. Spain

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I. International sources

1. UNCRPD

Spain signed the UNCRPD on 3 December 2007. The instrument of ratification was published in the *Boletín Oficial del Estado* [hereafter, BOE] no. 96, 21.4.2008 and the Optional Protocol in BOE no. 97, 22.4.2008. Both are in force since 3 May 2008. Following the adoption of the UNCRPD, a number of special statutes were enacted regarding social and economic rights of persons with disabilities (cur-rently consolidated in the General Act on the rights of persons with disabilities and their social inclu-sion, approved by Royal Legislative Decree 1/2013, of November 29 [BOE no. 289, 3.12.2013]). The most important of these statutes was Act 26/2011, of 1st of August (BOE no. 184, 2.8.2011), which was aimed at adapting Spanish Legal system to the UNCRPD. This Act amended the legal definition of person with disability to improve conformity with the UNCRPD.

Concerning the right to legal capacity, however, the legal reforms needed to comply with Art 12 UNCRPD never took off. In two occasions, the Spanish Parliament set a deadline to the government asking it to present a bill on this issue. Successive deadlines expired and no project or draft bill saw the daylight. Accordingly, in 2011 the Committee on the Rights of Persons with Disabilities recommended "that the State party reviews the laws allowing for guardianship and trusteeship, and takes action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will and preferences" (Concluding observations on the report submitted by Spain under Art 35 UNCRPD no. 34 [CRPD/C/ESP/CO/1, 19.11.2011]). Since then, only minor reforms have been passed. One of them merely changed the name of the legal procedure of protection of adults ('incapacitation' was substituted for 'modification legal capacity'), revealing an astonishing lack of resolution to advance in the implementation of the UNCRPD.

Recent reforms concerning the rights of persons with disability are Act 4/2017, of 28 June (BOE no. 154, 29.6.2017) (repealing the need of medical proof of natural capacity to give consent to marriage, as had been required by Act 15/2015, of 2 July), Organic Act 1/2017, of 13 December (BOE no. 303, 14.12.2017) (improving the participation of persons with disabilities in juries) and Organic Act 2/2018, of 5 December (BOE no. 294, 6.12.2018) (eliminating all restrictions placed by judgments on the legal capacity to exercise one's fundamental right to vote).

2. HCIPA

The Hague Convention of 13 January 2000 on the International Protection of Adults has not been adopted by Spain. Many scholars have called for its adoption but few advances have been made so far. The internal system of international private law has been amended to take account of the HCIPA. For instance, the new Art 22 *quater* Organic Act on Judicial Power takes 'habitual residence' in Spain as the main criterion to grant jurisdiction to Spanish courts for the adoption of measures of protection (see Art 5(1) HCIPA). General applicable law is also the law of the State of the adult's habitual residence (Art 9.6 Civil Code). At any rate, Spanish law is to be applied for the adoption of provisional or emer-gency measures of protection. In case of change of residence to another State, the law of the new habitual residence is to be applied.

II. Statistics

The notion of vulnerable adult person is very vague. However, for the sake of clarity we can focus on the description provided by the HCIPA ('an adult who is not in a position to protect his or her interest'). The reasons for being in this situation are normally impairments, deficiencies or diseases connected with old age or disability. From this standpoint, 6,564,592 persons living in Spain in 1 January 2018 (approx. 15% of the population) were more than 70 years old. The number of persons with disabilities living in Spain reached 1,8M in 2017 and more than 1,5M had the official recognition. 485,700 of them suffered mental health problems or intellectual disability.

The number of those subject to a protection regime based on incapacitation is unknown. However, between 50,000 and 65,000 procedures for the determination of judicial measures of protection and support have been opened yearly before the Spanish courts in the last 3 years. With regard to legal acts involving the exercise of private autonomy data show that the number is also increasing –especially lasting powers of representation- but remains small in relative terms.

Figure 1 shows the number of *autotutelas*, legal acts aimed at nominating future guardians, and Figure 2 shows the trend regarding lasting powers of representation (*poderes preventivos*).

Autotutela

2010	1981
2011	2598
2012	2673
2013	2782
2014	3103
2015	3178
2016	3327
2017	3400
2018	3411

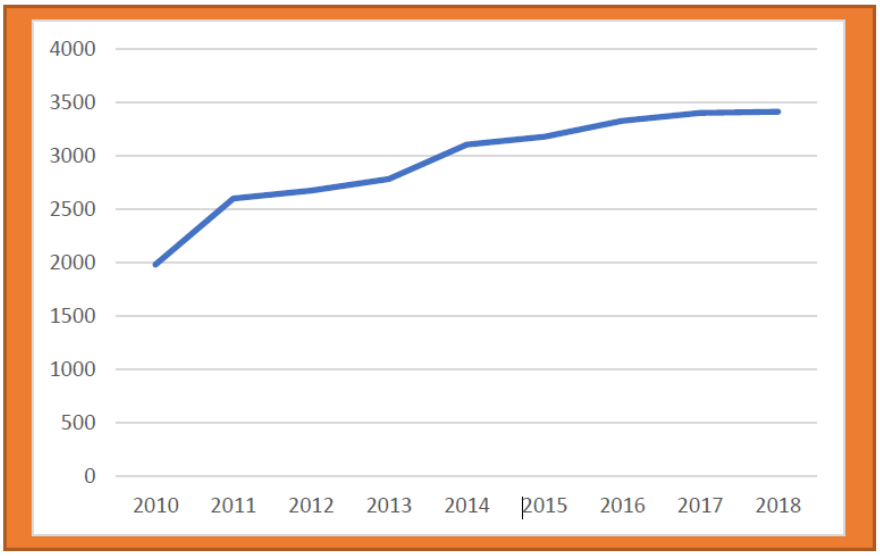

Figure 1

LPR

2010	857
2011	1295
2012	1881
2013	2582
2014	3460
2015	4465
2016	5606
2017	7820
2018	9350

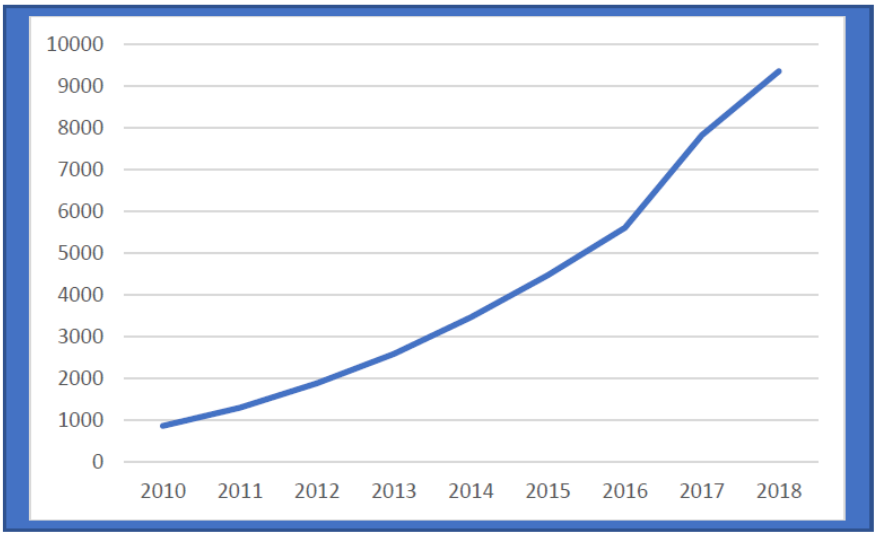

Figure 2

III. Measures of protection and support

1. 'Incapacitation' as a protective measure

The provisions currently in force on legal capacity and measures to protect and support those who are not in a position to protect their interests date from a wide-ranging reform of the Civil Code and the Civil Procedure Act that took place in 1983. They have undergone a number of amendments since 2003 but the principles and the original legal framework remain.

These provisions rely upon a adversarial procedure of 'incapacitation' and the subsequent appointment of a guardian (*tutor*) to represent the incapacitated person, or a curator (*curador*) to support him or her. Pursuant to Art 200 Civil Code, the only grounds to incapacitate a person are the 'permanent physical or psychic diseases or impairments that prevent a person from taking his or her own decisions'. Legal procedure for determination of incapacity and the institution of a protective regime is open to the vulnerable person concerned. But Art 757.1 Civil Procedure Act also allows some members of the family to file the petition: spouse or cohabitant, children, parents or grandparents, and siblings. In case that none of these persons sets the proceedings in motion, the public prosecutor (*Ministerio Fiscal*) must file the petition (Art 757.2 Civil Procedure Act). In addition, Art 201 Civil Code provides that the parents of a minor can start the proceedings in order to extend their legal powers of representation and support once the child reaches the age of legal majority (*patria potestad prorrogada*, Art. 171 Civil Code). Until the appointment of a guardian or a curator –but also in cases of conflicts of interest between them and the incapacitated person or of a temporary impossibility of acting on his or her behalf- the Civil Code provides for the appointment of a *defensor judicial* (see Art 215-3 CC; and also Art 27 Voluntary Jurisdiction Act).

The legal capacity of the vulnerable person is modified and restricted to the extent of his or her impairments to make decisions. He or she will not be able to give effective consent to most legal acts, which are legally deemed voidable in case that the guardian or the curator do not provide their consent (see Art 1263, 2nd CC on legal capacity to enter into contractual agreements).

2. *Judicial* measures of support and protection

The person can be placed on two types of permanent regime: guardianship or curatorship, which differ in the scope of the powers granted to the guardian or to the curator. The guardianship is a type of substituted decision-making regime in which the tutor is responsible for the care of the adult person and for managing his or her property and economic assets (Art 267-270 Civil Code). On the other hand, curatorship is deemed to be a supported decision-making only, in which the person placed under this measure decides whether to do or not certain legal act but he or she needs the agreement of the curator (Art 288-290 Civil Code). The provisions of the Civil Code apply to minors and to adults whose legal capacity has been modified. Guardians are subject to a periodical judicial monitoring of their activities and are accountable for the situation of the person and the management of his or her assets (see Art 269 Civil Code) They can be removed in cases of breach of their duties, proven ineptitude or serious and continuing problems with the person under guardianship (Art 247 Civil Code).

3. Non-judicial measures of support and protection

3.1 *Autotutela*, lasting powers of representation and *patrimonio protegido*

Act 41/2003, of 18th November (BOE no. 277, 19.11.2003) brought in several provisions aimed at in-creasing private autonomy and the availability of non-judicial measures of protection and support for adults with disabilities or that could be subject to incapacitation procedures. Firstly, it created the so-called 'protected assets' (patrimonio protegido), which consists of funds or

assets kept apart from other assets of a person with disability, and whose transfer benefits from tax exemptions and a special legal regime of management aimed at ensuring that current of future needs of that person are covered in the future. In addition, Act 41/2003 also amended the Civil Code to permit that an adult person could decide who will be appointed as guardian or curator in case that he or she is to be incapacitated (autotutela; Art 223 Civil Code). The judge is allowed to appoint a different person as guardian or curator, but only exceptionally (Art 234 Civil Code). The increase in the number of ageing persons living alone and the fact that families cannot take care of relatives with mental disorders or intellectual dis-ability has led to the appointment of professional guardians and assistants, most of them working for NGOs.

Act 41/2003 also provided a minimal legal framework for powers of representation that stand as valid in spite of the donor's subsequent loss of natural capacity, or that are specially granted to enter into effect when he or she lacks capacity (the so-called *poder preventivo*; Art 1732 Civil Code). The current regulation of these lasting powers of representation in very poor: the holder of the power of representation is authorized to act by a notary after a medical examination of the donor, without intervention of the public body responsible for vulnerable adults and without special judicial monitoring of the activities of the representative. This lack of formality and controls explains the success of the instrument (see the data above § II): they allow vulnerable persons and their families to manage economic affairs in a swift manner. On the other hand, the risks of exploitation, abuse and undue influence of vulnerable persons are evident. The only remedy at hand seems to be, according to Art 1732 Civil Code, that 'the power of representation… be terminated by order of the judge either when placing the donor under guardianship or at the request of the guardian'.

3.2 The "*guarda de hecho*"

For a number of reasons, most of the adults that could be protected by means of incapacitation are not incapacitated. As a result, the persons who are in charge of them –normally, their parents or chil-dren- take care of their needs, supervise their daily life activities and act on their behalf when needed. According to Art 304 Civil Code, any legal act entered into by the carers cannot be avoided if it was useful for the vulnerable person in care. In 2015 the Civil Code was amended to allow the judges to formally grant them additional powers of representation such as those of a guardian. If requested by the judge, the carers have the legal duty to inform about the situation of the vulnerable person and the current state of his or her assets (Art 303 Civil Code).

IV. Personal and family rights of vulnerable persons

With regard to personal and family rights, the situation is not as clear as it should be. The general rule hold by doctrine and case law is that legal acts concerning personal rights and one's own family rights must be exercised personally by the vulnerable person provided she or he has natural capacity. In other words, there shall not be substituted decision-making in this area. Only in exceptional cases both the Constitutional Court and the Supreme Court have held that the guardian could file a divorce petition on behalf of a person in coma. However, guardianship can reach both personal and economic interests. As a result, guardians are legally responsible for the persons placed under guardianship and the law confers them, for instance, the right to determine their residence, decide their medical treatments or have access to their medical records. Art 156.2 Penal Code even allows them to file a petition asking the forced sterilization of a person with 'serious psychic impairment'. Last but not least, in practice many decisions establishing guardianship (or even curatorship) interfere with fundamental rights such as the right to marry, to vote or to make a will. The Supreme Court has already taken a critical stance against this practice and a number of recent legal reforms try to curb it down [see above § I.1].

V. Overview of strengths, weaknesses and opportunities. Functioning of the current system in practice. Prospects in the near future

The main goal of the 1983 legal reforms was to prevent abuse when placing vulnerable persons in protective regimes. The reform was based on the principles of legality, necessity and proportionality. Furthermore, the Supreme Court stressed the principle of subsidiarity holding that there is no need to incapacitate the person suffering mental health problems or with intellectual disability who, with the support of the family and following the proper medical treatment, can take care of his or her interests (Judgment of 17.10.2008). In practice, these principles seem to have been forgotten and disregarded.

According to Art 760.1 Civil Procedure Act, the decisions on incapacitation shall clearly laid down their scope and limits. Most of them have nevertheless become stereotyped and many persons with disability and older people have been deprived from their autonomy outright. Some authors and public officials held that the entry into force of UNCRPD should mean immediate derogation of the incapacitation procedure. Such a view was rejected by the Civil Chamber of the Supreme Court in a judgment issued on 29 April 2009: '"[The] Civil Code would not be contrary to the values of the Convention be-cause the adoption of specific measures for this group of people is justified, given the need for protection of these persons on the grounds of to their lack of understanding and will'. The court's view was that current legal measures of protection and support comply with the UNCRPD provided that they are tailored to the needs and to the remaining natural capacity of the vulnerable person. As a result, in the last years, case law developed to force judges to stick to the principles of necessity, subsidiarity and proportionality when ordering measures of support and protection. It also declared that courts should give priority to the most flexible measure available, which is curatorship, and allow them to redesign it as a supported-decision regime in conformity with the principles of the UNCRPD.

By the end of 2018 the government presented a comprehensive bill prepared by the General Commission of Codification with the aim of abolishing incapacitation and adult guardianship. The bill would bring about a new judicial procedure (although under the label *curatela*) for providing measures to support persons with disability in the exercise of their right to legal capacity. The bill reinforces the principles of necessity, subsidiarity and proportionality, including a preference for informal family sup-port and for lasting powers of representation. The bill will possibly enter Parliament this year after the elections due April 28th.

Finally, another problem of the current system is that many people with full natural capacity but who have difficulties to manage their affairs because of old age or illnesses are incapacitated merely to have access to legal measures of support and protection, as well as to social services and allowances. On the other hand, many persons with intellectual or psychosocial disabilities refuse to be under guardianship or even curatorship. They complain of severe restrictions to their autonomy and lack of support for they being able to make their own decisions. Both problems are currently addressed in Catalonia by means of a special judicial measure of protection and support (*assistència*, Art. 226-1 ff Catalan Civil Code) that is granted at the request of the vulnerable person only, and that he or she can give up at will. This measure does not require prior incapacitation and its scope is variable depending upon the needs of the person. It does not limit nor modify his or her legal capacity, although some acts may demand consent by the legal assistant to be fully effective.

Legislation: https://www.boe.es/legislacion/codigos/codigo.php?id=34&modo=1&nota=0&tab=2