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PORTUGAL

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(Initial State Party report (CRPD/C/PRT/1), 8 August 2012)

DisabCouncil's Independent **Review**

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PORTUGAL

Initial State party report (CRPD/C/PRT/1) submitted
8 August 2012

STATUS OF PERSONS WITH DISABILITIES IN PORTUGAL IN LIGHT OF THE CONVENTION

I. Summary Review of most critical issues

Article 12 (Legal capacity)

Restrictive concept of legal capacity

The full legal capacity of persons with certain forms of disabilities is still denied.

The State party is encouraged to harmonize its national legislation with the provisions of the Convention.

Article 14 (Deinstitutionalization)

Prevalence of the practice of institutionalization of persons with disabilities

The practice of institutionalization of persons with disabilities because of their disability, in the State party, is widely expanded.

The State party is encouraged to adopt a concrete timeframe for the deinstitutionalization of persons with disabilities.

Article 17 – (Protecting the Integrity of the Person)

The report notes forced medical treatment, forced organ and tissue donation and forced sterilization of persons with disabilities is still practiced in the State party (paras. 132, 114).

The State party is encouraged to ensure in practice the prohibition against violation of the integrity of the person in full compliance with provisions of articles 12, 15 and 17 of the Convention.

Article 23 (home and family)

Persons with mental forms of disabilities are denied the right to marry

Persons with certain mental forms of disability are denied their right to marry and establish a family (paras. 185, 188)

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The State party is encouraged to revise its national legislation to conform it to articles 12 and 23 of the Convention.

Article 29 - Participation in political and public life

The report notes that persons with intellectual disabilities do not enjoy electoral capacity in the State party (para. 249).

The State party is encouraged to ensure full participation of persons with disability in political and public life including the right to vote and to be elected in full compliance with articles 12, and 29 of the Convention.

II. General issues to consider when preparing reports to the Committee

In its Reporting Guidelines, the CRPD Committee requests State parties preparing their reports to meet a number of objectives including:

1. States parties should use the opportunity of the report drafting process to conduct a comprehensive review of the measures undertaken to harmonize national law and policy with the Convention

The report enumerates a number of measures that the State party has undertaken after the entry into force of the Convention for the State party (for example the National Strategy on Disability 2011-2013 adopted in December 2010 (para. 15), but most of them have been adopted before the entry into force of the Convention for the State party (for example the main Law 38/2004 on the “Legal system for prevention, habilitation, rehabilitation, and participation of the disabled person” adopted in August 2004 (para. 13) and the “Action Plan for the Integration of Disabled and Incapacitated Persons 2006-2009” (para. 17), and thus do not fully conform to the Convention. Therefore crucial provisions under article 12 (legal capacity), article 14 (deinstitutionalization of persons with disabilities) article 15 (prohibition of torture and other inhuman or degrading acts), article 23 (respect for home and family (limitation of marriage rights and parental rights of persons with certain forms of disabilities (paras. 185, 188)), article 24 (inclusive education (paras. 197, 200)), article 29 (participation in political and public life) among others remain to be harmonized in the national legislation.

The State party is encouraged to:

- (1) harmonize its national legislation with the Convention;*
- (2) proceed with efforts to adopt specific plans of action for each Convention right by confronting existing legislation, policies and plans with the requirements of the Convention; and*
- (3) develop a strategy for implementation with clear benchmarks, timelines and appropriate funding.*

The State is strongly encouraged to follow up on the recommendations of the Committee.

2. The report should indicate whether the State Party has adopted a comprehensive disability anti-discrimination legislation in accordance with the Convention

The State party does not have yet in place a comprehensive anti-discrimination legislation in line with the Convention (para.13).

The State party is encouraged to adopt a comprehensive anti-discrimination law framework and an action program and plan to implement each Convention right.

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3. The report should indicate any mechanisms in place to monitor progress toward the full realization of the Convention rights, including recognition of indicators and related national benchmarks in relation to each of the Convention rights.

The report contains little information about State’s mechanisms (such as indicators and national benchmarks) used to measure and monitor the progress in the realization of the Convention rights. The report mentions that a National Disability strategy was adopted in December 2010 for the period 2011-2013, and which is developed around the following axes: disability and multiple discrimination, justice and exercise of rights, autonomy and quality of life, accessibility and universal design, administrative modernization and information system. However even around these axes which do not in anyway

comprise all the areas covered by the Convention, the report provides little information about mechanisms such as indicators and related benchmarks put in place to monitor progress in the realization of each of the Convention rights.

The State party is encouraged to establish such mechanisms of measuring progress such as indicators and benchmarks. In addition to this the axes in the national strategy which should be transformed into a long term strategy for 10, 15 years should be matched to the specific rights contained in the Convention so that all rights in the Convention can be fully covered. This enables the State party itself to have a better picture of its real achievements in implementing its own agenda for the promotion of the rights of persons with disabilities consistent with its obligations under the Convention.

The State party is encouraged to follow up on the recommendations of the Committee.

4. In the report, any reservation to or declaration relating to any article of the Convention by the State party should be explained and its continued existence clarified

Portugal ratified the Convention and the Protocol on 23 September 2009. The Convention and the Protocol entered into force for the State party on 23 October 2009.

The State party has made no reservations to the Convention.

III. Analysis of the report (article by article)

Articles 1 to 4 of the Convention

Under these Articles, the Committee has recommended that the State party provide information clarifying, *inter alia*, the following issues:

The definition of “disability” and “reasonable accommodation”

The report provides a definition of disability which is close to the one provided under the Convention (para 7). *However the widespread practice of restriction of the rights of persons with intellectual and mental forms of disabilities shows that the State party still adheres to a medical model definition of disability.*

The report is silent about how the State party defines “reasonable accommodation” in its national legislation (para. 7).

The State party is encouraged to incorporate in its national legislation the full definition of “person with disabilities” and of “reasonable accommodation” in line with the Convention.

Article 5 Equality and non-discrimination

Under this article, the Committee encouraged the State party to provide information, *inter alia*, pertaining to:

- a) The real possibility of using existing laws to protect rights;
- b) measures to guarantee equal and effective protection, including reasonable accommodation; and
- c) policies, programs and affirmative action to ensure a de facto equality of persons with disabilities with other members of society

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The report states that the existing legislation of the State party effectively protects persons with disabilities from discrimination. This legislation includes the Constitution (which prohibits discrimination based on disability and on aggravated health risk), the Law 46/2006 (concerning direct and indirect discrimination) and the Law 38/2004 (on the Legal System for Prevention, Habilitation, Rehabilitation and Participation of of the Disabled Persons (paras. 13, 19-22)

In terms of real possibility of using existing laws to protect rights, the report states that the enforcement of Law 46/2006 requires citizens “to prevent and mend actions that can result in breach of fundamental rights or in denial or infringement of the exercise of any of the economic, social and other rights by persons with disabilities”. It also states that sanctions can be applied to those who fail to respect the prohibition and that the National Institute for Rehabilitation is entitled to receive complaints that it forwards to concerned authorities (paras.20-22).

The report provides little information about who are these “concerned authorities” and any examples of specific successful cases decided by these “concerned authorities”.

The report does not provide information about new legislation in force to enforce the specific rights provides under the Convention, adopted after the entry into force of the Convention for the State party in 2009, in particular if the right to vote or the right to inclusive education is denied to a person with disabilities from which “concerned authority” the person is entitled to seek redress of his/her violated right.

The report also fails to elaborate on the type of sanctions that “can be applied” to those who engage in discriminatory acts against persons with disabilities and on how often have they been applied in the past.

In terms of specific policies, programs and affirmative action in place in the State party to enhance the status of persons with disabilities in Portugal, the report notes the National Disability Strategy adopted in 2010 for the period 2011-2013 centered in the following axes: disability and multiple discrimination, justice and exercise of rights, autonomy and quality of life, accessibility and universal design, administrative modernization and information system.

The State party is encouraged to share with the Committee the results of the implementation of these strategies in the year 2011-2013. The State Party is also encouraged to develop new strategies for implementation in the next 10, 15 years with specific indicators and benchmarks for measuring progress in the implementation of each Convention right.

The existing disability anti-discrimination legislative framework appears largely insufficient to meet the requirements of the Convention (in particular rights such as full legal capacity of persons with disabilities, and participation in political and public are not yet fully covered by the existing legislative framework).

The State party is encouraged to adopt a comprehensive anti-discrimination law framework, an action program and plan to implement each Convention right. The State party is encouraged to adopt legislation giving direct access to Courts for persons with disabilities who claim the violation of their fundamental rights enshrined in the Convention without the need of going through the National Institute of Rehabilitation.

The State party should be encouraged to adopt other practical affirmative measures to combat discrimination against persons with disabilities (such as fiscal and economic incentives, and an effective system of sanctions).

The State party is encouraged to put in place a dedicated mechanism to deal with specific complaints regarding discrimination on the basis of disability in all areas of societal life. An Ombudsman for disability rights could be suggested.

Article 10 – Right to Life

Under this article the Committee has recommended that the State party provide information, *inter alia*, pertaining to:

Right to life of persons with disabilities; Prohibition of arbitrary deprivation of life

The report notes that the Constitution of Portugal protects the right to life of everyone (para. 64).

The report says nothing about the right of guardians to decide about termination of medical treatment for persons with disabilities.

The State party is encouraged to update the Committee on whether or not the right of guardians to decide about termination of medical treatment is established in the State party.

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Article 12 - Equal recognition before the law

Under this article the Committee has recommended that the State party provide information, *inter alia*, pertaining to:

Legislation does or does not exist which restricts the full legal capacity on the basis of disability and measures being taken towards conformity with article 12; support for persons with disabilities to exercise their legal capacity and manage their financial affairs; existence of safeguards against abuse of supported decision-making models

The report contains little information about the implementation of article 12 in practice and in the national legal system of the State party. For example the report is silent about the existence of a guardianship system in the State party and the restrictions imposed on the persons with certain forms of disabilities (intellectual, mental) in their legal capacity to act.

Elsewhere the report notes that the defense of insanity is practiced in the penal doctrine of the state party (para.97), and a person may be placed in institutions on account of their only disability on order of a competent judicial authority (para.93). Person with certain forms of disability are also denied the right to vote including “when they are clearly acknowledged demented, even if they are not barred by a sentence” (para.249).

There is no information in the report about any measures envisaged in the State party to review the legislation and practice in order to replace the substitute decision-making system prevalent in the State party by a supported decision-making system in accordance with the Convention which requires inter alia States parties to change or abolish contrary legislation and practice (article 4, CRPD Convention).

The Convention in article 12(2) requests States to recognise that persons with disabilities “enjoy legal capacity on equal basis with other in all aspects of life”, and to take appropriate measures to provide access to persons with disabilities to “the support they may require in exercising their legal capacity”. In article 12 (4) States parties are urged to ensure that measures to support persons with disabilities in the exercise of their legal capacity are protected with safeguards that “respect the rights, will and preferences” of the person requiring support and are subject to regular review by independent and impartial authority or judicial body.

The Convention, therefore, requires granting to all persons with disabilities the enjoyment of their full right to legal capacity, and thus to abolish the guardianship system. In exceptional circumstances and as a measure of last resort, a State party should provide access to persons with disabilities to the support they require to exercise their legal capacity.

There is no question of completely substituting the legal capacity of persons with disabilities with that of a guardian, as any such arrangements should “respect the rights, will and preferences” of the persons with disabilities. However, under the existing guardianship schemes of the State party, the will and preferences of the persons with disabilities are neither asked nor ensured. Accordingly the guardianship system should be gradually abolished and replaced by supported decision-making schemes in line with the Convention.

The State party should be encouraged to gradually replace in law and in practice its substitute decision-making mechanisms with supported decision-making schemes that “respect the rights, will and preferences” of persons with disabilities. Any such measures of supported decision-making should be subject to regular review. The lack of legal capacity to act has implications for the realization of practically all other rights of persons with disabilities under the Convention in particular to right to marry and establish a family, the right to vote, the right not to donate organs without free and informed consent (practices still accepted in the State party).

Article 14 - Liberty and Security of the Person

Under this article the Committee has recommended that the State party provide information, *inter alia*, pertaining to:

Measures to ensure that persons with disabilities are not deprived of liberty on the basis of disability; prohibition of institutionalization of persons with disabilities

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The report confirms that persons with disabilities (those persons “suffering from a psychic anomaly”) in the State party may be deprived of liberty on account of their disability alone (para. 93).

The State party justifies its incarceration measures for persons with disabilities saying that such measures are geared towards “the patients’ rehabilitation and his or her family and social reintegration” (paras. 102, 106).

There is therefore no prohibition in law or in practice against the institutionalization of persons with disabilities.

The State party is encouraged to take phased steps towards the gradual replacement of substitute decision-making models with models that support persons with disabilities in their decision-making. The State party should accordingly take steps for the prohibition in law and in practice of the institutionalization of persons with disabilities in full compliance with provisions of articles 12 and 14 of the Convention.

Article 15 - Freedom from torture or cruel, inhuman or degrading treatment or punishment

Under this article the Committee has recommended that the State party provide information, *inter alia*, pertaining to:

Prevention from medical or scientific experimentation without their free and informed consent; persons with disabilities should be made part of national strategies and mechanisms to prevent torture

The report states that the Constitution of Portugal states that “no one shall be submitted to torture or to cruel inhuman or degrading treatment” (para. 108). This provision is reinforced in a number of other acts such as the Penal Code and the Code of Criminal Procedures (paras. 109, 110).

However the State party notes that in 2010 came into force the new Code of execution of punishments and measures involving the deprivation of liberty (paras. 111, 112). This law also provides that the forced institutionalization of persons with disabilities is allowed on the basis of a judicial decision (para 113).

The report notes scientific and medical experiments as such are not allowed without the informed consent, *however compulsory ‘medical treatment’ is allowed in case of the so called “danger to life” of the person with disabilities (paras. 114, 130, 131).*

The State party is encouraged to provide statistical data regarding practices of compulsory medical treatment and experimentation in hospitals, and the strategy and policies adopted to prevent such practise which contrary to articles 15, 16 and 17 of the Convention.

The State party is further encouraged to adopt specific legislation, which takes into consideration these more subtle forms of torture and ill treatment justified by the supposed need to cure a form of disability against the will of persons with disabilities (para.114)

Article 17 - Protecting the integrity of the person

Under this article the Committee has recommended that the State party provide information, *inter alia*, pertaining to:

Protection of persons with disabilities from medical (or other) treatment given without the free and informed consent; protection of persons with disabilities from forced sterilization, and girls and women from forced abortions; independent review organizations (role and composition) and programmes of work

The report notes that compulsory medical treatment of persons with certain forms of disabilities is permitted with a judicial authorization “when the health status of the person does not allow the evaluation of the sense and the scope of the refusal” (paras. 113, 114)

The report also notes that forced sterilization and donation of organs by persons with certain forms of disability is also allowed with judicial authorization without the informed consent of the person with disabilities (para. 132).

It is clear that the denial of legal capacity of persons with disabilities has implications for the enjoyment of all others rights of persons with disabilities including the protection of their personal integrity.

The State party is strongly encouraged to adopt specific legislation prohibiting medical treatment without free and informed consent and prohibiting forced organ and tissue donation and forced sterilization and forced abortion on the basis of disability.

The State party is also encouraged to establish independent review boards in the composition of NGOs, human rights entities and medical and judicial institutions to review cases of consented therapeutic sterilizations, to prevent abuse (paras 130,131).

Article 18 - Liberty of movement and nationality

Under this article the Committee has recommended that the State party provide information, *inter alia*, pertaining to:

Measures to ensure the right of persons with disabilities to acquire a nationality and not to be deprived of it; to ensure the right of a person with disabilities to enter or leave his/her country freely; measures to ensure that every new-born child with a disability be registered upon birth and given a name and a nationality

The report states that Portugal guarantees to everyone the right to move freely and to settle anywhere in the territory and the right to leave and return to Portugal (*para. 141*).

The report also notes that foreign persons with disabilities are given a protected status in asylum cases (*paras. 154,155*).

However, it is not clear whether persons placed under guardianship can also freely move and freely choose their place of residence in the State party.

The State party is encouraged to update its legislation and implement in practice the human rights and social model definition of persons with disabilities.

Article 23 - Respect for home and the family

Under this article the Committee has recommended that the State party provide information, *inter alia*, pertaining to:

Measures to ensure that persons with disabilities may exercise the right to marry and to found a family on the basis of full and free consent; that persons with disabilities have access to family planning, assistive reproduction and adoption or fostering programmes; that parents with disabilities, who so require, are provided with the adequate support in their child-rearing responsibilities, ensuring the parent-child relationship; that no child is separated from her/his parents because of the disability of either the child or one or both of the parents; to support fathers and mothers, in order to prevent concealment, abandonment of the boy or girl with a disability; to avoid institutionalization of boys and girls with disabilities whose parents are unable to care for them

The report states that the Civil Code “still prohibits or restricts” the right to marry to persons “having clear mental illness, inabilitated or disabled by psychological/illness reasons” (para. 185).

The report is silent about any programs of support to parents with disabilities or to parents with children with disabilities in their child-rearing responsibilities. It notes instead that parents “interdicted or disabled for psychological or mental illness are considered inhibited for the exercise of parental responsibilities” (para. 188).

The State party is encouraged to develop a system of disability support programs to enable parents with disabilities to educate their children in the family environment, and to ensure in law and in practice that persons with disabilities can marry and establish a family if they so wish without discrimination of any kind.

The State party is further encouraged to provide statistical data on the number of institutions and number of children with disabilities in institutions and measures being undertaken such as fostering programs to prevent institutionalization of children with disabilities.

Article 24 - Education

Under this article the Committee has recommended that the State party provide information, *inter alia*, pertaining to:

Measures to ensure that every child with disabilities has access to early-stage education, and mandatory primary, secondary and higher education

The report states that the right to education is enshrined in the Constitution and that in this connection the State is to “create a network of public education institutions to cover the needs of the entire population, including special education needs of persons with disabilities” (paras. 192-194).

The report notes that a law adopted in 2008 establishes a network of schools for special education (paras. 196-198).

The report further notes that in the period 2010/2011, “43,708 individual educational programs were developed in public educational institutions, 2,320 of which related to pre-school education” (para. 201).

The report notes in terms of inclusive education that the State party has developed a “national network of 73 centers of educational inclusion and 23 resource centers for inclusion”(para.200). *It is not clear what these centers represent: places where teachers are taught the basis of a future national policy of inclusive education, or actual pilot schools where education is given in an inclusive education environment. However the information provided suggests that the State party has in place presently only 2 education subsystems for persons with disabilities: support classes for persons with disabilities in regular schools (para. 201) and special education schools (paras.196-198).*

The report is not clear about the existence of specific schools supporting full inclusive education (para 200).

The report provides no statistics on students disaggregated by types of disability, urban and rural areas, enrolled in the special education institutions, it is not clear from the report, who makes decisions and what motivates enrolment of students with disabilities in the special education schools: their free will, absence of reasonable accommodation or school assessments of the student with disabilities.

The report mentions no specific programs and action plans of school integration in accordance with the Convention that exist in the State party at this stage. Instead emphasis appears to be on the development of the network of special education institutions.

The State party is encouraged to design and implement a long term program and action plan of school integration of children with disabilities with specific benchmarks, control and sanctions for non-implementation.

The State party is also recommended to increase available resources in order to meet its obligations to provide for the same school opportunities to all including children with disabilities by gradually replacing the special education system with an integrated school system offering all reasonable accommodations for children with disabilities.

The State party is further encouraged to provide information on the impact of its special education programs disaggregated by types of disabilities, in urban and rural areas.

Article 27 - Work and employment

Under this article the Committee has recommended that the State party provide information, *inter alia*, pertaining to:

Measures taken to ensure protection against discrimination in all stages of employment; the impact of targeted employment programmes and policies in place to achieve full and productive employment among persons with disabilities ; affirmative and effective action measures for the employment of persons with disabilities in the regular labour market; accessibility of persons with disabilities to open employment and vocational training services, including those for the promotion of self-employment; availability of technical and financial assistance for the provision of reasonable accommodations; measures to assure the retention and retraining of workers who suffer a workplace injury resulting in a

disability preventing them from performing their previous tasks; to ensure various forms of work, such as work on location, telecommuting (off-site/at home) and subcontracting, and work opportunities offered by new communication technologies

The report states that the Employment and Vocational Training Institute of the State party has resources and programs to enhance the employability of persons with disabilities and that an integration plan for persons with disabilities or impairments established within the national reform plan for 2008-2010, provided the development of the following measures: support the creation of self-employment by persons with disabilities; signing protocols with large national companies in order to increase employment opportunities for persons with disabilities; support the creation of small business companies, by or with persons with disabilities; complementary training, generalization of aid to employment, redefinition of rules concerning protected employment (paras. 225,226).

The report however provides no information with regard to the degree of implementation of these measures in the years 2008-2010, considering that the report was drafted in 2011.

The report provides no information about the adoption of a comprehensive anti-discrimination legislation combating including disability based discrimination.

There is no more elaborate information regarding: any strategies to promote employment of persons with disabilities in the open market with measures such as a system of quotas supported with incentives, or incentives for conversion of temporary contracts into permanent ones.

There is little information about any specific legislative measures preventing the unfair dismissal of persons with disabilities, or measures taken to facilitate reemployment of persons with disabilities who have lost their jobs.

The State party is encouraged to provide an update of the results of the implementation of the measures designed in the integration plan of persons with disabilities 2008-2010 and to expand it in future as a long term global strategy for continuing to find ways of involving more persons with disabilities in employment including through the development of a program of quotas and relevant incentives, and to adopt legislative measures discouraging unfair dismissal of persons with disabilities, among others. The global action Strategy for the employment of persons with disabilities should contain specific benchmarks, control mechanisms and sanctions for violations.

The State party is further encouraged to continue awareness raising campaigns to develop a national culture of inclusion of persons with disabilities by offering more effective opportunities for their valid engagement in productive employment.

Article 29 - Participation in political and public life

Under this article the Committee has recommended that the State party provide information, *inter alia*, pertaining to:

Legislation and measures to guarantee to persons with disabilities, in particular, persons with mental or intellectual disability, political rights, including, if it is the case, existing limitations and actions taken to overcome them; support provided, if any, to persons with disabilities for the establishment and maintenance of organizations to represent their rights and interests at local, regional and national level

The report notes that persons with intellectual disabilities do not enjoy electoral capacity (para. 249).

The report notes that persons with physical disability do enjoy their full electoral rights, although accessibility issues remain a concern (paras. 250-260).

The report further notes the lack of statistics concerning the right to vote and be elected as exercised by persons with disabilities (para.257).

The State party is encouraged to revise its legislation to conform it to the requirements of the Convention under articles 29 and 12 and provide in law and practice the right to vote for all persons with disabilities without discrimination including for persons with intellectual forms of disability, and those placed in institutions or under guardianship.

The State party is further encouraged to proceed in practice to ensure an effective representation of persons with disabilities at all levels of the decision-making (Government, Parliament, Judiciary) which affects their interests if possible through a quota system to ensure diversity.

Article 33 - National implementation and monitoring

Under this article the Committee has recommended that the State party provide information, *inter alia*, pertaining to:

The designation of one or more focal points within the Government for matters relating to the implementation of the Convention and facilitate related action in different sectors and at different levels; the establishment of a framework, including one or more independent mechanisms, as appropriate and measures taken to promote, protect and monitor implementation of the Convention taking into account the principles relating to the status and function of national institutions for the protection and promotion of human rights; budget allocations for the purpose of national implementation and monitoring

The report notes that the coordination functions for the implementation of the Convention have been entrusted to the Directorate General of Foreign Policy (Ministry of Foreign Affairs) and to the Office for Strategy and Planning (Ministry of Solidarity and Social Security (para. 319).

The report notes that the government was still working on the designation of the organ entrusted with the monitoring functions under the Convention (para. 320).

The State party is encouraged to update the Committee on the Organ designated and the monitoring organ under the Convention.

The State party is further encouraged to officially designate by Act of Parliament, all national NGOs working for persons with disabilities in the State party as monitoring institutions under the Convention.