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Review Article

The Portuguese Protection of the Adult

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Abstract

The Portuguese Law nº. 49/2018, of 14 August, creates the legal adult protection regime, regarding vulnerable adults. This matter has suffered recent changes in the Portuguese legal and judiciary field. A vulnerable adult is someone who is unable to - due to health, disability or behaviour reasons - fully, personally and consciously exercise his/her rights or, in the same terms, fulfil his/her duties.

The adult protection regime aims to ensure his/her welfare, his/her recovery, full exercise of all his/her rights and compliance with his/her duties, within certain limits. It was important to find a more flexible system, that could promote, as much as possible, the will of the persons with disabilities and their self-determination, and also respect their dignity. The adults in these conditions benefit from guardianship measures foreseen in the Portuguese Civil Code.

The adult protection regime may only be applied based on a judicial decision, after certain conditions are verified. The decision can only be taken after personal and direct hearing of the beneficiary and after the consideration of the evidence provided (article 139), 'so, the judge may assess, in person, the real capacity of the person concerned and. The adult protection regime is also ruled by the principle of necessity. The possibility of the vulnerable adult to act autonomously (without the guardian) will depend on the configuration the judge establishes for the specific case and the measure adopted

As we will see, this new legal outlook has also more respect for private autonomy, within certain limits.

Keywords: Legal adult protection; vulnerable adult; guardianship; adult autonomy

Abbreviations: CC: Civil Code, CRPD: Convention on the Rights of Persons with Disabilities, MAVI: Independent Living Support Scheme

Introduction

The publication and the entry into force of the Law no. 49/2018, of 14 August, which creates the legal adult protection regime and eliminates the interdiction and inability assumptions, established a new regime, which aims to protect vulnerable adults, due to health, disability or behaviour reasons, who are not able to fully, personally and consciously exercise their rights and fulfil, in the same terms, their duties (art. 138 of the Civil Code (CC)).[1]

The 'Law no. 49/2018 has provided a positive answer to the concerns that were also felt in the area of the impairments of persons with disabilities, with the establishment of this new legal adult protection regime (...). We now have, (...) a regime that follows a flexible and monist model of case-by-case and reversible guardianship or support, which respects, as far as possible, the will of the persons and their power of self-determination'[1].[2]

For situations in which the person presents specific characteristics that limit his/her natural propensity to understand his/her actions and their respective effects, the Civil Code established negotiating disabilities for the exercise, foreseeing, as mentioned, minority (articles 122 - 133), interdiction (articles

138 - 151) and inability (articles 152 - 156). In all these situations, foreseen for the protection of the incapable person, the person presents characteristics that decrease or are able to limit his/her will and ability to exercise his/her rights, to administer his/her assets and to govern him/herself [2].[3] The mentioned disabilities imposed, therefore, and in its own interest, a limitation to the freedom of the person to act.

This legal regime regarding disabilities was thought as a way to protect the incapable person (and his/her property) against his/her own limiting characteristics. Therefore, starting at 18 years of age (the age in which majority is reached), the full capacity for the exercise of rights is acquired. But there are some characteristics in certain persons that impose that the legal system grants them some protection against their inability or fragility.

Therefore, the Civil Code predicted, and according to the seriousness of the situation, certain typified grounds that lead to interdiction (appointing a guardian, who replaced the incapable person in the practice of acts) or inability (appointing a curator, who helped the incapable person in the practice of acts).

'The evolution of the social structure, the awareness of the seriousness that the referred remedies carry for the incapable person and the influence of international legal instruments dictated that, gradually, the goodness of the solution consecrated in the Civil Code was questioned' [3].[4]

All these factors converged to the approval, through the Law no. 49/2018, of 14 August, of the adult protection regime and the revocation of the interdiction and inability regimes.

In view of the previous regime, the protection of an adult could only be done if he/she was considered incapable, due to his/her interdiction or inability.

'Effectively, only after an incapable person is interdicted or considered disabled, that person can find a substitute – a guardian – or who accompanies him/her – a curator – in the practice of acts that concerns him/her. So, this is one of the major inconveniences the regime presents (…). An adult with disabilities should be able to get help without having to lose his/her capacity for exercise! For that reason, the appeal for the urgency of consecrating measures that could help persons with disabilities, in order for them to maintain their capacity for exercising rights. Therefore, a major movement arose all over the world (…), with the highlight going to the United Nations Convention on the Rights of Persons with Disabilities and the legislative changes in several legal systems, such as Germany, France, Italy, Spain and Brazil, among others'.[5]

As Paula Távora Vítor refers, the changes in social, economic and medical contexts have been determining a reform in the legal systems, in order to suppress traditional disabilities [4].[6]

The interdiction and inability regimes, with emphatic grounds and requisites to be observed under the legally foreseen terms, left without protection and legal coverage some individuals that, due to their specific characteristics or weaknesses, or due to the aging process, did not fit within the scope of the mentioned regimes (e.g., people with certain degenerative diseases, which did not translate into psychological anomalies; stroke victims with some disability who need someone to accompany them; situations of temporary disability; etc). On the other hand, and mainly regarding interdiction, once decreed, the incapable person became unable to practice any act with regards to him/herself or to his/her property, which means, the legal solution was general and did not meet the specificities of each specific person.

Therefore, legislative change in this matter was mandatory, as had occurred in other legal systems, to which contributed, as mentioned, some international instruments, such as the Convention of New York, which we will briefly refer to.

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[1] Whenever articles are cited in this paper, without expressly indicating the legal document to which they belong, the mention refers to the Civil Code.

[2] A. P. Monteiro (2019), 'Das incapacidades ao maior acompanhado – breve apresentação da Lei n.º 49/2018', *O novo regime jurídico do maior acompanhado, ebook*, Centro de Estudos Judiciários, Lisbon, pp. 27 and 28.

[3] V., A. Gonçalves (2012), 'Breve estudo sobre o regime jurídico da inabilitação', *Estudos em homenagem ao Professor Doutor Heinrich Ewald Hörster*, Almedina, Coimbra, p. 114.

[4] M. M. Barbosa (2018), *Maiores acompanhados – primeiras notas depois da aprovação da Lei n.º 49/2018, de 14 de agosto*, Gestlegal, Coimbra, p. 10.

[5] A. P. Monteiro (2019), 'Das incapacidades ao maior acompanhado – breve apresentação da Lei n.º 49/2018', *O novo regime jurídico do maior acompanhado, ebook*, Centro de Estudos Judiciários, Lisbon, pp. 19 and 20.

[6] P. T. Vítor (2018), 'Os novos regimes de proteção das pessoas com capacidade diminuída', *Autonomia e capacitação os desafios dos cidadãos portadores de deficiência*, Atas do seminário, Universidade do Porto, Porto, p. 127 and note 3.

Methods

We've based this study in an extensive bibliographical and jurisprudence research. Our premise was the legal adult problem and how the Portuguese legal framework has evolved. After gathering background information from the legislation and various authors it was possible to make several observations and draw some concluding thoughts. We believe that more than formulating a problem in itself, it would be more beneficial – at this point – for the reader to fully understand the Portuguese legal regime and its evolution.

The Convention on the Rights of Persons with Disabilities impact and the legal evolution in this matter and

The Convention on the Rights of Persons with Disabilities (CRPD), adopted by the United Nations in New York, on 13 December 2006, and signed by Portugal on 30 March 2007 (and approved by Resolution of the Parliament no. 56/2009, of 7 May, and ratified by Decree of the President of the Republic no. 71/2009, of 30 July), as well as the Optional Protocol, adopted by the United Nations on 30 March 2007 (and approved by Resolution of the Parliament no. 57/2009, and ratified by Decree of the President of the Republic no. 72/2009, of 30 July), applying human rights already consecrated in other international legal instruments regarding disabilities, aims to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.[7] Its article 1 states that 'persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

As it is made clear in the opinion of the Draft Law no. 110/XIII regarding the National Monitoring Mechanism on the United Nations Convention on the Rights of Persons with Disabilities,[8] it seems clear that disability arises, more than from individual characteristics, mainly from stigmatised and stigmatising social interactions, environmental barriers and other social phenomena.

In the mentioned Convention, and following the same opinion, the approach to disability, from a human rights perspective, implies a paradigm shift in the attitudes and approaches to these persons, who stop being 'objects of charity, medical treatment and social protection towards viewing persons with disabilities as subjects with rights, who are capable of making decisions as well as being active members of society'.

Therefore, one assists to 'the recognition of human dignity regardless of the existence of disability or the intensity of the necessary support, with the access to rights being unconditional, assured and protected, challenging the presumption that the existence of a disability or impairment may jeopardise the right to enjoyment and exercise of the mentioned rights'.[9]

On the other hand, the need for support in decision-making must not be used as justification for limiting fundamental rights, such as the right to vote, the right to marry or found a family, reproductive rights, parental rights, the right to liberty or the right to consent for medical treatment (see paragraph 25(f) of the General Comment no. 1).

Regarding the notion of discrimination on the basis of disability, we can find it in article 2 of the CRPD, where it is defined as 'any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.'

The Committee emerging from the Optional Protocol disclosed final observations regarding the initial report of Portugal, from which we can highlight the relevance of the equal recognition of persons with disabilities (article 12 of the CRPD), which outlines the duty of States Parties to take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

The mentioned legislative change arises in this context. As written by Joaquim Correia Gomes, it is interesting to note that, the generality of jurisprudence, 'in the cases of interdiction and inability, has persistently ignored the cited article 12 of the CRPD, when it was already in force, not having made any interpretation of the discipline of those cases in light of this article' [5].[10]

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[7] We can also mention the recommendation of the Council of Europe on Principles Concerning the Legal Protection of Incapable Adults [Recommendation No. R (99) 4, of the Council of Europe, adopted by the Committee of Ministers on 23 February 1999].

[8] *http://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c324679 626d56304c334e706447567a4c31684a53556c4d5a5763765130394e4c7a464451554e455 44563765247396a6457316c626e527663306c7561574e7059585270646d46446232317063 334e68627938775a54553359544d7a4e693031596a4e6a4c54526c4e6d457459575a6b4d7 930784d544d79596a6c6d4d545534597a63756347526d&fich=0e57a336-5b3c-4e6a-afd3-1132b9f158c7.pdf&Inline=true, consulted on 8 January 2019.*

[9] Opinion of the Draft Law no. 110/XIII regarding the National Monitoring Mechanism on the United Nations Convention on the Rights of Persons with Disabilities, mentioned in note 10.

'Recognising the equality of persons with disabilities in terms of legal capacity, in the broad sense, implies, first of all, a radical change from a paradigm that is based on protection to a paradigm based on the respect for autonomy; therefore, a model of best interest is abandoned in favour of a model of best wishes, in which the will and preferences of the person with disabilities take a central role (…). From the combination of numbers 2, 3 and 4 of article 12 of the Convention results that the first goal regarding the measures for the support in the exercise of legal capacity of the persons with disabilities is the operationalization of their rights in that respect, whenever possible and in the measure of that possibility, to their will and preferences' [6].[11]

The CRPD imposes some demands on the States.

'So, in terms of legal capacity, those demands are based on the establishment of a principle of equality, whose achievement presupposes the transition from a model centred on the promotion of the best interest of the persons with disabilities to a model centred on the respect for their wills and preferences. Legally, this transition implies a progression from a model of replacement, based on an abstract statement of disability, to models of guardianship, based on case-by-case judgements subordinated to the principles of necessity and of proportionality.

These guidelines are reflected in the new legal adult protection regime, starting with the new wording of article 145(1) of CC, which establishes that the guardianship is limited to the necessary, and to the elimination of automatic disabilities of enjoyment, whether they are currently related to the interdiction or the inability regime.

Likewise, the influence of the Convention on the Rights of Persons with Disabilities in order to grant relevance to the will of the individual in the conformation of the regime to which he/she will be subject to is recognised, whether during the initial petition, or in the court decision regarding the terms of the guardianship or regarding the identity of the guardian.

Lastly, the legislative concern in accentuating the temporary and usually transitory nature of the guardianship measures should also be highlighted, consecrating a mandatory regime of legal and periodic review of the measures in the new wording of article 155 of CC.

Hence, notwithstanding some interpretation doubts and disagreements that the reform may raise, it seems clear the notorious legislative evolution towards the compliance of the Portuguese legal framework with the Convention on the Rights of Persons with Disabilities'.[12]

It should also be mentioned, and relating to the implementation of the Convention, the Decree-Law no. 129/2017, of 9 October, which establishes the Independent Living Support Scheme (MAVI) programme. 'As stated in the preamble, this programme aims to "provide personal assistance to persons with disabilities or impairments for the performance of daily or mediation activities in different contexts (…) constituting a paradigm shift in the public inclusion policies of persons with disabilities, trying to reverse the trend of institutionalization and family dependence"'.

MAVI is based 'on the rule of right of self-determination for persons with disabilities, ensuring conditions for the exercise of the right to make decisions regarding their lives, although there are different situations of disability, with different levels of dependence or impairment, which require distinctive supports'.

According to article 10(1), persons with a degree of disability of 60% or more and aged 16 or over are eligible for personal assistance. Persons with 'intellectual disability', persons with 'mental illness' and persons with 'Autism Spectrum Disorders', provided that aged 16 or over, are eligible for personal assistance, regardless of the degree of disability they may have (2).

'The adults declared as disabled may benefit from personal assistance and their active participation in the process of will formation and effectiveness of their decisions should be ensured, without prejudice of the legal regime of disabilities and respective provision' (article 10(4)).

On the other hand, the activities foreseen in article 6(1), and especially the 'activities of support in participation and citizenship' and the 'activities of support in decision-making', including the collection and interpretation of the necessary information, 'do not substantiate or prejudice the exercise of legal representation and the respective legal framework, in accordance with the Civil Code'.

The articulation of the MAVI programme with the adult protection regime will not be any easier, as demonstrated in the abovementioned article 6(2), but seems to be essential for the effective implementation of the Convention in our country' [7].[13]

B. In the Explanatory Memorandum of the Draft Law no. 110/XIII, which was behind the Law no. 49/2018, of 14 August,[14] reads as follows:

[11] J. C. Gomes (2018), 'Autonomia e (in)capacidades: passado, presente e futuro', Autonomia e capacitação os desafios dos cidadãos portadores de deficiência, Atas do seminário, Universidade do Porto, Porto, p. 68. There you can find the rulings of the Court of Appeal of Coimbra, of 11/11/2014 and 13/09/2016, and of the Court of Appeal of Guimarães, of 28/09/2017 and 07/12/2017 (in http://www.dgsi.pt).

[12] M. F. Costa (2018), 'O reconhecimento da proibição do excesso como critério delimitador das medidas de acompanhamento das pessoas com deficiência', Autonomia e capacitação os desafios dos cidadãos portadores de deficiência, Atas do seminário, Universidade do Porto, Porto, pp. 106 and 107.

[13] Ibidem, p. 115.

[14] M. Paz (2019), 'O maior acompanhado – Lei n.º 49/2018, de 14 de agosto', O novo regime jurídico do maior acompanhado, ebook, Centro de Estudos Judiciários, Lisbon, pp. 126 and 127.

'The diagnosis of the multiple problems that affect the assumption of the denominated disabilities in adults has been done for a long time. The wide consensus that exists in

academia, in several sectors of legal and medical professions, and in the community in general, which has been formed regarding the indispensability of a global reformulation of that assumption, is undeniable.

The solutions provided by the Civil Code of 1966 – which, in itself, represented a notable progress regarding the Civil Code of 1867 – were perhaps appropriate to the society of its time, but they became progressively inadequate in view of the socioeconomic and demographic development of the country.

Since the effectiveness of the Civil Code, a very considerable increase in the standard of living of the population was verified. The level of developed countries was reached, with everything this may entails, on both sides of the same coin. In an interconnected phenomenon, an expressive increase of life expectancy and a birth rate decrease were verified. As a consequence, the age pyramid tends towards inversion. On the other hand, there can be no doubt today in considering a person with disabilities as an equal person, without prejudice of the special needs that the law must address. Civil Law, traditionally focused on the activity of the adult citizen, sui iuris, in full use of all his/her faculties and with a mere nod to minors, needs to be adapted'.

In this sense, one tried to 'ensure the dignified treatment, not only of the elderly, but also of people of any age who needed protection, whatever the grounds for that need. The Civil Code cannot remain indifferent to the increase of the natural limits of the population, due to an increase of limiting pathologies, which results from the increase of life expectancy, of a better diagnosis, of a decrease of the aggregating capacity of families and, in certain cases, of the own prevailing living conditions. And, despite judicial interventions in this domain being numerically significant, the truth is that the large majority of the situations of physical or psychic impairment or disability are left out of any legal protection measures'.

Therefore, and 'aware of this reality, the (...) Government (...) chooses, as a strategic goal, the inclusion of persons with disabilities or impairments'. So, 'that inclusion must have as key element the recognition that the different situations of disability, with different levels of dependence, lack answers and distinctive supports, and that diversity should be taken into account in the design of measures and answers given to each case'.

Paula Távora Vítor refers that 'demography has population ageing as a dominant note, which caused the increase of age groups in which the appearance of neurodegenerative diseases and limitations to capacity related to these diseases is more common. At the same time, we have witnessed significant scientific progress, which has become a diverse comprehension of mental health and disability, both as social conditions, and that, alongside drug advances, led to a new interpretation of these phenomena, open to the valuation of the spaces of capacity and autonomy for community inclusion, and to the idea of reversibility of the status of the person with impaired capacity. Lastly, social values, which rule the legal response to the condition of adults with impaired capacity, have changed, following the path of the theory of fundamental rights'.[15]

As written by Jorge Duarte Pinheiro,

'the interdiction and inability proceedings are slow; sometimes, entail heavy costs; have a stigmatising nature; do not cover situations of temporary disability, even when they refer to severe temporary disability. Regarding inability, there is more concern with property protection than with the protection of the incapable person. In terms of interdiction, the protection mechanism is the guardianship, inspired by a means for providing parental responsibilities that is not very flexible. In fact, interdiction and inability are exceptional assumptions that urge to be reviewed, because they do not value the autonomy of persons with impaired capacity, whether they are old or not. Interdiction and inability conflict with the so-called less restrictive doctrine of alternative, according to which, protection should be made in a way that fully respects the autonomy of the person concerned and that affects, in the least possible way, his/her fundamental rights' [8].[16]

As we have seen, the inadequacy causes of this regime are obvious. As mentioned in the referred draft law, such inadequacy results from the 'rigidity of theinterdiction/inability dichotomy, which precludes the maximisation of the spaces of capacity that the person still bears; the stigmatising nature of the denomination of the protection instruments; the role of the family that whether lends total support to the vulnerable adult or ignores him/her; the type of publicity foreseen in the law, with prior notices in courts, parish councils and newspapers, disrupting the personal and family privacy and reserve that should always accompany this type of situations.

All this forces an ambitious reform, attentive to the experience of legal systems culturally close to our own and to international instruments binding to the Portuguese Republic, with the highlight going to the United Nations Convention on the Rights of Persons with Disabilities, of 30 March 2007, adopted in New York, approved by Resolution of the Parliament no. 56/2009, of 7 May, and ratified by Decree of the President of the Republic no. 71/2009, 30 July', and that we have already analyzed here.

[15] P. T. Vítor (2018), 'Os novos regimes de proteção das pessoas com capacidade diminuída', Autonomia e capacitação os desafios dos cidadãos portadores de deficiência, Atas do seminário, Universidade do Porto, Porto, p. 127.

[16] J. D. Pinheiro (2016), O Direito da Família Contemporâneo, 5.ª ed., Almedina, Coimbra, pp. 313 and 314.

As a summary and in the wake of the referred draft law,

'The final grounds for the change of the denominated disabilities in adults – ordered by its harmonious integration in the Civil Code, therefore, precluding to systematic breaks that hinder its application and place in danger the pursued goals – are (...) the following: the primacy of the person's autonomy, whose will must be respected and used to its fullest extent; the subsidiarity of any legal constraints to his/her capacity, only admissible when the problem cannot be overcome using the common duties of protection and guardianship, inherent to any family situation; the flexibility of interdiction/inability, within the idea of the uniqueness of the situation; the maintenance of an effective judicial control over any constraint imposed to the concerned; the rule of his/her personal and property interests; the agility of the procedures, regarding the previous topics; the intervention of the Public Prosecution in defence, and, when necessary, on behalf of the concerned'.

In general, and without prejudice of what we will analyse later on, the following changes can be highlighted:

'choice of a monist, material and guardianship model, characterised by a broad flexibility, allowing a specific and individualised response by the judge, appropriate to the specific situation of the protected person; the possibility of the vulnerable adult, unless otherwise expressly decided by the judge, to maintain his/her liberty for the practice of several personal acts, namely: freedom to marry, to have a non-marital partnership, to procreate, to admit paternity of a child, to adopt, to exercise parental responsibilities, to divorce or to make a will; the qualification of the proceedings as non-contentious and urgent proceedings; the obligation of the judge to personally contact with the beneficiary before ordering the guardianship, and the express possibility of reviewing, in light of the new regime, interdictions and inabilities decreed in the past, at the request of the adult, the guardian or the Public Prosecution [9].[17]

Next, we will study these changes and the adult protection regime introduced by the Law no. 49/2018, of 14 August.

The regime brought by Law no. 49/2018, of 14 August

As previously mentioned, the Law no. 49/2018, of 14 August, creates the legal adult protection regime and eliminates the interdiction and inability regimes.

We will analyse this regime, included in articles 138 to 156, dedicated to vulnerable adults, leaving out the references to the changes made in other legal documents.

According to article 140, the adult protection regime aims to ensure his/her welfare, his/her recovery, full exercise of all his/her rights and compliance with his/her duties, except the legal exceptions determined by judgement. The measure does not occur whenever its goal is ensured through the general duties of cooperation and assistance that should be considered[18]. In addition to this idea of supletivity (or subsidiarity), the regime is also ruled by the principle of necessity, pursuant to article 145, i.e., the guardianship shall be limited to what is necessary.

As previously mentioned, it would be important to find a more flexible system, 'which promoted, as much as possible, the will of the persons with disabilities and their self-determination, which always respected their dignity and facilitated a periodic review of the restrictive measures decreed by judgement'.[19]

Therefore, it is necessary to present a definition of vulnerable adult,[20] reflecting a situation in which the adult[21] is unable to, due to health, disability or behaviour reasons, fully, personally and consciously exercise his/her rights or, in the same terms, fulfil his/her duties. The adults in these conditions benefit from guardianship measures foreseen in the Civil Code (see article 138).

[17] N. L. L. Ribeiro (2019), 'O maior acompanhado – Lei n.º 49/2018, de 14 de agosto', *O novo regime jurídico do maior acompanhado, ebook*, Centro de Estudos Judiciários, Lisbon, p. 75.

[18] It is considered here, 'firstly, the articles 1674 and 1675 of the Civil Code; but it is accepted that they may result from another source; it would be ideal that the situations of persons living in a shared economy (Law no. 6/2001, of 11 May) and in a non-marital partnership (Law no. 7/2001, of May) were regarded; nfortunately, the competent regimes do not expressly establish the duties of cooperation and assistance, although we will get there by good faith' (M. Cordeiro/A. P. *Monteiro, Da situação jurídica do maior acompanhado. Estudo de política legislativa relativo a um novo regime das denominadas incapacidades dos maiores, http://www.smmp.pt/wp-content/uploads/Estudo_Menezes-CordeiroPinto-MonteiroMTS.pdf, p. 119)*.

[19] A. P. Monteiro (2019), 'Das incapacidades ao maior acompanhado – breve apresentação da Lei n.º 49/2018', *O novo regime jurídico do maior acompanhado, ebook*, Centro de Estudos Judiciários, Lisbon, p. 20.

[20] The National Monitoring Mechanism on the United Nations Convention on the Rights of Persons with Disabilities, in its opinion regarding the Draft Law no. 110/XIII, recommended that it should reflect the definition of disability foreseen in the CRPD, 'definitely moving away from the medical and disability model, assuming as a general principle, the principle of capacity of every person'. The referred draft law mentioned only the vulnerable adult due to health or behaviour reasons. The Law no. 47/2018 included the word 'disability' in the final wording of article 138 of the Civil Code.

[21] In other words, a person over 18 years of age or, in a similar situation, an emancipated person, pursuant to article 133.

As mentioned before, the adult guardianship aims to ensure his/her welfare, his/her recovery, full exercise of all his/her rights and compliance with his/her duties, except the legal exceptions or those determined by judgement. The measure does not occur whenever its goal is ensured through the general duties of cooperation and assistance that should be considered.[22] In addition to this idea of subsidiarity, the adult protection regime is also ruled by the principle of necessity, pursuant to article 145. As we will see, depending on each case and regardless of what has been requested, the court may entrust, to the guardian, any or some of the following regimes: a) exercise of parental responsibilities or the means to provide them, depending on the circumstances; b) general representation or special representation with express indication, in this case, of the categories of acts in which it might be needed; c) total or partial administration of assets; d) prior authorisation for the practice of certain acts or categories of acts; e) other type of interventions, duly explained.

The guardianship may lead to legal representation, depending on the contour given to the assumption and the guardian's concrete powers. If so, legal representation follows the guardianship regime, with the necessary adaptations, with the court being able to waive the constitution of the family council (article 145(4)). As Mafalda Miranda Barbosa mentions, in situations in which the guardianship reinstates legal representation, there is a difference regarding interdiction: 'while this was decreed in general, the representation underlying the guardianship regime is determined according to the specifically proven needs of the beneficiary, which may be general or special'.[23]

António Pinto Monteiro writes that

'a person less focused on these themes could think that the disabilities had disappeared, not at all, the disabilities would have been replaced by a new regime, the adult protection regime. But this is obviously not the case; rather this new regime replaces, only and exclusively, the interdiction and inability assumptions and, therefore, the disabilities, which resulted from the establishment, by a court, of those assumptions'.[24]

The adult protection regime may only be applied based on a judicial decision, after certain conditions are verified. The decision can only be taken after personal and direct hearing of the beneficiary and after the consideration of the evidence provided (article 139), 'so, the judge may assess, in person, the real capacity of the person concerned and, we believe, hearing him/her, if possible, regarding the measures to be implemented' [10].[25]

The situation of the persons with impaired capacity was traditionally treated in a protection perspective. It should now be mentioned, in the new regime, the respect for the principle of private autonomy and for the will of the guardianship beneficiary. In addition to the adult protection regime being requested by the person concerned (article 141), the guardian, who is appointed by the court, may be chosen by the person concerned or by his/her legal representative (if he/she is still a minor, since the guardianship may be requested and determined within a year before majority – article 142) (article 143). As written by Sónia Moreira, the principle of respect for private autonomy and for the will of the beneficiary in the guardian's choice has to entail that the beneficiary is able to make the selection.[26]

As we will see, the respect for private autonomy is also included in article 156, where the possibility of a person concluding a mandate for the management of his/her interests is foreseen, anticipating an eventual need for guardianship. A solution similar to the one consecrated in the legal document of the Anticipated Directives of Will (ADW) and the so called "Living Will", in which a person, still capable, chooses a health care proxy, i.e., the person who will decide in his/her place regarding the provision of this type of care, when the person is no longer in conditions to do so (see articles 11 et seq. of the Law no. 25/2012, of 16 July). Raquel Guimarães stated that the first sign of change in the Portuguese regime of disabilities arose precisely with the adoption of the ADWs [11].[27]

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[22] The expression raises some issues, namely: '(i) who are the individuals involved (since it does not unveil the legal establishment of this type of duties, except among spouses and parents and children, and an extension similar to the figure of the guarantor in Criminal Law is not customisable); (ii) which are the implications of the duty of assistance, which is configured as a duty to provide material support, therefore, odd regarding the guardianship framework, which regards mere care and not conomic support; (iii) lastly, which are the consequences of its non-compliance and the forms of control of its performance' (P. T. Vítor (2018), 'Os novos regimes de proteção das pessoas com capacidade diminuída', Autonomia e capacitação os desafios dos cidadãos portadores de deficiência, Atas do seminário, Universidade do Porto, Porto, p. 138).

[23] M. M. Barbosa (2018), Maiores acompanhados – primeiras notas depois da aprovaçãoda Lei n.º 49/2018, de 14 de agosto, Gestlegal, Coimbra, pp. 50 and 51.

[24] A. P. Monteiro (2019), 'Das incapacidades ao maior acompanhado – breve apresentação da Lei n.º 49/2018', *O novo regime jurídico do maior acompanhado, ebook*,bCentro de Estudos Judiciários, Lisbon, p. 15.

[25] S. Moreira (2018), 'A reforma do regime das incapacidades: o maior acompanhado', in Benedita Mac Crorie, Miriam Rocha and Sónia Moreira (eds.), *Atas da I Conferência Internacional de Direito e Bioética, Temas de Direito e Bioética. Novas questões do Direito da Saúde, vol. I, ebook*, DH-CII – Direitos Humanos – Centro de Investigação Interdisciplinar, JusGov – Centro de Investigação em Justiça e Governação, Escola de Direito da Universidade do Minho, Braga, p. 232.

[26] *Ibidem*, pp. 232 and 233.

[27] V., M. R. Guimarães (2016), 'Este país não é para velhos? A protecção das pessoas maiores incapazes no direito civil português; Perspectivas de evolução', in Helena Mota and Maria Raquel Guimarães (eds), *Autonomia e heteronomia no Direito da Família e no Direito das Sucessões*, Almedina, Coimbra, p. 239.

The possibility of the vulnerable adult to act autonomously will depend on the configuration the judge establishes for the specific case and the measure adopted. In any case, and pursuant to article 147, which we will also analyse later on, the exercise of personal rights and the celebration of the business of everyday life by the person concerned are of free will, unless otherwise provided for by law or judicial decision. And the following are personal rights, such as the rights to marry or to have a non-marital partnership, to procreate, to admit paternity of a child or to adopt, to take care and educate his/her children or adopted children, to choose a profession, to move in the country or abroad, to set domicile or residence, to establish relationships with whom he/she intends or to make a will, among others.

The maintenance of the capacity to exercise rights is assumed by the person who resorts to a guardianship measure. These are support measures for the person with disabilities based on his/her self-determination.

We will also see that the adult protection regime may be terminated or modified (within the constraints imposed to the vulnerable adult) when justified (article 149), provided that a periodic review of the guardianship measures is done (article 155).

As we have seen, the adult protection regime applies to vulnerable adults, due to health, disability or behaviour reasons, who are not able to fully, personally and consciously exercise their rights and fulfil, in the same terms, their duties (article 138). There is now no description of the grounds for the adoption of the measure, as occurred in the interdiction and inability regimes, with the legislator choosing undetermined concepts.

As Mafalda Miranda Barbosa refers, there are two requisites for the regime to be decreed: one of subjective nature and another of objective nature[28]. Also, António Pinto Monteiro presents two types of requisites: regarding the cause and regarding the consequence.[29]

Therefore, and regarding the subjective requisite, following the cited author, there should be an impossibility to fully, personally and consciously exercise rights or fulfil duties (refers to the requisite regarding the consequence). Therefore, the possibility of a person forming his/her will in a natural way is at stake and there is, i.e., the possibility of self-determining the exercise of his/her rights and compliance of his/her duties.

Regarding the objective requisite, the impossibility to exercise rights or fulfil duties must be based on health reasons, a disability or the beneficiary's behaviour (requisite regarding the cause). The jurisprudence clearly has a determining role in the densification of these concepts, giving the cited author some answers.[30]

Regarding the objective requisite, the impossibility to exercise rights or fulfil duties must be based on health reasons, a disability or the beneficiary's behaviour (requisite regarding the cause). The jurisprudence clearly has a determining role in the densification of these concepts, giving the cited author some answers.[31]

Based on official statistics, in 2020, Portugal had a total of 2,295,036 persons aged 65 or over[32]. In 2019, the number of residents in Portugal aged 65 or over was 2,262,325[33] and, in that same year, 2104 adult protection regime requests, 185 authorisation/regime provision requests, 12 regime change requests and 8 reviews were presented.[34]

State-ordered/voluntary measures and ex lege representation

As soon as the abovementioned requisites are verified, the adult protection regime is decided by the court, pursuant to article 139. At any time during the proceedings, the provisional and urgent guardianship measures can be determined, which are necessary to make provisions regarding the defendant's person and assets.

The legitimacy to request this adult protection regime is assigned to the vulnerable adult or, by his/her authorisation, to the spouse, to the non- marital partner, to any successor relative or, regardless of authorisation, to the Public Prosecution (article 141(1)). The court may provide the authorisation to the beneficiary when, in view of the circumstances, he/she cannot give it freely and consciously, or when the court considers there are sufficient grounds (article 141(2)). The beneficiary's authorisation provision request may be cumulative with the guardianship request (article 141(3)). Furthermore, as laid down in article 153, the publicity

[28] M. M. Barbosa (2018), Maiores acompanhados – primeiras notas depois da aprovação da Lei n.º 49/2018, de 14 de agosto, Gestlegal, Coimbra, p. 53.

[29] A. P. Monteiro (2019), 'Das incapacidades ao maior acompanhado – breve apresentação da Lei n.º 49/2018', O novo regime jurídico do maior acompanhado, ebook, Centro de Estudos Judiciários, Lisbon, p. 24.

[30] M. M. Barbosa (2018), *Maiores acompanhados – primeiras notas depois da aprovação da Lei n.º 49/2018, de 14 de agosto*, Gestlegal, Coimbra, pp. 53-59.

[31] A. P. Monteiro (2019), 'Das incapacidades ao maior acompanhado – breve apresentação da Lei n.º 49/2018', *O novo regime jurídico do maior acompanhado, ebook*, Centro de Estudos Judiciários, Lisbon, p. 24.

[32] In a total of 10,297,081 citizens residing in Portugal (in 2020). Statistics available at https://www.pordata.pt/Portugal/População

[33] In a total of 10,286,263 citizens residing in Portugal (in 2019). Statistics available at https://www.pordata.pt/Portugal/População

[34] 2020 statistics not yet available. The figures for 2019 can be consulted at https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Processos-civeis-findos-nostribunais-judiciais-de-1-instancia.aspx

regarding the beginning, the course and final decision of the guardianship proceedings is limited to the strictly necessary, in order to defend the interests of the beneficiary or of third parties, being decided by the court, according to each case.

The provisions in articles 1920-B and 1920-C (article 153(2)) related to the register of the decisions regarding parental responsibilities are applicable to the judicial decisions of guardianship.

The process of creation of the adult protection regime is ruled in articles 891 to 904 of the Code of Civil Procedure [CPC].

As Miguel Teixeira de Sousa states,

'The adult guardianship proceedings is the only way to obtain the grant of the corresponding measure, since the guardianship can only be decided by the court (article 139(1), CC), the termination or modification of a guardianship measure already decreed, since that modification or termination can only be performed through a judicial decision (article 149(1), CC), and also the review of the guardianship measures, because this review can also only be performed by the court (article 153, CC)' [12].[35]

The competent court will be the local civil court. In fact, article 122 of the Law no. 62/2013, of 26 August (Law on the Organisation of the Judicial System – LOSJ), did not suffer any change regarding the competence of the children and family courts. Also, regarding the existing jurisprudence related to the interpretation to be given to the article 122(1)(g)[36], we consider this is the best understanding.

Reflecting the respect for the person's autonomy and for the will of the beneficiary, article 143 determines that the guardian, who should be an adult and in the full exercise of his/her rights, is chosen by the person concerned or by his/her legal representative (in the situations contemplated in article 142), being legally appointed.

In the absence of choice, the guardianship is deferred, during the respective proceedings, to the person whose appointment better safeguards the strong interest of the beneficiary, namely:

a) To the spouse not legally or *de facto* separated;[37]

b) To the non-marital partner;

c) To any of the parents;

d) To the person appointed by the parents or by the person that exercises parental responsibilities, through will or official or certified document;

e) To the adult children;

f) To any of the grandparents;

g) To the person indicated by the institution in which the person concerned is in (such as nursing homes);

h) To the representative to whom the person concerned has granted powers of representation (the previous choice of the beneficiary is respected, made in a moment in which consciously foreseeing the possibility of later needing guardianship measures, he/she has appointed a representative for this effect, pursuant to article 156, which we will address ahead);

i) To another reliable person (to be assessed in the specific case).

The court may also appoint several guardians with different functions, specifying each of their responsibilities, in accordance with the previous numbers (article 143(3)).

The criterion for the guardian's choice is to safeguard the strong interest of the beneficiary; therefore, there is no hierarchy regarding the persons mentioned by the law, given that the order in which they appear may reflect the persons that primarily and alternatively safeguard that interest.

Article 144 determines that the spouse, the descendants or the ascendants cannot be excused or exonerated. The descendants may be exonerated, upon request, after five years, if there are other equally reliable descendants. The other guardians may be excused, according to the grounds foreseen in article 1934 (regarding the excuse from guardianship), or replaced, upon request, after five years.

Without prejudice to the provisions in article 144, the removal and exoneration of a guardian follow, pursuant to article 152, the provisions in articles 1948 to 1950 (removal or exoneration of tutor). Therefore, the guardian that fails to perform his/her duties or that is proven to be unfit for the exercise of these functions, as well as the guardian that, incidentally, puts him/herself in a situation that prevents his/her appointment, may be removed from this responsibility.

In the performance of his/her duties, the guardian is governed by the duty of care and diligence, favouring the welfare and recovery of the person concerned, with the due diligence required by a good head of family, in the specific considered situation (article 146(1)).[38] The guardian maintains permanent contact with the person concerned, and has the duty to visit him/her, at least, on a monthly basis, or other frequency the court may consider appropriate (article 146(2)).

[35] M. T. Sousa (2019), 'O regime do acompanhamento de maiores: alguns aspectos processuais', *O novo regime jurídico do maior acompanhado, ebook*, Centro de Estudos Judiciários, Lisbon, p. 32.

[36] See the ruling of the Appeal Court of Coimbra, of 11.10.2016.

[37] We consider that the law not only refers to the de *facto* separation and the legal separation of persons and assets, but also to the administrative separation.

[38] This solution is criticised by P. T. Vítor (2018), 'Os novos regimes de proteção das pessoas com capacidade diminuída', *Autonomia e capacitação os desafios dos cidadãos portadores de deficiência*, Atas do seminário, Universidade do Porto, Porto, p. 145.

Pursuant to article 150, the guardian must abstain from an act that results in a conflict of interest with the person concerned. The breach of the duty mentioned in the previous number has the consequences foreseen in article 261 (regarding personal business). If necessary, the guardian must request authorisation or the convenient specific measures to the court.[39] Note that it is not just the conclusion of legal business, but also any form of acting that involves a conflict of interest (e.g., the simple authorisation for the conclusion of a business by the person concerned may be at stake).[40]

The guardian's functions are of free will, without prejudice to the allocation of expenditure, according to the condition of the person concerned and of the guardian (article 151(1)). The guardian reports to the person concerned and to the court when he/she terminates his/her duty or, in pendency, when it is legally determined (article 151(2)).

Article 145 rules the scope and content of the adult protection regime, being reflected, once again, in the number 1 of this article, the respect for the principle of private autonomy and for the will of the beneficiary, imposing that the guardianship is limited to the necessary. As we have seen, the configuration of the regime will depend on the specific case (the '*tailored suit*' to which Mafalda Miranda Barbosa refers, citing Pinto Monteiro).[41] The judge is not limited to what has been requested in the proceedings, being able to establish, in each specific case, according to the beneficiary's situation, one or more measures foreseen in article 145(2). Thus, and according to each case and regardless of what has been requested, the court may entrust, to the guardian, any or some of the following regimes:

a) Exercise of parental responsibilities or the means to provide them, depending on the circumstances (see article 1913(1)(b), where the disqualification of the exercise of parental responsibilities is foreseen if the judgement establishes it)[42];

b) General representation (situation in which the guardian is the legal representative of the beneficiary, replacing him/her in the celebration of the legal business of everyday life) or special representation with express indication, in this case, of the categories of acts in which it might be needed (the guardian only replaces the beneficiary in some types of business or acts that will be determined by judgment, which means that the beneficiary may act freely regarding the remaining situations);[43]

c) Total or partial administration of assets (the provisions in article 1967 et seq., regarding minors, as laid down in article 145(5), is applied to the total or partial administration of assets, with the necessary adaptations);

d) Prior authorisation for the practice of certain acts or categories of acts (the guardian will act side by side with the beneficiary, previously authorising that he/she concludes, by proper means, the business foreseen in the judgment);

e) Other type of interventions, duly explained[44].

It should be highlighted that, in each case, the acts regarding real estate require previous and specific legal authorisation (art. 145(3))[45].

The regime presents a broad flexibility, allowing that the judge may define the most appropriate model for the beneficiary (being able to even establish other measures in addition to the provisions in article 145(a to d), based on paragraph e).

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39 S. Moreira (2018), 'A reforma do regime das incapacidades: o maior acompanhado', in Benedita Mac Crorie, Miriam Rocha and Sónia Moreira (eds.), *Atas da I Conferência Internacional de Direito e Bioética, Temas de Direito e Bioética. Novas questões do Direito da Saúde, vol. I, ebook*, DH-CII – Direitos Humanos – Centro de Investigação Interdisciplinar, JusGov – Centro de Investigação em Justiça e Governação, Escola de Direito da Universidade do Minho, Braga, p. 239.

40 V., M. M. Barbosa (2018), *Maiores acompanhados – primeiras notas depois da aprovação da Lei n.º 49/2018, de 14 de agosto, Gestlegal*, Coimbra, p. 62.

41 *Ibidem, p*. 60.

42 The law foresees the possibility of the court granting the exercise of parental responsibilities to the guardian (regarding minor children of the person concerned), which may cause some perplexity, since the regulation of the exercise of parental responsibilities is subject to specific proceedings and must meet the best interest of the child.

43 Pursuant to the same article 145(4), legal representation follows the guardianship regime, with the necessary adaptations, with the court being able to waive the constitution of the family council.

44For example, 'the access to bank information, the intervention in certain banking and real estate operations and the safekeeping of valuable or precious objects'. V., M. Cordeiro/A. P. Monteiro, *Da situação jurídica do maior acompanhado. Estudo de política legislativa relativo a um novo regime das denominadas incapacidades dos maiores, http://www.smmp.pt/wp-content/uploads/Estudo_Menezes-CordeiroPinto-MonteiroMTS.pdf*, p. 123.

45 M. T. Sousa (2019), 'O regime do acompanhamento de maiores: alguns aspectos processuais', *O novo regime jurídico do maior acompanhado, ebook*, Centro de Estudos Judiciários, Lisbon, p. 47, considers that, although article 145(3) only refers to real estate, 'it is not excluded that, through an extensive interpretation, the same must apply to other forms of wealth, such as, for example, securities and other financial instruments'.

'In the determination of the guardian's responsibilities, we have noted, however, an omission related to matters which are ignored by the legislative study that precedes the project. It would make sense, from the protection of the category of rights perspective that is here at stake, that the guardian's powers and their limits, within the personal scope, were expressly regulated, giving updated answers and in conformity with a new logic of the system to sensitive matters, such as voluntary termination of pregnancy, options of family planning, establishment of residence or personal data management'[46]. We have already seen that the guardianship regime assumes that the person concerned maintains his/her capacity of exercise, eventually restricted or shaped by the guardianship measure to be applied to the specific case, with the possibility to grant to the guardian the power to represent, generically or specifically, the beneficiary or to authorise him/her to conclude certain types of business. personal data management'[46]. We have already seen that the guardianship regime assumes that the person concerned maintains his/her capacity of exercise, eventually restricted or shaped by the guardianship measure to be applied to the specific case, with the possibility to grant to the guardian the power to represent, generically or specifically, the beneficiary or to authorise him/her to conclude certain types of business.

Responding to the principles of the CRPD, the new regime assumes that the beneficiary has the negotiating capacity to conclude strictly personal business and to take care of his/her personal life, exercising, by proper means, his/her personal rights. Therefore, article 147 determines that the exercise of personal rights and the celebration of the business of everyday life by the person concerned are of free will, unless otherwise provided for by law or judicial decision. Thus, only in the cases in which the law or the decision of guardianship determines it, is there a restriction to the exercise of such rights. And article 147(2) adds that the following are personal rights, such as the rights to marry (see article 1601(1)(b), which foresees the possibility of the judge to exclude the right to marry to the person concerned) or to have a non-marital partnership, to procreate, to admit paternity of a child (see article 1850, which foresees the possibility of the judge to exclude the right to admit paternity of a child to the person concerned) or to adopt, to take care and educate his/her children or adopted children (own children and adopted children are distinguished, as if the adopted child does not have the legal status of a blood child), to choose a profession, to move in the country or abroad, to set domicile or residence, to establish relationships with whom he/she intends or to make a will (see article 2189, which foresees the possibility of the judge to exclude the right to make a will to the person concerned), among others. The list is merely illustrative, since other rights may exist.

Regarding the concept of business of everyday life, article 127(1)(b) refers to this category of acts. This is the business that most people conclude or use to meet daily needs or to meet needs that are still part of everyday life, beyond daily life. For example, the purchase of a book to gift a friend on his/her birthday, the purchase of a ticket to a concert or show will be admissible to the guardianship beneficiary, but the acquisition of a car will not[47].

Article 147 refers that it will be, therefore, sufficient that the court does not specify, in the judgment, the establishment in the guardianship of a certain act, in order for the person concerned be able to exercise or practice it.

Article 148 foresees the possibility of the institutionalisation of the vulnerable adult (both the institutionalisation due to health reasons and the institutionalisation in a nursing home, in the opinion of Pinto Monteiro)[48]. The institutionalisation of the vulnerable adult depends on the express authorisation of the court. In case of emergency, the institutionalisation may be immediately requested by the guardian, subject to the judge's ratification. The law does not clarify which situations justify the institutionalisation.

We consider it may cover health-related situations, but eventually there may be other circumstances to be assessed by the court that justify it. The jurisprudence will also have here a relevant role in terms of interpretation and delimitation of the situations.

The acts practiced by the vulnerable adult that do not meet the decreed guardianship measures are void, if he/she practices an act that the judgment defined as needed to be accompanied (article 154). Article 154 takes into account the moment in which the act was practiced in comparison with the guardianship record. In other words, if the act for which the beneficiary should have representation was subsequent to the guardianship record (article 154(1)(a)), such act is void.

[46] P. T. Vítor (2018), 'Os novos regimes de proteção das pessoas com capacidade diminuída', *Autonomia e capacitação os desafios dos cidadãos portadores de deficiência*, Atas do seminário, Universidade do Porto, Porto, pp. 141 and 142.

[47] M. M. Barbosa (2018), *Maiores acompanhados – primeiras notas depois da aprovação da Lei n.º 49/2018, de 14 de agosto*, Gestlegal, Coimbra, p. 65.

[48] A. P. Monteiro (2019), 'Das incapacidades ao maior acompanhado – breve apresentação da Lei n.º 49/2018', *O novo regime jurídico do maior acompanhado, ebook*, Centro de Estudos Judiciários, Lisbon, p. 26.

If the acts were practiced after the announcement of the beginning of the proceedings, but before the record, they are void, but only after the final decision, and if they are considered harmful to the vulnerable adult (the prejudice reports to the moment of the practice of the act and not to the moment of the decision) (article 154(1)(b)).

Number 3 of this article also laid down that the accidental disability regime is applied to the acts prior to the notice of the beginning of the proceedings (article 257). The voidability of the business concluded before the notice of the beginning of the guardianship proceedings is, therefore, assessed on a case-by-case basis, in view of the existing circumstances in the moment of the conclusion. Therefore, in order for the act to be void, it is required that the individual was momentarily disabled, i.e., that in the moment of the practice of the act (when he/she issued the declaration of negotiations), he/she was unable to understand the extent of his/her act and/or of determining his/her will in accordance with a pre-understanding he/she may have had; secondly, it is required that that state of disability was known or notorious by the counterparty (and it will be when a person of normal diligence would notice it).

The period in which the action for annulment should be proposed only enters into force when the judgment is registered (article 154(2)). This reference is made for the case of the business concluded during the pendency of the guardianship proceedings.

Regarding this norm, it is important to recall the solution presented in article 153(2), i.e., the application of articles 1920- B and 1920-C.

Pursuant to article 156, the adult may, foreseeing an eventual need for guardianship, conclude a mandate for the management of his/her interests, with or without powers of representation (1). Foreseeing that, in the future, the person will need guardianship measures (as it may happen in cases of diagnosis of degenerative diseases), he/she, still perfectly capable, may choose a representative for the guardianship. The mandate follows the general regime and specifies the rights involved and the scope of the eventual representation, as well as any other elements or conditions of exercise, being freely revocable by the principal (2). In the moment the guardianship is decreed, the court uses the mandate, in whole or in part, and takes it into consideration for the definition of the scope of protection and appointment of the guardian (3).

The court may terminate the mandate when it is reasonable to assume that the will of the principal would be to revoke it (4).

The autonomy of the guardianship beneficiary should be here, once again, safeguarded. But, as Mafalda Miranda Barbosa affirms, the 'autonomy of the will is not absolute here'. The judgement of guardianship related to the principal makes the mandate expire, according to the provisions of article 1175, from the moment in which it is known by the representative or when no losses may result from the expiry for the principal or his/her heirs (2). The death of the principal or the judgement of guardianship related to him/her, does not make the mandate expire when it has also been granted in the interest of the representative or of a third party (1).

On the other hand, being the court able to harness the mandate content, as much as possible, steering it towards the definition of the scope of protection and for the election of a guardian, the judge does not have to lean in to what is determined in it, being able to go beyond the powers granted to the representative by the mandate[49].

In article 155, a periodic review of the adult protection regime measures is foreseen: the court reviews the guardianship measures in force according to the frequency indicated in the judgement and, at least, every five years.

As determined in article 149, and resulting from the mentioned review, the guardianship terminates or is modified according to a judicial decision that recognises the termination or the modification of the causes that may justify it (1).

The effects of the decision may retroact to the date in which the termination or modification mentioned in the previous number is verified (2).

The guardian or any other person mentioned in article 141(1)(3), including the person concerned, may also request the termination or modification of the guardianship.

Conclusion and critical reflection

The publication and the entry into force of the Law no. 49/2018, of 14 August, which creates the legal adult protection regime and eliminates the interdiction and inability assumptions, established a new regime, which aims to protect vulnerable adults, due to health, disability or behaviour reasons, who are not able to fully, personally and consciously exercise their rights and fulfil, in the same terms, theirduties. The adults in these conditions benefit from guardianship measures foreseen in the Civil Code.

The maintenance of the capacity to exercise rights is assumed by the person who resorts to a guardianship measure. These are support measures for the person with disabilities based on his/her self- determination.

The adult protection regime aims to ensure his/her welfare, his/her recovery, full exercise of all his/her rights and compliance with his/her duties, except the legal exceptions determined by judgement. The measure does not occur whenever its goal is ensured through the general duties of cooperation and assistance that should be considered. In addition to this idea of subsidiarity, the guardianship is also ruled by the principle of necessity, i.e., the guardianship shall be limited to what is necessary.

[49] M. M. Barbosa (2018), *Maiores acompanhados – primeiras notas depois da aprovação da Lei n.º 49/2018, de 14 de agosto*, Gestlegal, Coimbra, pp. 59 and 60.

The situation of the persons with impaired capacity was traditionally treated in a protection perspective. It should be mentioned, in the current regime, the respect for the principle of private autonomy and for the will of the guardianship beneficiary. In addition to the guardianship being requested by the person concerned (article 141), the guardian, who is appointed by the court, may be chosen by the person concerned or by his/her legal representative.

The respect for private autonomy is also included in article 156, where the possibility of a person concluding a mandate for the management of his/her interests is foreseen, anticipating an eventual need for guardianship.

The possibility of the vulnerable adult to act autonomously will depend on the configuration the judge establishes for the specific case and the measure adopted. In any case, and responding to the principles of the CRPD, the current regime assumes that the beneficiary has the negotiating capacity to conclude strictly personal business and to take care of his/her personal life, exercising, by proper means, his/her personal rights. Therefore, article 147 determines that the exercise of personal rights and the celebration of the business of everyday life by the person concerned are of free will, unless otherwise provided for by law or judicial decision.

The regime presents a broad flexibility, allowing that the judge may define the most appropriate model for the beneficiary.

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Conflict of Interest

No conflict of interest.

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