

The Right to Access to Justice –

Art. 13 CRPD (Convention on the Rights of Persons with Disabilities)

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Good morning to all participants of this workshop

I am very pleased and honored to be invited for a presentation on access to justice of persons with disabilities. In the coming 30 minutes, I am going to develop some answers to structural aspects of access to justice and will only briefly and illustratively refer to specific measures envisaged by this guarantee. A focus on structural issues seems important at the present time, as they have not yet gotten the attention they need. In my work for the Committee, it has become quite clear that in many areas of the CRPD, structural questions have not yet been resolved to the degree necessary.

In the coming minutes, I am going to present you an incorporation theory of article 13, and I am looking forward to your comments.

Human Rights Law Before the CRPD

The issue of access to justice is not new to international human rights law, neither is it confined to the rights of persons with disabilities. The Universal Declaration of Human Rights of 1948 holds in its article 8:

“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.”

And article 10 of the Declaration specifies: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

Following the lead of the UDHR (Universal Declaration of Human Rights), the two U. N. Covenants of 1966 incorporate due process guarantees and guarantees of an effective remedy. Similarly, on the regional level, the European Convention of Human Rights, the Inter-American Convention on Human Rights and the African Charter on Human and Peoples’ Rights all contain comparable guarantees. And the Charter of Fundamental Rights of the European Union also guarantees, in its article 47, a right to an effective remedy and to a fair trial, specifying some aspects in the subsequent three articles.

Similarly, at the U. N. level, the CAT (Committee against Torture), CEDAW (Committee on the Elimination of Discrimination) and CRC (Committee on the Rights of the Child), as do others, all stress, in one way or another, the importance of fair procedures available to determine the application of the laws and to adjudicate violations of human rights. The CEDAW Committee, in its general recommendation no. 33 of 2015, even laid out in great detail the normative contents of a right to access to justice for women.

Purposes of a Guarantee of Access to Justice

The CRPD is, however, the first international human rights treaty that explicitly guarantees a right to access to justice. Article 13 of the Convention reads as following:

“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.”

This guarantee builds on the human rights provisions just mentioned, and takes them a significant step further. Before we think about its content, we need to clarify its purposes.

In a liberal democratic state, law as a means to organize society aims at safeguarding the dignity of each and every individual person within the jurisdiction of that state. This is, as a draft for the German constitution famously stated, the ultimate goal of the state and the law. While law only functions if it is mostly respected voluntarily, in many areas it needs to be backed up by adjudicative processes ensuring it is observed and followed in practice. Adjudicative processes in courts, tribunals and public administrations are of fundamental importance for the realization of law, as it applies to individuals, and of human rights, as they protect specific persons. Without adjudicative processes, law and in particular human rights risk of remaining theoretical and not becoming practical. Access to adjudicative processes is, therefore, of paramount importance for the realization of the law and its protection of the individual.

One of the core function of the law is to guarantee equal treatment of all persons subject to it. In order to realize this goal, access to adjudicative procedures needs to be equal to all persons. It is, therefore, of fundamental importance that, as article 14 ICCPR (International Covenant on Civil and Political Rights) states, “(a)ll persons shall be equal before the courts and tribunals”. On this background, it becomes transparent that it was crucial to include a guarantee of access to justice in the CRPD. Aiming over all at ensuring substantive equality, this treaty could not ignore the importance adjudicative procedures have in this respect.

This more theoretical importance was confirmed by the practical experience with the procedural guarantees international law already contained. The promises the procedural rights the ICCPR and other international human rights treaties hold remained vague and not real for most persons with disabilities. Article 13 CRPD should change that. It starts from the existing procedural guarantees in international law designed to ensure the availability of fair procedures and aims at making them in fact operational for persons with disabilities.

Two Prongs of Article 13: Procedural Rights and Rights to Participation

On a basic level, article 13 contains two different guarantees:

On the one hand, article 13 enshrines a right to a fair trial and to an effective remedy, and on the other hand a right to effective participation in the justice system. With this second prong, the right to access to justice far exceeds the previously existing fair trial guarantees. I will get back to this issue later in my presentation. First, I will focus on the first prong of fair trial and effective remedy.

The Ambit of Article 13: Incorporating Rights to Fair Trial and Effective Remedy

The first question to be asked pertains to the type of procedures article 13 covers. In the literature, the positions on this question vary widely. In order to get clarity on this issue, we need to start with the relationship of article 13 with existing fair trial and effective remedy rights. These rights, I am referring to articles 9, 14 and 2(3) ICCPR as placeholders for human rights guarantees outside the CRPD, delineate the procedures to which they apply and provide different guarantees within each procedure:

The habeas corpus guarantees of article 9 provide procedural safeguards in situations of deprivation of liberty, the fair trial guarantees of article 14 provide rights of access to courts and, again, procedural safeguards in civil and criminal cases, and article 2(3) enshrines a general right to an effective remedy in all cases concerning human rights.

On a first level, we need to attach article 13 CRPD to the ambit of these rights, meaning to the scope of their application. On this level, Article 13 should ensure that the existing procedural rights are designed in a way that they are fully protective of persons with disabilities. Article 13, therefore, is applicable in all situations in which one of the existing human rights fair trial and effective remedy-guarantees apply.

The First Level of Applicability: International Human Rights Law

This first level, or inner circle, of applicability, does not define the ambit of article 13 exhaustively. To explore the second level, we need to take note of the explicit reference in its text to the guarantee of equality: Article 13 guarantees rights “on an equal basis with others”, thereby referring to, and incorporating article 5. This passage was, historically, designed to respect the mandate of the drafters to not create any new rights.

The Second Level of Applicability: National Law

However, the equality clause of article 13 extends its scope of application beyond the existing procedural human rights guarantees that I have just sketched. The equality clause comes into play if a national legal system provides access to adjudicative procedures beyond the mandates of existing human rights guarantees. This is, for example the case if it guarantees access to such a proceeding – either of an administrative body, an independent tribunal or a court – in cases outside the scope of article 14 ICCPR and not involving human rights (and therefore is not covered by article 2(3) ICCPR). In such situations, the equality clause of article 13 CRPD extends its application to the procedures provided by national law. Whether such procedures are created by constitutional or domestic statutory law, is irrelevant. Once national law opens up an adjudicative procedure, the CRPD requires it to be open to persons with disabilities “on an equal basis with others”.

Accordingly, the CRPD Committee, in its concluding observations on New Zealand, recommended the State party to “examine the processes for the assessing of compensation by the Accident Compensation Corporation”, a procedure specific to that country.

Let me give you an example: Neither the ICCPR nor any other international human rights treaty, including the ECHR (European Convention on Human Rights), ACHR (American Convention on Human Rights) and Banjul-Charter (African Charter on Human and Peoples’ Rights), provide a comprehensive guarantee of access to an independent court in all legal conflicts. National law, however, frequently contains such provisions, as, for example, the German Constitution in its article 19(4). Whenever such national guarantees exceed international protection, be they grounded in constitutional, statutory or case law, they fall under article 13 CRPD, due to its equality and non-discrimination clause.

This means that whenever international or national law establishes legal proceedings in which individuals may partake as direct or indirect participants (I will come back to this distinction), article 13 is applicable to them.

Rights Protected by Article 13

This line of reasoning does not only apply to questions of the procedures covered by article 13, but extends to the procedural rights guaranteed in such procedures. It answers the question of which procedural guarantees article 13 provides. Article 13 ensures very broadly “effective access to justice”. Under the concept developed here, this broad term, on the first level, incorporates all procedural guarantees provided by Articles 9, 14 and 2(3) ICCPR, as well as other international fair trial and effective remedy-guarantees. These international human rights norms provide a minimum standard of procedural guarantees aimed at securing access to and fairness in adjudicative proceedings. Such guarantees are, for example, the provision of equality of arms, of the independence and impartiality of the tribunal, of a fair hearing, access to court documents, access to courts or other tribunals, etc.

In addition, article 13 extends to those procedural guarantees that national law provides, beyond the minimum standard set by international human rights law. As with respect to the scope of application, the equality clause of article 13 makes this guarantee applicable to all situations where national law provides procedural rights to the parties. It incorporates procedural guarantees grounded in national law, be it constitutional, statutory or case law. If, for example, national law provides legal assistance not just in criminal matters, as contained in article 14(3)(d) ICCPR, but also in civil or administrative proceedings, article 13 ensures that persons with disabilities are provided legal assistance as well.

In sum, article 13 extends to all procedures and encompasses all procedural rights that international human rights law or national law establish.

Incorporating Regional Human Rights Law

Let me briefly add a side-note: This far, I have taken the procedural provisions of the ICCPR as the prime examples of procedural international human rights. Other conventions contain additional

guarantees, exceeding the scope of the ICCPR, such as, for example, article 12 CRC with respect to children. In addition, and this I would like to highlight, regional human rights law contains often far-reaching and well-entrenched procedural guarantees, such as Articles 5, 6 and 13 ECHR, art. 47 of the EU Charter, and articles 7 and 8 of the American Convention. Just as Article 13 incorporates procedural guarantees in national law through its equality clause, it incorporates provisions like these in regional human rights instruments. The scope and content of article 13 CRPD may therefore vary depending on the human rights treaties a State party has ratified.

The Right to “Procedural Accommodations”

Up to this point, I have read article 13 mainly as a guarantee incorporating existing procedural provisions. Now, we are approaching the specific normative content that article 13 adds. The key term in this respect, the pivotal term of article 13, is “procedural and age-appropriate accommodations”. Let me highlight some central issues pertaining to this term, first restricting it to “procedural accommodations”:

The guarantee of procedural accommodations aims at ensuring that persons with disabilities can in fact exercise the procedural rights incorporated from international human rights and national law, “on an equal basis with others”. It provides the measures necessary to remove the barriers persons with disabilities face when exercising their procedural rights. Such barriers may be of very diverse nature, as, for example, physical barriers restricting entrance to a building of a court or an administrative agency, guardianship laws muting the legal voice of persons with intellectual and psycho-social disabilities, docket files unreadable for person with cognitive or intellectual disabilities, or court and other fees rendering the participation in an adjudicative process illusory.

Article 13 mandates the State to enact those procedural accommodations that are necessary to remove such barriers. Such legislation is, as legislation, necessarily of a general nature. It needs to be precise enough to provide the needed guidance in individual situations, and it needs to be open enough to allow for adjustments the specific situation may require. Such provisions should, in my view, be adopted by the procedural laws governing the respective processes.

With the qualifier “age-appropriate”, article 13 highlights the fact that individual requirements for an effective participation in adjudicative procedures may vary greatly depending on the parties’ age. Article 13 requires these differences to be taken into account. However, the equality clause in this article incorporates the guarantee of equality and non-discrimination of article 5, which encompasses an exceedingly broad range of factors to be accounted for. The explicit mentioning of “age-appropriate” in article 13 highlight the practical importance of taking account of age in the design of procedural rights, but does not, in my view, add any normativity not already provided by article 5.

In addition to the state obligation to legislate, article 13 confers an individual right to procedural accommodations. This right reinforces and specifies the rights provided by procedural guarantees of international and domestic law, adapting them to the specific circumstances of the person with disabilities seeking justice. As with respect to the procedural rights outside of the CRPD, the right to procedural accommodation is generally not subject to restrictions based on a proportionality

analysis. The absence of the term “reasonable” is no accident. This does not mean, however, that restrictions are absolutely prohibited.

The Right to Legal Assistance

This far, I have not delved into the specific rights provided by article 13 as procedural accommodations, and I will not delve into this subject, except for one such right. The literature has intensively discussed the question of whether and to what extent article 13 guarantees a right free or affordable legal assistance in adjudicative procedures. Many, including the forthcoming Principles elaborated by the Special Rapporteur, answer this question in the affirmative. I would take a more nuanced approach, following the incorporative understanding of article 13 sketched above:

As briefly mentioned, international human rights guarantees such as article 14(3)(d) ICCPR or article 6(3)(c) ECHR provide, under certain circumstances, a right to free legal assistance in criminal cases. The HRC (Human Rights Council), in its GC 32, §10, “encourages” States to extend free legal aid to other cases. In individual communications, it extends free legal aid further. Article 13 CRPD incorporates such guarantees.

In addition, free legal assistance provided by national law is also incorporated. For example, the Constitution of my home country provides free legal assistance, under certain circumstances, in all adjudicative procedures, irrespective of their legal nature.

These rights to free legal assistance, based on an incorporation of international human rights and national law, are not the only such rights article 13 guarantees. At the basis of the right to free legal assistance lies the guarantee of equality as applied to adjudicative procedures. In the context of article 13 CRPD, free legal assistance may be an appropriate accommodation necessary to ensure effective access on an equal basis with others. This logic, on the international level mainly developed within the guarantee of equality before the courts of article 14(1) ICCPR, also applies to article 13 CRPD. It remains the duty of the CRPD Committee to specify and shape the contours of the right directly based on the equality clause.

The Right of Non-Parties to Participation

In my presentation, I have focused on one aspect of article 13, and have not addressed other parts. The reason is simply a lack of time, and certainly not the idea that they are less important. Let me briefly refer to what I mean:

In language hard to understand, Article 13 applies to “direct and indirect participants”. Apparently, the idea was that this text should indicate that article 13 does not only apply to the parties in adjudicative proceedings, but extends to all participants, such as judges, jurors, witnesses, lawyers, or staff. The literature is quite uneven on this point. This opens up an entirely new part, only sporadically and loosely related to existing procedural international human rights law.

Article 13, with this prong, protects the right of persons with disabilities to act in the capacities mentioned, “on an equal basis with others”, and requires the states to provide the necessary procedural accommodations. This may, for example, require changes in the technical administration of the docket or in the drafting procedures of judgments to accommodate a blind

clerk, changes in the rules governing the appraisal of evidence by the court in order to accommodate a judge or a juror with a hearing impairment, etc. The aim is to remove those barriers that hinder persons with disabilities from exercising the functions mentioned as persons without disabilities can.

A Brief Reference to the Duty to Promote Appropriate Training

This far, and I am getting close to the end of my presentation, I have not mentioned para. 2 of article 13. It imposes a duty on the state to promote “appropriate training” to persons “working in the field of administration of justice”, in order to ensure the realization of para. 1 of article 13. The illustrative mentioning of “police and prison staff” clarifies that the term “those working in the field of administration of justice” is particularly broad. It appears that it extends to all personnel entrusted with the application of law, as applying the law with the authority to do so is a form of administration of justice, irrespective of whether criminal, civil or administrative law is concerned.

Summary

Let me sum up: Article 13 CRPD is a novel guarantee that heavily builds on existing human rights law. I first incorporates the existing procedural guarantees of international law – be it global or regional – and of domestic law. Incorporation pertains to the scope of application of article 13 and to the procedural guarantees provided. On a second level, it requires the states to provide all those accommodative measures necessary to remove the barriers persons with disabilities face due to their disability in the exercise of these rights. Such procedural accommodation is generally not subject to restrictions based on a proportionality analysis.

The incorporation theory of article 13 does not apply to its second prong. Article 13 does not only confer rights on the parties in adjudicative procedures, as the procedural provisions of international human rights law generally does, but extends the right to procedural accommodations to other participants in such procedures, such as judges, jurors, clerks, witnesses, lawyers, or staff. This part of article 13 applies the guarantee of equality and non-discrimination to all non-parties with the aim of ensuring that persons with disabilities can exercise the functions mentioned on an equal basis with others.

Together with the state obligation under paragraph 2 of article 13 to promote training for all persons exercising state functions in adjudicative processes, article 13 is a comprehensive guarantee for the participation of persons with disabilities in all functions of all adjudicative procedures on an equal basis with others. It requires the removal of all barriers limiting the participation of persons with disabilities in such procedures. This is – as the CRPD in general – an ambitious goal that will accompany us for the foreseeable future. Thank you.