

# Looking back to look forward: The right to legal capacity of persons with disabilities

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Paula Campos Pinto, PhD  
CIEG/ISCSP, University of Lisbon



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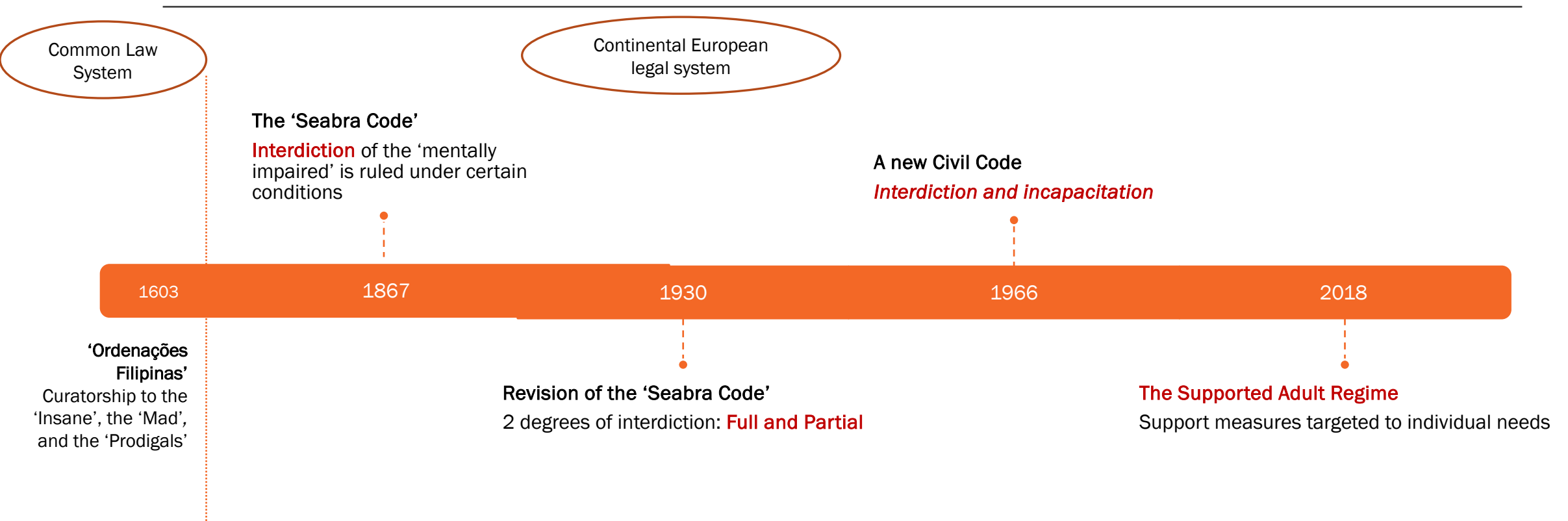


# Legal capacity

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- A person's power or possibility to act within the framework of the legal system.
- It makes a human being a subject of law, able to make binding decisions, ranging from the most profound (e.g. choosing where and with whom to live or giving consent to a complex medical treatment) to everyday choices (e.g. to buy a bus ticket or to sign a lease).
- It goes beyond decision-making - **it is about what it means to be human, because the life choices we make are part of who we are** (Quinn, 2010).

# A timeline of the Portuguese framework on legal capacity



# Approaches to equality in current Portuguese law

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- Anti-discrimination clause in article 13 of the Constitution:
  1. *All citizens have the same social dignity and are equal before the law.*
  2. *No one can be privileged, advantaged, or disadvantaged, prevented of enjoying any right, or exempt from any duty on the grounds of ....* **[formal approach to equality]**
- ...must be read in conjunction with Article 71 (Citizens with Disabilities), calling upon the State “to develop a national policy of prevention and treatment, rehabilitation and integration of citizens with disabilities and their families ... and to bear the cost of the effective realization of their rights.” **[substantive approach?]**

# The 'Seabra' Code, 1867

- Interdiction may apply to the “mentally disabled” (*mentecaptos*) and others whom, due to “*the abnormal state of their mental abilities, show inability to govern their person and assets*” (art. 314), and is established by a Court decision (art. 317);
- The person deprived of legal capacity holds the **status of a minor** (art. 321);
- The freedom of the person deprived of legal capacity must be, as much as possible, respected; the person cannot be incarcerated in any kind of institution without a Court decision (art. 333);
- The ‘deaf-mute’ lacking the ability to govern their assets are also **interdicted** (art. 337), with the Court determining the limits and extension of the guardianship on an individual basis (art. 338).

# The 'Seabra' Code

Particularly relevant for persons with a **significant amount of assets**; hence, the Law promoted a double protection - of both the interdicted as well as their presumed inheritors.

Presumes a **notion of risk** attached to the legal understanding of persons with mental disability.

Persons with mental impairments (or 'dementia' in the broad sense of the 1867 Seabra Code) constructed as **lacking the capacity for self-determination** (e.g. making judgements, evaluate their interests, assess the advantages or disadvantages of their actions)

# Revision of the 'Seabra' Code, 1930

- Inspired by the Italian Civil Code of 1865
- Introduces **two degrees of interdiction**, the extension and limits of *partial interdiction* being determined by the Court, on a case-by-case basis (art. 314, para.1)
  - **Full guardianship** reserved to the **severely mentally impaired**
- Both *full and partial interdiction* on the grounds of 'dementia' could affect acts beyond financial matters.

# 1966 Civil Code

- Influenced by the 1942 Italian Code (*interdiction* and *incapacitation*) ... but **less rigid approach**: certain categories of impairments (e.g. psychic anomaly, deaf-muteness, and blindness) are conducive to interdiction **only if the person also presents “an inability to govern the self and own assets”**.
- **The interdicted** were denied the rights to marry, to parenthood or adoption, to testify in court, to vote, sign contracts, and dispose of their assets (“**civil death**”), and were provided with a tutor who substituted them in all affairs;
- **The incapacitated** were assigned a curator, who was placed in charge of their **financial decisions**.



# The 1966 Civil Code

Greater concern with the protection of society and the market than with the protection and support of the person

Marginalization and stigmatization of the interdicted and incapacitated

**Medical model** - relevance given to medical examinations to certify the impairments (art.951); publicity of the Court decision

# Convention on the Rights of Persons with Disabilities (UN 2006)

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- Art. 1 -
- Article 12
  - the right to “equality before the law, on equal terms with all other citizens, in all areas of their life”
  - calls upon State parties to eliminate barriers to full citizenship and participation.
- Portugal ratified the CRPD in 2009

# The Supported Adult Regime

Law 48/2018

- CRPD, emphasis on social participation of persons with disabilities and gradual change of social attitudes
- **Support measures tailored to individual needs** for persons whom, *“due to their health status, disability, or behavior, are unable on their own, to fully and consciously exercise their rights, or fulfil their duties”* (art. 139).
- Emphasis on the **autonomy and will of the subject**:
  - support measures are required by the person herself
  - the Court must directly hear the beneficiary
  - the beneficiary can decide whom the support person will be

# The Supported Adult Regime

Law 48/2018

**Support measures** aim to ensure the “...*full exercise of rights as well as fulfilment of duties*” (art. 140, para.1), and they should be “*limited to the necessary*”

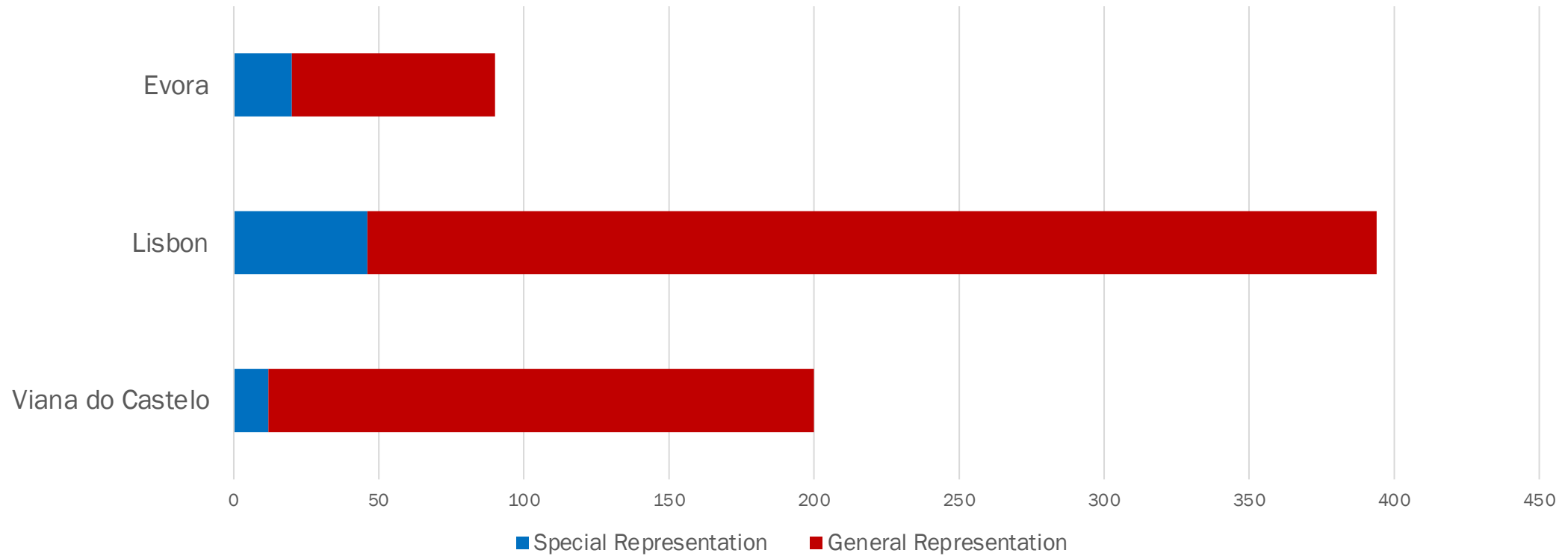
In practice, the Court may determine a range of support measures so wide that is not really different from the old regime of interdiction

# The Supported Adult Regime

## Court decisions in 3 jurisdictions (urban, rural, semi-urban)

February 2019 - February 2022

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# In conclusion

The Portuguese framework on legal capacity has evolved to a system more in line with the CRPD

The **Regime of the Supported Adult** resembles the “support administration” (*amministrazione di sostegno*) system introduced in Italy in 2004

However ... the Portuguese experience is **very recent and the old ‘paradigm’ still prevails**

## **We need:**

**Disability awareness and training** on the CRPD for legal practitioners to support their transition to the new paradigm

**Sociolegal research** to document the benefits for beneficiaries and society