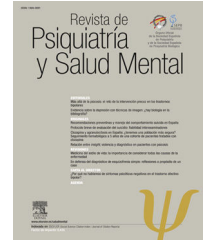




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LETTER TO THE EDITOR

From capacity modification to support measures in people with disabilities



De la modificación de la capacidad a la provisión de apoyos en personas con discapacidad

On September 2, 2021, Law 8/2021¹ came into force, reforming civil and procedural legislation to support people with disabilities to exercise their legal capacity. Said Law constitutes one of the most drastic changes in the perspective of Spanish civil and procedural legislation in recent decades. This reform, motivated by the Spanish adaptation to the 2006 International Convention on the Rights of Persons with Disabilities of New York, ratified by Spain in 2008,² advocates that persons with disabilities have legal capacity on an equal footing with others in all aspects of life. This makes it necessary to change the existing system from the current substitution in decision-making, to a system based on respect for the will and preferences of the individual, who is in charge of making his or her own decisions. Moreover, the former approach overemphasized property considerations. However, the emphasis is now on the multiple facets in which people are holders of rights and that must be taken into account with regard to decision making.

Voluntary and extrajudicial measures, such as preventive powers of attorney or the *de facto* guardian, are deemed to be preferable, a judicial procedure not being necessary in order to apply such support measures. Nevertheless, if the matter is brought to court, the judicial declaration of a person as being incapacitated no longer exists, but the judicial provision of support measures does. Consequently, the processes of modification of capacity, the figure of the legal guardian, extended parental authority, as well as the case of prodigality are eliminated, although the figure of the curator is maintained and reinforced.

Law 8/2021 preferentially chooses the voluntary jurisdiction for the judicial provision of support, unless opposition is formulated or cannot be resolved in the proceedings themselves, in which case the contentious process could be initiated.

Among the support measures regulated in the new Title XI of the Civil Code, the following are particularly salient: friendly accompaniment, technical assistance in the communication of declarations of will, the elimination of

architectural barriers, advice, delegated decision making, the figure of the legal defence counsel, and, as a last resort, representation. Maximal inclusion of the person with disabilities, both psychic and physical and sensory, is pursued through specific and one-off aids or support for those areas affected, adapting them in accordance with the needs of each individual. Moreover, the Law establishes that as many modifications in the supports will be promoted as changes occur in the competences of the person involved.

In order to achieve this “custom-made suit”, the necessary support measures must be established to enable the person with a disability to exercise his or her rights with full equality. To this end, a detailed study of the areas of competence is necessary, identifying possible deficiencies and their degree, proposing a support measure to overcome them.

The medical-forensic reports that until now were prepared at the judicial level to advise on procedures for modification of civil capacity already included, among others, a complete psychopathological examination,^{3,4} the use of complementary tests as appropriate,^{5–8} and considerations concerning the adaptive and communication capacity of individuals. Henceforth, more precise and detailed evaluations will be needed in order to establish the support measures that are judged to be most appropriate for the individual, while aiming for the timeliest possible application of these measures.

With respect to the approximately 250,000 people declared legally incompetent in Spain, Law 8/2021 requires a judicial review of all cases within a maximum period of three years in order to adapt to the new legislation.

Apart from the impact on people with disabilities and their families, there are undeniable repercussions in the field of healthcare and social services. Nor can healthcare professionals remain unaffected by these legislative changes,⁹ which are aligned with a more humanizing vision of mental health.¹⁰ This law confirms the need to emphasize comprehensive and multidisciplinary management of cases within the health care system. The information that psychiatry, geriatrics, neurology, psychology, occupational therapy, or social work will provide in support procedures will be paramount. The health and social services environment and, more specifically, the institutions previously known as guardianship institutions will experience greater complexity in the legal management of cases and will require an increase in resources so as to comply with the new requirements in the care of people with disabilities.

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Conflict of interests

The authors have no conflict of interests to declare.

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