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# Access to Justice for Persons with Disabilities: The Case of Legal Aid

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A Presentation to the NWT Human Rights Commission, October 21, 2013

# Defining Access to Justice

Access to Justice generally contains 3 distinct, yet interdependent components:

“**[S]ubstantive justice** which concerns itself with an assessment of the rights claims that are available to those who seek a remedy;

**procedural aspects** which focus on the opportunities and barriers to getting one’s claim into court (or other dispute resolution forum); and,

the **symbolic component** of access to justice which steps outside of doctrinal law and asks to what extent a particular legal regime promotes citizens’ belonging and empowerment.”

- ▶ R. Bahdi, “Background Paper on Women’s Access to Justice in the MENA Region”, cited in S. Ortoleva, “INACCESSIBLE JUSTICE: HUMAN RIGHTS, PERSONS WITH DISABILITIES AND THE LEGAL SYSTEM”

# Access to Justice under the UN CRPD

## Article 13 – Access to justice

- ▶ 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.

# Art 13 CRPD & Legal Aid

## Research methodology:

- ▶ Topics: access to justice for PWD, legal aid
- ▶ Survey of:
  - Academic literature
  - Courts/tribunals decisions
  - Policy documents
  - Government and NGO documentation—including disabled people's organizations and civil society organizations
- ▶ International and Domestic Material – academic research databases in law, open access sources
- ▶ Limitations: include language (English sources, primarily)

# The Council of Europe

*Human Rights and Disability: Equal rights for all” (2008). Paper by the Council of Europe’s Commissioner for Human Rights*

<https://wcd.coe.int/ViewDoc.jsp?id=1355349>

**“The judicial system has to be accessible to victims of discrimination and the legal costs involved affordable.”**

# 3 Approaches to Justifying Legal Aid for PWDs

A survey of the academic literature, judicial/tribunal decisions, governmental and nongovernmental policy statements, both internationally and domestically, reveals 3 main justifications for requiring financial aid to ensure access to justice for persons with disabilities:

1. Vulnerability
2. Reasonable accommodation (as a tool for accessing justice)
3. Financial means

# Vulnerability

- ▶ **PWDs are significantly more vulnerable to discrimination and other legal transgressions**
- ▶ **Study by Baxter, Trebilcock & Yoon, published in 2012, found that disability is the most significant demographic predictor of civil justice problems in Canada, the United Kingdom and New South Wales. What this means is that persons with disability status are the most likely individuals to become enmeshed in justiciable events.**

# Vulnerability

- ▶ **Mental Disability Advocacy Center (MDAC)**
  - who they are
- ▶ **MDAC states:** “People subject to guardianship provisions, people in institutions, people labelled with psycho-social disabilities or intellectual disabilities, people with communication difficulties, and children all face barriers to accessing justice. This can be due to legal prohibitions on people complaining or accessing a court. It can also be because there is no legal aid to pay for legal advice and assistance, and if need be, representation ”

<http://www.mdac.info/en/access-to-justice>

# Mental Disability Advocacy Center – Policy Paper~2011

MDAC asserts:

- ▶ **“4. The law must include a procedure to allow all persons with disabilities, regardless of their legal capacity status, to exercise the right to legal representation, i.e. to freely appoint a lawyer or another representative of their choice.**
- ▶ **5. The law must enable all people with disabilities to access State-funded legal aid to a person whose legal capacity is being questioned.”**

▶ “Access to Justice for People with Intellectual Disabilities and People with Psycho-Social Disabilities in Russia” MDAC Policy Paper~2011

[http://www.mdac.info/sites/mdac.info/files/English\\_Access\\_to\\_Justice\\_for\\_People\\_with\\_Intellectual\\_Disabilities\\_and\\_People\\_with\\_Psycho-social\\_Disabilities\\_in\\_Russia.pdf](http://www.mdac.info/sites/mdac.info/files/English_Access_to_Justice_for_People_with_Intellectual_Disabilities_and_People_with_Psycho-social_Disabilities_in_Russia.pdf)

# Vulnerability

- ▶ **PWDs are vulnerable to discrimination because of their disability status**
- ▶ **Canadian statistics**
- ▶ **Australia** – provides legal aid for PWDs primarily for anti-discrimination cases
- ▶ **Russia** – legal aid for PWDs provided in some regions for more than just discrimination (St. Petersburg City Government program –noted by MDAC as particularly effective). But MDAC also “notes with concern that only a few regions in Russia have implemented schemes for providing people with disabilities with access to quality free legal aid” (p.9 Policy Paper ~2011)

# Vulnerability

- ▶ Canadian statistics – disability discrimination cases
- ▶ A significantly high percentage of complaints of discrimination brought on grounds of disability in the statutory human rights context across Canada. In 2011–12, disability reported to range from 30.8% to 84.3% of all cases in human rights commissions/tribunals across Canada
- ▶ See table – next slide

# Canadian Human Rights Cases involving Disability 2011–2012

2011-12	Fed	YK	NWT	NVT	BC	AB	SK	MB	ON	PQ	PEI	NB	NFLD	Total
# of complaints on ground of disability	1	12	21	0	417	565	0	1	0	353	20	77	57	1522
# of total complaints	1	26	38	0	1092	670	0	1	0	1001	65	169	90	3151
% of total complaints	0.3%	46.2%	55.3%	0%	38.2%	84.3%	0%	0.1%	0%	35.3%	30.8%	45.6%	63.3%	48.3%

# Australia

- ▶ Prof. Frances Gibson (Australia) notes:

“There is a number of specialist community legal centres providing assistance for people with a disability, including disability discrimination legal centres in New South Wales, Victoria, the Australian Capital Territory, South Australia and Queensland; Mental Health Legal Centres in Victoria and Western Australia; an HIV/AIDS Legal Centre in New South Wales; the Intellectual Disability Rights Service and Criminal Justice Support Network in New South Wales; Queensland Advocacy Inc; the Villamanta Disability Rights Legal Service Inc in Victoria; and People With Disabilities (WA) Inc in Western Australia...”

# Australia

But Prof. Frances Gibson (Australia) asserts further:

- ▶ “although these specialist services for people with a disability exist, they are mostly limited to disability discrimination law and services that assist people with particular disabilities, such as mental health legal centres...”
- ▶ “there is in Australia the barebones of a legal aid system offering access to justice for people with a disability. It is not enough to meet the requirements of the CRPD in terms of ‘effective access to justice’.”
- ▶ Gibson asserts that support for all rights and issues protected by CRPD should have legal aid attached to them so that PWDs may realize their rights.

# Reasonable Accommodation

- ▶ Reasonable Accommodation as a tool for achieving access to justice for PWDs

## **Art. 2 CRPD:**

- ▶ "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms"

# European Court Human Rights (ECHR) – *Nenov c. Bulgarie* (2009)

- ▶ « Eu égard à ces observations, la Cour est d'avis que le fait de ne pas avoir bénéficié d'une aide judiciaire a privé le requérant de la possibilité de défendre efficacement sa cause et qu'il a entraîné une inégalité des armes inacceptable avec la mère des enfants . » (*Nenov*, ECHR 2009, para. 52)
- ▶ the court held that not having legal aid deprived the husband from the possibility of effectively defending his case. He was put in a situation of an unequal playing field with respect to the opposing party, the mother of his children.

# Financial means

- ▶ Legal aid – eligibility generally premised on a financial means test (eg Legal Aid Ontario)
- ▶ **Providing legal aid for PWDs can be justified by the prevalent low income/income security reality of PWDs.**

# Financial means

## Connection between PWDS and low income/income insecurity

(Table 7 adopted from: <http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/demographic-profile/understanding-poverty-exclusion>)

**Table 7. After tax low income status by disability status and labour force status (Source: PALS 2006)**

Labor force status	Without disability	With disability
Employed	7.3%	11.0%
Unemployed	18.7%	26.8%
Not in the labour force	19.4%	28.4%

# The Council of Europe

*Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006–2015*

## 3.12. – Action line No. 12: Legal protection ...

- ▶ vi. to provide appropriate assistance to those people who experience difficulty in exercising their legal capacity and ensure that it is commensurate with the required level of support;

# EU CHARTER OF FUNDAMENTAL RIGHTS

## *Article 47*

### *Right to an effective remedy and to a fair trial*

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

**Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”**

# Additional resources

- ▶ UN Convention on the Rights of Persons with Disabilities, full text :<http://www.un.org/disabilities/convention/conventionfull.shtml>
- ▶ Frances Gibson, “Article 13 of the Convention on the Rights of Persons with Disabilities— A Right to Legal Aid?” 15 AUSTL. J. OF HUM. RTS. 123, 131 (2010).
- ▶ S. Ortoleva, “Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System” (2011) 17 ILSA J. Int'l & Comp. L. 281
- ▶ Mental Disability Advocacy Center (<http://www.mdac.info/en>)
- ▶ *AFFAIRE NENOV c. BULGARIE*, (ECHR Requête n° 33738/02) Judgment of 16 July 2009, application no. 33738/02 , available online (in French only):  
<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93634>

- ▶ Cameron Crawford, *Disabling Poverty and Enabling Citizenship: Understanding the Poverty and Exclusion of Canadians with Disabilities*, online: Council of Canadians with Disabilities online: <http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/demographic-profile/understanding-poverty-exclusion>
- ▶ *Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006–2015*, available online: [http://www.coe.int/t/e/social\\_cohesion/soc-sp/integration/02\\_council\\_of\\_europe\\_disability\\_action\\_plan/Council\\_of\\_Europe\\_Disability\\_Action\\_Plan.asp](http://www.coe.int/t/e/social_cohesion/soc-sp/integration/02_council_of_europe_disability_action_plan/Council_of_Europe_Disability_Action_Plan.asp)
- ▶ Baxter, Trebilcock & Yoon, "The Ontario. Civil Legal Needs Project: A Comparative Analysis of the 2009 Survey Data" in Michael Trebilcock, Anthony Duggan, and Lorne Sossin, eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012)

Thank you\*.

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\* Thanks also to the following Windsor Law students for their excellent research assistance and amazing dedication: Rebecca Holton, Amanda Mariuz, Justin Reid and Stephanie Skinner.