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UPDATE ARTICLE

Psychiatric evaluation of civil capacity with the new Brazilian Statute of the Person with Disabilities

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The objective of this paper is to provide an update to psychiatrists regarding the new Brazilian Law for the Inclusion of People with Disabilities (BLI, Law 13,146 of 2015), and, specifically, to discuss potential implications of situations in which examination by a forensic psychiatrist points toward civil incompetence, while the above-mentioned law mandates full civil capacity for disabled persons. A study of Law 13,146/2015 was conducted, including a comparative analysis of legal and psychiatric approaches on the subject. This analysis revealed that the BLI has generated differences of opinion among legislators. However, the greatest difference seems to arise between the justice system and psychiatric expertise in relation to the difference of criteria adopted in the two approaches. The BLI is very recent; it should be revised in response to debates among psychiatrists and the criminal justice system, and especially as jurisprudence is formed over time.

Keywords: Forensic psychiatry; legal interdiction; disability advocacy; discrimination

Introduction

On July 6, 2015, the Brazilian Law for the Inclusion of People with Disabilities (BLI), Law 13,146 of 2015, was approved, more than a decade after its proposition as a bill in the National Congress.¹ It is grounded in the International Convention on the Rights of People with Disabilities, approved by the United Nations (UN).² The BLI, also known as the Statute of the Person with Disabilities (Estatuto da Pessoa com Deficiência), came into force on January 2, 2016.

Article 2 of the BLI defines a disabled person as “one with a long-term physical, mental, intellectual, or sensory impediment.” Therefore, the term disability in the BLI does not refer to intellectual disability as in the DSM-5,^{3,4} but instead covers all cases of mental disability. Thus, in addition to a patient with intellectual disabilities, one with schizophrenia or another with dementia would also be considered disabled from the perspective of this law, and would thus be ensured full civil capacity.

This document establishes a condition of equality between disabled and non-disabled people in relation to the acts of civil life. Thus, from a legal point of view, disabilities could no longer compromise a person’s full civil capacity. This legal innovation has a number of repercussions for forensic psychiatry, which will be addressed in this study.

Articles of the new Law and expert activity

The introduction of the BLI has brought a series of legal changes that directly affect the work of forensic

psychiatrists, both in their relationship with legal professionals as well as when writing an expert report, which is bound to contain additional considerations. Among the articles of the new BLI, some are of particular interest to the forensic psychiatrist.^{5,6} In addition to Article 2, already mentioned, others are directly related to the psychiatrist’s work, both as care provider and as legal expert, and thus need to be known by professionals in both fields.

Article 6 states that “disability does not affect the full civil capacity of the person.” The wording of this article, which is later reinforced in Article 84, admits that factors other than disability, such as age, can legally affect the full civil capacity of a person. The BLI considers those under age 16 as absolutely incapable and those aged 16 to 18 years as relatively incapable. Prodigality, which is a legal, not medical, concept, also remained as a factor of relative incapacity. However, mental disease, mental health disorders, and intellectual disabilities have been legally excluded from the list of conditions that affect full capacity.

The work of the clinical psychiatrist, in turn, is directly affected by Article 11, which refers to involuntary treatment and hospitalization. The wording of this law clearly states that “a disabled person cannot be forced to undergo medical or surgical intervention, treatment, or forced institutionalization.” It is worth noting that, before the BLI, there were two forms of involuntary hospitalization: a procedure initiated, indicated, and performed by the physician (involuntary hospitalization) and one mandated by the court (compulsory hospitalization). In cases of psychiatrist-initiated involuntary hospitalization, the professional had to report the event to the prosecutor within 72 hours of admission. With the change established by this article, psychiatrists can no longer initiate involuntary hospitalization. According to Article 11, this procedure must be requested by a judicial authority. It is not difficult to infer that having to

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wait for a court order will make the psychiatrist's work more difficult, especially when faced with a situation in which urgent involuntary intervention is required.

Article 84 of the BLI may be the most relevant one to forensic psychiatrists, not only due to its rich content but also because of the major differences that it can create between legal and psychiatric approaches. The article states: "the disabled person is guaranteed the right of legal capacity on an equal basis with others." However, from the standpoint of psychiatric expertise, a person's inability to exercise activities of civil life may be absolute or relative. In such cases, experts will have to explain this divergence in their reports and clarify the psychiatric point of view.

In its second paragraph, Article 84 adds a legal novelty to the Civil Code,⁷ namely, that a person with disability, but not under trusteeship, has the right to adopt the supported decision-making process. This process is explained in Article 1783-A and consists of the appointment, by the disabled individual, of two suitable persons of trust to support him or her in making decisions about the acts of civil life. This process has two basic differences in relation to trusteeship: first, it is the person's choice; second, the final decision lies with the disabled person, not with his or her caretaker.

According to the same Article 84, now in its third paragraph, trusteeship "is an extraordinary protective measure, proportional to the needs and circumstances of each case, and will last the shortest time possible." This paragraph excludes the possibilities of total and definitive interdiction. By addressing "proportionality to the needs" of each case, it proposes partial interdiction, meant to address specific acts; by limiting the duration of trusteeship to the shortest possible time, it allows only temporary interdiction.

Furthermore, Article 85 adds that "trusteeship only affects acts related to equity and business," but does not extend to other spheres such as marriage or vote.

This clearly shows that the BLI amends the Civil Code⁷ in relation to trusteeship, revoking or modifying several of its articles.^{8,9} According to the BLI, trusteeship, which is a consequence of interdiction, becomes an exceptional measure and can be only applied when "absolutely necessary," even though the law does not explain the criteria for this category.^{10,11}

Discrimination or protection? The forensic psychiatry point of view

As one would expect, the BLI raised much controversy and disagreement among legislators themselves. Those in favor argue for the inclusion of disabled people as a means to fight discrimination. The law provides penalties for discriminatory acts - even, in some cases, punishing discriminators with a 2-to-5-year prison sentence. According to the proponents of this law, disabled persons will no longer have to adapt to society; on the contrary, society will have to include them and use resources to do so. The physician is no longer the only one responsible for evaluating whether to grant benefits requested by the disabled; instead, multidisciplinary teams will be

established to assess disability, social reality, and psychological factors.

Conversely, others argue that this law is not safe for the people who become vulnerable due to the lack of discernment and/or intellectual resources needed to carry out activities of civil life. According to Tomazette & Araújo,¹² the changes introduced by the Statute of the Person with Disabilities, although well intentioned, can lead to disastrous consequences; according to those authors, the new system enshrines "a misunderstanding between the terms disability, interdiction, and trusteeship."

Sant'Ana¹³ cites three factors that limit a person's autonomy: the law, the public order, and morals and customs. These are external constraints that seem more curtailing to freedom than to autonomy itself. Abdalla-Filho¹⁴ noted differences between these two terms while considering that all people have the right to the freedom of being autonomous, but not all of them have enough autonomy to be free. Autonomy is understood as a resource intrinsic to the person, which cannot be given, but has to be conquered. Freedom, in turn, is intrinsically related to the link between man and environment. Individual freedom has autonomy as a prerequisite, but is not restricted to it. Taking these ideas as a basis, one may believe that the new law grants greater freedom to people with disabilities, but unfortunately, the BLI alone cannot strengthen their autonomy.

Thus, we are faced with the inevitable question of whether emphasis should be placed on the freedom of a person to exercise civil acts or on strengthening their autonomy in order to provide progressively greater achievements in these individuals' lives. The greatest challenge is to strike a balance between the two approaches.

If, on the one hand, the BLI is a form of social achievement, on the other hand, from a forensic psychiatry point of view, it poses difficult challenges regarding the application of some of its articles. In this sense, even though Article 84 determines that disabled persons have the same legal right to exercise civil capacity as others, this same person may not be mentally competent to do so. It is an equality that does not take into consideration the principle of equity. The latter, in turn, understands that different people have different needs, and thus should be treated differently in order to achieve actual, fair equality.

Psychiatric reports and the BLI

The foregoing gives rise to the question of where forensic psychiatrists and their expert reports now stand in the civil sphere. What should be done when a discrepancy exists between an expert's conclusion of civil incompetence and a BLI-based determination of full capacity?

Despite differences in definitions of legal capacity, it is up to the forensic psychiatrist, as an expert at the service of the court assigned to assess the mental capacity of the examinee, to clarify, as thoroughly as possible, the doubts raised by legal professionals. Forensic investigation of mental capacity should be conducted in the same way as before publication of the BLI. When examining a patient with mental disorders such as schizophrenia, intellectual

disability, or dementia, the expert psychiatrist should point out the examinee's limitations in terms of capacity, stating, if applicable, the feasibility or infeasibility of full civil capacity. After all, the psychiatrist alone is the sole responsible for his or her report.

As noted above, those who cannot express their wishes, even due to a transient cause, are no longer considered absolutely incapable; rather, they are now considered only relatively incapable. In a literal/grammatical interpretation, even a person who is admitted to an intensive care unit with a severe neurosurgical condition, for example, will only be considered relatively incapable from the civil standpoint during the hospitalization period, rather than absolutely incapable, as before. However, a systematic/teleological interpretation is expected, i.e., examination of a given situation from a global point of view rather than from a single standpoint.

It makes no sense to have psychiatrists try to adjust to the law and, despite realizing the limitations of an examined patient, answer the questions according to what is determined by the BLI. Experts should not deviate from their primary function, which is to describe in their report, as faithfully as possible, the mental condition observed during the examination.

It is important to remember that the expert report is not legally binding, i.e., it may be considered or discarded by the judge. However, in the vast majority of cases, as noted by Pikona-Sakir et al.,¹⁵ the report is accepted by the court. Those authors studied judgments in a particular Israeli center and reached the conclusion that, in 99.4% of cases, the psychiatric recommendations contained in the report were accepted by the judges. The Brazilian scenario, in turn, was studied by Ramos,¹⁶ whose conclusions closely matched that of the Israeli study: the author found 91.7% concordance between psychiatric reports and the corresponding judicial decisions.

Conclusions

As discussed previously, the BLI has amended several articles of the Civil Code.^{5,8} The focus of the new status of trusteeship is no longer the need to protect the person and/or their assets, but rather to promote social guarantees, without much room for the person's psychic reality.^{10,13}

The novelty and recency of the topic addressed herein created limitations to this study, as there were not many printed publications to draw from; thus, the author resorted to various specific websites as reference material.

A possible divergence between legal and psychiatric approaches to the same person may give rise to impasses in these early years of the BLI. In many situations, an examinee may be considered incapable from the psychiatric point of view while the law mandates that this same person be considered civilly liable. However, without doubt, such divergences will force a dialogue between psychiatry and the justice system; this dialogue, in turn, will contribute to jurisprudence on the subject. The expected result is that the BLI will lead to adjustments and consequently improvement of the Brazilian legislation,

achieving a balance between social aspects and the psychic reality of the disabled person.

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Disclosure

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