

PENSER LE DROIT DES MAJEURS VULNÉRABLES

SUPPRIMER L'INCAPACITÉ?

THE SPANISH SYSTEM OF SUPPORT FOR PEOPLE WITH DISABILITIES IN THE EXERCISE OF THEIR LEGAL CAPACITY. SUBSTANTIVE AND PROCEDURAL ASPECTS

Pilar Peiteado Mariscal
Profesora Titular. Univesidad Complutense de Madrid

Law 8/2021, of June 2021, which reforms Spanish civil and procedural legislation to support people with disabilities in the exercise of their legal capacity, introduces a substantial change in our way of understanding the legal treatment of disability.

The purpose of the Act is to bring our legal system into line with the International Convention on the Rights of Persons with Disabilities, signed in New York on December 2006. The core of the Convention is focused on the abolition of the traditional legal mechanisms aimed at replacing the will of the person with disabilities; they must be changed for solutions which respect their will, consider their preferences and provide people with the necessary supports, adapted to their individual circumstances, to enable them to exercise their rights. Spanish legislation fully adopts this point of view and adapts to it, both in its substantive and procedural regimes.

1. KEY LINES

1) Spanish legislation abolishes judicial declarations of incapacity, making disappear the civil status of "incapacitated".

(2) As a consequence, Spanish legislation eliminates, related to people with disabilities, the distinction between legal capacity and ability to act. Legal capacity includes both the capacity to be a holder of rights and an actor under the law. Everyone, whether disabled or not, have legal capacity, although some persons may need support in exercising their legal capacity. The difference is thus transferred to the distinction between legal capacity and the exercise of legal capacity.

(3) It follows from the foregoing that the disabled person should not be replaced for decision-making affecting him but should be supported to the extent necessary for the exercise of his or her legal capacity. Therefore, the system set up by the reform prefers voluntary measures and assistance over representation or replacement.

(4) Support measures must be based on respect for the dignity of the person and the protection of his or her fundamental rights, with the aim of enabling persons with disabilities to fully develop their personality and to operate legally under conditions of equality. Those who provide support must always act in accordance with the will, wishes and preferences of the person receiving it; In exceptional cases, where, despite considerable effort, it is not possible to determine the will, wishes and preferences of the person with a disability, the support measures may include

representative functions, but even in such cases, the **representative** must take the decision that the person with a disability would have taken if representation was not required. This should take into account the life course of the person with a disability, their beliefs and values.

(5) Spanish legislation separates the legal regimes of disability and minority:

- Internally. The lack of capacity for self-government of minors implies the deprivation of their ability to act, which is only achieved when they reach the age of majority. This means that the measures adopted related to minors are intended to protect them and to replace them to make decisions. On the contrary, and as has already been said, the eventual impact of disability on the capacity of self-government in a person of legal age does not entail the modification of his or her ability to act. They have legal capacity on an equal basis with other people, both the capacity to be the holder of rights and the capacity to act in law. For this reason, measures in respect of disabled persons lose their protective purpose and are not intended to replace them, but to support or assist the person in the exercise of his or her legal capacity.
- Externally. The legislation provides for different measures for minors and for persons with disabilities. The measure traditionally linked to representation, the guardianship, is reserved for minors; and the possibility of extension and rehabilitation of parental authority (*patria potestad*) has been eliminated, so that the transition to the age of majority of the disabled person is also marked by the disappearance of the support measures proper to minors. The legislator has sought to completely separate minority and disability, to prevent the disability regime from bringing them closer to minors, who do not have full legal capacity. Probably because of it, Spanish legislator did not consider it appropriate to introduce a measure like the family empowerment of the French legal system, in the opinion that parents are not always the most suitable persons to support people with disabilities because they can interfere with the achievement of their will autonomy.

2. A NEW CONCEPT OF LEGAL CAPACITY

One of the stronger ideas behind the New York Convention is that international declarations of human rights are not effective for some groups of people if they are not accompanied by the recognition of other rights. The basis of this idea are in the Independent Living Movement, which was developed in the 1960s and 1970s in the USA and the UK, and in the Americans with Disabilities Act of 1990, aimed at preventing discrimination on the basis of disability and from which the New York Convention was inspired.

The initial premise is disability cannot limit rights or legal standing; All persons have the capacity to exercise their rights, and support will only be established when necessary for their exercise, without limiting the person's capacity.

Spanish legislation has avoided including a definition of “person with a disability”, even though it was requested by several sectors during the reform process, to avoid legal uncertainty. However, in a global perspective, we can perceive a social conception of disability, which is not only caused by physical or mental impairments that are foreseeably permanent, but also by the interaction of

these impairments with barriers that limit or prevent effective participation in society. Disability is a de facto situation, not a legal status.

3. DISABILITY SUPPORT MEASURES

Function

As stated above, the system is based on the presumption of capacity of all persons, whether disabled or not, so that the function of support measures is to allow the proper exercise of legal capacity under equal conditions, preventing disability, which is a de facto situation, causes discrimination in the legal field.

The welfare nature prevails, respecting the will, wishes and preferences of the recipient of the support, and the functions of protection and representation are reduced to what is strictly essential.

Guiding principles for measures

Principle of necessity. Disability is a prerequisite, but not sufficient, for taking supportive measures. Support measures only apply where the person with disability is unable to adequately exercise his/her legal capacity on his/her own.

Principle of autonomy. The disabled person's will is the main element in the design of his/her support system.

Principle of subsidiarity. The judicial provision of support measures is only appropriate where the person in need of support has not expressed his will, or what he or she has expressed is not sufficient.

Principle of proportionality There are no general support measures, or measures associated with types of disability. The measure must be exactly adjusted to what each person needs to exercise his or her capacity.

Principle of temporality Any action taken should be reviewed periodically.

Configuration

The entire support system (specific measures and the content of each of them) must respect the will, wishes and preferences of the person with disabilities. It is only exceptionally, and with sufficient justification, that the person providing the support, or the judicial authority may dispense with this will of the person concerned, in three situations.

- Proof circumstances unknown to the affected person that make their preference inconvenient.
- The persons purposed as supporters may be a risk of abuse, conflict of interest, or undue influence.
- That despite having made a considerable effort (this is literally required by the rule), it has not been possible to determine the will, wishes and preferences of the person.

Inability and Prohibitions

Support measures may not be exercised from who provide care, residential or similar services to the person in need of support by a contractual relationship.

Those who provide support have forbidden three kind of acts, with the aim of withholding the assets of the person with disabilities and the person providing the support:

- Receiving gifts from the person who needs the support or from his successors until his or her management has been definitively approved, except if they are usual gifts or goods of little value.
- Providing support in issues in which the supporter are also acting on its own behalf or on behalf of a third party and there is a conflict of interest.
- Acquiring property **for consideration** from the person in need of support, or to transfer property to him or her under the same title.

Types of support measures

Support measures can be formal or informal.

The informal support measure is **de facto custody**, that is, which is effectively exercised by a person, without any voluntary or judicial measures being applied. De facto guardianship is no longer considered a temporary situation that must end but becomes a desirable situation which must be maintained if it provides sufficient and adequate care. Where a representative act of the guardian is needed, he must be provided with and *ad hoc judicial authorisation*, thus avoiding a general procedure for the provision of support.

Formal support measures can be voluntary or judicial.

Voluntary measures depend entirely on the will of the person with a disability, who can design them as he or she wishes; this category includes any measure of support for his own person or property that may be decided by any person of legal age in anticipation of future circumstances that may hinder the exercise of his or her legal capacity. The CC regulates two kinds of these voluntary measures, nevertheless it does not exclude other provisions that may be established by the person with a disability himself:

- Preventive powers and mandates. It means that in anticipation of a future need for support, the interested party may grant in a **public deed** preventive **power of attorney** in favour of a person of his/her trust
- Self-curatorship, proposing in a public deed the appointment or exclusion of certain persons for the exercise of the function of curator, and also provisions on the operation and content of the curatorship.

Judicial support measures are only adopted if the person in need of support has not provided for it voluntarily; they are the curatorship (stable) and the judicial defender (for specific acts or where conflict of interest with the curator).

The CC also contains a system of authorisations, reports and procedures; they are previous measures aimed at ensuring the correct formation and expression of the will of the person with a disability; and also regulates subsequent measures, called safeguards and controls, aimed at verifying that this correct formation and expression has happened.

As a closing mechanism, CC provides that where someone without de facto guardian requires urgent support for the exercise of his or her legal capacity, the

support shall be provided on a provisional way by the public entity entrusted with this function.

4. PROCEDURAL SYSTEM

At the procedural level, the main consequence of the reform is the replacement of the processes aimed at the incapacitation by a system of judicial adoption of support measures for persons with disabilities. It is a two-stage system, which always begins with a non-contentious jurisdiction procedure; the contentious judicial process has been reserved for cases in which an interested party express an opposition in the non-contentious jurisdiction file. Therefore, the contentious proceedings can never be initiated directly, but only after the adoption of the measures in the voluntary jurisdiction procedure has been attempted

The reform also has another procedural consequence that affects not only the processes of providing support, but also any civil process in which a person with a disability is involved, since, at the request of the person with a disability, or ex officio by the court itself, adaptations will be made in the process so that the person with a disability can participate in it under conditions of equality. The regulation is particularly concerned with the right of persons with disabilities to understand and be understood in all proceedings before the courts, and for this purpose it provides for three different measures.

- The practice of all oral or written communications in a language understandable to the person with a disability, and the use of means of interpretation or support for oral communication.
- The possibility for the person with a disability to be accompanied by a person of his choice from the beginning of the process.
- The participation of a professional expert, called facilitator, who helps the person with a disability to understand, and the court to adapt the necessary actions.

Position of Judicial Intervention in the Reform

In the previous system, the response to disability was necessarily judicial. In order to adopt support measures, incapacitation was essential, and it only took place by court decision. The current system makes judicial intervention secondary, first, because disability does not imply a lack of capacity to act. And, secondly, because if the disabled person needs support to exercise his or her capacity, the legislator prefers informal measures, such as de facto custody, to formal ones; and, among the formal ones, voluntary measures are preferred to ones established with judicial intervention. Judicial involvement for adopting support measures is, therefore, configured as an exceptional, secondary and subordinate situation. Broadly speaking, judicial intervention will take place in the following cases:

- The establishment of curatoship, the measure envisaged for the need for continuous support where there is not de facto guardianship or voluntary provisions.
- For the appointment of a legal defender, as an appropriate measure when the need for support is required on an occasional, even if recurrent, basis.

- To obtain the extinction of the preventive powers granted by the person who needs the support, if the attorney-in-fact has grounds for removal.
- To authorise certain aspects of de facto custody, such the guardian acting on behalf of the person with a disability.

File of non-contentious jurisdiction for the provision of support measures

The 2021 reform introduces a new file into the law on non-contentious jurisdiction, for the adoption of stable support measures, and for all matters related to them, such as determining the acts for which assistance is needed, or the appropriate control measures, or the designation of the person providing the support. As has already been said, the stable support measure provided for in the Civil Code is curatorship, so that this new file is mainly linked to it; In addition to this file, the Law on non-contentious Jurisdiction maintains other specific files for certain issues and more specific or temporary roles.

The judge of disabled person's residence has jurisdiction for this fail; and his changes of residence determines the change of court until the hearing is held.

The case may be initiated by the Public Prosecutor's Office, the person with a disability, his or her spouse (or person in a de facto similar situation) not de facto or legally separated or who is in a similar de facto situation and his or her descendants, ascendants or siblings. In addition, even if they have not initiated the proceedings, all these persons may attend the hearing, make submissions and propose evidence.

None of the parties needs to act through a lawyer or solicitor, although they can do so if they wish. If the disabled person is unable to act or decide for himself, even to appoint a lawyer, the person making the request for the provision of support measures must also request that a legal defender be appointed.

The application must be accompanied by such documents as the applicant deems necessary and contains the proposal of evidence. Once received by the court, everyone legitimated are summoned to a hearing, and may propose the evidence they believe should be used. Before the hearing, the court may ex officio request:

(a) A report on possible alternatives for support, without judicial action, to a public entity with functions of assistance to persons with disabilities, or to a social entity authorized as a collaborator of the Administration of Justice.

(b) An expert opinion about the person with a disability.

At the hearing, the witnesses are heard and evidence is taken; it can also be taken in the following ten days if it is not possible on the spot. In addition, the judge must interview the person with a disability, to inform him or her of possible alternatives and to form his own judgment.

The dossier ends:

- Where the person with a disability takes voluntary measures.

- By a ruling containing the court's decision on the support measures. Since it is a non-contentious jurisdiction, it is possible to seek its removal, modification or confirmation through a lawsuit before the contentious jurisdiction.
- By order to close the case due to the opposition of the person with a disability or of any of the persons entitled to do so, which may be expressed in writing before the hearing or in voice at it. Opposition refers to the adoption of any measure, not to the dispute over a specific measure or its operation.

Contentious judicial process

It will take place:

- Where there has been opposition in the file of non-contentious jurisdiction
- Where the case could not be resolved for any reason.
- Where the modification or revocation of the decision is sought, since the non-contentious jurisdiction file does not have the effect of *res judicata*.

The court that heard the non-contentious jurisdiction case has also jurisdiction for the contentious process, unless the person for whom the support is requested has changed residence, in which case the judge of the new residence will hear it. Changes of residence result in a change of court until the hearing.

The legal standing to initiate the process of providing support is given to the person with a disability and his or her closest relatives: a spouse not separated or who is in a comparable *de facto* situation, descendants, ascendants and siblings. They are joined by the Public Prosecutor's Office, which has subsidiary standing, so that it can only promote the process when the relatives do not exist or have not filed the corresponding lawsuit. Both those who have standing to initiate the process and those who prove a legitimate interest may request their entry and intervention in the process, under the same conditions as the parties.

The parties to this process must act through a lawyer and a solicitor. If the defendant does not appear with these professionals, or does not appear at all, the public prosecutor's office will represent and defend him/her, unless the public prosecutor is the plaintiff; In this case, a legal defender will be appointed for the person with a disability. This prevents the disabled person from being declared *in absentia* and encourages someone to always defend his interests.

In addition to the evidence proposed by the parties, there are three ones that the court is required to order. They may only be waived on an exceptional basis if the applicant is the person with a disability and he requests it in order to preserve his privacy. These are:

- An interview between the court and the person with a disability
- A hearing of the spouse and of the closer relatives.
- An expert opinion drawn up by an expert appointed by the court.

The judgment will not modify the capacity of the person with a disability, it will only determine the judicial support measures that are adopted as provided for by civil law, the person responsible and their content. As a rule, judicially adopted support measures will be reviewed periodically within a maximum period of three years, although the court may set a longer period, which may not exceed six years.

They must also be reviewed in the event of any change in the person's situation that may require a modification of these measures. The review is always initiated by a non-contentious jurisdiction file expressly provided for this purpose; Thus, again, the corresponding contentious process may only be initiated in the event that any of the interested parties objects in the previous file of voluntary jurisdiction.

Law 8/2021 extends the need for judicial review of measures to all measures agreed prior to the entry into force of this Law in order to adapt them to it, either at the request of a party or ex officio within a maximum period of three years.

5. HERITAGE PROTECTION

Since 2003 exists a specific regulation to protect the assets of persons with disabilities, a legal norm that bears the same name, the law on the protection of the assets of persons with disabilities. It should be borne in mind, however, that for this regulation only those who have a mental disability of more than 33% or a physical or sensory disability of more than 65% are considered to be a person with a disability, and it is not applicable to other disability situations.

This law creates the so-called "protected patrimony", a mass of assets and rights linked to the satisfaction of the vital needs of its owner, the person with disabilities, and subject to a specific regime of administration and supervision.

Protected heritage can be constituted by the person with a disability himself. Parents, guardians and the de facto guardian may also do so on their behalf.

The administration of the estate, which also includes the carrying out of acts of disposal, is entrusted to the person or non-profit entity designated by the constituent of the estate, whether it is a third party or the person with a disability. This person or entity is subject to the rules of administration and supervision established in the incorporation document. In addition, the Public Prosecutor's Office has an institutional oversight function, through two channels:

- The administrator is required to render annual accounts of his management.
- The Public Prosecutor's Office may request the judge to take such action as it deems necessary on behalf of the disabled person, including the replacement of the administrator, the change of the rules of administration, the establishment of special control measures, the adoption of precautionary measures, the extinction of protected assets or any other similar measure.