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Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development

Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities

Report of the Office of the United Nations High Commissioner for Human Rights

Summary

In the present study, the Office of the United Nations High Commissioner for Human Rights sets forth the standards on equal and effective access to justice by persons with disabilities under article 13 of the Convention on the Rights of Persons with Disabilities. In the study, the Office provides guidance for the implementation of article 13, identifying good practices and making recommendations.



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I. Introduction

1. In its resolution 31/6, the Human Rights Council requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to prepare its annual study on the rights of persons with disabilities to be submitted to the thirty-seventh session of the Council with a focus on article 13 of the Convention on the Rights of Persons with Disabilities. The study, to be made available prior to the thirty-seventh session, was to be undertaken in consultation with States and other relevant stakeholders, regional organizations, the Special Rapporteur on the rights of persons with disabilities, civil society organizations, including organizations of persons with disabilities, and national human rights institutions. The Council also requested OHCHR to require that contributions be submitted in an accessible format and that they be made available, together with the study, in an easy read version on the OHCHR website.¹

2. Pursuant to the Council's request, OHCHR solicited contributions and received 22 responses from States, 14 from national human rights institutions, 2 from regional organizations and 21 from civil society organizations and other stakeholders. The present study focuses on the right to access to justice in relation to the implementation of the Convention.

II. Right to access to justice under international human rights law

A. Access to justice

3. Access to justice is a core element of the rule of law.² It is a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights.³ Access to justice encompasses the right to a fair trial, including equal access to and equality before the courts, and seeking and obtaining just and timely remedies for rights violations. Guaranteeing access to justice is indispensable to democratic governance and the rule of law as well as to combat social and economic marginalization.

4. Persons with disabilities face significant obstacles in accessing justice, including criminal proceedings and the determination of civil rights and obligations. These obstacles include denial of their legal standing and due process guarantees and the inaccessibility of the physical and communication environments during proceedings. Furthermore, national legislation often contains provisions that deny equal treatment of persons with disabilities before courts and other jurisdictional bodies.

5. The Convention on the Rights of Persons with Disabilities is the first international human rights instrument that enshrines an explicit right to access to justice. It calls for the elimination of obstacles and barriers faced by persons with disabilities in accessing justice on an equal basis with others, and innovates on previous standards developed under international human rights law. The Convention not only clarifies what access to justice means for persons with disabilities, but also upholds equal and effective participation at all stages of and in every role within the justice system as a core element of the right to access to justice. The Convention thereby expands this right beyond the notions of a fair trial and effective remedies which have been the principal features put forward by human rights instruments and their monitoring bodies.

6. Goal 16 of the 2030 Agenda for Sustainable Development calls for promoting the rule of law and ensuring equal access to justice for all. Member States have a unique opportunity to implement article 13 of the Convention as part of their strategy to accomplish the goals of the 2030 Agenda. In order to "leave no one behind", under the

¹ See www.ohchr.org/EN/Issues/Disability/Pages/RighttoAccestoJusticeArticle13.aspx.

² See General Assembly resolution 67/1, paras. 14 and 16.

³ See A/HRC/25/35, para. 3.

Agenda Member States commit to the principles of equality and non-discrimination, including for persons with disabilities, as a cross-cutting feature of all Sustainable Development Goals.

7. International cooperation has a key role in advancing the right to access to justice of persons with disabilities, as recognized in both the Convention and the 2030 Agenda. Technical and financial cooperation should adopt a twin-track approach by mainstreaming the rights of persons with disabilities and adopting disability-specific programmes; disability markers can contribute to monitoring their implementation.

8. The present report focuses on formal justice systems and other quasi-judicial systems; however, any of the provisions applicable to them, particularly those related to non-discrimination and participation, are also applicable in traditional justice systems such as religious, customary, indigenous and community justice systems.

B. Evolution of the right to access to justice in international human rights law

9. The right to access to justice has developed over time in international and regional human rights instruments, although it was not explicitly formulated as such until the adoption of the Convention. The Universal Declaration of Human Rights provides for the right to equality before the law without discrimination, equal protection under the law, the right to an effective remedy for violations of rights, the right to a fair and public hearing by an independent and impartial tribunal, and the presumption of innocence.⁴ Similarly, the International Covenant on Civil and Political Rights recognizes these principles and rights.⁵ The Covenant, as interpreted by the Human Rights Committee, provides several due process guarantees for the conduct of judicial proceedings to ensure the right to a fair trial that apply to any judicial body with any legal competence.⁶ Further, the Human Rights Committee has determined that States parties are required under the Covenant to guarantee that individuals have accessible and effective remedies to assert their rights, which should be appropriately adapted so as to take into account the specific requirements of different populations.⁷

10. The International Covenant on Economic, Social and Cultural Rights also recognizes that everyone has the right to an effective remedy, be it judicial or administrative. The Committee on Economic, Social and Cultural Rights has determined that, should an administrative remedy be deemed appropriate, it too must be “accessible, affordable, timely and effective”.⁸ The Committee against Torture has interpreted the provision of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on redress as encompassing the concepts of effective remedy and reparation, and emphasized the importance of victim participation in achieving the ultimate objective of restoration of the dignity of the victim.⁹ The Committee on the Elimination of Discrimination against Women adopted a general recommendation on women’s access to justice in which it recognized that effective access to justice optimizes the emancipatory and transformative potential of the law. It encompasses justiciability, availability, accessibility, good quality, the provision of remedies and accountability of justice systems.¹⁰ The Committee on the Rights of the Child also calls for particular attention by States parties to ensure that effective, child-sensitive procedures are available to children

⁴ Arts. 7, 8, 10 and 11.

⁵ Arts. 2 (1) and (3), 14 and 26.

⁶ See general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 7.

⁷ See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 15.

⁸ See general comment No. 9 (1998) on the domestic application of the Covenant, para. 9.

⁹ See general comment No. 3 (2012) on the implementation of article 14, paras. 2 and 4.

¹⁰ See general recommendation No. 33 (2015) on women’s access to justice, paras. 1 and 2.

and their representatives in accessing independent complaint procedures and courts.¹¹ Similarly, the regional human rights mechanisms also enshrine the right to fair trial and an effective remedy.¹²

11. All these instruments, and others related to access to justice, apply equally to persons with disabilities and ensure that they are entitled to the same protections and guarantees in accessing justice as others. None of the treaty bodies had specifically addressed the barriers facing persons with disabilities in accessing justice, and it was only with the entry into force of the Convention on the Rights of Persons with Disabilities that explicit attention to this issue emerged.

C. Convention on the Rights of Persons with Disabilities

12. The Convention introduced innovations that expanded the classical notion of access to justice. It underscores the fact that access to justice for persons with disabilities entails not only the removal of barriers to ensure access to legal proceedings to seek and obtain appropriate remedies on an equal basis with others, but also the promotion of the active involvement and participation of persons with disabilities in the administration of justice.

13. During the negotiations on the Convention, the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities initially considered including this right within parts of other articles of the Convention. Ultimately, it decided to create, for the first time in a human rights treaty, a specific provision formulated as the right to access to justice.¹³

14. The right to access to justice is presented in the Convention in two parts. Article 13 (1) requires States parties to 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 the investigative and other preliminary stages”. By including witnesses and, implicitly, jurors, judges and lawyers, access to justice became for the first time an entitlement belonging to persons other than the parties concerned in legal proceedings. Article 13 (2) requires States parties to promote appropriate training for those working in the field of the administration of justice. The Convention thus considers the justice system as an integral part of governance which requires the contributions and participation of society to function effectively. Ensuring participation in the justice system, in all capacities, is a reaffirmation of the exercise of citizenship also enshrined in articles 4 (3), 29 and 33.

15. Access to justice under the Convention is a cross-cutting right that should be interpreted in line with all its principles and obligations. In particular, article 13 should be read in conjunction with article 5 on equality and non-discrimination, to ensure that persons with disabilities enjoy access to justice on an equal basis with others. Access to justice requires enabling rights for persons with disabilities, in particular equal recognition before the law (art. 12), and accessibility, including multiple means of communication and access to information (arts. 9 and 21).

16. The Convention seeks to eliminate multiple and intersecting forms of discrimination faced by persons with disabilities on the grounds of impairment, sex, age, ethnicity, indigenous background, sexual orientation and gender identity, among other elements of their identity.¹⁴ Read together with article 6, article 13 reinforces the right to access to

¹¹ See general comment No. 5 (2003) on general measures of implementation of the Convention, para. 24.

¹² African Charter on Human and Peoples’ Rights, art. 7; Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), arts. 6 and 13; American Convention on Human Rights, arts. 8 and 10.

¹³ Ad Hoc Committee, seventh session, daily summary of discussions, 18 January 2006.

¹⁴ See Committee on the Rights of Persons with Disabilities, general comment No. 3 (2016) on women and girls with disabilities, para. 4 (c).

justice for women and girls who face specific barriers.¹⁵ In addition, in conjunction with article 7, the Convention addresses the specific situation of boys and girls with disabilities, recognizing the right to express their views in all matters affecting them and to be provided with disability and age-appropriate assistance to do so (arts. 7 (3) and 13 (1)). Targeting multiple and intersecting discrimination beyond the grounds of age and sex should help to address the specific challenges that persons with different types of impairment face, including persons with albinism, deaf persons, deafblind persons and persons with psychosocial or intellectual impairments. Additionally, persons with disabilities who are migrants, refugees, indigenous people, people living in rural areas, poor people, intersex persons and others face specific forms of exclusion that should be considered in the administration of justice and by all judicial mechanisms and actors.

III. Access to justice of persons with disabilities

A. Equality before the courts and right to a fair trial

17. The Convention calls for substantive equality, “which includes both equality of opportunities and equality of outcomes”,¹⁶ and article 13 (1) explicitly requires States parties to “ensure access to justice for persons with disabilities on an equal basis with others”. The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.¹⁷

18. The Committee on the Rights of Persons with Disabilities has stressed that persons with disabilities are entitled to all rights and procedural safeguards during the pretrial, trial and post-trial phases, including the right to a fair trial, presumption of innocence, the rights of defence and the right to be heard in person, as well as all the other rights granted to other persons.¹⁸ While all procedural guarantees apply equally to persons with disabilities, the present report will concentrate on those elements that most commonly pose barriers to ensuring access to justice on an equal basis with others.

19. Access to justice must effectively be guaranteed in all cases to ensure that no individual is deprived, in procedural terms, of his or her right to claim justice.¹⁹ In relation to persons with disabilities, whether with respect to criminal proceedings or in civil matters access to justice is most often denied as a result of lack of accessibility of and access to information, procedural accommodations, the right to claim justice and stand trial, respect for presumption of innocence and legal aid.

1. Accessibility and access to information

20. Persons with disabilities may face physical barriers to accessibility, such as barriers which render the act of physically entering police stations or courts impossible. Communication barriers may prevent access to information, understanding legal procedures or exchanges with judges, lawyers and other interlocutors. Further, many persons with disabilities are impeded from accessing courts and claiming their rights as a result of confinement to institutions or being isolated in their homes, without recourse to outside contact to lodge complaints. In addition, lack of information on their rights and how to invoke them before courts and authorities pose barriers to seeking remedies.

21. Effective access to information and communication allows persons with disabilities to know and defend their rights. The use of accessible information and communications technologies, in particular through their application to delivering government services (e-governance), can contribute to improving access to justice and access to information. The

¹⁵ Ibid., para. 52.

¹⁶ Ibid., para. 9.

¹⁷ See Human Rights Committee, general comment No. 32, para. 2.

¹⁸ *Makarov v. Lithuania* (CRPD/C/18/D/30/2015).

¹⁹ See Human Rights Committee, general comment No. 32, para. 9.

Committee has pointed out that article 9 (2) (h) of the Convention calls on States parties to promote accessible legal information to persons with disabilities and to society at large by using the full and varied range of formats and modes of communication. It also noted that new technologies could contribute to that end.²⁰

22. Several good practices illustrate the possibilities of guaranteeing that legal information and communication are accessible to persons with disabilities. The Constitutional Court of Colombia²¹ and the Supreme Court of Mexico²² called for the translation of judgments concerning the rights of persons with disabilities into easy read formats for the benefit of the petitioners and other persons with intellectual disabilities. In Finland, the police have designed their website to provide a range of accessible formats, such as plain language, content and videos in sign language, some of them captioned, and a complaint form in large print.

23. States should implement mechanisms to monitor their legal proceedings and evaluate the success of their policies with regard to access to justice. For example, States could establish markers that allow for the identification of persons with disabilities who access the justice system and the outcomes. Existing systems could also include data-collection tools that allow for disaggregation, such as the Washington Group on Disability Statistics Short Set of Questions.²³

2. Procedural and age-appropriate accommodations

24. Equality of arms is a component of the right to a fair trial, guaranteeing that the same procedural rights are provided to all the parties to ensure access to the same information and the same opportunities to adduce and challenge evidence.²⁴ Persons with disabilities are frequently hindered in enjoying equality of arms due to inaccessible documentation or procedures. Beyond accessibility, States parties must make available the procedural and age-appropriate accommodations that persons with disabilities may require in accessing justice. The list of measures that States parties should take to ensure effective and equal access to justice enumerated in article 13 (1) of the Convention is not exhaustive, and States parties are obliged to provide procedural and age-appropriate accommodations to facilitate the role of persons with disabilities as direct and indirect participants in all legal proceedings, including the investigative and other preliminary stages. Hence, procedural accommodations serve as a means to effectively realize the right to a fair trial and the right to participate in the administration of justice, and are an intrinsic component of the right to access to justice. The Committee on the Rights of Persons with Disabilities has provided a number of examples of how procedural accommodations for persons with disabilities can look in practice, for example, through the provision of sign language interpretation, legal and judicial information in accessible formats for, multiple means of communication, easy read versions of documents, Braille and video link testimony, among others.²⁵ Procedural accommodations should also encompass procedural flexibility to accommodate specific requirements for participation, for example allowing sign language interpreters to participate in confidential jury debates, extending or adjusting procedural deadlines and adjusting procedural formalities.

25. The obligation to provide procedural accommodations derives directly from civil and political rights. It is directly linked to the principle of non-discrimination and is not subject to progressive realization. In the negotiations on article 13 of the Convention, it was debated whether the language to be adopted should refer to “procedural accommodation” or

²⁰ See general comment No. 2 (2014) on accessibility, para. 22.

²¹ Decision T-573/2016.

²² Resolución Judicial de la Primera Sala de la Suprema Corte de la Nación en el Amparo en Revisión 159/2013.

²³ Available from www.cdc.gov/nchs/washington_group/wg_questions.htm.

²⁴ See Human Rights Committee, general comment No. 32, para. 13.

²⁵ See general comment No. 1 (2014) on equal recognition before the law, para. 39; CRPD/C/ARM/CO/1, para. 21; CRPD/C/BIH/CO/1, para. 24; CRPD/C/CAN/CO/1, para. 30 (b); and CRPD/C/CYP/CO/1, para. 36.

“reasonable accommodation”; it was decided to drop the reference to “reasonable”.²⁶ The deliberate decision to drop “reasonable” underscored that, unlike reasonable accommodation, procedural accommodation is not subject to a proportionality test;²⁷ failure to provide procedural accommodation when required by a particular person with disability thus constitutes a form of discrimination on the basis of disability in connection with the right to access to justice.

26. The Committee has not yet defined what the practical process in providing procedural accommodations would be. Nevertheless, it has consistently indicated that procedural accommodations should be provided on the basis of the “free choice and preference” of the person concerned. Therefore, the judge or the responsible entity should give primary consideration to the request of the individual with disability, as he or she knows best what his or her own accommodation needs are.²⁸ The determination of the need for procedural accommodations should not necessarily be based on medical information and cannot be subject to any disability assessment, for example those related to the granting of a disability card or certification. If the requirements of the person concerned change over time, procedural accommodations must be modified or replaced, as appropriate.²⁹

27. Procedural accommodations must be age-appropriate. The Committee has recognized this right for children with disabilities.³⁰ Additionally, the Committee on the Rights of the Child has highlighted that different accommodations should be made to guarantee the right to access to justice for children, including children with disabilities.³¹ For example, age-appropriate procedural accommodations may require modified courtroom procedures and practices, specific settings and age-appropriate assistance, among others.³²

28. The Committee on the Rights of Persons with Disabilities has consistently recommended to States parties that they review their legislation, including administrative, civil and criminal legislation, in order to explicitly include the duty to provide procedural accommodations in all legal proceedings.³³ National laws and regulations should also define the entity responsible for providing procedural accommodations and should include details on where and how persons with disabilities can request and access them. Procedural accommodations must always be available and provided free of charge.³⁴ Accommodation request processes should be documented by the obligated entity in order to facilitate accountability and to improve knowledge management.³⁵ In this last sense, systematization of good practices allows the identification of those accommodations that best serve the purpose of ensuring effective participation to the benefit of future proceedings. It also contributes to building a resource within the institutional memory of the organization, thereby contributing to the goal of making jurisdictional systems more inclusive and accessible.

29. The process of request and provision of procedural accommodations should be carried out confidentially, in line with article 22 of the Convention, and this requirement

²⁶ Ad Hoc Committee, seventh session, daily summaries, 18 January 2006. At that session, Israel put forward the view that that “accommodations” in article 13 referred to “process” and not to “reasonable accommodation”; Chile requested the inclusion of the phrase “judicial proceedings should be adjusted as needed”; and Canada suggested “reasonable accommodation”. At the eighth session, on 13 September 2006, the drafting group adopted “procedural and age-appropriate accommodations”.

²⁷ See A/HRC/34/26, para. 35.

²⁸ See CRPD/C/ARM/CO/1, para. 22; CRPD/C/BIH/CO/1, para. 25; and CRPD/C/SRB/CO/1, para. 24.

²⁹ See A/HRC/34/26, para. 46, in which a similar requirement with respect to reasonable accommodation is discussed.

³⁰ See CRPD/C/CAN/CO/1, para. 29 (b); CRPD/C/DEU/CO/1, para. 28 (b); and CRPD/C/MEX/CO/1, para. 26 (c).

³¹ See general comment No. 10 (2007) on children’s rights in juvenile justice, para. 6; and general comment No. 12 (2009) on the right of the child to be heard, para. 9.

³² See general comment No. 10, paras. 46 and 49.

³³ See CRPD/C/KEN/CO/1, para. 26 (b); CRPD/C/ECU/CO/1, para. 27 (c); and CRPD/C/CHN/CO/1, para. 24.

³⁴ See CRPD/C/MUS/CO/1, para. 24; and CRPD/C/CAN/CO/1, para. 30 (b).

³⁵ See A/HRC/34/26, para. 41.

must be clearly stated in national laws and regulations. Persons with disabilities should not be forced to openly disclose personal, health or rehabilitation information against their will and without their free and informed consent.³⁶

30. A number of States have made progress on adopting legislation and developing protocols concerning procedural accommodations for persons with disabilities in accessing justice. For example, Azerbaijan modified its Code of Civil Procedure to allow witnesses with disabilities to testify at their place of residence, when appropriate.³⁷ The Best Practices Tool Kit for State and Local Governments under the Americans with Disabilities Act of the United States of America, the Protocol for Accessing Justice by Persons with Disabilities of Argentina and the Disability Access Bench Book of Australia are examples of protocols that provide recommendations and guidance on how to provide procedural accommodations.

31. Lack of procedural accommodations violates the right to a fair trial and may lead to effective exclusion from proceedings and/or being subjected to unfair sentences. Related to the latter, limited support in terms of procedural accommodations for persons with intellectual and psychosocial disabilities in criminal proceedings results in their overrepresentation among persons sentenced to the death penalty,³⁸ as acknowledged by the Committee.³⁹ In the past year, it has been reported that people with intellectual and psychosocial disabilities have been executed or remained under sentence of death,⁴⁰ despite Economic and Social Council resolution 1989/64,⁴¹ General Assembly resolution 71/187 and Human Rights Council resolution 36/17, in which retentionist States were called upon not to impose or execute the death penalty on persons with intellectual or psychosocial disabilities. The Human Rights Committee has also underlined that States parties must refrain from executing or sentencing to death persons with psychosocial and intellectual disabilities.⁴² The Committee on the Rights of Persons with Disabilities has expressed concern at the fact that persons with psychosocial and/or intellectual disabilities may face a greater risk of incurring the death penalty because of a lack of procedural accommodations in criminal proceedings.⁴³

32. The imposition of the death penalty is increasingly regarded as being incompatible with fundamental tenets of human rights, in particular human dignity, the right to life and the prohibition of torture or other cruel, inhuman or degrading treatment or punishment. States that continue to impose and implement death sentences should declare a moratorium on executions with a view to abolishing the death penalty. The Secretary-General has recently reiterated that laws and sentencing guidelines must be developed or amended to prohibit the imposition of the death sentence and the execution of persons with psychosocial and intellectual impairments.⁴⁴

3. Right to claim justice and stand trial

33. Deprivation of legal capacity and substituted decision-making arrangements can prevent and exclude persons with disabilities from participating in legal proceedings and may force their representation by a third party, such as a legal guardian. The exercise of legal capacity is intrinsically connected with the right to access to justice, as often the second cannot be exercised without the first.⁴⁵ At the same time, without access to justice,

³⁶ See CRPD/C/DNK/CO/1, para. 51.

³⁷ See CRPD/C/AZE/Q/1/Add.1, para. 74.

³⁸ See, for example, Fair Punishment Project, "Death penalty disproportionately used against persons with significant mental impairments in five Florida counties", January 2017.

³⁹ See CRPD/C/IRN/CO/1, paras. 22 and 23.

⁴⁰ Amnesty International, *Global Report: Death Sentences and Executions 2016*, p. 7.

⁴¹ See also E/2015/49 and Corr.1, para. 85.

⁴² See CCPR/C/PAK/CO/1, para. 18 (c).

⁴³ See CRPD/C/IRN/CO/1, paras. 22 and 23.

⁴⁴ See A/HRC/36/26, para. 56.

⁴⁵ See Committee on the Rights of Persons with Disabilities, general comment No. 1, para. 38.

persons with disabilities cannot challenge deprivation of their legal capacity or the denial or restrictions of their rights that ensue as a result.⁴⁶

34. Deprivation of legal capacity, whether formally mandated or as a result of de facto practice, leads to exclusion from judicial processes and has pervasive effects on the right of persons with disabilities to a fair trial under due process of law. For example, defendants with psychosocial and intellectual impairments are often deprived of their right to be heard in person, pursue adversarial proceedings, give evidence or contest witnesses. Such limitations affect the principles of equality of arms and non-discrimination, impeding access to justice on an equal basis with others. The Committee has exposed such limitations imposed on persons with disabilities standing trial, and has consistently recommended that States parties refrain from and prohibit such practices, and repeal those legal provisions from their laws.⁴⁷

35. Persons with disabilities may also be subjected to tests to assess their competence or fitness to stand trial that may lead to detention and treatment against their will, and commonly for durations that exceed the sentences ordered upon conviction. The Committee has strongly rejected the concept of unfitness to stand trial and its discriminatory character⁴⁸ and has called for its removal from the criminal justice system.⁴⁹ This position is supported by the Working Group on Arbitrary Detention, which has called for persons with psychosocial disabilities to be given the opportunity to stand trial promptly, with support and accommodations, rather than declaring such persons incompetent.⁵⁰

36. Another manifestation of the denial of legal capacity within the access to justice is the practice of applying “non-liability” (“*inimputabilidad*”; “*non-imputabilité*”) or the “insanity defence”, according to which the individual is declared to have been “of unsound mind” and/or “insane” at the moment of the commission of the alleged crime, resulting in exemption from criminal responsibility. The individual is then diverted from the proceedings and subjected to security measures entailing deprivation of liberty and treatment against his or her will, often indefinitely, thereby denying him or her the same due process guarantees as others, in violation of the right to a fair trial. The Committee has recommended revising criminal procedures to repeal the concept of non-liability, as well as any version of the insanity defence. In addition, it has called for eliminating security measures that involve forced medical or psychiatric treatment in institutions, and expressed concern about those that involve a lack of the guarantees regularly provided in the criminal justice system and an indefinite deprivation of liberty, recommending that they be abolished.⁵¹

37. The Committee has highlighted the intersection between access to justice and equal recognition before the law and recognized support for decision-making, as expressed in article 12 (3) of the Convention, as a means for exercising the right to access to justice.⁵² The provision of supported decision-making can facilitate instructing a lawyer, directing one’s defence in court and self-representation.

38. Supported decision-making requires further development in the context of access to justice; protocols and guidelines supporting the work of judges, lawyers and other agents of

⁴⁶ European Court of Human Rights, Grand Chamber, *Stanev v. Bulgaria* (application No. 36760/06), judgment of 17 January 2012.

⁴⁷ See, for example, CRPD/C/CAN/CO/1, paras. 31 (b) and 32 (b); CRPD/C/ETH/CO/1, paras. 31 and 32; CRPD/C/ARE/CO/1, para. 27 (b); CRPD/C/THA/CO/1, paras. 29 and 30; CRPD/C/QAT/CO/1, para. 27; CRPD/C/DNK/CO/1, para. 34; CRPD/C/KOR/CO/1, paras. 27 and 28; and CRPD/C/ECU/CO/1, paras. 28 and 29 (b).

⁴⁸ “Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: the right to liberty and security of persons with disabilities, adopted by the Committee at its fourteenth session, held in September 2015”, para. 16.

⁴⁹ See CRPD/C/KOR/CO/1, para. 27.

⁵⁰ See the basic principles and guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court (A/HRC/30/37, annex), guideline 20, para. 107 (b).

⁵¹ See CRPD/C/KEN/CO/1, paras. 27 and 28; CRPD/C/ITA/CO/1, para. 35; CRPD/C/ECU/CO/1, paras. 28 and 29 (b); CRPD/C/PRT/CO/1, para. 33 (b); and CRPD/C/BRA/CO/1, paras. 30 and 31 (a).

⁵² See general comment No. 1, para. 38.

justice operating in judicial or administrative proceedings are fundamental. The provision of procedural accommodations in this context can also contribute to building up relevant practice. Theoretical and applied research can contribute by systematizing practices and developing tools to ensure respect of the right to exercise legal capacity in all legal procedures.⁵³ States should involve their national associations of law professionals in developing these tools in consultation with persons with disabilities and their representative organizations, in accordance with the Convention.

4. Presumption of innocence

39. The presumption of innocence is a fair trial principle that guarantees that an accused person maintains innocence until proven guilty. In certain legal systems, persons with disabilities found “unfit to stand trial” or exempted from criminal responsibility on the basis of their psychosocial or intellectual impairment are commonly diverted from proceedings and subjected to security measures entailing committal or forced treatment in mental health facilities under a regime of impairment-based detention, which may be of an indefinite duration.⁵⁴ As trial is not pursued and no conviction obtained, instead of being based on a finding of guilt, security measures are ordered based on the individual’s alleged “dangerousness” to self and others.⁵⁵ Such court orders constitute unequal treatment, as they are based on perceived “dangerousness”, impairment or impairment-related assumptions,⁵⁶ rather than on a determination of culpability for the commission of a crime through due process. These practices culminate in the abandonment of the individual’s right to the presumption of innocence and in the denial of due process safeguards that should be applicable to every person, as recognized in international law. The Committee has accordingly called for them to be repealed.⁵⁷

5. Legal aid

40. The absence of free legal aid is one of the most common barriers to equality of arms and equal access to justice, particularly for persons with disabilities, who number disproportionately among the world’s poor and face challenges in affording legal advice and representation. The right to legal counsel is a fair trial right and includes the right to free legal aid.

41. The Committee has raised concerns about the lack of available free legal aid for persons with disabilities,⁵⁸ including for those living in institutions,⁵⁹ and for women and girls with disabilities facing violence or abuse.⁶⁰ In some countries where legal aid services have been established, in practice they lack the necessary resources; do not operate on an independent basis; are inaccessible to persons with disabilities; or lack sufficient expertise about the rights of persons with disabilities.⁶¹ States parties should increase their efforts to guarantee legal aid for persons with disabilities, enacting legislation and allocating resources to support the provision of free legal aid. Legal aid should be accessible, and States parties must ensure the availability of services and information using multiple means, modes and formats of communication across their whole territory. For example, in Canada, the Ontario Legal Aid Office provides all information online in alternative formats and trains employees on communicating with people with various types of impairments.

⁵³ See rule 68, paragraph 2, of the Committee’s rules of procedure (CRPD/C/1/Rev.1) and paragraph 69 of the Committee’s working methods (CRPD/C/5/4).

⁵⁴ See, for example, *Noble v. Australia*, (CRPD/C/16/D/7/2012), para. 8.7.

⁵⁵ See CRPD/C/BEL/CO/1, para. 27.

⁵⁶ See CRPD/C/CYP/CO/1, para. 38.

⁵⁷ See CRPD/C/PRT/CO/1, para. 33 (b).

⁵⁸ See CRPD/C/ARM/CO/1, para. 22; CRPD/C/SVK/CO/1, para. 41; CRPD/C/UKR/CO/1, para. 28; and CRPD/C/KEN/CO/1, paras. 25 and 26 (a).

⁵⁹ See CRPD/C/MEX/CO/1, paras. 25 and 26 (b).

⁶⁰ See CRPD/C/GTM/CO/1, para. 38.

⁶¹ See CRPD/C/CHN/CO/1, para. 23; CRPD/C/NZL/CO/1, para. 23; CRPD/C/ARE/CO/1, para. 25 (b); and CRPD/C/THA/CO/1, para. 27.

42. States should be mindful that austerity measures can prevent persons with disabilities from accessing essential services and benefits, exposing them to social exclusion and rights violations that call for legal support to claim rights.⁶² Cutting legal aid has pervasive effects and subjects persons with disabilities to further marginalization.

B. Right to an effective remedy

43. The right to an effective remedy is a central component of the right to access to justice and an element inherent in the effective enjoyment and exercise of all rights. The Committee has documented many examples of ineffective remedies for persons with disabilities involving the failure on the part of the authorities to act with due diligence to investigate, prosecute and punish perpetrators and/or provide remedies.⁶³ To have effective remedies, persons with disabilities require: (a) equal and effective access to justice (i.e., available and accessible complaint mechanisms, investigation bodies and institutions, including independent judicial bodies capable of determining the right to reparation and awarding redress⁶⁴); (b) adequate, effective and prompt redress and reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms.⁶⁵

1. Duty to investigate

44. As set out in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, States have the duties to investigate and, if there is sufficient evidence, to prosecute the person allegedly responsible for violations and, if found guilty, to punish him or her.⁶⁶ It is important to highlight this essential element of effective remedies, in particular for persons with disabilities, given that cases of violence, abuse, exploitation and other forms of harm to their mental and bodily integrity commonly remain unaddressed due to lack of reporting, delays in opening investigations on the grounds of lack of credibility of the victims or a failure to do so, or general acceptance of practices such as those connected to witchcraft beliefs. This results in the recurrence of violations and a culture of impunity,⁶⁷ which engender negative stereotypes on the basis of multiple and intersecting grounds such as gender, age, impairment, colour, race, ethnic or social origin and religion, among others. Complaint mechanisms and investigations thus require positive measures which are gender sensitive to ensure that victims of gender-based violence are able to come forward and seek and obtain reparation.⁶⁸

45. The Committee has called on States to ensure that authorities identify, investigate and prosecute all cases of killing, abduction, violence, abuse, exploitation and forced labour involving persons with disabilities, including collecting disaggregated data on these incidents and reporting by persons with disabilities, and their outcomes.⁶⁹ Article 16 (3) of the Convention sets out an explicit obligation for States to prevent the occurrence of these violations through effective independent monitoring of facilities and programmes designed to serve persons with disabilities. States should explore ways of enhancing their capacity to investigate human rights violations against persons with disabilities, strengthening their monitoring frameworks and going beyond by providing for functions or creating bodies

⁶² CRPD/C/15/R.2/Rev.1.

⁶³ See CRPD/C/LVA/CO/1, para. 29 (a); and CRPD/C/MNE/CO/1, para. 21 (b).

⁶⁴ See Committee against Torture, general comment No. 3, para. 5.

⁶⁵ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147, annex.

⁶⁶ *Ibid.*, para. 4.

⁶⁷ See *X v. United Republic of Tanzania* (CRPD/C/18/D/22/2014), para. 8.2.

⁶⁸ See Committee on the Elimination of Discrimination against Women, general recommendation No. 33, para. 51; and Committee against Torture, general recommendation No. 3, para. 33.

⁶⁹ See CRPD/C/LVA/CO/1, para. 29 (a); CRPD/C/ARM/CO/1, para. 28; and CRPD/C/AUS/CO/1, para. 38.

which allow for exposing truth and illustrating the proper dimension of the situation they are facing.

2. Independent monitoring frameworks

46. Independent monitoring frameworks designated under article 33 (2) of the Convention, including national human rights institutions, can play a significant role in strengthening access to justice for persons with disabilities, particularly when sufficiently resourced to independently monitor and promote the implementation of the Convention. Beyond monitoring, for example for the purposes of preventing and identifying violations in accordance with article 16 (3), these institutions may be mandated to receive and address complaints relating to human rights violations. Through their work, they can help identify barriers faced by persons with disabilities in accessing justice by documenting them and make recommendations to address them, including by calling for urgent policy or legal reforms. Further, they are central to raising awareness about the rights of persons with disabilities and can assist Governments in the design and delivery of training programmes to judges, legal professionals, police staff and other stakeholders. Such mechanisms should work closely with persons with disabilities, providing them with accessible information about their rights and assisting them in making complaints or seeking appropriate remedies.

3. Redress and reparation

47. Courts and other jurisdictional bodies should pay specific attention to redress and reparation when providing for specific remedies for persons with disabilities, ensuring that the remedy for the violations of the human rights at stake is proportionate to the overall objective of restoring the dignity of the victim.

48. The Committee has called on States to ensure the availability and accessibility of legal remedies and of effective reparations and redress for victims of discrimination.⁷⁰ It has stated that remedies should aim at changing attitudes⁷¹ and ensure the possibility of seeking injunctions.⁷² Redress and reparation include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁷³ Persons should have access to remedies in criminal and civil courts, and in administrative and quasi-judicial jurisdictions.

49. Restitution aims to restore the victim to the original situation before the violation occurred, and will require a case-by-case analysis to ensure that the individual is removed from a risk of repetition of the violation. Standardized solutions may not provide redress for the specific situation of persons with disabilities; hence, an assessment involving the direct participation of the person concerned is needed when rendering judicial or other jurisdictional decisions. For example, in Peru the Supreme Court of Santa requires a contextual analysis of the person when deciding cases on the basis of the standard of the “best interpretation of the will and preference”, as developed by the Committee in its general comment No. 1.⁷⁴ Further, regarding arbitrary deprivation of liberty, the Committee has endorsed the recommendations of the Working Group on Arbitrary Detention, among others that, in any legal proceeding, whether judicial or administrative, where detention is found to be arbitrary owing to the lack of free and informed consent to proceedings, restitution should imply the restoration of liberty.⁷⁵

⁷⁰ See CRPD/C/DEU/CO/1, para. 12 (c); CRPD/C/TKM/CO/1, para. 10; and CRPD/C/CYP/CO/1, para. 14.

⁷¹ See CRPD/C/BEL/CO/1, para. 12. See also Inter-American Court of Human Rights, *Ximenes-Lopes v. Brazil*, series C No. 149, judgment of 4 July 2006, as an example of this type of remedy.

⁷² See CRPD/C/BEL/CO/1, para. 12.

⁷³ See Basic Principles and Guidelines on the Right to a Remedy and Reparation, para. 18; and Committee against Torture, general comment No. 3, para. 6.

⁷⁴ Acta de Sesión Plenaria, Pleno Jurisdiccional Distrital de Familia, Corte Superior de Justicia del Santa, Peru, 15 July 2016.

⁷⁵ See “Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities”, para. 24; see also Basic Principles and Guidelines on the Right to a Remedy and Reparation, para. 19.

50. Compensation should be proportional to the gravity of the violation and the circumstances of each case. As recommended by the Committee, complaint mechanisms should permit invoking multiple grounds of discrimination and ensure proportionality in determining both liability and remedies.⁷⁶

51. Rehabilitation aims to restore, as far as possible, the individual's independence and physical, mental, social and vocational ability, and his or her inclusion and participation in society. All rehabilitative measures, including selection of service providers, must be provided on the basis of the individual's free and informed consent.⁷⁷

52. Satisfaction should include thorough investigation, prosecution and exposure of truth of human rights violations while protecting the privacy and safety of witnesses involved in the investigation, as well as effective judicial and administrative sanctions. Investigation should also inform legal and policy reform. States should conduct inquiries into past violations against persons with disabilities, particularly in institutional settings such as social care or psychiatric institutions, exposing the truth and providing appropriate redress and reparations.⁷⁸

53. Guarantees of non-repetition of the offence necessarily call for States to undertake measures to combat impunity for violations. This should include building the capacity of those who work in the administration of justice, including health professionals and prison staff, on the human rights of persons with disabilities. Guarantees of non-repetition have been recognized as offering an important potential for the transformation of social relations that may be the underlying causes of violations; hence, they also call for systemic change such as amending laws and policies and taking effective preventive and deterrent measures.⁷⁹ This is supported by the Committee in its recommendations contained in its views on individual communications in relation to obligations to take measures to prevent similar violations in the future. In these recommendations the Committee has called for, among other things, the enactment or amendment of regulations, policies and laws in accordance with the Convention, in consultation with representative organizations of persons with disabilities, and ensuring their non-discriminatory application by domestic courts; and the training of public officials, including judges and other judicial officials, so that they may adjudicate cases in line with the Convention. The Committee has also called for the repeal of laws that are not aligned with the provisions of the Convention.

C. Participation in the administration of justice

1. Access to justice as an integral part of governance

54. Under the Convention, for persons with disabilities to have access to justice on an equal basis with others, they must be able to effectively participate, directly or indirectly, in all legal proceedings, including at the investigative and other preliminary stages. Direct participation refers to those instances in which the person with disability acts as a claimant or defendant, as one of the official parties to the proceedings. Indirect participation refers to other roles that contribute to the administration of justice, such as that of witness, qualified expert, juror, judge or lawyer.

55. The Convention considers administration of justice a part of the democratic system that contributes to good governance and, hence, goes beyond upholding the fair trial rights of a particular person with disability. Upholding democracy, rule of law, accountability and the effective administration of justice requires the involvement of persons representing all facets of society, in all capacities, including persons with disabilities. Article 13 seeks to promote the rights of persons with disabilities to contribute and participate in all aspects of the administration of justice and other legal proceedings, as a component of active

⁷⁶ See general comment No. 3, para. 18.

⁷⁷ See Committee against Torture, general comment No. 3, para. 15.

⁷⁸ See CEDAW/C/JPN/CO/7-8, para. 25; and A/72/133, para. 49.

⁷⁹ See Committee against Torture, general comment No. 3, para. 18.

citizenship to shape the society in which we live.⁸⁰ Consequently, participation in ensuring access to justice is bound to participation in public and political life, as described across articles 4 (3), 29, 33 and 34 of the Convention.

56. Persons with disabilities continue to face restrictions to their participation in various capacities in legal proceedings, for example as judges, prosecutors, witnesses or jurors, both in law and in practice.⁸¹ These restrictions are based on stereotypes that discredit the credibility and the capacity of persons with disabilities, particularly women, to effectively contribute to proceedings.⁸² An example of a positive development in this context is a ruling by the Supreme Court of Canada in which the Court held that people with intellectual disabilities could testify in criminal cases on the basis of a promise to tell the truth, whereas previously they had to prove their competence to testify by explaining the meanings of the concepts of promise, truth and falsehood.⁸³

57. The Committee has specifically noted that the performance of jury duty is an important aspect of civic life and integral to the judicial system. Being denied appropriate measures to participate on an equal basis with others, such as through the provision of sign language interpretation, has resulted in violations relating to access to justice, non-discrimination, accessibility, freedom of expression, access to information, and participation in political and public life.⁸⁴ The role of procedural accommodations is key to ensuring that rules of procedure can be interpreted with sufficient flexibility for the inclusion and participation of persons with disabilities on juries on an equal basis with others.⁸⁵

58. To overcome barriers to participation, States are engaging in improving their systems. For example, Chile has repealed the prohibition against blind and deaf persons being eligible to be magistrates. Similarly, in Ethiopia, the House of Federation ruled against a customary practice in the justice sector which prohibited blind persons from acting as judges, and ordered courts to provide the necessary accommodations for them to perform their duties. In Peru, reasonable accommodations are made available for blind candidates taking the entry examination to become a judge or prosecutor. In Germany, nearly 70 blind persons are judges and some have reached the highest judicial offices in the country, including at the Federal Supreme Court.

2. Training in the fields of administration of justice and legal education

59. Attitudinal barriers affect access to justice for persons with disabilities, as they may negatively influence the way in which laws, legal policies, procedures and practices are implemented. Often, these attitudinal barriers stem from lack of awareness of the rights of, and appropriate practices for, persons with disabilities in the justice system on the part of police officers, public defenders and professionals working as public defenders or providing legal aid, legal service providers and others. The provisions of article 13 (2) promote appropriate training as a measure to overcome these barriers. States parties should design and deliver mandatory regular training programmes, which should be properly funded, involving persons with disabilities at all stages of legal proceedings, including in rural areas.⁸⁶

⁸⁰ See Committee on the Rights of Persons with Disabilities, *Beasley v. Australia*

(CRPD/C/15/D/11/2013), para. 8.5; and *Lockrey v. Australia* (CRPD/C/15/D/13/2013), para. 8.9.

⁸¹ See CRPD/C/COL/CO/1, para. 34; CRPD/C/JOR/CO/1, para. 28 (b); CRPD/C/IRN/CO/1, para. 29 (a); and CRPD/C/THA/CO/1, para. 27.

⁸² See Committee on the Elimination of Discrimination against Women, *R.P.B. v. Philippines* (CEDAW/C/57/D/34/2011); see also general recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19, para. 31 (c).

⁸³ *R. v. D.A.I.* (case No. 33657), judgment of 10 February 2012.

⁸⁴ See *Beasley v. Australia*, para. 8.5; and *Lockrey v. Australia*, para. 8.9.

⁸⁵ Supreme Court of Illinois, *People v. Guzman* (case No. 118749), decision of 19 November 2015, cited in Eilionóir Flynn, *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Ashgate, 2015), p. 123.

⁸⁶ See CRPD/C/ETH/CO/1, para. 30; CRPD/C/KOR/CO/1, para. 24; CRPD/C/PRT/CO/1, para. 31; and CRPD/C/UGA/CO/1, para. 25 (c).

60. The Committee has recommended that training programmes address such areas as: (a) barriers faced by persons with disabilities in accessing justice;⁸⁷ (b) the rights enshrined in the Convention, including participation on an equal basis with others;⁸⁸ (c) the provision of procedural accommodations in the legal process;⁸⁹ (d) overcoming gender- and disability-based stereotypes;⁹⁰ (e) the rights connected to marriage, family, parenthood, fertility and relationships;⁹¹ and (f) ways to combat prejudice against persons with disabilities, particularly those with psychosocial and/or intellectual impairments.

61. Several training programmes demonstrate ways in which article 13 (2) can be implemented. For example, in Spain, police and civil society have designed a training manual for distribution to police stations. In South Africa, the Police Service has prioritized the training of its staff about the rights of persons with disabilities. The European Union, Estonia and France have trained judges and other agents of justice in this regard.

IV. Conclusions and recommendations

62. **The Convention on the Rights of Persons with Disabilities innovates the notion of access to justice in international human rights law by defining what access means for persons with disabilities, including tools to overcome barriers, and recognizing the administration of justice as an integral part of governance in which participation is key to promoting citizenship.**

63. **The right to a fair trial for persons with disabilities includes ensuring that they have equal access to claim rights, meaning that they must have access to courts and legal proceedings and to maintain legal standing. Equal recognition before the law and the right to access to justice are intrinsically intertwined, and often one element cannot be enjoyed without the other. States should modify civil, criminal and procedural laws which prevent persons with disabilities from directly or indirectly participating in judicial or administrative processes on an equal basis with others either by granting third-party representation in law or in fact without free and informed consent or by denying legal standing. States should also implement laws and policies that ensure that information needed to defend rights is accessible, and that free and affordable legal aid is provided to persons with disabilities in all areas of law.**

64. **Within proceedings, persons with disabilities face a number of barriers to access justice due to discriminatory laws and practices, including being denied the right to a trial. In respect of the principle of equality of arms, States should repeal such laws and prohibit those practices and implement anti-discrimination measures, including providing procedural accommodations when necessary, in all their forms and in all legal proceedings. States should also reform their legislation that, as a consequence of depriving persons with disabilities of legal capacity, promotes further violations of the right to a fair trial, including the presumption of innocence, the right to be heard in person, the right to contest witnesses and the right to offer evidence, among other procedural safeguards of due process of law.**

65. **The right to an effective remedy includes the obligation on the part of States to act with due diligence to investigate, prosecute and punish perpetrators and/or provide remedies. Redress and reparation, in all their components, should be provided, taking into consideration the specific circumstances of the person with disability, addressing systemic change, including the exposure of truth as a component of satisfaction, and providing guidance for legal and policy reform and capacity-building as guarantees of non-repetition.**

⁸⁷ See CRPD/C/LTU/CO/1, para. 28.

⁸⁸ See CRPD/C/SVK/CO/1, para. 42 (a); CRPD/C/ARM/CO/1, para. 22; CRPD/C/BIH/CO/1, para. 25; CRPD/C/MDA/CO/1, para. 27 (b); CRPD/C/COL/CO/1, para. 35 (d); and CRPD/C/ETH/CO/1, para. 30.

⁸⁹ See CRPD/C/SVK/CO/1, para. 42 (b).

⁹⁰ See CRPD/C/CYP/CO/1, para. 18.

⁹¹ See CRPD/C/ITA/CO/1, para. 30.

66. Participation in the administration of justice is a fundamental condition of citizenship. States should enable persons with disabilities in their role as witnesses, jurors, experts, judges, lawyers or other interlocutors within the justice system to exercise their right to participate in public and political life on an equal basis with others. States must also seek to overcome barriers in access to justice by providing training to judicial officers, lawyers and others, including forensic experts, prison staff and the police, on the human rights of persons with disabilities.

67. States should collect and analyse disaggregated data on human rights violations against persons with disabilities and on how the justice system is providing access to a fair trial and effective remedies. Implementation of disaggregated data-collection tools such as the Washington Group on Disability Statistics Short Set of Questions can contribute to the data revolution and the realization of the promise of “leaving no one behind” under the Sustainable Development Goals, particularly goal 16.
