



Guidelines on **Access to justice for persons with psychosocial disabilities**

Introduction: rationale and target audience

Access to justice is a basic principle of the rule of law and refers to the human right to enforce rights (e.g. right to work and employment, freedom of expression, health, adequate standards of living and social protection, participation in criminal proceedings, etc.). In other words, access to justice is the right that enables and empowers individuals to enforce their rights and seek redress. Some common elements of access to justice include the right to a fair trial, equality of arms¹, due process, access to court, judicial protection, effective remedies and redress².

Access to justice is paramount to ensure the full enjoyment of all human rights for all persons and in particular for people that are at risk of facing discrimination and barriers to inclusion. It guarantees that every individual must be considered the central rights holder regardless their age, sex or gender, disability, race, religion, or any other personal or social condition or circumstance.

This is a particularly important principle as system biases, structural inequalities and stigma are still present in laws, procedures and practices. While navigating the justice system can be difficult and alienating for anyone not familiar with it, these elements can create additional barriers for persons with disabilities, including persons with psychosocial disabilities, as they prevent them from fully enjoying their rights on an equal basis with others.

They can also have adverse or wrongful consequences for the individual, when they are parties in the proceedings: inaccessible information or support could lead to the lack of understanding of legal steps and timely actions, while negative attitudes or stigma could lead to the lack of credibility by the court of the testimony of a person with psychosocial disabilities.

This document aims to provide guidance on what access to justice means in practice for persons with psychosocial disabilities and how to ensure that this right is respected and implemented. The rights and principles outlined below apply to the whole justice system, meaning all legal proceedings (civil, criminal and administrative) and procedural stages until final adjudication or sentencing. Accordingly, these guidelines can be of help to any stakeholder within all the branches of the justice system and any participant in legal proceedings. Guidance from this publication can support lawmakers and policymakers, as well as the judiciary, law enforcement, judicial and corrections officials. It could also benefit – and not be limited to – suspects and defendants, lawyers, jurors, witnesses, victims, detainees, and claimants. This document is also intended to provide guidance to persons with psychosocial disabilities and their representative organisations in understanding access to justice.

¹ The concept of equality of arms is part of the right to a fair trial, as stipulated in Article 6 of the European Convention on Human Rights. It protects and promotes the fair balance between the opportunities afforded to the parties involved in litigation (for instance, for both parties to call witnesses and cross-examine, to provide their own evidence or to be granted financial support to those who cannot afford legal representation).

² For more information on the topic, see the report *Access to Justice in Europe: An Overview of Challenges and Opportunities* by the Fundamental Rights Agency (2011), available at: https://fra.europa.eu/sites/default/files/fra_uploads/1520-report-access-to-justice_EN.pdf.

Understanding psychosocial disabilities from a human rights-based approach

Central to the understanding and enforcement of the right to access to justice for persons with psychosocial disabilities is the United Nations Convention of the Rights of Persons with Disabilities (UN CRPD). This Convention is a human rights treaty that has been signed and ratified by the European Union (EU) and all its Member States. The UN CRPD is considered to be a landmark treaty as it sets into a binding document the paradigm shift with which disabilities, including psychosocial disabilities, are recognised and interact with laws, regulations, customs and practices.

For a long time, people with disabilities have been seen and treated differently from people without disabilities based on the assumption that their impairment made them 'inferior' or 'inadequate'. Psychosocial disabilities in particular have often been framed through a biomedical approach which focused the attention on the illness, its biomedical factors and genetic predisposition. Under this model, exclusion of persons with disability became legitimised as it was believed that they could not be part of, would be a burden to, or would be dangerous for mainstream society.

In the last decades however, this mindset has been critiqued and the attention has shifted from focusing on the impairment that a person might have, to the barriers created by society. With little scientific evidence pointing to genetic markers or differences in brain functions that can reliably predict or identify mental ill health, the understanding of psychosocial disabilities has also changed. As such, it has become more evident that there are other determinants influencing a person's mental wellbeing. This so-called psychosocial approach frames psychosocial disability as a human experience and understands mental ill-health as the result of a variety of factors, including wider socio-economic issues, or challenging and traumatic life events. Rather than focusing on individual impairments, this model focuses on the barriers and how to overcome them, through adequate support and adjustments. Following this approach, persons with disabilities, including persons with psychosocial disabilities, are seen and treated on an equal basis with others. Persons with psychosocial disabilities have thus the right to exercise their will and preferences, and to have choice and control over their lives.

As per the paradigm shift set off in the UN CRPD, any deprivation of such rights or of the means to access such rights amounts to discrimination. In relation to access to justice, this shift in understanding disability is enshrined in Article 12 and Article 13 of the UN CRPD, and the way they recognise the autonomy of persons with disabilities.

Understanding access to justice from a human rights-based approach

Article 12 of the UN CRPD promotes and protects the equal recognition before the law of persons with disabilities, including persons with psychosocial disabilities. In particular, it recognises that persons with disabilities have the right to enjoy legal capacity on an equal basis with others in all aspects of life. The concept of legal capacity is especially important for persons with psychosocial disabilities as it “includes the capacity to be both a holder of rights and an actor under the law. Legal capacity to be a holder of rights entitles a person to full protection of [their] rights by the legal system. Legal capacity to act under the law recognizes that person as an agent with the power to engage in transactions and create, modify or end legal relationships.”³

Article 13 of the UN CRPD goes more into details about the specific right to access to justice and the obligations that States Parties to the Convention have vis-à-vis this right. Article 13 of the UN CRPD reads:

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.

³Committee of the Rights of Persons with Disabilities, General Comment No. 1 on equal recognition before the law (2014), paragraph 12, available at: <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-1-article-12-equal-recognition-1>.

1. All persons with psychosocial disabilities have legal capacity and the right to access to justice

The UN CRPD prohibits any practice, law or measure that deprives a person with psychosocial disability of their legal capacity, which is defined above as the ability to hold rights and duties (legal standing) and exercise those rights and duties (legal agency). Similarly, the Convention also establishes that an individual cannot be denied access to justice based on their disability.

These principles have a series of implications when it comes to the implementation of the right to access to justice for persons with psychosocial disabilities, namely:

a. Persons with psychosocial disabilities have the full capacity and right to participate in the proceedings of all courts, tribunals and forums, including initiating and pursuing legal claims. Concepts like “unfitness to stand trial” or “incapacity to plead” must be repealed from laws, procedures and practices. Testimonies from persons with psychosocial disabilities cannot be restricted or rejected on the basis of their disability nor can a medical professional determine the capacity of a person with psychosocial disability to make decisions, to testify or stand a trial.

b. The criminal justice systems must be universally accessible and not create separate judicial procedures for persons with psychosocial disabilities in order to comprehensively comply with international human rights law.⁴ In the transition to such systems, persons with psychosocial disabilities should have at minimum the same standard of proof and probative value of prosecution evidence as with typical trials for other defendants; the same presumption of innocence, with the associated requirement for proof of all elements; availability to the accused of all defences, and; proceedings against the accused to be based on their rights, wishes and preferences and not their perceived ‘best interests’. Persons with psychosocial disabilities should not be subjected to unlimited duration of trial detention on the basis of their disability.⁵ As an outcome of the proceeding, any deprivation of liberty should not be based on the concept of perceived dangerousness of persons with psychosocial disabilities and should not last longer than it would for a typical criminal case, same crime and same gravity of the offence.

⁴ Gooding P., McSherry B., Arstein-Kerslake A. “Supported Decision-Making in Criminal Proceedings: A Sociolegal Empirical Study”, *Journal of Disability Policy Studies* vol. 1-11, 2021.

⁵ Gooding P., Arstein-Kerslake A., Andrews L., McSherry B. “Unfitness to stand trial and indefinite detention of persons with cognitive disabilities in Australia: human rights challenges and proposals for change”, *Melbourne University Law Review*, Vol. 40, No. 3, 2017, p. 863.

c. All forms of substitute decision-making are a violation of the right to legal capacity of a person with psychosocial disability, including schemes that foresee substitute decision-making as a last resort must be abolished. States Parties to the UN CRPD must replace substitute decision-making systems with the establishment and implementation of supported decision-making systems and provide access to persons with psychosocial disabilities to the wide range of support they may require in exercising their legal capacity.⁶

d. Involuntary practices against persons with psychosocial disabilities justified on the ground of their disability constitute a de facto denial of legal capacity, even though they were not formally deprived of legal capacity.⁷ People with psychosocial disabilities that have been subjected to involuntary practices have therefore the right to seek legal remedies and justice. Laws, procedures and practices that prevent this must be repealed or amended.⁸

e. Although legal aid should be accessible, available and affordable, it cannot be made mandatory. This is particularly important for persons with psychosocial disabilities since some regimes of supported decision making still include the condition of compulsory support. Instead, persons with psychosocial disabilities must always be considered as the central holders of rights and must have the right not to choose legal support.⁹ Likewise, persons with psychosocial disabilities have the right to choose their own counsel, and no other appointed counsel should have the precedence over the one they choose.

f. Persons with psychosocial disabilities must be given the possibility, on an equal basis with others, to be involved in various roles in the administration of justice (e.g. judges, lawyers, prosecutors, witnesses, jurors, experts and court officials). Laws, procedures and practices that prevent people with psychosocial disabilities from serving in any justice-related position must be repealed or amended. This includes removing barriers that discriminate on the basis of disability, such as asking about health or disability in applications for admission to the legal profession and positions in the justice system.

⁶ For more information on the topic, including examples of promising practices on supported decision-making and the respect of legal capacity, see <https://www.mhe-sme.org/what-we-do/human-rights/promising-practices/>.

⁷ This notion corresponds to the UN CRPD Committee's General Comment No. 1 (2014) cited above. Legal capacity entails the ability to hold rights as well as to exercise rights and duties, including having these rights and duties recognised by law. Legal capacity thus also entails assessing and producing legal effects concerning the rights of others. Involuntary treatment and placement against persons with psychosocial disabilities, regardless if formally deprived of legal capacity or not, constitutes therefore an informal deprivation of legal capacity.

⁸ For more information, see MHE reflection paper on Access to Justice for Persons with Psychosocial Disabilities & Mental Health Problems, available at: <https://www.mhe-sme.org/access-to-justice-reflection-paper-promising-practices/>.

⁹ Ibid.

2. All persons with psychosocial disabilities have the right to procedural accommodations

The UN CRPD defines reasonable accommodations as “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.”¹⁰ Article 3 on general principle, Article 4 on general obligations and Article 5 on equality and non-discrimination clarify that the concept of reasonable accommodations applies throughout the Convention, including Article 13.

Concurrently, Article 13 establishes that procedural and age-appropriate accommodations must be in place to ensure effective access to justice for persons with psychosocial disabilities on an equal basis with others. Procedural accommodations are “all necessary and appropriate modifications and adjustments in the context of access to justice, where needed in a particular case, to ensure the participation of persons with disabilities on an equal basis with others.”¹¹

Differently from the concept of reasonable accommodations, procedural accommodations do not include the mention of disproportionate or undue burden. This distinction is not casual and – while they both apply to Article 13 – the two concepts should not be confused: “during the negotiations on the [UN CRPD], the term ‘reasonable’ was intentionally left aside in the framing of Article 13. Article 13 requires ‘procedural accommodations’, which are not limited by the concept of ‘disproportionate or undue burden’. This differentiation is fundamental, because the right of access to justice acts as the guarantor for the effective enjoyment and exercise of all rights. Failure to provide a procedural accommodation therefore constitutes a form of discrimination on the basis of disability in connection with the right of access to justice.”¹²

Procedural accommodations do not mean that proceedings should be less formal. The justice system can be complex and overwhelming, with strict legal language and procedures that make it difficult to navigate. Procedural accommodations are therefore there to ensure that the needs of persons with disabilities are considered as rightful parties and that procedural barriers are eliminated.

¹⁰ Article 2 of the United Nations Convention on the Rights of Persons with Disabilities, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities>.

¹¹ Special Rapporteur on the rights of persons with disabilities, International Principles and Guidelines on Access to Justice for Persons with Disabilities (2020), available at: <https://www.ohchr.org/en/special-procedures/sr-disability/international-principles-and-guidelines-access-justice-persons-disabilities>.

¹² Human Right Council, Equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities – Report of the Office of the United Nations High Commissioner for Human Rights (A/HRC/34/26), available at: <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F34%2F26&Language=E&DeviceType=Desktop&LangRequested=False>.

Procedural accommodations include (but are not limited to):¹³

- Ensuring that persons with psychosocial disabilities are informed of their rights to request procedural accommodations throughout the course of the proceedings.
- Having intermediaries and facilitators that have been appropriately trained to support persons with psychosocial disabilities in assessing what type of accommodation might be needed and to provide communication assistance throughout the course of the proceedings. This support may also facilitate the communication with other actors, such as relevant healthcare or social service providers, family members, friends and communities that may be relevant for the outcome of the proceeding.
- Ensuring that persons with psychosocial disabilities can choose support that does not necessarily act regarding the substance of their legal case (in other words, support that is not legal aid). That may include availability of mental health and emotional support, e.g. through allowing the person to be accompanied by a chosen peer or family member, or by making psychological support accessible upon request.
- Adapting judicial procedures to the needs of persons with psychosocial disabilities: for instance, by adjusting the venue or the pace of the proceedings, giving the possibility to see the hearing room beforehand, removing cloaks or wigs, allowing for more breaks or to be separated from others if this causes distress.
- Adapting language and communication to the needs of the person with psychosocial disabilities: for instance, by avoiding merely reading out the statute and instead providing information on procedures in plain language, ensuring that the person is aware of what is expected of them, modifying the method of questioning.

¹³ More information on how to create inclusive spaces for persons with psychosocial disabilities can be found in MHE reflection paper on accessibility, available at: <https://www.mhe-sme.org/wp-content/uploads/2020/09/MHE-reflection-paper-accessibility.pdf>.

3. All people working in the justice system must receive appropriate training on psychosocial disabilities

The above-mentioned practices and adjustments to implement Article 13 of the UN CRPD can only effectively work if adequately understood and internalised by the justice system and the people that operate within it. This is why the second paragraph of Article 13 addresses the importance of raising awareness among the people working in the field of administration of justice.

Negative attitudes, stigmatisation and lack of awareness of the barriers faced by persons with psychosocial disabilities can lead to unfair and unequal treatment. Consequently, persons with psychosocial disabilities can become sceptical about the system and its ability to effectively seek and enforce justice.

Training and awareness raising campaigns are therefore pivotal in ensuring access to justice and equal treatment. Training must be provided on a going basis to all justice officials, such as the police and first responders, judicial officers, lawyers, service professionals, forensic experts, and probation, prison and detention staff, as well as judges, jurors, victim service professionals, social workers and health professionals.

Training must be comprehensive and cover, inter alia, the following topics:

- Rights, principles and obligations of the UN CRPD, with a particular focus on the right to equal recognition before the law, legal capacity and supported decision-making, and access to justice.
- Barriers faced by persons with psychosocial disabilities and how to remove them, including how to combat stigma and discrimination, including intersecting forms of discrimination on the basis of disability and other grounds (e.g. sex, gender, race, age, religion).
- Use of adequate and inclusive language, and communication skills.
- Procedural accommodations.

As per the UN CRPD, training programmes must be designed, delivered and monitored with the involvement of persons with psychosocial disabilities and their representative organisation. Human rights bodies, such as equality bodies and national human rights institutions, should also be involved in the process.

Since the justice system can be at times rigid and hierarchical, distrust and scepticism can hinder the meaningful attendance to training programmes and the willingness to bring change to the system. This is why it is important to form and have champions at the highest levels of the hierarchy (e.g. judges) to contribute to the training of their peers and lead by example. Similarly, training courses on the UN CRPD and the rights of persons with psychosocial disabilities should also be integrated in educational curricula and preparation for future professionals of the justice system (e.g. judges, lawyers, police).

4. Conclusions

These guidelines have the purpose to explain and assist in the implementation of the right to access to justice for persons with psychosocial disabilities. While we provided concrete examples and practical guidance to achieve this, the actions listed above should not be considered exhaustive lists of what can and should be done. Considering the diversity of justice systems as well as the fact that these can change, these guidelines aim to provide stakeholders and participants to the justice system with the adequate tools and approach to ensure that persons with psychosocial disabilities can enjoy their right to equal and fair access to justice, without discrimination. More information, actions and practices can be found in all the documents referenced in these guidelines, in the jurisprudence of the UN CRPD Committee as well as at www.mhe-sme.org.



www.mhe-sme.org

Contact person:
Laura Marchetti (Policy Manager):
laura.marchetti@mhe-sme.org

Mental Health Europe (MHE) is the largest independent network organisation representing people with mental health problems, their supporters, care professionals, service providers and human rights experts in the field of mental health across Europe. Its vision is to strive for a Europe where everyone's mental health and wellbeing flourishes across their life course. Together with members and partners, MHE leads in advancing a human rights, community-based, recovery-oriented, and psychosocial approach to mental health and wellbeing for all.



**Funded by the
European Union**

Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the European Commission's CERV Programme. Neither the European Union nor the granting authority can be held responsible for them.