

A REVIEW PAPER ON CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

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ABSTRACT

This Article shall provide an applied review of Article 12 (Equal recognition before the law) of the CRPD and Article 13 (Access to justice) in the context of Article 6 Article 6 Article 6 (Women with disabilities). Recent CRPD literature has extended Article 12's analysis to take into account its broader relevance for the interpretation of Article 13. The interaction of Article 12 and Article 13 is an emerging issue in CRPD discussions. This paper argues that the CRPD should be interpreted based on the current theory of human rights. It offers a case review of the interplay between Article 12 and Article 13 on the basis of facts recited in the UK Court of Appeal (RP v Nottingham City Council (2008)) and the European Court of Human Rights' petition of RP (RP and Others v UK (2012)). The analysis shows that the principles of CRPD could and should have been applied in the case of RP. It finds that current practises that exclude disabled people from participation in lawsuits are inconsistent with the CRPD.

KEYWORD: CRPD, Law, Review

INTRODUCTION

The Convention on the Rights of Persons with Disabilities (CRPD), particularly with regard to Article 12 (equal recognition before the law), has been continuing to generate vigorous debate[1–18]. The discussion of Article 12 is marked by a wide range of views and sometimes heated disagreement. There is a danger that the CRPD contribution can be missed in a contested intellectual environment if the "philosophical and moral assumptions that underlie the law's formal structures" are not examined[15]. As the scope and scope of Article 12 are more clearly defined, structures already taken for granted in the law are sharply alleviated. In particular, this is the case if Article 12 is considered in conjunction with other CRPD articles. This article seeks to take into account the interaction between Article 12 (Equal recognition before the law) and Article 13 (Access to justice). Eilionoir Flynn, Lucy Series and Eilionoir Flynn and Anna Lawson have highlighted the fundamental importance of the interaction between these two articles. [19–21]. Other scholars of the CRPD commented on the application in criminal law of Article 13 [14–18,22–25]. This Article examines the application in family law proceedings of Article 13 (Access to Justice). In particular, it addresses the issue of educational capacity through an analysis of the factual situation in the English case of the RP v Nottingham City Council (2008) and the European Court of Human Rights petition of the RP [26]. The case of RP illuminates the way that attitudes, practises and processes are taken for granted within the law and compounds discrimination against persons with disabilities. The effect of such practises is that

people with disabilities are not allowed to participate in the law. Without participation, access to justice is limited, and before the law is compromised the right to equal recognition.

The argument put forward in this article is that RP's participation in the legal proceedings could and should have continued. Rather than being excluded on the basis of a lack of mental capacity, adequate information and support should have been provided to RP. In addition, institutional structures and processes to accommodate her disability should have been modified. The Committee on the Rights of Persons with Disabilities' interpretation of Article 12 argues that the determination that a person "lacks mental capacity for the purposes of law" is not allowed in a human rights compliant context[27]. If the latter proposal is accepted, a substantial shift is required in current practise.

The case of RP is important as it illustrates the process and the result of exclusion. RP was a young 21-year-old woman with a mild intellectual disability, who bore a premature baby with major health problems. After an intensive period of hospital treatment, the health agency initiated formal treatment with the goal of making RP's child a foster family. It was then determined that RP was unable to instruct its appointed attorney. An ad litem guardian or guardian solicitor has been appointed to represent RP in the proceedings. The subsequent placement was contested by RP and her family[26].

CASE STUDY

The RP dispute provides a "Case Study" to analyse the principles of the CRPD. In view of the CRPD, three articles of the CRPD are directly relevant to the situation of RP: Article 6 (Women with Disabilities) recognises the multiple forms of discrimination faced by women and girls; Article 13 (Access to justice) calls upon States parties to facilitate participation by persons with disabilities in all legal proceedings. The analysis of CRPD General Comment 1's alternative decision-making is also relevant to RP case analysis[27]. If proper support has been provided from the start, RP may have been better assisted in her child's care. In the legal procedure, the RP could have understood the legal context, contested the evidence, expressed its views and challenged the decision to remove her child. The outcome of the treatment procedure must not therefore have been different ([26], para. 19–20). The argument is that discrimination and preconceived ideas about disability and motherhood should be clear and unambiguous as to why a child is taken away. To this end, the CRPD requires support to enable people with disabilities to participate fully in the process of law, including the modification of institutional practises aimed at excluding people from participation in such processes. Ultimately, the democratic ideal of full participation for people with disabilities in society is at stake. As Tom Tyler's work has shown, procedural justice and proper process play important roles in guaranteeing the acceptance of legal decisions and processes by individuals and the community[28–30]. Procedural justice informs contemporary justice approaches and complements the approach to human rights. The current practise, as occurred in the case of RP, of excluding people with disabilities from legal proceedings following determination of educational incapacity is no longer in line with modern communities' expectations.

CONCLUSION

In the five parts of this article, the argument for universal participation is advanced. Part 2 sums up the evolution of human rights from the 20th to the 21st centuries showing how the CRPD has a connection between international human rights law and theory of critical disability. Part 3 provides an extended RP case account. Part 4 provides an analysis of the situation of RP with regard to Article 12, which shows that the first instance assessments of educational capacity were not made in accordance with law. The extended analysis in Part 5, consistent with CRPD General Comment 1, concludes that capacities testing is inconsistent with the CRPD ([27] para. 25(i)). In short, this paper shows how the principle of universal legal capacity can be implemented by demonstrating how the CRPD ethic of social and legal participation in the case of RP could and should have been applied.

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