

# A REVIEW PAPER ON SOCIAL LAW AND HUMAN RIGHTS

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## ABSTRACT

The case of RP highlights a conceptual confusion linked to the notion of mental capacity. The literature relating to disability is an ongoing conclusion that one's "mental capacity" is a fixed attribute, which can be objectively defined without reference to the decision-making or information context. This is out of step with the CRPD and modern capacity legislation. In the context of providing relevant information and in a manner that takes into consideration the particular circumstances of the individual, mental capacity must always be determined. The CRPD recognises that "comprehension" is never an independent concept. It is influenced by the ability of a person to receive and understand information in the sense of "make sense of." For instance, a person who is afraid or stressed may not be able to hear or understand basic instructions. An individual may not understand information provided in an unfamiliar language. Information may be incomprehensible if it is linked to unknown knowledge or facts. In short, mental capacity always depends on subjectivity, information and the context. Failure to understand does not indicate incompetence but indicates possible information deficits or delivery.

**KEYWORD:** Social Law, Human Rights, Review

## INTRODUCTION

According to Gerard Quinn, the CRPD requires scholars to re-conceptualize the philosophical and juridical relations intended to constitute the citizenship, rights, and powers and responsibilities of the State[1]. Quinn refers to the conceptual developments in international human rights law recognising human rights as the right to social, economic and spiritual human beings ([2]; [3], p. 31; [4], p. 274). Recognition of the human context is crystallised in human rights papers, which state that "all human rights are universal, indivisible, interdependent and interrelated"[5]. Much of the human rights discourse has sought to articulate the interrelation of human rights and its relevance to the human condition since the 1993 World Congress, when the second sentence was coined ([6], p. 110). For instance, Amartya Sen makes a contemporary analysis of justice as a way of achieving actual social rights (understood as integrated rights) ([7], p. 9). The development of a complex, contextualised human rights account is also evident in the medical understanding of health social determinants and the economic appreciation of development [8]. In terms of human rights, these ideas are expressed in the principle of substantive equality. Accordingly, "The concept of equality has (also) changed in international law...with the conceptual transition from formal to substantive equality" ([9], para. 14). In the theoretical analysis of linked human rights the disability rights movement has taken one step further by appreciating the intersections between the theory of human rights, feminism, critical theory, critical disability and the concept of the embodiment [10]. The theory of

disability responds to the documentation of the discrimination, marginalisation, inequality and exclusion mechanisms and effects [11]. The direct involvement of disabled people in the development of the CRPD also underpins the human rights logic of the CRPD[2]. Social and legal exclusion is recognised by the CRPD as a basis for discrimination against people with disabilities (emphasis by the author). The CRPD is geared to social and legal inclusion and acknowledges social and legal inclusion as a tool for social reintegration.

The emphasis in the CRPD on inclusion and participation is evident within the "social model of disability," the demand for equality of access and before the law, the inclusion of reasonable accommodation and the overall concern for society participation as a measure of social change ([12], p. 15). The new approach has been informed by the recognition of barriers experienced by people with disabilities. In terms of CRPD, inclusion is the key to the realisation of the rights of disabled people. The principles of CRPD point out the idea that involving disabled people is the point of departure for all decisions or procedures in law and elsewhere[13].

This section gives a brief summary of the RP case based on the judgement of the European Court of Human Rights (ECtHR)[26]. As noted above, RP was a young woman 21 years old who has a mild intellectual disability and bore a premature baby of 27 weeks old ([26], para. 7). RP didn't know that she was pregnant and was not in a child's father relationship ([26], para. 7). She lived in modest circumstances with her family. The family was the health authority's "known." RP's baby had severe health problems requiring intensive 24-hour care. RP visited the hospital and took part in her child's care, but did not have good contact with the hospital staff ([26], para. 8). The staff reported she was "only" 1-2 hours a day and didn't seem to be able to complete basic care work ([26], para. 9). The health authority does not appear to have regarded other family members as proper caregivers. The documentation does not show whether the practical and emotional difficulties faced by young women in the situation of RP are considered. The local authorities expressed concern over RP's ability and motivation to look after her child and carried out a "parental assessment" ([26], para. 10). The baby was temporarily cared for. Over the next seven months, RP has participated in parenting and supported contact visits. Following an additional parenting evaluation, the health authority initiated continuous foster care proceedings contrary to the wish of RP (and its family) to keep their child ([26], para. 11)

In anticipation of the care procedure, an independent, publicly funded solicitor represented RP. After their initial interaction, the RP applicant raised serious concerns about the ability of RP to understand the advice it received ([26], para. 12). A clinical psychologist who advised the appointment of a litem guardian or litigation guardian evaluated the 'capacity to instruct' of RP. In English law, the Official Solicitor is responsible for appointing a litigation guardian, under the Mental Capacity Act ([41], s51(2)(e)). The role of the proceedings guardian is to represent a person without education on a basis of best interests ([26], para. 13). The original (unabhängig) solicitor of RP has been appointed ad litem as her guardian.

The care procedure led to RP's child being permanently placed. In the UK courts, RP appealed unsuccessfully. The Official Solicitor did not object to the order being issued. Therefore, the litigation

guardian did not bring the case of RP to the court or contest the proof in accordance with the best interest obligation ([20], p. 68). RP and her mother, father, and brother subsequently submitted a parallel request to ECtHR with the intervention of the Commission on Equality and Human Rights (United Kingdom)[26]. RP submitted infringement of its rights under Articles 6, 8, 13 and 14 of the European Convention on Human Rights (ECHR)[42]. Although the ECtHR accepted that RP had the capacity to conduct disputes for its purposes, the court concluded that earlier appointments were appropriate; the capacity of the RP was further assessed in proceedings; that appropriate and effective means were in place to enable RP to challenge the involvement of the guardian; that it was not practicable to examine RP C's Curiously, the CRPD was mentioned but not extensively discussed in support of the Court's findings[44].

## CONCLUSION

It cannot be concluded that RP was unable to understand the information because she did not understand the letter. Instead, it shows the importance of proper explanation and support. Most people are unable to understand complex legal concepts without adequate explanation. It is significant that consideration of RP's functional literacy appears to be lacking in the context of the letter. Moreover, since RP kept in touch with her attorney, she continued with the initial instructing relationship. If the changed relationship was not adequately explained, RP was prevented from looking at the best way to proceed or whether to seek additional help. She was not informed that the scheme allowed the appointment to be revoked if the capacity was challenged, if it was determined that the person was capable of, or the person was determined to have regained capability. Without such information and advice, RP has effectively been prevented from triggering "safeguards," which are integrated into the scheme of office solicitor. The Official Solicitor's practises made the rights included in the scheme illusory.

## REFERENCES

1. Boeve, M. N., & den Broek, G. M. (2012). The programmatic approach; A flexible and complex tool to achieve environmental quality standards. *Utrecht Law Review*, 8(3), 74–85. <https://doi.org/10.18352/ulr.206>
2. Catley, P., & Claydon, L. (2016). The use of neuroscientific evidence in the courtroom by those accused of criminal offenses in England and Wales. *Journal of Law and the Biosciences*, 2(3), 510–549. <https://doi.org/10.1093/jlb/lsv025>
3. Caulfield, T., Burningham, S., Joly, Y., Master, Z., Shabani, M., Borry, P., Becker, A., Burgess, M., Calder, K., Critchley, C., Edwards, K., Fullerton, S. M., Gottweis, H., Hyde-Lay, R., Illes, J., Isasi, R., Kato, K., Kaye, J., Knoppers, B., ... Zawati, M. H. (2014). A review of the key issues associated with the commercialization of biobanks. *Journal of Law and the Biosciences*, 1(3), 94–110. <https://doi.org/10.1093/jlb/lst004>
4. Chandler, J. A. (2016). The use of neuroscientific evidence in Canadian criminal proceedings. *Journal of Law and the Biosciences*, 2(3), 550–579. <https://doi.org/10.1093/jlb/lsv026>

5. Claassen, R., & Gerbrandy, A. (2016). Rethinking european competition law: From a consumer welfare to a capability approach. *Utrecht Law Review*, 12(1), 1–15. <https://doi.org/10.18352/ulr.321>
6. Claes, M., & de Visser, M. (2012). Are you networked yet? On dialogues in European judicial networks. *Utrecht Law Review*, 8(2), 100–114. <https://doi.org/10.18352/ulr.197>
7. de Kogel, C. H., & Westgeest, E. J. M. C. (2016). Neuroscientific and behavioral genetic information in criminal cases in the Netherlands. *Journal of Law and the Biosciences*, 2(3), 580–605. <https://doi.org/10.1093/jlb/lsv024>
8. de Vries, S. A. (2013). Balancing fundamental rights with economic freedoms according to the European court of justice. *Utrecht Law Review*, 9(1), 169–192. <https://doi.org/10.18352/ulr.220>
9. Dove, E. S., Knoppers, B. M., & Zawati, M. H. (2014). Towards an ethics safe harbor for global biomedical research. *Journal of Law and the Biosciences*, 1(3), 3–51. <https://doi.org/10.1093/jlb/lst002>
10. Dresser, R. (2014). Public preferences and the challenge to genetic research policy. *Journal of Law and the Biosciences*, 1(3), 52–67. <https://doi.org/10.1093/jlb/lst001>
11. Eisenberg, R. S., & Nicholson Price W., I. I. (2017). Promoting healthcare innovation on the demand side. *Journal of Law and the Biosciences*, 4(1), 3–49. <https://doi.org/10.1093/jlb/lsw062>
12. Enneking, L. (2014). The future of foreign direct liability? Exploring the international relevance of the Dutch shell Nigeria case. *Utrecht Law Review*, 10(1), 44–54. <https://doi.org/10.18352/ulr.256>
13. Farahany, N. A. (2016). Neuroscience and behavioral genetics in US criminal law: An empirical analysis. *Journal of Law and the Biosciences*, 2(3), 485–509. <https://doi.org/10.1093/jlb/lsv059>
14. Gelter, M., & Siems, M. (2012). Networks, dialogue or one-way traffic? An empirical analysis of cross-citations between ten of Europe's highest courts. *Utrecht Law Review*, 8(2), 88–99. <https://doi.org/10.18352/ulr.196>
15. Gless, S. (2013). Transnational cooperation in criminal matters and the guarantee of a fair trial: Approaches to a general principle. *Utrecht Law Review*, 9(4), 90–108. <https://doi.org/10.18352/ulr.244>
16. Gless, S., & Vervaele, J. A. E. (2013). Law should govern: Aspiring General Principles for Transnational Criminal Justice. *Utrecht Law Review*, 9(4), 1–10. <https://doi.org/10.18352/ulr.239>
17. Hoffman-Andrews, L. (2017). The known unknown: The challenges of genetic variants of uncertain significance in clinical practice. *Journal of Law and the Biosciences*, 4(3), 648–657. <https://doi.org/10.1093/jlb/lsv038>
18. Jančić, D. (2012). The Barroso initiative: Window dressing or democracy boost? *Utrecht Law Review*, 8(1), 78–91. <https://doi.org/10.18352/ulr.181>

19. Johnson, P. (2015). 'Homosexual propaganda' laws in the Russian federation: Are they in violation of the European convention on human rights? *Russian Law Journal*, 3(2), 37–61. <https://doi.org/10.17589/2309-8678-2015-3-2-37-61>
20. Jwa, A. (2016). Early adopters of the magical thinking cap: A study on do-it-yourself (DIY) transcranial direct current stimulation (tDCS) user community. *Journal of Law and the Biosciences*, 2(3), 292–335. <https://doi.org/10.1093/jlb/lsv017>
21. Keessen, A. M., & Van Rijswick, H. F. M. W. (2012). Adaptation to climate change in European water law and policy. *Utrecht Law Review*, 8(3), 38–50. <https://doi.org/10.18352/ulr.204>
22. Kerikmäe, T., & Särav, S. (2015). Legal impediments in the EU to new technologies in the example of e-residency. *Baltic Journal of Law and Politics*, 8(2), 71–90. <https://doi.org/10.1515/bjlp-2015-0019>
23. Knowles, L., Luth, W., & Bubela, T. (2017). Paving the road to personalized medicine: Recommendations on regulatory, intellectual property and reimbursement challenges. *Journal of Law and the Biosciences*, 4(3), 453–506. <https://doi.org/10.1093/jlb/lsx030>
24. Kulynych, J., & Greely, H. T. (2017). Clinical genomics, big data, and electronic medical records: Reconciling patient rights with research when privacy and science collide. *Journal of Law and the Biosciences*, 4(1), 94–132. <https://doi.org/10.1093/jlb/lsw061>
25. Largent, E. A. (2016). EBOLA and FDA: Reviewing the response to the 2014 outbreak, to find lessons for the future. *Journal of Law and the Biosciences*, 3(3), 489–537. <https://doi.org/10.1093/jlb/lsw046>
26. Lindhout, P. E., & Den Broek, B. V. (2014). The polluter pays principle: Guidelines for cost recovery and burden sharing in the case law of the European court of justice. *Utrecht Law Review*, 10(2), 46–59. <https://doi.org/10.18352/ulr.268>
27. Luchtman, M., & Vervaele, J. (2014). European agencies for criminal justice and shared enforcement (eurojust and the European public prosecutor's office). *Utrecht Law Review*, 10(5), 132–150. <https://doi.org/10.18352/ulr.305>
28. Maoz, U., & Yaffe, G. (2016). What does recent neuroscience tell us about criminal responsibility? *Journal of Law and the Biosciences*, 3(1), 120–139. <https://doi.org/10.1093/jlb/lsv051>
29. Maslen, H., Douglas, T., Kadosh, R. C., Levy, N., & Savulescu, J. (2014). Thereregulation of cognitive enhancement devices: Extending the medical model. *Journal of Law and the Biosciences*, 1(3), 68–93. <https://doi.org/10.1093/jlb/lst003>
30. Mehlman, M. J., & Li, T. Y. (2014). Ethical, legal, social, and policy issues in the use of genomic technology by the U.S. Military. *Journal of Law and the Biosciences*, 1(3), 244–280. <https://doi.org/10.1093/jlb/lst021>

31. Meynen, G. (2017). Brain-based mind reading in forensic psychiatry: Exploring possibilities and perils. *Journal of Law and the Biosciences*, 4(2), 311–329. <https://doi.org/10.1093/jlb/lsw006>
32. Nicol, D., Bubela, T., Chalmers, D., Charbonneau, J., Critchley, C., Dickinson, J., Fleming, J., Hewitt, A., Kaye, J., Liddicoat, J., McWhirter, R., Otlowski, M., Ries, N. M., Skene, L., Stewart, C., Wagner, J., & Zeps, N. (2016). Precision medicine: Drowning in a regulatory soup? *Journal of Law and the Biosciences*, 3(2), 281–303. <https://doi.org/10.1093/jlb/lsw018>
33. Palacios-González, C., & Medina-Arellano, M. J. (2017). Mitochondrial replacement techniques and Mexico's rule of law: On the legality of the first maternal spindle transfer case. *Journal of Law and the Biosciences*, 4(1), 50–69. <https://doi.org/10.1093/jlb/lsw065>
34. Polcz, S., & Lewis, A. (2016). CRISPR-Cas9 and the non-germline non-controversy. *Journal of Law and the Biosciences*, 3(2), 413–425. <https://doi.org/10.1093/jlb/lsw016>
35. Prince, A. E. R. (2016). Prevention for those who can pay: Insurance reimbursement of genetic-based preventive interventions in the liminal state between health and disease. *Journal of Law and the Biosciences*, 2(3), 365–395. <https://doi.org/10.1093/jlb/lsv008>
36. Robertson, J. A. (2014). Egg freezing and egg banking: Empowerment and alienation in assisted reproduction. *Journal of Law and the Biosciences*, 1(3), 113–136. <https://doi.org/10.1093/jlb/lsw002>
37. Robertson, J. A. (2016). Other women's wombs: Uterus transplants and gestational surrogacy. *Journal of Law and the Biosciences*, 3(1), 68–86. <https://doi.org/10.1093/jlb/lsw011>
38. Sachs, R. E., & Edelstein, C. A. (2016). Ensuring the safe and effective FDA regulation of fecal microbiota transplantation. *Journal of Law and the Biosciences*, 2(3), 396–415. <https://doi.org/10.1093/jlb/lsv032>
39. Scholten, M., & Ottow, A. (2014). Institutional design of enforcement in the EU: The case of financial markets. *Utrecht Law Review*, 10(5), 80–91. <https://doi.org/10.18352/ulr.302>
40. Schoukens, H., & Cliquet, A. (2014). Mitigation and compensation under EU nature conservation law in the flemish region: Beyond the deadlock for development projects? *Utrecht Law Review*, 10(2), 194–215. <https://doi.org/10.18352/ulr.278>
41. Scurich, N., & Appelbaum, P. (2016). The blunt-edged sword: Genetic explanations of misbehavior neither mitigate nor aggravate punishment. *Journal of Law and the Biosciences*, 3(1), 140–157. <https://doi.org/10.1093/jlb/lsv053>
42. Suter, S. M. (2016). In vitro gametogenesis: Just another way to have a baby? *Journal of Law and the Biosciences*, 3(1), 87–119. <https://doi.org/10.1093/jlb/lsv057>
43. Tallapragada, N. P. (2016). Off-patent drugs at brand-name prices: A puzzle for policymakers. *Journal of Law and the Biosciences*, 3(1), 238–247. <https://doi.org/10.1093/jlb/lsw008>

44. van den Bos, K., van der Velden, L., & Lind, E. A. (2014). On the role of perceived procedural justice in citizens' reactions to government decisions and the handling of conflicts. *Utrecht Law Review*, 10(4), 1–26. <https://doi.org/10.18352/ulr.287>
45. van der Woude, M. A. H., & van Berlo, P. (2015). Crimmigration at the internal borders of Europe? Examining the schengen governance package. *Utrecht Law Review*, 11(1), 61–79. <https://doi.org/10.18352/ulr.312>
46. Vervaele, J. A. E. (2013). Ne bis in idem: Towards a transnational constitutional principle in the EU? *Utrecht Law Review*, 9(4), 211–229. <https://doi.org/10.18352/ulr.251>
47. Wexler, A. (2016). A pragmatic analysis of the regulation of consumer transcranial direct current stimulation (TDCS) devices in the United States. *Journal of Law and the Biosciences*, 2(3), 669–696. <https://doi.org/10.1093/jlb/lsv039>

