

## THE RIGHT TO LIBERTY OF PERSONS WITH DISABILITIES FROM THE STATUTE OF PERSONS WITH DISABILITIES

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From the most remote Western civilizations, the disabled person has always been marginalized in society under the stigma of inferiority. This reality, however, has been suffering from the impacts of a worldwide trend towards the promotion of its social inclusion, especially in the last decades. This work aims to analyze this social phenomenon, with an emphasis on the right of freedom of the disabled, in their legal-normative perspective. Given the repercussion of recent legislative innovations in numerous spheres of action of the individual, this theme is relevant and requires more in-depth reflection from the operators of the Law.

In addition, statistical data reveal that this social segment corresponds to a significant percentage of the Brazilian population - 23.9% (twenty-three point nine percent) have some type of physical disability and 8.3% (eight point three percent) presents a severe deficiency<sup>1</sup> - which claims the state and society at large - which seeks to be guided by the supreme values of freedom, security, well-being, development, equality and justice in a context of fraternity, pluralism and absence of prejudice<sup>2</sup> - special attention. After delimiting the concept of handicapped, we will make a brief historical retrospect of the social insertion of the disabled person, from antiquity to the present.

Next, we will approach the notions of autonomy and human dignity as guidelines of the legal rule and, subsequently, the freedom of the disabled, in light of Brazilian legislation, specifically Law 13,146, of July 6, 2015 Deficiency.

The available jurisprudential collection is very small, thus the research will be supported predominantly by a bibliographical and normative one, by reading scientific works and articles published

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<sup>1</sup> Census 2010. Available at:

<http://www.pessoacomdeficiencia.gov.br/app/sites/default/files/publicacoes/cartilha-censo-2010-people-com-deficiencia-reduzido.pdf>. Access: 6 feb. 2017.

<sup>2</sup> This is taken from the preamble to the Constitution of the Federative Republic of Brazil of 1988, which reads as follows: We, representatives of the Brazilian people, assembled in a National Constituent Assembly to establish a Democratic State, to ensure the exercise of social and freedom, security, well-being, development, equality and justice as the supreme values of a fraternal, pluralist and unprejudiced society founded on social harmony and committed, in the internal and international order, with the pacific solution to controversy, we enact, under the protection of God, the following Constitution of the Federative Republic of Brazil. Available at: <<https://www.planalto.gov.br/>>. Accessed on: Feb 4 2017.

in national and international journals, that directly or indirectly face the proposed issues.

Without intending to exhaust the subject, we will discuss the right of liberty of the disabled person from an eminently normative perspective, with the aim of contributing to the debate on the scope of the legislation of regency.

## **§ 1 – THE PERSON WITH DISABILITIES AND THEIR SOCIAL INSERTION**

Throughout their life trajectory, handicapped experience all sorts of adversities, under the cloak of invisibility.

Nonetheless, the growing awareness of their intrinsic value and potential has led to some state and civil society initiatives aimed at minimizing the negative effects of discriminatory actions and social exclusion, through the implementation of specific public policies.

In order to approach this theme, it is necessary to first delimit the concept of a handicapped and, in the sequence, to make brief considerations about the historical evolution of its insertion in the society, from the Antiquity to the present times.

### **A) Delimitation of the Concept of Handicapped<sup>3</sup>**

The Declaration on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly on 9 December 1975, uses the term “disabled person” to designate a person incapable of assuring, in whole or in part the needs of a normal individual or social life, due to a deficiency, congenital or not, in their physical or mental capacities<sup>4</sup>.

Convention No. 159 of the International Labor Organization, promulgated by Decree No. 129 of May 22, 1991<sup>5</sup>, and the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (or the Convention of Guatemala), promulgated by Decree No. 3.956, of October 8, 2001<sup>6</sup>, define a disability, for the purpose of legal

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<sup>3</sup> Until the advent of the Constitution of the Federative Republic of Brazil of 1988, the terms “invalid”, “incapable”, “exceptional” and “deficient” were commonly used to designate the person with physical, mental or sensory too much. Subsequently, the term “person with a disability” was incorporated into ordinary legislation, and the words “persons with special needs” or “special person” were also adopted, with similar meanings. This change in nomenclature signaled a shift in focus from the problem of social exclusion of the disabled - from the disabled and incapacitated person to being considered as a person with a peculiar characteristic, without esteem of inferiority. By virtue of international diplomas, however, the expression “person with a disability” was abandoned, on the premise that deficiencies do not fit because they are in the person.

<sup>4</sup> UN, Resolution 2542/75. *Declaration on the Rights of Persons with Disabilities*. Available at: <[http://www.portal.mec.gov.br/seesp/arquivos/pdf/dec\\_def.pdf](http://www.portal.mec.gov.br/seesp/arquivos/pdf/dec_def.pdf)>. Accessed on: Feb 4 2017.

<sup>5</sup> Available at: <[https://www.planalto.gov.br/ccivil\\_03/decreto/1990-1994/D0129.htm](https://www.planalto.gov.br/ccivil_03/decreto/1990-1994/D0129.htm)>. Accessed on: Feb 4 2017.

<sup>6</sup> Available at: <[https://www.planalto.gov.br/ccivil\\_03/decreto/2001/d3956.htm](https://www.planalto.gov.br/ccivil_03/decreto/2001/d3956.htm)>. Accessed on: Feb 4 2017.

protection, as a physical, mental or sensorial restriction, permanent or transitory, which limits the ability to exercise one or more essential activities of daily living, caused or aggravated by the economic and social environment.

The International Convention on the Rights of Persons with Disabilities and its Optional Protocol, ratified by the National Congress through Legislative Decree no. 186, of July 9, 2008, in the system provided for in art. 5, paragraph 3, of the Constitution of the Federative Republic of Brazil, and in force externally since August 31, 2008, and, internally, as of the promulgation of Decree 6.949 of August 25, 2009<sup>7</sup>, define disability as a lasting physical, mental, intellectual or sensory disability, which, in interaction with behavioral and environmental barriers, may prevent the full and effective participation of the individual in society on an equal basis with others.

These international norms have consolidated a paradigm shift in the world context: from the traditional medical model to a social model, in which the limiting factor is the environment in which the person is inserted, not the deficiency itself, signaling, with such innovation, that the deficiency does not necessarily mean the existence of disease, nor does it give the individual the condition of being sick.

The Constitution of the Federative Republic of Brazil provides for the protection of the physical, sensory or mental handicap, but relegates to the ordinary legislator the delimitation of the respective concept<sup>8</sup>.

At the infra-constitutional level, the most relevant norm is Law No. 7,853, dated from October 24, 1989<sup>9</sup>, which supports the social

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<sup>7</sup> Available at:

<[https://www.planalto.gov.br/ccivil\\_03/\\_Ato2007-2010/2009/.../D6949.htm](https://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2009/.../D6949.htm)>.

Accessed on: Feb 4 2017

<sup>8</sup> Just to give an example, it is necessary to mention the rules set forth in the Constitution of the Federative Republic of Brazil, in its article 7, item XXXI, which prohibits any discrimination regarding salary and admission criteria of the worker with a disability; article 23, item II, which provides for the common competence of the Union, the States, the Federal District and the Municipalities to take care of health and public assistance, the protection and guarantee of people with disabilities; article 24, item XIV, which attributes to the Federal Government, the States and the Federal District competence to legislate concurrently on the protection and social integration of persons with disabilities; article 37, item VIII, which requires the legislator to reserve a percentage of public positions and jobs for people with disabilities and to define the criteria for their admission; article 40, paragraph 4, item II, and 201, paragraph 1, that allow differential treatment to disabled persons for the granting of retirement; article 100, paragraph 2, which ensures preference in the order of payment of court orders; article 203, sections IV and V, which lists the protection of the disabled as an objective of the social assistance system (habilitation and rehabilitation and granting of pecuniary benefit of a charitable nature); article 208, item III, which provides them with specialized educational services, and articles 227, §1, paragraph II, and 2, and 244, which impose on the State the creation of specialized prevention and care programs for people with physical disabilities, sensory or mental health, as well as the social integration of adolescents and young people with disabilities, through training for work and coexistence, and facilitating access to collective goods and services, eliminating architectural obstacles and all forms of discrimination, as well as the adequacy of public places, public buildings and collective transport vehicles.

<sup>9</sup> Available at: <<https://www.planalto.gov.br>. Accessed on: Feb 4 2017>.

integration of the disabled, based on the basic values of equal treatment and opportunity, social justice, respect to the dignity of the human person, welfare and others, as indicated in the Constitution or justified by the general principles of Law, and Decree No. 3.298, of December 20, 1999, with the changes promoted by Decree No. 5,296, of 2 December 2004<sup>10</sup>, which regulates the said legal diploma.

In the regulations mentioned above, deficiency is conceptualized as any loss or abnormality of a psychological, physiological or anatomical structure or function that generates incapacity for the performance of activity, within the standard considered as normal for the human being; permanent disability, such as that which has occurred or stabilized for a period of time sufficient to prevent recovery or is likely to change, despite new treatments, and incapacity, such as the effective and marked reduction of the capacity for social integration, in need of equipment, adaptations, means or special resources so that the person with a disability can receive or transmit information necessary for their personal well-being and the performance of the function or activity to be performed.

Decree n° 3.298, of December 20, 1999, also lists the categories of disability, in the following terms:

- “(1) the complete or partial alteration of one or more segments of the human body, which causes the impairment of physical function, presenting as paraplegia, paraparesis, monoplegia, monoparesis, tetraplegia, tetraparesis, triplegia, tripareisia, hemiplegia, hemiparesis, amputation or absence of limb, cerebral palsy, limbs with congenital or acquired deformity, except aesthetic deformities and those that do not produce difficulties for the performance of functions;
- (2) partial or total hearing loss, which can vary in degrees and levels (mild deafness - from 25 to 40 decibels, moderate deafness - from 41 to 55 decibels, severe deafness - from 56 to 70 decibels, severe deafness - from 71 to 90 decibels, profound deafness - above 91 decibels, and finally anacusis - absence of hearing);
- (3) reduction of visual acuity (equal to or less than 20/200 in the best eye, after the best optical correction), visual field (less than 20° - Snellen table) or both situations, being defined as blindness to visual acuity equal to or less than 0.05 in the best eye, with the best optical correction, and as low vision the visual acuity between 0.3 and 0.05 in the best eye, with the best optical correction;
- (4) mental deficiency, where intellectual functioning is significantly below average, since before the age of eighteen and associated with limitations in two or more areas of

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<sup>10</sup> Available at: <<https://www.planalto.gov.br>. Accessed on: Feb 4 2017>.

adaptive skills (communication, personal care, social skills, community use, health and safety, academic skills, leisure and work), and  
(5) multiple deficiency, characterized by the association of two or more deficiencies”<sup>11</sup>.

The Disabled Person’s Statute<sup>12</sup>, in turn, defines a person with a disability as one who has a long-term physical, mental, intellectual or sensorial disability, which, in interaction with one or more barriers, may obstruct their full participation and society on an equal basis with other people.

The view of society about the disabled, however, has evolved over time, which will be discussed in the next topic.

### **B) Historical Evolution of the Insertion of the Disabled in Society: a Paradigm Shift**

Among primitive people, disabled ones received from the members of the community two distinct types of treatment: either rejection and summary elimination, as a hindrance to the survival of the group; or welfare protection, in the search for the sympathy of the gods.

In classical civilizations (Hebrews, Greeks, and Romans), there are some references, including legislative, to the disabled<sup>13</sup>. In the Bible, there are records of discriminatory treatment towards people with any type of disability.

In ancient Rome, collectivity allowed fathers - nobles or commoners - to sacrifice babies who were born with some kind of anomaly, since the vitality of the disabled by Roman law was not recognized. The custom, however, especially among noble families, was to leave the children on the banks of rivers or in sacred places, for families of the plebs or slaves to welcome them<sup>14</sup>.

Even in Sparta, both newborns and people who acquired some deficiency in the course of their life were thrown into the sea or off a precipice. Thus, children who had some form of different constitution would need to be exterminated, at the discretion of the Council of Elders, who, according to previously established requirements, could choose some from the age of twelve and send them to a camp where they would learn to survive alone<sup>15</sup>.

In his work *The Republic*, Plato accurately portrays the dominant thought of the time: “for the sick and incontinent individual, they

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<sup>11</sup> Decree No. 3.298, of December 20, 1999. Available at:

<<https://www.planalto.gov.br>>. Accessed on May 25, 2018.

<sup>12</sup> Statute of the Persons with Disability. Available at: <<https://www.planalto.gov.br>>. Accessed on: Feb 4 2017.

<sup>13</sup> FONSECA M., “Legal Protection of Persons with Disabilities”, *IBAP - Brazilian Institute of Public Advocacy & Esplanada Publishing ADCOAS*, São Paulo, December 2000, p. 482.

<sup>14</sup> FONTES F., *Pessoas com deficiência em Portugal*. Lisbon: Francisco Manuel dos Santos Foundation, 2016. p. 21.

<sup>15</sup> FONTES F., *Pessoas com deficiência em Portugal*. Lisbon: Francisco Manuel dos Santos Foundation, 2016. p. 21.

did not think that there was any advantage to him or to others in prolonging his life, nor that art of medicine was done in its intention, even if it were to be treated, was richer than Midas<sup>16</sup>.

In spite of this, by the influence of Aristotle, Athenians developed a system of protection and social protection of the sick and disabled, from the conception that to treat of equal way the unequal constituted an injustice<sup>17</sup>.

With the advent of Christianity, society's view on physical disability has undergone a significant transformation, under the influence of the valuation of the human person and the teachings of forgiveness of offenses, charity, humility and understanding of poverty and simplicity of life.

From the fourth century, establishments were set up to serve the poor and marginalized, including individuals with some kind of disability.

In 451, the Council of Cacedonia<sup>18</sup> approved a guideline that assigned to bishops and other religious the responsibility to organize and assist the poor and sick in their communities. Charity and aid institutions were set up in different regions, including on the initiative of the French king Childebert in the year 543 in the French city of Lyon. Between the fifth and fifteenth centuries, the places for care of the disabled were maintained, but under the control of feudal lords.

Historical references emphasize that, throughout the medieval period, mystical conceptions predominated, alternating the concept of physical deficiency or congenital malformation as possession by the devil (theological) or, sometimes, as divine design or punishment from God.

During the Inquisition, the Catholic Church itself adopted discriminatory and persecutive behavior, replacing the feeling of charity by rejecting those who deviated from a "standard of normality" whether by their physical aspect or by the defense of alternative beliefs.

During the Renaissance, the development of a humanist philosophy and the advancement of science allowed the

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<sup>16</sup> PLATÃO, *A República de Platão*, J. Guinsburg (organização e tradução), Perspectiva, São Paulo, 2014, p. 127.

<sup>17</sup> The model guided by the construction of an ideal and perfect society and by the instrumental function of the individual to the collective resurfaced in the first decades of the twentieth century, with the dissemination of eugenics movements, justified by scientific theories and the need to reduce state costs with disabled people. Maria Nivalda de Carvalho FREITAS, *The insertion of people with disabilities in Brazilian companies - a study on the relations between conceptions of disability, working conditions and quality of life at work*, doctoral thesis presented to the Graduate Center and Research in Administration of the Faculty of Sciences Economics of the Federal University of Minas Gerais – Belo Horizonte – 2007, pp. 43-44, Available at:

[https://ufsj.edu.br/portal2-repositorio/File/incluir/tese\\_maria\\_nivalda.pdf](https://ufsj.edu.br/portal2-repositorio/File/incluir/tese_maria_nivalda.pdf) (accessed on: 28 Apr. 2018).

<sup>18</sup> Available at:

<http://catolicadeanapolis.edu.br/revmagistro/wp-content/uploads/2015/08/History-of-dogmas-cristolicos-de-Calced%C3%B4nia-aos-our-days.pdf> (accessed on: February 7th. 2017).

recognition of universal rights, but without overcoming the social exclusion of the disabled. The individual ceased to be a hostage of “natural powers” or divine wrath, prevailing a revolutionary new way of thinking, which would alter the destiny of less fortunate, sick, and marginalized men, including those with physical, sensorial or mental problems<sup>19</sup>.

After the French Revolution and until the nineteenth century, mercantile capitalism and its developments - such as the Industrial Revolution - gave rise to the idea that disability was a medical and educational issue, requiring the confinement of the person in convents, hospices or educational establishments. A paradigm model was created in which the individual was kept segregated, with permanent link with the institution, in search of means that facilitated the execution of work and locomotion.

Throughout the sixteenth and seventeenth centuries, specific places of care for people with disabilities were built in different European countries, outside traditional shelters or homes for the poor and the elderly.

In the United States of America, from the 19th century, the disabled began to be treated differently. In 1811, sailors and marines who acquired some physical limitation were assisted with housing and food. In Philadelphia, in 1867, after the Civil War, the National Home for Disabled Volunteer Soldiers housed countless veteran war soldiers.

In the twentieth century, the two World Wars boosted the process of rehabilitation of the disabled, the shortage of labor and the need to ensure a remunerated activity and dignified social life for mutilated soldiers. The assistance and quality of treatment accorded not only to persons with disabilities but also to the population at large have made substantial progress because the large contingent of individuals with war sequelae required special measures (for example, specific rehabilitation programs).

Currently, in the normative horizon, there is an evolution in the role of the rights of the disabled person, which began with the rupture of the welfare model by the Constitution of the Federative Republic of Brazil of 1988 - which established pluralism and isonomy as vectors in a society characterized by diversity - and reached its apex with the conclusion of the International Convention on the Rights of Persons with Disabilities and its Optional Protocol, which established uniform guidelines and criteria to ensure, promote and protect the full and equal exercise of rights by with a view to their social inclusion.

In Brazil, this agreement was approved with constitutional amendment status and led to the issuance of the Disabled Persons Statute, for the adjustment of the infra-constitutional order to the parameters outlined in the international orbit.

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<sup>19</sup> O. M. SILVA, *A Epopéia Ignorada: a pessoa deficiente na História de ontem e de hoje*, CEDAS, São Paulo, 1987, p. 226.

## § 2 – THE RIGHT OF LIBERTY RECOGNIZED TO PERSONS WITH DISABILITIES

The International Covenant on the Rights of Persons with Disabilities is a landmark in guaranteeing human rights because it is the result of a widespread consensus of the international community (governments, non-governmental organizations and citizens) on the need to ensure respect for the integrity, dignity and freedom of individuals with disabilities, with the prohibition of negative discrimination, through laws, policies and programs that meet their characteristics and promote their participation in society.

In the wake of this normative evolution, Law 13,146 of July 6, 2015, which includes a set of normative prescriptions, was established in Brazil to ensure and promote, under conditions of equality, the exercise of the fundamental rights and freedoms of the disabled person, with a view to their social inclusion and citizenship.

Before entering into the specific analysis of such legislation, with regard to the right of freedom of the disabled, it should be emphasized that the freedom of all individuals is substantially based on two distinct pillars: autonomy and responsibility.

### A) Autonomy and Human Dignity as Normative Guidelines

The conceptions of autonomy and dignity of the human being are logical presuppositions for the discussion about the content of the norms that make up the legal status of people with disabilities.

Kant was the first theoretician of Modernity to affirm that it is not possible to attribute value (price) to man, since man, as a rational being, must be considered as an end in itself and in function of its autonomy<sup>20</sup>. Freedom to exercise practical reason is the only condition for the person to put on dignity, independently of any social recognition (equality)<sup>21</sup>.

It is for no other reason that the entire international system of protection of human rights was based on the freedom of the individual.

In order to approach this theme, autonomy is understood as the ability of the individual to decide freely about himself and his relationships with others, forming his own personality (and personal history), absolutely individual and irreplaceable. And dignity is understood - as an ethical, political and juridical value<sup>22</sup>,

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<sup>20</sup> I. KANT, *Fundamentação da metafísica dos costumes e outros escritos*, tradução de Leopoldo Holzbach, Martin Claret, São Paulo, 2004.

<sup>21</sup> *Ibidem*.

<sup>22</sup> For Kant, dignity is the value of everything that is priceless, that is, that can not be replaced by an equivalent: “in the realm of ends everything has either a price or a dignity. When a thing has a price, it can be put instead of any other as equivalent; but when a thing is above all price, and therefore does not allow equivalent, it has dignity”(I. KANT,



often associated with the idea of the dominant justice in society - as an inherent quality of the human being that allows him to exercise, autonomously, his practical reason. Dignity is, therefore, inseparable from autonomy.

Such notions are echoed in the homeland doctrine.

Ingo Wolfgang Sarlet defines the dignity of the human person as “the intrinsic and distinctive quality recognized in each human being that deserves the same respect and consideration on the part of the State and the community, implying, in this sense, a complex of fundamental rights and duties that guarantee the person against any and all degrading and inhuman acts, as they will guarantee the minimum existential conditions for a healthy life, as well as fostering and promoting their active and co-responsible participation in the destinies of their own existence and life in communion with other human beings, with due respect to the other beings that are part of the network of life”<sup>23</sup>.

Indeed, the autonomy of the will, as the capacity to determine oneself and to act in accordance with the representation of certain laws, is an exclusive attribute of rational beings, constituting the foundation of the dignity of human nature.<sup>24</sup>

For Alexandre de Moraes, “Dignity is a spiritual and moral value inherent to the person, which manifests itself singularly in the conscious and responsible self-determination of life itself and which brings with it the pretension of respect on the part of other people, constituting a invulnerable minimum, which every legal status must ensure, so that only exceptionally limitations can be placed on the exercise of fundamental rights, but always without neglecting the necessary esteem that all persons deserve as human beings”<sup>25</sup>.

Flávia Piovesan points out that human dignity is the greatest value that inspired the Universal Declaration of Human Rights of 1948, extracting the universality and indivisibility of human rights<sup>26</sup>.

In reality, the recognition and guarantee of freedom - and of fundamental rights in general - constitutes a requirement of the dignity of the human person, a vector that limits the performance of the State itself. Protecting one’s individuality and autonomy from state and third-party interference implies ensuring the ownership of rights by the individual<sup>27</sup>.

It should not be forgotten that social inclusion does not mean the absolute equality of all members of the community, but rather

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*Fundamentação da metafísica dos costumes e outros escritos*, tradução de Leopoldo Holzbach, Martin Claret, São Paulo, 2004).

<sup>23</sup> I. W. SARLET, *Dignidade da Pessoa Humana e Direitos Fundamentais na Constituição Federal de 1988*, Livraria do advogado, Porto Alegre, 2001, p. 73.

<sup>24</sup> *Ibidem*, p. 40.

<sup>25</sup> A. DE MORAES, *Direito Constitucional*, 16. ed., Atlas, São Paulo, 2004, p. 52.

<sup>26</sup> F. PIOVESAN et al. *Leituras complementares de direito constitucional*, 3.ed., JusPodivm, Salvador, 2008, p. 52.

<sup>27</sup> I. W. SARLET, *Dignidade da Pessoa Humana e Direitos Fundamentais na Constituição Federal de 1988*, Livraria do advogado, Porto Alegre, 2001, p. 59.

respect for diversity, the guarantee of effective participation in the dynamics of the social group and the granting and protection of rights based on equality.

### **B) The Legal Treatment of the Freedom of the Handicapped in Law 13,146 / 2015 (Statute of Persons with Disabilities)**

In his work *The Right of Freedom*, Honneth<sup>28</sup> argues that every individual has the right to reject social obligations and ties when they are incompatible with their own legitimate interests or moral convictions. Indeed, the State protects this right or it is intersubjectively guaranteed.

According to the author, juridical freedom is associated with the idea that the State has to protect the individual's option to relegate an ethical decision for a time if it is necessary for him to perform his will, and moral freedom is that through which the individual removes certain social impositions, claiming juridically accepted reasons. Both form systems of action for individual freedom are regulated by rules of reciprocal recognition<sup>29</sup>. Individuals contract social bonds or are in closed communities, and legal and moral liberties are parasitically related to the practice of social life, allowing the individual to renounce the demands of that society and assume, in relation to them, a vision of "conscious" revision<sup>30</sup>. Intimate relationships presuppose a space for the reciprocal exploration of individual emotional states. Apart from marriage and the family constitution, they are institutionalized, regardless of the sexual orientation of the individual. Even if there is no intention of maintaining a long-term, State-sanctioned bond, they constitute a form of legitimate relationship for all members of society.

Honneth warns that intimate relations (any of them) are expected: reciprocal love not founded on the arbitrary qualities of the other, desires and interests that are considered meaningful in their interpretation for themselves, reciprocal obligations and reference to a common future, concept established in the stable union<sup>31</sup>.

He also maintains that a new concept of marriage has emerged in the doctrine: from then on marriage has come to be defined, in a broad sense, as a community of sustenance and gain, so that the spouse that is not economically active, after legal or natural right to marry, is entitled to half of the goods acquired during the time during which they were married, in the form of compensation for gain or support<sup>32</sup>.

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<sup>28</sup> A. HONNETH, *O Direito de Liberdade*, Martins Fontes, São Paulo, 2015.p. 225.

<sup>29</sup> *Ibidem*, p. 225.

<sup>30</sup> *Ibid.*, p. 227.

<sup>31</sup> *Ibid.*, p. 265.

<sup>32</sup> *Ibid.*, p. 271.

In today's social context, freedom in intimate relationships can only be experienced where there is no marriage or where it cannot be celebrated. The non-existence of restrictions to public marriage (subjective right) is what ensures their private autonomy (in essence). In affective bonds, there is a greater unevenness of closeness, individuals complement each other not only to stipulate and to support their ethical formation, but also to meet the physical needs of each one for their personal well-being. This particularity has repercussions on the duration of the bond: "often the protagonists are presented as if they no longer have the motivation to allow normative obligations necessary to continue the love relations"<sup>33</sup>.

According to Honneth, "the institutional autonomization of the intimate relationship, which stripped itself of any external supports in the social tasks in the family expectations, ended up making only the still individual feelings of affection and attraction decide how long the duration of the bond with one another"<sup>34</sup>.

The fact of joining two persons linked to each other is considered the third sphere of personal attachment, given that, for social freedom, which we can speak of in the concept of the modern family, triangularity is decisive and constitutive<sup>35</sup>.

In addition, the traditional structure of the family composed of the father (provider), the mother (caretaker of the home) and the child (the object of formation for the future) was altered by social factors (including economic, market and professional) and implied a change of concepts. This transformation was also reflected in the father's position in the triangular relationship for the child's affective-social socialization, which was once the exclusive role of the mother<sup>36</sup>.

Incorporated in the intimate relationship, the principle of remission of revocation loses legitimacy within the family, since the relationships between parents and children are not legally and normatively irredeemable, becoming a central point of attention and lifelong care for parents<sup>37</sup>.

Distinct family nuclei (married / unmarried parents, biological / social children, heterosexual / homosexual parents) are more frequent. The relational device composed of three members with the same rights and values, whose roles and tasks change over the course of the phases of life in common, allows us to draw some conclusions about the implicit norms of current family life<sup>38</sup>. One observes the alternation of roles, independently of the norms, and, gradually, it has been assuming an institutional force, which is the fulfillment of a normative requirement, which has accompanied the

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<sup>33</sup> *Ibid.*, p. 276.

<sup>34</sup> *Ibid.*, p. 277.

<sup>35</sup> *Ibid.*, pp. 282-283.

<sup>36</sup> *Ibid.*, p. 296.

<sup>37</sup> *Ibid.*, pp. 299-300.

<sup>38</sup> *Ibid.*, p. 300.

modern family, as well as in romantic love: each of its three members - father, mother and son – “is inserted in the family with the same rights, each one in the peculiarity of his subjectivity, and, in this way, it is correspondingly that he should receive a zeal and an empathy that correspond to his needs”<sup>39</sup>.

To Honneth, “according to the normative principle, today the three members of the family - and it does not matter if they are one or more children - are opposed to the normative principle as partners of interaction in equal rights, being able to expect empathy, dedication and care demanded by their specific needs and inherent to each stage in which they are: at the normative level, this is precisely the consequence of which the triangularity of family today, as a tendency went from a “in itself” to a “for itself”<sup>40</sup>.

In reality, there is a “moral obligation” in families, according to the standard of the duties of friendship: “if grown children, in relation to care and support, are only forced by their parents since the relationship continues to be characterized as love, and affection, we must rid ourselves of the old conception of love and affection, we must rid ourselves of the old conception that these are duties attached to roles or even “natural” and instead bear in mind the normative model of relations of friendship (...) governed by moral norms founded on reciprocal affection, also among families the constitutive obligations result only from ties and attachments that have always been experienced.<sup>41</sup>” A new relationship is established, called by some as the “purification” of the family, with the modification of external roles and impositions<sup>42</sup>.

In contemporary families, social freedom is no longer connected to the reflection of the parental recognition relationship in a third member (triadic relationship). Although this triadic relation was considered by Hegel his contemporaries, the reality of the death of one of the parents still in the infancy of the son was not considered, since the son then saw itself. Today, as the family relationship has extended over time, the child is seen further in the parents<sup>43</sup>. What Hegel identified as the objectification of the love of the couple in their own child is conceived today with a very different meaning from the reciprocal symbolization of past and future stages of life. John Rawls was best theorized about the democratic value of a prodigal education with a dedication to love, but if the democratic community depends on the ability of its members to practice cooperative individualism, the political-moral meaning of family spheres will no longer be questioned ; “because with abstraction to the affective ties, the psychic preconditions are created in the bosom of families guided by the trust and equality in all the occupations with which the individual will have to contribute to be

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<sup>39</sup> *Ibid.*, p. 301.

<sup>40</sup> *Ibid.*, p. 302.

<sup>41</sup> *Ibid.*, p. 305.

<sup>42</sup> *Ibid.*, p. 307.

<sup>43</sup> *Ibid.*, p. 305.

inserted in certain communities by virtue of their individual capacities and competences, in view interests beyond the public sphere”<sup>44</sup>.

Durkheim in *Sociology of morality* treats the family as a “secondary organ of the state”, thought as “normative reconstruction” of all moral and ethical “rules of behavior, whose individual observance should ensure the preservation of a cooperative democracy. The author, moreover, since a democratic public sphere has to be erected with the aid of state laws and the corresponding redistribution of everything in its power, to enable families, thus, to unfold their forms of interaction idiosyncratic, which ultimately stimulated cooperation”<sup>45</sup>.

In view of such lessons, Law No. 13,146, of 2015, known as the Disabled Persons Statute, represents an important step forward in consolidating the freedom of an expressive social segment, since, from the legal point of view, it guarantees numerous rights to the individual with disabilities, such as to constitute a family, to marry or be in a stable union and to act with autonomy. To ensure equality with others, the legislator abolished his condition of incapacity, allowing him to practice, with autonomy, acts of civil life, regardless of the authorization of the healer.

This normative innovation can be associated with the conception that freedom in affective relationships does not derive from contractual obligations giver by the State (official marriages). Social prototypes are abandoned, and private autonomy gains space, based on subjective rights that emerge from these relationships.

Equality is the fundamental basis of the legislation protecting the disabled person, as advocated in Article 1 of the Statute: “Article 1 - The Brazilian Law on the Inclusion of Persons with Disabilities (Statute of the Person with Disabilities) is hereby established, designed to ensure and promote, under conditions of equality, the exercise of fundamental rights and freedoms by persons with disabilities, with a view to their social inclusion and citizenship.”

In this new scenario, the person with disabilities integrates the family and can no longer be treated as absolutely incapable<sup>46</sup>. The freedom to decide with whom to relate, guaranteed in articles 84<sup>47</sup>

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<sup>44</sup> *Ibid.*, p. 307.

<sup>45</sup> *Ibid.*, pp. 307-321.

<sup>46</sup> Statute of the Person with Disability: Article 6. Disability does not affect a person’s full civil capacity, including: I – marrying and forming a stable union; II – to exercise sexual and reproductive rights; III – exercise the right to decide on the number of children and to have access to adequate information on reproduction and family planning; IV – to preserve its fertility, being prohibited the compulsory sterilization; V – to exercise the right to family and family and community coexistence, and VI – exercise the right to custody, guardianship, custody and adoption, as adopter or adopting, on an equal basis with other persons. Available at: <https://www.planalto.gov.br> (accessed on May 25, 2018).

<sup>47</sup> Statute of the Person with Disability: Art. 84. A person with a disability has the right to exercise his legal capacity on equal terms with other persons. Paragraph 1: When necessary, the person with disabilities shall be subject to custody according to law. Paragraph 2: The person with disabilities is allowed to adopt a decision-making process supported. Paragraph 3: The definition of a person with a disability is an extraordinary

and 85<sup>48</sup> of the Statute of People with Disabilities, strengthens their social integration.

In addition, there is a tendency for norms to be fulfilled within the family, regardless of the presence of feelings of antipathy affection, since this gives the individual strength to assume responsibilities in the distribution of tasks, insofar as he feels accepted and added emotionally to the other members.

The great “innovation” of family functioning - in which the disabled is inserted with full autonomy - is the ability to exercise “cooperative individualism”: “ability to develop the scheme of thought of a generalized other, in the perspective of intrafamilial responsibilities have to be distributed in a fair and equitable way, willingness to assume such obligations in a way that is also active, the deliberative negotiation of such responsibilities in one’s own occupations, the tolerance necessary for other members to develop their lifestyles and preferences that contradict the their own ethical principles” - reciprocal acceptance.

The role of the disabled person is strengthened by the “legal” guarantee of the freedom to establish their affective relationships, without interference from third parties.

## CONCLUSION

Throughout history, society’s view of the disabled has undergone a significant change: from rejection and summary elimination, combined with a welfare protection, to the equalization of rights and duties.

This paradigm shift has led to the incorporation of norms that aim to promote their social inclusion in the legislation of countless countries, including Brazil, especially in the last decades.

Among the normative innovations of greater relevance in the Brazilian legal system, the edition of the Statute of Persons with Disabilities (Law no. 13,146 / 2015) stands out, which, based on the International Convention on the Rights of Persons with Disabilities and its Optional Protocol, ratified by the National Congress through Legislative Decree 186, of July 9, 2008, in the system provided for in art. 5, paragraph 3, of the Constitution of the Federative Republic of Brazil, recognizes the deficient

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protective measure, proportional to the needs and circumstances of each case, and shall last as shortly as possible. Paragraph 4: The Trustees are obliged to render annually accounts of their administration to the judge, presenting the balance of the respective year. Available at: <https://www.planalto.gov.br> (accessed on May 25, 2018).

<sup>48</sup> Disability Statute: Art. 85. The custodian will only affect the acts related to the patrimonial and business rights. § 1º. The definition of curatela does not reach the right to own body, sexuality, marriage, privacy, education, health, work and voting. § 2º. The curatorship is an extraordinary measure, and the reasons and motivations of its definition must be stated in the sentence, preserving the curate’s interests. § 3º. In the case of a person in a situation of institutionalization, when appointing curator, the judge must give preference to the person who has a family, affective or community bond with the curatelado. Available at: <https://www.planalto.gov.br> (accessed on May 25, 2018).

autonomy to exercise fundamental rights, consecrating their individual freedom in a broad spectrum.

Law No. 13,146, of 2015, called the Disabled Persons Statute, represents an important step forward in consolidating the freedom of an expressive social segment, since it guarantees numerous rights to the disabled person, such as to establish a family, to contract marriage or stable union and to act with autonomy. To ensure equality with other persons, the legislator abolished the condition of incapacity, allowing him to practice, with autonomy, acts of civil life, regardless of the authorization of the healer.

This normative innovation can be associated to the conception that freedom in affective relations does not derive from contractual obligations given by the State (official marriages), extending the private autonomy.

In this new scenario, the person with disabilities integrates the family and can no longer be treated as absolutely incapable. The freedom to decide with whom to relate, guaranteed in the Statute of People with Disabilities, strengthens their social integration.

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