

ACCESS TO JUSTICE FOR WOMEN AND CHILDREN WITH DISABILITIES WHO ARE VICTIMS OF CRIME

Submitted by the Child Witness Institute

KEY CONCEPTS	
Access to justice	Persons with disabilities
International instruments	Regional instruments
Special accommodations for persons with disabilities in court	Persons with physical disabilities
Persons with mental disabilities	Availability of information for persons with disabilities

1. ACCESS TO JUSTICE

Access to justice is a basic principle of the rule of law and is defined as the right a person has to seek and obtain a remedy through formal or informal institutions of justice for grievances they may have in accordance with human rights standards. It is understood in terms of legal rights, processes and procedures and requires legal systems to ensure that these are accessible to all persons irrespective of social or economic capacity and that every person is entitled to just and fair treatment within the legal system. However, access to justice is more than improving an individual's access to courts or guaranteeing legal representation, as can be seen from the following definition:

A person or entity facing a legal issue i.e., they could benefit from or be hurt by a legal action has timely and affordable access to:

- (a) the appropriate level of legal assistance, and
- (b) a fair and efficient court or process to resolve disputes

so that they can understand and make decisions about their legal issue; get a fair and cost-effective resolution on the facts and applicable law; and feel like they were heard, were treated fairly, and understood the outcome.

Access to justice is interpreted widely enough to include being heard, being treated fairly and being able to understand and make decisions about one's legal issue. This is a right that is applicable to both accused persons and victims or witnesses. There is no access to justice where citizens, especially those who form part of marginalised groups, fear the system; do not understand the processes and do not access it; where they are unable to access the system for financial reasons; where they have no legal representation; or where they do not have information or knowledge of their rights.

Access to justice includes the following elements:

- Equal access to legal machinery
- Enhanced physical access
- Linguistic accessibility
- Access to legal aid
- Legal awareness i.e. an understanding of legal rights and the means for claiming them

- Availability of remedies for grievances
- Capacity and competence of justice personnel
- Trust and satisfaction in the justice systems.

Since statistics for sexual assault are extremely high for persons with disabilities, particularly women, due to their increased vulnerability, the Committee on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) issued General Recommendation No.33, which focuses on women's access to justice. The Committee identified the following six essential components of access to justice:

- justiciability: the unhindered ability of women to access justice and claim their rights under CEDAW
- availability: the existence of courts and other quasi-judicial bodies throughout the national territory, including rural and remote areas
- accessibility: justice systems required to be secure, affordable, physically accessible to women and adapted and appropriate to the needs of women
- good quality: justice systems which include elements such as competence, efficiency, independence, impartiality and timeliness
- provision of viable and meaningful remedies
- accountability of the justice systems.

2. INTERNATIONAL LEGAL FRAMEWORK

International human rights instruments protect the rights of all humans and are, therefore, applicable to persons with disabilities. Although people with disabilities are not explicitly mentioned, these instruments guarantee the fundamental rights to all human beings, irrespective of their gender, race, religion, ethnic origin, political belief or any other status. The Universal Declaration of Human Rights (1948) recognises in Article 1 that all human beings are born free and equal in dignity and that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction with regard to race, colour, sex, religion, political or other opinion, national or social origin, property, birth or other status (Article 2). The Declaration also recognises the right to access to justice in Article 8, which provides that "everyone 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." The right to access to justice is found in core United Nations human rights treaties, including the International Covenant on Civil and Political Rights, which provides that persons whose rights or freedoms have been violated are entitled to an effective remedy and that "all persons shall be equal before the courts and tribunals."

Although human rights are universal, some international and regional human rights conventions specifically protect the rights of persons with disabilities, or have provisions that relate specifically to persons with disabilities. The Convention on the Rights of Persons with Disabilities was introduced in 2006 with the purpose of promoting, protecting and ensuring the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. It is made up of two documents, the Convention on the Rights of Persons with Disabilities, which contains the main human rights provisions, and the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

However, this research focuses specifically on the implementation of the rights of persons with disabilities within the criminal justice system and, in particular, their right to access justice. In terms of international law, every person should, on an equal basis with others, have the rights to equality before the law, to equal protection under the law, to a fair resolution of disputes, to meaningful participation and to be heard. States are required to ensure equal access to justice for all persons with disabilities by providing the necessary accommodations and support.

2.1 Convention on the Rights of Persons with Disabilities

The Convention defines persons with disabilities as those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. Discrimination on the basis of disability is defined as any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in all spheres.

The general principles of the Convention focus on the fundamental rights of persons, entrenching them for persons with disabilities. Of particular relevance to access to justice are the following principles:

- non-discrimination
- full and effective participation and inclusion in society
- respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
- accessibility.

Article 5 requires State parties to recognize that all persons with disabilities are equal before and under the law, and are entitled without any discrimination to equal protection from and equal benefit of the law. State parties are to further prohibit all discrimination on the basis of disability and guarantee persons with disabilities equal and effective legal protection against discrimination on all grounds.

However, Article 12 and 13 of the Convention represent a paradigm shift in recognising the rights which persons with disabilities have within the legal system and their right to access justice. The key provisions of Article 12, which focuses on equal recognition before the law, include the following:

- (1) Persons with disabilities have the right to recognition everywhere as persons before the law
- (2) Persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life
- (3) Persons with disabilities are entitled to the necessary support to exercise their legal capacity
- (4) All measures that relate to the exercise of legal capacity must have appropriate and effective safeguards to prevent abuse. These measures must respect the rights, will and preferences of the person, be free of conflict of interest and undue influence, be proportional and tailored to the person's circumstances, apply for the shortest time possible and be subject to review by a competent, independent and impartial authority.

Article 13 focuses specifically on access to justice, and provides the following principles:

- (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.

The Convention also includes in Article 16 the right to freedom from exploitation, violence and abuse, specifically aimed at persons with disabilities:

- (1) States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.
- (2) States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.
- (3) In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.
- (4) States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.
- (5) States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

These rights apply “both within and outside the home” and include “all forms of exploitation” so would thus apply to abuse experienced in the form of secondary trauma as a result of insensitive and/or inappropriate treatment at the hands of judicial and investigative processes. This is further supported by the fact that States Parties are required to ensure that protection services are age-, gender- and disability-sensitive.

Article 16(5) requires that States Parties put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

Article 20 refers to personal mobility of persons with disabilities and does have relevance to assistance they may require in the court building. The Article requires that access should be facilitated to quality mobile aids, devices, assistive technologies and forms of live assistance and intermediaries. This would be particularly relevant to witnesses with disabilities to ensure that they are able to partake in the court processes and guarantee their right to access to justice.

In Article 21 of the Convention deals with the measures required to ensure that persons with disabilities are able to exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice. This includes the provision of information intended for the general public to be in accessible formats and technologies appropriate to different kinds of disabilities. This would have particular relevance to informational and educational materials provided in court buildings and at police stations. Article 21(b) requires that there be acceptance and facilitation of the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions. This would apply to communication within the criminal justice process as well, since that would amount to an official interaction.

Article 7 focuses specifically on the rights of the disabled child and accords children with disabilities the entitlement to all human rights and fundamental freedoms on an equal basis with other children. The best interests principle is reiterated in Article 7(2), which provides that in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

2.2 UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities 1993

The General Assembly adopted the Standard Rules in December 1993 and, although not a legally binding instrument, they do represent a strong moral and political commitment on governments to strive for the equalization of opportunities for persons with disabilities. Although this instrument is aimed at the development of policies for technical and economic cooperation, it also focuses on target areas for equal participation and accessibility and is thus relevant to access to justice.

According to paragraph 15 of the Standard Rules, the purpose of these Rules is to ensure that all persons with disabilities are able to exercise the same rights and obligations as others, since there are many obstacles that prevent them or make it difficult for them to participate fully in society. The term 'equalization of opportunities' is defined as the process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all, particularly persons with disabilities.

Rule 1 provides that States should ensure that responsible authorities distribute up-to-date information on available programmes and services to persons with disabilities and their families. Information must be presented in a format that is accessible to persons with disabilities. This would have relevance to information about court processes and preparation programmes.

Rule 5 focuses on accessibility and looks at the aspects of both physical accessibility as well as accessibility of communication. States are required to initiate measures to remove the obstacles to participation in the physical environment. It urges States to develop policies and enact legislation to

ensure accessibility in various areas in society, including public buildings. In terms of accessibility to communication, States are required to develop strategies to make information services and documentation accessible to different groups of persons with disabilities. Braille, tape services, large print and other appropriate technologies should be used to provide access to written information and documentation for persons with visual impairments. Similarly, appropriate technologies should be used to provide access to spoken information for persons with auditory impairments or comprehension difficulties. Consideration must be given to the use of sign language and language interpretation services should be made available for the hearing disabled, as well as for those with other communication disabilities. This is of particular application in the courtroom where persons with disabilities may be called upon to communicate with the court.

2.3 Convention on the Rights of the Child

The UN Convention on the Rights of the Child (UNCRC) was the first international treaty to explicitly recognise the rights of children with disabilities. The principle of non-discrimination, contained in Article 2, expressly prohibits discrimination on the grounds of disability:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Article 23 of the UNCRC recognises that a child with mental or physical disabilities is entitled to enjoy a full and decent-life, in conditions that ensure dignity, promote self-reliance and facilitate the child's active participation in the community. More importantly the article emphasizes the need of inclusion of children with disabilities in society and basic services to eradicate the stigmatisation that surrounds children with disabilities.

3. REGIONAL INSTRUMENTS

There are certain regional instruments that also entrench the rights of persons with disabilities to access to justice. These include the following:

3.1 African Charter on Human and People's Rights

The African Charter guarantees rights and freedoms to all individuals generally without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status. Every individual is equal before the law and entitled to the protection of the law.

Article 18(4) focuses specifically on persons with disabilities and provides that the "aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs."

3.2 African Disability Protocol

The African Disability Protocol (ADP) builds on the rights enshrined in the United Nations Convention on the Rights of Persons with Disabilities, but has adopted an African perspective with the focus on

the rights of persons with disabilities in Africa. Article 1 of the Protocol states the purpose of the Protocol as “to promote, protect and ensure the full and equal enjoyment of all human and people’s rights by all persons with disabilities, and to ensure respect for their inherent dignity.”

Article 5(2)(a) calls upon States Parties to prohibit discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds. There is acknowledgment that, in order to ensure equal and effective legal protection, it may be necessary that special measures are provided for persons with disabilities.

Take steps to ensure that specific measures, as appropriate, are provided to persons with disabilities in order to eliminate discrimination and such measures shall not be considered discrimination.

Article 6 deals with the right to equality and provides that every person with a disability is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all human and people’s rights, and would include access to justice.

Article 13 deals specifically with the right to access justice and requires that persons with disabilities are provided with the necessary accommodations to participate in the legal process.

States Parties shall take measures to ensure that persons with disabilities have access to justice on an equal basis with others, including through the provision of procedural, age and gender-appropriate accommodations, in order to facilitate their effective roles as participants in all legal proceedings.

Article 13 speaks specifically to the training of criminal justice personnel and requires that all law enforcement and justice personnel be trained at all levels to effectively engage with and ensure the rights of persons with disabilities are recognised and implemented without discrimination. Training is an essential element in accommodating persons with disabilities in the criminal justice system.

Persons with disabilities have a right to access to information in terms of Article 24, and States Parties are required to put policy and legislative measures in place to ensure that this can happen. These measures include the following:

- to provide information intended for the public as well as official interactions in accessible formats and technologies appropriate to different kinds of disabilities
- to recognise and promote the use of sign languages and deaf culture
- to ensure that persons with visual impairments or with other print disabilities have effective access to published works, including the use of information and communication technologies.

This entrenches the right of persons with disabilities to have access to information and programmes offered by the applicable departments in a manner appropriate to their disability.

Article 27 emphasises the protection of the rights of women and girls with disabilities and calls upon States Parties to ensure that women and girls with disabilities are protected from discrimination

based on disability and are able to enjoy the right to be treated with dignity. Women with disabilities must be able to access information, communication and technology. In addition, Article 27(j) requires that women with disabilities be protected from sexual and gender-based violence and are provided with rehabilitation and psychosocial support.

Although Article 27 refers to women and girls with disabilities, Article 28 deals specifically with children with disabilities and calls upon States Parties to ensure that children with disabilities have full enjoyment of human and people's rights on an equal basis with other children. It also entrenches the best interests principle and requires that the best interests of the child be the primary consideration in all actions undertaken by any person or authority concerning children with disabilities. States Parties must ensure that children with disabilities have the right to express their views freely on all matters affecting them and that they are provided with age and gender-appropriate assistance to realise their rights. The following further provisions are relevant to access to justice for children with disabilities:

- life, survival, protection and development of children with disabilities must be ensured – protection here would include protection within the criminal justice system as well;
- children with disabilities must be protected from all forms of sexual exploitation, abuse and forced labour – secondary traumatisation in the criminal justice process will amount to abuse;
- specific measures must be taken to protect children with disabilities who require more intensive support;
- children with disabilities must be protected from exploitation, violence and abuse within family, institutional and other settings – it could be argued that “other setting” would include the criminal justice system.

3.3 African Charter on the Rights and the Welfare of the Child

The African Charter on the Rights and the Welfare of the Child deals specifically with children with disabilities in Article 13. Article 13(1) provides that every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community. This would encompass special measures of protection for children within the criminal justice system. In addition, Article 13(3) urges States Parties to make resources available to ensure that persons with disabilities have access to public buildings.