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AGING AND ITS CARE

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INTRODUCTION

One of the most visible and progressive demographic changes is the aging of the most developed populations. This aging is linked to several circumstances and causes: changes in family size and functions, increased life expectancy, better socio-health and economic conditions. Without denying the positive effects of increasing life expectancy, aging is also surrounded by dangers and problems, such as those derived from degenerative diseases, both physical and mental. For the purposes of this communication we are interested in highlighting some significant aspects: increase of people living alone and increase of services and devices to ensure greater personal autonomy in residential environments, in short, the need for care and support.

This article attempts to analyze the social consequences of the reform introduced by Law 8/2021 of June 2, which reforms the civil and procedural legislation for the support of people with disabilities in the exercise of their legal capacity and which highlights the importance of "curators" (Curatela), natural or legal persons, and Law 39/2006 on Dependency, which establishes various measures, resources and services to care for, assist and provide support to people with some dependency in the field of care and caregivers and the characteristics of the new professions or emerging professionals to provide this support and care.

STARTING POINT

On December 13, 2006, the United Nations approved the International Convention on the Rights of Persons with Disabilities (CRPDD), a treaty that introduces a new perspective on the rights of Persons with Disabilities (PWD).

The Convention, ratified by Spain in May 2008, introduces changes in the concept of disability and in the way it is treated. It states that people do not lose their capacity to act and that judicial incapacitation is not appropriate, but that this legal figure must be modified. The important thing is to provide support to people with limitations to compensate for their deficiencies or limitations.

Although changes have been taking place in Spanish legislation on disability, following the principles of the Convention, such as Law 26/2011, of August 1, 2011, on regulatory adaptation to the CRPDD or Royal Legislative Decree 1/2013, of November 29, 2013, approving the revised text of the General Law on the Rights of PWD and their social inclusion, it is not until this year 2021 when the issue of incapacitation and guardianship is addressed, adapting it to the provisions of the Convention, with the approval of Law 8/2021, of June 2, which reforms civil and procedural legislation to support persons with disabilities in the exercise of their legal capacity. As stated in the preamble (section III) of the Law, "*the pivotal element of the new regulation will be neither the incapacitation of those who are not considered sufficiently capable, nor the modification of a capacity that is inherent to the condition of the human person and, therefore, cannot be modified..... The central idea of the new system is to support the person who needs it*".

In this communication we will focus on the new procedure for the provision of support (previous procedure for modification of capacity or incapacitation) and how to meet the needs of people with disabilities, ensuring their rights and more specifically on the role of guardianship foundations and their future.

We intend to review the role that guardianship foundations, which since 1983 have assumed the different legal figures of incapacitation and guardianship, play and can play in the light of the changes of Law 8/2021.

CHANGES INTRODUCED BY LAW 8/2021

The new Law eliminates those articles of the CC of 1983 and the LEC that made reference to incapacitation and its procedures, which is suppressed, in accordance with the provisions of Article 12 of the Convention, to "*promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, as well as to promote respect for their inherent dignity*". Therefore, neither judicial incapacitation, nor guardianship or tutorship have any place from now on. But, as it is easy to understand, the suppression of this procedure and of these figures, does not change the situations of the persons who until now were protected through these figures.

This means that protection must continue to be a priority objective and that it will have to be provided in other ways or through other procedures in which judges will continue to play an essential role, since they will have to determine what and how this protection will be provided in the face of possible abuses or lack of protection.

The Law is clear and does not distance itself from the provisions of the Convention: People with any limitation, disability, illness that differentiates them from other people, will have to **receive the necessary supports** so that they can enjoy all human rights and fundamental freedoms. In other words, receiving care and support is a right of persons that must be protected by justice.

From now on, with the disappearance of incapacitation and guardianship, another figure based on care is given way to another figure based on care: **the guardianship**. If guardianship was based on the loss of the capacity to make decisions by oneself and for these to have legal validity, from now on, any person with a disability will have to be cared for (guardianship), attended or assisted so that any act he/she performs is covered by the support that another person (natural or legal) can provide.

The person who provides support and accompanies him/her is the "**curator**". "*The new regulation tries to attend not only to matters of a patrimonial nature, but also to personal aspects, such as those related to decisions about the vicissitudes of their ordinary life - domicile, health, communications, etc.*" (Explanatory Memorandum, section III).

According to the philosophy that inspires this legal change, the care, under the denomination of "**curatorship**" becomes the new and fundamental institution of protection, which in the first place supposes a support and accompaniment, but not an annulment, substitution or supplanting of the person with some limitations. Unlike the traditional concept of "curatorship", the new figure is not limited only to the patrimonial aspects, but to any other need of the person, that is to say, to those other characteristics that had been taken care of under the figure of "guardianship". "*The institution subject to a more detailed regulation is the guardianship, the main support measure of judicial origin for people with disabilities. The very meaning of the word curatorship -care-, reveals the purpose of the institution: assistance, support, help in the exercise of legal capacity; therefore, as a principle of action and in order to exclude as far as possible actions of a representative nature,* ***the curatorship will be, primarily, of an assistance nature. However, in those cases in which it is necessary, and only exceptionally, representative functions may be attributed to the guardian*** (this may be the case in some situations of people with mental illness or Alzheimer's disease or other pathologies associated with age, whose degenerative process is not comparable to other situations of people with intellectual disabilities). *The value of care, on the rise in today's democratic* *societies, has particular application in the exercise of guardianship. All persons, and especially persons with disabilities, require to be treated by others and by the public authorities with care, that is, with the attention required by their specific situation*" (Explanatory Memorandum, III).

It is not a mere change of terms or words, since from now on the emphasis is on human rights: it is "*a new and more accurate approach to reality, which will point out something that has long gone unnoticed: that people with disabilities have the right to make their own decisions, a right that must be respected; it is, therefore, a matter of human rights*" (Explanatory Memorandum, III).

CONCLUSIONS

The supports constitute the guarantee for any person to be able to fully exercise his or her rights. These supports are not concessions or gifts to be made by the signatory states; they are rights that must be guaranteed so that all people are considered equal. "*The central idea of the new system is that of support for the person who needs it, support that encompasses all kinds of actions: from friendly accompaniment, technical assistance in the communication of declarations of will, the breaking down of architectural barriers and all kinds of barriers, advice, or even the making of decisions delegated by the person with a disability. It should even be added that in situations where support cannot be given in any other way, and only in the face of this situation of impossibility, this may take the form of representation in decision-making*" (Statement of Reasons Law 8/2021).

The philosophy underlying all the articles of the CDPCD revolves around the term and concept of "supports". What is intended is that the responses to the limitations that people present are carried out in a personalized way, adapted and appropriate to the capabilities and possibilities of each person. The support should be adapted and oriented so that each person can achieve the objectives and possibilities proposed. The individualized response avoids the standardization of measures and their chronification.

Support must be adjusted or changed as situations change and goals are achieved. It is in this perspective where it makes sense to think of integral intervention models centered on people, from a vision that integrates quality of life, the guarantee of rights and personal circumstances.

The supports will be oriented to complete the deficits, to avoid or modify the social circumstances that prevent the development and exercise of rights with full capacity.

It is intended that the procedure, in full coherence with the requirements of the Convention, be able to "determine the supports", supports that may be of different nature: natural supports and formal supports.

The first level of support for people with limitations or deficits is to be found in the area of proximity and closeness, at the microsystem level; at this level are the family support, that of the neighbor, the friend or the person who, in short, acts as a referent in each case and situation. These supports can be foreseen and agreed upon by the persons themselves before they found themselves in the situation of deficit or limitation or by the families themselves, and expressed through formal acts before notaries; this is the case of living wills, of advance directives, foreseen in the legal system. These decisions made by the person with a disability, in which the types of support and the people who can or who want them to be provided can be expressed, can have legal significance. Such supports, decided by the person with disability himself, may be established either informally or in a documentary manner.

The second level, that of formal supports, i.e., those established in a regular, institutional or legal manner, is another level that requires different guarantees and controls. Entities and services that work in a specialized way with people who have limited capacities will have to adapt their processes and procedures to improve these limitations and provide the necessary support, through personalized and evaluated programs. But support should not only be limited to these entities, but also to the processes that the administrations should urge so that there is no discrimination for having a certain disability or impairment, when they have to go to establishments to process certain matters (health, administrative, labor, legal...).

In conclusion, Law 8/2021 establishes that the types of support measures, as established in Article 250, are those of a **voluntary nature**, established by the person with disabilities when he/she designates who should provide support and the scope of such support (generally before a notary public; they are the preventive powers and mandates and the self-guardianship)**, the de facto guardianship,** informal support measure and those dictated by the judicial authority for the protection of the person with disabilities such as **the guardianship and the judicial defense** which are formal support measures.

All this new legislation, applied to the world of care for the elderly, has an indisputable legal advantage: care for the elderly is not the responsibility of the family or certain organizations, but when situations of vulnerability or loss of faculties due to age-related detriment occur, care is judicially imposed through the classic figure of the guardian or conservator, which gives greater guarantee and security to people. Another thing is how this figure and its functions are exercised and contemplated. In order to understand the possible changes that may arise, it will be necessary to take into account what is already established in Law 39/2006 on the promotion of personal autonomy and care for dependent persons and the different services and support contemplated therein.

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