Ivinović v. Croatia: legal capacity and the (missing) call for supportive decision-making

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We have all heard about the so-called paradigm shift brought about by the UN Convention on the Rights of Persons with Disabilities (CRPD). The social model of disability and the duty of reasonable accommodation are some of the "conceptual innovations" reshaping human rights law. However, we know much less about what that means in practice. One field in which this question has utmost importance is that of legal capacity of persons with disabilities, particularly of those with intellectual, psychosocial and sensory impairments. The recent judgment of the European Court of Human Rights in *Ivinović v. Croatia*, like other cases decided against the same state, deals with that issue: the legal capacity of persons with disability. The decision is part of a growing corpus of disability case law and is welcome for a number of reasons – which I briefly sketch here. Yet, in this post, I suggest looking at this judgment as somewhat of a missed opportunity.

In my view, this case offered the Strasbourg Court the opportunity to take a more clear position on two crucial matters concerning the right to legal capacity of persons with disabilities. The first refers to the difference between mental capacity and legal capacity and its implications for domestic legislative choices and judicial decisions. The second concerns the distinction between substitutive decision-making and supportive decision-making systems, and their compatibility with the ECHR. Clarifying these questions is not only desirable in light of the aforesaid paradigm shift in disability rights prompted by the UN framework. By addressing these issues, the European Court could have also provided some guidance to member States as to what kind of measures and policies are required today for ensuring people with disabilities equal enjoyment of their human rights. I will start by contextualising the judgment on *Ivinović v. Croatia* and then come back to these two questions.

Contextualising the case

Croatia, like many states across the globe, allows the partial or total deprivation of a person's legal capacity "on account of mental illness or for other reasons" (art. 159 of the Family Act, which refers to any person who "is unable to look after his or her own needs, rights and interests, or presents a risk to the rights and interests of others"). Accordingly, a court can appoint a "special guardian" who shall look after the ward, his or her interests and rights as well as manage his or her assets. Figures indicate that around 410 out of 100.000 individuals are under guardianship in Croatia.[1] Furthermore, resort to plenary guardianship (total substitution in decision-making) is extraordinary higher (89%) than the use of partial legal

Based on the relevant Croatian legislation and relying exclusively on two psychiatric opinions, a Municipal Court deprived Ms. Ivinović of part of her legal capacity. The tribunal deemed that Ms. Ivinović, who suffers since early childhood from cerebral palsy and uses a wheelchair, was unable to adequately protect her own interests and might jeopardise the rights and interests of others. The judicial decision stopped her from disposing of her money and other assets and from making independent decisions concerning her medical treatment. She was 64 when that decision was taken and so far she had acted rather autonomously in both her daily activities and her financial affairs.

The European Court rightly found that this constituted a violation of the applicant's right to private and family life (art. 8 ECHR). The seven judges said:

> Even when the national authorities establish with the required degree of certainty

> that a person has been experiencing difficulties in paying his or her bills, deprivation, even partial, of legal capacity should be a measure of last resort, applied only where the national authorities, after carrying out a careful consideration of possible alternatives, have concluded that no other, less restrictive, measure would serve the purpose or where other, less restrictive measure, have been unsuccessfully attempted. However, there is no indication that any such option was contemplated in the present case (emphasis added).

The Court further concluded: "*the national courts in depriving partially the applicant of her legal capacity, did not follow a procedure which could be said to be in conformity with the guarantees under Article 8 of the Convention*" (emphasis added).

Ivinović v. Croatia is part of interesting and recent jurisprudential developments. This includes, among other things, the recognition of disability as a ground of discrimination covered by article 14 ECHR (*Glor v. Switzerland*), the condemnation of the deprivation of liberty (*Shtukaturov v. Russia*), the inhuman conditions of institutionalisation (*Stanev v. Bulgaria*) and the denial of the right to vote (*Alajos Kiss v. Hungary*) as a result of placing a person under guardianship. Moreover, the Court has held that, by virtue of the right to a fair trial, persons affected by this situation must have effective access to courts to seek restoration of their legal capacity (*Kędzior v. Poland*). Although the landmark case of *Stanev v. Bulgaria* did not address the application of legal guardianship under the right to private life, subsequent decisions have done so. Precisely in cases against Croatia, the Court has pointed out that "*a measure such as divesting one of legal capacity amounts to a serious interference with that person's private life*". (*X and Y v. Croatia*, para. 102). Therefore, "*strict scrutiny is called for where measures that have such adverse effect on a person's personal autonomy are at stake*". (*M.S. v. Croatia*, para. 97). The *Ivinović* case is thus a valuable contribution within the articulation of procedural rights that play a significant role in securing the integrity, liberty and private life of persons with disabilities. Moreover, in *Ivinović* the Court qualified the deprivation of legal capacity as a last resort measure, restricting its application to those rare situations where there are no other less intrusive means. Nevertheless, this judgment, as those that have preceded it, falls short of safeguarding the right to legal capacity of persons with disability in its entire dimension. Notably, none of these decisions has gone beyond the procedural aspects of the use of guardianships to challenge the institution itself.

(Right to) legal capacity and (factual) mental capacity

The right to recognition as a person before the law, that is, the right to legal capacity, is accorded universally to every human being. The ECHR does not contain such a right as other regional and international treaties do.[3] However, as seen above, the European Court has interpreted article 8 ECHR as somehow encompassing this right. Legal capacity entails two intertwined elements: legal standing and legal agency.[4] The former is the capacity to be a holder of rights and duties, while the latter is the capacity to exercise those rights and to act under the law. It is this agency dimension of the legal capacity that has been historically denied to discriminated groups. Although most of these exclusions have -at least in law- been overcome, people with disabilities still remain largely deprived of this right worldwide. The reason? Their diagnosed "deficiencies" in making "rational" decisions. Once it is medically determined that a person lacks the ability to comprehend or assess the implications of her acts, the common conclusion is that she needs "protection". The idea of "protection" (instead of rights) makes all the more "adequate" to have someone else taking decisions on her behalf. The problem with this logic is that it conflates mental and legal capacity thereby compromising the human rights of the person concerned.

Morally, we understand that the poor health condition of someone whose advanced age makes her or his recovery more unlikely does not authorise lowering efforts in saving her or his life. We also agree that despite the biological fact that only women can give birth, children are a social (and not women's) responsibility. Why is it then so difficult to internalise that impairments in mental capacity do not justify encroaching on one's legal capacity?

In *Ivinović* the Court fairly suggests that mental and legal capacity cannot be equated. It says:

> [...] any decision based on an assessment of a person's mental health has to be

> supported by relevant medical documents. However, it is the judge and not a physician who is required to assess all relevant facts concerning the person in question and his or her personal circumstances. (para. 40)

Yet the Court does not unpack, to their fullest extent, the consequences of distinguishing between mental and legal capacity. Avoiding the conflation of these concepts is significant because it means that decision-making skills simply cannot be considered legitimate grounds for denying legal capacity (fully or partially). The UN Committee on the Rights of Persons with Disabilities has been categorical in this respect:

> This approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law. [...] Article 12 [CRPD] does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity[5] (emphasis added).

From this perspective, the partial deprivation of Ms. Ivinović's legal capacity deserved a substantial review and not just an examination in procedural terms.

Support instead of substitution

A substantial review in this case implied scrutinising the institution of guardianship itself, which is based on substitutive decision-making. This figure, as applied to Ms. Ivinović, operates under the presumption that "deficits" in mental capacity should lead to "deficits" in legal capacity, which are "solved" by substituting the will, autonomy and preferences of the person concerned. Acknowledging that this suppression of agency violates people with disabilities' right to equal recognition before the law, the Committee CRPD has called upon the use of "supportive" decision-making systems. Support to the exercise of legal capacity can be given through a variety of mechanisms, and states are free to choose those that better fit their cultural, legal and political landscapes. What defines supportive arrangements is that it is the individual concerned the one making decisions even though s/he is assisted to reach and communicate these decisions. The supporter does not take the place of the assisted person; the supporter only facilitates the decision-making process. Interestingly, this seems to institutionalise something that is usually forgotten: that most of us (if not all) need some form of advice and help to take many decisions.

People with a disability have the right to retain their legal capacity and to have their desires, interests and will respected. Acting otherwise on the ground of their physical or mental disability gives rise to discrimination. Replacing substitutive models by supportive systems for the exercise of legal capacity is one of the ways in which the current standards of international human rights law seeks to realise the principles of equality and non-discrimination, dignity, independency, autonomy, social inclusion and participation for people with disabilities.

Could the European Court have engaged, to some extent, in this kind of analysis in the *Ivinović case*? I think that the main reason to answer this question with a "no" lies on the framing of the applicant's complaint. The applicant focused on the manner in which the proceedings by which she had been partly deprived of her legal capacity had been conducted and the grounds upon which domestic courts had made that decision (para. 30 of the judgment). The way in which complaints are framed influences the way in which the Court deals with them. Therefore, the procedural character of Ms. Ivinović submissions could perhaps explain the procedural response of the Court. Fair enough. Notwithstanding that, other relevant factors make me suggest that it was possible for the Court to say more. The Court could have at least 'noted' the human rights issues generated by a substitutive decision-making institution like guardianship while also considering supportive mechanisms amongst the other 'less restrictive measures' available to the State.

To start with, Croatia ratified the CRPD in 2007 (even before it entered into force). Although the Court mentioned this, the convention did not really serve hermeneutical purposes in the case.

Secondly, the third-party interveners (The PERSON Project and Mental Health Europe) invoked the CPRD, claimed that deprivation of legal capacity was an unjustified intrusion in the private life of the applicant, and argued that states should replace substitute decision-making by supported decision-making in the exercise of legal capacity. Thirdly, Recommendation 1854 of the Parliamentary Assembly (26 January 2009) which refers to its Resolution 1642 "Access to rights for people with disabilities and their full and active participation in society" invites member States to "*guarantee that people with disabilities retain and exercise legal capacity on an equal basis with other members of society by: 7.1. Ensuring that their right to make decisions is not limited or substituted by others, that measures concerning them are individually tailored to their needs and that they may be supported in their decision making by a support person"* (emphasis added). The Court, however, only referred to the Committee of Ministers' Recommendation No. R (99) 4 on "Principles concerning the legal protection of incapable adults" (adopted on 23 February 1999) which, despite containing relevant safeguards, reflects an outdated and paternalistic understanding of the rights of people with disabilities.

In conclusion

What is suggested here, obviously, is not that the Court should have somehow applied the CRPD. But it is also clear that the Court does not apply the ECHR in a vacuum. It is certainly not my intention to overlook the fact that most states in the world still have substitutive decision-making systems. Transition to supportive mechanisms for the exercise of legal capacity takes time. The change will take place progressively. However, change cannot be put in motion if states are not aware of what their human rights obligations consist of. And, so far, states do not seem to really understand what the shift from substitute decision-making to support decision-making entails.[6] Against this backdrop, isn't it reasonable to expect that, in cases like the one discussed here, the European Court could take a position on this matter and a step further in providing guidance to member states? I have no doubt that the Court will have again, sooner rather than later, the opportunity to do so. And then, particular account should be taken of the substantial questions involved in the protection of legal capacity of persons with disabilities. In this sense, the challenges ahead are numerous. But here, it suffices to highlight two of them. One is the need to acknowledge the incompatibility of guardianships and other substitutive decision-making arrangements with the ECHR and the ensuing call for supportive mechanisms. A second challenge is to recognise that having a certain category of persons declared legally incapacitated is a blatant (institutionalised) form of discrimination.

[1] Figures available in Mental Disability Advocacy Center, *Legal Capacity in Europe*, October 2013. http://mdac.info/sites/mdac.info/files/legal_capacity_in_europe.pdf

[2] Idem.

[3] See e.g. art. 6 UNDHR; art. 16 ICCPR; art.12 CRPD; art.3 ACHR and art. 5 of the African Charter.

[4] UN Committee on the Rights of Persons with Disabilities, *General Comment No. 1*. Article 12: Equal recognition before the law, adopted on 11 April 2014, para. 14.

[5] Ibid, para. 15.

[6] See, *inter alia*, Committee CRPD concluding observations on Hungary (CRPD/C/HUN/1); Austria (CRPD/C/AUT/1); Spain (CRPD/C/ESP/1); Tunisia (CRPD/C/TUN/1); Belgium ((CRPD/C/BEL/1); Mexico (CRPD/C/MEX/1); Australia (CRPD/C/AUS/1). The Committee welcomes law reforms processes undertaken by states but shows concerns where guardianship is not derogated and proposed amendments maintain a substitutive decision-making model.