



## The repercussion of the Convention on the Rights of Persons with Disabilities in Brazilian courts

*A repercussão da Convenção sobre os Direitos das Pessoas com Deficiência nos tribunais brasileiros*

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Artigo recebido em 17/12/2019 e aceito em 04/10/2020.



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### Abstract

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) was the first treaty to be incorporated as a Constitutional law, according to the determination of the Brazilian Constitution for human rights treaties. In addition, the Optional Protocol was also promulgated, recognizing the competence of the Committee on the Rights of Persons with Disabilities to supervise the application of the treaty in Brazil. This study aims to analyze the impact of the Committee and Convention in Brazilian courts, specifically in the courts that have jurisdiction to rule on cases based on treaties, that is, the Federal Justice. An extensive survey of judicial decisions was carried out in order to verify whether the protections of the treaty are applied. This research focus on the efforts to ensure the rights of persons with disabilities on the Brazilian legal system, based on the commitment to international cooperation to guarantee and promote the rights and principles announced in the CRPD, particularly regarding the social model of disability, which is the main protective concept used in the treaty.

**Keywords:** International cooperation; Social model of disability; Human rights treaty bodies.

### Resumo

A Convenção sobre os Direitos das Pessoas com Deficiência da ONU (CDPD) foi o primeiro tratado a ser incorporado como uma Lei Constitucional, de acordo com a determinação da Constituição Brasileira para os tratados de direitos humanos. Além disso, o Protocolo Facultativo também foi promulgado, reconhecendo a competência do Comitê dos Direitos das Pessoas com Deficiência para supervisionar a aplicação do tratado no Brasil. Este estudo tem como objetivo analisar o impacto do Comitê e da Convenção nos tribunais brasileiros, especificamente nos tribunais que têm competência para julgar casos com base em tratados, ou seja, a Justiça Federal. Foi realizado um amplo levantamento das decisões judiciais para verificar se as proteções do tratado são aplicadas. Esta pesquisa tem foco nos esforços para a garantia dos direitos das pessoas com deficiência no ordenamento jurídico brasileiro, com base no compromisso de cooperação internacional para garantir e promover os direitos e princípios anunciados na CDPD, em particular no que se refere ao modelo social da deficiência, que é o principal conceito protetivo utilizado no tratado.

**Palavras-chave:** Cooperação Internacional; Modelo social da deficiência; Tratados de direitos humanos.



## Introduction

After centuries of exclusion and stigmatization of persons with disabilities, this socially differentiated group<sup>1</sup> has achieved a legal status that meant a real break of paradigms, both in the international order and in the Brazilian legal order. The United Nations Convention on the Rights of Persons with Disabilities (CRPD), signed in New York on March 30, 2007, affirmed the social model of disability and formally ensured equality in the right to citizenship for this group of people. This concept comprehends disability as a long-term impairment that, in interaction with attitudinal or physical barriers, can hinder the full and effective participation of the persons with disabilities in society on equal terms with others (article 1 of the Convention), rather than placing the responsibility for this barriers on the persons with disabilities themselves, as previous concepts perceived.

In Brazil, the UN Convention was promulgated, according to the procedure established by the article 5, paragraph 3, of the 1988 Constitution (with the status of constitutional amendment), on August 25, 2009, through the Decree 6,949<sup>2</sup>. This enactment occurred in conjunction with the promulgation of the Optional Protocol, recognizing the competence of the Committee on the Rights of Persons with Disabilities to supervise and regulate the country's compliance with the terms of the Convention in specific cases involving possible affronts to the rights of persons with disabilities. Consequently, the Brazilian Inclusion Law (Federal Law 13.146, of July 6<sup>th</sup>, 2015), which was drafted in accordance to the determinations of the Convention, implemented a series of measures to ensure a more extensive inclusion for persons with disabilities in Brazilian

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<sup>1</sup> The article 3 of the UN Convention on the Rights of Persons with Disabilities considers disability to be an expression of human diversity and therefore part of humanity. Therefore the term "socially differentiated group" is used since the differences in this plural group of people are social in nature. For the standards analyzed here, differences (always in the plural) are a fact of social reality that must be respected.

<sup>2</sup> In order for an international treaty to have internal enforceability, the Federal Supreme Court has demanded the promulgation of the text by Presidential Decree. In addition, all of the analyzed decisions in this study refer to the Presidential Decree. Under the terms of the Brazilian Supreme Court decision, the reception of international treaties in the Brazilian legal system depends, for the purpose of its subsequent execution at the domestic level, on a causal and orderly succession of acts covered by political and legal character: (a) approval by the National Congress of such conventions, by legislative decree; (b) ratification of these international acts by the Head of State, by depositing the respective instrument; (c) promulgation of such agreements or treaties by the President of the Republic, by decree, in order to enable the production of the following basic effects, essential to its domestic validity: (1) official publication of the text of the treaty and (2) enforceability of the act of public international law, which then - and only then - is bound and obliged in terms of positive domestic law (decision CR 8279, from 06/17/1998).



society, following the system of protection to human rights established by the Federal Constitution of 1988<sup>3</sup>.

The Brazilian State has sovereignly decided to submit to the guidance and agendas of the referred specialized body by promulgating the Convention and the Optional Protocol, thus recognizing the competence of the Committee and incorporating the Convention in the national legal system. Therefore, the present research seeks to analyze how (or if) the Brazilian Courts, specifically the courts that have jurisdiction to rule on cases based on treaties, i.e. the Federal Courts, apply the Convention and the Committee's guidelines and recommendations. Thus, we performed a jurisprudential research<sup>4</sup> with focus on the decisions of the Tribunais Regionais Federais (TRF)<sup>5</sup>, which are collegiate courts that represent the second tier of the Brazilian Federal Justice, thus all of the analyzed cases have already been judged by a singular judge in the first tier of the Federal Justice before being analyzed by the collegiate body.

We chose the TRFs for this research, since the article 109 of the Brazilian Constitution establishes that the Federal Justice is responsible for prosecuting cases based on a treaty or contract between Brazil and a foreign state or international body. International treaties are legal documents formally incorporated into the Brazilian legal system. Therefore, all judges from all spheres of jurisdiction have the duty to apply the treaties. Likewise, having recognized the competence of courts or other international bodies, such as the case of the referred Committee, the judges also have the duty to honor the international cooperation commitments signed by Brazil in these areas. Therefore, both federal and state judges have the duty to apply the CRPD. However, the discussion about the international responsibility of the Brazilian State to fulfill or not of the commitments of signing and incorporating international treaties is raised within the scope

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<sup>3</sup> The Constitution of 1988 dealt with persons with disabilities in several articles and was the first Brazilian Constitution to do so. On the matter of equal pay, there is article 7, item XXXI. Regarding the competencies of the federated entities for the matter, there is article 23, item II. On prevention programs and specialized care for children, adolescents and young people with disabilities, there is article 227, paragraph 1, item II.

<sup>4</sup> The jurisprudential research is an important mechanism in Brazilian law and is often made available so that the general population can access judicial decisions. The term "jurisprudential" does not mean that all cases studied necessarily represent definitive understandings of the higher courts, but represents the judicial system of consulting decisions.

<sup>5</sup> The most appropriate term for this judiciary body in English would be "Federal Regional Courts". However, we chose not to translate this expression in the text due to the lack of equivalence of the Court's name in English, considering the specific organization of the Brazilian Federal Justice. Thus, we refer to the Court in the text by its acronym "TRF".



of the competence attributed by the Brazilian Constitution to the Federal Justice. For this reason, we restricted the research object to analyze the second tier of the Federal Justice.

For such work, the main methodology used was the jurimetry, which is the quantitative analysis of judicial decisions. Jurimetry is understood as a research method based on the use of empiricism, combined with statistical analysis, applied to the study of law (YEUNG, 2017, p. 249). Thus, we carried out a review of the summaries<sup>6</sup> of decisions of the collegiate decisions from the five TRFs of Brazil, in order to evaluate references to the UN Committee and the Convention on the Rights of Persons with Disabilities. All the researched data is available on the website of the Federal Justice Council<sup>7</sup>. The time interval established for the jurisprudential research was from 25/08/2009 (date of the promulgation of the Convention in Brazil) to the present time<sup>8</sup>.

Thus, we performed a quantitative analysis of these Courts' decisions in order to determine how many decisions referred to each of the search terms that were elected to conduct this research, which were: "*Committee on the Rights of Persons with Disabilities*" and "*Convention on the Rights of Persons with Disabilities*". After the analysis of the summaries of the decisions, the data was organized taking into account the *court*, *date*, and *subject* of the judgment. Analyzing each *court* aims to verify whether the number of total decisions from each TRFs varied<sup>9</sup>. The *date* of the decisions, allowed us to note how often the Convention and the Committee were cited in the decisions and from which date they were effectively used in the reasons of the decisions. The *subject* of each judgment, obtained by reading the summaries, is necessary to verify which matters were dealt with the decisions that referred to the terms used as search parameters (Convention and Committee).

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<sup>6</sup> The jurisprudential research mechanisms implemented by the Brazilian courts provide a summary of each lawsuit in the respective court, which contains the main facts and considerations of the respective lawsuit.

<sup>7</sup> The used website can be accessed by the electronic address: <https://www2.cjf.jus.br/jurisprudencia/unificada/>

<sup>8</sup> It is worth to point out that there are decisions for public consultation on the website that were made available after our timeframe and may not have been included in this research due to the internal routine of the courts. Also, the research presented judgments that cite the Convention, but do not directly discuss the rights of persons with disabilities, so were not included in the present work.

<sup>9</sup> The second tier of the Brazilian Federal Justice is divided into 5 regions among the federated states. Each region presents unique features regarding jurisdictional contingent, population, and cultures, which reinforces the need of studying each Region separately to fully understand the application of the Convention in the country.



After organizing these data, it was possible to understand the number of decisions that cite the Convention and the Committee, as well as the main legal discussions in which these references appear. The main problem found in this research was that there are no decisions referring the Committee on the Rights of Persons with Disabilities, considering the importance of this body to supervise and define international parameters for the application of the CRPD by Brazil. Although we have not identified any references to the Committee, we found many references to the Convention. In addition, we also identified a significant difference between the numbers of references to the Convention among the studied Courts. Thus, even though a very rich material for quantitative and partially qualitative clarification was encountered, it was necessary to better elucidate how the references to the search terms appeared in decisions, also considering that no similar researches were found in the literature.

According to our results, it is possible to affirm that the changes triggered by the international commitments accepted by Brazil are not just the result of a process of simple incorporation (or “nationalization”) of international law. They also result from the commitment to international cooperation that all institutions assume to guarantee and promote human rights. Therefore, this article seeks to study and verify what and how Brazilian courts have debated, built and consolidated regarding global agendas and commitments arising from the CRPD. The present article also presents a study on the main procedures of the Committee and its relation with the Brazilian legal system, besides a brief bibliographic review on the social model of disability. Thus, the present research is based on the main scientific debates involving the protections on the rights of persons with disabilities, such as the development of a social theory of disability, the influence of the social model in the social participation of persons with disabilities and the modification in Brazilian law triggered by the CRPD.

### **The UN Convention on the Rights of Persons with Disabilities and the social model of disability**

It is essential to understand the importance of the UN Convention on the Rights of Persons with Disabilities to comprehend why it is central to the present work. Despite the advances made by the Federal Constitution of 1988, it was the CRPD that materialized the



main paradigm shift regarding the concept of disability, which is the substitution of the medical model by the social model of disability. The social model, which conceives disability as the result of the interaction of long-term impediments with the social barriers (article 1 of the Convention, reproduced in its entirety by article 2 of the Brazilian Inclusion Law), puts on the social barriers the responsibility for obstructing the access to citizenship on equal terms with other people. Therefore, the responsibility for the difficulty of exercising the citizenship is no longer exclusive of the persons with disabilities, but is attributed to society as a whole, that is, to individuals who have discriminatory attitudes, such as the public agents who do not perform accessibility works, the private school that charges additional fees to enroll children with disabilities<sup>10</sup>, among others.

Previously, disability was defined by the medical model, a concept that understood disability as a result of impairments, in a relation of causality between impairment and disability, so that the responsibility for the lack of social inclusion was fully placed on the person with disability (DINIZ, 2007, p. 44). The main example of this application was the International Classification of Impairments, Disabilities and Handicaps (ICIDH) of the World Health Organization, published in 1980, with the objective of standardizing the biomedical language about injuries and disabilities, which perpetuated a view exclusively medical on disability.

However, since the 1980s, there was a need to develop a social approach to disability (OLIVER, 1986, p. 12), so that the social model of disability started to be developed aiming to understand disability as a result of social barriers. In this sense, Abberley (1987) seeks the development of a social theory of disability based on the concept of oppression, identifying that this disadvantage is not a biological product, but a social one, since oppression results from the social perception that biological aspects of people with disabilities are necessarily a problem that puts them in a supposed inferiority. It is possible to notice that the academic literature tends to understand that the social model of disability is connected to a social-politic phenomenon, since disability can also be associated to social structures of exclusion and marginalization (GRUE, 2016, p. 960), rather the result of a disease or impairment.

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<sup>10</sup> The Federal Supreme Court prohibited the collection of additional fees for the registration of persons with disabilities and stated: "*In the light of the Convention and, consequently, of the Constitution of the Republic, inclusive education in all the levels of education is not a reality foreign to the national legal system, but an imperative that is set by an explicit rule.*" (Decision 5.357/2016).



The development of the social of disability meant a significant change in the way that persons with disabilities are viewed in the society, which is demonstrated by the International Classification of Functioning, Disability and Health<sup>11</sup> (ICF), which substituted WHO's previous understanding on disability. This classification, adopted in 2002, aims to present a multi-causal and functionality-based model, taking in consideration the social participation of persons with disability (BAMPI, et al., 2010, p. 819). Thus, the comprehension of disability in function of the interaction of the persons with disabilities with social barriers demonstrate that the affirmation of difference should be understood as a human right, in order to strengthen minority groups in their claims for an adequate participation in society (PERUZZO; LOPES, 2019, p. 17).

This paradigm shift had a great legitimacy impact on the domestic law, allowing an international cooperation marked by the broad participation of individuals, non-governmental organizations and social movements in the construction of global agendas and normative documents<sup>12</sup>, while embodying in the UN Convention the direct reflection of the opening of the transnational public sphere to multiple actors (BERNARDES, 2011).

In this sense, it is possible to identify in international human rights organizations a fundamental public sphere for the protection of victims of serious human rights violations practiced or made invisible by the State itself. Thus, these organisms have functioned as an open space to the multiple international actors who face the fact that resorting to the State itself is often insufficient to solve the problems, since the violating State usually ignores relevant and structural issues that are exposed much clearly in international forums (CASONI; PERUZZO, 2021). This clarity is fundamental to building global human rights agendas. Specifically on the subject of this work and in line with what has been worked on under the idea of new fundamental rights, global agendas are essential since it is impossible to continue thinking about human rights of persons with disabilities without considering that the focus is not reduced to promotion of rights only

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<sup>11</sup> WHO. International Classification of Functioning, Disability and Health (ICF). Available at: <https://www.who.int/classifications/icf/en/>.

<sup>12</sup> The participation of multiple actors in the construction of the CRPD is also repeated in the formulation of the Committee's general guidelines, such as the General Guidance on article 12 of the Convention, issued in 2014 (CRPD / C / 11/4), which registers the participation of: (...) "*experts, States parties, organizations of persons with disabilities, non-governmental organizations, treaty bodies, national human rights institutions and United Nations agencies.*"



at the local level, but to a real agenda, so that people with disabilities can be respected as citizens of the world<sup>13</sup>.

Regarding the international cooperation in such cases, it is also worth to point out that Brazil was the target of severe critics regarding the resistance of the common legislation to thoroughly adapt to the social model (MENEZES, et al., 2020, p. 11), which later lead to the current format of the Brazilian Inclusion Law, as well as to significant changes in important laws.

This is the case of the Brazilian Civil Code, which, before the response of the Brazilian Inclusion Law to the UN Convention, presumed the civil incapacity of the disabled person, placing them in a discriminatory position of presumed distrust. Thus, Brazil has modified the Civil Code to ensure the presumption of capacity for this group of people, following the recommendation of the Convention and the General Comment of the Committee on article 12 (CRPD/C/11/4), which aims to hold States accountable for ensuring that persons with disabilities enjoy legal capacity on an equal basis conditions with other people in all aspects of life.

This particular change in the Brazilian civil legislation was implemented by the Law 13.416/2015, better known as the Brazilian Inclusion Law or Statute of the Person with Disabilities, which also established several other protective measures. This law finally implemented the social model of disability in the Brazilian ordinary legislation. An example of this paradigm shift in the field of civil capacity occurred with the regulation of the “supported decision making”, which, instead of presuming the incapacity<sup>14</sup> of the person with disabilities to exercise their citizenship, presumes their capacity. This institute was regulated with direct modifications to the Civil Code, specifically with the insertion of article 1.783-A and following articles, which, moreover, were a direct consequence of the rule contained in article 12 of the Convention (BARBOZA; ALMEIDA, 2018, p. 383).

Since this international treaty has been incorporated into Brazilian law along with the recognition of the Committee's competence, the respect for the orientations

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<sup>13</sup> Peruzzo and Spada (2018) explain that a international dynamic panorama emerges from the discussion about “new” fundamental rights, since the idea that what happens within a local reality can influence or interfere in the lives of other people its jurisdictions is increasingly more relevant. For example, pollution of a river or an ocean, cross-border arms and drug trade or even the use of new technologies for genetic “improvement” are all situations that affect humanity as a whole.

<sup>14</sup> Before the introduction of the “Brazilian Law of Inclusion”, the civil legislation determined that persons with disabilities did not have the full legal capacity to perform regular activities of their civil life.



emanating from this body is expected as a logical consequence of the exercise of national sovereignty, considering that the Brazilian State has opted to legally bind to the treaty. The only exception to this rule, then, would be a national interpretation that would give more effectiveness to the rights of the group to which the international convention is dedicated. Therefore, this research also presents a study of the full procedure of the Committee on the Rights of Persons with Disabilities, in order to comprehend how this organism performs the functions of supervising and regulating the application of the CRPD in the State parties, especially the procedure of analyzing complaints on affronts of the rights of persons with disabilities.

### The Procedure of the Committee on the Rights of Persons with Disabilities

The competencies for analyzing the State reports are established in the Convention (article 35 of the Convention), in order to strengthen international cooperation with other bodies (article 38 of the Convention) and to make general recommendations<sup>15</sup>, aiming to concretize the content of the articles of the Convention (Committee Rules of Procedure - CRPD/C/4/2-2010). The Optional Protocol also contains the competence for receiving and analyzing communications submitted by persons or groups of persons claiming to be victims of violations of the Convention provisions by the respective State Party (article 1 of the Optional Protocol). The Rules of Procedure of the Committee are divided into three parts: 1 - general rules, 2 - functions of the Committee and 3 - interpretation and amendments. The first rules determine that the Committee shall hold meetings to ensure effective compliance with the Convention, guided by the principles of inclusion and

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<sup>15</sup> Article 47 of the Rules of Procedure of the Committee establishes *general remarks*. For example, the *general remark* on article 12 of the Convention, issued in 2014, provides guidelines on article 12, which deals with equal legal capacity. Among the explanations are the following: "(...) A person's mode of communication should not be an obstacle to obtaining support in decision-making, even when that communication is unconventional or understood by very few people. (...) Some persons with disabilities only seek to have their right to legal capacity recognized on equal terms with others under article 12, paragraph 2, and may not wish to exercise their right to receive support under the provisions of article 12, paragraph 3. (...) Support in decision-making should not be used as a justification to limit other fundamental rights of persons with disabilities, especially the right to vote, the right to marry (or establish a civil union) and found a family, reproduction rights, parental rights, the right to grant consent for intimate relationships and medical treatment and the right to freedom. (...) Progressive effectiveness (art. 4, paragraph 2) does not apply to legal capacity."



accessibility (articles 1.1 and 1.2) and shall hold that at least two regular sessions per year (article 2).

Regarding the work and functions of the Committee, the Rules of Procedure determines that the meetings shall be public, except in cases where the Committee understands the need for confidentiality (article 29). The Committee should try to reach decisions by consensus and if this does not happen, votes shall be taken (article 34), regarding the simple majority of the present members (article 35.2). The quorum required for formal decision-making is 12 present members of the total 18 members of the Committee (article 32). Finally, the Committee must submit reports of its activities every 2 years to the General Assembly and the Economic and Social Council (article 38). The second part of the Rules of Procedure lays down provisions on the functions of the Committee which, together with the Working Methods<sup>16</sup>, regulate the two types of participation of State Parties in the Committee, i.e., 1 - the submission of mandatory reports and 2 - the submission of individual or group communications in the event of an affront against persons with disabilities.

According to article 35, paragraph 1 of the Convention, State Parties are required to report to the Committee about the implementation of the Convention on the country within two years from ratification and every 4 years thereafter. The item I of the Working Methods determines the form in which such reports should be analyzed and the rules established in items 39 to 48 of the Methods (CRPD/C/5/4, from September 2<sup>nd</sup>, 2011) determine the functions of the Committee regarding the submission of the reports. The reports shall be analyzed in public Committee meetings, where the analyzed country must be notified by the Committee's secretariat (sub-item "A" of the Working methods). Countries shall attend meetings represented by delegations (sub-item "F") and the Committee should also elaborate a list of supplementary questions to be answered by the country under consideration (sub-item "B").

In the event of a significant delay in submitting the reports, the Committee shall notify the State Party on the need to examine the application of the Convention on the country if the report is not submitted 3 months after the notification (article 42.2 of the Rules of Procedure). After cooperative dialogue with the State Party, the Committee shall

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<sup>16</sup> Working Methods are rules that define Committee procedures and can be the object of periodic reviews. They are fixed by the Committee itself during its sessions.



set its final observations during a private meeting (sub-item “G” of Working Methods), which will be transmitted to the country and will be published on the Office of the High Commissioner for Human Rights (OHCHR). These observations will also be included in the report of the Committee to the General Assembly and to the Economic and Social Council (sub-item “H” of the Working Methods). After this phase, the State Party shall focus on the relevant topics identified by the Committee and submit the requested additional information (sub-item “I” of the Working Methods).

It is also important to point out that the Committee shall assist State Parties, when necessary, in increasing their national capacities for the implementation of the Convention (article 48 of the Regulation), according to articles 4 (paragraph 3), 33 (paragraph 3) and 37 of the Convention. The Committee also counts on the participation of specialized agencies and UN organs to submit additional information and recommendations on the performed work under article 38 of the Convention. There is also an invitation for national human rights (working methods sub-paragraph “D” and article 51 of the Rules) and civil society institutions, including NGOs (working methods sub-item “E” and article 52 of the Rules of Procedure), to participate in the process of preparing reports of State Parties.

The Committee also allows the submission of written reports by NGOs specialized in different types of disability containing relevant information regarding the issue under discussion. It also allows the participation of such organizations in public meetings to give oral presentations on the topic under consideration, as well as allows the organization of “side events” during the sessions to provide more information to Committee members (sub-item “I” of working methods). The Committee also shall make general comments with references to articles, observations on specific themes of the Convention (Item III of the Working Methods), in order to assist the implementation of the Convention and to encourage NGOs to act in countries (sub-item “A” of the working methods). These general comments shall be formulated according to the following steps: consultation of NGOs, specialized agencies and academia during a day of general or thematic discussion and elaboration of the general comment by a Committee member, based on previous consultations. In addition, a general discussion day open to the public shall be held (sub-item “B” of the Working Methods).

Articles 55 to 91 of the Rules of Procedure deal with the procedure of communications received by the Committee under the Optional Protocol, a matter also



dealt with by the Working Methods item IV. First, communications may be submitted by individuals or groups of individuals (article 69) and must be transmitted to the Committee by the Secretary-General, who may also request additional information (articles 55 to 58 of the Rules). A Special Rapporteur shall also be appointed as responsible for communications (sub-item “A”). Communications review meetings should always be closed (article 59), for which the Committee may establish one or more working groups, as well as a Special Rapporteur (article 63.1). It is also noteworthy that the procedure of reviewing communications and related documents should be kept confidential, as a rule (articles 76.1 and 76.2).

At any time after receiving the communication, the Committee may transmit a request for the adoption of interim measures to prevent irreparable harm to the victims to the concerned State Party (article 64 of the Regulation). Once the communication has been registered and provided with the consent of the individual or group of individuals (article 70.1), the State Party shall submit to the Committee, within 6 months, a written answer on the merits and admissibility of the communication and information on the measures taken until the moment (article 70.3 of the Rules of Procedure).

After the State Party’s response and having the communication been considered admissible, the Committee shall evaluate the information contained in the communication (article 73.1 of the Rules of Procedure) by a simple majority of its members and transmit its recommendations to the State Party through the Secretary-General (article 73.5 of the Rules of Procedure). Six months after the transmission of the views of the Committee on the communication, the State Party shall submit information on the measures taken regarding the received recommendations (article 75.1). The Committee may also designate a Special Rapporteur or working group to define measures to be taken by the country for the fulfillment of the recommendations (article 75.5). In addition, the Committee may also designate one or more members to conduct an inquiry regarding information submitted by a State Party, confidentially, considering the Convention, the Optional Protocol and the Rules of Procedure (article 84). The inquiry may also include a visit to the concerned State Party (article 86.1 of the Rules of Procedure) and may determine the organization of a hearing in the country.

Finally, the third part of the Rules of Procedure deals with the Committee's interpretation and amendments of the own Rules (articles 92 to 95 of the Rules). For the interpretation of the Rules of Procedure, the Committee may resort to other treaties with



similar rules (article 93) and may suspend any of the rules, provided that such decision does not conflict with the Convention or the Optional Protocol (article 94). The rules of procedure may also be amended by a decision of two-thirds of the Committee members present at the vote within 24 hours of the circulation of the proposed amendment since it does not contradict the Convention or the Optional Protocol (article 95).

### **The binding of the National Jurisdiction to the Convention and the Committee**

The binding of domestic jurisdiction to international treaties and conventions is a matter already settled in Brazilian law, as there is no doubt about the binding of international norms formally incorporated into the national legal order. After intense academic and jurisprudential debates on the subject, the Constitutional Amendment 45/2004, inserted the paragraph 3 in the article 5 of the Federal Constitution, granting the status of constitutional amendment to international human rights treaties and conventions that are approved in each House of the National Congress, in two rounds, by three-fifths of the votes of the respective members. In addition, the Federal Supreme Court (Extraordinary Appeal 466343/2008), consolidated the understanding that human rights treaties and conventions not approved by the quorum of paragraph 3 of article 5 (i.e., treaties incorporated before the implementation of the Constitutional Amendment 45 in 2004) would have a status below the Constitution and above ordinary and complementary laws, which was denominated as “supralegal” status<sup>17</sup>.

Even though it is possible to glimpse with reasonable confidence the rules of binding domestic jurisdiction to the formally incorporated norms of international law, the same cannot be said about binding the determinations and interpretations emanating from international human rights bodies. This is even more complex regarding the UN Committee on the Rights of Persons with Disabilities, since its competence was recognized by a treaty incorporated with the status of a constitutional amendment in Brazil. There are still no Brazilian cases involving the rights of persons with disabilities

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<sup>17</sup> The term “supralegal status” is directly used by the Supreme Court, in the referred decision, in an effort to establish the idea of legal norms that have a hierarchical value above ordinary laws, but still hierarchically below the Constitutional Laws.



judged admissible in the Committee<sup>18</sup>, however, it is necessary to discuss which would be the normative strength of the Committee's decisions and general orientations, since this would face interpretations of normative texts that have national value, following the example of the article 12 of the Convention. Thus, the issue in question is which interpretation should prevail in the event of occurring divergences between an interpretation of the Federal Supreme Court regarding article 12 of the Convention and the General Comment issued by the Committee in 2014 on the same article, considering that the Committee also has a constitutional status.

In this example, considering that there is no concrete case in the Brazilian courts on the subject, the present study seeks to make an analysis of this problem according to Hans Kelsen's theory, which still guides the structure of Brazilian law, also to provide theoretical elements within this research from concrete data. Discussing the interpretation of a legal norm, Kelsen (1934) considers that an authentic interpretation is an act of choice (within the frame of the norm) performed by an authority with legal competence to do so, such as a judge or a public administrator. Thus, an organ capable of performing an authentic interpretation holds certain preconditions of validity that legitimize it in creating law:

The interpretation by the law-applying organ is always authentic. It creates law. To be sure, we speak of "authentic interpretation" only if this interpretation assumes the form of a statute or an international treaty and has general character, that is, if it creates law not only for a concrete case but for all similar cases – in other words, if the act described as authentic has the character of the creation of a general norm. However, the interpretation by a law-applying organ is authentic (law-creating) also if it creates law only for a concrete case, that is, if the organ creates only an individual norm or executes a sanction. Here it is to be noted: By way of authentic interpretation (that is, interpretation of the norm by the law-applying organ) not only one of the possibilities may be realized that have been shown by the cognitive interpretation of the norm to be applied; but also a norm may be created which lies entirely outside the frame of the norm to be applied. (KELSEN, 1934, p. 250)

Thus, from Kelsen's considerations that the authentic interpretation can be performed by any judge or body of public administration, it is possible to state that the

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<sup>18</sup> The only case of a communication sent to the Committee against Brazil was not admitted for consideration (Decision of the Committee on the Rights of Persons with Disabilities Under article 5 Of The Optional Protocol To The Convention On The Rights Of Persons With Disabilities (12th Session). Ms. S.C. UN Doc. Crpd/c/12/d/10).



Committee on the Rights of Persons with Disabilities is an authentic interpreter (even in the condition of an administrative body). In addition, Kelsen allows for an “out of frame” interpretation, which would be possible if it was done by the Constitutional Court or even in the hypothesis of a single judge performing a decision out of the frame and this decision gained the force of a final judgment. Two questions arise from these findings: 1) in case of conflict between decisions of the Supreme Court and the Committee, which one should prevail? 2) Could the Committee make an “out of frame” interpretation? The second question is less complex, since the Committee did not assume, in Brazil, the character of a Constitutional Court (although its competence has been recognized by constitutional statute). Therefore, it could not interpret the Convention "out of frame." Nonetheless, and precisely for this reason, the issue relative to the conflict between an interpretation of the Supreme Court and the Committee requires a complex, two-steps answer.

In an initial analysis, it would be possible to conclude that, for Kelsen and the Brazilian constitutional order, it is up to the Federal Supreme Court (STF)<sup>19</sup> to guard the Constitution and, therefore, the final decision about the Constitution must be from the Supreme Court. Considering that the UN Convention has the power of a constitutional amendment, it would be possible to state that the final decision would belong to the Supreme Court. It turns out that this reflection is false or at least incomplete. The problem arises considering that, within Kelsen's theory, the fact that the Supreme Court has the constitutional role to protect the Constitution does not prevent the Constitution itself from assigning the role of interpreting a certain set of constitutional norms to another body, as seems to have happened with the incorporation of the referred Convention and Committee. Thus, when the derived constituent power amended the Constitution and later assigned the UN Committee on the Rights of Persons with Disabilities with the power to interpret the CPRD and receive individual communications, the constituent itself restricted the scope of the Federal Supreme Court.

As an academic effort to maintain the coherence of the analysis based on Kelsen's theory, the only way out of this complex issue would be to argue that the decisions of the Committee prevail over those of the Federal Supreme Court, since this was the decision

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<sup>19</sup> The Federal Supreme Court (Supremo Tribunal Federal) is the highest body in the Brazilian judiciary power. Its main function is the Federal Constitution by judging cases involving possible divergences from the constitutional norms, according to the definitions of article 102 of the Constitution.



of the constituent legislator. A revision of this interpretation would only be possible if the Supreme Court analyzed the constitutionality of the articles of the Convention and the Protocol conferring their interpretative competence of the norms that were incorporated with constitutional amendment status in Brazil. Therefore, the only option remaining for the Federal Supreme Court would be to declare the unconstitutionality of the Committee's competence to determine the direction of the implementation of the Convention in Brazil (this would might be justified on a violation against the separation of powers). The main problem of this option is that this declaration of unconstitutionality would withdraw permanently the Committee's competence for all cases because it would regard directly the very own competence of the Committee to interpret the norms of the Convention with the status of a constitutional amendment. Thus, the deliberation of the derived constituent power (established in Article 49 of the Constitution) would have become useless.

In addition, the Federal Supreme Court could even choose to abolish the competence attributed to the Committee by the constituent, but this would assume a position of disengagement with global pacts. Kelsen defended the monist proposal of the primacy of International Law, but although these reflections were based on what was proposed in the *Pure Theory of Law*, it is unnecessary to resort to monism to justify the hypothetical non-compliance of the decisions of the Committee. Therefore, it is possible to state that it would be impossible for the Federal Supreme Court to declare the unconstitutionality of an interpretation made by the Committee on the Rights of Persons with Disabilities, considering the general duty of cooperation<sup>20</sup> and the benefits of the commitment to the global human rights agendas.

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<sup>20</sup> A recent example of the importance of international cooperation with international mechanisms of human rights is the latest report presented by the UN Special Rapporteur on the elimination of discrimination against persons affected by leprosy and their family members about Brazil, which used the definitions of the social model of disability in order to refer to severe damages suffered by victims of violations (<https://undocs.org/A/HRC/44/46/Add.2>). For more information on this subject, verify: VAN BRAKEL, et al. Disability in people affected by leprosy: the role of impairment, activity, social participation, stigma and discrimination. *Global Health Action*, [S.l.], v. 5, n. 1, p. 18394-18404, 19 jul. 2012. Informa UK Limited. <http://dx.doi.org/10.3402/gha.v5i0.18394>.



## Results of the jurisprudential research on the TRFs

The jurisprudential research was conducted focusing on the summaries of the TRF judgments, using the Committee and the Convention on Persons with Disabilities as research parameters. Initially, it is important to point that no decision was found referring to the Committee on the Rights of Persons with Disabilities, evidencing an omission of the judiciary considering what this international body produces on the specific convention. In contrast, 778<sup>21</sup> judgments were found using the Convention as a search parameter, citing the international treaty in decisions involving the rights of persons with disabilities. When analyzing the different Courts, significant differences were found regarding the number of judgments, the types of issues discussed and the ways that the decisions are justified in light of the Convention. It is also worth to point out that the decisions analyzed represent how each TRF views the CRPD in judging cases involving the rights of this group of persons. Therefore, the judgments are a direct reflection of the influence (or lack of) of the Convention on the Brazilian Federal Justice, specifically in the second instance. Thus, we present the main considerations on the decisions of each TRF to demonstrate how the human rights of persons with disabilities have been discussed by the judiciary of the different regions of the country.

### TRF1

The TRF of the 1st Region has under its jurisdiction the Federal District and the states of Acre, Amapá, Amazonas, Bahia, Goiás, Maranhão, Mato Grosso, Minas Gerais, Pará, Piauí, Rondônia, Roraima, and Tocantins. In this jurisprudential research, 65 judgments were found discussing the rights of persons with disabilities with direct reference to the UN Convention. The most recent decision occurred on 09/10/2019 (Case 0003962-60.2015.4.01.4100) and the oldest judgment was delivered on 19/03/2015 (Case 0020059-67.2015.4.01.9199). Among the most common issues discussed in the decisions are: request for reducing working hours for public servants who have children

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<sup>21</sup> It is worth mentioning that this number represents the situation until the submission of this article, in December 2019, considering that the databases are updated frequently.



with disabilities (25 judgments); the concession of Continuous Cash Benefit (BPC)<sup>22</sup> for persons with disabilities (23 judgments); participation of persons with disabilities in public tenders (6 judgments); concession of free pass for disabled persons on interstate public transport (5 judgments). In addition, we found discussions on other less common issues, such as applications for enrollment for people with disabilities in public universities and a request to ensure accessibility of building structures for people with disabilities in houses delivered by the program “Minha casa minha vida” (My House my life), which is a state program to improve housing for people with low income.

It is possible to notice that the TRF1 presents a significant amount of judgments on the rights of persons with disabilities regarding the CRPD and also presents different types of issues discussed. The decisions generally indicate whether the disability is evident and which is the type of disability alleged by the author of the lawsuit. The citations to the Convention often contain direct and clear references to the concept of the social model of disability, particularly in cases involving the concession of the BPC.

As an example of the use of this concept to characterize disability, it is worth to cite the case 0043732-21.2017.4.01.9199, published on 6/1/2018, which deals with the granting of BPC. In this case, the lawsuit was dismissed in the first instance, because the petitioner of the lawsuit has only partial incapacity for work, thus the partial disability would not be characterized by the requirement of social security law. However, the TRF reformed the decision, stating that the partial disability does not prevent the characterization of the benefit, demonstrating an understanding according to the social model. The decision also states that the Convention brought a new conception of disability to the Brazilian law, against the outdated concept of the Organic Law of Social Assistance. Such references demonstrate the progress brought by the international treaty regarding the definition of disability referenced in the social model, according to the human rights principles and seeking the appropriate inclusion of people with disabilities in society.

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<sup>22</sup> This benefit is known in Brazil as Benefício de Prestação Continuada (BPC) and is a social security benefit for persons with disabilities that are unable to work and support themselves financially. The requirements for the concessions of this benefit are determined in the law 8.742/1993 (Social Security Law). The request is processed by the National Social Security Institute, but in the case of denial, the applicant can file a lawsuit in the Federal Justice, in order to have the benefit granted judicially.



## TRF2

The TRF of the 2nd Region, which has jurisdiction over the states of Rio de Janeiro and Espírito Santo, has 13 different judgments on the rights of persons with disabilities that cite the Convention. The most recent judgment was delivered on 18/03/2019 (Case 0007102-51.2018.4.02.0000) and the oldest on 16/05/2013 (Case 0000343-90.2001.4.02.5101). The subjects of the judgments are: concession of Continuous Cash Benefit (BPC) (3 judgments); requests for adaptation of public buildings to ensure accessibility for persons with disabilities (3 judgments); participation of persons with disabilities in public tender (3 judgments); a request for reducing working hours for public servants who have children with disabilities (1 judgment); a concession of free pass for persons with disabilities on interstate public transport (1 judgment); claim for reparation for moral damages for alleged psychiatric illness suffered by military man after being expelled from the army (1 judgment).

An example of the use of the Convention in this Court is the case 0005980-06.2016.4.02.5001, from 09/09/2018, in which a public company was demanded to present and execute a project for the adaptation of the company warehouses in order to grant the full accessibility of persons with disabilities. The decision was justified on the determinations of the Brazilian Inclusion Law (Lei nº 13.146/2015) that all public buildings shall ensure the accessibility of persons of disabilities to all of its facilities and services. The summary of the decision also clarifies that the referred law was directly based on the Convention on the Rights of Persons of Disabilities and its protective provisions.

There are only a small number of judgments that refer to the CRPD within approximately 5 years, since the first decision. However, the judgments have a sufficient legal basis to demonstrate the use of the concept of the social model of disability in all the various subjects dealt with, with direct reference to the Convention under consideration.

## TRF3

In the TRF of the 3<sup>rd</sup> Region, which has jurisdiction over the states of São Paulo and Mato Grosso do Sul, we found 687 different judgments citing the Convention on the Rights of Persons with Disabilities (Table 3). The most recent judgment was held on



10/09/2019 (case 0003835-83.2019.4.03.9999) and the oldest judgment was held on 09/09/2013 (case 0041258-97.2007.4.03.9999). Unlike other Courts, the TRF3 has a large dominance of only one issue, which is the concession of the Continuous Cash Benefit (BPC), representing 670 cases. Among the few different subjects, we found 7 judgments discussing the concession of a 25% increase in age retirement benefit for disabled elderly people who need the help of others for all acts of everyday life.

In addition, there are some noteworthy cases that differ from this pattern, such as: a public civil action<sup>23</sup> (0008081-04.2013.4.03.6000) requesting to increase the time for persons with disabilities to take the admission exam for the Brazilian Bar; a public civil action (0008640-83.2012.4.03.6100) against the National Telecommunications Agency (ANATEL) in order to determine the regulation of the sale of mobile phones in order to guarantee the accessibility to persons with disabilities; an action (0007951-96.2013.4.03.6102) in which the disabled person requested the exemption from the Tax on Industrialized Products (IPI) for importing an accessible car that is not available in Brazil.

Thus, the TRF3 has a much higher number of cases than the other TRFs studied. Quotations to the Convention demonstrate the definition of disability according to the social model, but also succinctly. The summaries of the great majority of the cases (actions involving the concession of BPC) are presented extremely succinctly, without further details about the specific case and the deficiency of the authors. The summaries of these decisions are limited to say whether the disability is present and whether the author of the action is economic insufficient, which are the requirements for the concession of the BPC, according to the Brazilian Legislation. The definitions presented in social security cases are well suited to the model provided for by the human rights treaty studied. In the three different cases mentioned above, interesting results were found demonstrating the understanding of this TRF.

The case that presented a request for the extension of the time in the Brazilian Bar exam was denied by the TRF, since there is already an additional of 1 hour in these cases. The public civil action requesting the regulation of mobile phones to grant the accessibility of visually impaired people was also denied, which was denied due to the

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<sup>23</sup> The public civil action is a specific type of lawsuit used in cases that involve relevant public interest to protect the social and public patrimony, as established by the article 129, III of the Federal Constitution.



understanding of the Court that this would determination would not be economically reasonable. However, the request for the exemption from the Tax on Industrialized Products for the importation of a car that met the needs of the author of the action accepted by the Court in terms with the social model of disability, demonstrating a considerable evolution of the Brazilian Judiciary regarding the rights of persons with disabilities.

#### TRF4

In the TRF of the 4<sup>th</sup> Region, which includes the states of Paraná, Santa Catarina, and Rio Grande do Sul (south region of Brazil), only 4 judgments were found referring to the Convention on the Rights of Persons with Disabilities, the most recent of which was 30/05/2017 (5030030-42.2014.4.04.7000) and the oldest of 18/08/2009 (2006.72.00.000736-2), which is actually the first judgment referring to the Convention. The subjects of the cases found are: request to determine the inclusion of a video system for hearing impaired candidates in the National High School Exam (ENEM); concession of BPC; claim for compensation for moral damages by visually impaired person who did not have the necessary assistance for overcoming existing barriers in a public tender; claim for compensation for moral damages by a person with physical disability who was prevented from entering a bank branch due to the locking of a revolving door.

The TRF4 has a very small number of decisions found compared to the other Courts. The summaries cite the Convention succinctly to support their decisions, under the social model. Despite the small number of decisions found, it is worth mentioning case 2006.72.00.000736-2, the oldest judgment found among all TRFs and the first collegiate decision among the Federal Courts that referred to the Convention on the Rights of Persons with Disabilities.

Another example of the application of the social model of disability is the case 5030030-42.2014.4.04.7000, from 30/05/2017, which maintained the decision of the lower court to demand the State to adopt the video-system in the ENEM (High School National Exam), to ensure the access of deaf candidates to the exam, entirely in the Brazilian Sign Language.



## TRF5

Finally, the TRF of the 5th Region, integrating the states Alagoas, Ceará, Paraíba, Pernambuco, Rio Grande do Norte, and Sergipe (northeast region of Brazil), presents 9 judgments concerning the Convention. The most recent judgment occurred in 19/10/2017 (0002541-10.2017.4.05.9999) and the oldest in 12/07/2012 (0000694-81.2012.4.05.8500). The main issues discussed by the decisions are: concession of BPC (5 judgments); request for provision of guide dog for visually impaired person; exemption from taxes for the purchase of accessible cars; competence of the Federal Court to decide on the Convention in question; guarantee of participation of disabled people in public tender. Similarly to the TRF2 and TRF4, the TRF5 has a small number of decisions over a long time.

Generally, the summaries present justifications that cite the Convention with a low level of detail, but also refer to the social model and the CRPD appropriately and directly. However, there is an important decision found in this TRF (0000694-81.2012.4.05.8500), from 12/07/2012, which was already mentioned in this paper. This particular lawsuit was first dismissed in the first instance of the Federal Justice under the argument that the case was not in the competence of the Federal Justice, considering the low financial value of the lawsuit. The decision of the Federal Region Court, however, reformed the sentence and admitted the continuation of the lawsuit, justifying that cases involving possible infringements to the Convention on the Rights of Persons of Disabilities should be prosecuted under the Federal Justice. This decision demonstrates that the CRPD also plays an important role of ensuring that cases involving possibly discriminatory actions taken by the Brazilian State against persons with disabilities shall be prosecuted under the jurisdiction of the Federal Courts.

## Conclusion

The present work presents as main data source the jurisprudential research of the Brazilian Federal Justice, together with the analysis of international documents for the protection of the rights of people with disabilities. This study allowed us to verify that the Brazilian legal system incorporated the protective measures of the Convention on the



Rights of Persons with Disabilities, since it not only incorporated the CRDP with constitutional amendment status, but also disseminated its orientations within the legal framework of the Brazilian Inclusion Law, especially regarding the social model of disability. However, the Judiciary has not yet fully aligned itself structurally and systematically with the guidelines of the Convention and the Committee on the Rights of Persons with Disabilities.

This situation was verified by the lack of references to the Committee in the decisions of all the analyzed TRFs, as well as by the limited discussions involving the Convention, without actually developing the discussion of the social model of disability in in great part of the decisions that cited the CRDP. Many decisions usually cite the CRPD only referring to Brazil's commitment to the treaty, without taking into account international cooperation on human rights and global governance on the rights of people with disabilities. In addition, although the Convention was effectively incorporated in 2009, only the TRF of the 4th Region cited the Convention in 2009, while the TRF of the 5th Region started to refer to it only in 2012, the 3rd and 2nd in 2013, and that of the 1st Region only in 2015.

On the other hand, the progress represented by the fact that the Convention is referred by the analyzed decisions is undeniable, particularly in the decisions that were made considering the social model of disability, such as those that ensured access to social benefits. The main example are the cases involving the BPC, which require proof of disability and economic insufficiency as requirements for the concession, since decisions usually use the social model to broaden the understanding of disability, mainly in TRF3, where this reference is significantly more frequent.

The analysis of the Committee's competence is relevant not only due to the fact that its competence was sovereignly recognized by Brazil, but also due to the fact that it is an organ responsible for international action on the rights of people with disabilities. In this sense, even though we have not found references to the Committee in the analyzed decisions, understanding its functioning and its role is a way to increase the degree of compliance expected from the international cooperation commitment assumed by Brazil with this body. Thus, the present study on the Committee serves as a basis for future research on the question of the scope and normative force of international human rights treaties and also of the guidelines of international human rights bodies and courts,



especially the CRPD, which was the first international human rights treaty to be incorporated into the Brazilian legal system with constitutional amendment status.

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