CONCERNS AND LEGAL CHALLENGES IN THE SOCIAL ECONOMY OF CARE IN PORTUGAL*

Marta Rosas

I
INTRODUCTION

According to data from the latest Social Economy Satellite Account (SESA)[1], in 2020 there were 73851 entities in the sector in Portugal. This set of entities is divided into several groups, such as: cooperatives (2.9%), mutual associations (0.1%), holy houses of mercy (0.5%), foundations (0.8%), community and self-managed subsectors (2.2%) and associations with altruistic goals (93.4%). Regarding the activities carried out by these entities, stands out activities of culture, communication, and recreation activities (more than 40% of the sector), followed by religious activities (almost 12%). Soon after, it was found that about 9% (8.9% in 2020) were classified in the activity of social services. Examples of activities in social services include "(social) support services for children, youth, the elderly, persons with disabilities and families, temporary shelters, emergency and rescue services, refugee support, vocational training or counselling activities, among others"[2]. Health services of hospitals and integrated long-term care establishments, with accommodation, nursing homes, among others, are part of the human health services section[3].

---

* I would like to thank Professor Deolinda Meira for her valuable contribution to the preparation of this text, for all the sharing of knowledge, discussion, and reflection on the social economy of care.

1 Social Economy Satellite Account 2019/2020, Eduardo Pedroso, Edna Neves (CASES) Cristina Ramos, Carina Rodrigues (INE), Coleção de Estudos de Economia Social no. 17, avaiable at: https://cases.pt/wp-content/uploads/2023/08/Conta-Satelite-2019-2020.pdf

2 Table 12 of the Social Economy Satellite Account 2019/2020.

3 Ibidem.

Under the terms of the Framework Law on the Social Economy (Law No 30/2013 of 8 May), the entities that incorporate the sector carry out an economic and social activity that pursues, directly or indirectly, the general interest of society[4]. Moreover, the Framework Law "opted, as regards the definition of the concept of social economy, for a combined technique, that is to say, complementing the definition of social economy contained in Article 2 by an open list of social economy entities (Article 4) and by the enunciation of its guiding principles (Article 5)"[5]. According to Article 2 of the Framework Law, "social economy means all the economic and social activities freely carried out by the entities referred to in Article 4 (...)" of the Law (paragraph 1), and those activities "have the purpose of pursuing the general interest of society, either directly or through the pursuit of the interests of its members, users and beneficiaries, where socially relevant" (paragraph 2)[6]. The first guiding principle for the actions of social economy entities referred to in Article 5 of the same law refers to the "primacy of people and social objectives" (paragraph a).

There are several entities that are part of the social economy sector and are dedicated to providing services to people in vulnerable situations. Think, for example, of social solidarity cooperatives, whose objective is "(...) embodied in a clear mission of assistance to situations of social and economic vulnerability, based on a paradigm of social intervention, giving expression to the values of altruism and solidarity"[7], such as support for people of advanced age and, at any age, support for people with disabilities or in other situations of vulnerability and/or dependency. Also, in general terms, in the various entities with IPSS status[8]: the activities they develop – and which, as noted by D. Meira[9], justify the positive discrimination they benefit from by the State – have the mission of helping people in situations of economic and social debility[10].

---

4 Vd. Meira, Deolinda, "O fim mutualístico desinteressado ou altruísta das cooperativas de solidariedade social", CIRIEC- Revista jurídica de economía social y cooperativa, 2020, 221-247.

5 Meira, Deolinda, "A lei de bases da economia social portuguesa. Breve apresentação", Cooperativismo e Economía Social, no. 35 (2012-2013), pp. 231-236, p. 232.

6 For the list of the entities concerned, cf. Article 4 of the Framework Law.

7 Meira, Deolinda, "O fim mutualístico…", cit., p. 233.

8 IPSS - Private Institutions of Social Solidarity (translator's note).

9 Meira, Deolinda, "*Breves notas sobre el marco jurídico del sector de no mercado de la economía social en portugal – especial referencia a las instituciones particulares de solidaridad social*", Dos decénios actividad universitaria en economía social, cooperativismo y emprendimiento desde el Instituto Universitario IUDESCOOP (R. Chaves Ávila), IUDESCOOP, Valencia, 2023, pp. 409 e ss., p. 411.

10 Ibidem.

II
SOME LEGAL CHALLENGES FOR THE SOCIAL ECONOMY OF CARE: DIALOGUE WITH THE NEW LEGALLY ENSHRINED SUPPORT SCHEMES

As is the case in several legal systems and in compliance with international guidelines11, the Portuguese system has experienced important legal advances in recent years in terms of support for people in vulnerable situations. Among other reforms or novelties, it is possible to highlight the elimination of the previous "incapacities" regimes in the Portuguese Civil Code, replaced by the new regime for the monitoring of adults (Law No. 49/2018, of 14 August). On the other hand, a movement to support informal caregivers has achieved the consecration of its own statute and the recognition of rights, duties and support measures provided to those who care for others in a situation of greater dependence (cf. the diplomas listed below, in point II.3).

Naturally, the various entities of the social economy of care that deal daily with people in vulnerable situations and their families and/or caregivers may often be faced with the need to articulate their action and intervention with the new regimes.

The following are some points in which, at the exclusively legal level, the aforementioned support schemes and the social economy of care are directly interconnected, addressing, topically, certain doubts or very concrete challenges that this interconnection raises. It is a surgical survey of sparse issues that are considered to be of interest to the sector, without pretensions of exhaustiveness.

II.1
INTEGRATION OF A ACCOMPANIED ADULT IN AN INSTITUTION: NEED FOR JUDICIAL AUTHORIZATION?

A question that may arise and that does not find a direct answer in the current law is related to the necessity (or not) for prior judicial authorization in cases where, being accompanied, the adult is integrated into an institution in a tendentially lasting manner. For example, consider the hypothesis that it becomes essential11[12] to ensure the beneficiary the more or less continuous provision of care through his or her admission with a residential character in a dedicated establishment, in order to ensure that situations of risk to the beneficiary are eliminated and when the person's will favours this option.

---

[11] United Nations Convention on the Rights of Persons with Disabilities.

[12] Without prejudice to the primacy of the model of independent living: cf. Article 19 of the CRPD ("Right to live independently and to be included in the community").

In the first place, it should be noted that the question arises, in the light of the law posed, if there is an accompanying measure decreed and provided that this measure entrusts the accompanying person with representative functions that cover the exercise of the personal rights in question. If a follow-up measure is not justified or, if such a measure exists, the accompanying person is not entrusted with functions of this type[13], it will always be up to the accompanied person to decide (with the necessary support for the full exercise of his rights, if applicable) whether or not he intends to be integrated into an institution and the ways in which this occurs. Since the accompanying measure must, by legal imperative, be limited to what is strictly necessary for its objectives to be achieved, those cases will not be the most frequent, but will be reserved for borderline situations. It should be remembered that the potentially applicable measures may be more or less intense, given the flexibility of the accompaniment (cf. Article 145 of the Civil Code)[14]. For example, the person accompanied may be subject to a measure of total or partial administration of assets (Article 145(c)(2) of the Civil Code), without any impact on the exercise of rights of a personal nature and without the judgment determining any restriction on them. It should be noted that, as a rule, the accompanied person may freely exercise his or her personal rights (cf. Article 147 of the Civil Code). Finally, it should be noted that, even where one of the situations referred to in Article 138 of the Civil Code is capable of justifying, in the abstract, the enactment of an accompanying measure, that measure is not always actually to be decreed, if the general duties of cooperation or assistance arising from family relations are, in practice, spontaneously and fully complied with, leading to the unnecessity of judicial intervention[15].

The doubt initially raised arises following the short validity of the rule in Article 148 of the Civil Code, which has since been repealed. The precept was introduced by Law no. 49/2018, of 14 August, as part of the new legal regime for the accompaniment of adults, entitled "Internment". The rule made internment subject to judicial control, making it dependent on the express authorisation of the court or, only in cases of urgency, on subsequent ratification by the judge, following a request for internment by the companion[16]. In line with the above, it seems true that

[13] Unlike the legal issue dealt with in the text, which has as its background the regime of accompaniment of adults and the implementation of the hypotheses in which this same regime requires prior judicial authorization for certain actions of the companion, it is to know what is the solution for situations in which the person in a situation of vulnerability is unable to provide consent, even though she is not accompanied.

[14] Cfr. Guedes, António Agostinho; Rosas, Marta Monterroso, annotation to Article 145, in *Comentário ao Código Civil – Parte Geral*, 2.ª ed. revised and updated, UCP Editora, Lisbon, 2023, pp. 361 et seq.

[15] Cfr. Guedes, António Agostinho; Rosas, Marta Monterroso, annotation to Article 140, *in Comentário ao Código Civil – Parte Geral*.,cit., pp. 348 et seq.

[16] Article 148 reads as follows: "1. The internment of the accompanied adult depends on the express authorization of the court. 2. In case of urgency, the hospitalization may be immediately requested by the accompanying person, subject to the approval of the judge."

the provision covered only cases in which an accompanying measure had already been enacted[17]. The precept, unparalleled in the regimes of past interdiction and disqualification (in the wording prior to Law no. 49/2018, of 14 August), early on raised questions as to its interpretation. It has even seen its conformity with the Constitution questioned[18]. However, the main question that arose among the Doctrine was to know what "type" of internment would be at stake[19]. More specifically, it was discussed whether the rule in Article 148 would refer to hospitalization for the purposes of the then current Mental Health Law (MHL)[20], hospitalization or similar, for health care, and/or residential hospitalization. Regarding the first hypothesis, there seemed to be a majority understanding that the internment referred to in the precept was not to be confused with the compulsory internment regulated by the MHL, at the time in force[21]. It was no longer unambiguous, however, whether the rule intended to refer to hypotheses of hospitalization and/or residential hospitalization of the accompanied adult. In other words, it was not clear whether the scope of the rule covered hospitalizations intended to ensure the more or less continuous provision of health care or treatment and/or the admission of the accompanied person to a nursing home or similar establishment[22]. One possible interpretation would be to understand that the purpose and concern

---

17 It could be questioned whether it is feasible for the committal to take place pending the follow-up process, should this prove necessary. On this issue, cf. Alves, Cláudia David, “Regime Jurídico do Maior Acompanhado e Lei de Saúde Mental: que internamento?”, Revista do CEJ, 2021, n.º1, pp. 157-166, p. 161), and the Ac. of the Lisbon Relation, 13.07.2021, 448/19.7T8VFX-B.L1-7.

18 Vd. Gomes, Inês Espinhaço (“O internamento do maior (des)acompanhado à luz da Constituição», Julgar, no. 41, 2020, pp. 79-98), and Ac. of the Constitutional Court n.º 509/2022, 14.07.2022.

19 Also in the course of the preparatory work, the first CNECV Opinion (No. 100/CNECV/2018, Lobo Xavier / Costa Santos) pointed out the need to distinguish the type of hospitalization and the degree of need for monitoring of the person.

20 At the time, Law no. 36/98, of 24 July.

21 See, e.g., the above-mentioned Ac. of the Constitutional Court No. 509/2022, 14.07.2022, as well as Vítor, Paula Távora, in Código Civil Anotado, vol. I (articles 1 to 1250), coord. of Ana Prata, 2nd ed., Almedina, Coimbra, 2019, pp. 191-192, p. 191), Paz, Margarida, "The Public Prosecutor's Office and the new regime of the accompanied adult", CEJ, The new regime of the accompanied adult (ebook), Lisbon, 2019, pp. 111-138, p. 135), Alves, Cláudia David, "Regime Jurídico...", op. cit., p.158 et seq.

22 According to Monteiro, António Pinto, “Das incapacidades ao maior acompanhado: breve apresentação da Lei nº 49/2018”, RLJ, Year 148º, (nov-dez 2018), 72-84, p. 82, with regard to the initial wording of the precept, "[i]n spite of the letter of the law does not say so, it seems to us that the rule should be understood to cover both hospitalization for health reasons, in a hospital or private clinic, and hospitalization in a nursing home". Ribeiro, Geraldo Rocha (“O instituto do maior acompanhado à luz da Convenção de Nova Iorque e dos direitos fundamentais”, Julgar, 2020, p. 37), maintained that "[I]t may also extend its scope to situations where the accompanying person wishes to change the beneficiary's residence. This change has a substantial impact on the life of the person and should be syndicated as a means of ensuring respect for the will and pursuit of the interests of the beneficiary". For Vítor, Paula Távora (cit., p. 191), It did not seem that the rule was limited to internment for the purpose of medical treatment, leaving "the decision of internment as a decision to determine the residence of the accompanied person and which includes placement in a home or other establishment. Only in these cases is it justified that, since the decision cannot be taken by the person being accompanied, the first potential decision-maker in any matter that concerns him, it is outside the competence of the companion and deserves the solution especially guarantee of judicial jurisdiction”. Vd. Ac. from the Lisbon Court of Appeal de 11-12-2019 (5539/18.9T8FNC. L1-2).

of the rule would be to subject to the court's control decisions that are important for the life course of the beneficiary of an accompanying measure. The change of domicile, daily life and life habits resulting from entering a residential institution are often of this importance. Once a measure limiting the exercise by the accompanied person of certain rights of a personal nature has been determined, so that he could not consent to an intervention of the type of "internment", the court would (only in these cases[23]) be called upon to exercise functions of control, prior or successively, of the actions of the accompanying person. It would thus be a norm of a guarantee tendency, subjecting an act of special relevance to the life of the accompanied person to the scrutiny of the court[24].

Article 148 had a troubled and short term: it was repealed, a few years after the enshrinement of the new regime for accompanied adults, by the new Mental Health Law (Law no. 35/2023, of 21 July)[25]. The new MHL "provides for the definition, foundations and objectives of mental health policy, enshrines the rights and duties of people in need of mental health care and regulates the restrictions on these rights and the guarantees of protection of their freedom and autonomy" (Article 1(1) of the Law). The repeal of the former article 148 of the Civil Code by the new MHL was certainly due to the interpretative difficulty that the rule raised, avoiding overlaps or doubts in the face of, from the outset, the new regime of internment for involuntary treatment, provided for in that law.

However, taking into account that the previous wording of article 148 allowed an interpretation in the sense that the need for prior judicial authorisation is appropriate in cases of integration of the accompanied person in an institution of a (also) residential type when such a decision fell within the scope of the functions entrusted to the accompanying person, the question remains as to whether that authorisation must, or not, be requested, in the light of the current regulatory framework.

Arguments for and against the aforementioned requirement or need for judicial authorization can be raised.

On the one hand, it is true that, as mentioned by some Doctrine in the light of the wording of article 148 (subsequent to Law 49/2018 and prior to its repeal by the new LSM), the decision to

[23] The accompaniment is the "first potential decision-maker" in these matters, as he rightly notes Vítor, Paula Távora (in Código Civil Anotado, cit., p. 191).

[24] In Ac. of the Lisbon Court of Appeal of 12-01-2023 (10384/20.9T8SNT. L1-2) it was understood that, "(...) the internment of a accompanied adult must always be authorised by the court, when it is justified, with a view to the well-being and recovery of the accompanied person (cf. Article 145(1) of the Civil Code), in a suitable institution appropriate to the patient's health situation (which may often be of a residential nature, including the provision of some nursing and/or physiotherapy care), in the face of the lack of an alternative, especially within the family, that proves to be more beneficial". The accompanying judgment under appeal had limited the rights to establish domicile and residence.

[25] Cf. Article 54(d) of the aforementioned Law.

integrate into an institution has a relevant impact on the life of the person being accompanied, which is why the judicial control of this decision would serve to rule out possible cases of non-compliant exercise of the duties of the companion and, Above all, to ensure that the solution adjusts to the concrete needs and aligns with the desires and preferences that the beneficiary manifests/has manifested in the conduct of his or her life. In the Spanish legal system, the need for judicial authorization for the entry into a residential center of a person who cannot give his or her express consent has been the subject of a great deal of attention[26].

On the other hand, especially after the repeal of article 148, it is not easy to sustain a current legal requirement, in the light of the established law, of judicial authorization of the companion to perform the acts in question. In the Portuguese context, the need for authorisation could possibly be anchored in Article 1938(1)(d) of the Civil Code (applicable *ex vi* to Article 145(4))[27]), when the decision to join an institution involves contracting or resolving obligations (the contravention of the provisions of that paragraph leads to the annulment: Article 1940 of the Civil Code); however, the subparagraph itself restricts the obligations contracted in relation to maintenance or are necessary for the administration of the assets of the person being accompanied, especially the first situation in which there is no need for authorisation (i.e. the satisfaction of the needs covered by the concept of maintenance). In addition, our law provides for the need for authorisation for acts of a fundamentally patrimonial nature, and there is no normative hypothesis similar to that contained in article 287, 1, of the Spanish Civil Code, as amended by the *Ley 8/2021, de 2 de junio* (which determines that the curator who acts as a representative of the person in need of support needs judicial authorization to carry out "acts of personal or family transcendence", when the person concerned cannot do so for him/herself).

It is, therefore, an aspect that calls for closer attention and whose debate is left open. It would be appropriate to clarify the safeguard regime applicable in the event of a decision – by the accompanying person to whom these functions have been entrusted and in the event of a judicial limitation on the exercise of the personal rights of the accompanied person (related to the taking of that decision) – to enter a residential institution, with a lasting character. Such clarification would be to everyone's advantage: for the person being accompanied, of course, but also for the accompanying person and for the institutions themselves which receive persons who are

---

[26] Cf., for example, MELÉNDEZ ARIAS, MARÍA DEL CARMEN, "El ingreso de los mayores con demencia en la ley 8/2021", Tribuna Abierta, 31 Mayo 2023, avaiable at https://cenie.eu/es/blog/el-ingreso-de-los-mayores-con-demencia-en-la-ley-82021; ALHAMBRA, LUCIANA MIGUEL; CHACÓN CAMPOLLO, RAQUEL, "Internamiento en residencia de ancianos con demencia. Reflexiones con motivo de la entrada en vigor de la Ley 8/2021, de 2 de junio", El Notario del Siglo XXI - Septiembre - Octubre / n.º 111.

[27] Cf. GUEDES, ANTÓNIO AGOSTINHO; ROSAS, MARTA MONTERROSO, annotation to Article 140, *in Comentário ao Código Civil – Parte Geral..., cit.,* p. 366.

beneficiaries of accompanying measures and who need to adapt their regulations and admission procedures to the law and the principles in force.

II.2
DESIGNATION OF A PERSON INDICATED BY THE INSTITUTION IN WHICH THE ACCOMPANIED PERSON IS INTEGRATED TO ACT AS A COMPANION

Article 143 of the Civil Code provides for the new regime of the accompanied adult as to how the accompanying person is to be chosen and who can assume this role.

The rule is to give primacy to the choice of the beneficiary of the accompanying measure (paragraph 1). Preferably, the choice of the companion is up to the accompanied person himself, as a result of legal imperatives (including from an international source[28]) that put respect for the will and preferences of the person in need of support at the forefront. However, the accompanying person will always be appointed by the courts, and the Court must monitor the existence of an effective freedom of choice (*i.e.*, that there are no undue influences) and safeguard the overriding interests of (and only of) the beneficiary[29].

It is further added that the companion is "of legal age and in full exercise of his rights" (same paragraph 1 of article 143): "that is, the companion must have completed eighteen years of age (which excludes emancipated minors) and cannot benefit from any type of accompaniment himself. Persons who do not meet these two requirements are not eligible to perform the duties of accompanying adults, regardless of the extent of the accompaniment"[30].

Paragraph 2 of the same article 143 of the Civil Code determines that, in the absence of a choice, the accompaniment is granted to the person whose designation best safeguards the overriding interest of the beneficiary, listing, over several subparagraphs, some of these persons potentially designated as companions. It is a non-closed cast, only illustrative[31].

---

28 Cf. Article 12 of the Convention on the Rights of Persons with Disabilities, the driving force behind civil reform.

29 Cf. Guedes, António Agostinho; Rosas, Marta Monterroso, annotation to Article 143, *in Comentário ao Código Civil – Parte Geral…, cit.,* p. 358. Ac. of the STJ of 10-03-2022 (2076/16.0T8CSC. L2. S1) refers that "[i]t will not be respected for the choice of the person being accompanied if his mental faculties do not allow him to make such an assessment, that is, if he does not have the capacity to understand and evaluate the reality that surrounds him, or if the person chosen by him does not prove to be suitable for the exercise of the position. It is therefore up to the court, according to the criterion of the "overriding interest of the beneficiary", to confirm, or not, the choice of the person being accompanied".

30 Guedes, António Agostinho; Rosas, Marta Monterroso, annotation to Article 143, *in Comentário ao Código Civil – Parte Geral…, cit.,* p. 358.

31 Guedes, António Agostinho; Rosas, Marta Monterroso, annotation to Article 143, *in Comentário ao Código Civil – Parte Geral…, cit.,* p. 359. For the aforementioned catalogue, cf. Article 143(2).

In paragraph g) of the aforementioned precept, it is provided that the accompaniment may be granted "to the person indicated by the institution in which the accompanied person is integrated". On the other hand, subparagraph (i) stipulates that the position may be entrusted to "another suitable person". These people may belong to or perform certain functions within social economy institutions whose purpose is to provide assistance, including residential assistance, in situations of greater vulnerability. Think, for example, of the members (including volunteers[32]) of a social solidarity cooperative. On the other hand, the accompanied person may be "integrated" in an organization that, under one of the various forms provided for by law, has the status of IPSS (for example, a social solidarity association or a holy house of mercy)[33]. It all depends on the specific situation of the person who needs follow-up and the possible intervention of these entities. The person appointed by the institution in which the person being accompanied is integrated or the suitable person appointed by the Court may, for example, be the "director" of the institution, as practice has shown, but does not necessarily have to be so.

It should be noted that it has been understood that the designation of the "director" of the institution in which the accompanied person is integrated as a companion is presented as a last resort, that is, only possible when there is no family network available. The family, the primary source of duties of cooperation and assistance, is the first to emerge and, as a result of family solidarity, certain members of the family cannot excuse themselves from their positions[34]. A "jurisprudential orientation" has been affirmed in the sense that the appointment made in those terms must be "(...) The last solution to be considered and should only be put in place when the possibility of appointing someone from the personal and family circle is completely excluded (…)"[35]-[36].

It may also happen – thinking beyond that designation or indication of the director of a certain institution – that the person who is integrated in an institution and who does not have family members or other close people available establishes a close bond with someone who is part of the structure (for example, the one who most directly and frequently provides care, with great

---

[32] On the adequacy of the legal form of the social solidarity cooperative to frame an organization that promotes volunteering and revisiting the definitions of effective member and honorary member in this light, *see,* elaborately, Meira, D., "O fim mutualístico desinteressado ou altruísta das cooperativas de solidariedade social", *CIRIEC- Revista jurídica de economía social y cooperativa*, 2020, 221-247, especially pp. 235 et seq..

[33] Cfr. Meira, Deolinda, "Breves notas sobre el marco jurídico del sector de no mercado de la economía social en portugal - especial referencia a las instituciones particulares de solidaridad social", *Dos decenios actividad universitaria en economía social, cooperativismo y emprendimiento desde el Instituto Universitario IUDESCOOP* (R. Chaves Ávila), IUDESCOOP, Valencia, 2023, pp. 409 e ss.

[34] Cf. Article 144.

[35] Ac. of the Court of Appeal of the Port of 22-03-2021 (63/19.5T8PVZ.P2), quoting Ac. of the same Relationship of 24-10-2019. In a similar fashion, *vd.* Ac. of the Court of Appeal of Évora de 09-09-2021 (4/21.0T8RMZ.E1); Ac. of the Court of Appeal of the Port of 11-10-2022 (1937/15.8T8LOU-A.P1).

[36] In the Doctrine, raising reservations, Paula Távora Vítor (*Código Civil Anotado, cit.,* p. 180).

commitment, in a disinterested way). In the latter case, the beneficiary of the measure may choose (Article 143(1) of the Civil Code) that person for the position of companion, although it is up to the court to ensure that, in the absence of an effective family support network, this is the really appropriate solution taking into account the "best interests" of the beneficiary and that there are no conflicts of interest or undue influence[37]. It should also be taken into account that several companions may be appointed, as long as their functions do not overlap (Article 143(3) of the Civil Code).

In practice, a person who performs functions or is otherwise a member of an institution may be chosen (by the beneficiary), designated (by the court) or appointed (by the institution, by court order). In this case, the accompanying person must perform his or her duties with a view to ensuring the well-being of the beneficiary, his or her recovery, the full exercise of all his or her rights and the fulfilment of his or her duties (Article 140 of the Civil Code), acting with the "diligence required of a good father of a family, in the specific situation under consideration" (Article 146, paragraph 1). The companion must always take into account, as a standard of action, the need to respect the desires, will and preferences of the accompanied, by which he or she must guide his or her mission.

It should also be noted that our system configures the companion as a natural person. In the preliminary works, it reads: "[t]he German law permits the existence of the accompanying association (*Btreuungsverein*), even if the *Betreuer* must ultimately be a natural person, appointed by the association. The relationships of trust required by the accompaniment presuppose a natural person; however, this may be indicated by an association"[38]. As stated in Ac. of the Court of Appeal of Porto of 22-03-2021 (63/19.5T8PVZ. P2), "[t]he Companion must be of legal age and in the full exercise of his or her rights, from which it follows that he or she must be a natural person, it cannot be an institution, even if hospital or social solidarity where the accompanied person is hospitalized or placed – without prejudice to accepting the designation of natural persons designated by them"[39].

---

[37] Cf. Ac. of the Court of Appeal of Guimarães de 14-09-2023 (375/22.0T8MNC.G1).

[38] CORDEIRO, ANTÓNIO MENEZES, "Da Situação Jurídica do Maior Acompanhado. Estudo de Política Legislativa Relativo a um Novo Regime das Denominadas Incapacidades dos Maiores", *Revista de Direito Civil,* Ano III (2018), No. 3, pp. 473-553, study also available at https://www.smmp.pt/wp-content/uploads/Estudo_Menezes-CordeiroPinto-MonteiroMTS.pdf (cf. p. 121).

[39] Under Spanish law, it is provided that the judicial authority may appoint a curator "*[a] una persona jurídica en la que concurran las condiciones indicadas en el párrafo segundo del apartado 1 del artículo anterior*" (art. 276.º, 7.º), ou seja, "*fundaciones y demás personas jurídicas sin ánimo de lucro, públicas o privadas, entre cuyos fines figure la promoción de la autonomía y asistencia a las personas con discapacidad*" (Article 275, both of the Spanish Civil Code, as amended by the *Ley 8/2021*).

II.3
THE FUNDAMENTAL ROLE OF THE SOCIAL ECONOMY OF CARE IN THE REALIZATION OF THE INFORMAL CAREGIVER'S RIGHT TO REST

At the same time that our legal system is adapting and evolving with a view to providing more effective support to people in vulnerable situations, the care informally given to these same people has also received recent attention. Those who provide care to a family member in a situation of dependency often need support in carrying out this task, not only so that the care they provide is adequate and informed, but also to minimize increased risks to their health, well-being and social and/or professional insertion[40]. In this context, and among other necessary supports, the caregiver's *right to rest* appears as essential, as a measure "to mitigate burnout and promote physical and/or mental health"[41].

Law no. 100/2019, of 6 September, approved the Informal Caregiver Statute, establishing that the duly recognized informal caregiver has the right to "benefit from rest periods aimed at their well-being and emotional balance" (al. g), art. 5), and may benefit, for this purpose, from the measures of: i) referral of the person cared for, within the scope of the National Network of Integrated Continuing Care, for the inpatient unit; ii) referral of the person cared for to "social support services and establishments, namely residential structure for the elderly or residential home, on a periodic and transitory basis"; iii) home support services, when this is more advisable or when this is the wish of the informal carer and the person being cared for (als. a), b) and c), paragraph 2, article 7, of the Statute). The new Statute also provides that, in order to implement these measures, the amount to be paid by the user in the inpatient units of the National Network of Integrated Continuing Care is positively differentiated (paragraph 11 of the same article 7). In turn, Regulatory Decree No. 1/2022, of 10 January, implementing the support measures set out in the Statute and following the evaluation of the pilot projects, provides that the Specific Intervention Plan – a document that assesses the needs of the informal caregiver and defines the support strategies, in each case – must include the annual rest period of the caregiver to which it refers ("if applicable") and, also, the "declaration of consent of the person cared for reception in a social response or inpatient unit of the National Network of Integrated Continued Care for the rest of the informal caregiver, when applicable" (als. c) and d), paragraph 4, art. 12, of the aforementioned Regulatory Decree).

---

[40] For further developments on the new regime of the informal caregiver, from the labour and civil justice perspective, cf. SANTOS, Catarina Gomes, ROSAS, Marta Monterroso, "O Estatuto do Cuidador Informal: alguns aspetos laborais e civis", *Questões Laborais*, Ano XXX, n.º 63 (Agenda do Trabalho Digno), Coimbra, Almedina, jul-dez 2023, pp. 79- 110.

[41] Preamble to Ordinance no. 335-A/2023, of 3 November, better identified below.

It is article 16 of Regulatory Decree no. 1/2022, of 10 January, which regulates in more detail the right to rest of the informal caregiver with a view to reducing the physical and emotional burden they may experience. The rule refers to an ordinance the definition of the conditions under which the person cared for can be referred to the inpatient unit of the National Network of Integrated Continued Care or be, on a temporary basis, referred and welcomed in a social support establishment ("namely residential structure for the elderly, residential home...") (paragraph 2).

Caregiver rest may extend up to thirty days per year, and is preferably granted to carers "who are identified as having greater needs" (paragraph 3) and must take into account, in addition to these needs, the will of the carer and the person being cared for, the work requirements of the informal caregiver (if applicable), the assessment of the burden, *inter alia* (paragraph 4 of the last precept referred to).

Finally, the ordinance – announced in the aforementioned article 16 of Regulatory Decree no. 1/2022, of January 10 – was published on November 3, 2023: it is Ordinance no. 335-A/2023, which "Defines and establishes the terms and conditions for the rest of the informal caregiver and makes the seventh amendment to Ordinance no. 196-A/2015, of 1 July, as amended". In addition to the hypothesis of home care, the regulation contained in the Ordinance makes it possible "that the person being cared for can be welcomed in a structure where health care and/or social support appropriate to their needs are provided"[42].

Thus, it is necessary and fundamental to articulate the care provided informally by family members and the intervention, even if temporary and punctual, of the structures and institutions qualified to receive and care for people in situations of dependence[43]. These structures are called upon to welcome and provide various types of assistance to the persons cared for, within the scope of their functions and in accordance with the services available. However, in these cases, they are also determinant actors in the promotion of the physical and mental health of informal caregivers, alleviating the intensity of work usually associated with the act of caring. In this way, they not only act positively and directly in a context of vulnerability (with regard to the person being cared for), but also contribute, indirectly, to avoid situations of derivative or exponential vulnerability. In this specific context, the articulation, and joint efforts between individuals (who act driven by family solidarity and in fulfillment of duties of assistance and assistance arising from legal-family relations), the State and the actors of the social economy of care are quite visible. This transversality or symbiosis of responses is explained, from the outset, by the fact that the support of people in

[42] Preamble of the Ordinance under analysis.

[43] *"Adequate support to carers entails access to affordable and qualitative formal care services, likely to ease the burden if adequately combined with informal care"* – EUROCARERS, *ANNUAL REPORT 2022 - Acknowledging the central role played by informal carers across Europe through the implementation of the EU Care Strategy*, 2022, available at https://eurocarers.org/wp-content/uploads/2023/05/AR22_final.pdf.

vulnerable situations is the responsibility of society as a whole and of each legal subject, in particular.

The Ordinance reinforces the need for a declaration of consent from the person being cared for, "or from those who represent him/her", in order to be referred or directed to one of the possible structures or services, while the caregiver is resting (article 3(3) of the Ordinance). It is commendable the constant concern, throughout the new legal regime related to informal care, to ensure that the will of the person being cared for is met and valued, in all matters that concern him/her.

As regards the legal reference to the consent given by the legal representative, in the case of a companion designated under a measure of accompanying an adult with representation functions, it may be questioned whether the considerations set out in point II.1 are equally appropriate. This is consent to be given by the legal representative, it seems, in place of the person being cared for, when such a substitution falls within his or her duties. Be that as it may, we do not believe that the two situations are comparable. Consent to referral to social structures for the purpose of the caregiver's respite is, by its nature and purpose, limited in time and markedly transitory. The fact that it is not a decision capable of affecting the establishment of domicile or way of life, nor a decision with "personal or family significance" for the person being cared for (to use the expression of the *Spanish Civil Code*, already mentioned) clearly points to the fact that there is no need for prior judicial authorisation for the accompanying person-legal representative to be able to give the consent in question. This decision will also be part of your general functions and will not be very different from the decisions you have to take in the medical field. Nor would it be convenient to bureaucratize or hinder the realization of the caregiver's right to rest, with a burden on the courts.

One might ask what procedure should be adopted when the person being cared for is not in full enjoyment of his or her faculties and does not have a designated representative, whenever he or she is referred or directed to one of the available structures or services, for the rest of his or her informal caregiver. This is, however, a remote hypothesis, in light of the current regime of the informal caregiver and its Statute: Regulatory Decree No. 1/2022 requires, for the stage of application/recognition of the status of the informal caregiver, that "[i]n the event that the person being cared for is not in full use of his or her faculties, the person who provides or is willing to provide care to the person cared for also has the legitimacy to express provisional consent for the person being cared for, for this purpose, the application for recognition of the status of informal caregiver must be examined with proof of the request made to the court to bring the action for the accompaniment of an adult in relation to the person being cared for, under the terms provided for in the Civil Code" (paragraph 4, article 8, of the Regulatory Decree). Therefore, when, downstream, the consent of the person being cared for becomes necessary for temporary referral to social response, there are two likely scenarios: either it has already been concluded that the person being

cared for is able to consent (which will be the rule); or a companion has already been appointed with supply functions in this matter, in the most serious cases in which, in fact, the person is not "in the full use of his or her faculties" (adopting the legal terminology).

From all of the above, it follows that, in order to enforce the informal caregiver's right to rest, the person being cared for may be referred to certain social responses, such as residential structures for the elderly (ERPI) or residential homes (RH). Here, too, a positive differentiation in the family contribution, borne by social security (articles 8 and 9 of Ordinance no. 335-A/2023). Another important practical aspect has to do with the management of vacancies, considering the geographical proximity of the social response (cf. paragraph 2 of article 10 of the Ordinance).

In summary, the structures of the social economy of care emerge, in the context of the informal caregiver's right to rest, as indispensable agents in constant two-sided articulation: on the one hand, they are in the front line of the reception of people/individuals; on the other hand, they are articulated with public efforts and support, *id est,* with state intervention, in this matter.

III
CONCLUDING REFLECTION

The preceding lines focus, topically, on some issues with potential relevance for the social economy of care sector, from an exclusively legal point of view and in the light of current law. Although these are very specific aspects of the regime, they nevertheless reveal the need for further study and a constant harmonious dialogue between the recent normative advances in terms of support for people in vulnerable situations and the practical action of social economy entities in the pursuit of their mission. A holistic and integrated vision is needed, capable of convening all stakeholders who take on the role of supporting people in vulnerable situations, with a view to implementing the purposes of the CRPD and the other principles in force in this area.

BIBLIOGRAPHY

Alhambra, Luciana Miguel; Chacón Campollo, Raquel, "Internamiento en residencia de ancianos con demencia. Reflexiones con motivo de la entrada en vigor de la Ley 8/2021, de 2 de junio", *El Notario del Siglo XXI* - Septiembre - Octubre / n.º 111.

Alves, Cláudia David, "Regime Jurídico do Maior Acompanhado e Lei de Saúde Mental: que internamento?", *Revista do CEJ*, 2021, n.º 1, pp. 157-166.

Cordeiro, António Menezes, "Da Situação Jurídica do Maior Acompanhado. Estudo de Política Legislativa Relativo a um Novo Regime das Denominadas Incapacidades dos Maiores", *Revista de Direito Civil,* Ano III (2018), n.º 3, pp. 473-553, study also available at https://www.smmp.pt/wp-content/uploads/Estudo_Menezes-CordeiroPinto-MonteiroMTS.pdf.

Gomes, Inês Espinhaço, "O internamento do maior (des)acompanhado à luz da Constituição", *Julgar*, n.º 41, 2020, pp. 79-98.

Guedes, António Agostinho; Rosas, Marta Monterroso, annotations to Arts. 140º, 143.º, 145.º, *in Comentário ao Código Civil – Parte Geral,* 2.ª ed. revised and updated, UCP Editora, Lisbon, 2023, pp. 361 et seq.

Meléndez Arias, María del Carmen, "El ingreso de los mayores con demencia en la ley 8/2021", Tribuna Abierta, 31 Mayo 2023, available at https://cenie.eu/es/blog/el-ingreso-de-los-mayores-con-demencia-en-la-ley-82021.

Meira, Deolinda, "A Lei de Bases da Economia Social portuguesa. Breve apresentação", *Cooperativismo e Economía Social*, nº 35 (2012-2013), pp. 231-236.

Meira, Deolinda, "O fim mutualístico desinteressado ou altruísta das cooperativas de solidariedade social", *CIRIEC-Revista jurídica de economía social y cooperativa*, 2020, 221-247.

Meira, Deolinda, "Breves notas sobre el marco jurídico del sector de no mercado de la economía social en portugal - especial referencia a las instituciones particulares de solidaridad social", *Dos decenios actividad universitaria en economía social, cooperativismo y emprendimiento desde el Instituto Universitario IUDESCOOP* (R. Chaves Ávila), IUDESCOOP, Valencia, 2023, pp. 409 et seq.

Monteiro, António Pinto, "Das incapacidades ao maior acompanhado: breve apresentação da Lei nº 49/2018", *RLJ*, Ano 148.º, (nov-dez 2018), n.º 4013, pp. 72 a 84.

Ribeiro, Geraldo Rocha, "O instituto do maior acompanhado à luz da Convenção de Nova Iorque e dos direitos fundamentais", *Julgar (online),* May 2020.

Paz, Margarida, "O Ministério Público e o novo regime do maior acompanhado", *CEJ, O novo regime do maior acompanhado* (*ebook*)*,* Lisbon, 2019, pp. 111-138.

SANTOS, Catarina Gomes, ROSAS, Marta Monterroso, "O Estatuto do Cuidador Informal: alguns aspetos laborais e civis", *Questões Laborais*, Ano XXX, n.º 63 (Agenda do Trabalho Digno), Coimbra, Almedina, jul-dez 2023, pp. 79- 110.

Vítor, Paula Távora, *in Código Civil Anotado,* vol. I (artigos 1.º a 1250.º), coord. of Ana Prata, 2.ª ed., Almedina, Coimbra, 2019, pp. 191-192.

OTHER SOURCES:

CNECV Opinion No. 100/CNECV/2018 (Counselor Rita Lobo Xavier / Counselor Jorge Costa Santos).

Social Economy Satellite Account 2019/2020, Eduardo Pedroso, Edna Neves (CASES) Cristina Ramos, Carina Rodrigues (INE), COLEÇÃO DE ESTUDOS DE ECONOMIA SOCIAL N.º 17, available at https://cases.pt/wp-content/uploads/2023/08/Conta-Satelite-2019-2020.pdf.

Eurocarers, *ANNUAL REPORT 2022 - Acknowledging the central role played by informal carers across Europe through the implementation of the EU Care Strategy*, 2022, available at https://eurocarers.org/wp-content/uploads/2023/05/AR22_final.pdf.