

Atención a la Dependencia de Personas Mayores en España*

Atenção à Dependência das Pessoas Idosas na Espanha *Attention to the Dependency of Elderly People in Spain*

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Resumen

El envejecimiento de la población ha provocado un aumento del número de personas mayores dependientes de cuidados. Tradicionalmente la asistencia y apoyo a las mismas se ha prestado en el ámbito familiar, pero los cambios sociales acontecidos, entre otros, la incorporación de la mujer al mercado de trabajo, que ha sido quien fundamentalmente ha prestado los cuidados a sus ascendientes, obliga al Estado a contar con marcos jurídicos adecuados y mecanismos financieros efectivos, para garantizar el derecho a la vida y a la dignidad en la vejez.

Palabras clave: derecho de cuidado y asistencia; dependencia; personas mayores.

Resumo

O envelhecimento da população tem provocado um aumento de idosos com dependência de cuidados. Tradicionalmente, a assistência e o apoio a eles têm sido prestados no âmbito familiar, mas as mudanças sociais ocorridas, como a incorporação das mulheres no mercado de trabalho, têm sido uma ação fundamental nos cuidados aos mais velhos, exigindo do Estado o desenvolvimento de quadros jurídicos adequados e mecanismos financeiros eficazes para garantir o direito à vida e à dignidade na velhice.

Palavras chave: direito ao cuidado e assistência; dependência; pessoas mais velhas.

Abstract

The aging of the population has caused an increase in the number of elderly people dependent on care. Traditionally, assistance and support for them has been provided within the family, but the social changes that have occurred, among others, the incorporation of women into the labor market, who have been the ones who have fundamentally provided care to their elders, require State to have adequate legal frameworks and effective financial mechanisms to guarantee the right to life and dignity in old age.

Keywords: care and assistance right; dependency; elderly people.

1 Introduction

In the Madrid International Plan of Action on Ageing and the Political Declaration, which were adopted at the Second World Assembly on Ageing in April 2002, it was already recognized in point I.7 that the fastest-growing group of people is that of the oldest old, namely those aged 80 years or over. While in the year 2000 their number reached 70 million, it was projected that in the next 50 years that figure would increase more than fivefold.

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With regard to care and support, whether provided by older persons or directed towards them, it is mainly undertaken by the family or the community. When those providing assistance are older persons, measures must be taken to support them; and when they are the recipients of care, it is necessary to establish and strengthen human resources as well as health and social infrastructures as an essential means to achieve effective services of prevention, treatment, care, and support. This system of care must be backed and reinforced by public policies as the proportion of the population in need of such assistance increases.

In the last two decades, community care and ageing within one's own community have become a goal of many governmental policies—perhaps due to financial motives and the assumption that families will provide most of the care—since community care is expected to be less costly than residential care. It is still asserted that if sufficient help is not provided to family members responsible for caring for older persons, they may become overwhelmed by the burden. Moreover, even when structured systems of community care exist, they often lack sufficient capacity due to limited resources and poor coordination. Therefore, residential care may be the preferable solution for ill elderly individuals and those caring for them. Thus, it would be appropriate to have various economically accessible solutions available, ranging from family-based to institutional care.

The Inter-American Convention on the Protection of the Human Rights of Older Persons (2015), aiming among other things to integrate and prioritise the issue of ageing in public policies, and to allocate and manage human, material, and financial resources to ensure the proper implementation and evaluation of special measures, recognises in Article 6 the right to life and dignity in old age. States Parties shall adopt all necessary measures to ensure that older persons enjoy the effective right to life and the right to live with dignity in old age until the end of their days.

Article 12, concerning the rights of older persons who receive long-term care services, states that States Parties must design support measures for families and caregivers through the introduction of services for those who perform caregiving activities for older persons, taking into account the needs of all families and other forms of caregiving, as well as ensuring the full participation of the older person, respecting their opinion^{1,2}.

The Decade of Healthy Ageing 2020–2030, declared by the United Nations General Assembly in December 2020, constitutes the main strategy for building a society for all ages. It is about “adding life to years,” since the opportunities that arise with increased longevity depend largely on healthy ageing. However, if these additional years are dominated by poor health, social isolation, or dependency on care, the consequences for older persons

¹ Available as of 2-9-24 at: <https://social.un.org/ageing-working-group/documents/mipaa-sp.pdf>

² Available as of 2-9-24 at: https://www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_A-70_derechos_humanos_personas_mayores.asp

themselves and for society as a whole are significantly more negative. The Decade of Healthy Ageing focuses on four areas of action:

1. changing how we think, feel, and act regarding age and ageing;
2. ensuring that communities foster the capacities of older persons;
3. delivering integrated, person-centred care and primary health services that respond to the needs of older persons; and
4. ensuring access to long-term care for older persons who need it.

It must be noted, in relation to this last area of action, that as individuals reach a point in life where they can no longer care for themselves without support and assistance, they require access to quality care, which is essential for preserving their functional capacity, enjoying basic human rights, and leading a life of dignity. Therefore, every country must have a system capable of meeting the long-term care needs of older persons, particularly through support and social assistance services that help them with daily living and personal care, enable them to maintain relationships, age in a suitable environment, avoid abuse, access community services, and participate in activities that give meaning to their lives.

This may require a wide range of services such as day care, respite care services, which in turn must be linked with health care and extensive community networks and services. Supporting informal caregivers and strengthening their capacities should be a priority in order to remedy inequity and alleviate the burden disproportionately borne by women. Therefore, the Decade of Healthy Ageing considers Member States responsible, among other activities, for ensuring the existence of legal frameworks and sustainable financial mechanisms for the provision of long-term care, developing national standards, guidelines, protocols, and accreditation mechanisms for the provision of community-level social support and care, in accordance with ethical principles and in a manner that promotes the human rights of older persons and their caregivers. It involves establishing community services aligned with these standards, to carry out social and health support and care tasks from an integrated and person-centred approach³.

Unlike Brazil, which has Law No. 10.741 of October 1, 2003—Statute of the Elderly—our country lacks a specific regulation aimed at older persons, with the exception of Law 39/2006 of December 14, on the Promotion of Personal Autonomy and Care for Persons in Situations of Dependency (hereinafter LAPAD), which, despite its temporal trajectory, currently shows a worrying level of effectiveness⁴.⁴ Also essential for the care of the elderly is

³ Available as of 2-9-2024 at: https://www.who.int/es/publications/m/item/decade-of-healthy-ageing-plan-of-action?sfvrsn=b4b75ebc_25

⁴ The entry into force of the aforementioned law entailed the assumption of responsibilities by the State in the field of care. Furthermore, considering that the relevant care and support benefits are aimed at addressing the needs of individuals with difficulties performing basic activities of daily living, what is particularly concerning is the delay in the assessment of the degree of dependency—this must be compounded by the delay in granting the corresponding benefit, as well as the time that often elapses before the requested service is received, which in many cases leads

the more recent Law 8/2021 of June 2, which reforms civil and procedural legislation to support persons with disabilities in the exercise of their legal capacity (hereinafter LRAPD). The interrelation of both laws forms the object of the present study in order to assess the necessary protection of our elderly population.

2 Toward a Renewed Legal Regulation

Article 50 of the Spanish Constitution states: “Public authorities shall guarantee, through adequate and regularly updated pensions, the economic sufficiency of citizens during old age. Likewise, and regardless of family obligations, they shall promote their well-being through a system of social services that will address their specific health, housing, cultural, and recreational needs.” In this way, and given its place within the constitutional text, it is specifically positioned as a guiding principle of social and economic policy.

However, the simultaneous existence of both a family obligation and a public responsibility to promote the well-being of older persons through social services is particularly significant. In fact, Article 50 of the Constitution, in recognizing the rights of older persons, constitutes the only reference to them in the constitutional text, combining the family duty with the state’s obligation toward them. It is clear that the constitutional legislators at the time could not have foreseen the Spanish social context half a century later—marked by increased longevity and transformed family relationships. Nevertheless, the reference to the welfare state remains relevant as an objective to be immediately pursued (García Cantero, 2018, p. 114).

Its predecessor, Article 43 of the Spanish Constitution of 1931, is in turn the first constitutional text to include an explicit mention of older persons, the elderly, or, as the text itself says, “the aged” (Álvarez Velez, 2024, p. 154). However, unlike the current Article 50 of the Constitution, which provides that the State must promote the well-being of older persons through a system of social services in addition to family obligations, the 1931 Spanish Constitution clearly established the State’s duty to assist the elderly⁵.

On December 13, 2006, Article 12 of the Convention proclaims that persons with disabilities have legal capacity on an equal basis with others in all aspects of life, requiring

to the death of the applicant before any assistance is provided. According to the Statistical Information from the System for Autonomy and Care for Dependency (IMSERSO-SAAD), as of February 29, 2024, the average time from the application for dependency status to the resolution of the benefit is 327 days. Available as of 2-9-2024 at: <https://goo.su/LB9FrF>

⁵ Within Chapter II concerning Family, Economy, and Culture of Title III titled “Rights and Duties of Spaniards,” Article 43 was specifically dedicated to the family, declaring that the family is under the special protection of the State, ensuring equal rights for both sexes within marriage, including its possible dissolution. It also stated that parents are obliged to feed, assist, educate, and instruct their children, and that the State shall ensure the fulfillment of these duties and is subsidiarily obligated to carry them out. After addressing various matters related to parenthood, it concluded: “The State shall provide assistance to the sick and the elderly, and protection to motherhood and childhood, adopting the ‘Geneva Declaration’ or Table of Children’s Rights.”

States Parties to adopt appropriate measures to provide such persons with access to the support they may need in exercising their legal capacity. That is, adequate and effective safeguards must be provided to prevent abuse, ensuring that measures relating to the exercise of legal capacity respect the rights, will, and preferences of the person, are free of conflicts of interest and undue influence, and are proportionate and tailored to the person's circumstances.

The most extensive and significant reform in this regard has occurred in the Civil Code, which no longer revolves around the incapacitation of the person—which is eliminated—or the modification of capacity, which is inherent to the condition of the human person, but rather on support for the individual who requires it. Exceptionally, in situations where such support cannot be provided otherwise, it may take the form of representation for decision-making.

The value of care, increasingly recognized in modern democratic societies, finds particular application in the exercise of guardianship (*curatela*), whose meaning—*care*—reveals the purpose of the institution: assistance, support, help in the exercise of legal capacity. All people, and especially those with disabilities, must be treated by others and by public authorities with care—that is, with the attention their specific situation requires.

Following the precedents of other European legal systems and the guidelines of the Council of Europe, when specifying support measures, the new regulation gives preference to voluntary measures—that is, those that the person with a disability can take on their own—such as powers of attorney, advance directives, and the possibility of self-guardianship (*autocuratela*), with the principal court-ordered support measure being guardianship (*curatela*).

Special mention must be made of the strengthening of the role of the de facto guardian (*guarda de hecho*), which becomes a distinct legal institution of support. It ceases to be a provisional situation when it is demonstrated to be sufficient and appropriate for safeguarding the rights of the person with a disability. Reality shows that, in many cases, persons with disabilities are adequately assisted or supported in making decisions and exercising legal capacity by a de facto guardian, generally a family member, since the family continues to be, in our society, the fundamental group of solidarity and support among its members, particularly toward the most vulnerable.

This support does not require formal judicial appointment, although in cases where the guardian must undertake a representative act, it is foreseen that a specific judicial authorization must be obtained, following an assessment of the circumstances⁶.

Therefore, based on the evident vulnerability of our elderly population, the support they require—whether in the form of personal care and assistance, or aid in patrimonial matters—is received under the protection of this presumed family solidarity. It is expected that

⁶ Preamble of the Law.

children, grandchildren, or nephews and nieces will respond to this dependency situation, which, to varying degrees, every elderly person will experience over time.

Indeed, the LRAPD generally refers to assistance, care, and support in decision-making and, therefore, in most cases, this will entail tasks of patrimonial administration, without prejudice to the informal care provided to the elderly in their daily activities.

For this reason, certain rules pertaining to inheritance law and contract law in our Civil Code have been particularly affected by the reform, since the capacity to exercise rights implies the ability to perform legal acts of great significance, the execution, validity, and effectiveness of which must be addressed according to this new perspective.

We shall focus specifically on two fundamental issues relating to *mortis causa* dispositions by older persons and their concern to ensure care and assistance in old age—issues that have been modified or addressed by the LRAPD. Traditionally, testamentary clauses have been established whereby, as a condition or burden for becoming an heir or legatee of the deceased, the provision of necessary care was required. These clauses have persisted to the present day, often triggering challenges from those who expected to have been designated, citing issues of capacity or undue influence.

In this regard, the new Article 665 of the Civil Code grants a fundamental and renewed role to the Notary in the execution of wills by persons with disabilities, with significant changes compared to the previous version. The same applies to Article 753 of the Civil Code, which sets out limitations and safeguards to prevent undue influence, particularly that exerted by caregivers.

A person with a disability may make a will, when, in the judgment of the Notary, they are able to understand and express the scope of their provisions. The Notary shall ensure that the person carries out their own decision-making process, supporting them in understanding and reasoning, while also facilitating the expression of their will, desires, and preferences through the necessary adjustments. It is indeed the case that, as a highly personal act, the execution of a will (Art. 670 CC) can and must be carried out by a person in need of support in exercising their legal capacity. Moreover, the capacity required to execute a will may be lower than that required to enter into a contract, since the Notary is to authorize the will of a person who, due to deterioration resulting from advanced age, could not, for example, enter into a sales contract without the legally prescribed supports. In reality, the support will be provided by the authorizing Notary, and not through the assistance or representation channeled via the legally established protection institutions (Guilarte Martín-Calero, 2014, pp. 629 and 632). The Notary, therefore, as was already the case in the past, performs two functions: namely, assessing the capacity or recognizing the legal capacity required to execute the will, and providing the necessary means to ensure that the testator's will is free and not subject to undue influence (Carol Rosés, 2023, p. 564; Guilarte Martín-Calero, 2014, p. 630).

With regard to the capacity to inherit by will, according to Art. 753 of the Civil Code, any disposition made by persons who are institutionalized for reasons of health or care, in favor of caregivers who are owners, managers, or employees of the public or private institution in which they are institutionalized, shall be null and void, as shall any disposition made in favor of said institutions. Other natural persons who provide care, assistance, or similar services to the decedent may only be beneficiaries in their succession if the provision is made in an open notarial will. However, dispositions made in favor of a guardian, curator, or caregiver who is a relative entitled to inherit *ab intestato* are valid.

Even if the testator is of sound mind at the time of making the will, it may be understood that they acted under pressure from the beneficiaries, in what is referred to as a vulnerable testator. Consider single individuals who have not formed their own family or who, although having done so, are estranged or have no relationship with them. Their loneliness, health issues, and age render them defenseless, at the mercy of any unscrupulous individual who may seek to seize their estate by any means. However, it must also be considered that an elderly person is entitled to benefit, provided they do so freely and knowingly, those who have fulfilled a role that their relatives were unwilling to assume (Cabezuelo Arenas, 2017), thereby raising the complex and difficult dilemma between undue influence and the elderly person's freedom to make a will.

2.1 Law 39/2006 on Dependency

Law 39/2006, of December 14, on the Promotion of Personal Autonomy and Care for Persons in Situations of Dependency, unlike the LRAPD, explicitly recognizes the new social reality regarding the significant increase in the elderly population, which inevitably entails dependency issues in the later stages of life. It also acknowledges that, until now, families—particularly women—have traditionally borne the burden of caring for dependent persons, a phenomenon commonly referred to as informal care. This must be considered alongside changes in the family model and the progressive incorporation of women into the labor market. These factors justify the reform of the law to revise the traditional model of care in order to ensure an adequate capacity to provide care for those in need, with reference to Arts. 49 and 50 of the Spanish Constitution and to the social services system promoted by public authorities for the welfare of citizens.

The main innovation of the LAPAD is, therefore, the establishment of a subjective right of citizenship in the realm of social services. Precisely due to its name, which should not be misleading, certain social services are categorized as rights, thereby converting their holder into the active subject of a directly enforceable right, rather than a passive subject merely

receiving a public social action (Holgado González, 2018, p. 58). In fact, the classification of a person as dependent turns them into the holder of a subjective right that is enforceable through administrative and judicial procedures. In this respect, the Law constructs and recognizes an actual subjective right, with specific measures to make it effective, which cannot be merely labeled as such.

As a fundamental right, insofar as there is no express incorporation in the Constitution, and despite the fact that certain manifestations of this right refer to fundamental rights enshrined therein (Moretón Sanz, 2011, p. 61).

According to Monereo Pérez (2006, 2007), we are faced with an emerging social risk or a new situation of need shaped by the progressive aging of the population, as a result of low birth rates and improved life expectancy among the elderly due to medical advances. Added to this is the breakdown of the family care model, traditionally carried out by women, due to the new configuration of the family structure brought about by their integration into the labor market. Undoubtedly, to this context must be added the insufficiency of social services policies.

The allusion to alleged family obligations toward the elderly in Article 50 of the Spanish Constitution, as previously mentioned, and the absence of any other reference in the rest of the constitutional text, may suggest—thus it must be assessed—that the action to promote their well-being is being subordinated to the absence of a family-based response, the latter being considered as the duty of support among relatives established in Articles 142 to 153 of the Civil Code.

However, in line with criticism of the traditional basis of the legal duty of support among relatives, it should be reduced to the obligation of parents toward their children, until the latter are able to lead autonomous lives. The protection of any other adult who, due to inherent risks of social life such as old age, illness, or dependency, is not self-sufficient, must be a responsibility incumbent upon society as a whole (Ribot Igualada, 1998, p. 1152). It must be borne in mind that the only way for the duty of support for the elderly to remain within the realm of moral obligations would be for the Welfare State to fully guarantee the exercise of the rights of the elderly and the fulfillment of all their needs. Until such time, the family must continue to play that protective role (Zurita Martín, 2004, p. 53). Ultimately, if the strict condition for the legal duty of support lies in the existence of need, such a need exists when social institutions fail to fulfill their assigned roles, relegating the institution of family support for the elderly to a subsidiary position (Díez-Picazo; Gullón, 2006, p. 48).

The truth is that the vulnerability of minors justifies their protection and support by their parents, legally derived in this case from parental authority. In the case of elderly persons, regardless of whether children act out of a sense of gratitude, as a form of compensation for

what they received from their parents during childhood, or by assuming the legal framework of support among relatives, the fact is that—precisely due to their status as vulnerable adults—they deserve priority in terms of state protection, which is undoubtedly a public obligation. This would entail relegating the family to the role of immediate caregiver, with the indispensable support of the State to ensure the comprehensive well-being of their elders (Cremades García, 2023, p. 408).

3 Conclusions

Both the LAPAD and the LRAPD share the ultimate objective of protecting vulnerable individuals and addressing the care needs arising from their particular situation. The convergence of both laws becomes necessary in relation to old age. In this regard, the adaptation of the national legislator to the 2006 New York Convention, with respect to the latter, is commendable. However, it remains to be addressed—both by the national legislator and the various regional civil codes—the issue of individuals who are not disabled but are nonetheless vulnerable, for instance, due to age (Nieto Alonso, 2023, p. 223). Unlike the LAPAD, the LRAPD does not contain specific references to elderly individuals, even though care related to advanced age in practice requires the use of its provisions.

The first law, however, in Article 2's definitions and regarding dependency, recognizes this as a permanent state in which individuals, due to age, illness, or disability, and associated with a lack of physical, mental, intellectual, or sensory autonomy, require assistance from another person to carry out basic daily activities, or, in cases of intellectual disability or mental illness, need additional support for personal autonomy. Does not an elderly person, for example, when making a purchase or conducting online procedures—hindered by the digital divide—need the help of a younger family member, such as a son, grandson, or nephew, to successfully carry out such tasks? That family member thus becomes their "support" to achieve the desired autonomy, or as also defined by the LAPAD, the ability to control,

to face, and to make, on their own initiative, personal decisions about how to live in accordance with their own rules and preferences, as well as to carry out basic daily life activities.

In accordance with the LRAPD, measures concerning the exercise of legal capacity or the support to be provided must be carried out with respect for the rights, will, and preferences of the person. Only in this way can the aforementioned autonomy be achieved, which ultimately means freedom and, above all, dignity for people with disabilities in particular, and for all vulnerable individuals in general, with special emphasis on the elderly.

From both laws we must also highlight the essential role of the family. In reality, it remains—fortunately—the basic unit of solidarity and support among its members in our society, especially regarding its most vulnerable members. This is why the LRAPD gives prominence to the figure of the de facto guardian, who is almost always a close relative caring for their elder, driven precisely by those familial bonds. Undoubtedly, elderly individuals are dependent and require support that encompasses, as the law itself recognizes, all types of actions—from friendly companionship, technical assistance in expressing will, removal of architectural and other barriers, guidance, and even, in exceptional cases where the person is unable to act, representation in decision-making. In this way, unlike nineteenth-century codes more concerned with the patrimonial interests of individuals than their comprehensive protection, this new regulation seeks to address not only patrimonial matters but also personal aspects related to decisions in everyday life—such as residence, health, communication, etc.

The LAPAD, for its part, contextualizes the situation concerning the care of dependent persons, traditionally carried out by the family, especially by women. Social changes, such as the incorporation of women into the labor market, have raised the complex equation between informal and formal or professional care services.

It is essential to implement a culture of care for the elderly to make real all the social rights that legislation may protect (Carlini, 2024, p. 179). Undoubtedly, the care or attention provided to the elderly to ensure their well-being must be a priority in the social policy of developed countries. The value of care for the elderly in the final stage of their lives must transcend the private sphere of the family circle, and be regarded as a social conviction grounded in intergenerational solidarity.

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