



# INTERNATIONAL MEDICAL REVIEW ON DOWN SYNDROME

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## EDITORIAL

### More than just words

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In December 2006 the International Convention on the Rights of Disabled People took place in New York. On the 13th of December the final document was signed, which was ratified by the Kingdom of Spain on the 23rd of November of 2007. The spirit that gave rise to the conclusions of the agreement was based on two particular points:

1. States Parties recognize that all disabled persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law, equal to that of all other people in all aspects of their lives.
2. The States shall take relevant measures to guarantee to disabled people access to the equal and effective legal protection they may require. With this aim, they will provide effective safeguards respecting the rights, the will and the preferences of disabled people, provided and adapted to circumstances, which shall be applied as soon as possible and will be periodically reviewed.

This document, that has received general praise, has been presented as if a new era in the legal treatment of disabled people were beginning, as something totally different to anything before. However, in front of this wave of hyperbolic messages, enthusiasm must be tempered. Firstly, because the initial position of different countries was and is not the same: in some countries, the rights of disabled people are protected and treated with attention and care, whereas in others these rights and their protection are minimal. And secondly, because beyond mere words, there are not many effective differences between the proposals of the Convention and current law in force in the countries that share our culture.

Indeed, the history we are interested in did not begin in 2006. This history is very old in the countries of our region and there are parts of it —as frequently happens when it comes to human actions—that are the object of admiration rather than denigration. This history began in Ancient

Rome, as all legal tradition in the Western countries, which is not to be wondered at, since, as Paul Valéry said, Western civilization has its roots in Greek Philosophy, Roman Law and Christian Theology. In Rome, the care of a person with disability and their goods was given into the hands of a guardian. The purpose of guardianship was not to empower a guardian but to designate them as a manager. Its origin lies in the Twelve Tables, where it is established that a guardian shall be designated to watch over the interests of the disabled person and their heirs, this last point is due to a social structure based on family property. It must be highlighted that guardians were appointed by Law or a magistrate's decision, but never by private will. Furthermore, it must be noted that, although the office of guardian was stable, in the Postclassical era guardianship was suspended during the lucid phases of the person with disability. On the other hand, the guardian never had the *auctoritas* of parents or tutors of minors, far from that, the guardian limited their actions to protecting the interests of the disabled person with the aim of preserving for them and their heirs, if and when the disabled person could not make known their will. Finally, the guardian assumed responsibility for the management of their interests. In view of this system of protection of disabled persons established in Ancient Rome, it is difficult to admit that the 2006 Convention was a dividing line between a before and an after.

However, it is true that the flexible Roman system was not copied by the Spanish Civil Code of 1889, which followed the rigid model of the French Civil Code of 1804. The basic difference between both systems lies in the following two points:

1. The rigid statement regarding disability of the Civil Code, that only includes two situations: totally capable or absolutely incapable, although jurisprudence overcame this strict classification after a brave sentence passed down by the Supreme Court on the 5th of March of 1947.

2. The equal status of the tutors of disabled people —the Code does not speak of guardians — with tutors of minors.

In spite of these differences, of an importance that cannot be ignored, it is also true that, as Professor Federico de Castro wrote, the underlying spirit tended to the special protection of the disabled person. Finally, it can be said that the Reform of 1983 is coherent with this spirit, on one hand, because it distinguishes between tutor and guardian, and on the other, because it admits degrees of disability determined by legal sentence.

Indeed, this change must be integrated into a wider process of social change that is based on the individual —of the able and the disabled, of adults and minors—and their fundamental rights, even above concepts such as family or *home*. In this sense, Professor Encarna Poca, in her book *Family and Social Change. From the Home to the Person*, in 1999, wrote that

“the changes in Family Law over the last twenty years are undoubtedly based on social changes that have taken place during the same period of time” and that “if in any legal scenario [this social change] is absolutely relevant, it is precisely in the study of Family Law”. She further rounds out her ideas on the subject by adding that the protection of minors and disabled people must be addressed based on a strict respect for the fundamental rights of all persons, that is, of all citizens, whatever their status.

As a result, we welcome the New York Convention as a reinforcement of principles that have been in force for centuries and an evolution that, in our culture, was already underway promoted by social change. But we do not consider it is a good idea to assume that the Convention is the beginning of a new era of light and progress after a dark and mistaken past. And, above all, let us not be dazzled by words: since in Law, words that do not become action are mere literature and, usually, poor literature.