

Article

Legal Capacity and Access to Justice: The Right to Participation in the CRPD

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Abstract: This article provides an applied analysis of Article 12 (Equal recognition before the law) of the Convention on the Rights of Persons with Disabilities (CRPD) and Article 13 (Access to justice) in the context of Article 6 (Women with disabilities). Recent literature on the CRPD has extended the analysis of Article 12 to consider its broader relevance for the interpretation of Article 13. The interaction between Article 12 and Article 13 is an emerging issue in CRPD debates. This article argues that the CRPD must be interpreted in light of current human rights theory. It provides a case study of the interaction between Article 12 and Article 13 based on the facts recited in the Court of Appeal case in the United Kingdom (*RP v Nottingham City Council* (2008)) and RP's petition to the European Court of Human Rights (*RP and Others v United Kingdom* (2012)). The analysis shows that CRPD principles could and should have been applied in RP's case. It concludes that current practices excluding people with disabilities from participation in legal proceedings are contrary to the CRPD.

Keywords: convention on the Rights of Persons with Disabilities; Article 12; Article 13; capacity; participation

1. Introduction

The Convention on the Rights of Persons with Disabilities (CRPD) continues to generate vigorous debate, particularly with respect to Article 12 (Equal recognition before the law) [1–18]. The Article 12 debate is characterized by a marked diversity of opinion and sometimes heated disagreement. In a contested intellectual environment, there is a danger that the contribution of the CRPD may be missed if the “philosophical and moral assumptions underpinning the formal structures of the law” remain unexamined [15]. As the scope and reach of Article 12 becomes more clearly defined, previously taken for granted structures in the law are thrown into sharp relief. This is especially so when Article 12 is considered in tandem with other articles in the CRPD. The purpose of this article is to consider the interaction between Article 12 (Equal recognition before the law) and Article 13 (Access to justice). The fundamental importance of the interaction between these two articles has been highlighted by Eilionoir Flynn, Lucy Series and Eilionoir Flynn and Anna Lawson [19–21]. Other CRPD scholars have commented on the application of Article 13 in the criminal law [14–18,22–25]. This article considers the application of Article 13 (Access to justice) in family law proceedings. Specifically, it considers the question of instructional capacity through an analysis of the factual situation in the English case of *RP v Nottingham City Council* (2008) and RP's petition to the European Court of Human Rights [26]. RP's case illuminates the way taken for granted attitudes, practices and processes in the law compound the discrimination experienced by people with disabilities. The effect of such practices is the exclusion of people with disabilities from participation in the law. Without participation, access to justice is limited and the right to equal recognition before the law is compromised. Considering RP's case in light of the CRPD provides an opportunity to illustrate how a “shift from substituted decision making to supported decision making” would enable RP's active participation in the legal process consistent

with Article 13 (Access to Justice) ([26], para. 22). The argument advanced in this article is that RP's involvement in the legal proceedings could and should have been maintained. Rather than being excluded on the basis of a lack of mental capacity, RP should have been provided with appropriate information and support. In addition, institutional structures and processes should have been altered to accommodate her disability. The interpretation of Article 12 put forward by the Committee on the Rights of Persons with Disabilities asserts that determinations that a person "lacks mental capacity for the purposes of the law" are not permitted in a human rights compliant framework [27]. If the latter proposition is accepted, a profound shift in current practice is required.

RP's case is significant because it illustrates the process and consequence of exclusion from the law. RP was a 21-year-old young woman with a mild intellectual disability who gave birth to a premature infant with significant health problems. After a period of intensive hospital treatment, the health authority initiated formal care proceedings, seeking to place RP's child with a foster family. At that time, it was determined that RP lacked the capacity to instruct her appointed solicitor. A *guardian ad litem* or guardian solicitor was appointed to represent RP in the proceedings. RP and her family contested the subsequent placement [26].

The litigation surrounding RP provides a "case study" for the analysis of CRPD principles. Considered from a CRPD perspective, three CRPD articles are directly relevant to RP's situation: Article 6 (Women with disabilities) recognises the multiple discriminations faced by women and girls; Article 13 (Access to justice) requires state parties to facilitate the participation of people with disabilities in all legal proceedings; and Article 12 (Equal recognition before the law) asserts the right to recognition before the law [1]. The analysis of substitute decision making in CRPD General Comment 1 is also relevant for the analysis of RP's case [27]. It may be the case that had appropriate support been provided from the outset, RP may have been better assisted in the care of her child. With respect to the legal proceedings, had support been provided, RP could have understood the legal context, contested the evidence, expressed her point of view and challenged the decision to remove her child. This does not mean that the outcome of the care proceedings should have been different ([26], paras. 19–20). The point being made is that the grounds upon which a child is removed should be clear and untainted by discrimination and preconceived ideas about disability and motherhood. To this end, the CRPD requires the provision of support to enable the full involvement of people with disabilities in the processes of the law, including the modification of institutional practices that work to exclude people from participation in such processes. Ultimately, what is at stake is the democratic ideal of full participation in society for people with disabilities. As the work of Tom Tyler has shown, procedural justice and due process play a vital role in ensuring individual and community acceptance and confidence in legal decisions and processes [28–30]. Procedural justice informs contemporary approaches to justice and complements the human rights approach. The current practice of excluding people with disabilities from legal proceedings following a determination of instructional incapacity, as occurred in RP's case, no longer accords with the expectations of a modern community.

The argument for universal participation is advanced in the five parts of this article. Part 2 provides a brief sketch of the evolution of human rights thinking from the 20th to 21st centuries showing how international human rights law and critical disability theory entwine to illuminate the meaning and significance of the CRPD. Part 3 provides an extended account of RP's case. Part 4 provides an analysis of RP's situation in light of Article 12, showing that the assessment of instructional capacity in the first instance was not conducted according to law. In keeping with CRPD General Comment 1, the extended analysis in Part 5 concludes that tests for capacity are not compatible with the CRPD ([27], para. 25 (i)). In summary, this article illustrates how the principle of universal legal capacity can be pursued by showing how the CRPD ethos of social and legal participation could and should have been applied in RP's case.

2. Social and Legal Inclusion as a Human Right

Gerard Quinn argues that the CRPD requires scholars to re-conceptualise the philosophical and legal relationships thought to constitute citizenship, entitlement and the power and responsibilities of the state [15]. Quinn alludes to the conceptual developments in international human rights law that recognise human rights as entitlements adhering to socially, economically and spiritually contextualised human persons ([14]; [31], p. 31; [32], p. 274). In human rights documents, recognition of the human context is crystallised in the statement that “all human rights are universal, indivisible, interdependent and interrelated” [33]. Much of the human rights discourse since the World Congress in 1993, when the latter phrase was coined, has sought to articulate the interconnectedness of human rights and their relevance for the human condition ([34], p. 110). For example, Amartya Sen posits a contemporary analysis of justice as one that seeks the actual realisation of rights in society (understood as integrated rights) ([35], p. 9). The emergence of a complex, contextualised account of human rights is also evident in the medical understanding of the social determinants of health and the economic appreciation of development [36,37]. In human rights terms, these ideas manifest in the principle of substantive equality. Accordingly, “...the notion of equality in international law has (also) changed...with the conceptual shift from formal equality to substantive equality” ([27], para. 14). The disability rights movement has taken the theoretical analysis of interconnected human rights a step further by appreciating the intersections between human rights theory, feminism, critical theory, critical disability studies, and the notion of embodiment [14,22]. Disability theory responds to the documentation of the mechanisms and effects of discrimination, marginalisation, inequality and exclusion [38,39]. The direct involvement of people with disabilities in the drafting of the CRPD also underpins the human rights logic expressed in the CRPD [2]. The CRPD recognizes social and legal *exclusion* as the basis of discrimination against people with disability (author’s emphasis). The CRPD is oriented toward social and legal inclusion and recognises social and legal inclusion as a tool for reintegration in society.

The emphasis in the CRPD on inclusion and participation is evident in the “social model of disability”, the requirement of equal access and equality before the law, the inclusion of reasonable accommodation and the overarching concern with participation in society as a measure of social change ([38]; [40], p. 15). Recognition of the barriers experienced by people with disability has informed the new approach. In CRPD terms, inclusion is the key to the realisation of human rights for people with disabilities. CRPD principles point to the proposition that the starting point for all decisions or procedures in the law and elsewhere is the involvement of people with disabilities [14].

3. The Facts of RP’s Case

This section provides a brief summary of the facts in RP’s case based on the European Court of Human Rights (ECrHR) judgment [26]. As is noted above, RP was a young woman of 21 years of age with a mild intellectual disability who gave birth to a 27-week-old premature baby ([26], para. 7). RP had not known she was pregnant and was not in a relationship with the father of the child ([26], para. 7). She lived with her family in modest circumstances. The family was “known” to the health authority. RP’s baby had serious health problems requiring 24-hour intensive care. RP visited the hospital and participated in the care of her child but did not establish a good rapport with hospital staff ([26], para. 8). The staff reported that she “only” attended for 1–2 hours a day and seemed unable to complete basic care tasks ([26], para. 9). It appears that the health authority did not view other family members as suitable caregivers. It is not clear from the documentation whether the practical and emotional difficulties any young woman would face in RP’s situation were considered. The local authority was concerned about RP’s ability and motivation to care for her child, and conducted a “parenting assessment” ([26], para. 10). The baby was placed in temporary foster care. Over the following seven months, RP participated in parenting education and supported contact visits. Following another parenting assessment, the health authority instigated care proceedings for permanent foster placement, contrary to RP’s (and her family’s) wish to keep her child ([26], para. 11).

In anticipation of the care proceedings, it was arranged that RP be represented by a publically funded, independent solicitor. After their initial interaction, RP's solicitor raised serious concerns about RP's ability to understand the advice she was given ([26], para. 12). RP's "capacity to instruct" was assessed by a clinical psychologist, who advised the appointment of a *guardian ad litem* or litigation guardian. In English law, the appointment of a litigation guardian, pursuant to the Mental Capacity Act is the responsibility of the Official Solicitor ([41], s51(2)(e)). The role of the litigation guardian is to represent a person who lacks instructional capacity on a best interests basis ([26], para. 13). RP's original (independent) solicitor was appointed as her *guardian ad litem*.

The care proceedings resulted in the permanent placement of RP's child. RP appealed unsuccessfully in the UK courts. The Official Solicitor did not oppose the making of the care order. Acting in accordance with the best interest obligation, therefore, the litigation guardian did not put RP's case to the court nor contest the evidence ([20], p. 68). RP and her mother, father, and brother subsequently brought parallel applications before the ECtHR, with the Equality and Human Rights Commission (United Kingdom) intervening [26]. RP argued, unsuccessfully, that her rights under Articles 6, 8, 13 and 14 of the European Convention on Human Rights (ECHR) had been breached [42]. While the ECtHR accepted that RP had litigation capacity for its purposes, the court found that the earlier appointment of the guardian was appropriate; that further assessment of RP's capacity had been taken during proceedings; that there were appropriate and effective means in place to enable RP to challenge the involvement of the guardian; that it would not have been practical to review RP's capacity in the courts; that the solicitor had taken proper steps to make RP aware of the involvement of the Official Solicitor and the nature of the guardian's role; and that the guardian solicitor was not obliged to advance the argument desired by RP, or to ensure that her views were put to the court ([26], paras. 69–76; [43]). Curiously, the CRPD was mentioned in support of the court's findings but was not discussed at length [44].

4. CRPD Based Analysis

Article 13—Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 13 (Access to justice) requires States Parties "to ensure effective access to justice for persons with disabilities on an equal basis with others" [1]. This is to be achieved "through the provision of procedural and age appropriate accommodations", applies to "all legal proceedings" and to both direct and indirect participatory roles ([1], Article 13(1)). As is noted above, RP was excluded from participation in the legal proceedings in the UK on the basis that she lacked instructional capacity. While Article 13 is silent about the notion of instructional capacity, CRPD General Comment 1 indicates that it is correct to read Article 13 in tandem with Article 12 [4,5,27].

Article 12 invokes the proposition that people with disabilities should never be excluded from participation in legal proceedings on the basis of disability. According to General Comment 1, "(d)enial of legal capacity must not be based on personal traits such as gender, race, or disability, or have the purpose or effect of treating the person differently" ([27], para. 9). Moreover, while individuals may have different cognitive capabilities, a person's lack of mental capacity must never be the basis for a denial of legal capacity ([27], paras. 13–14). This means that both direct and indirect discrimination

on the basis of disability are not permitted under the CRPD. Tests for mental capacity offend the principle of indirect discrimination because they will have a disproportionate impact on people with cognitive impairment ([27], para. 9). The principle of indirect discrimination, therefore, creates a conundrum for the operation of laws that rely on determinations of mental capacity. If capacity testing is unacceptable, how will the law operate? Answering this question requires a close examination of the text of Article 12.

4.1. Article 12(1)—Recognition as a Person before the Law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

Article 12 is pivotal to the CRPD's conception of social and legal inclusion. Article 12(1) affirms the universal right to "recognition everywhere as persons before the law" without exception or limitation ([3], p.124).

4.2. Article 12(2) on an Equal Basis with Others

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

Article 12(2) recognises that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life" [1]. Legal capacity refers to the dual concepts of legal standing (where the person who is recognised as a holder of rights) and legal agency (where the person is recognised as being able to "create, modify or end legal relationships" ([27], para. 12; [45], p. 23). A person with legal standing is entitled to the full protection of his or her rights by the legal system. Legal capacity therefore encompasses the right to be recognised as a person before the law and the subsequent right to have one's decisions legally recognised [3]. In CRPD terms, protection of the law is not sought through withdrawal from the law, but through active participation in legal processes. In short, the CRPD promotes a radical revision of the law. Its approach stands in contrast with laws that operate on the assumption that mental incapacity is a threshold requirement or necessary precondition of legal capacity.

Article 12(2) recognises that people with disabilities are frequently denied legal capacity on discriminatory grounds ([27], para. 8). Typically, legal capacity is denied on the basis that the person has a disability (the status approach), that the person makes an unpalatable decision (the outcome approach) or that the person's reasoning is faulty (the functional approach) ([27], para. 15). A key difficulty for the CRPD approach to universal legal capacity is that modern legal systems promote functional tests of capacity as enlightened, objective standards that are capable of equal application to all people ([27], para. 9). RP's case illustrates Amita Dhanda's substantive point that capacity assessments are typically overlaid with discriminatory attitudes and practices [2]. The first instance of discrimination in RP's case was the erroneous assessment of capacity.

4.3. The Assessment of Capacity in RP's Case

In English law, the relevant standard for capacity is found in Articles 2 and 3 of the Mental Capacity Act 2005 (UK) [41]. The standard for instructional capacity is found in the Court of Appeal decision of *Masterman-Lister (Masterman-Lister v Brutton & Co (Nos 1 and 2))* [46].

Article 2 (1) of the Mental Capacity Act states:

For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

Article 3 (Inability to make decisions) of the Mental Capacity Act states:

- (1) For the purposes of Section 2, a person is unable to make a decision for himself if he is unable—
 - (a) to understand the information relevant to the decision,
 - (b) to retain that information,
 - (c) to use or weigh that information as part of the process of making the decision, or
 - (d) to communicate his decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

Article 3 represents a codification of the common law of capacity as developed in the English case law in the second half of the twentieth century, and is a standard that has been adopted in most Anglo-American jurisdictions [47,48].

In *Masterman-Lister (Masterman-Lister v Brutton & Co (Nos 1 and 2))*, Lord Justice Chadwick considered how instructional capacity should be assessed. His Honour stated that capacity must be assessed contemporaneously and in relation to the relevant transaction or decision “What is required is the capacity to understand the nature of the transaction involved *when it is explained*” ([46], per Chadwick LJ at para. 58). His Honour continues:

...the test to be applied, it seems to me, is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisors and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law whether substantive or procedure should require the imposition of a next friend or guardian ad litem...([46], per Chadwick LJ at para. 75).

According to Chadwick LJ, a person is considered able to understand the information relevant to the decision if he or she can understand an explanation about that information in broad terms and simple language. Moreover, he or she should not be regarded as unable to make a rational decision merely because it is not a decision that another person with ordinary prudence would make.

In RP’s case, a clinical psychologist assessed her instructional capacity independent from the informational context. The psychologist’s report concluded that RP had a significant learning disability, stating that:

Because of the difficulties [RP] has in understanding, processing and recalling information, I believe that she will find it very difficult to understand the advice given by her solicitor. She will not be able to make informed decisions on the basis of this advice, particularly when this involved anticipating possible outcomes. It would be appropriate for the Official Solicitor to become involved ([26], para. 13).

This passage indicates that the clinical psychologist applied an incorrect legal test. Many individuals who are permitted to instruct solicitors have a general understanding of the objectives and purpose of legal proceedings, but would be unable to follow the detail of legal argument. To provide expert advice on such matters is the very purpose of seeking legal advice. The discriminatory basis of RP’s assessment is evident. First, an assessment of capacity should never occur in isolation from the information that is relevant to the decision. Second, there should always be an opportunity for

explanation. Finally, the psychologist placed the bar of understanding too high. What is required is an ability to understand the general nature of the transaction.

4.4. Substituting RP's Judgement

The consequence of the determination that RP lacked instructional capacity was the appointment of a substitute decision maker in the form of a *guardian ad litem*. Once the guardian was appointed, RP was considered to be a "protected party" and was barred from giving instructions ([26], para. 28). One of the major achievements of CRPD General Comment 1 is the clear definition of what constitutes substitute decision-making. Substitute decision-making occurs when:

- (a) The legal capacity of the person is removed;
- (b) A substitute decision maker is appointed by another person without the consent or approval of the person with a disability; and
- (c) The substitute decision-maker is required to make decisions on a best interest basis ([27], para. 27).

Substitute decision-making, as defined in the General Comment, is contrary to CRPD principles. In RP's case, the appointment of *guardian ad litem* was made without RP's knowledge or consent, because RP was never effectively informed that the appointment had been made. RP believed (mistakenly) that the solicitor was acting as an independent advocate, when, in fact, the solicitor had been appointed as the litigation guardian. The failure to effectively inform RP that she was subject to special arrangements lies at the heart of procedural justice deficit in the justice process.

4.5. Best Interests

The special arrangement also involved the substitution of RP's wishes with a best interest test. CRPD General Comment 1 makes it clear that "(T)he 'best interests' principle is not a safeguard which complies with Article 12 in relation to adults" ([27], para. 21). It states that "the 'will and preferences' paradigm must replace the 'best interests' paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others" ([27], para. 21). RP was represented in the care proceeding by a litigation guardian on a "best interest" basis. Aside from the immediate observation that the CRPD does not support a best interest approach, the court's discussion of best interests reveals that in RP's case, RP's best interests were conflated with the best interests of her child. As is the norm in the Official Solicitor's scheme, RP's child was not represented in the proceedings. The matter of the child's representation is a separate issue that is beyond the scope of this article. However, in RP's case, the Official Solicitor appeared to interpret the responsibility of the litigation guardian as including consideration of the best interests of the child. It was assumed that it was in RP's best interests for the child's best interests to dictate the outcome of the proceedings. The conflation of best interest between mother and child reveals the role that an ideal standard of motherhood played in determining the outcome. That the legal actors involved were willing to interpret RP's most intimate responses to the experience of motherhood, in her absence and without consultation, and with full knowledge of her desire to mother the child, encapsulates the loss of dignity that is concomitant of the denial of legal capacity. Both the UK court and the ECtHR accepted without question the appropriateness of the substitute decision-making arrangement.

4.6. Article 12(3)—The Obligation to Provide Support

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

The CRPD's answer to the traditional system of substitute decision-making is the introduction of "measures to support legal capacity". The CRPD requires all substitute decision-making arrangements to be replaced by supported decision-making. The requirement in Article 12(3) is expressed as

the requirement that individuals with disabilities are entitled to “support...in exercising their legal capacity” [1] The CRPD debate has tended to focus on “supported decision-making” in its various forms rather than the idea of “support for legal capacity” which has a broader meaning [4]. Support for legal capacity should enable persons with a disability to exercise their legal capacity and should otherwise give effect to the decisions of people with disabilities. Measures of support for capacity encompass “informal and formal support arrangements of varying types and intensity” ([27], para. 17), with the overarching requirement that such arrangements are suitable for the person, desired by them and subject to appropriate safeguards in accordance with Article 12(4) ([27], para. 20).

In RP’s case, the independent solicitor was appointed as her *guardian ad litem*. RP argued that she was never informed of the appointment. At the time, she believed that her solicitor continued to act on her behalf. RP claimed that no one explained the situation to her. She did not know that she could challenge the determination of capacity or challenge the appointment of the Official Solicitor. The Official Solicitor claimed that RP was informed of these matters by way of a standard letter that RP received in the post ([26], paras. 14–15). The letter set out the legal matters and the consequences of the determination that RP lacked instructional capacity. The letter was written in complex and technical language. It seems strange that such a letter was posted to a person who is known to have a learning disability, as a means of communication. In the absence of a verbal or plain language explanation, it seems unlikely that RP could have understood the information in that form.

It cannot be concluded that because RP did not understand the letter, she lacked the capacity to understand the information. Rather, it illustrates the importance of appropriate explanation and support. Without appropriate explanation, most people are unable to understand complex legal concepts. It is significant in the context of the letter that consideration of RP’s functional literacy appears to be absent. Moreover, because RP continued to have some contact with her solicitor, she assumed the original instructing relationship continued. In the absence of a proper explanation of the changed relationship, RP was prevented from considering how best to proceed, or whether to seek additional assistance. She was not made aware that the scheme allowed for the appointment to be revoked if there was a challenge to the determination of capacity, if it were determined that the person had capacity, or it was determined that the person had regained capacity. Without such information and advice, RP was effectively prevented from triggering the “safeguards” that were embedded in the Official Solicitor scheme. The practices of the Official Solicitor rendered the rights embedded in the scheme illusory.

4.7. Article 12(4)—Safeguards

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.

RP’s case illustrates the importance of surrounding “measures that support capacity” with appropriate safeguards as outlined in Article 12(4). The question of how the safeguards requirement in 12(4) should be satisfied is yet to be fully addressed in the CRPD literature [3,4]. Article 12(4) safeguards require that measures supporting legal capacity are directed toward recognition of the person’s “rights, wills and preferences”. Article 12(4) therefore speaks to the quality of support relationships and mechanisms. It aims to ensure that interactions with the people with a disability are free “from fear aggression threat deception or manipulation” ([27], para. 22). It contemplates the introduction of both formal and informal arrangements to monitor such relationships.

A similar point was made in the submissions of the Equality and Human Rights Commission (United Kingdom) to the ECtHR. The Commission submitted that:

...Articles 6, 8 or 14 could be breached if limitations were placed on a learning-disabled litigant's right of access to a court which were not strictly necessary, or if a litigation friend did not take sufficient positive steps to ensure that the specific needs and interests of such a parent were properly taken into account. In particular, it was important that strong procedural safeguards existed to ensure that the parent's views were properly, fully and fairly advanced before the court. In order for this to be the case, it was essential that decisions about the parent's litigation capacity should not be taken on the basis of a joint report part funded by an opposing party in family litigation; that the question of capacity be kept open, with a formal institutional/legal mechanism for it to be challenged by the learning-disabled person and reviewed if any evidence suggested it could be wrong or that the position had changed; and that the case put forward by the Official Solicitor or other litigation friend should be focused solely on the needs of the parent ([40], para. 60).

In RP's case, the Official Visitor scheme included processes of appeal and review. Such processes are a typical feature of many statutory schemes and are commonly referred to as safeguards. To what extent such mechanisms constitute effective safeguards, sufficient to satisfy 12(4), is a matter of evaluation. In RP's case, the safeguards in the Official Visitors scheme were rendered meaningless by the absence of appropriate decision-making support for RP.

4.8. Reasonable Accommodation

Article 2 (Definitions)

Reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden where needed in particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

Articles 12(3) and 12(4) mandate special, positive measures for the support of legal capacity, governed by the requirement of "reasonable accommodation" [1] (Article 2 Definitions).

Considered in light of RP's case, the reasonable accommodation requirement imposes a positive obligation to provide specific measures that support RP's legal capacity and secure her participation in the legal proceedings [32]. Under the reasonable accommodation principle, RP would have been entitled to additional explanation, communication and support with respect to all legal decisions and processes. Maintaining RP's effective role in the legal proceedings could have been achieved by (i) providing an adequate explanation to RP of her legal circumstances and implications of the clinical psychologist's determination that RP lacked litigation capacity; (ii) ensuring that RP had the opportunity to challenge the determination; and (iii) ensuring that RP was properly represented by an independent solicitor or advocate.

Without limiting the range of possible solutions that might be found, the following suggestions address the practical implications of the obligation to provide support outlined in the previous paragraph. The first point could be achieved by ensuring that there was a "legal interpreter" or an advocate who would assist RP to understand her legal situation. The second point could be achieved by ensuring that an independent opinion was sought, and that the determination of capacity was reviewed by an independent authority or tested in a court of law. The third point could be achieved by enabling RP to appoint an independent solicitor who was willing to advocate on her behalf. The deciding factor should be the strategy preferred by RP.

5. Discussions

Tom Tyler's work emphasises the importance of considering the perspective of the person who is at the centre of the legal process [30]. Considered in light of the CRPD, procedural justice principles

provide a framework for implementing Article 13 obligations. Understanding the philosophical underpinnings of the CRPD assists in appreciating the way in which Article 12 and 13 combine to extend the principle of universality to individuals with disability through the requirement for support and participation. In RP's case, the determination of incapacity resulted in her exclusion from the legal process. The absence of legal standing was interpreted as a requirement that RP be removed from participation in the proceedings. It was assumed that her current thoughts, opinion and aspirations were irrelevant. Article 12 indicates that the person's legal capacity must always be respected. The person must always be involved. If a person is not involved, the CRPD requirement of making decisions in accordance with the "rights, will and preferences" is difficult to meet. If they are not involved, only the person's past preferences are available for consideration, not their current views or their response to changing circumstances. In RP's case, once it was determined that she lacked instructional capacity, she was no longer viewed as a participant in the proceedings in any meaningful way. RP's preference for the child to be placed in her care was made known to the court, but not pursued. Her second preference, that the child be placed with her family, was dismissed from the outset. RP was never involved in active discussions about possible options and solutions. This dynamic suggests that as the adversarial format of all legal proceedings is modified by active negotiation between the parties or is imbued with mediation strategies, the disadvantage associated with exclusion from legal proceedings on the grounds of incapacity is increased.

The argument advanced in this article is that the CRPD should be interpreted in light of critical theory's challenge to the reification of disembodied "reason" or rational capacity as the defining characteristic of the human personality. The human person in modern philosophy is imbued with social, cultural and emotional experiences and relationships [49]. Accepting a proposition of relational autonomy allows for a reading of Article 12(2) that challenges the conclusion that only independent rational beings are entitled to participate in the law. Instead, the contextualised perception of each individual is recognised as part of subjective reality that must be incorporated into the legal landscape. In RP's case, the practical consequence of the determination of incapacity was that RP did not participate in the original legal proceedings. The European Court of Human Rights compounded the legal exclusion by basing its decision on an assessment of the outcome of the earlier proceedings, not on the processes that should have ensured RP's access to justice. A procedural justice focus would have altered the court's reasoning.

RP's case highlights a point of conceptual confusion associated with the notion of mental capacity. Threaded through disability related literature is a persistent inference that one's "mental capacity" is a fixed attribute that can be determined objectively without reference to the decision-making or informational context. This is out of step with the CRPD and with the modern law of capacity. Mental capacity must always be determined in the context of the provision of relevant information and in a way that takes into account the particular circumstances of the person. The CRPD recognises that "understanding" is never a stand-alone concept. It is influenced by a person's ability to receive and comprehend, in the sense of "make sense of", the information. For example, a person who is frightened or stressed may be unable to hear or comprehend basic instructions. A person may not comprehend information that is provided in an unfamiliar language. Information may be incomprehensible if it is related to knowledge or facts that are unknown. In short, mental capacity is always subjective, information driven and context dependent. A failure to comprehend does not indicate an inability to do so, but points to possible deficits in the information or its delivery.

Article 12 is important because it requires the law to engage with the subjective, contextual nature of decision-making. It requires support measures that are tailored to the needs of each individual. Above all, CRPD based decision-making requires the involvement of people with disabilities. A re-orientation toward support for legal capacity as required by the CRPD can be summarised as the shift toward the principles of support, participation and procedural justice. CRPD requirements cannot be met unless the person is present and involved. When support is understood in

the light of the principle of participation, the basic proposition in modern law that people who lack the requisite understanding should not be permitted to participate in the law evaporates.

6. Conclusions

In RP's case, the interaction between Article 12 and Article 13 occurs in the context of Article 6 (Women with disabilities). Article 6 recognises that "women and girls with disabilities are subject to multiple discrimination" ([1], Article 6). It requires states parties to take measures to ensure the full and equal enjoyment by the name of all human rights and fundamental freedoms ([1], Article 6). RP is multiply disadvantaged. She is far from the ideal rational legal subject of classical liberal theory. Feminist legal scholarship has long observed that when "freedom" is inscribed as the inalienable and inherent right of a legally privileged, atomistic, individual citizen, the call to equality will inevitably challenge basic precepts in the law ([19], p. 22). RP's case underscores this observation. Eilionoir Flynn and Anna Arstein-Kerslake argue that the CRPD requires "a radical rebalancing of autonomy and protection" ([3], p. 127). This article has argued that the radical rebalancing required by the CRPD is one that secures the effective, voluntary participation of people with disabilities in the legal process. RP was not in need of protection in the traditional sense. She was in need of effective, accessible, honest, information. She was in need of support for her legal capacity. She was in need of support from her family, who were also excluded. Had the necessary information been provided to her, in a timely way, a more suitable legal outcome may have been reached, and the ongoing litigation avoided. In retrospect, it can be seen that the (erroneous) determination of instructional incapacity not only excluded RP from the legal proceedings, but reinforced the initial premise of the proceedings which was the assumption that RP was and always would be, an unsuitable mother. The determination of instructional incapacity foreshadowed and secured the pre-ordained outcome—that RP's child would be permanently placed with another family. From a CRPD perspective, if appropriate support had been provided, RP could have taken her place as an active participant in the legal proceedings. Ultimately, it is her right to legal capacity that underpins her right to access to justice on an equal basis with others.

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Abbreviations

The following abbreviations are used in this manuscript:

CRPD	Convention of the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights

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