

Human rights: A reality for All
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Equal recognition before the law
- Boglárka BENKÓ –

The European Court of Human Rights repeatedly emphasised that persons with disabilities constitute a particularly vulnerable group of society, as they are historically subject to prejudice and discrimination with lasting consequences, resulting in their social exclusion. Such prejudice can also entail legislative stereotyping about their legal capacity, which prohibits the individualised evaluation of their capacities and needs.

Although it has been disputed by the Governments of certain member States, the case-law of the European Court of Human Rights also recognises that the right to legal capacity falls under the ambit of Article 8 of European Convention of Human Rights and Fundamental Freedoms (*Shtukurov v. Russia*, no. 44009/05, *Lashin v. Russia*, no. 33117/02. This is so even when a person has been deprived of his or her legal capacity only in part (compare to *Berková v. Slovakia*, no. 67149/01, and *Salontaji-Drobnjak v. Serbia*, no. 36500/05). “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), since as a result of incapacitation the person concerned becomes fully dependent on his or her guardian in almost, if not all, areas of his or her life (*A.N. v. Lithuania*, no. 17280/08). In this context Article 12 of the CRPD has been cited approvingly and the notation of legal capacity as a universal attribute inherent in all persons

The recent jurisprudential developments European Court of Human Rights have also demonstrated how a denial of legal capacity to persons with disabilities, through the imposition of a guardian, leads to the violation of other fundamental rights – such as the right to a fair trial, and in particular the right to access to a court, (*Kędzior v. Poland*), the right to be informed of decisions made about the person (*Cervenka v. the Czech Republic* no. 62507/12), the right to liberty and freedom of movement ((*Shtukurov v. Russia*), right to property (*Zehentner v. Austria*), right to to freedom from inhuman and degrading treatment or punishment ((*Stanev v. Bulgaria*), right family life right (*X. v. Croatia*) and the right to vote ((*Alajos Kiss v. Hungary*).

Therefore, it is not disputed that “*strict scrutiny is called for where restriction of their fundamental right or measures that have such adverse effect on their personal autonomy are at stake*”. (*M.S. v. Croatia*, para. 97).

Notwithstanding these considerations, the judgments of the Court, admittedly, fall short of safeguarding the right to legal capacity of persons with disability in its entire dimension and of challenging the institution itself. Thus, the Court has not yet gone so far as to question domestic legislations justifying the initiation of guardianship proceedings and the limitation of legal capacity if the person concerned was either unable to care for his or her own needs, rights and interest, or presented a risk to the rights and interests of others (*M.S. v. Croatia, X.and Y. v. Croatia*).

Rather, the two methods applied by the Court to address the institution of guardianship have been the assessment of the proportionality of the measure and of the existence of procedural safeguards in the proceeding leading to the incapacitation of persons with disabilities.

Relying on Recommendation No. R(99)4 on principles concerning the legal protection of incapable adults, the Court has emphasised that where a measure of protection is necessary it should be proportionate to the degree of capacity of the person concerned and tailored to his individual circumstances and needs. It thus held, that legislation that only distinguishes between full capacity and full incapacity did not provide for a tailor-made response and that such guardianship regime was not geared to the applicant’s individual case but entailed restrictions automatically imposed on anyone who had been declared incapable by a court (*A.N. v. Lithuania, and Salontaji-Drobnjak v. Serbia*).

The Court also pronounced itself on the proportionality of the partial deprivation of legal capacity and ruled in the case of *Ivinovic v. Croatia* (no. 13006/13) that it 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. Since it that case there were no indication that any such option was contemplated, the Court found a violation of the applicant’s right to private life.

In addition, the Court enhances the principle that mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation (*Shtukurov v. Russia*)-

As regards the procedural aspects of guardianship, it has been the Court’s constant case-law of finding a violation of the right to a fair trial (access to court) or the right to private life in situations where the procedure on the basis of which the domestic courts had decided on

the limitation of the applicant's legal capacity had been seriously flawed. The key factors finding that the guardianship proceedings were not in compliance with the State's obligation to ensure respect for private life can be summarised

- the lack of a comprehensive psychiatric examination of the applicant (*H.F. v. Slovakia*)
- -the length of the proceedings for the restoration of the applicant's legal capacity
- -the been excluded from the final hearing and had therefore been unable to personally challenge the experts' report recommending the partial deprivation of his legal capacity
- the lack of periodical judicial re-assessment of the applicant's conditions in the applicable domestic law
- -lack of adequate representation (*H.F. v. Slovakia*)
- the fact that the applicant was represented by an employee of the guardianship authority in the guardianship proceeding (*M.S. v. Croatia*)
- -the fact that the psychiatric expert opinion substituted a judicial assessment of legal capacity (*Ivinovic v. Croatia*)
- -lack of direct access to a court to institute proceedings for restoration of legal capacity (*Stanev v. Bulgaria*)
- the fact that the applicant was not present during the guardianship proceedings (*Shtukaturvov v. Russia*)
- -the lack of notification of institution of guardianship proceedings (*Sykora v. the Czech Republic*)

As stated above, this line of judgments contributes to an emerging body of case law where the placement of people with disabilities in adult guardianship has resulted in a violation of their fundamental rights, but also demonstrates, that the ECtHR was reluctant to go beyond the procedural and proportionality aspects of the use of guardianships and to rule out the possibility of the institution in principle.

Nevertheless, it is important to notice that in the landmark case of *Stanev v. Bulgaria* the Court has recognised the growing importance which international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible.

Furthermore, the ECtHR is constantly building a bridge between the ECHR and the CRPD in other aspects of the rights of persons with disabilities. In this sense in the case of *Cam v.*

Turkey the Court took over the definition of “reasonable accommodation” enshrined in the CRPD (art. 2) to find that the denial of reasonable accommodation constitutes discrimination, although the wording of Article 14 of the Convention does not include this aspect of non-discrimination. Relying again on the CRPD the Court emphasised States’ obligation to provide appropriate accommodation to facilitate the role of persons with disabilities in legal proceedings (*R.B. v. the United Kingdom*). Moreover, invoking the right to live in the community as enshrined in Article 19 of the CRPD, the Court found a violation of the Convention concerning cuts in care and assistance provided to persons with disabilities (*McDonald v. the United Kingdom*). Similarly, the Court found that the domestic authorities have failed to provide appropriate assistance to an applicant with disabilities in the exercise of this contact rights with his son, as it would have been required under Article 23 of the CRPD (*Kacper Nowakowski v. Poland* no. 32407/13). The Court also found that the domestic authorities failed to conduct effective investigations into the allegations of rape of a girl with mild intellectual disabilities.

It is a constant understanding of the Court that when interpreting the provisions and clarify the scope of protection of the Convention, regard must be had of the relevant rules and principles of international law (*Al-Dulimi and Montana Management Inc. v. Switzerland*) and the common international or domestic-law standards of European States (see *Opuz v. Turkey*), and in particular the fact that the majority of CoE member States have ratified to CRPD. Finally, the idea that “the Convention is a living instrument ... which must be interpreted in the light of present-day conditions” has spread throughout the Strasbourg case-law and has formed the basis for an interpretive approach which has enabled the Court to adapt, over time, the text of the Convention to legal, social, ethical or scientific developments. The new *Council of Europe Strategy on the Rights of Persons with Disabilities 2017-2023* is an important contribution to this normative alignment to international standards within the Council of Europe.

There is no reason to hold that using the above methods of interpretation and relying on the international standards under the CRPD the Court would not integrate supported-decision as replacement of substituted decision making in its case-law under Article 8 of the Convention.