

Access to Justice – UN CRPD and EU Law



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Overview

- ⊗ What do people with disabilities require to ensure effective access to justice?
- ⊗ Article 13, Convention on the Rights of Persons with Disabilities
- ⊗ EU Law on access to justice: accessibility, participation and administration of justice
- ⊗ Next steps: division of competencies

Effective Access to Justice

"Access to justice" is a broad concept, encompassing people's effective access to the systems, procedures, information, and locations used in the administration of justice. People who feel wronged or mistreated in some way usually turn to their country's justice system. In addition, people may be called upon to participate in the justice system, for example, as witnesses or as jurors in a trial. Unfortunately people with disabilities have often been denied fair and equal treatment before courts, tribunals, and other bodies that make up the justice system in their country because they have faced barriers to their access. Such barriers not only limit the ability of people with disabilities to use the justice system, but also limit their contributions to the administration of justice.

The ability to access justice is of critical importance in the enjoyment of all other human rights. For example, a person with a disability who feels that she or he has been denied the right to work may wish to turn to the justice system to seek a remedy. However, if the justice system fails to accommodate their physical, communication, or other disability-related needs, and/or expressly discriminates against her or him, then clearly denial of access to the justice system also results in denial of protection of the right to work. Similarly, a person with a disability who has been the victim of a crime may wish to report the crime to the police and press charges against the offender. However, if he or she is denied physical access to the police station, clear communication with the police, or access to information that is understandable, then that person may not be able fully to exercise her or his rights as a victim. These examples demonstrate that human rights are **indivisible, interdependent, and interconnected**.

Janet Lord, et al, Human Rights Yes! Action and Advocacy on the Rights of Persons with Disabilities (2009)

Three key components

- ⊗ Substantive justice which concerns itself with an assessment of the rights claims that are available to those who seek a remedy
- ⊗ Procedural aspects which focus on the opportunities and barriers to getting ones claim into court (or other dispute resolution forum)
- ⊗ Symbolic component of access to justice which steps outside of doctrinal law and asks to what extent a particular legal regime promotes citizens' belonging and empowerment

Substantive Justice

- ⊗ People with disabilities have a right to an effective remedy where they have been discriminated against on the basis of disability
- ⊗ Realms of employment, access to goods and services (including transport, education, social services, etc.), general equality/human rights claims
- ⊗ Presupposition: people with disabilities are recognised as persons before the law and entitled to make a claim in their own right

A Just Outcome?

In Re Marion (1992)

For the above reasons, which look to the risks involved in the decision, particularly in relation to the threshold question of competence and in relation to the consequences of a wrong assessment, our conclusion is that the decision to sterilise a minor in circumstances such as the present falls outside the ordinary scope of parental powers and therefore outside the scope of the powers, rights and duties of a guardian under section 63E(1) of the Family Law Act. This is not a case where sterilisation is an incidental result of surgery performed to cure a disease or correct some malfunction. Court authorisation in the present case is required.

Sinnott (2001)

I wish to emphasise that this is not a case in which the law has no remedy for the Plaintiff on the fraught and moving question of what is to be done for him in the future. This is a case where, in my view, the Plaintiff is not entitled to succeed in the single, limited avenue which, to the exclusion of all others, was pursued on his behalf. In particular, recent statutory provisions have effected a revolution in educational legislation which will undoubtedly be explored by some person with grievances about educational services, but this has not been done here. Similarly, the Court retains its wide jurisdiction to ascertain and enforce the rights of individuals, whatever their origin in law or in the Constitution.

Procedural Justice

- ⊗ Barriers getting claim into court include:
- ⊗ Physical, structural (legal process),
- ⊗ Communicative/language barriers,
- ⊗ Information and advice barriers
- ⊗ Prohibitive cost, uncertain outcomes
- ⊗ Finding the 'right' plaintiff
- ⊗ Court/tribunal setting not appropriate

Some people with disabilities face insurmountable obstacles to accessing justice. The authors of this text have visited institutions in countries which have ratified the Convention where there are obvious abuses taking place against people with mental health problems or intellectual disabilities. A benevolent human rights lawyer visiting such institutions may be in the frustrating position of not being able to do anything if the person with disabilities lacks the capacity to instruct a lawyer. In some countries, the director or staff member of the institution is also the guardian, a situation which creates an obvious conflict of interests.

Bartlett, Lewis and Thorold, *Mental Disability and the European Convention on Human Rights* (2007)

Symbolic Justice

- ⊗ Involvement of civil society (and DPOs) in bringing about a just society for PWD
- ⊗ Participation of PWD in all aspects of the justice system: witnesses, lawyers, judges
- ⊗ Role of the academy in promoting symbolic justice?

In my time doing social justice work, I have found that disability is something most people know very little about—and that includes seasoned, fierce and well-respected community organizers and activists. People usually think of disability as an individual flaw or problem, rather than as something partly created by the world we live in. It is rare that people think about disability as a political experience or as encompassing a community full of rich histories, cultures and legacies.

Mia Mingus, *Challenging the Framework: Disability Justice*
(2010)

Article 13 CRPD

- ❖ 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.

Negotiation: Third Session

Article 5: Obligations in relation to remedies

Each State Party to this Convention undertakes: To ensure that any person or class of persons whose rights or freedoms recognized in the Convention are violated shall have an effective remedy, whether the violation has been committed by persons or entities acting in an official capacity or by private persons or entities; To ensure that any person claiming such a remedy shall have his or her right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, including as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination; and To ensure that the competent authorities shall enforce such remedies when granted. States Parties recognize that access to effective remedies may require the provision of free legal assistance to persons with disabilities and the modification or flexible application of existing laws and practice regulating matters of procedure and evidence.

Negotiation: Fourth Session

- ❖ Draft Article 9: Recognition as a Person before the Law
- ❖ States Parties shall: recognise persons with disabilities as individuals with rights before the law equal to all other persons;
- ❖ ensure that persons with disabilities who experience difficulty in asserting their rights, in understanding information, and in communicating, have access to assistance to understand information presented to them and to express their decisions, choices and preferences, as well as to enter into binding agreements or contracts, to sign documents, and act as witnesses; ³⁴

Negotiation: Fifth Session

- ⊗ During the discussion of draft article 9, considerable support was expressed for the inclusion in the convention of language that would guarantee persons with disabilities access to justice. Most delegations supported the inclusion of the language in a separate article. A number of delegations met informally to elaborate a proposal to include, as draft article 9 bis, the following: “States parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, facilitating their effective role as direct and indirect participants in all legal proceedings, including the investigative and other preliminary stages.”

EU Law: Art 21, CFR & 78/2000

- ⊗ Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, **disability**, age or sexual orientation shall be prohibited.
- ⊗ In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided

Employment Discrimination and Access to Justice

- ⊗ Article 9(1) of the Employment Equality Directive
- ⊗ *“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...”*

Art 47, Charter Fundamental Rights

- ⊗ Right to an effective remedy and to a fair trial
- ⊗ Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
- ⊗ Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
- ⊗ Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

EU Disability Strategy 2010-2020

- ⊗ Areas for action: accessibility, equality, participation, education (including training of judiciary, legal professionals, etc.)
- ⊗ *There is not much quantitative Europe-wide information about rights such as equal recognition before the law (Article 12) and access to justice (Article 13), but there are clear indications that this is a key problem area.*
- ⊗ *There is evidence that judicial buildings are still barely accessible and that justice personnel are not properly trained to provide an appropriate service and to cover the needs of people with disabilities (this is particularly true for women with disabilities). Round-table panellists at the Conference of State Parties to the UNCRPD in September 2009 underlined the importance of equal legal rights and access to justice. These problem areas have also been identified as priorities by the High Level Group on Disability. The area of legal rights and access to justice is therefore of key importance in the new strategy*

Next steps: Division of Competencies

EU

- ⊗ Substantive: remedies beyond employment context – accessibility legislation?
- ⊗ Procedural: ensure ECJ processes accessible
- ⊗ Symbolic: Affirming the inclusion and empowerment of PWD

Member States

- ⊗ Substantive: remedies in all aspects of discrimination, equality, human rights
- ⊗ Procedural: all procedures of justice – from reporting/investigative stages to post-trial procedures accessible
- ⊗ Symbolic: Encouraging involvement of PWD in ensuring a ‘just’ society

Resources

- ⊗ http://fra.europa.eu/fraWebsite/research/projects/proj_essingjustice_en.htm
- ⊗ <http://sites.google.com/site/womenenabled/access-to-justice>
- ⊗ <http://www1.umn.edu/humanrts/edumat/hreduseries/TB6/index2.html>
- ⊗ <http://www.un.org/disabilities/default.asp?id=1423>