

Portugal

Prof. Paula Távora Vitor

1. Recent developments and international obligations

Portugal has ratified both the CRPD and its Optional Protocol in 2009, without any reservations. The Hague Convention 2000 has been ratified and entered into force in July of 2018.

The regime of adult protection has undergone a profound reform in 2018 (Law n.º 49/2018, of August 14th) that has entered into force in February 2019. Such alterations followed the recommendation of the *Committee on the Rights of Persons with Disabilities (Concluding observations on the initial report of Portugal – May 20th 2016)*, that considered that the previous regime did not allow the possibility to adopt tailored measures demanded by the principle of proportionality and thus should be reformed. The new legislation aimed to comply with the international obligations and the impositions of the principles of necessity, subsidiarity and proportionality. In the resolutions that preceded the reform. “elderly people” were targeted as a category to be protected by the new regime. However, the new Law does not refer to “age” as a relevant element to be taken into account.

The previous regime had remained fundamentally the same since 1967, the date of entry into force of the Civil Code. Such regime encompassed two measures of protection: *tutela* (guardianship) and *curatela* (curatorship). Guardianship (*tutela*) implied almost total lack of capacity (comparable to minority) and representation by a guardian. Curatorship (*curatela*) allowed the circle of capacity to be judicially tailored, but it demanded lack of capacity for *inter vivos* acts of disposal. As a rule, the curator would control through authorization the acts that were performed by the person under protection (assistance). In both cases, not only was legal capacity to act restricted but also legal capacity to entitle some personal rights (right to marry, right to acknowledge paternity, right to exercise parental responsibilities or to write a will).

In 2012, the acknowledgment of prospective autonomy and thus the possibility to plan one’s future incapacity had been introduced by Law No. 25/2012, 16 July that regulated advanced directives (living wills) and health care enduring powers of attorney.

2. Statistics on measures of protection

The available data regarding the previous regime recorded around 2.000 incapacitation procedures each year (data of 2013: 2314; data of 2012: 2102; data of 2011: 1892).

3. Current legal system of MoP and underlying policy choices

The protection of vulnerable adults is comprehensively organized in the Civil Code; the procedure is regulated in the Civil Procedure Code.

The current regime has been introduced by Law n.º 49/2018, of August 14th. It establishes a single protective measure – custodianship (*acompanhamento*).

The regime of custodianship shall apply to persons of full age who by reasons of health, disability or because of their behavior cannot fully exercise their rights or fulfill their duties in a personal and conscious way.

The application may be made by the beneficiary of custodianship or, depending on their authorisation, by the spouse, the cohabitee, by any inheriting relative or, regardless of authorisation, by the Public Attorney Service. The required authorisation may be supplied by the court, considering the mental state of the beneficiary of custodianship or other relevant ground. It may be applied for in the year before majority, but it will only be effective after this date.

The Civil Code offers a list of possible custodians. The first rank is occupied by the person chosen by the beneficiary of custodianship and appointed by the court. In the absence of such

choice, it should be appointed the person who is best suited to take care of the interests of the person under custodianship. There is the possibility to appoint more than one custodian. In such case, it has to be determined which custodian is entrusted with which group of tasks.

The protective measure of custodianship is limited by a principle of necessity. It includes those activities that are necessary to attend to the affairs of the person under custodianship and therefore the court may determine, regardless of the petition, the following duties: (a) exercise or parental responsibilities; (b) general or special representation; (c) general or partial administration of assets; (d) authorization for the person under custodianship to act; (e) other specified interventions.

As a rule, the person under custodianship is capable of entering into contract deemed to be an everyday transaction. The exceptions may be created by law or by court decision.

Regarding personal acts, the same rule applies - the person under custodianship is capable of exercising "personal rights". The law has deemed necessary to exemplify this category, including the right of entering into marriage or cohabitation, to procreate, to recognise or to adopt a child, to care and raise one's child, to choose the profession, to move across the country and abroad, to determine domicile or residence, to relate with other persons or to draw up a will. However, for instance, the court decision may determine lack of capacity to marry, the "restriction of personal rights" in the decision that places under custodianship implies lack of capacity to recognise a child.

In the particular case of confinement of the person under custodianship, it must be issued an express court authorisation.

Custodians must attend to the affairs of the persons under custodianship 'with the diligence of a *bonus pater familiae*' and keep personal contact with them, visiting them monthly. In case of conflict of interests with the person under custodianship, the custodian must abstain to act and to require the court the necessary measures on that account.

Placement under custodianship does not necessarily imply becoming legally incapacitated, since capacity may be tailored by the court decision. Therefore acts performed by a person under custodianship are voidable just insofar they are not in accordance with the custodianship decision and (i) are performed after the decision has been registered; (ii) are performed after the legal procedure has been announced, but only after the final decision has been pronounced and in case they prove to be harmful to the person under custodianship. As for those acts performed before the beginning of the legal procedure, they may only be voidable depending on the fulfillment of some legal requirements: (i) the declaration of intent is made in a state of mental disturbance, which prevents either the ability to understand it or the free exercise of will; (ii) as long as that situation is notorious or known by the other party. This is the regime of temporary mental disturbance, to which the custodianship regime refers to.

In addition to the regime of custodianship, there are other protection mechanisms to be taken into account. The new regime has created the "mandate for custodianship purposes". Such mandate may encompass representation of the person under custodianship or not. This contract is subject to the general rules of mandate and it can be freely revoked but the rights and duties involved, the sphere of representation as well as other elements may be tailored. The court has to take into account the mandate (partially or as a whole) when determining the custodianship and appointing the custodian. The court may also terminate the mandate whenever there is a reasonable presumption that this would be according to the person's wishes.

The custodianship measure may only be established through a legal court procedure, of urgent nature. The kind of public announcement of such procedure is tailored by the court according to each case. In this procedure, the personal hearing of the person by the judge is mandatory so as to evaluate the adequacy of the measure. The court decision establishes not only the concrete measure of custodianship, but also the existence of living wills or health care durable powers of attorney.

Article 71 of the Portuguese Constitution stresses that ‘physically or mentally disabled citizens enjoy full rights and are subject to duties laid down in the Constitution’; the only exception accepted by the Constitution to this general rule regards the situations of “incapacitation”. Therefore, according to the Constitution, the State has the duty to create the conditions for their free development. This last dimension configures a true social right. Finally, No. 3 of Article 71 establishes that ‘the State supports associations of disabled people’. Subparagraphs g) and h) of Article 74 of the Constitution, that refer to the ‘right to education’, hold the State responsible for promoting the special education of people with disabilities and the protection and appreciation of Portuguese sign language as a cultural means of expression and way of providing access to education.

Portuguese legislation protects and promotes the rights of people with disabilities on various levels. The Law on the Prevention, Habilitation, Rehabilitation and Participation of Disabled People (Law No. 38/2004, 18 August) outlines the principles of the development of global and sectorial policies of rehabilitation. Law No. 36/98, of 24 July establishes the policy on mental health. A special social benefit for the inclusion of persons with disabilities was created by Decree-law n- 126-A/2017, of 6 October. Other special benefits may be found, regarding, for instance, special education (Decree 3/2016, 23 August). The rights of the worker with disabilities are specially protected by the Labour Code (Articles 85 ff. of the Labour Code) together with a cluster of rules promoting the inclusion of persons with disabilities.

4. Other instruments/legal provisions offering protection

General private law techniques such as *negotiorum gestio* may also apply. Furthermore the Law grants the spouse the possibility to act on the behalf of the person as an administrator of personal assets or common assets whenever there is an obstacle to perform such acts – diminished capacity may be considered among those obstacles.

5. Assessment legal system in terms of empowerment and protection

The 2018 reform has been presented as shift of paradigm in terms of empowerment and protection of vulnerable adults, shaped by the international conventions. However its options are not always clear and an interpretation according with the principles of equality, subsidiarity and proportionality is often due.

With regard to the mandate, a voluntary instrument that should have been presented as the core of the new paradigm, its regime has not been sufficiently developed and therefore many loopholes remain (formalities; registration; entry into force; etc.). Moreover these provisions are not adequately integrated with other mechanisms, such as custodianship, living wills and enduring health care power of attorney.

The new regime has also not regulated important personal issues, such as sterilization or determination of residence. Some solutions may also be contrary to the UNCRPD and particularly with article 12 – general powers of representation may be granted to the custodian and the lack of capacity regarding personal rights may be established by court decision.

The requirement of statistics and data collection provided for in art. 31 CRPD is clearly not met by the Portuguese State at the present. Awareness-raising regarding the possibility to plan one’s future diminished capacity is also lacking.