



Access to Justice: New Right or a Reaffirmation of Existing Human Rights for Persons with Disabilities?

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Article Information

Submitted : August 10, 2022
 Reviewed : September 17, 2022
 Revised : October 05, 2022
 Accepted : December 25, 2022

Keywords:

access to justice; CRPD;
 disability; human rights.

DoI: 10.20961/yustisia.
 v11i3.68402

Abstract

The Convention for the Rights of Persons with Disabilities (CRPD) as a specific human rights instrument seems to create a new disability specific right to access justice under Article 13. This study analyze the place of specific rights for people with disability to access to justice in the CRPD. The article uses the conceptual approach related to the disability and human right at the international instrument. This study concludes that Article 13 of the CRPD has expanded the traditional conceptions of access to justice since it also covers effective remedy and fair hearing. Several inherent limitations, or impairments, which interact with multidimensional and inherent barriers, have prevented persons with disabilities from accessing justice based on equally with others. The article has shown that the new set of rights is a guarantee of justice.

I. Introduction

It was not easy to convince the international community the importance of human rights for persons with disabilities ([Clements & Read, 2005](#)). There have been several unsuccessful attempts in the 1980s to persuade UN General Assembly members to implement disability-specific human rights instruments ([Kayess & French, 2008](#)), including efforts by Sweden and Italy ([Kanter, 2003](#); [Quinn et al., 2002](#)). Certainly, the international community was not convinced that persons with disabilities experience specific and aggravated dimensions of human rights violations, exclusion, desertion, and humiliation ([Kayess & French, 2008](#); [Lawson, 2007](#); [Quinn et al., 2002](#)). Furthermore, international instruments were reluctant to recognize persons with disabilities' exclusion. They also failed to specify disability as a ground of discrimination ([Mégret, 2008](#)). Likewise, the international human rights law before the advent of the Convention on the Rights of Persons with Disabilities (CRPD) did not fully stressed access to justice for the disability-specific dimension ([Flynn & Lawson, 2013](#)). The CRPD is the first United

Nations (UN) human rights instrument to enshrine a stand-alone right to 'access to justice'. Access to justice is a fundamental right and an essential requirement of all other human rights ([UN High Commissioner for Human Rights, 2013](#)). Consequently, the CRPD calls for elimination of obstacles and barriers faced by persons with disabilities in accessing justice based on equality with others. It also transforms previous standards, which were developed under international human rights law by expanding the right beyond fair trial and effective remedies ([Office of the United Nations High Commissioner for Human Rights, 2017](#)).

This study analyzed the place of specific rights for people with disability to access to justice in the CRPD. It argued that due to inherent limitations posed by physical, mental, intellectual, or sensory impairments in an interaction with attitudinal, environmental, and institutional barriers, persons with disabilities are left behind compared to others in access to justice. The CRPD as a specific human rights instrument seems to create a new disability specific right to access justice under Article 13. Before examining barriers to access to justice faced by persons with disabilities, the classical meanings and scope of access to justice are reviewed in the following section.

II. Overview Disability and Human Rights at the International Instrument Level

The United Nations affirms the essentiality of a universal respect for, and observance of, human rights and fundamental freedoms for all without distinction. The rights of individuals with disabilities are grounded in a human rights framework based on the United Nations, the Universal Declaration of Human Rights, international covenants on human rights and related human rights instruments ([Stein & Lord, 2009](#)). All international treaties guarantee the full enjoyment of civil, political, social, economic, and cultural rights for people with disabilities. All members of society, including those with and those without impairments, gain from the full inclusion of people with disabilities because of the unique ways in which they contribute to the betterment of all aspects of life ([Stein & Lord, 2009](#)).

More generally, the rights of people with disabilities have been addressed all through the evolution of international human rights law. The rights of people with disabilities are based on the idea of equality, which is discussed in numerous international human rights accords ([Lang et al., 2011](#)). Modern international law has progressively acknowledged the need for all nations to incorporate human rights principles into national legislation in order to further realize the rights of persons with disabilities ([Lang, 2009](#)). No nation is immune to the need for better policies and legislation for individuals with disabilities, nonetheless, the methods selected to achieve full realization of economic, social, and cultural rights of persons with disabilities may vary ([Lord & Stein, 2008](#)).

Disabled people's rights are both broadly and explicitly protected under international human rights instruments. Disabled people's human rights could be further advanced through the implementation of a number of specific international

human rights agreements. Throughout the decades of the 1940s and 1950s, the United Nations prioritized a variety of social welfare strategies aimed at promoting the rights of people with physical disabilities. The adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights in the 1960s, along with initiatives within the disability community, led to a significant reevaluation of the rights of individuals with disabilities within disability policies ([Arstein-Kerslake et al., 2017](#)).

In response to rising global awareness of the plight of people with disabilities in the 1970s, the General Assembly adopted the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons and declared 1981 the International Year of Disabled Persons. In the 1980s, protecting the rights of people who are disabled began to rise to the top of the worldwide policy agenda. In 1982, at its 37th session, the General Assembly approved the World Programme of Action for Persons with Disabilities. The World Programme of Action is an all-encompassing worldwide strategy that uses the principle of “equalization of possibilities” to ensure that people with disabilities can take part equally in all spheres of social and economic life and development ([Harpur, 2012](#)). As part of the World Programme, the rights of people with disabilities were elevated from a “social welfare” concern to a central focus.

In 1993, at the United Nations General Assembly’s forty-eighth session, the organization’s governing body enacted the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, a major accomplishment of the 1990s’ United Nations Decade of Disabled Persons. The Standard Rules are a human rights based international instrument that can be used for technical and economic cooperation as well as the formulation and evaluation of policies that are inclusive of people with disabilities. In 1997, the United Nations released a report titled “Review and appraisal of implementation of the World Programme of Action concerning Disabled Persons” that compared and contrasted disability policies and programs around the world ([UN Secretary-General, 1997](#)). Based on the results of this research, it is clear that disability policies and programmes need to be further developed and created in order to promote the social, economic, cultural, and political rights of people with disabilities ([Eide & Loeb, 2016](#)).

In the last decade, people’s knowledge and appreciation of disability rights problems has increased. Particularly important in this regard has been the adoption in 2006 of the Convention on the Rights of Persons with Disabilities (CRPD), which came into force on May 3, 2008. CRPD provides a holistic strategy for achieving this goal. CRPD is significant for its elucidation of disabled people’s rights and for its potential to alter public attitudes toward those who are disabled ([Liasidou, 2016](#)). The United Nations High Commissioner for Human Rights outlines a human rights-based strategy for addressing impairments. Institutionalization, social exclusion, stigma and discrimination, and a lack of access to health care, formal education, and employment are only some of the

human rights abuses that people with disabilities experience ([Kayess & French, 2008](#)). CRPD establishes a wide range of rights covering all aspects of life, including the right to life, freedom from torture or cruel, inhuman, or degrading treatment or punishment, and the right to equal protection and equal benefit of the law ([de Beco, 2019](#)).

III. The Idea and Scope of Access to Justice

The term 'access to justice' is massively used to explain rights originating from the justice system that are acknowledged based on human rights treaties ([Lawson, 2017](#)). The right to access to justice is frequently associated with rights to effective remedy and fair trial.

According to Australian Human Rights Law Resource Centre, the right to fair trial includes the minimum basic elements of procedural and substantive rights (Human Rights Law Resource Centre Ltd, 2009). Article 10 of the UDHR ([United Nations, 1948](#)) and the first paragraph of Article 14 of the ICCPR similarly necessitate that every person is entitled to fair and public hearing by an independent, competent, and impartial tribunal duly mandated by law ([Office of the United Nations High Commissioner for Human Rights, 1966](#)). More specifically, based on Article 14 paragraph 2 of the ICCPR, the fair trial rights of defendants include prohibition against double jeopardy, trial without undue delay, and presumption of innocence until proven guilty ([Office of the United Nations High Commissioner for Human Rights, 1966](#)). The rights are the hallmark of ensuring procedural access to justice.

On the other hand, the right to access to justice is now regulated standalone in Article 13 of the CRPD. It can be traced back to effective remedy, which is widely acknowledged in some constitutions and bill of rights ([Flynn & Lawson, 2013](#)). Article 8 of the UDHR states that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law" ([United Nations, 1948](#)). For Flynn, the UDHR is unique as it extends rights that are protected by the constitutions or local laws. Normally in international instruments, redress is only available for the rights and freedoms that are protected by the instrument ([Flynn & Lawson, 2013](#)). Remedy is clear for readers. However, the term 'effective' deserves some explanation. In *McFarlane v. Ireland*, while defining 'effective' under article 13 of the European Convention on Human Rights (ECHR) (European Court of Human Rights, 1950), the Strasbourg court indicated that a remedy must be adequate and accessible ([McFarlane v Ireland App no 31333/06, 2010](#)). It has substantial significance if it is analyzed based on article 9 and 13 of the CRPD ([United Nations General Assembly, 2007](#)). Certainly, it would contribute towards the removal of barriers, paving the way for persons with disabilities for access to justice based on equality with others. This study defines access to justice as "effective access to the systems, procedures, information, and locations used in the administration of justice" ([Lord et al., 2012](#)). The following section explains specific barriers inherently experienced by persons with disabilities.

IV. Barriers to Access to Justice for Persons with Disabilities

A significant setback on right to justice has led to a heavy burden for people who expect to experience human rights and fundamental freedoms. Furthermore, such circumstances may create a disproportionate impact on persons with disabilities. They may have been neglected by the international human rights community ([Kanter, 2003](#)) and, at the same time face multifaceted barriers. Before the emergence of the CRPD, none of the core international human rights instruments included disability within their list of protected categories. The only exception was the convention on the rights of the child. The Convention made specific reference to ‘mentally and physically disabled’ children on Article 23 ([Kayess & French, 2008](#)). The abandonment of persons with disabilities, as holders of human rights, is definitely a consequence of their exclusion from mainstream services due to several barriers. Lawson notes that such marginalization has not been recognized as human rights violations. In most cases, it is even attributed to people who are disabled by their impairments or differences only ([Lawson, 2017](#)). Consequently, it demotes the meaning and the importance to individual’s personal issue, which never require policy response ([Lawson, 2017](#)). The phenomenon emphasizes the essential for understanding disability in line with the CRPD. People are classified as disabled because of the interaction between their impairment and barriers. The circumstance leads to exclusion and restriction.

Several barriers prevent persons with disabilities to hold right to justice, making them different with others. Beqiraj, McNamara, and Wicks mention about overarching barriers faced by persons with disabilities to access justice. They are, among others, societal, legal, barriers, and accessibility barriers ([Beqiraj et al., 2017](#)). In addition, Flynn and Lawson also state that barriers to access justice may take various forms, such as denying persons with disabilities legal standing, paternalistic attitudes, insufficient and inaccessible information, etc. ([Flynn & Lawson, 2013](#)). Interestingly, the forms of barriers seem to fall under many of the overarching barriers proposed by Beqiraj, McNamara, and Wicks ([Beqiraj et al., 2017](#)). Persons with disabilities have diverse degrees and types of impairments. They also have distinct dimensions of barriers. The phenomena pose a unique challenge to ensure the access to justice ([Larson, 2014](#)). The next analyze Article 13 and, further, it argues that the CRPD provision have gone beyond the traditional conception of access to justice by almost creating new rights.

V. Specific Dimensions of Disability in Relation with the Right to Access to Justice in the CRPD

The CRPD, as a 21st century international human rights instrument, contains several technical innovations. According to Mégret, the CRPD implements various concepts by accommodating disability to be in line with existing human rights in various ways ([United Nations General Assembly, 2007](#)). He also notes that CRPD comes close to creating new rights rooted in experiences of persons with disabilities by way of innovation ([Mégret,](#)

[2008; United Nations General Assembly, 2007](#)). Similarly, the CRPD introduced innovations that expanded the classical understanding of access to justice ([Office of the United Nations High Commissioner for Human Rights, 2017](#)). These innovations will be analyzed further below.

Access to justice is covered in all rights and obligations that are enshrined in the CRPD ([Office of the United Nations High Commissioner for Human Rights, 2017](#)). In particular, Article 13 of the CRPD is the most important since it is the first article in the history of human rights instruments mentioning 'access to justice'. Unfortunately, there are also other key provisions in the CRPD that are relevant to the right to access justice. Hence, before attempting to analyze the key elements of Article 13, it is important to explore relevant CRPD provisions that have close relationships with the notion of access to justice.

Article 5 of the CRPD on non-discrimination is relevant for reinforcing one's understanding of access to justice. The article is describing provision in the CRPD, including Article 13. It shows that access to justice in the CRPD is a right that needs to consider all core principles and obligations in the CPRD ([Office of the United Nations High Commissioner for Human Rights, 2017](#)). The purpose of Article 13 of the CRPD is to 'ensure effective access to justice for persons with disabilities on an equal basis with others' ([United Nations General Assembly, 2007](#)). The term 'on an equal basis with others' appears at least 35 times in the CRPD ([Cremin, 2016](#)). It indicates persons with disabilities have equal rights with others. Flynn points out that it resonates with the principle of non-discrimination of the CRPD ([Flynn, 2017](#)). Access to justice also has strong relationships with Article 12 of the CRPD on equality before the law. Legal capacity and access to justice provisions are stipulated under two separate articles but they still reinforce each other. The right to access to justice is dependent on inherent recognition of legal capacity. In other words, the first cannot be exercised without the second ([UN Committee on the Rights of Persons with Disabilities, 2014a](#)). Furthermore, Article 9 paragraph 2h accessibility provision of the CRPD calls countries to promote accessible legal information for persons with disabilities ([United Nations General Assembly, 2007](#)). In the same way, the CRPD Committee under General Comment 2 observed that there is no effective access to justice if law enforcement agencies and the judiciary's physical, information, and communication systems are not accessible to persons with disabilities ([UN Committee on the Rights of Persons with Disabilities, 2014b](#)). It is worth noting that the above articles are not an exhaustive list of provisions that are relevant for accessing justice in the CRPD.

As argued above, Article 13 expands the classical right of equality before the law into a positive obligation of ensuring access to justice. It requires state parties to ensure effective access to justice for persons with disabilities through appropriate accommodations on an equal basis with others ([United Nations General Assembly, 2007](#)). The CRPD does not provide such lists, procedural accommodations may include sign language interpreters,

materials in Braille, and easy-read legal and judicial information in accessible formats for multiple means of communication, as well as video link testimony ([UN Committee on the Rights of Persons with Disabilities, 2014a](#)). The procedural accommodations are not subject to proportionality tests since they are different from 'reasonable accommodations'. Furthermore, procedural accommodations are related with non-discrimination clauses of the CRPD's civil and political rights expected to have immediate effect ([Office of the United Nations High Commissioner for Human Rights, 2017](#)). The absence of the term 'reasonable' suggests that 'procedural and age-appropriate accommodations' rarely give rise to disproportionate or undue burden claims ([Cremin, 2016](#)).

On the other hand, the age-appropriate accommodations are also included in Article 7 of the CRPD ([United Nations General Assembly, 2007](#)). The state parties are expected to protect the rights of children with disabilities based on equality with other children. The CRPD committee also remarks that age-appropriate accommodations may include information sharing about compliant mechanisms in age-appropriate and simple language ([UN Committee on the Rights of Persons with Disabilities, 2014b](#)). The age and procedural accommodations are believed to mitigate multi-dimensional and inherent barriers faced by persons with disabilities to access justice.

The core provision of access to justice in the CRPD, Article 13, protects persons with disabilities' effective role as both 'direct and indirect' participants in the justice system. The persons with disabilities' participation reaches far beyond. They are not merely a party to a dispute but their participation in a jury tribunal and as a witness are also covered ([Kayess & French, 2008](#)). Undeniably, such innovative stipulation of witnesses and the implied reference to jurors, judges, and attorneys is a new development in the history of the right to access to justice ([Office of the United Nations High Commissioner for Human Rights, 2017](#)). Flynn and Lawson state that the practice is different from the scope of the Charter of European Fundamental Rights ([Official Journal of the European Union, 2012](#)). The Charter is only concerned with parties in the dispute ([Flynn & Lawson, 2013](#)). It shows that the rights enshrined under Article 13 of the CRPD are much broader than the rights in effective remedy and fair hearing.

The specific barriers to effective access to justice stem from lack of awareness of the rights. In addition, appropriate practices for persons with disabilities in the justice system also adds the barriers ([Office of the United Nations High Commissioner for Human Rights, 2017](#)). Thus, the second paragraph of Article 13 imposes a duty to implement appropriate capacity building training for people who are engaged in the administration of justice, including prison staff and the police force. The provision requires state parties to provide appropriate training for police officers, public defenders, and lawyers, which also includes hardly referred prison staff members. The requirement is almost non-existent in traditional provisions, including in effective remedy and fair hearing ([Flynn & Lawson, 2013](#)).

VI. Conclusion

The CRPD guarantees all of its citizens equal and unfettered access to justice. Article 13 of the CRPD is particularly noteworthy because it is the first time the phrase “access to justice” has appeared in a human rights document. This study concludes that Article 13 of the CRPD has expanded the traditional conceptions of access to justice since it also covers effective remedy and fair hearing. Several inherent limitations, or impairments, which interact with multidimensional barriers, have prevented persons with disabilities from accessing justice based on equally with others. The article has shown that the CRPD has constructed a new set of rights to guarantee access to justice.

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