

Ensuring and enforcing the right of access to justice for persons with disabilities in EU law, under the UNCRPD and beyond - outline
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I. The notion of “access to justice”

- The CRPD is exceptional in that it refers specifically to “access to justice” in its Article 13; international human rights treaties normally use such terms as “effective remedy”; “prompt recourse and effective recourse”; “right to take proceedings to court” or “fair and public hearing”.
- Access to justice may be defined narrowly as “the possibility for an individual to bring any claim before a court and obtain a decision from the court on that claim,” or more broadly as “a right to have the case heard and adjudicated in accordance with the standards of fairness and justice.” In the latter sense it is implicit that it is not sufficient that a court hears a claim, it must also do it in a fair and just manner.
- Access to justice may refer more specifically to a system of legal aid for the more disadvantaged members of society, including persons with disabilities.
- The notion of access to justice may be seen as a stand-alone independent right, regarding rights and obligations generally or as an intrinsic element of other substantive rights; in the latter sense it can be said that all human rights have a procedural component.
- Access to justice implies a right to obtain reparation for a human rights violation; such a right to redress may include, depending on the circumstances, a duty to investigate, a duty to punish the perpetrators, a duty to provide reparation, a duty to prevent further violations etc.
- Narrowly, access to justice refers to judicial protection; more broadly it refers to all public authorities, not limited to courts, which perform a dispute settlement function.
- The right of access to justice may be subject to limitations which are acceptable as long as they have a compelling justification:
 - formal restrictions: systems of prior authorisation (for vexatious litigants), or immunities from suit that some professional categories enjoy,
 - procedural restrictions, such as time limits or limitation periods.
 - practical and financial considerations such as court fees or the cost of hiring a lawyer.

II. Article 13 of the CRPD on access to justice

Article 13 may be broken down into the following components:

- Effective access to justice on an equal basis with others.
- Effective access to justice at all phases of the administration of justice, including at preliminary stages, such as initial investigations.
- Applicable to both direct and indirect participants, including witnesses.
- A right to receive procedural and age-appropriate accommodations to facilitate access to justice.

- An obligation to provide training to those working in the administration of justice, including police and prison staff, in order to help ensure effective access to justice.
- Concluding Observations on the report of China: the Committee asked the state to make sure legal aid service centres providing assistance to persons with disabilities are adequately funded and independent. The Committee also suggested that persons with disabilities participate in judicial proceedings “as subject of rights and not as object of prosecution”.

Article 13 against the broader context of the Convention:

- Article 13 is closely related to Article 12, as full legal capacity is a prerequisite for any access of justice; the *travaux préparatoires* show that Article 13 was in fact incorporated in an earlier version of current Article 12 titled “Equal recognition of a Person before the Law”.
- The provisions regarding accessibility (Article 9 or Article 21 for example) have to be applied in the field of administration of justice.
- The obligations to take into account the specific situation of women and children with disabilities (Article 6 and 7), including in the context of justice.
- The obligation under Article 33 to establish a framework, including one or more independent mechanisms, to promote, protect and monitor the implementation of the CRPD, may also serve to advance the access to justice of persons with disabilities, for example by establishing a mechanism of monitoring places where persons with disabilities are detained.
- The Optional Protocol to the CRPD setting out an individual petition procedure.
- Many of the substantive rights included in the Convention contain a procedural obligation, such as Article 16 concerning freedom from exploitation, violence and abuse.

III. EU Law

Substantive EU law creating rights to persons with disabilities

- Article 26 CFR states that “the EU recognizes and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community”; Article 21 prohibits any discrimination on the basis of disability.
- The TFEU requires the EU to combat discrimination based on disability when defining and implementing its policies and activities (Art. 10) and gives it the power to adopt legislation to address such discrimination (Art. 19).

The Employment Equality Directive (2000/78/EC)

- Article 5 creates an obligation for employers to create a reasonable accommodation for disabled employees.

Procedural rights

- Article 47 of the Charter of Fundamental Rights: Right to an effective remedy and to a fair trial
- the right to judicial protection is one of the general principles of law;
- the right to judicial protection is applicable in relation to the “rights and freedoms guaranteed by the law of the Union”
- a formal entitlement to institute proceedings is not enough: to be effective, the right of access requires that practical impediments must not unduly obstruct the exercise of the right.
- The right to a fair trial covers explicitly access to Community courts as well as access to national courts and tribunals.
- Employment Equality Directive: Article 9(1): Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them...
- An individual may make a complaint to certain bodies established by the EU to investigate certain kinds of wrongdoing, such as the European Data Protection Supervisor, the European Parliament’s Committee on Petitions or the European Ombudsman; however, these bodies do not deliver a legally-binding outcome.
- Accession of the EU to the ECHR

The Employment Equality Directive (2000/78/EC)

The Directive includes a series of mechanisms to ensure effective remedies in the event of discrimination:

- reinforcing access to justice or to conciliation procedures (both in the form of individual access and by empowering organisations to exercise this right on behalf of a victim);
- shifting the burden of proof;
- protection of victims of discrimination against victimisation;

Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime

- purpose: to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings (Article 1)
- Victims of crime should be recognised and treated with respect without discrimination based on...disability... (Preamble, (9))
- States should ensure that victim with disabilities are able to benefit fully from the rights set in this Directive, on an equal basis with others, including by facilitating the accessibility to premises where criminal proceedings are conducted and access to information (Preamble, (15))
- Information and advice provided by competent authorities, victim support services and restorative justice services should be provided in a manner that be understood by the victim, in simple and accessible language; particular account should be

taken of difficulties in understanding or communicating which may be due to a disability of some kind such as hearing or speaking impediments (Preamble, (21))

- Emphasizes the gravity of violence committed in close relationships (Preamble, 18)
- Individual assessments should be undertaken taking into consideration the personal characteristics of the victim, including any disability, the type or nature and the circumstances of the crime, such as whether it is a hate crime etc. the purposes of such assessments is in order to determine the risk of secondary and repeat victimisation, of intimidation and of retaliation as well as eligibility for any special protection measures required (Preamble, (55))
- Disability hate crime at the ECHR: *Dordevic v Croatia*, 2012

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