

**MECHANISMS FOR PROTECTING RIGHTS OF PERSONS
WITH DISABILITIES: THE INTERNATIONAL FRAMEWORK
AND THE CASES OF BRAZIL AND PORTUGAL**

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Hakem Deęerlendirmesi: Dıř baęımsız.

ıkar atıřması: Yazarlar tarafından ıkar atıřması bildirilmemiřtir.

Finansal Destek: Yazarlar bu alıřma iin finansal destek almadıęını beyan etmiřlerdir.

Katkı Payı Oranı: Eřittir.

Bu makaleye atıf iin; Crtes, Ana, Oliveira, Pedro “Engelli Kiřilerin Haklarının Korunması İin Mekanizmalar: Uluslararası Mevzuat ve Brezilya ve Portekiz Vakaları”, Anayasa Hukuku Dergisi, Cilt No.: 10, Sayı No.: 20, 2021, s. 395-416.

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ABSTRACT

Persons with disabilities have historically occupied a vulnerable position in society. However, it was only after the Second World War that a sense of responsibility became stronger in the international community in order to prevent their rights from violations.

This article aims to present both a brief analysis of the international legal framework on the rights of persons with disabilities, focused on the CRPD, and a case study with legal, historical and practical aspects focused on the Brazilian and the Portuguese contexts. Besides the introduction and the final remarks, the text is divided into two main parts: one focused on the protection of persons with disabilities in an international law perspective and the other presenting the case study. The case study, in its turn, is divided into a description of the legal framework in Brazil and in Portugal and an empirical case-law study focused on the approach to the civil capacity of persons with disabilities.

Keywords: Disability, Constitutional Court, CRPD, Brazil, Portugal

* Bu makale 25.02.2021 tarihinde Yayinevimize ulaşmış olup, 13.03.2021 tarihinde birinci hakem; 16.03.2021 tarihinde ikinci hakem onayından geçmiştir.

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Conflict of Interest: The authors have no conflict of interest to declare

Grant Support: The authors declared that this study has received no financial support

Contribution Statements : Half-and-half (50%/50%)

Bu makaleye atıf için; Côrtes, Ana, Oliveira, Pedro, “Mechanisms for Protecting Rights of Persons with Disabilities: The International Framework and the Cases of Brazil and Portugal”, *Anayasa Hukuku Dergisi*, Cilt No.: 10, Sayı No.: 20, 2021, s. 417-440.

1. Introduction

Persons with disabilities have historically occupied a vulnerable position in society. However, it was only after the Second World War that a sense of responsibility became stronger in the international community in order to prevent their rights from violations.

Since then, legislation on persons with disabilities rights, for example in the areas of social welfare, social security, and mental health, started being adopted by an increasing number of countries. As a result, many people with disabilities began to have the possibility of being provided with rehabilitation, institutionalisation, and labour benefits. Following the course of the evolution of disability rights, subsequently, the welfare policy based on the medical paradigm was gradually shifted to a human rights model of disability, which focuses on equality rights of individuals and creates anti-discrimination laws. The leading international legal instrument to illustrate this new policy is the United Nations Convention on the Rights of People with Disabilities (henceforth CRPD), signed in New York on the 30th of March of 2007 and aimed at all disabilities.

This article aims to present both a brief analysis of the international legal framework on the rights of persons with disabilities, focused on the CRPD, and a case study with legal, historical and practical aspects focused on the Brazilian and the Portuguese contexts.

Brazil and Portugal are interesting case studies in this topic not only for being both State Parties in the United Nations' CRPD but also for having recently issued legal norms on the civil capacity of persons with disabilities, profoundly changing the approach to disability rights in their national framework in accordance with the CRPD.

Hence, besides the introduction and the final remarks, the text is divided into two main parts: one focused on the protection of persons with disabilities in an international law perspective and the other presenting the case study. The case study, in its turn, is divided into a description of the legal framework in Brazil and in Portugal and an empirical case-law study focused on the approach to the civil capacity of persons with disabilities.

2. The protection to persons with disabilities in an international law perspective

In the United Nations (UN) context, the shift from a medical model of disability³ to a social and a human-rights one began in the '70s and was endorsed in the following decade (1983-1992), the UN decade of disabled persons.⁴ At first, the main focus of the UN with regard to disability policies was the prevention, the rehabilitation and the definition of disability.⁵ Afterwards, they were complemented with equality policies through the adoption of the World Programme of Action Concerning Disabled Persons of 1982.⁶

During the Decade of Disabled Persons, a wide range of studies on the human rights field was carried out in the UN by the Commission of Human Rights and its sub-commission. As a result, the General Assem-

³ This model focused on the clinical feature of disability, seeing it as an illness that needs to be treated, healed, or, at least, rehabilitated. In other words, such a model perceives disability solely as a personal problem from those who have got it. Not surprisingly, disability remained invisible for many years. As emphasised by Theresia Degener and Andrew Begg in "From Invisible Citizens to Agents of Change: A Short History of the Struggle for the Recognition of the Rights of Persons with Disabilities at the United Nations", *The United Nations Convention on the Rights of Persons with Disabilities* (ed. Valentina Della Fina, Rachele Cera, Giuseppe Palmisano), Springer, 1. 2017, there was a long process before disability started being considered a human-rights issue in this context. The authors highlight four phases: from 1945 to 1970, issues related to disability were invisible in the UN policy, from 1970 to 1980, persons with disabilities started being considered subjects of rehabilitation, from 1980 to 2002, they became objects of human rights, and in the new millennium they were finally recognised as subjects entitled to human rights. On the medical model, see also, Theresia Degener, "Disability in a Human Rights Context", *Laws*, No 5 (available on: <<https://www.mdpi.com/2075-471X/5/3/35>>, 2016, Accessed 04 Sept 2021)

⁴ On this normative evolution, see Filipe Venade de Sousa. *A Convenção das Nações Unidas sobre os Direitos das Pessoas com Deficiência no Ordenamento Jurídico Português - Contributo para a Compreensão do Estatuto Jusfundamental*, Coimbra: Almedina. 2018

⁵ See, for instance, the "Declaration on the rights of the mentally retarded persons"

⁶ The programme's disability policy was structured in 3 specific pillars: prevention, rehabilitation and equity of opportunities. Such a programme alerted that the social barriers sharpened disability by preventing persons with disabilities from having the same opportunities as their peers in society. See the General Assembly Resolution n.º 37/52, of the 3rd of December, 1982: "United Nations Decade of Disabled Persons"

bly issued a soft law instrument of human rights in 1990, the "Tallinn Guidelines for Action on Human Resources Development in the Field of Disability".⁷ This resolution established that persons with disabilities were entitled to the right to live independently and, as such, they should not be considered an object of guardianship. Therefore, their participation in mainstream society should be promoted by the signatory states.⁸

In 2000, the World Conference of NGOs of persons with disabilities was held in Beijing, resulting in the adoption of the Declaration on the Rights of Persons with Disabilities in the New Millennium. This document has as an aim, among others, the creation of a legal binding convention concerning disability rights.⁹ This appeal, claimed on various occasions by the States Parties and by NGOs from across the world, culminated in the approval of the CRPD on the 13th of December, 2006¹⁰. The participation of the civil society was a standout feature in the process of creating the Convention.

The CRPD defines as "persons with disabilities" those who have a permanent form of physical, intellectual or sensory impairment that prevents participation as a peer in society. In addition, the CRPD expressly determines in its article 12 that States Parties must recognise the equality

⁷ General Assembly Resolution n.º 44/70, of the 8th of December, 1989

⁸ In the following year, on the 17th of December, 1991, the General Assembly adopted Resolution n.º 46/119, concerning the principles for protection of persons with mental illness and the improvement of mental health care. This document incorporated the social model of disability, establishing the right to autonomy and dignity of persons with disabilities, as well as the necessary support for the enjoyment of these rights.

⁹ This initiative would be strengthened at the World Conference in Durban in 2001

¹⁰ The CRPD was approved through Resolution A/RES/61/106 and opened to signature by States on the 30th of March 2007, in New York. Also on this date, an Optional Protocol to the CRPD was approved, giving the Committee on the Rights of Persons with Disabilities the competence to examine individual complaints regarding alleged violations of the CRPD by States Parties to the Protocol. However, it is important to note that the Protocol may be used only when all national claims have been previously used. The UN Mexican Delegation played a relevant role in boosting an official Resolution (n.º 56/168) on the 19th of December, 2001, which created the ad hoc committee responsible for the CRPD's negotiation process. This process took only five years, representing a record compared to the term of approval of other Human Rights treaties. See Carlos Parra-Dussan. "Convención sobre los Derechos de las Personas con Discapacidad: antecedentes y sus nuevos enfoques", *Revista Colombiana de Derecho Internacional*, 16, 347. 2010

of conditions between persons with disabilities and other people to enjoy legal capacity in all aspects of their lives, as well as take steps to ensure the necessary support for people with disabilities exercise their legal capacity and prevent possible abuses.

The bare concept of "person with a disability" established by the UN in the CRPD, drawn up with the collaboration of hundreds of representatives of NGOs, innovates by overcoming the merely medical understanding of the term disability, leading to focus on social and attitudinal barriers that prevent this group from fully participating in society. Thus, the concept as a combination of these factors leads to the inference that the disability is in society, and, when barriers to access are broken down, citizenship is guaranteed to persons with disabilities.¹¹

In other words, it is not the person with a disability who needs to be "cured" in order to adapt to society, but rather society and the State that must adopt public policies for inclusion. This approach involves seeing the person with a disability first as a human being and then using medical data only to define needs.¹²

Throughout the CRPD, this concept involves the recognition of the person with a disability as capable of contributing to the common well-being and diversity, and it is a necessary duty for human and social development to act so that the disadvantages faced by this group are reduced, and their full social participation is encouraged.¹³ For this conception, it is central to perceive people with disabilities not as objects of compassion but as holders of rights that they should exercise without any discrimination.¹⁴

As it can be inferred, the CRPD¹⁵ represents not only a civilisational conquer but also one step forward in International Law in relation

¹¹ Ricardo Tadeu Marques da Fonseca. "A ONU e seu conceito revolucionário de pessoa com deficiência", *Revista do Tribunal Regional do Trabalho da 14.ª Região*, Jan/Jun, 121. 2010

¹² André de Carvalho Ramos. *Curso de Direitos Humanos*. (5ª ed.). São Paulo: Saraiva. 2018

¹³ Ricardo Tadeu Marques da Fonseca, 2010

¹⁴ André de Carvalho Ramos, 2018, p. 270

¹⁵ For further debates on the CRPD, see: Macario Alemany. "Should We Say 'Functional Diversity' To Refer To 'Disability'?", *Undecidabilities and Law The Coimbra Journal for Legal Studies*. 2021; Joaquim Correia Gomes / Luísa Neto / Paula Távora

to the fight for the implementation of the rights of persons with disabilities, as it translates the first international document that regulates the guaranties of them.¹⁶ Similar to the UN legal order in favour of other marginalised groups, the CRPD is a hard law instrument in the disability context.¹⁷

The CRPD's general principles are provided in Article 3 as follows: I. respect for inherent dignity, individual autonomy including the freedom to make one's choices, and independence of persons; II. Non-discrimination; III. Full and effective participation and inclusion in society; IV. Respect for difference and acceptance of persons with disabili-

Vitor (Eds.). *Convenção sobre os direitos das pessoas com deficiência*. Comentário, Centro de Investigação Jurídico Económica. 2020; Jennifer W. Reiss. "Innovative Governance in a Federal Europe: Implementing the Convention on the Rights of Persons with Disabilities", *European Law Journal*, Vol. 20, No. 1, 107. 2014; Filipe Venade de Sousa. "The Charter of Fundamental Rights of the European Union» and the United Nations Convention on the Rights of Persons with Disabilities: a dynamic pro unione and pro homine with particular reference to the CJEU case-law", *UNIO - EU Law Journal*. Vol. 5, No. 1, 109. 2019; Eve Hill / Peter Blanck. "Future of Disability Rights Advocacy and 'The Right to Live in the World'", *Texas Journal on Civil Liberties and Civil Rights*, 15, 29. 2009; Paul Harpur. "Time to Be Heard: How Advocates Can Use the Convention on the Rights of Persons with Disabilities to Drive Change", *Valparaiso University Law Review*, 45, 1271. 2011; Michael Ashley Stein / Janet E. Lord. "Future Prospects for The United Nations Convention On The Rights Of Persons With Disabilities", *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (ed. Oddný Mjöll Arnardóttir and Gerard Quinn), Leiden-Boston: Martinus Nijhoff Publishers, 17. 2009; Gerard Quinn. "Resisting the "Temptation of Elegance: Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?", *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (ed. Oddný Mjöll Arnardóttir and Gerard Quinn), Leiden-Boston: Martinus Nijhoff Publishers, 215. 2009; Isa Elisabeth Koch. "From Invisibility to Indivisibility: The International Convention On The Rights Of Persons With Disabilities", *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (ed. Oddný Mjöll Arnardóttir and Gerard Quinn), Leiden-Boston: Martinus Nijhoff Publishers, 67. 2009

¹⁶ Amparo San José Gil. "El primer tratado de derechos humanos del siglo XXI: la Convención sobre los derechos de las personas con discapacidad", *Revista Electrónica de Estudios Internacionales*, 13, 5. (available on: <http://www.reei.org/index.php/revista/num13/articulos/primer-tratado-derechos-humanos-siglo-xxi-convencion-sobre-derechospersonas-con-discapacidad>). 2007

¹⁷ For a comparative analysis between the CRPD and other soft law documents regarding the rights of persons with disabilities, see Carlos Parra-Dussan, 2010

ties as part of human diversity and humanity; V. equality of opportunities; VI. Accessibility; VII. Equality between men and women; VIII. Respect for the evolving capacity of children with disabilities and respect for the right of children with disabilities to preserve their identities.

With regards to the legal nature of this desideratum, it conjugates two facets, one based on social development; another one based on the human rights¹⁸. During the discussion concerning the Convention's content, there were divergences within the *ad hoc* Committee between some States and Organisations. The European Union, for instance, defended the adoption of the human rights model, which is based on equality and non-discrimination values, and feared that the social model could lead to the assistance paradigm reappearance. On the other hand, China defended the incorporation of the social model.¹⁹ As a consequence, the incorporation of both facets was implemented.

Moreover, it can be said that the CRPD content is mixed since it provides first-generation human rights (civil and political rights), as well

¹⁸ According to Theresia Degener. "Disability in a Human Rights Context", Laws, No 5 (available on: <<https://www.mdpi.com/2075-471X/5/3/35>>). 2016. p. 19: "the CRPD was initially drafted as a human rights convention that replaces the medical model of disability with the social model of disability. However, the drafters went beyond the social model of disability and codified a treaty that is based on the human rights model of disability. While the medical model of disability reduces the disabled individual to her impairment, the social model dissects disability as a social construct and debunks exclusion and denial of rights on the basis of impairment as ideological constructions of disability. The human rights model builds on the social model in that it is built on the premise that disability is a social construct, but it develops it further. There are six propositions for this assertion. First, the human rights model can vindicate that human rights do not require a certain health or body status, whereas the social model can merely explain that disability is a social construct. Secondly, the human rights model encompasses both sets of human rights, civil and political as well as economic, social and cultural rights and thus not only demands anti-discrimination rights for disabled persons. Thirdly, the human rights model embraces impairment as a condition which might reduce the quality of life but which belongs to humanity and thus must be valued as part of human variation. Fourthly, the human rights model values different layers of identity and acknowledges intersectional discrimination. The fifth proposition is that unlike the social model, the human rights model clarifies that impairment prevention policy can be human rights sensitive. Lastly, it is opined that the human rights model not only explains why 2/3 of the world's disabled population live in developing countries, but that it also contains a roadmap for change"

¹⁹ See Filipe Venade de Sousa, 2019

as the second-generation ones (economic, social and cultural rights). It is worth mentioning that the CRPD was not intended to create new rights in favour of persons with disabilities but to guarantee to them the exercise of existing human rights. Nonetheless, it introduced new formulations of rights, such as the right to accessibility (article 9)²⁰ and the right to live independently and to be included in the community (Article 19).²¹

Other examples of rights addressed in the CRPD are the right to life (Article 10), the right to liberty and security (Article 14), the freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 15), the freedom from exploitation, violence or abuse (Article 16), the liberty of movement and nationality (Article 18), the right to personal mobility (Article 20), the freedom of expression and opinion, and access to information (Article 21), the right to respect for privacy (Article 22), the right to respect for home and the family (Article 23), the right to equal recognition before the law (Article 12), the access to justice (Article 13), the right to education (Article 24), the right to health (Article 25), the right to habilitation and rehabilitation (Article 26), the right to work and employment (Article 27), the right to adequate standard of living and social protection (Article 28), the right to participation

²⁰ This provision determines: 1. “To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas”

²¹ According to this norm, "States Parties to the present Convention recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that: a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement; b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community»; c) community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs”

in political and public life (Article 29), and the right to participation in culture life, recreation, leisure and sport (Article 30).

Since disability as a legal issue is a vast subject, the adoption of other international documents was also needed to safeguard the rights of specific groups. One example is blind and visually impaired individuals. This group is constantly confronted with barriers that make things such as architecture and communication inaccessible and exclude them from full participation in mainstream society. In addition, they are disproportionately faced with a significant number of obstacles in terms of exercising fundamental rights, particularly the right to education, information, and culture, due to the lack of accessible format books. Therefore, on the 28th of June 2013, the Treaty of Marrakesh outlined a goal to end the so-called «book famine» faced by these persons. The treaty provisions are designed to facilitate their access to books and other printed materials, consequently limiting domestic copyright laws.

Furthermore, the application of the CPDP is complemented by other existing international documents, both on human rights in a general sense - i.e., the International Declaration of Human Rights (1948) -, and focused on persons with disabilities but in a regional context - i.e., Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (1999).

3. The cases of Brazil and Portugal

3.1. The legal framework

Since the 30th of March of 2007, Brazil and Portugal are signatories of the CRPD. Since then, both countries have been adopting measures to materialise the rights arising from the CRPD, ratified in 2008 in Brazil and in 2009 in Portugal.

The approach to disability issues has evolved with time in both countries. The first explicit references to disability or persons with a disability appeared in the Portuguese Constitution in 1976 and in the Brazilian Constitution in 1978 (through a constitutional amendment to the Constitution issued in 1973). As the years went by, the terms used on legislation to refer to disability changed, and the amount and the content

of rights guaranteed grew in both countries. Nowadays, the Portuguese Constitution includes educational rights and support to the families of persons with disabilities and organisations that defend their rights. The Brazilian Constitution of 1988, in its turn, explicitly mentions persons with disabilities rights with regards to, among others, health, equal pay, employment, education and accessibility.

Before 1988, Brazilian legislation on persons with disabilities was limited to scarce references about education. One year after the Brazilian Federal Constitution of 1988 was issued, nonetheless, was enacted a legal norm that dealt with the creation of the National Coordination for the Integration of Persons with Disabilities – CORDE and the support for people with disabilities and their social integration. In the following years, other legal norms linked to the theme emerged. Examples of issues addressed in the Brazilian legislation are employment quotas, social security benefits, access to education, accessibility and access to information, Brazilian sign language, and guide dogs.²²

In the Portuguese legislation, the rights of people with disabilities are also addressed at various levels of the legal system. The Basic Law for the Prevention and Rehabilitation and Integration of Persons with Disabilities, for example, is a relevant legal instrument in this regard and addresses the equalisation of opportunities, accessibility and mobility.

Even before the aforementioned norm, there was legislation aimed at people with disabilities in Portugal dealing with issues such as rehabilitation, special education, housing, special placement regime for teachers with disabilities, employment, and income subsidy. Moreover, in the years that followed the norm, the Portuguese legislation in this regard multiplied. There are now legal diplomas aimed at education, employability, social security benefits, accessibility, communication, quotas, the care of minors with disabilities, among others.²³

Notably, the issue of the civil capacity of persons with disabilities has recently received special attention in both the Brazilian and the Por-

²² Izabel Madeira de Loureiro Maior. “Movimento político das pessoas com deficiência: reflexões sobre a conquista de direitos”. *Revista Inclusão Social*, Brasília, v. 10, n. 2, p. 28-36. 2017

²³ António de Araújo. *Cidadãos Portadores De Deficiência (O Seu Lugar Na Constituição Da República)*. Coimbra: Coimbra Editora. 2001

tuguese legal frameworks. These legislative changes make these countries even more interesting cases to study.

The Brazilian Law of Inclusion (Lei Brasileira de Inclusão), also known as the Statute of Persons with Disabilities, played a double role of innovation in the Brazilian legal framework: while it expanded the protection of people with disabilities, it also addressed the expansion of autonomy, freedom and independence of this group of people, adapting Brazilian legislation to the CRPD with regards to civil capacity.

The change in legislation regarding civil capacity is one of the most relevant brought by the 2015 law. Until then, persons with mental or intellectual disabilities were considered relatively or absolutely incapable, and, with the advent of the Brazilian Law of Inclusion, they now have the right to exercise their civil capacity on equal terms with other persons.²⁴

The Brazilian Law of Inclusion revoked the provisions of the Brazilian Civil Code of 2002 that treated persons with disabilities as absolutely incapable. With the new law, only minors under 16 years of age are considered absolutely incapable. Moreover, the mentions to "those who have a mental disability with reduced judgment"²⁵ and "exceptional persons, without complete mental development" were eliminated from the article of the Civil Code that addresses relative capacity. The habitual drunkards, drug addicts and those who, for a temporary or permanent reason, cannot express their will are still considered relatively capable.

Therefore, what matters for civil capacity now is the possibility of expressing one's will, so that the expression "reduced discernment" is no longer used to rule out the capacity of persons with mental or intellectual disabilities, and the general rule is the establishment of full civil capacity. In short, the person with a disability will, as a rule, have full civil ca-

²⁴ The exercise of civil capacity includes the possibility of getting married, forming a stable union, exercising sexual and reproductive rights, having access to adequate information on reproduction and family planning, preserving their fertility, exercising the right to custody, guardianship, trusteeship and adoption

²⁵ When necessary, the terms in the Brazilian and the Portuguese legislation were translated into English by the authors

capacity and only not being able to express one's will makes one relatively incapable.²⁶

Since the new legislation was issued, thus, the concept of disability is disconnected from that of incapacity. However, as mentioned, the law does not set aside the protection of persons with disabilities. It also provides procedures to assist the exercise of civil capacity of those persons, such as supported decision-making and curatorship. The former being less invasive and, thus, preferential, and the latter being the exception to the rule of full civil capacity.

Supported decision-making exists on the own initiative of the interested person with a disability, who seeks the help of third parties to carry out civil acts of their life when they deem it necessary. Once defined, supporters have the duty to fight for the interests of the supported person and must notify a judge in case of situations that threaten those interests.

It is essential to keep in mind that the will of the person assisted, and not of the person who assists, must always prevail. That is why the law requires that the supporters be two and that they be reputable persons, trusted by the person supported, chosen by this person and with links to this person. The term, occasions and limits of support are not defined by law and must be delimited in the request by the supported person who, still being fully capable, may request the termination of the support at any time.²⁷

The curatorship, on the other hand, is provided for exceptional cases in which full civil capacity is compromised. The law also provides that the curatorship must be restricted to persons who cannot express their will, last as short as possible and be proportional to the circumstances of the case. The first difference in relation to supported decision-making is the legitimacy, which does not belong to the interested person, but to, as provided for in the Brazilian Code of Civil Procedure, spouses or partners, family members, the institution in which they are sheltered, or, in the absence of those, the Public Prosecutor's Office (*Ministério Público*).

²⁶ André de Carvalho Ramos, 2018, p. 823 and 824

²⁷ Ibid, p. 823 and 825

Once one of the legitimised ones has filed the suit, with the help of a multidisciplinary team of specialists, an inspection will be carried out with the objective of delimiting for which acts the curatorship will be necessary. The decision on those cases, which can be reviewed, will make explicit the limits of the curatorship (applicable only to property and business issues), as well as the duration. Moreover, the curators have an obligation to report annually to a judge with the balance of the year in question. The curatorship will not reach the right to one's own body, sexuality, marriage, privacy, education, health, work and vote.²⁸

As for the situation in Portugal, the legislation previously provided as sources of incapacity to exercise rights for adults: interdiction and disqualification. Those should be decreed in a court decision in the interest of the interested person, having as possible grounds, provided for in Portuguese Civil Code, psychic anomaly, deafness and blindness, depending on gravity. In any case, these causes would only justify interdiction or disqualification if one proved to be incapable of governing oneself and one's goods.²⁹

There was a latent need for new legislation on the issue because, in accordance with the CRPD, mechanisms to assist persons with disabilities should be created without taking away their civil capacity. It is always preferable, whenever possible, to offer assistance. It is necessary that people with disabilities be supported when needed, but while maintaining their capacity to exercise their rights, with a flexible regime that allows a case-by-case analysis and measures that only do not maintain capacity in exceptional cases, for those who really need it.³⁰

The Legal instrument to safeguard vulnerable adults (*Regime do Maior Acompanhamento*), issued in 2018 in Portugal, does not entirely replace the incapacity regimes. Instead, it modifies the institutes of interdiction and disqualification and the incapacities that result from them. In the new regime, these incapacities still exist, but they are measures to be taken exceptionally by courts according to the specificity of the case. The changes are deeply linked to the issue of civil capacity, and the in-

²⁸ Ibid, p. 823 and 824

²⁹ António Pinto Monteiro. "O Código Civil Português entre o elogio do passado e um olhar sobre o futuro". *Revista de Legislação e de Jurisprudência*. Nº 4002. 148. 2017

³⁰ Ibid, p. 151 and 152

stitutes of interdiction and disqualification are replaced (in a legislator's choice due to the negative stigma carried by the institutes) by the regime of the *Maior Acompanhado*. One of the biggest problems with the previous legislation was the need for one to be declared incapable before receiving protection and assistance in the exercise of one's capacity. In this sense, the regime of the *Maior Acompanhado* presents a satisfactory solution. With the reform, the articles of the Portuguese Civil Code that regulated interdiction and disqualification, now eliminated, deal with the new regime.³¹

The accompaniment measures provided in the new law are aimed at adult persons who, due to health, disability or behaviour, are unable to fully and consciously exercise their rights and fulfil their duties. These measures may be required by the person who needs them or, with their permission, by a spouse, *de facto* partner or a relative. The need for authorisation highlights the appreciation of autonomy. The only possibilities in which this authorisation is not necessary occur when the requisition comes from the *Ministério Público* or when a duly substantiated court decision fulfils it.³²

The Court defines whether there will be accompaniment as well as the appropriate measures for each specific situation. However, according to the new legislation, the interested person must be heard personally and directly before the decision. The definition of measures on a case-by-case basis pushes the new regime away from incapacity and considers the interests and self-determination of the beneficiary.³³

In general terms, the choice of the accompanying person will be up to the person concerned or his/her legal representative. If this choice has not been made, the law provides a list of possible companions, always keeping in mind the best interest of the person accompanied. The new

³¹ António Pinto Monteiro. “Das incapacidades ao maior acompanhado. Breve apresentação da lei n.º 49/2018”, *O Novo Regime Jurídico do Maior Acompanhado*, CEJ, Coleção de Formação Contínua, Jurisdição Civil e Processual Civil, fevereiro 2019, disponível em: <www.cej.mj.pt>. 2019

³² Mafalda Miranda Barbosa. “Majores Acompanhados: da incapacidade à capacidade?”, *Revista da Ordem dos Advogados*, Ano 78, Lisboa. 2018. p. 239

³³ Mafalda Miranda Barbosa. “Fundamentos, conteúdo e consequências do acompanhamento de maiores”, *O Novo Regime Jurídico do Maior Acompanhado*, CEJ, Coleção de Formação Contínua, Jurisdição Civil e Processual Civil, fevereiro 2019, available on: <www.cej.mj.pt>. 2019

regime is characterised by flexibility and case-by-case analysis, as opposed to the previous regime of duality between interdiction and non-interdiction. It is possible, therefore, that the Court finds necessary different interventions, always justifiably and in exceptional cases. Hospitalisation also depends on authorisation from the Court and may be requested in urgent cases, subject to ratification by the judge.³⁴

The accompanied person maintains the exercise of his/her personal rights and the possibility of conducting business in everyday life, unless otherwise stated. However, in the event of the conclusion of transactions that do not respect the accompaniment measures enacted, the acts will be annulable if subsequent to the registration of the accompaniment or if performed after the start of the process is announced. After the establishment and if they prove harmful to the accompanied, accidental incapacity applies to previous acts. The accompaniment will be subject to periodic review and will cease or be modified with a court decision based on the causes that motivated its initiation.³⁵

The collation of information shows that, in both countries, the most recent legal norms on the rights of persons with disabilities changed mechanisms previously provided in the respective civil codes in order to safeguard the civil capacity of these persons and guarantee their autonomy. However, it did not mean leaving those persons unprotected. For guaranteeing protection, new and more flexible mechanisms were created.

3.2. Case law

Aiming to illustrate how this theoretical debate translates into judicial decisions - that is to say, how Brazilian and Portuguese legal frameworks with regards to civil capacity of persons with disability is applied in case law - we conducted an empirical study with the Brazilian Superior Court of Justice and the Portuguese Supreme Court of Justice. This section will be introduced by the methodological notes that enable to better comprehend it.³⁶

The courts were chosen because they play comparable roles in their countries. They both have national jurisdiction and handle civil

³⁴ António Pinto Monteiro, 2019, p. 36

³⁵ Ibid, p. 33 and 37

³⁶ Machado, (2017)

matters as part of their remit. In Brazil, the Superior Court of Justice has among its functions the attribution of judging, in a special appeal (*Recurso Especial* - REsp), cases in which federal laws (such as the Civil Code and the Brazilian Law of Inclusion) are contradicted, or their interpretation is contested.³⁷ In the Portuguese system, in its turn, it is the responsibility of the Supreme Court of Justice to head the courts of ordinary jurisdiction, which are responsible for judging matters connected to, among others, the central Portuguese legal norms on disability rights.

The search was carried out in 2021, considering decisions until the 31st of December of 2020. We used the online search engine each of the courts made available online³⁸, and we carried out a free search with the parameters ("person with a disability" OR "disabled person")³⁹ AND capacity AND civil. Bearing in mind the aim to illustrate and present examples of the countries' case law regarding the mentioned matter, we selected relevant decisions after excluding from the results decisions that, despite mentioning the parameters, dealt with unrelated issues (for example cases that do not deal with people with disabilities or that do not discuss civil capacity, but rather another type of capacity⁴⁰).

Through the described process, we were able to select two decisions from each of the courts to further explore in this section. It should also be noted that the research is in a way hampered in terms of Portuguese case law, considering how recent the Law of the *Maior Acompanhamento* is.⁴¹

The first case of the Portuguese Supreme Court of Justice⁴² involves a claim for compensation, denied by the Lisbon Court of Appeal because the victim was supposedly not able to express his feelings. The

³⁷ Masson, (2018)

³⁸ For the Brazilian Superior Court of Justice: <<https://scon.stj.jus.br/SCON/>>; and for the Portuguese Supreme Court of Justice: <<http://www.dgsi.pt/>>

³⁹ For the search, we used the terms in Portuguese. And we are both native speakers of Portuguese

⁴⁰ Such as work capacity or other issues, like health and education

⁴¹ The Law is from 2018 and the Supreme Court of Justice decides appeals of decisions from appeal courts, it can, therefore, be considered a 3rd instance of ruling

⁴² Portuguese Supreme Court of Justice (Supremo Tribunal de Justiça), case reference 191/09.5PEPDL.L4.S1, 14th of March 2018

denial was considered unconstitutional and consequently reversed for violating the Constitution of the Portuguese Republic.

Indeed, in understanding that compensation for non-pecuniary damage would not be due to the victim - as a result of her, due to physical and mental incapacity, not being able to express or make visible her suffering - the versed appealed decision violates the provisions of the article 1 and the number 1 of article 71 of the Constitution of the Portuguese Republic.⁴³

Throughout this decision, not only Portuguese legislation was used to substantiate the case but also the CRPD. All reasoning with regards to the subject at hand converged to the defence that it is not allowed to, motivated by reasons linked to disability, deprive of rights or restrict rights.

The other decision from the Portuguese Supreme Court of Justice⁴⁴ debates one request for intervention and, although it is from 2019, does not apply the law which introduces the *Maior Acompanhado* regime because the appealed decision was before the issue of the law⁴⁵. Even so, the Court decides for the less burdensome possible regime in the Portuguese Civil Code: the disqualification instead of the intervention. The reasoning is based on recognising the civil capacity even in cases of mental disability and on searching for support mechanisms instead of simply making one civil incapable.

With reference to the psychic anomaly, which is the reasoning invoked in this action, it must be borne in mind that this disabling cause covers all deficiencies, not only of the intellect, but also of the will, affectivity and sensitivity and must be *current* (ie, not past or future) and *permanent* (and not merely accidental or transitory) and assume a seve-

⁴³ Portuguese Supreme Court of Justice, 2018. Our translation. Original text: “Com efeito, ao entender que não seria devida indemnização por danos não patrimoniais à ofendida, em consequência de esta, em virtude da sua incapacidade física e mental, não ser capaz de exprimir ou tornar visível o seu sofrimento, o duto acórdão recorrido, viola o disposto no artigo 1º e no nº 1 do artigo 71º da Constituição da República Portuguesa.”

⁴⁴ Portuguese Supreme Court of Justice (Supremo Tribunal de Justiça), case reference 909/16.0T8CLD.C1.S1, 21th of March 2019

⁴⁵ See footnote 39

rity such that it interferes with the one's faculties, in such a way as to restrict one's ability to govern one's person and goods.

In turn, the **disqualification** is to be applied when the pathologies, although permanent, are not serious enough to allow the **interdiction** to be decreed (cf. art. 152 of the CC). That is to say: even if it is found that the person's capacities are diminished, the interference in one's discernment, will and want does not make one completely unfit to govern one's person and goods, as required for the **interdiction**.

In the case of the case file, it is clear from the proven fact that the defendant presents deterioration of some cognitive aspects, which make him dependent on the help of third parties to perform certain tasks that require higher levels of abstraction and complexity.

Nevertheless, the accurate clinical picture (*of slow and gradual evolution - as stated in the expert report*) does not currently prevent him from carrying out the daily management of his person and assets, only the most complex or demanding activities or tasks being compromised.⁴⁶

The decisions show that even before the advent of specific legislation, it was possible to use the existing – national and international - le-

⁴⁶ Portuguese Supreme Court of Justice, 2019. Our translation. Highlights from the original. Original text: “Com referência à anomalia psíquica, que é o fundamento invocado nesta ação, há que ter presente que essa causa incapacitante abrange todas as deficiências, não apenas do intelecto, mas também da vontade, afetividade e sensibilidade e deve ser atual (ou seja, não passada ou futura) e permanente (e não meramente acidental ou transitória) e assumir uma gravidade tal que interfira com as facultades do indivíduo, de modo a tolher-se a sua capacidade de reger a sua pessoa e bens.

Por sua vez, a inabilitação é de aplicar quando as patologias, embora permanentes, não revistam gravidade que permita decretar a interdição (cf. art. 152º, do CC). Quer dizer: ainda que se constate que as capacidades da pessoa se encontram diminuídas, a interferência no seu discernimento, vontade e querer não torna o portador completamente inapto para governar a sua pessoa e bens, como exigido para a interdição.

Ora, no caso dos autos, resulta da factualidade provada que o requerido apresenta deterioração de alguns aspetos cognitivos, que o tornam dependente da ajuda de terceiros para realizar certas tarefas que exijam níveis de abstração e complexidade superiores.”

Não obstante, o quadro clínico apurado (de evolução lenta e paulatina - como se afirma no relatório pericial) não o impede, atualmente, de fazer a gestão diária da sua pessoa e bens, ficando apenas comprometidas as atividades ou tarefas mais complexas ou exigentes

gal framework to value the capacity of persons with disabilities, what should be expanded with the new legislation. Prior to the 2018 legislation, the CRPD, the Constitution of the Portuguese Republic and the Portuguese Civil Code were used in defence of the interests of persons with disabilities.

In the Brazilian Court's sample, there is one decision prior to the Brazilian Inclusion Law⁴⁷ and one subsequent to it⁴⁸. Whereas the decision prior to the 2015 law discusses interdiction possibilities and the role of the *Ministério Público* in cases involving people with disabilities, the one subsequent decision is focused on affirming the capacity of people with disabilities.

Despite the difference in thematic, Brazilian decision prior to 2015 should not be read as contrary to the rights of people with disabilities. On the contrary, it already reflected the evolution of a concept that came to be crystallised in the Brazilian Law of Inclusion. The previous decision state, for example, that under a reputed allegation of protection of the interests of people with disabilities, the *Ministério Público* cannot prevent the free expression of will. Also, that interdiction cases should already be highly casuistic. This decision, as well as the decisions of the Portuguese Court, show jurisprudential practices of paying attention to the rights and capacity of people with disabilities.

In other words: the disabled person, in full enjoyment of his mental faculties, in an act of free will, decided to enter into the agreement under the terms contained therein. There is no element in the process that indicates a reduction, on the part of the defendant, of his judgment. He is thus, from the point of view of civil capacity, a complete person, capable, like any other, of acquiring rights and assuming obligations without any assistance. In this circumstance, it cannot be admitted that the *Ministério Público*, acting in the supposed help of the disabled person, refuses to guarantee him the basic right to freely express his will.⁴⁹

⁴⁷ Brazilian Superior Court of Justice (Superior Tribunal de Justiça). Case reference REsp 1105663, 4th of September 2012

⁴⁸ Brazilian Superior Court of Justice (Superior Tribunal de Justiça). Case reference REsp 1694984, 14th of November 2017

⁴⁹ Brazilian Superior Court of Justice, 2012. Our translation. Original text: “Ou seja: a pessoa deficiente, no pleno gozo de suas faculdades mentais, em um ato de manifes-

Prior to the Brazilian Law of Inclusion, the referred legal norms in defence of persons with disabilities' rights were, besides the Brazilian civil code, laws on the protection and rights of persons with mental disorders, on support for people with disabilities and their social integration, and on the National Coordination for the Integration of People with Disabilities.

The decision subsequent to the Brazilian Law of Inclusion, in its turn, focuses on the defence that disability, by itself, does not imply incapacity. This decision is in agreement with what is stated in the recent Brazilian Law of Inclusion and in the CRPD. There is to say, that it is necessary to move away from the definition of lack of capacity from that of disability.

Under the terms of the novel Statute of Persons with Disabilities, Law n. 13,146 of 2015, a person with a disability is a person with a long-term hindrance, of a physical, mental, intellectual or sensory nature (art. 2), and should no longer be technically considered civilly incapable, as the disability does not affect the full civil capacity of the person (according to articles 6 and 84). With the new regulation, there is a necessary and absolute dissociation between mental disorder and the recognition of incapacity. That is to say, the automatic definition that a mental weakness of any nature would imply in the limitation of one's civil capacity does not exist any longer.⁵⁰

tação livre de vontade, decidiu celebrar o acordo pelos termos nele contidos. Não há, no processo, qualquer elemento que indique redução, por parte do recorrido, de seu discernimento. Ele é, assim, do ponto de vista da capacidade civil, uma pessoa completa, capaz, como outra qualquer, de adquirir direitos e assumir obrigações sem qualquer assistência. Nessa circunstância, não se pode admitir que o MP, atuando no suposto auxílio da pessoa deficiente, negue-se a lhe garantir o direito básico de manifestar livremente sua vontade.”

⁵⁰ Brazilian Superior Court of Justice, 2017. Our translation. Original text: “Nos termos do novel Estatuto da Pessoa com Deficiência, Lei n. 13.146 de 2015, pessoa com deficiência é a que possui impedimento de longo prazo, de natureza física, mental, intelectual ou sensorial (art. 2º), não devendo ser mais tecnicamente considerada civilmente incapaz, na medida em que a deficiência não afeta a plena capacidade civil da pessoa (conforme os arts. 6º e 84). A partir do novo regramento, observa-se uma dissociação necessária e absoluta entre o transtorno mental e o reconhecimento da incapacidade, ou seja, a definição automática de que a pessoa portadora de debilidade mental, de qualquer natureza, implicaria na constatação da limitação de sua capacidade civil deixou de existir.”

Although this section did not mean to establish quantitative inferences or causal links between the new legislation in Portugal and Brazil and the application in practice, the selected decisions from courts that have national jurisdiction and deal with the rights of persons with disability can illustrate well the legal and theoretical debate.

The new legislation issued in Brazil and even more recently in Portugal is influenced by numerous aspects including history, practice, civil society mobilization and the development of the rights of persons with disabilities in an international law perspective. In the application of law, case law shows that it was possible to value the civil capacity of persons with disabilities even before the most recent norms, considering other national and international legal diplomas. However, it is also possible to see that the new legislation comes with a fundamental role of securing rights, adapting national legal frameworks to the CRPD and creating more flexible mechanisms for offering assistance without harming civil capacity.

4. Final remarks

This article addressed the international legal framework for the rights of persons with disabilities with a focus on the CRPD and sought to illustrate the adaptations to it through a case study of two State Parties: Brazil and Portugal.

The CRPD constitutes a landmark approach to the rights of persons with disabilities in the international law field. As a hard law mechanism, it had and should continue to have a significant impact on the way the State Parties deal with some current vital issues, namely the approach to the civil capacity regime.

In order to provide persons with disabilities with more independence and autonomy, such a regime has been modified in Brazil and in Portugal by creating new and more flexible legal tools. The modifications maintained, however, the possibility for these persons to access special protection regimes, since they still face barriers concerning not only the exercise of civil capacity but also several other aspects of life.

The change in the understanding of the concepts involves moving the concept of disability away from the concept of incapacity. These are not synonymous, as the countries' case law corroborates. Even though persons with disabilities have certain vulnerabilities and may need spe-

cial support and protection to live fully, they should not have their autonomy limited as a rule.

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