

# Planning the Future of a Disabled Person: Civil Law Solutions?<sup>1</sup>

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If the disabled person wants to plan, guarantee and design a patrimonial strategy to safeguard future needs, how does the Law respond? Which are the legal instruments one can resort to in order to anticipate or organize mechanisms able to meet the special requirements of a disabled person? This paper aims to analyse this problem, making a connection with the Rule of Law.

**Keywords:** rule of law, civil Law, disability, legal capacity, Portuguese accompanied adult regime, autonomy, self-determination.

## Neįgaliojo ateities planavimas: civilinės teisės sprendimai?

Kaip reaguotų įstatymas neįgaliajam panorėjus planuoti, garantuoti ir sukurti patrimonialinę strategiją siekiant apsaugoti būsimus poreikius? Kokiomis teisinėmis priemonėmis galima naudotis, norint numatyti ar organizuoti mechanizmus, kurie patenkinėtų specialiuosius neįgaliajų poreikius? Straipsnyje siekiama išanalizuoti šią problemą, siejant su teisine valstybe.

**Pagrindiniai žodžiai:** teisinė valstybė, civilinė teisė, negalia, teisnumas ir veiknumas; Portugalijos suaugusiojo lydimos asmens režimas, autonomija, apsisprendimas.

## 1. Presenting the problem

Because Law aims to respond to specific needs of the society and must evolve as those needs intensify, a preliminary analysis of practical cases is necessary to objectively illustrate the problem in discussion before seeking for legal answers. When rethinking a legal institute or even a whole regime, it is imperious

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to focus on the real needs of society and consider the legal instruments available to fulfil those needs. Concerning the future of a disabled person, there are many issues to reflect upon. By analysing three typical and practical cases, in order to present the social and juridical problem under examination, it can easily be concluded that they very often demand the same kind of response.

It is nowadays possible, for instance, that an adult with full capacity is early diagnosed with a progressive and degenerative disease. This person knows that, in a short/medium-term, will probably lose some faculties (partly or in full) and, therefore, want to self-programme his/her future. This person wants, in anticipation of future needs, to self-organize his/her own assets, establish property management guidelines and appoint a representative to fulfil this assignment, for example. A second example may be a family worried about the future of a disabled child. These parents know that, fortunately, it is today very likely that this child will live for many years, despite having special needs and requiring greater financial resources in order to guarantee a life with full dignity. These parents' major anxiety is that they cannot support their child forever and want to find the answer to the question: "how will it be when I am no longer here?". Consequently, this family needs legal instruments to primarily guarantee the child's future patrimonial safeguard. They do not want to rely on State aid only, but to dynamically create the conditions to empower their disabled relative. Finally, the protection and dignity of the elderly is a broadly recognized major concern and an international-level priority. With the increase of average life expectancy comes a growth of some common degenerative diseases. It is therefore only natural that a person wants to foresee their future needs, self-determining the administration of their patrimony.

These three scenarios lead us to the same juridical challenge: if one wants to plan, guarantee and design a *patrimonial strategy to safeguard future needs*, how does the Law respond? Which are the legal instruments one can resort to in order to anticipate or organize mechanisms able to meet the special requirements of a disabled person? This paper aims to analyse this problem, making a connection with the Rule of Law.

Hence, before trying to find the answer, it is important to highlight that these legal mechanisms are intended to help not only persons with some kind of disability, but also with any type of disease or any other problem that affects the capacity to form, express or execute the person's will. Moreover, the following lines are limited to Private Law fields. More specifically, the patrimonial protection of persons with some kind of "discapacity"<sup>2</sup>. However, each and every legal solution in equation is aligned (or aims to be) with the international shift of standards and principles in this area<sup>3</sup>, particularly the Convention on the Rights of Persons with Disabilities, adopted in 2006 by the United Nations

<sup>2</sup> The Spanish legal system adopted the term *discapacidad*, currently considered more accurate than "incapacity" (about the concept of *discapacidad* and its evolution, see AZCANO, E. M. M. *El Patrimonio Protegido De Las Personas Con Discapacidad*, Madrid, La Ley Actualidad, 2011, pp. 125, 134, and GARCIA, I. S. *Discapacidad e incapacidad en la Ley 41/2003, de 18 de noviembre*, *Revista jurídica del notariado*, n° 52, 2004, pp. 231–271). For instance, the concept of *discapacidad* is concretized by the *Ley 41/2003, de 18 de noviembre (de protección patrimonial de las personas con discapacidad y de modificación del Código Civil, de la Ley de Enjuiciamiento Civil y de la Normativa Tributaria con esta finalidad)*, BOE n.º. 277, 19/11/2003 – article 2 defines persons with *discapacidad* for the purpose of the application of the Law. Defending the use of the term "discapacitade" in the Portuguese context, see GOMES, J. C. *Constitucionalismo, deficiência mental e discapacitade: um apelo aos direitos*. *Julgar*, Coimbra, Coimbra Editora, n.º 29 (maio-ago. 2016), pp. 119–151.

<sup>3</sup> That means, more precisely, that any legal solution concerning the protection of persons with disabilities must be aligned with an idea of proportionality and subsidiarity of judicial measures, a preference for supported decision-making solutions instead of substitutive ones, self-determination and maximum respect for the will and preferences of the adult concerned.

General Assembly<sup>4</sup> and Recommendation Rec(1999)4 (on principles concerning the legal protection of incapable adults), approved by the Council of Europe's Committee of Ministers<sup>5</sup>.

## 2. The usual response: a brief overview over the Portuguese Civil Code's new regime on legal capacity

When a person lacks full capacity to form, express and/or execute their will<sup>6</sup>, the usual response of domestic legal systems is based on the adoption of judicial measures. These measures, always decreed by a court, can sometimes limit adults' legal capacity to act<sup>7</sup>. This limitation may be more or less intense. Some countries have judicial measures only intended to support and monitor the person's special needs, without replacing them in the decision-making process. Across Europe, several countries have either recently reviewed their domestic legislation regarding legal capacity or are still working on the modification of their civil code's regime in this subject<sup>8</sup>.

Zooming in to the Portuguese legal system, it is pertinent to analyse the recent evolution<sup>9</sup> towards the

<sup>4</sup> Article 1 of the Convention 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" (emphasis added). Concerning patrimonial protection, it is very important to mention Article 12 ("Equal Recognition before the Law"), paragraph 5: "States Parties shall 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 Convention promoted a real shift of standards on legal capacity issues, encouraging measures that respect the rights, will and preferences of the person involved, like supported decision-making solutions (based only on assistance and advice, instead of substitution).

<sup>5</sup> See, more specifically, Principle 8 ("Paramourncy of the interests and welfare of the adult concerned"), paragraph 3: "This principle also implies that property of the incapable adult should be managed and used for the benefit of the person concerned and to secure his or her welfare".

<sup>6</sup> It is important to separate these three manifestations of the person's will, since it is possible, for instance, that the disabled person only needs help in the execution of his/her intentions, but is perfectly able to freely and fully form his/her will. That is why a person may need „accompaniment on the execution, accompaniment on communication or accompaniment on the formation of the will“, as maintained by the Portuguese National Ethics Council for the Life Sciences ("Conselho Nacional de Ética para as Ciências da Vida" – CNECV), Opinion no. 102 / CNECV / 2018, on the proposal of law no. 110 / XII / 3, Rapporteurs Jorge Costa SANTOS and Rita Lobo XAVIER. Available at <<http://www.cnecv.pt/pareceres.php>>.

<sup>7</sup> Relating legal capacity with the right to access to justice, from the perspective of the Convention on the Rights of Persons with Disabilities, see BEQIRAJ, J.; McNAMARA, L.; and WICKS, V. *Access to justice for persons with disabilities: From international principles to practice*, International Bar Association, October 2017. Available at <[https://www.academia.edu/36801664/Access\\_to\\_justice\\_for\\_persons\\_with\\_disabilities\\_From\\_international\\_principles\\_to\\_practice](https://www.academia.edu/36801664/Access_to_justice_for_persons_with_disabilities_From_international_principles_to_practice)>. The Authors note that "Article 12 of the CRPD affirms that all persons with disabilities have full legal capacity. However, persons with disabilities, including those with physical, mental, intellectual or sensory impairments, are 'the group whose legal capacity is most often denied in legal systems across the globe'".

<sup>8</sup> See, for a comparative view on decision making and legal capacity in dementia, DIAZ, A.; *et al. Dementia in Europe yearbook 2016: decision making and legal capacity in dementia*, Luxembourg, Alzheimer Europe, 2016. Available at <<https://www.um.edu.mt/library/oar/handle/123456789/27732>>. The Authors point out that "Traditionally, there have been two models of deprivation of legal capacity, namely full (or plenary) guardianship and partial guardianship. Under a full guardianship order, the person would be deprived of all his/her rights to self-determination and the guardian is granted comprehensive decision-making authority over an individual's financial affairs or personal care or both. <...> In the case of partial guardianship, the powers and duties that are granted to the guardian are limited. A person under partial guardianship retains some rights depending on his/ her level of capacity. Still, there are differences in these partial systems, as in some cases, the judge has flexibility to decide, on a case by case basis, from which rights the individual is deprived or needs assistance for" (p. 39).

<sup>9</sup> For a detailed analysis on demographic, social and legislative developments in the context of disabilities (and legal capacity) both from the Portuguese perspective and a comparative view, see CORDEIRO, A. M. Da situação jurídica do maior acompanhado: estudo de política legislativa relativo a um novo regime das denominadas incapacidades dos maiores. *Revista de Direito Civil*, Lisboa, 3 n.º 3 (2018), pp. 473–553.

acceptance of the new paradigm promoted by the Convention on the Rights of Persons with Disabilities: in fact, in this current year of 2019, the Portuguese Civil Code suffered a profound, long-awaited<sup>10</sup> and claimed change on legal capacity. It is said to be the major reform on the General Theory of Civil Law since the approval of the Code in 1966<sup>11</sup>.

Law 49/2018<sup>12</sup> changed the Portuguese Civil Code's incapacity framework entirely. Until a recent past, the Portuguese "solution" for vulnerable adults was based on two outdated and inflexible legal figures: "interdição" (*interdiction*) and "inabilitação" (*inabilitation*)<sup>13</sup>. The person declared "interdita" was legally treated as a minor and could not celebrate contracts or any legal transactions on their own (personally and spontaneously) without a legal representative replacing them in that task. The measures decreed by the court were mostly "all or nothing" measures. The person's assets were passively controlled and preserved by the guardian and the legal acts of the "interdito" (when performed alone, without the legal guardian) were considered void, with very few exceptions.

The reworded Code, now according to Law 49/2018, replaces both figures – "interdição" and "inabilitação" – with the *accompanied adult regime* ("regime do maior acompanhado"). The legal response is now called *accompaniment* ("acompanhamento") and is seen as a benefit.

Explaining who can benefit from an accompanied adult measure, the new redaction of article 138 of the Portuguese Civil Code states that: "The person who is unable, for reasons of health, disability or behaviour, to fully, personally and consciously exercise his or her rights or to fulfil his or her duties, shall benefit from the accompanying measures <...>". It is obviously an open clause and there are no predetermined causes that might justify the decree of the measure<sup>14</sup>. The measure may be applied to any person who is unable to fully exercise their rights or to fulfil their duties due to any reason related to health, disability or even behaviour.

*Accompaniment* remains – of course – an exclusively judicial measure. Since it may involve a limitation of the person's legal capacity (not necessarily, however), a legal proceeding is required. Only a judge can decide what measure is to be applied to each case. There is no "accompanied adult" without a judicial sentence (articles 891 to 904 of the Portuguese Civil Procedural Code).

When *accompaniment* is requested to the court by someone legitimated<sup>15</sup> to start the legal procedure, the judge may conclude that no measure is to apply to the case. Even if there is actually a situation of diminished capacity, the court shall not decree any kind of measure if that measure is not necessary. In fact, one of the main guidelines of the new regime is the *subsidiarity principle*: the accompaniment

<sup>10</sup> See, from one of the first Portuguese Authors standing for the legal reform on this subject and a main work on legal capacity, ALVES, R. G. Alguns aspetos do instituto da interdição. *Revista da Faculdade de Direito da Universidade Católica Portuguesa, Direito e Justiça*, Lisboa, Vol. 9, Tomo 2, 1995, pp. 131–168.

<sup>11</sup> See MONTEIRO, A. P. Das incapacidades ao maior acompanhado – Breve apresentação da Lei n.º 49/2018. *O novo regime do maior acompanhado* [e-book], CEJ, Lisboa, feb. 2019, p. 33. Available on: <[http://www.cej.mj.pt/cej/recursos/ebooks/civil/eb\\_Regime\\_Maior\\_Acompanhado.pdf](http://www.cej.mj.pt/cej/recursos/ebooks/civil/eb_Regime_Maior_Acompanhado.pdf)>.

<sup>12</sup> Lei n.º 49/2018, de 14 de agosto, Cria o regime jurídico do maior acompanhado, eliminando os institutos da interdição e da inabilitação, previstos no Código Civil, aprovado pelo Decreto-Lei n.º 47 344, de 25 de novembro de 1966. *Diário da República*, 1st Serie, n.º 156, 14th August 2018, pp. 4072–4086. ELI: <<http://data.dre.pt/eli/lei/49/2018/08/14/p/dre/pt/html>>. The new Law entered into force on 11<sup>th</sup> February 2019>.

<sup>13</sup> The two institutes were regulated on articles 138 to 156 of the Civil Code (version before 11<sup>th</sup> February 2019).

<sup>14</sup> The previous regime listed the causes that could lead, for example, to "interdição": mental disorder, deafness-muteness and blindness.

<sup>15</sup> The persons entitled to apply for an accompaniment measure are the beneficiary (the adult with diminished capacity) himself and his/her spouse, unmarried partner or a successor (relative), all of them *with the consent* of the adult concerned. Only the public prosecutor can initiate the accompaniment procedure and ask for a judicial measure without the authorization of the beneficiary (article 141 of the Portuguese Civil Code). However, when the spouse, unmarried partner or successor are not able to obtain the consent of the concerned adult because he or she cannot give it freely and consciously, the court may supply the beneficiary's authorization.

measure is only admissible when its purpose is not safeguarded by the general duties of cooperation and assistance proper to the case (article 140, 2 of the Portuguese Civil Code), namely, duties proper to any family situation. When the adult's family provides the required support, the court can decide that no judicial measure is necessary.

The accompaniment (measure) is “limited to what is necessary” to ensure the wellbeing, recovery, full exercise of rights and fulfilment of obligations of the beneficiary (article 140 of the Portuguese Civil Code). The court is allowed to choose any kind of measure that suits the needs of the person concerned. This can be either the administration of assets or the appointment of a legal representative<sup>16</sup>, as well as mere general advice or the follow-up of hospital treatments. It is a *tailor-made* measure. But it is imperious that the court only decides what is really necessary, by replacing what is lacking in the beneficiary's situation and context. As said, if the family or the person concerned have already assured their special needs, the court should not interfere. Because the person's situation may evolve, article 155 of the Portuguese Civil Code states that the accompanying measures shall be reviewed by the court at least every five years.

The new regime has taken a step forward concerning the protection and respect of the person's will. First, it must be the beneficiary himself to apply to the court for the measure<sup>17</sup>. Furthermore, ideally, the accompanier must be chosen by the accompanied (article 143 of the Portuguese Civil Code). The beneficiary of the measure must always be personally heard by the court: a personal and direct hearing of the adult concerned is necessary (if needed, the judge must even move to the place where the beneficiary is)<sup>18</sup>. Finally, and still concerning the person's preferences and will, the beneficiary may resort, in anticipation of a future need, to a mandate (article 156 of the Portuguese Civil Code), with or without powers of representation: in that case, the court must respect that mandate as much as possible.

### 3. The Rule of Law and the new paradigm

The Rule of Law implies<sup>19</sup>, among many other things, protecting people – including persons with disability, the elderly and the ones who are fighting a severe disease – and assuring their fundamental rights. The Rule of Law guarantees real inclusion.

<sup>16</sup> The legal consequence for the acts concluded by the adult (beneficiary) against or disrespecting the measure decreed by the court is still the invalidity of those acts (article 154 of the Portuguese Civil Code).

<sup>17</sup> As stated by the said article 141 of the Portuguese Civil Code.

<sup>18</sup> Article 897 of the Portuguese Civil Procedural Code.

<sup>19</sup> Defining the Rule of Law is a complex mission. This paper focus more on what the Rule of Law implies concerning non-discrimination, access to justice, inclusion and other rights and guarantees, from the “incapable” adults perspective. “While the normative foundation of the rule of law in the UN framework originates from the Preamble of the UN Charter, the precise meaning of “the rule of law” remains contested among the membership. In 2004, the Secretary-General defined the rule of law as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights and standards. <...> Not all States, however, concur with the Secretary-General's definition, and to date, there is no universally agreed understanding on the definition and elements of the rule of law” (ARAJÄRVY, N. The Rule of Law in the 2030 Agenda. *Hague J Rule Law*, 2018, 10, pp. 187–217, p. 189. DOI: <<https://doi.org/10.1007/s40803-017-0068-8>>. For a “meeting point between disability studies and criminology”, see LUNDBERG, C.; SIMONSEN, E. Disability in court: intersectionality and rule of law. *Scandinavian Journal of Disability Research*, 17(S1), 2017, pp. 7–22. DOI: <<http://doi.org/10.1080/15017419.2015.1069048>>. “Rule of law represents an underlying framework of rules and rights in which no citizen, including government, is above the law. Laws protect fundamental rights, justice is accessible to all and legal protection implies that the individual is protected from encroachment or arbitrary action by the government or other authorities (Echhoff and Smith 1997). There are several principles pertaining to legal protection within the criminal justice system. One should be able to defend one's rights, not be deprived of the opportunity to take part in one's own court case, and also have the possibility of submitting an appeal and have cases re-examined. These principles are both an ideal and a practical guideline in several aspects of the criminal justice systems in liberal democracies in Western Europe and the USA. In a wider sense, legal protection also means that laws and the enactment of them should be in line with general human rights (Kjønstad and Syse 2005), such as the Convention on Rights for People With Disabilities.”)

But how does the Rule of Law work when it comes to inclusion, equality and fundamental rights of vulnerable persons? It results, *inter alia*, in two commands.

On the one hand, it means that every person lacking full capacity to form, express or execute their will must be able to benefit from a judicial measure tailored for their special needs. In other words, access to justice<sup>20</sup> is imperious. But, on the other hand, it also means that it is for the Law to provide legal mechanisms and tools for these persons to use to self-programme and self-regulate their special necessities. In other words, they must have *efficient legal institutes available they can call upon* to fulfil their needs and to pacify their anxieties, while simultaneously expressing their autonomy and exercising their remaining capacity.

The Rule of Law dictates that the answers we seek are provided *by the Law*. Consequently, and reconsidering the three examples mentioned before, can a disabled person (and their relatives) find suitable instruments in the Law to guarantee future patrimonial protection?

Thinking, for instance, about the Portuguese case, presented in the previous section, we can say that the first idea – Rule of Law meaning access to courts and judicial tailored measures – appears to be going in the right direction. The new regime, at least, improved autonomy and highlighted family aid.

But the second idea requests further improvement.

The new paradigm – both on a domestic and international level – is based on the principles of necessity and subsidiarity of judicial measures, as briefly seen. The measures decreed by the court are many times the necessary remedy, but they must not be the only one available. This point leads us to the next question: what remedies exist or can be adopted by domestic legislations to complement (or even substitute) judicial measures?

## 4. Planning the future and ensuring the present: Civil Law solutions?

### 4.1. Autonomy and self-determination

Going back to the three practical examples referred in the beginning of this paper, and bearing in mind what was said about the recent developments in this area and the role of the Rule of Law as a basis to every possible equation, it is now time to reflect upon the following: how can Civil Law help find solutions to the problem in analysis, *besides* the decree of judicial measures? As said, judicial measures on legal capacity – more or less intense, depending on the limitations or difficulties the adult faces when forming, manifesting or executing their will – are extremely important and sometimes (the “hard cases”) the only true remedy. But if these judicial measures and legal capacity modifications are now seen as subsidiary and strictly restricted to what is necessary, what other (juridical) mechanisms can be adopted?

<sup>20</sup> Of course, access to justice has many ramifications and is not limited to tailored-made measures. Focusing on access to justice and what it means to persons with disabilities, from the Convention perspective, see ORTOLEVA, S. Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System. *ILSA Journal of International & Comparative Law*, Vol. 17, No. 297, 2011, pp. 282–317: “Access to Justice” is a broad concept, encompassing peoples’ effective access to the systems, procedures, information, and locations used in the administration of justice. People who feel wronged or mistreated in some way usually turn to their country’s justice system for redress. In addition, people may be called upon to participate in the justice system, for example, as witnesses or as jurors in a trial. Persons with disabilities have often been denied access to fair and equal treatment before courts, tribunals, law enforcement officials, prison systems, and other bodies that make up the justice system in their country because they have faced barriers. Additionally, persons with disabilities have been discriminated against in terms of attaining positions as lawyers, judges, and other officials in the justice system” (p. 284).

The area where the court does not interfere<sup>21</sup> is left to autonomy and self-determination. The person concerned, and quite often the person's family (or any other person concerned with the disabled's future), must be able to design their own solutions, making use of the legal instruments available in order to fulfil their specific needs (these specific needs vary from case to case).

For instance, the person mentioned above in the first practical example, early diagnosed with a degenerative disease, wants to self-organize their patrimony, choose who will manage it in the future and how that management can be directed to their requirements. They want to plan solutions for a short-medium term capacity decrease. As long as the person has the necessary remaining capacity to celebrate contracts and enter into a legal transaction of that nature, there is no reason to misuse that capacity.

In the second example, we mentioned the parents worried about the future of their disabled child: they want to be sure that their child is guaranteed a certain income and that someone reliable will take care of his/her assets and needs in the future.

In the third practical case, the person who simply wants to prevent a reduction of capacity in old age seeks to celebrate a contract able to plan a future vulnerability. This last person wants, mainly, security.

## 4.2. Civil Law legal instruments

### 4.2.1 Portugal

Looking specifically at the Portuguese legal framework, it is possible to consider some legal instruments able to respond to the highlighted need. These instruments are based on the autonomous initiative of private persons, seeking for a contract that suits their requests.

First of all, it must be emphasized that the Portuguese Civil Code finally has a preventive figure named “Mandato com vista ao acompanhamento” (mandate<sup>22</sup> for accompaniment)<sup>23</sup>. The new redaction of article 156 of the Code states that the adult may, preventing any need for “accompaniment”, celebrate a mandate for the management of their interests, with or without powers of representation. The article also states that when an accompanying measure is decreed, the court shall use the mandate and take it into account when defining the degree of protection and designating the accompanier.

It is also very common to resort to private insurance products in order to prevent a future “incapacity” or a future necessity of a relative (both self-insurance and insurance on behalf of a third party, such as life-insurance)<sup>24/25</sup>.

<sup>21</sup> As highlighted before, this paper only focuses on private law solutions. State Aid, social welfare, public law and administrative remedies, institutionalization, etc., are as important as private instruments, but then again not included in this analysis.

<sup>22</sup> About the importance of the mandate in this context of diminished legal capacity, see VITOR, P. T. *Administração do Património das Pessoas com Capacidade Diminuída*, Coimbra, Coimbra Editora, 2008.

<sup>23</sup> Since it is a “new-born institute”, there are still some doubts about its application. However, it is an important step towards the concretization of the new paradigm.

<sup>24</sup> See XAVIER, M. R. L. *Planeamento Sucessório e transmissão do património à margem do Direito das Sucessões*, Porto, Editora Universidade Católica, 2016, p. 152.

<sup>25</sup> Of course that, in this field, one must consider and take into account the anti-discrimination rules of people with disabilities or aggravated health risk, namely Lei 46/2006, of 28 August. ELI: <<https://data.dre.pt/eli/lei/46/2006/08/28/p/dre/pt/html>>, and the provisions of article 15 Decreto-lei 72/2008, of April 16, commonly referred to as the “Lei do Contrato de Seguro”. ELI: <<https://data.dre.pt/eli/dec-lei/72/2008/p/cons/20150909/pt/html>>.

The Portuguese Civil Code regulates life rent contracts, such as “renda perpétua”<sup>26</sup> and “renda vitalicia”<sup>27</sup>, that, despite not being much used in practice, can provide some solidity for the future. The legal subjects can use one of these typical contracts regulated by Civil Law or, of course, create and design an atypical contract (for instance, a contract in favour of third parties): private autonomy is a main principle of contract law. However, the “imagination” of the contracting parties is here somehow limited by other private law principles, such as rights *in rem* typicity.

Even the creation of a foundation, having the scope of promoting the wellbeing of the disabled person, can be considered<sup>28</sup>. Once again, though, we may find some severe legal obstacles<sup>29</sup>.

The instruments and figures listed are not directly designed and thought specifically for persons with some kind of disability or severe disease (except for the “Mandato com vista ao acompanhamento”, of course). Yet, they can (sometimes) be adapted to those situations.

#### 4.2.2. Other European legal systems

But there are other possible legal instruments concerning the patrimonial protection of persons with diminished capacity adopted by other domestic legislations (some of them designed to *directly* respond to the question this paper began with): instruments based on autonomy and self-regulation.

For instance, the adult from the first practical case (the person knowing that, in a short/medium-term, will lose some of their faculties partly or in full) could set up a trust (a self-funded special needs trust, for instance<sup>30</sup>), if their domestic legislation recognises the institute (Common Law Systems). The flexibility of the figure allows a conformation of the asset and its administration to the special needs of the beneficiary (which is absolutely relevant, because each disability demands a different intervention), and the trustee has sufficient room of manoeuvre to act (he is not limited by the constant need for judicial authorization and can manage the assets in the way that best suits the trust scope). The cautious person from the third case could also set up a trust in order to safeguard their near old age (and eventual diseases often related).

The parents or relatives from the second practical case, were they in Spain, could create a *patri- monio protegido (de las personas con discapacidad)* according to *Ley 41/2003, de 18 de noviembre*<sup>31</sup> and form a protected asset with a favourable tax policy and a specially controlled administration<sup>32</sup>. The beneficiary of the asset must be a person with *discapacidad*<sup>33</sup>. The same *Ley 41/2003, de 18 de*

<sup>26</sup> Article 1231 of the Civil Code describes the perpetual rent contract as the one in which a person alienates in favour of another some amount of money, other movable or immovable thing or a right, and the second is bound, *without limitation of time*, to pay as rent a certain amount of money.

<sup>27</sup> It is a contract in which a person alienates in favour of other an amount of money, or any other movable or immovable thing, or a right, and the second has to pay a certain amount of money or other fungible thing *during the life* of the transferor (Article 1238 of the Civil Code).

<sup>28</sup> See Lei n.º 24/2012, of 09 July. ELI: <<https://data.dre.pt/eli/lei/24/2012/p/cons/20150910/pt/html>>.

<sup>29</sup> The Foundation must proceed a social interest and is not designed for the protection of a single and particular person (even if that person is a disabled or vulnerable one).

<sup>30</sup> Because this is an institute where autonomy prevails, “classifications” are difficult. But, at least, can be here referred the Special Needs Trust, the Spendthrift Trust and the Protective Trust for the Disabled.

<sup>31</sup> *Ley 41/2003, de 18 de noviembre, de protección patrimonial de las personas con discapacidad y de modificación del Código Civil, de la Ley de Enjuiciamiento Civil y de la Normativa Tributaria con esta finalidad*, BOE n.º 277, de 19/11/2003. ELI: <<https://www.boe.es/eli/es/l/2003/11/18/41/con>>.

<sup>32</sup> About this protected asset (constitution, beneficiaries, administration, etc.), see AZCANO, E. M. M. *El Patrimonio <...>, op.cit.*, and GARCIA, I. S. *Protección patrimonial de las personas con discapacidad – tratamiento sistemático de la ley 41/2003*, Madrid, Iustel, 2008.

<sup>33</sup> See, *supra*, foot-note n. 3 for the term *discapacidad* and its utility.



*noviembre* also regulates other useful figures to protect persons with *discapacidad*, such as the *auto-tutela*<sup>34</sup>, preventive mandates and some relevant modifications on succession law<sup>35</sup>, among others. In Italy<sup>36</sup>, they could call upon the *atti di destinazione (destinati alla realizzazione di interessi meritevoli di tutela riferibili a persone con disabilità)* – article 2645-ter of the Italian Civil Code (Regio Decreto 16 marzo 1942, n. 262<sup>37</sup>), allocating registrable goods to the protection of this specific worthy interest<sup>38</sup>.

This very brief overview intends to highlight that it is possible (and desirable) to think about new legal instruments, based on autonomy, in order to protect the vulnerable person and guarantee their patrimonial stability in the future.

## Conclusions

The Rule of Law is a precondition of sustainable and solid inclusion of persons with disabilities. Starting with this premise – and for now, based on the brief analysis this paper aims to do – it is (so far) possible to draw some preliminary conclusions:

- 1) The new international paradigm on legal capacity restriction and protection of vulnerable adults is based on self-determination and respect for the will of the adult concerned; non-substitutive measures are desirable and access to property must be guaranteed – among other acts, this guidelines result from the Convention on the Rights of Persons with Disabilities, adopted in 2006 by the United Nations General Assembly and Recommendation Rec(1999)4 (on principles concerning the legal protection of incapable adults), approved by the Council of Europe’s Committee of Ministers.
- 2) According to the new paradigm, many countries have adapted or are adapting their domestic legislation on legal capacity and disabled persons’ protection. For instance, the Portuguese Civil Code suffered a profound change on the legal capacity framework when Law 49/2018 entered into force. This Law brought to light a flexible solution, inaugurating the *accompanied adult regime* (“regime do maior acompanhado”). The legal response is now called *accompaniment* and seen as a benefit to the adult concerned.
- 3) The Rule of Law and its connection to vulnerable persons’ protection works in many different ways. Of course, it means that every person lacking full capacity to form, express or execute their will must be able to benefit from a judicial measure tailored for their special needs (a corollary of access to justice). However, it also means that those persons must have efficient legal institutes available which they can call upon, at the same time expressing their autonomy and exercising their remaining capacity.
- 4) Judicial measures on legal capacity – more or less intense, depending on the severity of the case – are vital and sometimes the most accurate response. But the area where the court does not interfere (sometimes, because the court must not interfere) is left to autonomy and self-determination.

<sup>34</sup> It is a notarial act that allows the subject that is still able to regulate, for the future, some personal and patrimonial aspects in anticipation of a future incapacitation.

<sup>35</sup> See ALABART, S. D. La sustitución fideicomisaria sobre el tercio de legítima estricta a favor de hijo o descendiente incapacitado judicialmente (art. 808 Cc. reformado por la Ley 41/2003, 18 de noviembre). *Homenaje al profesor Lluís Puig i Ferriol*. CAMPOY, J. M. A.; LLARI, M. E. A. (Coord.), Vol. 1, Madrid, Tirant lo Blanch, 2006, pp. 1045–1062.

<sup>36</sup> The Italian legal system also recognizes the trust as an instrument suitable for protecting persons with disabilities. See AAVV. *Atti di destinazione e trust*. VETTORI, G. (Coord.), Padova, CEDAM, 2008.

<sup>37</sup> U Serie Generale n.79 del 04-04-1942.

<sup>38</sup> See FRANCESCHINI, B. Atti di destinazione (art. 2645-ter c.c.) e trust, 2010. Available at <[http://www.notaiofranceschini.it/Atti-di-destinazione-\(art.-2645-ter-c.c.\)-e-trust.pdf](http://www.notaiofranceschini.it/Atti-di-destinazione-(art.-2645-ter-c.c.)-e-trust.pdf)>, and LUPOI, M. Gli atti di destinazione nel nuovo art. 2645-ter C.C., quale frammento di trust. *Rivista del Notariato*, Vol. LX, Marzo-april 2006, pp. 468–475.

- 5) Some Portuguese civil law legal institutes can be used in this specific field: yet, none of them (except for the new “Mandato com vista ao acompanhamento”) have been directly designed and created having in mind the situations of diminished capacity.
- 6) Other legal systems possess interesting instruments to solve the problems at discussion. Protected assets like trusts, special types of mandates, “autotutela” and succession law solutions, for instance.
- 7) The Rule of Law dictates that the answers we seek are provided *by the Law*. Legal instruments, based on autonomy, can – or maybe must – be developed by the civil law legislator, side by side with legal capacity judicial measures.

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### Planning the Future of a Disabled Person: Civil Law Solutions?

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#### S u m m a r y

This paper focuses on the problem of assuring the patrimonial future of a person with diminished capacity, from a private law point of view. To objectively illustrate the problem in discussion, the paper starts with a preliminary analysis of three practical cases, showing that legal subjects often search for legal instruments they can call upon to fulfil their necessities. Many often the response is the adoption of judicial measures on legal capacity, therefore, after a practical approach, the analysis proceeds with a reference to the international shift of standards in this area and, more precisely, a brief overview of the Portuguese Civil Code’s new regime on legal capacity (“*regime do maior acompanhado*”). A connexion between the protection of persons with disabilities and the Rule of Law leads to the conclusion that it is desirable to think about civil law instruments, based on autonomy, in order to protect the vulnerable person and guarantee their patrimonial stability in the future, side by side (or even substituting) tailored-made judicial measures.

### Neįgaliojo ateities planavimas: civilinės teisės sprendimai?

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#### S a n t r a u k a

Straipsnyje nagrinėjama neįgalųjų interesų užtikrinimo problema privatinės teisės požiūriu. Siekiant iliustruoti aptariamą problemą, straipsnis prasideda trijų praktinių atvejų analize, parodančia, kad teisės subjektai dažnai ieško teisinių priemonių, kurių galėtų imtis, kad užtikrintų savo poreikius. Dažnai pasirenkamos su veiksmumu susijusios teisinės

priemonės, todėl, remiantis praktiniu požiūriu, analizė tęsiama atsižvelgiant į tarptautinius šios srities standartų pokyčius ir pateikiant trumpą Portugalijos civiliniame kodekse įtvirtinto naujo „regime do maior acompanhado“ teisės instituto apžvalgą. Ryšys tarp neįgaliųjų interesų apsaugos ir teisinės valstybės leidžia daryti išvadą, kad pageidautina galvoti apie autonomija grindžiamas civilinės teisės priemones siekiant apsaugoti pažeidžiamą asmenį ir užtikrinti jo padėties stabilumą ateityje greta (ar net jas pakeičiant) specialiai pritaikytų teisminių priemonių.