any proceedings in which such matters are decided.⁶

Nowadays, the right of children to participation is in general stipulated in Art. 867 of the CC, which says

‘before making a decision affecting the child’s interests, the court shall provide the child with the necessary information to enable him/her to form his/her own opinion and to communicate it.’ (para 1), ‘if, in the court’s opinion, the child is unable to receive the information, or is unable to form his/her opinion, or is unable to communicate that opinion, the court shall inform and hear the person who is able to protect the interests of the child, provided that the person must be a person whose interests do not conflict with the interests of the child; a child over the age of twelve shall be presumed to be able to receive the information, form his/her own opinion and communicate that opinion. The opinion of the child shall be given due weight by the court.’⁷

According to Art. 875 para. 2 of CC, parents of a child also have to enable the child’s participation in a decision-making process regarding the child. This also applies to proceedings in which the child is represented by the parent.

The procedural countside followed the changes of the substantive law by passing amendments to the Civil Procedural Code from 1963⁸, which in § 100 para 3 stipulates that in proceedings involving a minor child capable of forming his/her own views, ‘the court shall proceed in such a way that his/her views on the matter are ascertained’. This provision is the general rule for the child’s participation rights in civil court proceedings.

Moreover, in 2013, the Act on Special Civil Proceedings⁹ was passed, which regulates non-litigious proceedings, for instance “proceedings on granting full legal capacity to minors”, “proceedings on protection of personality rights”, “inheritance proceedings”, “proceedings on divorce”, “proceedings on affiliation”, “proceedings on adoption”, and “proceeding in matters of care of minors”. Similarly to proceedings

4 Act No. 89/2012 Sb., as amended, hereinafter: “CC”.

5 Act No. 94/1963 Sb., as amended especially by the Act No. 91/1998 Sb.

6 Art. 31 para. 3 of the Act on Family.

7 Art. 867 para. 2 of CC.

8 Act No. 99/1963 Sb., Civil Procedure Code, as amended, hereinafter “Civil Procedure Code”.

9 Act No. 292/2013 Sb., on Special Civil Proceedings, as amended, hereinafter “ASCP”.

based on the Civil Procedural Code, ‘the court shall proceed in such a way that the minor receives the necessary information about the court proceedings and is informed of the possible consequences of complying with his/her opinion and the consequences of the court’s decision. The minor’s legal representative or guardian has a similar duty towards the minor’.¹⁰ It is often ruled by the Constitutional Court that the child’s right to participate in proceedings is his/her right, not an obligation, and whether the child wants to exercise the right is solely his/her decision he/she will make based on the information on the proceedings and the subject-matter provided to him/her.¹¹

Besides general provisions on participation rights, there is a regulation of specific proceedings. One such case is adoption proceedings. If a child is eligible to be adopted¹², the administrative body may start proceeding to arrange for an adoption of the child. In the proceeding, the child’s participation rights are explicitly guaranteed by Art. 806 of the CC, which states that a child over 12 years old can only be adopted with his/her consent. Moreover, if the child was too young during the adoption proceedings, the adoptive parents have a duty to inform the child about adoption when appropriate, no later than when he/she begins compulsory school attendance¹³.

Special participation rights of the child are also guaranteed in the context of healthcare decisions. If a child over the age of 14 opposes a medical procedure, even if his/her representatives (mostly parents) agree with it, it cannot be carried out without the court’s approval. Conversely, if the child’s legal representative does not agree with the interference with the integrity of the child, despite the child’s wishes, the procedure may be carried out at his/her request or at the request of a close person only with the approval of the court¹⁴. Other rules are part of specialised legislation¹⁵.

2.2. Criminal Proceedings

In the Czech legal system, a minor can be held responsible for an offence only as a juvenile. However, the substantive and procedural specifics of criminal proceedings with a minor are regulated separately in the Act on the Liability of Young Persons for Unlawful Acts and on Juvenile Justice from 2003¹⁶. A juvenile is defined as a person who ‘at the time of committing the offence has attained the age of fifteen years and has not exceeded his eighteenth year’.¹⁷ Children under the age of 15 do not have criminal responsibility. Proceedings in the case of children under 15 years of age on suspicion of having committed an otherwise criminal offence shall, unless the law provides otherwise, be conducted in accordance with the rules governing civil court

10 Art. 20 para. 4 of the ASCP.

11 Constitutional Court case No. II. ÚS 2866/17 from 28. 2. 2018; see also: Čamdžicová, 2021.

12 in compliance with Arts. 819 and 820 of the CC.

13 Art. 836 of the CC.

14 Ibid., Art. 100.

15 i.e. Act No. 272/2011 Sb., on Health services, as amended.

16 Act No 218/2003 Sb., Juvenile Justice Act, hereinafter “JJA” or “Juvenile Justice Act”.

17 Art. 2 para 1 point c) of the JJA.

proceedings.¹⁸ However, not even every minor over the age of 15 has to be criminally responsible, pursuant to Art. 5 para 1 of the JJA

‘a juvenile who, at the time of the commission of the offence, has not attained such intellectual and moral maturity as to be able to recognise the unlawfulness of the offence or to control his/her actions is not criminally responsible for the offence.’¹⁹

The JJA regulates both substantive and procedural specifics of proceedings concerning acts of juveniles.

The purpose of separate regulation on proceedings with minors is to apply measures

‘which will effectively contribute to refrain them from committing an unlawful act and to finding a social outlet appropriate to his/her abilities and rational development, and to contributing, to the best of his/her ability, to the redress of the harm caused by his/her unlawful act; the proceedings must be conducted in such a way as to contribute to the prevention and deterrence of unlawful acts.’²⁰

Contrary to standard criminal proceedings, in cases of juveniles, more emphasis is put on prevention rather than retribution. Moreover, people involved in the proceedings with minors are required to have undergone special training on dealing with juveniles.²¹ Criminal cases involving minors are heard in juvenile courts, which are, however, not separate judicial bodies but specialised judges working at general courts in cooperation with the authority for the socio-legal protection of children and specialised law enforcement authorities.

The manner of conducting the juvenile proceedings is specified in Art. 41 et seq. of the JJA, according to which the juvenile’s ‘age and mental maturity must be taken into account in such a way that their psychological and social balance is not disturbed and their further development is endangered as little as possible’. In particular, the regulation emphasises the psychological and social balance of the juvenile, thereby seeking to interfere with the juvenile’s mental state and social situation as little as possible.²² This applies to all acts carried out by the authorities acting under the Juve-

18 Ibid., Art. 96.

19 Šámal, 2011, p. 37.

20 Art. 1 para. 2 of the JJA.

21 Ibid., Art. 3 para. 8 says ‘Judges, prosecutors, law enforcement officers, and Probation and Mediation Service officers acting in juvenile criminal cases must have special training in dealing with juveniles’.

22 Šámal, 2011, p. 394.

nile Justice Act, i.e. police, prosecutors, and courts, irrespective of the stage of the criminal proceedings at which they are carried out.²³

The Juvenile Justice Act expressively lists the rights of a minor in juvenile proceedings, such as the right to treatment appropriate to his/her age, mental maturity, and state of health. Meanwhile, all authorities are obliged to inform the juvenile of his/her rights and to give him/her full opportunity to exercise them.²⁴ This includes the right to participation in accordance with the view of the child as an active subject as defined by the Committee on the Rights of the Child.²⁵

Nonetheless, there are still provisions showing a paternalistic approach towards minors, such as the right of the minor's parents to represent them in the proceedings and act on their behalf, which explicitly allows the legal representative to exercise these rights even against the juvenile's wishes, following the requirement of best interests of the child.²⁶ The juvenile also has a right to professional representation in the proceedings. According to Art. 33 para. 1 of the Criminal Procedure Code²⁷, a juvenile has the right to choose a defence counsel. The juvenile must have a defence counsel from the moment measures are taken against him/her pursuant to the Juvenile Justice Act or the Criminal Procedure Code, including urgent and non-repeatable acts, unless the act cannot be postponed and the notification of the defence counsel cannot be ensured. The importance of the participation of a defence counsel is then emphasised by the broad definition of compulsory defence of minors.²⁸ The participation of a defence counsel strengthens the juvenile's position in the proceedings and mitigates his/her disadvantage, which is such that, due to his/her age, the juvenile usually does not have sufficient knowledge of his/her rights and the applicable regulation or is unable to exercise them independently.²⁹

Besides being on trial, minors can be involved in criminal proceedings as witnesses or victims, for which special protection of the minor's interests is guaranteed by the law. A specific approach is required when dealing with minors; for example, since questioning on some details of a criminal act could negatively affect the mental and moral development of the minor, the questioning must be conducted with particular care. In terms of its content, it should be conducted in a way that the interrogation need not be repeated in subsequent proceedings, with the assistance of another person experienced in dealing with minors. If it could contribute to the interrogation, parents may also be brought in. However, the presence of parents is excluded if they are also witnesses in the case, are involved as victims, or could be prosecuted. The

23 Ibid., p. 392.

24 Art. 42 of the JJA.

25 UN Committee on the Rights of the Child, 2009.

26 According to Art. 43 of the JJA, parents of the juvenile are entitled to represent the juvenile, in particular, to choose a defence counsel for the juvenile, make motions on behalf of the juvenile, and file applications and appeals on his behalf.

27 Act No. 141/1961 Sb. as amended.

28 Arts. 42 and 36a of the Criminal Procedure Code.

29 Šámal, 2011, p. 409.

same applies if it can be concluded that the minor will not be able or willing to tell the truth in the presence of their parents.³⁰³¹

2.3. *Administrative Proceedings*

Children's right to participation in administrative proceedings is guaranteed by the Administrative Procedure Act, which came into effect in 2006³². The ability of subjects to be a party in administrative proceedings does, similarly to civil proceedings, correspond to their legal capacity. Irrespective of their procedural capacity, according to Art. 29 para 3 of the Administrative Procedure Act, anyone has a right to be heard in the course of the proceedings.

Provision analogical to Art. 100 para 3 of the Civil Procedure Code is Art. 29 para. 4 of the Administrative Procedure Act,³³ which applies to proceedings conducted by social-legal protection authorities. The child must be given an opportunity to express his/her views either directly, through a representative, or the socio-legal protection authority. Since under standard circumstances, the representative of a child would be the parent, in cases regarding socio-legal protection of the child, the authorities must take into consideration the possibility of a conflict of interests between the child and the parent, and it is often necessary to obtain the child's opinion otherwise.³⁴

Moreover, according to Art. 8 para. 2 of the Act on Socio-Legal Protection of Children³⁵ regulating procedural and substantive issues of socio-legal protection of children,³⁶

‘a child capable of forming his/her own opinions shall have the right, for the purposes of social protection, to express those opinions freely in the discussion of all matters affecting him/her, even without the presence of his/her

30 Arts. 102 and 158 para. 5 of the Criminal Procedure Code.

31 Šámal, 2011, p. 477.

32 Act No. 500/2004 Sb., as amended, hereinafter “Administrative Procedure Act”.

33 “In proceedings in which a minor child who is capable of forming his/her own views is a party, the administrative authority shall proceed in such a way that the views of the minor child on the matter are ascertained. To this end, the administrative authority shall give the child the opportunity to be heard either directly or through a representative or the competent child welfare authority. If the child's interests so require, the child's opinion may be ascertained without the presence of the parents or other persons responsible for the child's upbringing. In such a case, the administrative authority shall involve another suitable adult in the act. The opinion of the child shall be taken into account by the administrative authority taking into account the child's age and maturity of mind.”

34 Jemelka, Pondělíčková and Bohadlo, 2016, p. 172.

35 Act No. 359/1999 Sb., as amended.

36 According to Art. 1 para. 2, the law concerns in particular

- a) the protection of the right of the child to a favourable development and proper upbringing,
- b) the protection of the legitimate interests of the child, including the protection of the child's property,
- c) action aimed at restoring the disrupted functions of the family,
- d) providing an alternative family environment for a child who cannot be brought up permanently or temporarily in his/her own family.

parents or other persons responsible for the child's upbringing. The child's views shall be given due weight, appropriate to his/her age and mental maturity, in consideration of all matters affecting him/her. In its action, the social welfare authority shall take into account the wishes and feelings of the child, taking into account his/her age and development, so as not to endanger or impair his/her emotional and psychological development.³⁷

The regulation shows that the participation rights of children shall be respected not only in court proceedings but in all cases when the minor comes into contact with the socio-legal protection authority. Thereby, children's participation rights reflect the fact that the child is not an object of legal relations within parental responsibility nor an object of protection by the authorities involved in resolving the family situation, such as parental conflict.³⁸

3. Is There Child-Friendly Information/Translation of Legal Instruments Available for Children on the Possibility to Participate in General?

The child's ability to exercise his/her participation rights depends on the information the child receives. Although the right of the child to be informed is not explicitly mentioned in Article 12 of the CRC, it has traditionally been inferred by interpretation and confirmed by case-law. Indeed, the right of the child to be heard is "not limited to merely ascertaining the child's views on the matter under consideration but also includes further communication with the child and informing him/her of the proceedings".³⁹

The right of children to information can, in regards to the right to participation, be divided into two aspects. The first is the child's right to be informed about the proceedings affecting him/her. Regarding the participation of the child, the Czech Constitutional Court has consistently argued in its case-law that the child cannot be viewed as a mere object in the proceedings but must be perceived as an important subject of the law and a participant in the proceedings and treated as such.⁴⁰ Accordingly, the child should also be communicated with by the court in an appropriate manner. The Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice provide that

'the right of any person to access to justice and to a fair trial - in all its components (including in particular the right to be informed, the right to be heard,

37 Art. 8 para. 2 of the Act on Socio-Legal Protection of Children.

38 Rogalewiczová, 2018, p. 53.

39 Constitutional Court case No. II. ÚS 725/18 from 8. 10. 2018.

40 Ibid.

the right to a defence and the right to be represented) – is essential in a democratic society and applies equally to children’.⁴¹

It follows that as a part of the right to a fair trial, the child is entitled to be informed in the proceedings. In this sense, Article 12 of the CRC shall be understood as expressing the right of the child to access justice, inclusive of the right to a fair trial.

The exercise of the child’s right to information and, as a result, the child’s participation in the proceedings depends on whether and to what extent the entity obliged to provide the child with information on the proceedings fulfils its obligation. However, Czech legislation does not unanimously place the obligation to provide information in this sense onto one entity, but it varies from one provision to another. In general, the obligation to inform a child is placed with the judicial authority⁴², the child’s legal representatives⁴³, or authorities focusing on socio-legal protection of children⁴⁴.

Regulation of the child’s right to be informed about the proceedings is fragmented in the Czech legal order, which is why the Constitutional Court has addressed the issue, concluding that ensuring the child is properly informed is ultimately a responsibility of the general courts (the judges), saying that the court cannot rely on the child receiving information about his/her rights and the proceedings from their legal representatives, i.e. their appointed guardian.⁴⁵ Thus, the court cannot resign on its duty to inform simply because a similar duty is imposed on other entities. In addition, the court has a general duty to inform subjects of the proceedings,⁴⁶ including children. Moreover, it is the task of judicial authorities to protect fundamental rights and freedoms in accordance with Article 4 of the Czech Constitution and to ensure that the rights of the parties are respected in the proceedings, including the principles of fair trial under Article 36 et seq. of the Charter.

However, the child’s right to information is not limited to information to the extent at the discretion of the obliged person. The child has the right to actively ask questions or seek clarification.⁴⁷ The child shall be informed of the relevant facts consistently throughout the proceedings and should be provided with necessary assistance and support for understanding the information. The obligation to inform the child is not limited to facts relating to the merits of the case but also to information on the proceedings in general, including the meaning of possible procedural steps, rights, and obligations of the child.⁴⁸ The child should, therefore, also be informed of his/her participation rights.

41 Council of Europe, 2010, p. 14.

42 Art. 6 of the ECHR; Art. 867 para. 1 of the CC; Art. 20 para. 4 of the ASCP.

43 Art. 875 of the CC; Art. 20 para. 4 of the ASCP.

44 Art. 8 para. 3 of the Act on Socio-Legal Protection of Children.

45 Constitutional Court case No. II. ÚS 725/18 from 8. 10. 2018 and case No. I. ÚS 3038/16 from 5. 6. 2017.

46 According to Art. 5 of the Civil Procedure Code.

47 Rogalewiczová, 2018, p. 57.

48 Constitutional Court case No. II. ÚS 1532/10 from 7. 10. 2010.

The exercise of the right of the child to participate in proceedings is, in the first place, a result of the information (regarding the subject matter of the proceeding) the child has received. The possibility of the child exercising participation rights does, however, depend on the child's awareness of his/her rights and how to enforce them. Given the age and corresponding limited capacity of the child, besides assistance with information provided by an adult or an authority, the child should also have access to child-friendly information materials on their rights.

In order to ensure the child has an option to familiarise him/herself with his/her rights, there are some child-friendly sources of information available online. The links to such sources are also provided on the website of the public defender (ombudsman), with the possibility of reaching out for guidance. A child-friendly version of the CRC in the Czech language is also available on the website. Moreover, there is a leaflet by the Council of Europe addressed to children, explaining their rights in a brief and understandable way, including the right to express his/her opinion on anything that concerns him/her, which must be taken into account, all available on the ombudsman website.⁴⁹ An illustrated version of the CRC is available along with other explanatory materials by the Department of Labour and Social Affairs and non-profit organisations.⁵⁰ Videos informing children of their rights in a child-friendly way, including participation, right to information, right to be heard, and other rights of the child during proceedings are available as well.⁵¹ Even though these materials are easily accessible online, they may still be unreachable for some children, especially of a younger age, who do not have access to the internet. Therefore, the factual accessibility of these documents might, in many cases, still depend on parents or other adults. Another obstacle is the difference between a child having information on their rights and a child being able to exercise their rights.

4. Age as an Aspect of a Child's Access to Court

4.1. Civil Proceedings

The conditions of participation in civil proceedings are defined by the Civil Procedure Code as the ability to be a party to the proceedings and a procedural capacity. The capacity to be a party to proceedings is the capacity to have procedural rights and obligations in the proceedings. Procedural personality is defined in Art. 19 of the Civil Procedure Code, which provides that "the capacity to be a party to proceedings is vested in those who have legal personality; otherwise, only in those to whom the law

49 For more see: <https://deti.ochrance.cz/pomoc/odkazy/> (Accessed: 2 January 2024).

50 For more see: <http://www.pravonadetstvi.cz/tvoje-prava/umluva-o-pravech-ditete-1/prava-deti/ilustrovana-umluva-o-pravech-ditete/> (Accessed: 3 January 2024).

51 For more see: <https://kids.umpod.cz/web/en/childrens-rights> (Accessed: 3 January 2024).

confers it.” This provision refers to the substantive law concept of legal personality.⁵² Procedural capacity can then be defined as the ability to act independently in the proceedings (or through a chosen representative). Procedural capacity, defined in the CPC, also refers to substantive law, namely to the concept of legal capacity. Children generally have partial legal capacity based on their level of maturity, which is (rebutably) presumed to correspond to the maturity of minors of his age. The presumption allows an individual assessment of each minor’s intellectual and volitional maturity.

Article 20 para. 1 of the Civil Procedure Code provides that everyone has procedural capacity to the extent that he/she is capable of acting independently (within the substantive law). However, in some proceedings, the law grants full procedural capacity to minors beyond the abovementioned rule, i.e. some proceedings in family law matters. Where the minor lacks procedural capacity, he/she must be represented.

Regardless of the child’s procedural capacity, the law guarantees children the right to participation in proceedings that concern them. Access to proceedings for children is not restricted by an age limit under Czech law; however, the maturity of the child is the decisive factor in the manner of their participation and the relevance of their opinion. Article 867 of the CC (quoted above) establishes a rebuttable presumption that a child over the age of 12 is capable of accepting the court’s information and forming his/her own opinion. However, the court should also communicate with younger children. It is the duty of the judge to consider whether and how to ascertain the child’s opinion, bearing in mind that even an interview with a child younger than 12 years of age may provide further insights significant for the court’s decision. According to the Czech Constitutional Court

‘participation of children in legal proceedings shall increase with age of the child. It is a continuum. Whereas 18 years of age cannot be the point before which the child cannot participate in the proceeding at all and after reaching the age of 18 should participate fully’.⁵³

The manner of realisation of the child’s participation should then correspond to the child’s development.

4.2. Administrative Proceedings

Similarly to civil proceedings, in administrative proceedings, procedural capacity is defined as referring to the Civil Code, namely legal capacity. Nonetheless, Art. 29 para. 3 of the Administrative Procedure Act stipulates the administrative authority may give an opportunity to any person (regardless of legal capacity) to make a statement during the proceeding. In regards to a minor, the administrative authority shall

52 Legal personality is, according to Art. 15 para. 1 of the CC, the ability to have rights and obligations within the limits of the legal order. A person has a legal personality throughout the whole course of their life.

53 Constitutional Court case No. I. ÚS 1041/14 from 4. 12. 2014.

proceed in such a way that the views of the minor on the matter are ascertained if the minor is capable of forming his/her own views by giving him/her the opportunity to be heard either directly (with or without the presence of the child's parent) or through a representative or the children's socio-legal protection authority.⁵⁴ The opinion of the child must then be taken into account by the administrative authority considering the child's age and maturity.

Regarding the child's capability to form his/her opinion, just like in the case of legal capacity, the administrative authority would, with reference to Art. 867 of the CC, presume a child over the age of 12 is capable of doing so. Similarly, the Act on Socio-legal Protection of Children stipulates a rebuttable legal presumption that a child over 12 years of age has this capacity. It is presumed that a child over the age of 12 is mature enough to form and express his/her opinion.⁵⁵ However, the age limit of 12 years must be taken in so far as a rebuttable presumption, and the child's maturity shall be examined in each individual case.

4.3. Criminal Proceedings

For criminal proceedings, 15 years of age is the age limit of criminal responsibility. Therefore, for acts of younger minors, regulation of civil law proceedings applies. However, for minors over the age of 15, special procedural rules apply (the Juvenile Justice Act).

If a criminal proceeding concerns a child as a victim or witness to somebody else's offence (either adult or another minor), there is no age limit for hearing a minor. The Juvenile Justice Act stipulates that the proceeding must be conducted in a manner respecting the child's interests, for the purposes of which age and mental maturity of the child must be taken into account so their psychological and social balance is not disturbed and their further development is endangered as little as possible.⁵⁶

4.4. Terminology

The Czech legal order uses the term "capable of forming his/her opinion" and accepting the court's information, also used in the UN Convention and the Brussels II regulation, which also presumes the child is capable of a sufficient level of understanding (term used by the Council of Europe). The procedural rules, in combination with substantive law, as interpreted by the Czech Constitutional Court, are, therefore, based on a rebuttable presumption of a child over the age of 12 being able to accept the information, form his/her own opinion, and communicate it. Not age, but maturity of the child is the decisive aspect of the child's participation. The mental maturity of a child is related to his/her age, but the child's development is a continuous process with the development of intellectual and moral maturity until full adulthood.⁵⁷

⁵⁴ Art. 29 para. 4 of the Administrative Procedure Act.

⁵⁵ Rogalewiczová, 2018, p. 58.

⁵⁶ Art. 41 of the JJA.

⁵⁷ Šámal and Šámalová, 2011, pp. 398–399.

5. Child Participation (A Form of Access and Special Regulation for Hearing a Minor Child in the National Procedural Law)

5.1. Civil Proceedings

Article 100 para. 3 of the Civil Procedure Code stipulates the court shall proceed in such a way that the child's views on the matter are ascertained, preferably by questioning the child directly. In some cases, the court may also ascertain the views of the child through his/her representative, an expert opinion, or the socio-legal protection authority. The court may question the child without the presence of other persons if their presence could be expected to influence the child so that he/she does not express his/her true opinion.

However, a third person should be present at the interview, e.g. a socio-legal protection worker, a psychologist if necessary, or another court worker. If the public prosecutor's office intervenes in the case, the interview with the child may also take place in the presence of the public prosecutor. The court may deny the presence of a confidant of the child who is not his/her legal representative and whose presence is requested by the child only if the purpose of the questioning would be undermined by their presence.

The law establishes a priority of ascertaining the child's opinion directly. However, in some cases, the very question of the admissibility of a direct hearing of the child by the court may be dependent on the procedural arrangements the court can make to ensure that the child is not traumatised or unduly stressed by a direct interview in the court.⁵⁸ The priority of a direct hearing is based on the assumption of a more objective assessment of the child's opinion in direct contact with the child.⁵⁹ While conducting the interview with the child in the presence of the judge is considered to be "*a sufficient guarantee of objectivity*" of the interview,⁶⁰ case-law of the Czech Constitutional Court stresses the dependence of the child's ability to formulate his/her opinion on "*a properly and professionally conducted interview*"⁶¹ to enable the child to express his/her true opinion, which emphasises the requirement of specialised judges and other persons in contact with the child.

5.2. Administrative Proceedings

According to Art. 29 para. 3 and 4 of the Administrative Procedure Act, the administrative authority may give a minor an opportunity to express his/her opinion on the proceedings. The administrative authority shall ascertain the views of the child either by giving the child the opportunity to be heard directly (with or without the

58 Dušková, Hofschneiderová and Kouřilová, 2021, p. 210.

see also Constitutional Court case No. II. ÚS 1945/08, from 2. 4. 2009 or No. II. ÚS 291/16 from 29. 3. 2016.

59 Constitutional Court case No. III. ÚS 1265/16 from 19. 6. 2018.

60 Constitutional Court case No. IV. ÚS 2458/18 from 5. 11. 2018.

61 Constitutional Court case No. IV. ÚS 827/18 from 10. 4. 2018.

parent present) or through a representative or the children's socio-legal protection authority.

5.3. Criminal Proceedings

In juvenile proceedings, the authorities are obliged to cooperate with bodies of socio-legal protection of children, citizens' interest associations, and persons implementing probation programmes in order to strengthen the educational effect of juvenile proceedings, create conditions for an individual approach, respond in a timely manner to the needs and interests of juveniles and victims and other affected subjects, and prevent further criminal activity.⁶² In carrying out the juvenile proceeding, authorities must respect personalities of the subjects involved. In dealing with juveniles, their age and mental maturity must be taken into account in a way that their psychological and social stability is not disturbed and their further development is compromised as little as possible. Moreover, procedural acts should be carried out by the police authority specialised in juvenile criminal matters.

Special procedural rules apply when a child is a victim or a witness of a crime. When questioning a minor, the interrogation must be conducted with particular care. Attention to the procedural rights of minors is also reflected in other provisions of the Criminal Procedure Code (e.g. if an explanation is requested from a minor, his/her legal representative must be notified unless it cannot be postponed and notification of the legal representative cannot be arranged).

The Criminal Procedure Code specifically regulates the protection of personal data and privacy of persons under the age of 18 in regard to criminal proceedings.⁶³ No person may disclose in any way information that enables the identity of the victim under the age of 18 to be recognisable. The rule applies to the publication of images, visual and audio recordings, or other information on the proceedings. The court's decision may not be published in the public media with the name, surname, and place of residence of such victims. Such information may be published if necessary for the purposes of tracing persons, criminal proceedings, where public interest justifies it, or where the person in question has given his/her consent. In the case of a minor, a legal representative or a guardian has the right to consent, considering the best interest of the child.

6. Representation of Children in Proceedings

6.1. Civil Proceedings

Under Czech law, children can be represented in proceedings based on three different legal titles – statutory (by legal representative), judicial decision, and power of

⁶² Art. 40 para. 1 and Art. 41 of the JJA.

⁶³ Art. 8a et seq. of the Criminal Procedure Act.

attorney. Section 32 para 2 of the Civil Procedure Code provides that a party to the proceeding cannot be represented by a person whose interests are in conflict with those of the represented party.

In civil proceedings, children are generally represented by their legal representative because, in accordance with Art. 20 of the Civil Procedure Code, persons who cannot act independently in court must be represented, including minors. There is a correlation between legal capacity and procedural capacity regarding the subject matter. Under specific circumstances, the judge may decide a minor must be represented in the proceeding despite having the legal capacity to act independently in the subject matter (on the level of substantive law). On the other hand, in some cases, the minor is *ex lege* granted a full procedural capacity, e.g. proceedings for permission to marry.⁶⁴

The legal representative of a minor is usually his/her parent as a carrier of parental responsibility. According to Art. 865 para. 1 of the CC, parental responsibility is vested in both parents equally. In representing the child, the parents shall act in mutual agreement in accordance with the best interests of the child. If the parents do not reach an agreement on a matter significant to the child's interests, the court shall decide on a petition of one of the parents. Besides parents, a guardian⁶⁵ or custodian⁶⁶ can also act as a legal representative of the child.

A minor can also, just like any other procedural subject, be represented based on a power of attorney. Article 37 para. 2 of the Charter establishes the fundamental right to legal representation. A party to the proceedings has the right to be represented from the outset of the proceedings by a representative of his/her choice. It can be assumed that in many cases, the minor or his/her parent may wish for the child to be represented by a lawyer. In general, any party to the proceedings, including a minor, may be authorised by him/her pursuant to Art. 25 para. 1 of the Civil Procedure Code. The limited legal capacity of minors constitutes a restriction on choosing a legal representative and granting a power of attorney. It is then up to the minor's representatives to act on behalf of the minor pursuant to Art. 894 para. 1 of the CC in this as well.

In cases where the child is unable to act independently and is not represented, the judge will appoint a procedural guardian (guardian *ad litem*). A procedural guardian, appointed under Art. 29 para. 1 of the Civil Procedure Code, is not supposed to replace the guardian appointed by the guardianship court but should allow for a continuity of the proceeding.⁶⁷ Moreover, a procedural guardian only has the power to represent a party in the case for which he/she was appointed. The procedural guardian can be

64 Svoboda, 2022, marg. No. 15.

65 In accordance with Art. 928 of the CC, a guardian is appointed when there is no parent who has and exercises full parental responsibility towards the child. The guardian has in principle all the rights and obligations of a parent towards the child, except for a duty of maintenance.

66 Art. Art.63 para. 1 of the CC.

67 Smolík, 2022.

a close relative, another suitable person, or a lawyer. The person concerned, if not a lawyer, must agree to the appointment.

A problematic aspect of proceedings where guardian *ad litem* has been appointed for the child is that the child loses the opportunity to choose a legal representative for the proceedings since the legal representatives – the parents – who could otherwise grant a power of attorney on their behalf, have been excluded from representing him/her.⁶⁸ The child's representation is then fully dependent on a court-appointed guardian. In this respect, the Czech Constitutional Court criticised the cumulation of the subject acting in the best interest of the child (from an objective point of view, e.g. the child's legal representation) and representation of the child in the proceedings (acting according to the child's wishes, which may be in conflict with the "objective" best interest of the child). Both these roles are often assumed by the socio-legal protection authority. However, case-law has pointed out the lack of professional capacity, which may be an obstacle to the protection of the best interests of the child. This is particularly in cases requiring in-depth legal knowledge in civil litigation proceedings (e.g. in the case of objections to the ineffectiveness of gift contracts for immovable property to minors in case No. I. ÚS 3304/13 or IV. ÚS 3305/13).

The Czech Constitutional Court has also emphasised the necessity of the court maintaining contact with the child in addition to his/her representative.⁶⁹ Another consequence of the protection of participation of minors is the limitation of the possibility to issue payment orders. Payment orders without a hearing should not be issued against a minor who has not reached full legal capacity if the court has any doubts as to the propriety and effectiveness of his/her representation by the legal representative. In such cases, it is necessary to consider, before issuing a decision, whether it is appropriate to appoint a procedural guardian for the child, taking into account the best interests of the child.⁷⁰

6.2. Administrative Proceedings

Similar rules to the civil proceedings apply in administrative proceedings. The minor is also usually represented by his/her legal representative, guardian, or attorney in accordance with Art. 31 et seq. of the Administrative Procedure Act.

6.3. Criminal Proceedings

The minor's legal representatives have a right to represent the minor in the proceedings and act on their behalf, which explicitly includes the right of the minor to participate in those acts. However, the legal representative may exercise these rights on behalf of the juvenile even against the juvenile's will, following the requirement of the best interests of the child. Legal representatives of the child have several rights in the juvenile proceeding

68 Constitutional Court case No. I. ÚS 3304/13 from 19. 2. 2014.

69 See for example: Constitutional Court case No. I. ÚS 1041/14 from 4. 12. 2014.

70 See for example Constitutional Court case No. II. ÚS 3133/19 from 27. 11. 2019.

‘to choose a defence counsel, make motions on behalf of the juvenile, and file applications and appeals on his/her behalf; he is also entitled to participate in those acts which the juvenile may participate in under the law...the right to ask questions, to inspect evidence....’⁷¹

It is the court’s obligation to instruct the child’s representative on his/her procedural rights.

The juvenile also has a right to professional representation in the proceedings. According to Art. 33 para. 1 of the Criminal Procedure Code, a juvenile has the right to choose a defence counsel. The juvenile must have a defence counsel from the moment measures are taken against him/her pursuant to the Juvenile Justice Act or the Criminal Procedure Code, including non-repeatable acts, unless the act cannot be postponed and notification of the defence counsel cannot be ensured.⁷² The juvenile must have a lawyer even if he expressly refuses representation. If the juvenile does not exercise his/her right to choose a defence counsel and if the legal representative or guardian does not choose one, his/her next of kin, sibling, adoptive parent, spouse, companion, or other interested person may choose one instead.⁷³ The juvenile justice authorities are obliged to inform the juvenile of his/her rights and provide a full opportunity to exercise them. In the position of a victim, a minor is entitled to legal aid free of charge.⁷⁴

7. Enforcement of Child-Friendly Justice in the Czech Republic

7.1. Is Child-Friendly Language Utilised?

In regards to the participation rights of the child, his/her representative has the duty to inform the child. Considering the limited capacity of children, the way in which the information is communicated is also crucial for his/her participation. Therefore, the form of communication and language should be adapted to the child’s age and intellectual maturity so that he/she can understand it and form his/her opinion from it.

The Czech Constitutional Court has concluded that the court’s decision, even though it must comply with formal requirements, should also be formulated in such a way that the child can understand it. If it is not formally possible, it is the court’s obligation to inform the child of the contents of the decision. In this respect, the child’s wishes shall also be taken into account when it comes to the manner in which he/she wishes to be informed of the outcome of the proceedings.⁷⁵ Children should also be

⁷¹ Art. 43 of the JJA.

⁷² Ibid., Art. 42a.

⁷³ Ibid., Art. 44.

⁷⁴ Art. 51a para. 2 of the Criminal Procedure Act.

⁷⁵ In Constitutional Court case No. II. ÚS 725/18 from 8. 10. 2018, the minor, through her guardian in the proceedings (socio-legal protection body) expressed her wish to be informed of the outcome of the proceedings in the form of a letter sent to her mother’s address.

advised that their opinions and wishes are not binding for the judge. Furthermore, they should be given an explanation on how their opinion was taken into account in the decision and what are its consequences.

7.2. Are There Child-Friendly Court Spaces?

In the context of the child's right to a fair trial and the particular vulnerability of the child, the right to be heard should be understood to include the right to have the necessary procedural arrangements made to enable the child to participate in the proceedings.⁷⁶ The Czech Constitutional Court also emphasises the obligation of the court to ensure a "*peaceful atmosphere*" for the hearing.⁷⁷ It is not recommended to conduct an interview with a child in a courtroom during a hearing, as this setting may not be child-friendly. It may be conducted anywhere the court assesses to be appropriate, taking into account the interests of the child, e.g. in another room in the court building arranged to create a child-friendly atmosphere, in the judge's chambers, a school facility, or even in the child's home⁷⁸. The Constitutional Court stresses the priority of a personal interview between the judge and the child, even though the survey of the child's opinion via socio-legal authorities or experts does not constitute a violation of the procedural rules. It is apparent the Constitutional Court fully accepts ascertaining the child's opinion in an informal setting.

7.3. Are There Child-Friendly Hearing Methods?

As previously mentioned, the Czech Constitutional Court stresses the necessity of "a properly and professionally conducted interview",⁷⁹ which should take into account not only the age of the child (and the maturity) but also the nature of the case and other circumstances, such as the family background and the social environment.⁸⁰ The child's opinion should be ascertained "comprehensively, i.e., primarily by means of indirect questions (especially in the case of younger children)".⁸¹ The Constitutional Court has also emphasised the difference between the right of the child to be heard as a special procedural right and the questioning of persons as a means of evidence. It concluded there is no need to adhere to the formal procedures inherent in the examination of parties or witnesses.⁸²

7.4. Is There Training for Judges?

It is the court's responsibility to ensure the child is provided with an appropriate environment for his/her participation and to take measures to that end. Poor practice

76 Dušková, Hofschneiderová and Kouřilová, 2021, p. 212.

77 Constitutional Court case No. I. ÚS 2661/10 from 2. 11. 2010.

78 Such was the case considered in the Constitutional Court case No. II. ÚS 1931/17 from 19. 12. 2017.

79 Constitutional Court case No. IV. ÚS 827/18 from 10. 4. 2018.

80 Constitutional Court case No. III. ÚS 459/03 from 20. 8. 2004.

81 Constitutional Court case No. II. ÚS 291/16 from 29. 3. 2016.

82 Ibid.

in ascertaining a child's views can lead to so-called systemic abuse, which is "harm caused to a child by an improper or insensitively implemented official (or judicial) procedure". To prevent it, the Guidelines on child-friendly justice⁸³ stress the need for training professionals in communicating with children. In this context, it is worth mentioning the activities of the Judicial Academy in the Czech Republic on good practice. In particular, the recommendations for judges resulting from the 5th Family Law Symposium of the Judicial Academy on Child Participation in Custody Proceedings of 24-25 June 2021, in addition to the theoretical part, include a description of appropriate communication with the child and other aspects of child participation, and a tutorial model of conversation with children.

8. Is the Child's Right to Express His/Her Views Enforced? If Yes, to What Extent In...

8.1. Remedies

In regards to a child's participation rights, the child should be informed (as has been already mentioned) also about the outcome of the proceedings and possible remedies, including the constitutional complaint. Along with information on possible remedies, the child should be informed of the consequences of exercising them, including advice and support from qualified persons.⁸⁴ Often, the lack of awareness of children's rights and redress mechanisms is an obstacle to children's access to them, as they are dependent on other persons to pursue remedies on their behalf. It is also for this reason that the Committee on the Rights of the Child stressed the need for an independent institution specialising in the protection of the rights of children, whose advice and assistance would be available to children in an informal way. The failure to introduce such an institution in the Czech Republic has also been the subject of criticism by the Committee on the Rights of the Child.⁸⁵

8.2. Enforcement Procedures

Civil enforcement procedures are regulated either in Act No. 120/2001 Coll. on Bailiffs and Enforcement Activity (Enforcement Code) or the Civil Procedure Code. The parties to the enforcement proceedings are referred to as the beneficiary (the person who has filed the application for the order for execution) and the obligor (the person against whom the beneficiary directs the application for the order for execution). Meanwhile, procedural personality and capacity are defined by the same rules as for the purposes of inquiry proceedings⁸⁶. Enforcement proceedings can only be initi-

⁸³ Part IV, para. 15.

⁸⁴ Dušková, Hofschneiderová and Kouřilová, 2021, p. 213.

⁸⁵ Concluding recommendations of the Committee on the Rights of the Child on the third and fourth periodic reports of the Czech Republic on implementation of the obligations under the Convention on the Rights of the Child, para. 34.

⁸⁶ See the subchapter on representation in civil proceedings.

ated on request, which has to be filed by a person representing the child. When filing for enforcement of a court order, a parent may represent the child.⁸⁷ However (as in inquiry proceedings), if there is a conflict of interest between the parent and the child, a guardian must be appointed for the child.

Given the specific characteristics of enforcement proceedings, the court shall order enforcement of a decision without a hearing unless the court considers it necessary or if the law requires it.⁸⁸ Therefore, in enforcement proceedings, the parties generally do not have the opportunity to be heard (whether they are an adult or a child).

87 For example, to enforce the maintenance of a minor child from a parent, the other parent may represent the child.

88 Art. 253 of the Civil Procedure Code.

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