

## The legal capacity of the Convention on the Rights of the person with disabilities and the inadequacy of the *status* criteria, the result of the conduct and the functionality

*A capacidade jurídica pela Convenção sobre os Direitos da Pessoa com Deficiência e a insuficiência dos critérios do status, do resultado da conduta e da funcionalidade*

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### Abstract

The Convention on the Rights of the disabled person has spurred a turnaround in the disabilities regime and the system of protective Law on the substitution of wills. From that standard, the disabled person has equal legal capacity in relation to others, so that disability cannot be used as a modulatory criterion of legal capacity, either directly or indirectly. To ensure the participatory inclusion of the disabled person, the criteria that throughout history have been used to modulate the legal capacity from the disability. Whereas the psychological and/or intellectual limitation is not sufficient to deny autonomy, nor the capacity – both considered corollaries of dignity, the inclusion proposed by the Convention implies the rehabilitation of the society to accommodate the person with Disability in an attempt to optimize its functionality by reducing barriers.

**Keywords:** Convention on the Rights of the person with disabilities. Civil Ability. Autonomy.

### Resumo

*A Convenção sobre os Direitos da Pessoa com Deficiência impulsionou uma reviravolta no regime das incapacidades e no sistema de direito protetivo pautado na substituição de vontades. A partir dessa norma, a pessoa com deficiência possui igual capacidade legal em relação às demais, de modo que a deficiência não poderá ser utilizada como um critério modulador da capacidade jurídica, seja de modo direto, seja indireto. Para garantir a inclusão participativa da pessoa com deficiência, abandonaram-se os critérios que, ao longo da história, foram utilizados para modular a capacidade jurídica a partir da deficiência. Considerando que a limitação psíquica e/ou intelectual não é suficiente para negar a autonomia, tampouco a capacidade – ambos considerados corolários da dignidade -, a inclusão proposta pela Convenção implica a reabilitação da sociedade para acolher a pessoa com deficiência em uma tentativa de otimizar a sua funcionalidade pela redução das barreiras.*

**Palavras-chave:** Convenção sobre os Direitos da Pessoa com Deficiência. Capacidade Civil. Autonomia.

## 1 Introduction

Many civilists have already denounced the inadequacy of the disability regime, as provided in the Codes, for their inadequacy to deal with existential issues. They argue that the ownership of very personal rights cannot be separated or divided<sup>1</sup> of the exercise capacity, including, by virtue of its transferability and inherently to the particular person.<sup>2</sup> How to expect someone to exercise for others freedom of belief or freedom

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<sup>1</sup> MACHADO (2009, p. 25).

<sup>2</sup> In the voice of Antônio Menezes Cordeiro (2011, p. 108-109), there is an inherently of the rights of personality to the person of the holder and to the guardian object. Thus, "in the rights of personality a first strand of inherently is constituted by the transferability of its active position. The right of personality is born in the sphere of a holder and will remain there until his Extinction (...) The right of personality is still inextricably linked to its object. He reports to a good personality, reaching him wherever he is. In the event of an undue circulation of writings or images which are Considerer Protected by the personality regime, the holder can act wherever they are."

of thought? Admitting such a possibility would even empty your own right. It is for this reason that among the civilists themselves it was asserted that personality rights can only be exercised by the proprietor himself.<sup>3</sup>

In addition to the discussion on the characteristics of very personal rights, the philosophy of human rights proposes the realignment of concepts such as dignity, autonomy, and ability to foster the tutelage of people. Even to mitigate or eliminate the difficulties that people with disabilities find to enjoy their rights, it was necessary to implement a global policy of non-discrimination (ROIG, 2007).

The first phase of human rights theory, however, was based on the idea of human dignity associated with an ideal man prototype, characterized by a specific aesthetic and ethical pattern that we called *normality*. Endowed with the ability to reason, to feel and to communicate had the participation franchised in the moral discourse (ROIG, 2012, p. 44-45). This abstract and ideal man, an example of normalcy, was the subject who enjoyed the “true” moral capacity and genuine freedom of choice, which was not recognized to people with intellectual/psychic disabilities. Honestly, the latter could not even be said to hold “dignity” – the lack of those capacities mentioned above.

At the same time, the moral subject with dignity is every human being who recognizes the freedom of choice and, consequently, the possibility of achieving his life plan (PECES-BARBA, 2003). It is noted, however, that this freedom of choice, from its formal dimension, is not restricted to the aptitude to make concrete choices, it presents itself as an inherent attribute to every human equally (PECES-BARBA, 2003) and constitutes its own moral integrity, without which he will see himself transformed into a mere object (or whatever, of protection). Under these reasons it is recognized the freedom of choice and autonomy (the use of that freedom) to the person with disabilities, also crediting the legal capacity (of exercise, above all) which is the port of access to the exercise of rights and obligations, in equality with all other people.

Following this inclusive paradigm, the Convention on the Rights of the disabled person-CRPD established art. 12 which, in turn, is the primary foundation of discussions changes with the Brazilian Law of Inclusion or *Estatuto da Pessoa com Deficiência – EPD* (Law n.º 13.146/2015).<sup>4</sup> It has put down all the criteria that directly or indirectly were used, throughout history, to modulate the legal capacity from the disability. These criteria are listed: the approach of the status (*status approach*), the result approach (*outcome approach*) and the functional approach (*functional approach*).

In the current state of the art, it is understood that without the full legal capacity the person loses the chance to develop and exercise their potential and, with it, access to human rights, above all, the freedom of choice and the right to carry out their own plan of life. It also loses the right to manage its wealth and its assets, its inheritance, the right to credit, which is also guaranteed by CRPD, in that the legal capacity noted there is not limited to the existential business and applies to the patrimonial harvest (art. 12, item 5).

To the extent that the exercise of this legal conglobant capacity (ARAUJO; RUZYK, 2017) becomes a difficult task, the person may be benefited by the so-called support system.<sup>5</sup> Through this, autonomy develops in the context of the interdependence and the supporter accompanies the person long before the formation of the legal business, but in the conception, maturation and exteriorization of his will.

It is intended, by this text, to identify the basis and the contours of legal capacity in the CRPD as well as its effects on the Brazilian’s legal system of disabilities, briefly analyzing how support is established in comparison with the instruments by the substitution of the will.

<sup>3</sup> As Díez-Picazo (2003, p. 346), “*como es lógico, la titularidad del derecho corresponde a la persona y, en principio, solo seguramente, a ella. Es además, en línea de principio, un derecho de carácter personalísimo que solo el titular puede ejercer.*”

<sup>4</sup> CRPD is the first treaty of the 21st century universal human rights system and, by means of the principles “*in dubio pro capacitas*” and “*minimum intervention*”, promotes a turnaround in the regime of disabilities and the system of protective law governed by the substitution of wills. In Brazil, it’s approval was given by Decree N. 186/2008, with a qualified quorum of three fifths, in the two houses of the National Congress, in two shifts, as instructed by art. 5. §3º, of the Federal Constitution, which conferred on it the hierarchy of constitutional norm. In order to avoid possible interpretations of the rite for ratification of the Treaties and, consequently, losses to the person with disabilities, the President of the Republic ratified and promulgated the Convention by means of Presidential Decree No. 6.949/2009.

<sup>5</sup> In Brazil, we have the decision-making support, established by Brazilian law of inclusion or statute of the disabled person which added art. 1.783 to the Civil Code and the new guardianship whose discipline is also found in this law and in the new Civil Processual Code.

Following the methodology of constitutional civil law, part of the premise that the legal order is unitary, which implies the application of the infra standards in absolute adequacy to the constitutional standards, which includes, in the field of matter in examination, the CRPD. The person with a mental and intellectual disability is, for the purposes of this analysis, the subject of meat referred to Rodotà (2011), qualified by a unique identity and subject to the specific circumstances of life. The recognition of its legal capacity is a form of inclusion in the arena of legal, social, and political life, at the time when it enables the realization and guarantee of human, fundamental and civil rights, without which they would be harmed their dignity and the development of their personality.

The text is divided into three topics. In the first one, the lack of legal capacity provided for in traditional civil law is pointed out as a binary structure that is divided into enjoyment and exercise capacity, especially in the face of “human rights”. The second topic deals with the realignment of the concepts dignity, autonomy and capacity proposed by the philosophy of human rights hosted by CRPD. The third does a perfunctory analysis on the support model and on the possibility of its coexistence with the will replacement system.

## 2 Legal capacity as an expression of dignity

By means of CRPD, people with disabilities, including those with intellectual and/or psychic limitations, have come to enjoy equal *legal capacity* and respect for their personality (art. 12). From this premise, the statute of the person with disability or Brazilian Law of Inclusion (Law n°. 13.146/2015) reaffirmed, in an express way, the repeal of the disabilities regime, removing any reference to deficiency of arts. 3°. and 4°. of the Civil Code. Of plan, broke with those criteria that use disability to modulate the capacity.

With this, there was paradigm inclusion (although in the formal aspect) of all the people who were previously deprived of a greater and effective social, legal and political participation, because they could not exercise in themselves the ownership of some very subjective situations.<sup>6</sup> They lived under the direction of the legal representative who expressed his own will to burden them in the patrimonial and existential spheres.

This change aroused a serie of questions that reveal: a disbelief in the efficiency of the support system; the idea that people with psychic and intellectual disabilities can be categorized as one homogeneous block; and, that the exercise of autonomy can only be done by self-government, expressing autonomous decisions, and exempted from any kind of interference from others.

Starting from these premises, many understood that the *legal capacity* mentioned by CRPD would be circumscribed to the ability of enjoyment. This concern was already present in the discussions carried out by the delegations that composed the text of the Convention because, during the sessions that discussed its approval, there was a proposal (overdue) to include, in footnote, the observation that capacity meant mere enjoyment.

But CRPD’s intention was much greater. It was aimed at instituting a global policy of inclusion and equality. On this treadmill, the legal capacity mentioned in art. 12 it was indeed the so-called full legal capacity

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<sup>6</sup> As explained Ferrajoli (2001, p. 22), “*Personalidad, ciudadanía y capacidad e obrar, en cuanto condiciones de la igual titularidad de todos los (diversos tipos) de derechos fundamentales, son consecuentemente los parámetros tanto de la igualdad con de la desigualdad en droits fondamentaux. Prueba de ello es el hecho de que sus presupuestos pueden – y ha sido históricamente – más o menos extensos: restringidísimos en el pasado, cuando por sexo, nacimiento, censo, instrucción o nacionalidad se excluía de ellos a la mayor parte de las personas físicas, se han ido ampliando progresivamente aunque sin llegar a alcanzar todavía, ni siquiera en la actualidad, al menos por lo que se refiere a la ciudadanía y a la capacidad de obrar, una extensión universal que comprende a todos los seres humanos. La ciudadanía y la capacidad de obrar han quedado hoy como las únicas diferencias de status que aún delimitan la igualdad de las personas humanas.* Free translation: “The personality, Citizenship and ability to act, as conditions common to the equal ownership of all (various types) of fundamental rights, are also parameters of equality and inequality in this matter. Proof of this is the fact that their assumptions can-and has been historically-more or less extensive: Very restrictive in the past, when by sex, birth, census, education or nationality, if excluded from the majority of individuals, has expanded progressively, although they have not yet reached, even in the present, at least with regard to citizenship and the ability to act, a universal extension that includes all human beings. Citizenship and the ability to act remained today as the only differences in status that still define the equality of human beings.”

that brings together the “enjoyment” and the “exercise”.<sup>7</sup> The Convention opted to adopt the understanding that the legal capacity and principles of human dignity and autonomy are umbilically correlated.<sup>8</sup> As Roig (2018) explains,<sup>9</sup> “What is meant by capacity in the ethical and legal sphere are consequences of the very idea of human dignity, such as it has been built since its origin (in modernity) until our days and which is presented as an argument for rights.”

At the time when the person is assured of respect for his personality, dignity, he also recognizes the autonomy and legal capacity in equality with others. While providing for a support system that supports the subject in exercising this capacity, as will be seen ahead.

This understanding confronts the traditional orientation of the human rights theory seated on the prototype of the ideal man characterized as the individual capable of reasoning, of feeling and of communicating, consequently, able to participate in the moral discourse by itself and building the norms of social morality. In that perspective, the speech was excluded from the one who did not have the “rationality required”, the example of the children,<sup>10</sup> of women and people with intellectual and mental disabilities. Such people they could not even decide on their existential destiny, behaving as mere objects of the decision of the able subjects (ROIG, 2012, p. 44).<sup>11</sup>

Some civilists<sup>12</sup> have already shown concern about this way of conditioning the participation of people in the network of legal relations experienced in society. Perlingieri (2007) questioned the system of disabilities based on generic and abstract criteria. It is essential to note that the inability or ability to decide may, first, be the result of a temporal or social circumstance (ROIG, 2012, p. 48) and not necessarily of static personal characteristics. The child<sup>13</sup> that at a certain stage of life is lacking in self-determination, it will achieve a gradual autonomy throughout their experience, consolidating their full autonomy in adulthood. In this case, the natural ability to act is gradual and relative. If we consider the social circumstances, possible physical or psychic limitation could be aggravated by the barriers of the environment and thus become a disability (even severe) with a serious personal impediment. It is exemplified the legal impediment to the marriage that previously watches the statute as a barrier to the construction of family affective plan. Apart from the legal impediments, it is not hard to remember that, without the support and family and social investment, no one, nor the subject who suffers an intellectual limitation, will achieve effective success in his emancipatory

<sup>7</sup> “El concepto de ‘capacidad jurídica’ es un concepto más amplio, que, lógicamente presupone la capacidad de ser sujeto de derechos y obligaciones (elemento estático), pero también presupone la capacidad de ejercer dichos derechos, o asumir obligaciones a través de sus propias decisiones (elemento dinámico). Por ello, la capacidad jurídica incluye la ‘capacidad de obrar’, entendida como la capacidad y la facultad de una persona en virtud del derecho de asumir compromisos o transacciones particulares, mantener un estatus determinado, o una relación con otro, o, en un sentido más general, de crear, modificar o extinguir relaciones jurídicas” (BARIFFI, 2014, p. 303).

<sup>8</sup> On reengineering in legal capacity, see MENEZES and TEIXEIRA (2016).

<sup>9</sup> “Los referentes que determinan lo que se entiende por capacidad en el ámbito ético y en el jurídico son consecuencia de la propia idea de dignidad humana, tal y como ha sido construida desde su origen (en la modernidad) hasta nuestros días y que se presenta como argumento justificatorio de los derechos” (ROIG, 2018). See also Palacios and Bariffi (2012, p. 1-2).

<sup>10</sup> On the recognition of the Jurígena will of the child and adolescent, it is important to read the following authors: Stanzone and Sciancalepore (2006); Teixeira and Penalva (2008, p. 293-304); Tepedino (2010); Meireles (2008, p. 335-354); Menezes and Bodin de Moraes (2015, p. 501-532).

<sup>11</sup> “En todo caso, y en lo que aquí interesa, estas personas que no superan ese estándar de racionalidad, como señalaba antes no son sujetos sino objeto, quedando así su horizonte moral pendiente de la decisión de los capaces. Y esto ha provocado que el tratamiento de estas personas sea una cuestión de solidaridad y no necesariamente una cuestión de derechos. Sólo recientemente es posible hablar de un cambio que se percibe claramente en campo del tratamiento del menor y comienza a percibirse, de forma mucho más tímida, en la personas con discapacidad, consistente en adoptar un enfoque de derechos. Ciertamente a ello han contribuido una enorme literatura sobre ambas cuestiones y la aprobación de la Convención de Derechos del Niños y de la Convención de los derechos de las personas con discapacidad. Sin embargo, como señalaba antes, el cambio en relación con las personas con discapacidad es todavía muy tímido y se enfrenta tanto a la manera en la que sociedad percibe estas situaciones cuando a la manera en la que el Derecho las aborda”. (ROIG, 2012, p. 1-2).

<sup>12</sup> Perlingieri (2002, p. 163); Lôbo (2010, p. 121); Tepedino; Donato (2016, p. 237) highlighted the infeasibility of singling ownership and exercise capacity in relation to existential rights.

<sup>13</sup> The position of the child also has a widening of respect for its autonomy. With Roig (2012, p. 45), “aunque no se podría afirmar que la CDN reconoce el derecho pleno al ejercicio de la capacidad jurídica del niño, lo cierto es que incorpora algunas disposiciones y principios que tienen como objetivo justamente cuestionar los modelos paternalistas y tutelares donde los niños sólo pueden ejercer sus derechos y tomar decisiones jurídicamente vinculantes por intermedio de sus padres o representantes legales”. Free translation: “Although it is not possible to say that the CDN recognizes the full exercise of the legal capacity to the child, it is certain that it incorporates some provisions and principles that aims precisely questioner paternalistic and guardianship models where children can only exercise their rights and make legally binding decisions through their parents or legal representatives.”

project. We all need support, and the person with functional limitations in the physical, intellectual, and psychic area may need even greater support.

A greater personal talent for reasoning, feeling, and communicating will not represent a greater dignity. In the contemporary sense, the idea that the dignity of the person is associated with that prototype of an ideal human being, based on the abstract ideal of aesthetic and ethical perfection (PECES-BARBA, 2003), is broken. Even because, repeat, the greatest talent, most of the time, is the result of greater investment in stimuli and opportunities that historically were denied to the person with disabilities, until recently disregarded in his moral autonomy (ROIG, 2012, p. 53).

In the present day, beside the principle of the dignity of the human person operates the principle of equality and non-discrimination, whereby different treatment is considered as discriminatory based on non-relevant criteria and the equal treatment that disregards relevant circumstances (ROIG, 2012, p. 51).<sup>14</sup> The psychic and/or intellectual limitation are not sufficient to deny autonomy, nor the capacity – both considered corollaries of dignity.<sup>15</sup>

Such a limitation is not a disease or an anomaly, it substantiates a diversity factor (PALACIOS; ROMANACH, s/d) that cannot be used as discriminatory criterion to deny right or access to social participation, by mitigating legal capacity.

While the disease is related to a serious health change; disability can be expressed in terms of functional diversity, whether, or not, associated with a disease. Someone who contracts pneumonia, for example, may suffer reduction in respiratory and even labour. Who develops *Alzheimer's*, will suffer severe cognitive dysfunction. Polio victims may have an impact on the legs or arms and consequently limitations on their mobility. But not all functional diversity derives from a disease. People who have suffered cerebral palsy at the time of childbirth have been diagnosed with a psychic disorder or with a syndrome that implies intellectual disability may present a difference in their functional expression without this being correlated to a disease.

Moreover, despite the same diagnosis, people respond to life's challenges in a different way, presenting distinct functional capacities, with greater or lesser independence. This results in that the functional limitation should not be assessed in an isolated way with focus only on the person, without a reference to the external environment,<sup>16</sup> because the background of the medium can enlarge that functionality or aggravate it.<sup>17</sup> The person who lost his leg and went on to use titanium prosthesis could achieve even greater performance than he had before.<sup>18</sup> The child with cognitive deficit by intellectual or psychic limitation can, with due support and necessary stimuli, reach considerable levels of autonomy for an independent life.

<sup>14</sup> Transcription on the original: "Se considera así como discriminatorio tanto el trato diferente basado en circunstancias no relevantes, cuanto el trato no diferente desconocedor de circunstancias relevantes. Las circunstancias que se tienen en cuenta en este campo se corresponden bien con rasgos de las personas (lo que puede ser entendido como enfoque de la identidad) bien con situaciones en las que se encuentran las personas (lo que puede ser entendido como enfoque de la situación)". (ROIG, 2012, p. 51).

<sup>15</sup> Transcribing the stretch of the Committee about the People With Disability's Rights on the art. 12, Item 8. "El artículo 12 de la Convención afirma que todas las personas con discapacidad tienen plena capacidad jurídica. La capacidad jurídica les ha sido negada de forma discriminatoria a muchos grupos a lo largo de la historia, como las mujeres (sobre todo al contraer matrimonio) y las minorías étnicas. Sin embargo, las personas con discapacidad siguen siendo el grupo al que más comúnmente se le niega la capacidad jurídica en los ordenamientos jurídicos de todo el mundo. **El derecho al igual reconocimiento como persona ante la ley entraña que la capacidad jurídica es un atributo universal inherente a todas las personas en razón de su condición humana y debe defenderse para las personas con discapacidad en igualdad de condiciones con las demás. La capacidad jurídica es indispensable para el ejercicio de los derechos económicos, sociales y culturales.** Adquiere una importancia especial para las personas con discapacidad cuando tienen que tomar decisiones fundamentales en lo que respecta a la salud, la educación y el trabajo. (En muchos casos, la negación de capacidad jurídica a las personas con discapacidad ha conducido a privarlas de muchos derechos fundamentales, como el derecho de voto, el derecho a casarse y fundar una familia, los derechos de reproducción, la patria potestad, el derecho a otorgar su consentimiento para las relaciones íntimas y el tratamiento médico y el derecho a la libertad.) (Comité sobre los Derechos de las Personas con Discapacidad. 11º período de sesiones. 30 de marzo a 11 de abril de 2014. Tema 10 del programa provisional. Observaciones generales y días de debate general)" *Faucet Intentional*.

<sup>16</sup> "Art. 1º. People with disabilities are those who have long-term impediments of physical, mental, intellectual or sensory nature, which, in interaction with various barriers, can obstruct their full and effective participation in society in equal conditions with the other people."

<sup>17</sup> "In many cases, the supposedly flaw in performance can be fixed by the technology applied by humans. This is the case with glasses, hearing aids, computer-facilitated autistic communication and numerous prostheses. The deliberate action of adequacy of the medium for maintaining a satisfactory life allows the dysfunctional in some cases to become perfect-functional mind." (GAUDENZ; ORTEGA, 2016, p. 3067).

<sup>18</sup> Interesting story that highlights the evolution of prosthesis and the increase in the performance of its users (TRINDADE, 2016). Available at: <<http://www.otempo.com.br/hotsites/rio-2016/evolu%C3%A7%C3%A3o-nas-pr%C3%B3teses-leva-%C3%A0-melhora-nas-performances-1.1290035>>. Access on: 16 Apr. 2018.

The inclusion proposed by CRPD implies the rehabilitation of the society to accommodate the disabled person to optimize its functionality by reducing barriers, reasonable adjustments, assisted technology etc. It imposes the use of the medium as a factor of functional integration.

This adjustment extends the responsiveness of the subject, as Amundson points out (GAUDENZI; ORTEGA, 2016, p. 3067). The ability of the subject to respond to external challenges is measured not only by its intrinsic strength and determination, but also by the modification of the external environment. In the suggestion of Canguilhem (2012, p. 124), "It is up to us to welcome or not the different, creating conditions for stimulating the normative responses of individual subjects".

Following this orientation, the term "functional diversity" proposes the rupture with those words charged with discriminatory meaning that are still used to identify the person as "deficient", "unable", "limited", "abnormal", "invalid", "banned."<sup>19</sup> These terms refer the person to a condition lower than others, emphasizing the insufficiency of their functional characteristics compared to the others.<sup>20</sup> This whole approach is based on the surpassed medical model that identifies in the subject, and only in it, the effects of physical, psychic or intellectual limitation, disregarding the aggravation originating in the external environment and/or the lack of functional enlargement instruments in this same medium.

To strengthen inclusion, in addition to mitigation of barriers and background of the external environment, it is necessary to apply the concept of autonomy in the interdependence, opportunities to the person the support that needs. In this case autonomy is done in interdependence and not exclusively by an isolated "self-government" without any external aid. It implies recognizing the person with disabilities their personality and the ability to decide so that they can participate equally in legal relations,<sup>21</sup> exercising, by themselves and/or under support, the rights and complying with the corresponding duties.

The Copernican upset is in overcoming disability as a criterion applicable to capacity modulation and the possibility of autonomy in interdependence (DANDHA, 2007, p. 439).

Unfortunately, however, despite the presumption of viger capacity as an immemorial postulate, the person with disabilities, especially that arising from limitations in psychic or intellectual harvest, suffers a presumption *juris tantum* "disability". This was the reason for the implementation of a global non-discrimination policy, as outlined by CRPD (ROIG, 2007).

This global policy, however, implies a paradigm change that affects some anachronistic and outdated institutions,<sup>22</sup> based much more on a legal tradition of flashbacks times than in the criteria and conceptions of justice and equality that mark Human rights in the contemporary (BARIFFI, 2014, p. 264). Are Codes or human rights prioritized? Human rights are meta-legal norms? Certainly, the CRPD has another nature – it is a constitutional standard of direct efficacy and immediate applicability.

From that standard, the disabled person has *equal* legal capacity in relation to the others, it is fortunate that the disability will not be able to be used as a modular criterion of the legal capacity, either in a direct or indirect way. On the other hand, it is necessary to Person with mental and intellectual disability is stimulated in the exercise of their autonomy from childhood, as is available in the educational projects. Not only care,

<sup>19</sup> "Por eso el término 'diversidad funcional' se ajusta a una realidad en la que una persona funciona de manera diferente o diversa de la mayoría de la sociedad. Este término considera la diferencia de la persona y la falta de respeto de las mayorías, que en sus procesos constructivos sociales y de entorno, no tienen en cuenta esa diversidad funcional." (PALACIOS; ROMANACH, s./d., p. 107).

<sup>20</sup> "Las mujeres y hombres con diversidad funcional tienen que ver con sociedades que, siendo intrínsecamente imperfectas, han establecido un modelo de perfección al que ningún miembro concreto de ellas tiene acceso, y que definen la manera de ser física, sensorial o psicológicamente, y las reglas de funcionamiento social. Y que este modelo está relacionado con las ideas de perfección y 'normalidad' establecidas por un amplio sector que tiene poder y por el concepto de mayorías meramente cuantitativas." (PALACIOS; ROMANACH, s./d., p. 106).

<sup>21</sup> To Amita Dandha (2007, p. 435-436), "Human rights scholars argue convincingly that article 12 of the CRPD vests persons with disabilities with both these aspects of legal capacity. 6 In other words, the capacity to hold rights automatically entails the capacity to exercise them with appropriate supports acceptable to and chosen by each individual".

<sup>22</sup> "La persona no es exclusivamente para el Derecho civil el titular de derechos y obligaciones o el sujeto de relaciones jurídicas. Si esta rama del ordenamiento jurídico se caracteriza básicamente por ser la dedicada a la persona en sí misma considerada, debe ocuparse de la protección de sus atributos físicos y morales, de su libre desarrollo y desenvolvimiento." (DIEZ-PICASO, 2003, p. 327).

but the care and emancipation in interdependence are the north of human relations. We all need greater or lesser care throughout our lives.<sup>23</sup>

### 3 The shortcomings of the criteria that used the disability to modulate the legal capacity

By the face of all that has been said, none of the criteria used historically to address disability in the system of disabilities, which are, the approach of *status* (*status approach*), the approach of the outcome of the choice (*outcome approach*) and the functional approach (*functional approach*) may be applied without a frontal offence to the Convention.<sup>24</sup> By the first criterion, the very state of disability would be the disabling criterion. The mere occurrence of a specific disability (notably that of a mental and intellectual order) would be sufficient to deprive the person of the legal capacity, regardless of their concrete and real capacities.

The second criterion focuses on the results of the choices made by the person to gauge their ability. To that extent, the one who makes undressed and unreasonable choices, according to the social judgment of a certain time, may undergo a modulation in their capacity. Recently, a 25-year-old young boy in Goiás refused the treatment of hemodialysis essential to his health and was therefore subjected to guardianship, even when the forensic report did not conclude by a cognitive deficit in the realization of that choice.<sup>25</sup> The latter criterion observes the functionality of the subject, that is, his natural ability to, by himself, understand, discern, decide, reason, evaluating the convenience and the effects of his decisions. Following this criterion, the subject will be considered capable if he demonstrates the ability to make informed choices by himself, without any assistance from others.

Brazilian legislation has already made use of all these criteria. The Civil Code of 1916 used the *status approach*, rolling among the absolutely incapable “the madmen of all genres”.<sup>26</sup> By *outcome approach*, the Civil Code of 1916 predicted the modulation of the “prodigal” capacity, in which it was followed by the Civil Code of 2002.<sup>27</sup> It was the Civil Code of 2002 to adopt the *functional approach*, defining as absolutely incapable for the exercise of the civil life acts, the person with “illness or mental disability” without the necessary “discernment” to the practice of these acts.<sup>28</sup> And as relatively unable to practice certain acts of civil life, the person who, by the “mental disability” had the “discernment” reduced and similarly, the “exceptional” person without the “complete development”.<sup>29</sup>

Any of these criteria exposes the person with disabilities (psychic and intellectual) to a threshold condition in which their capacity is always questioned (DANDHA, 2007). For this reason, it is said that the CRPD broke with all of them. They use disability as a direct or indirect criterion to reduce or deny the person's ability, dispensing with discriminatory treatment. From the perspective of Dandha, among the criteria

<sup>23</sup> Feminist philosopher Eva Kittay is concerned with dismantling the liberal theories of justice and equality, by sustaining that dependence relationships are inevitable in social life and inescapable to the life story of all people. Care and interdependence, she says, are principles that structure social life and impose the centrality of dependence on human relationships. The American author made use of the idea that “we are all children of a mother” to say that we are all cared for by someone at some point in life. From the notion of *Self* transparent, that is, the *Self* morality of the one who has the duty to care for other people and is moved by an altruistic ideal, based on the bonds of affection and concern, reiterates that the moral subject is inherently relational, confronting the interpretation of *Self* Of the Liberal tradition. In this conception, the *Self* Transparent is the central moral element of the ethics of care. This is a way of understanding the individual and morality different from the traditional definition of the human being in western capitalist societies, where the individual is perceived as an independent subject only to himself and to the command of reason. [...] Empty the notions of individual capacity and independence and strengthening the ideas of interdependence and interpersonal relationship as criteria of judgement of the variant condition allow the judgment of the deficiency to be relativized (GAUDENZI; ORTEGA, 2016, p. 3067).

<sup>24</sup> CONCIL OF EUROPE (2012).

<sup>25</sup> News conveyed by the newspaper “Estadão”. Justice determines Prohibition of a young man who refuses dialysis to die in Goiânia. Available at: <[http://saude.estadao.com.br/noticias/geral,justica-determina-interdicao-de-jovem-que-recusa-hemodialise-para-morrer-em-goiania,70002099942="](http://saude.estadao.com.br/noticias/geral,justica-determina-interdicao-de-jovem-que-recusa-hemodialise-para-morrer-em-goiania,70002099942=)>.</http:>. Access in: 14 Apr. 2018.

<sup>26</sup> CC/1916, Art. 5º. They are absolutely incapable of exercising personally the acts of civil life: (...) II. The crazies of the whole genre. III. The deaf-mutes, who cannot express their will.

<sup>27</sup> CC/1916, Art. 6º. They are incapable in respect of certain acts (art. 147, n. 1), or the manner in which they are to be exercised:(...) III. The prodigals.” CC/2002, Art. 4º They are incapable of certain acts or their way of exercising them: (...) IV- The Lavish.

<sup>28</sup> CC/2002, Art. 3º-Are absolutely incapable of exercising personally the acts of civil life: (...) II- The That, by illness or mental disability, they do not have the necessary discernment for the practice of these acts;

<sup>29</sup> CC/2002, Art. 4º-They are incapable of certain acts or their way of exercising them: (...) II- The drunk, toxic addicts, and those who, by mental disability, have reduced discernment; III- the exceptional, without complete mental development;

presented *functional approach* you will be able to attend to the CRPD if your application is focused on the demarcation of the limits of the support to be directed to the person in facilitating the exercise of their legal capacity. Otherwise, if applicable to modulate or suppress capacity, it will not be appropriate to the overall policy of inclusion proposed by CRPD (2007, p. 457). In that same direction, the UN Committee on the Rights of the disabled person was positioned.<sup>30</sup>

Labeling the person with “disability” can bring irreparable damage to their development and constitute a “fulfilling” prophecy.<sup>31</sup> Released to the condition of incapable, the subject will not be encouraged to learn and develop certain tasks. Deprived of the continued exercise of deciding whether to see confined to perennial passivity. To avoid this fate is that the CRPD proposed a broad inclusion, guided in the attitudinal change of the family, of the school and of society, in the sense of believing and stimulating the person to an independent life – or better, interdependent.

In addition to the social support network, CRPD imposes on the signatory States the institution of mechanisms to support the exercise of legal capacity. Such instruments break with the willingness substitution system that complements the disability regime in the protection of the disabled person. In Brazil, guardianship was established, most of the time, with the powers of legal representation, with the curator’s duty to replace the curated in the acts of civil life.

#### **4 Support as an instrument of functional integration in the exercise of capacity and the possibilities of its coexistence with the substitution of will**

Under the proposal of CRPD the deficiency will not be capacity modulator criterion. However, depending on the psychic and intellectual limitation, the person may need to support the exercise of their capacity. Such support is important in support appropriate so that you can identify and communicate your wishes. It implies an agreement of trust and respect to the will of the person supported (BARIFFI, 2014, p. 366).

Each signatory State shall establish the instruments of legal aid for decision-making with the safeguards necessary to ensure that the rights of the person are not threatened. The demarcation of the support will be done in accordance with the needs of the person, and may be milder or more intense, with respect, in any case, their rights and safeguards (CRPD, preamble, paragraph J).

Under the prism of CRPD, even the most intense support cannot imply substitution of will. In Roig’s guidance (2012, p. 55),

<sup>30</sup> The Committee itself had also positioned contrary to these criteria, otherwise read: En la Observación General No 1 el CteCDPD señala que: [...] *En la mayoría de los informes de los Estados partes que el Comité ha examinado hasta la fecha se mezclan los conceptos de capacidad mental y capacidad jurídica, de modo que, cuando se considera que una persona tiene una aptitud deficiente para adoptar decisiones, a menudo a causa de una discapacidad cognitiva o psicosocial, se le retira en consecuencia su capacidad jurídica para adoptar una decisión concreta. Esto se decide simplemente en función del diagnóstico de una deficiencia (criterio basado en la condición), o cuando la persona adopta una decisión que tiene consecuencias que se consideran negativas (criterio basado en los resultados), o cuando se considera que la aptitud de la persona para adoptar decisiones es deficiente (criterio funcional). El criterio funcional supone evaluar la capacidad mental y denegar la capacidad jurídica si la evaluación lo justifica. A menudo se basa en si la persona puede o no entender la naturaleza y las consecuencias de una decisión y/o en si puede utilizar o sopesar la información pertinente. Este criterio es incorrecto por dos motivos principales: a) porque se aplica en forma discriminatoria a las personas con discapacidad; y b) porque presupone que se pueda evaluar con exactitud el funcionamiento interno de la mente humana y, cuando la persona no supera la evaluación, le niega un derecho humano fundamental, el derecho al igual reconocimiento como persona ante la ley. En todos esos criterios, la discapacidad de la persona o su aptitud para adoptar decisiones se consideran motivos legítimos para negarle la capacidad jurídica y rebajar su condición como persona ante la ley. El artículo 12 no permite negar la capacidad jurídica de ese modo discriminatorio, sino que exige que se proporcione apoyo en su ejercicio...]* Observación general No 1 (2014), Artículo 12: Igual reconocimiento como persona ante la ley, CRPD/C/GC/1, 19 de mayo de 2014, párrafo 15.

<sup>31</sup> According to Dandha (2007, p. 439), “development of human capabilities enables human beings to undertake all the doings and functions required to live a complete human life. But such capability development can happen only if every human being is accorded the opportunity to so live life as to realize his or her own inner genius. In my understanding, it then follows that in order to enable an individual to develop such capabilities, it is important that such individual be presumed to have the capacity to do so. In a major piece detailing the side effects of the label of incompetence, Bruce Winck provides psychological insights on how individual personality development is affected by such labels. A label of incompetence can often play out as a self-fulfilling prophecy. Once a finding is reached that a person is incompetent to perform certain tasks, such person shall not be given any opportunity to engage in or learn those tasks. It follows from Winck’s analysis that if a person is denied the opportunity to fulfill certain life activities, he or she fails to develop the capabilities required to perform those activities”.



[...] the support system must: I. Be able to respect at the maximum the autonomy of the person with mental or intellectual diversity; II. Be permeated to the different types of diversity and concrete circumstances of each person; III. Have the smallest possible duration and be reviewed periodically; I saw, to sacrifice in the smallest possible degree the rights of the person.<sup>32</sup>

In Brazil, the Statute of the Disabled Person instituted the so-called *decision-making support*, adding art. 1.783-A to the Civil Code and reformulated the guardianship, from art. 84. The first institute is notoriously suitable for CRPD as it reaffirms autonomy and does not mitigate or reduce the capacity of the supporter.<sup>33</sup> But as for the guardianship, there are some doubts. It is observed, in the EPD, the attempt to coat the institute traditionally present in the homeland legislation, with the nature of support.

Through art. 84, *caput*, situated in the chapter entitled "Of equal recognition before the law," reaffirmed the right of the disabled person to exercise their capacity on equal terms with other people. In the first paragraph of the same device he predicted that, "when necessary, the person with disabilities will be subjected to guardianship, according to the law."

The laws applicable to guardianship are the Civil Code and the Code of Civil Procedure.<sup>34</sup> The Civil Code was part of its standards altered by the EPD, but was still in the Art. 1.767, that people subject to this measure would be those who, "because transient or permanent, cannot express their will." Under article 4º, III, of the same Code, such persons are considered as to be relatively incapable of "certain acts or the manner in which they are exercised". It is deduced that every person subjected to the guardianship suffers a modulation in its civilian capacity, becoming relatively incapable.

As the alternative of guardianship continues to be applied with a lot of recurrence in the country to people with disabilities, including those that could manifest the will if they were under more consistent support, it is feared that CRPD is being under respected.<sup>35</sup>

All these problems require greater reflection, especially in cases where the person is experiencing a concrete situation that makes it impossible for a volitional demonstration even with all the support. In an exceptional situation such as this, the focus should be on the life situation and not the disability itself.<sup>36</sup>

To be considered the reading of Francisco Bariffi (2014, p. 391), article 12, item 2, of the CRPD, does not imply an absolute right to exercise the capacity of the person with disabilities but establishes the assurance that the disability will not be used as a criterion to restrict such capacity. If you do so, it will be by means of a criterion applicable to any subject.

In these hypotheses, some very exceptional ones, the person may be placed under specific protection. However, although under legal representation, it should not be subjected to the representative's splice, as instructed by the traditional system of the substitution of will. His preferences and his will, manifested to the time when he could position himself, whether by the way he lived, whether by the affections or even by verbal declarations, should be respected. In the event of suffering serious limitations from birth, impediments to any volitional manifestation, their fundamental interests should always be respected by the representative.

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<sup>32</sup> In the original, "Así, el sistema de apoyo debe: (i) ser capaz de respetar al máximo la autonomía de la persona con diversidad mental o intelectual; (ii) ser permeable a los distintos tipos de diversidad y a las circunstancias concretas de cada persona; (iii) tener la menor duración posible y ser revisables periódicamente; (iv) sacrificar en el menor grado posible los derechos de la persona" (ROIG, 2012, p. 55).

<sup>33</sup> About decision making supported, see Menezes (2016).

<sup>34</sup> About guardianship, see Menezes (2015).

<sup>35</sup> It is feared that, under the justification that the person cannot manifest a will by itself, and disregarding the integration of its functionality by support, end up disregarding the determination of CRPD. As Dandha (2007, p. 429), "Further, these reform efforts acknowledged that, if assistance is required to exercise capacity, then such assistance should be provided instead of holding a person to be incompetent. Accepting this premise, legal systems experienced with establishing legally recognized persons who could provide this assistance. A finding of incompetence in traditional legal systems has resulted in guardians of person or property being appointed, who then were charged with making decisions on behalf of the incompetent person. In comparison, it reform efforts were aimed at supporting rather than supplanting the person in need of assistance. The possibility of substitution, however, has been retained."

<sup>36</sup> This is Roig suggestion (2009, p. 7), "Por otro lado la Convención opta por el enfoque de la situación frente al enfoque de la identidad, lo que obliga a que cuando se abandone ese modelo de apoyo, por ejemplo en situaciones en las que no sea posible conocer la voluntad de la persona, se haga en razón de la situación determinada, y nunca en razón de la discapacidad".

It is not possible to authorize a wide substitution of will to burden the curated in all acts of civil life. Previously, the curator intrudes in matters and was able to decide on organ donation<sup>37</sup> and about sterilization without any sparing, for example. It cannot be admitted, anymore.<sup>38 39</sup>

The matter of the substitution of will is very controversial subject even among the scholars of human rights. Although the text of the CRPD has not been repealed expressly the system of substitution of will, was emphatic about the application of this system of support and safeguards. And, to the extent that the signatory countries do not adopt this support system, insisting on the solutions guided by the substitution of will, the United Nations (UN), through the Committee on the Rights of the person with disabilities is trying to rebuke them by guiding through the adequacy of the legislation. He did so with Brazil as it is read in the last report, dated 2015.<sup>40</sup>

Caution is required on these issues. At the time when it is not possible to return to the period in which the criterion of status was applied to qualify the subject as incapable only by the fact of the disability, neither can the criterion of the functionality be applied, including such responsiveness as a talent to exercise in an insular way. The functionality of the subject to meet the challenges of life can be integrated by the external environment and, in relation to the civil capacity, the support system would be the most suitable instrument for both.

## 5 Conclusion

1. CRPD implemented a paradigm change in the disability approach. To ensure its inclusion, it recognized the legal personality of the disabled person, their autonomy and legal capacity on equal terms with other people.

<sup>37</sup> "This issue is illustrated by a trial by the Court of Justice of São Paulo in the year 1986. In the context of the civil Appeal 76.123-1, the court analyzed the possibility of an interrelated with "epileptic psychosis, in the form Psycho", to donate a kidney to his brother, who presented chronic terminal insufficiency. The monocratic decision welcomed the request formulated by the curator of the incapable, of supply of consent, from which the transplant would be authorised. Unsatisfied, the prosecution has brought appeal. The court provided the appeal and reformed the sentence, under the argument that the inter statement had "simply vegetative life, without conditions to communicate or manifest a Will even in a faulty way." And in view of the "extremely" nature of the decision to donate human organs, the curator could not agree in the name of the incompetent. We do not delve into the analysis of the case in a proper comment if the court's decision was or was not correct. We are interested in the principles we can draw from it. Suppose, for the purpose of argument, that the intermission, in spite of mental illness, was able to manifest safely, exempt, his will. Even so, if we reproduce the fundamentals of the judgment (which, for the specific case, seem pertinent to us), the transplant could not be carried out. The civil interdiction, as implemented today, in aiming at the protection of the assets of the incompetent, ends up suppressing its capacity not only for the deeds, but also for the existential situations, for the exercise of personality rights. With this, the interpersonal does not practice the existential acts itself, as an effect of the loss of capacity, nor through the curator, given the financial character of these acts. In other words, in these moulds, the ban, which would be a measure of protection of the incompetent, results in the truth as a measure of exclusion (TJSP, Ap 76.123-1, 5th chamber, J. 14-8-1986, rel. Ruy Camilo)." (LEITE, 2012, p. 302-321).

<sup>38</sup> JUDICIAL Supply – Provisional curator requesting the sterilization of the banned – reception – possibility – historical interpretation and tele winemaking of Decree No. 6,949, which promulgates the International Convention on the Rights of persons with disabilities and their Optional Protocol – Reformed decision – appeal provided. (TJ-SP-APL: 00009916620148260654 SP 0000991-66.2014.8.26.0654, Rapporteur: Alvaro Steps, date of trial: 22/09/2015, 2nd Chamber of Private Law, date of publication: 29/09/2015); In another decision, "Judicial license. Tubal surgery. Handicapped person with mental and motor deficiency and who is already a mother. Indication made by the doctor. Procedural interest and legal possibility of the application demonstrated. Extinction away. Application of art. 515, § 3, of the CPC. Given that the author has already passed through the interdiction process, on the other hand, insignificant the need for the realization of new medical expertise by IMESC. Origin of the application. Reformed sentence. Resources provided." (TJ-SP-APL: 00007742320148260654 SP 0000774-23.2014.8.26.0654, Rapporteur: Pedro de Alcantara da Silva rudder son, trial date: 12/08/2015, 8th Private Chamber of Law, date of publication: 13/08/2015).

<sup>39</sup> "Of ordinary, in the acts of life, each one practice in himself the acts that will influence, actively or passively in its legal sphere. The effects result from acts in which the agent is *present*; because the practice, by positive or negative act. The rule is the presentation, where no one plays the role of another, that is, where no one *represents*." (MIRANDA, 2012, p. 307).

<sup>40</sup> According to the UN report, the EPD is not adequate to the dictates of the Convention. It is assumed that this possibility of substitution of the will by the guardianship which, ends up resubmitting the person the condition of relatively incapable, is the object point of greater criticism. "III. Principal areas of concern and recommendations. A. General principles and obligations (arts. 1-4) [...] 6. The Committee is concerned at the lack of a coherent and comprehensive disability strategy to implement the human rights model of disability established in the Convention and harmonize the State party's legislation, policies and programmes. 7. The Committee recommends that the State party develop a disability strategy to implement the human rights model of disability. The Committee further recommends that, in consultation with organizations of persons with disabilities, the State party initiate a systematic review of existing legislation, policies and programmes and, where necessary, brings them into line with the Convention. This should include a review of any legislation, policies or programmes upon which the rights of persons with disabilities are restricted or denied on the basis of impairment, or where services or benefits to persons with disabilities lead to their segregation or exclusion. 8. **The Committee is concerned that the Statute of Persons with Disabilities does not meet all of the State party's obligations under the Convention.**" (Intentional Griffin). Available at: <<http://acnudh.org/comite-sobre-los-derechos-de-las-personas-con-discapacidad-crpd-2015/>>. Access in: 10 Mar. 2018.

2. The legal capacity of article 12 of CRPD refers to the dual aspect of capacity: enjoyment and exercise.
3. CRPD does not adopt any of the criteria for disability approach to restrict capacity, whether they are the *status approach*, the *outcome approach*, or the *functional approach*.
4. To facilitate the exercise of legal capacity for those who need intensive or moderate support, it has implemented a support and safeguard system that consists of the necessary support without the mitigation of legal capacity.
5. By means of EPD, Brazil instituted the decision-making support that clearly meets the assumptions of CRPD.
6. There remains a doubt as to the solution of the guardianship, which remains a substitute instrument of will and which implies restriction on the legal capacity of the person with disabilities.
7. While CRPD has not repealed the will substitution systems, it does not allow the deficiency to be the criterion used for its application. Possible restrictive measure of capacity should be justified in the specific situation of the subject and not in the criterion of disability.

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