

Guiding Questions for the focus areas of the IX Session of the Open-ended Working Group on Ageing: Autonomy and independence

Contribution of the Portuguese Ombudsman

March 2018

1) In your country/region, how is the right to autonomy and independence of older persons defined in legal and policy frameworks?

Along with fundamental rights protection, which apply to older persons in the same way as to other people, the Portuguese Constitution¹ enshrines a specific provision on older persons, stating their right to economic security, to housing and family and to community living conditions that respect their personal autonomy and prevent isolation or social marginalisation (Article 72(1)). In its personal dimension, this means the recognition of a fundamental right to self-determination of older persons (see also Article 26 setting out certain rights relating to personality, including the right to personality development). As for the social rights' dimension, it implies positive obligations from the State. Accordingly, Article 72(2) of the Constitution points towards an old age policy that encompasses measures of an economic, social and cultural nature aimed at providing older persons with opportunities for personal fulfilment through active participation in the community life. Likewise, the promotion of an old age policy is a public task explicitly stated within the State obligations on family protection (Article 67).

Moreover, the Constitution safeguards autonomy and independence of older persons through particular attention given to this group of people within the acknowledgement of the right to social security (under Article 63, social security system protects, among others, citizens in illness, old age, invalidity, and widowhood, and, in addition to unemployment, in all other situations of lack or reduction of means of subsistence or of working capacity), as well as of the right to health (the latter being fulfilled, among other dimensions, by the creation of economic, social, cultural and environmental conditions that would namely ensure protection of old age – see Article 64).

Within this constitutional framework (further implemented by legislation and regulations adopted thereunder) and as it follows from the policy framework as well, the right to autonomy and independence of older persons is paramount for living with dignity during the ageing process. It encompasses the right to take one's own and all relevant decisions about one's life with autonomy and freedom, including inter alia the decision where to live, income and assets management, healthcare received².

2) What other rights are essential for the enjoyment of the right to autonomy and independence by older persons, or affected by the non-enjoyment of this right?

¹ An English version of the Portuguese Constitution is available at <http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf>.

² In this exact sense, see Council of Ministers Resolution 63/2015, of 25 August, on the “Strategy to Protect the Older Person” (<https://dre.pt/application/file/a/70094318>). As for the current Government's initiatives aimed at the older persons, and, more concretely, envisioning a “National Strategy for Active and Healthy Ageing”, the proposal already submitted by the inter-ministerial working group established by Order 12427/2016, of 17 October (<https://www.sns.gov.pt/wp-content/uploads/2017/07/ENEAS.pdf>) defines the key concept of autonomy as the perceived capacity of the individual to control and deal with situations and to be able to make decisions about his or her life according to one's own rules and preferences.

There are several rights which are paramount for the enjoyment of the autonomy and independence by elderly. One may highlight the following as being particularly important: the right to self-determination and self-fulfilment; to non-discrimination, namely on grounds of age; to respect for physical and mental integrity; to access to information; to economic security; to access to preventive and remedial (physical and mental) health care; to adequate housing; to social security benefits and to social services on old age; to lifelong learning and access to the various stages of education; to access to sports, leisure and cultural activities; to participation in society, including political life; and to adequate legal protection and remedies.

The right to autonomy encompasses the rights of older persons to manage their own affairs and to make decisions and choices about their life. They have the right to do it freely, by themselves and without the interference or control by others. Besides having the right to make their own decisions, the elderly also enjoy respect for their options and have access to a remedy in case of failure to respect their choices or in case of being prevented to make their own decisions.

Within this framework, protection of the rights of the elderly also claims for a legal regime concerning those who lack (either temporarily or on a more enduring basis) capacity to take decisions in an informed and autonomous manner, or to express or execute such decisions. Such legal regime must with full respect their dignity and take into account the particular circumstances of the specific case, so as to prevent abuse and exploitation by third persons (such as manipulation aimed at obtaining advantages on legal transactions, testamentary dispositions or granting of a proxy or powers of representation).

Moreover, in the specific domain of health care, and in line with the principle of the patient's autonomy and the patient's right to self-determination, the advance health care directives (or the so-called living will) are also relevant, as they allow for a person to express in advance their informed and free will regarding future health care decisions in the event of future incapacity³.

Non-enjoyment of the right to autonomy and independence ultimately affects the dignity of the older person.

3) What are the key issues and challenges facing older persons in your country/region regarding autonomy and independence? What studies and data are available?

- Isolation, mainly (but not limited to) in more depopulated rural areas (where the family/community support networks tend to break down along with the rural exodus) and in widowhood situations. The same reality affects older persons living in the cities. Under a community policing approach, security forces are particularly active in the identification of older persons at risk, including within the framework of partnerships with local authorities, social welfare entities, health institutions and private institutions, in order to provide adequate support and further monitoring. As an example, since 2011, the National Republican Guard (GNR) regularly carries out a national census on the older people, signalling those living alone and/or isolated or in situations of vulnerability.

- Scarcity of economic resources: in Portugal, in 2015, 18.3% of people aged 65 or over were at risk of poverty⁴. Economic security and sufficiency of economic conditions are critical for the enjoyment of autonomy and independence by older persons. For instance, in view of income-cutting measures (though exceptional, within a not too distant economic and state budgetary emergency

³ In Portugal, rules on this specific subject are contained in Law 25/2012, of 16 July.

⁴ *Portugal Report on MIPAA+15* (2017), p. 6, giving Eurostat as source (Portugal Report on the third review and appraisal of the regional implementation strategy of the Madrid International Plan of Action on Ageing (MIPAA), available at:

http://www.unece.org/fileadmin/DAM/pau/age/country_rpts/2017/POR_report_EN.pdf).

framework), which targeted pensioners, the Portuguese Ombudsman has voiced their disproportionate and unjust nature, relying on the pensioners' confidence generated by the entitlement to a pension, as well as the additional difficulties faced by older people, in redirecting their lives so as to increase income. With the same line of arguments and in view of a legislative reform aimed at updating real estate value for the purpose of rent increase, the Portuguese Ombudsman has intervened successfully in the defence of vulnerable older tenants and their right to adequate housing.

- Despite an improvement in the availability of social services and facilities for older persons⁵, the network of social responses for older people and its users' capacity do not reach all those in need. This, for instance, may lead to an increase of the demand for illegal old persons' homes, where users are more likely to be in a vulnerable situation as regards the respect for their autonomy and independence. The Portuguese Ombudsman highlights the importance of monitoring compliance with legal requirements by and quality of service provided in residential structures for older persons (private and public-private partnerships), including the exercise of the corresponding public inspection powers (e.g. regarding deficient conditions or unlawful operating).

- Institutionalisation of older persons against their will: situations are brought to the Ombudsman's attention where, once institutionalised, older persons are deprived from their personal documents and their own house keys, and are denied contact with the outside world or access to their own bank accounts. In addition, older persons' property management also deserves specific attention, even when they have assigned a trustee..

- On the other hand, in the specific domain of long term-care, the lack of a legal status for informal caregivers does not promote deinstitutionalisation, but hinders it. Legislative initiatives on that statute are currently under debate.

- Violence (physical, psychological, economic, sexual, neglect), including domestic violence, against older persons, who are particularly vulnerable victims. Within the project "Ageing and Violence (2011-2014)"⁶, involving different public bodies as well as the Portuguese Association for Victim Support (APAV)⁷, two studies (a population study on violence and a study of victims of violence) were carried out in this regard.

- Need to revise and update legal rules on protective legal measures for adults with incapacity in alignment with international human rights instruments (under Portuguese law, the legal rules governing disqualification and impediment remain unchanged since the first version of the 1966 Civil Code). Legislative initiatives on the matter are currently under debate.

- Discrimination on the grounds of age tends to arise from misrepresentations, prejudices and stereotypes that link ageing to incapacity and dependence. Instances of direct or indirect discrimination on the grounds of age are brought to the attention of the Portuguese Ombudsman, namely in the field of employment (e.g. legal rules that reduce certain advantages linked to employment on the grounds of age) and higher education (university regulations that block access to social benefit on the grounds of age). Where the difference of treatment on the grounds of age is not justified by a legitimate aim,

⁵ The "Social Charter" (<http://www.cartasocial.pt/>) analyses the dynamics of the Social Services and Facilities Network in the Portuguese mainland and that are under the responsibility of the Ministry of Labour, Solidarity and Social Security, with the aim of making social responses (including for older persons) known, their characterisation, location, facilities and support entities.

⁶ Available at:

<http://repositorio.insa.pt/bitstream/10400.18/1955/3/Envelhecimento%20e%20Viol%C3%Aancia%202011-2014%20.pdf>.

⁷ APAV (https://apav.pt/apav_v3/index.php/en/) is a national non-profit social solidarity organisation and, within its mission aimed at supporting victims of crime, particular attention is also paid to ageing and older persons' rights.

the Ombudsman advocates its immediate removal. Situations of double – and often multiple – discrimination faced by older persons must not be neglected either.

4) What steps have been taken to ensure older persons' enjoyment of their right to autonomy and independence?

- Promotion of autonomy and independence by deinstitutionalisation and increased services and social support responses for older persons, including partnerships with private social solidarity institutions. Some of these responses, such as Home Support Service, Day-Care Centres and Night-Care Centres, allow older persons to maintain their home and remain in their usual environment. The cost of these services is calculated on the basis of the beneficiaries' income, thus favouring low-income older persons.

- Promotion of economic security through several measures, such as updating of minimum, rural and social pensions, exemption from taxation and from charges in access to public health care, social tariffs in the transport, electricity and natural gas sectors. Moreover, in the aftermath of a period of economic crisis in the country (leading to successive legislative changes, such as the establishment of more stringent conditions on access and calculation of pensions and other social benefits, and the introduction of cuts in pensions and benefits already assigned)⁸, steps have been taken to tackle the problem of poverty, social exclusion and inequalities by raising pensions through reinstatement of their yearly updating rules; raising of the reference value of the Solidarity Supplement for Older Persons (CSI, in the Portuguese acronym)⁹ and updating the amount of the supplement currently allocated; reinforcing the Social Inclusion Income (RSI, in the Portuguese acronym)¹⁰ and progressive reinstatement of its reference value.

- As for criminal law, the circumstance of victims who are particular defenceless on account of their age is dealt with under the crimes of domestic violence and maltreatment. Moreover, similar circumstances of defencelessness/vulnerability/weakness on account of age are relevant for penalty aggravation (as occurs in the crimes of murder, offences against the physical integrity, threatening, coercion, persecution, forced marriage, abduction, theft, robbery and fraud). A specific family relationship or of economic dependency between the victim and the offender is also relevant for an aggravated punishment within the framework of certain crimes against individual sexual self-determination. The V National Plan to Prevent and Combat Domestic and Gender-based Violence 2014-2017 (V PNPCVDG)¹¹ addresses the need to protect particularly vulnerable victims and to prevent violence, namely through the adoption of measures aimed at raising awareness and fighting against violence towards older persons. In this context, there were several initiatives conducted by the security forces aimed in particular at preventing fraud and other types of crimes which may have older persons as potential victims. Special attention was given to particularly vulnerable groups of women, namely those living in rural areas.

⁸ See *Portuguese Ombudsman – NHRI: Report to the Parliament 2014*, p. 38 (http://www.provedor-jus.pt/site/public/archive/doc/Report_2014_ING.pdf) stating that the persistence of the economic crisis in the period under report had an impact on social rights (including of older persons), as a radical change of the paradigm of the Administration occurred, more focused on reducing public spending and less worried, in practice, with citizen's rights.

⁹ The CSI, in force since 2006, is a monetary benefit of the solidarity subsystem aimed at combating poverty among the older persons. See *Portugal Report on MIPAA+15*, p. 11.

¹⁰ The RSI is a monetary benefit of the solidarity subsystem aimed at guaranteeing social minimums, protecting the most fragile and vulnerable groups in situations of extreme poverty; RSI may be cumulated inter alia with non-contributory State old age pension, pension in respect of widowhood and CSI.

¹¹ https://www.cig.gov.pt/wp-content/uploads/2014/06/CIG-VPNPCVDG_2014-2017_ENG.pdf

• The V National Plan for Gender Equality, Citizenship and Non-discrimination 2014-2017 (V PNI)¹² addresses social inclusion and ageing dimensions within the strategic area of promotion of equality between women and men in the public policies. It highlights in particular the adoption of measures aimed at improving the levels of education and literacy among the elderly women, as well as training measures of security forces and of social action services on gender and ageing. .

5) What mechanisms are necessary, or already in place, for older persons to seek redress for the denial of autonomy and independence?

The Portuguese legal order encompasses both judicial and non-judicial mechanisms for the enforcement of rights, which are guaranteed to everyone, including, naturally, the elderly. Thus, the question is not so much the lack of redress mechanisms, but rather how to make their use more effective, in practical terms, by older persons who, in case of denial of autonomy and independence, are in a particular vulnerable situation.

As for the right of access to the courts, the Constitution (Article 20) enshrines the principle of an effective judicial protection and requires expedite and priority legal proceedings aimed at guaranteeing effective and timely protection against threats to or violations of personal fundamental rights, freedoms and guarantees. This includes the guarantee of the older persons' autonomy and independence. In this line, civil legislation foresees the availability of remedies against either threats or offences to rights relating to personality (Article 70 of the Civil Code and Articles 878 to 880 of the Civil Procedure Code); in addition, any voluntary limitation to the exercise of rights relating to personality is void if it is contrary to the principles of public order (Article 81(1) of the Civil Code). As for administrative justice, it also encompasses urgent proceedings, namely the writ for fundamental rights, freedoms and guarantees protection where an expedite ruling imposing a certain action from the public administration is issued by the Court in order to ensure the timely exercise of the specific (Articles 109 to 111 of the Administrative Courts Procedure Code). Non-judicial administrative guarantees also apply within relations between the public administration and citizens, encompassing internal administrative claim and review procedures.

As for specifically disqualification and impediment legal proceedings, and despite the fact that applicable rules in force concern adults in general (not being therefore exclusive to older persons), it is for the Public Prosecution Service¹³ to act in the interest of the concerned person due to the fact that the public interest requires special attention to be given to those who are in the most vulnerable situations.

The Commission for the Protection of Victims of Crimes¹⁴ is an independent administrative body, working within the Ministry of Justice, responsible for receiving, examining and deciding on claims for State compensation filed by victims of violent crimes and victims of domestic violence¹⁵. Recently, the Council of Ministers announced the extension of the Commission's powers (renaming it

¹² https://www.cig.gov.pt/wp-content/uploads/2014/06/CIG-VPNI_2014-2017_ENG.pdf.

¹³ In the document "Triennial and Annual Strategic Objectives – 2015-2018 Triennium" (p. 19), the Public Prosecution Service included the rights of older persons amongst its strategic areas, highlighting that the physical, psychological and emotional fragility and the family and/or social abandonment of older persons have been raising important issues for the public entities regarding the need to review legal and procedural frameworks, by favouring the promoting of older persons' rights (http://www.ministeriopublico.pt/sites/default/files/documentos/pdf/objetivos_ministerio_publico_2015-2018.pdf).

¹⁴ <https://cpvc.mj.pt/>.

¹⁵ http://www.infovictimas.pt/pt_en/001_home/001_infovictms.html.

National Commission to Support Victims of Crime) and the beneficiaries of the right to advance payment of compensation, so as to encompass all particularly vulnerable victims.

Within non-judicial mechanisms, the right to complain to the Ombudsman should also be mentioned. Besides handling citizens' complaints, the Portuguese Ombudsman is also empowered to act on its own initiative, defending and promoting people's rights, particularly of those in the most vulnerable situations, including older persons¹⁶. To that aim the Office of the Ombudsman comprises a specialised and multidisciplinary unit and, since 1999, provides a helpline for older persons, with a view to facilitate their access to this NHRI. As stated in the *Portuguese Ombudsman – NHRI: Report to the Parliament 2016*¹⁷, within the three specialised helpline services provided¹⁸, the Ombudsman receives, since 2003, the majority of the telephone claims from older persons. One of the reasons explaining this situation is the fact that the helpline is nationwide and free of charge; moreover, it is one of the few national mechanisms specifically dealing with older persons issues. Finally, also the gradual ageing of the Portuguese population can explain the high number of telephone calls received.

As for the activity of the Portuguese Ombudsman regarding redress mechanisms themselves, special attention is given, for example, to procedures within the various police stations, defending the need to their standardisation, with a view to achieving the objectives of community policing and victim support programmes already in place and directed at the older person. To this end, the Ombudsman has already suggested that the entities concerned consider the signing of protocols as well as the adoption of forms or operation standards that may lead to the improvement of the identification of risk situations or the prevention of problems that may endanger the safety of older persons.

6) What are the responsibilities of other, non-State, actors in respecting and protecting the right to autonomy and independence of older persons?

There is a duty to respect and protect the right to autonomy and independence of older persons within relations between private actors (on the “horizontal effect” of constitutional norms relating to fundamental rights, see Article 18(1) of the Constitution), ranging from the family context and the proximity community network to private support facilities for older persons or any other actor. Disregard for the right to autonomy and independence of older persons leads to civil and criminal liability, as well as to administrative sanctions or even disciplinary proceedings towards the offender, where applicable.

¹⁶ See Article 4(1) of the Portuguese Ombudsman Statute (available at http://www.provedor-jus.pt/site/public/archive/doc/Ombudsman_s_Statute.pdf). Moreover, Article 2 (2) of the Statute broadens the Portuguese Ombudsman's scope of activity: this NHRI may also act as regards relations between private actors, where they entail a special relationship of power from one over the other. The aim of the intervention is to protect fundamental rights, freedoms and guarantees.

¹⁷ http://www.provedor-jus.pt/site/public/archive/doc/Report_to_the_parliament_2016_EN_0.pdf (see pages 74-75).

¹⁸ The other two are addressed to children and to persons with disability.