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**Strengthening Access to Civil Justice
for Persons with Disabilities:
A Comparative Socio-Legal Study of Thailand and Ireland**

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Doctoral Thesis in Law (PhD, Law)

Submitted to National University of Ireland, Galway

School of Law

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Table of Contents

Declaration	4
Acknowledgements	5
Abstract	7
List of Abbreviations	8
Table of Cases	13
Table of Legislation and Regulations	15
Table of International Instruments	19
Table of Other Documents	21
CHAPTER 1: Research Introduction	25
Introduction	25
1.1 Background and Scope of the Research	25
1.2 Aim and Objectives of the Research	27
1.3 Research Methodology	29
1.4 Limitations of the Study	39
1.5 Recommendations for Further Research	42
1.6 Explanation of Terminology Used in This Research	43
1.7 Research Outline	46
Conclusion	48
CHAPTER 2: Conception of Access to Justice for Persons with Disabilities	50
Introduction	50
2.1 What is “Justice”?	50
2.2 What is “Access to Justice” for Persons with Disabilities?	81
Conclusion	88
CHAPTER 3: Access to Civil Justice in International Human Rights Law	90
Introduction	90
3.1 Explanation of Process for Attaining Six Categories of the Right to Access to Civil Justice	90
3.2 Six Categories of the Right to Access to Civil Justice in International Human Rights Law	93
Conclusion	114

CHAPTER 4: Access to Civil Justice under the Convention on the Rights of Persons with Disabilities (UNCRC)	116
Introduction	116
4.1 Understanding Access to Justice under the UNCRC	117
4.2 Evaluation of the UNCRC towards the Six Categories of the Right to Access to Civil Justice	148
4.3 Key Elements of Access to Civil Justice in My View.....	162
Conclusion	165
CHAPTER 5: Case Study of Thailand	167
Introduction	167
5.1 Information on Thailand and Its Legal System	168
5.2 Demographic Information about Persons with Disabilities in Thailand.....	181
5.3 Legal Mechanisms and Regulations Relating to Access to Civil Justice for Persons with Disabilities.....	183
5.4 Recommendations.....	244
Conclusion	248
CHAPTER 6: Case Study of Ireland	251
Introduction	251
6.1 Information on Ireland and Its Legal System.....	251
6.2 Demographic Information about Persons with Disabilities in Ireland	258
6.3 Legal Mechanisms and Regulations Relating to Access to Civil Justice for Persons with Disabilities.....	260
6.4 Recommendations.....	333
Conclusion	336
CHAPTER 7: CROSS-CASE ANALYSIS	338
Introduction	338
7.1 Legal System.....	338
7.2 Justice System	340
7.3 Legal Mechanisms and Regulations	342
7.4 Discussion of the Research Findings through the Theoretical Conception of Access to Justice	352
Conclusion	361
CHAPTER 8: Conclusion	363
Introduction	363
8.1 Conclusion of the Research Findings.....	363

8.2	Research Contributions	367
8.3	Reflection on the Theoretical Framework of This Thesis.....	368
	Conclusion	371
	Appendices	373
	Appendix 1: List of Interview Participants	373
	Appendix 2: List of Concluding Observations Reports of the Committee on the Rights of Persons with Disabilities.....	375
	Bibliography.....	378

Declaration

I certify that this thesis is my own work and that I have not used this work in the course of another degree, either at the National University of Ireland Galway or elsewhere.

Signed: _____

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Abstract

This research aims to find out how to strengthen access to civil justice for persons with disabilities, especially in Thailand and Ireland. It examines the meaning of “access to justice” through theories of justice and access to justice, principles of equality, general international human rights law and the Convention on the Rights of Persons with Disabilities (UNCRPD).

The research identifies four dimensions of the conception of justice in the disability context: institutional, capability, non-domination and equality dimensions; and adopts Amartya Sen’s Capability Approach by interpreting the conception of access to justice in this study as a “functioning” that persons with disabilities have reason to value in order to be able to achieve their rights and liberties protected by the rule of law.

The research also examines international human rights laws, and classifies the right to access to civil justice into six categories: 1) the right to equality before courts and tribunals, 2) the right to legal assistance or representation, 3) the right to communication assistance, 4) the right to be heard or a fair hearing by courts, tribunals or other competent bodies in personal presence within a reasonable time or without delay, 5) the right to a remedy, reparation or compensation, and 6) the right to complain, challenge or appeal. The research findings show that the phrase “effective access to justice for persons with disabilities on an equal basis with others” in article 13 of the UNCRPD and interrelationship between article 13 and other articles in the Convention are the key additional features provided by the UNCRPD.

The research examines legal mechanisms and regulations on access to civil justice for persons with disabilities in two jurisdictions: Thailand and Ireland, and includes qualitative research with all groups of persons with disabilities and people who work in the justice system to identify the effectiveness of these laws and regulations in practice.

This research proposes five key elements for strengthening access to civil justice for persons with disabilities in those two countries: 1) effective and enforceable legal mechanisms, 2) competent, independent and impartial justice systems, 3) supportive mechanisms, 4) positive and inclusive attitudes towards persons with disabilities, and 5) effective enforcement mechanisms.

List of Abbreviations

1997 Constitution	Constitution of the Kingdom of Thailand BE2540(1997)
2007 Constitution	Constitution of the Kingdom of Thailand BE2550(2007)
2007/2014 Constitutions	acknowledgement in the 2014 Interim Constitution of the guarantees and protection under the 2007 Constitution (Thailand)
2014 Interim Constitution	Constitution of the Kingdom of Thailand (Interim) BE2557(2014)
2017 Constitution	Constitution of the Kingdom of Thailand BE2560(2017)
AAC	alternative and augmented communication
Ad Hoc Committee	Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities
ADMA 2015	Assisted Decision-Making (Capacity) Act 2015 (Ireland)
ADR	alternative dispute resolution
AJI	Association of Judges of Ireland
APA 1996	Administrative Procedure Act BE2539(1996) (Thailand)
BCA 1979	Building Control Act BE2522(1979) (Thailand)
BCA 1990	Building Control Act 1990 (Ireland)
BCA Regulation on Facilities 2005	Ministerial Regulation Imposing Facilities in Building for Persons with Disabilities and Elderly Persons BE2548(2005) (Thailand)
BMA	Bangkok Metropolitan Administration (Thailand)
CCC	Civil and Commercial Code (Thailand)
CCPOA 2018	Constitutional Court Procedures Organic Act BE2561(2018) (Thailand)
CEPEJ	European Commission for the Efficiency of Justice
CFREU	Charter of Fundamental Rights of the European Union
CIB	Citizens Information Board (Ireland)
CJEU	Court of Justice of the European Union
CLAA 1995	Civil Legal Aid Act 1995 (Ireland)
CoE	Council of Europe

Compilation of proposal	Compilation of proposals for Elements of a Convention (UNCPRD) (15 January 2004)
Court Rules on Video Conference 2013	Rules of the President of the Supreme Court on Guidance for Examining Evidence and Witness through Video Conference BE2556(2013) (Thailand)
CPC	Civil Procedure Code (Thailand)
CSO	Central Statistics Office (Ireland)
CtteeAT	Committee against Torture
CtteeCPR	Human Rights Committee
CtteeEDAW	Committee on the Elimination of Discrimination against Women
CtteeESCR	Committee on Economic, Social and Cultural Rights
CtteeRC	Committee on the Rights of the Child
CtteeRPD	Committee on the Rights of Persons with Disabilities
DA 2005	Disability Act 2005 (Ireland)
DEP	Department of Empowerment of Persons with Disabilities (Thailand)
DPOs	disabled people's organisations
DPP Regulation on Legal Assistance 1990	Regulation of the Department of Public Prosecution on Legal Assistance BE2533(1990) (Thailand)
EACCPA 1999	Establishment of Administrative Courts and Court Procedure Act BE2542(1999) (Thailand)
ECHR	European Convention on Human Rights
ECHRA 2003	European Convention on Human Rights Act 2003 (Ireland)
ECtHR	European Court of Human Rights
ESA 2000	Equal Status Act 2000 (as amended) (Ireland)
ESRC	Economic and Social Research Council
EU	European Union
EU law	European Union law
FLAC	Free Legal Advice Centres (Ireland)
FRA and CoE	European Union Agency for Fundamental Rights and Council of Europe

GG	Government Gazette (Thailand)
HSE	Health Service Executive (Ireland)
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICPED	International Convention for the Protection of All Persons from Enforced Disappearance
IHREC	Irish Human Rights and Equality Commission
ISL	Irish sign-language
ISLA 2017	Irish Sign Language Act 2017 (Ireland)
JAAB	Judicial Appointments Advisory Board (Ireland)
JFCCPA 2010	Juvenile and Family Courts and Court Procedure Act BE2553(2010) (Thailand)
LRC	Law Reform Commission (Ireland)
LSN	Landmine Survivors Network
MHA 2001	Mental Health Act 2001 (Ireland)
MHA 2008	Mental Health Act BE2551(2008) (Thailand)
MHA Appeal Tribunal	Appeal Tribunal of the Mental Health Act (Thailand)
NAS	National Advocacy Service for People with Disabilities (Ireland)
National Reform Plan	Declaration of the Office of the Prime Minister on the Announcement of the National Reform Plan (6 April 2018) (Thailand)
NDA	National Disability Authority (Ireland)
NEP	National Office for Empowerment of Persons with Disabilities (Thailand)
NEP Regulation on Evidence and Mediation 2013	Regulation of the National Committee for Empowerment of Persons with Disabilities on Principle, Method, and Requirement for Requesting, Collecting Evidence, Mediating, Remunerating and Making a Decision

	of the Sub-committee or Mediators, in Relation to Unjust Discriminatory Actions Against Persons with Disabilities BE2556(2013) (Thailand)
OA 1980	Ombudsman Act 1980 (as amended) (Ireland)
OHCHR	Office of the United Nations High Commissioner for Human Rights
OHCHR thematic report on article 13	Report of the Office of the United Nations High Commissioner for Human Rights: Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities (27 December 2017)
Ord	Orders (Ireland)
OUP	Oxford University Press
PD	Practice Direction (Ireland)
PDEA 2007	Persons with Disabilities Empowerment Act BE2550(2007) (Thailand)
PDEA Regulation on Facilities 2012	Ministerial Regulation Imposing Qualification of Devices, Facilities, or Services in Building, Place, or Other Public Services, to Facilitate Accessibility of Persons with Disabilities BE2555(2012) (Thailand)
PDEA Regulation on Information and Communication 2011	Ministerial Regulation Imposing Terms, Procedures and Conditions on Accessibility and Utilisation of Information, Communication, Telecommunication Services, Information and Communication Technology, and Information and Communication Access Technology for Persons with Disabilities BE2554(2011) (Thailand)
PDEA Sub-committee	Sub-committee on Elimination of Unfair Discrimination against Persons with Disabilities (Thailand)
PILA	Public Interest Law Alliance (Ireland)
RDC	Rules of the District Court (Ireland)
Rehabilitation Act 1991	Rehabilitation of Disabled Persons Act BE2534(1991) (Thailand)
Report of the Working Group	Report of the Working Group to the Ad Hoc Committee (27 January 2004)
RI	Rehabilitation International
RSC	Rules of the Superior Courts (Ireland)
SCRPD	Secretariat for the Convention on the Rights of Persons with Disabilities
SI	Statutory Instrument (Ireland)
TGD-M	Technical Guidance Document M (Ireland)

The Fifth Session Report of the Ad Hoc Committee	Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its fifth session (23 February 2005)
The Seventh Session Report of the Ad Hoc Committee	Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its seventh session (13 February 2006)
The Third Session Report of the Ad Hoc Committee	Report of the third session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (9 June 2004)
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCEDAW	Convention on the Elimination of All Forms of Discrimination against Women
UNCRC	Convention on the Rights of the Child
UNCRPD	Convention on the Rights of Persons with Disabilities
UNDG	United Nations Development Group
UNDP	United Nations Development Programme
VAS	Voluntary Assistance Scheme (Ireland)
WRC	Workplace Relations Commission (Ireland)

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81/2531(1988), 6655/2538(1995)
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Disabilities Nos 1/2558(2015), 4/2558(2015)

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Attorney General [2004] IEHC 413, [2006] 4 IR 204
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029 (ES/2001/439)

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Constitution of the Kingdom of Thailand (Interim) BE2557(2014)
Constitution of the Kingdom of Thailand BE2550(2007)
Constitution of the Kingdom of Thailand BE2560(2017)
Constitutional Court Procedures Organic Act BE2561(2018)
Administrative Procedure Act BE2539(1996)
Building Control Act BE2522(1979)
Civil and Commercial Code
Civil Procedure Code
Compensation for Injured Persons and Compensation and Costs to Defendants in Criminal Cases Act BE2544(2001)
Consumer Case Procedure Act BE2551(2008)
Council of State Act BE2522(1979)
Establishment of Administrative Courts and Court Procedure Act BE2542(1999)
Establishment of Bankruptcy Court and Court Procedure Act BE2542(1999)
Establishment of Intellectual Property and International Trade Court and Court Procedure Act BE2539(1996)
Establishment of Labour Courts and Court Procedure Act BE2522(1979)
Establishment of Tax Court and Court Procedure Act BE2528(1985)
Establishment of the Specialised Court of Appeal Act BE2558(2015)
Judicial Service of the Courts of Justice Act BE2543(2000)
Justice Fund Act BE2558(2015)
Juvenile and Family Courts and Court Procedure Act BE2553(2010)
Law for the Organisation of Courts of Justice BE2543(2000)
Lawyers Act BE2528(1985)
Mental Health Act BE2551(2008)
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Ireland

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Equal Status Act 2000 (as amended)
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Irish Human Rights and Equality Commission Act 2014
Irish Sign Language Act 2017
Judicial Separation and Family Law Reform Act 1989
Legal Services Regulation Act 2015
Lunacy Regulation (Ireland) Act 1871
Mental Health Act 2001
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- Convention on the Rights of Persons with Disabilities 2006
- Convention on the Rights of the Child 1989
- Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to
Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms
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- International Convention on the Elimination of All Forms of Racial Discrimination 1966
- International Convention on the Protection of the Rights of All Migrant Workers and Members of
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- Committee on Economic, Social and Cultural Rights 'Draft General Comment No 9'
(3 December 1998) (Adopted at the 51st meeting on 1 December 1998) UN Doc
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- Committee on Economic, Social and Cultural Rights 'General Comment No 3' (1 January 1991)
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- Committee on the Elimination of Discrimination against Women 'General Recommendation
No 28' (16 December 2010) UN Doc CEDAW/C/GC/28
- Committee on the Rights of Persons with Disabilities 'General Comment No 1' (19 May 2014)
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- 'General Comment No 3' (25 November 2016) UN Doc CRPD/C/GC/3
- 'General Comment No 4' (25 November 2016) UN Doc CRPD/C/GC/4
- 'General Comment No 5' (27 October 2017) UN Doc CRPD/C/GC/5
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support and protection of victims of crime, and replacing Council Framework Decision
2001/220/JHA [2012] OJ L315/57

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UNGA 60/266 (17 August 2005) UN Doc A/60/266

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UNGA 'Letter dated 7 October 2005 from the Chairman to all members of the Committee'
(14 October 2005) UN Doc A/AC.265/2006/1

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Convention on the Protection and Promotion of the Rights and Dignity of Persons with
Disabilities on its fifth session' (23 February 2005) UN Doc A/AC.265/2005/2

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Disabilities on its seventh session' (13 February 2006) UN Doc A/AC.265/2006/2

UNGA 'Report of the Office of the United Nations High Commissioner for Human Rights:
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Disabilities' (27 December 2017) UN Doc A/HRC/37/25

UNGA 'Report of the third session of the Ad Hoc Committee on a Comprehensive and Integral
International Convention on the Protection and Promotion of the Rights and Dignity of
Persons with Disabilities' (9 June 2004) UN Doc A/AC.265/2004/5

UNGA 'Report of the Working Group to the Ad Hoc Committee' (27 January 2004) UN Doc
A/AC.265/2004/WG.1

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Compilation of proposals for a Comprehensive and Integral International Convention
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CHAPTER 1:

Research Introduction

INTRODUCTION

This chapter provides an overview of this research study. It consists of seven sections. The chapter firstly explains the background and scope of this research, then specifies the aim and objectives of this research. It then discusses the methodology this research employed to achieve its aim and objectives, outlines the limitations of the research and its recommendations for future research. Specific terminology used in this research is also explained to clarify its scope and meaning in this research. Finally, a chapter outline for the remainder of this thesis is provided in the last section of this chapter.

1.1 BACKGROUND AND SCOPE OF THE RESEARCH

This research was funded by the Royal Thai Government under the National Strategy Empowerment Funds, allocated to the Office of the Judiciary, the secretariat of the Court of Justice in Thailand. The Office required me, as a funding recipient, to conduct research in the area of disability law. I directed my research interest to the area of access to justice for persons with disabilities in order to both fulfil the funding requirement and contribute to the mandate of the Office.

My initial review of this topic area, in 2013, suggested that there was a multilateral treaty, the Convention on the Rights of Persons with Disabilities (UNCRPD), adopted by the United Nations since 2006.¹ It was acknowledged as the first binding international human rights treaty comprehensively addressing the human rights of persons with disabilities.²

¹ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (UNCRPD).

² 'Frequently Asked Questions regarding the Convention on the Rights of Persons with Disabilities' (UN) <www.un.org/development/desa/disabilities/convention-on-the-rights-of-

It clearly articulated a guarantee on effective access to justice for persons with disabilities in its article 13, which covered both civil and criminal systems.³ Despite this, there were no comprehensive guidelines on how to effectively implement this right, while the issue of inaccessible justice was a major concern which affects the rule of law⁴ and the full enjoyment of all human rights.⁵

The initial proposal for this research included access to justice for persons with disabilities in both civil and criminal law in light of article 13 of the UNCRPD. Due to the significant differences between civil and criminal systems, as well as other limitations of doctoral study, the research scope was narrowed down to focus only on one aspect, civil justice, which had received less attention in Thailand and Ireland.⁶

The scope of access to civil justice in this research starts from when legal claims or disputes arise until the end of court proceedings. Although important, the post-court proceedings and enforcement process are not the focus of this research, due to the need to limit the scope of the thesis, based on time constraints and the need to source accurate data on this subject. The study will examine access to justice for person with disability as an issue for national strategy development. Therefore, it includes all groups of persons with disabilities, rather than focusing on a particular impairment group, to ensure that it has the broadest analysis possible of the various barriers and support needs required to access the civil justice system of both countries.

[persons-with-disabilities/frequently-asked-questions-regarding-the-convention-on-the-rights-of-persons-with-disabilities.html](#)> accessed 3 August 2018.

³ UNCRPD, art 13.

⁴ Yash Ghai and Jill Cottrell, 'The rule of law and access to justice' in Yash Ghai and Jill Cottrell (eds), *Marginalized Communities and Access to Justice* (Routledge 2010).

⁵ Stephanie Ortoleva, 'Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System' (2011) 17(2) *ILSA Journal of International and Comparative Law* 281.

⁶ Many universities in Thailand offered a study programme on criminal justice, but no parallel programme available on civil justice. Consequently, researches concerning access to justice were mostly on criminal aspect. Only few researches on civil justice system were conducted, but they were not specifically on the disability perspective. Moreover, in both countries, people get less support from the State for accessing civil justice, in comparison with accessing the criminal justice system.

1.2 AIM AND OBJECTIVES OF THE RESEARCH

The aim of this research is to find effective ways to improve access to civil justice for persons with disabilities, particularly in Thailand and Ireland. However, the goal is also to ensure that findings from this research could also benefit other countries facing similar challenges. To achieve this goal, the research has three objectives to accomplish: 1) to discover challenges and barriers hindering persons with disabilities in accessing civil justice, 2) to identify good practices or elements that facilitate effective access to civil justice for persons with disabilities, and 3) to provide recommendations for improving access to civil justice in light of the principles of the UNCRPD.

According to these objectives, the main research question of the study is “**what are the key elements for strengthening access to civil justice for persons with disabilities in Thailand and Ireland?**” To answer this question, there are five sub-questions to be investigated.

The first sub-question is “**what does access to justice for persons with disabilities mean?**” To answer this question, the study firstly explores the major conceptions of justice proposed by the leading theorists, ie John Rawls and Amartya Sen, then discusses the meaning of “access to justice” drawing from the existing interpretations of various scholars and the conceptions of justice.

The second sub-question is “**what are the guarantees of the right to access to civil justice in international human rights law?**” The third sub-question is “**what are the additional features supporting access to civil justice for persons with disabilities provided by the UNCRPD?**” To answer these questions, core international human rights laws are explored. These include: the Universal Declaration of Human Rights (UDHR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (UNCEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the Convention on the Rights of the Child (UNCRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), the International Convention for the Protection of All

Persons from Enforced Disappearance (ICPED) and the Convention on the Rights of Persons with Disabilities (UNCRPD).⁷

The fourth sub-questions are **“to what extent have the current laws and regulations of the case study countries, Thailand and Ireland, complied with international human rights law standards and the UNCRPD on access to civil justice for persons with disabilities?”** and **“what are the issues to be rectified for the case study countries to achieve effective access to civil justice for persons with disabilities?”** These two questions consider practical examples of how states apply the international human rights obligations and the UNCRPD in practice. In addition to the existing literature, the research acquires empirical information from persons with disabilities, people working in justice system and ethnographic observation to meaningfully answer these questions.

The final sub-question is **“is there any variation between the two case study countries that may differently affect access to civil justice for persons with disabilities?”** To answer this question, the research identifies similarities and

⁷ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR); International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (UNCEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICMW); International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPED); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (UNCRPD).

differences between the two case studies and analyse whether their differences can have different impacts on access to civil justice for persons with disabilities or not.

1.3 RESEARCH METHODOLOGY

To answer these research questions, this study adopted a comparative socio-legal research approach, which integrates qualitative methods (based on case study analysis) into comparative legal research methodology. Comparative legal research generally involves an analysis of the similarities and differences of the objects in comparison (comparators).⁸ However, its practice may vary in different legal contexts or for different purposes.⁹ This research adopts five ‘intellectual and practical steps’ explained by Marie-Luce Paris for comparative research: 1) identify the research ‘problem’, 2) decide ‘the choice [and number] of comparators’, 3) determine the sources of data and research material, 4) conduct ‘analytical comparison’ based on the research question, and 5) produce the ‘findings’.¹⁰

This study pursues a comparative law approach to serve two main purposes. The first purpose is to develop a set of universal principles of access to civil justice for persons with disabilities in international human rights law. The research chooses the core international human rights law treaties as comparators, and uses thematic and doctrinal methods for data collection and analytical comparison. This stage focuses on similarities of legal provisions within the specified international human rights law treaties.

The second purpose of comparative legal research in this study is to facilitate the development of reforms on access to civil justice for persons with disabilities, which is the central goal of the research funding. This comparative legal study aims to elicit new

⁸ Rudolf Schlesinger, ‘The Past and Future of Comparative Law’ (1995) 43(3) *The American Journal of Comparative Law* 477.

⁹ *ibid*; Jaakko Husa, *A New Introduction to Comparative Law* (Bloomsbury 2015); Marie-Luce Paris, ‘The Comparative Method in Legal Research: The Art of Justifying Choices’ (2016) University College Dublin Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No09/2016.

¹⁰ Paris (n 9) 16-19, citing Peter de Cruz, *Comparative Law in a Changing World* (2nd edn, Cavendish 1999) 235-39.

understandings of different legal systems and how they operate in practice. The comparison also further facilitates better comprehension of the researcher's own legal system.¹¹ The research chooses two jurisdictions in different regions and legal systems as the comparators. It adopts a socio-legal method for data collection and analytical comparison. It considers both similarities and differences between these comparators, including contents of law, legal formation and consequences of law for society.¹² The analytical comparison of these two countries investigates whether their variations differently affect access to civil justice for persons with disabilities. As the comparative analysis only involves two countries, it will not be possible to identify all critical factors or challenges that might be encountered globally. However, this study may assist some other countries comparable to Thailand or Ireland in strengthening access to civil justice for persons with disabilities.

Socio-legal research is an alternative way of doing legal research, by incorporating additional features to the doctrinal method,¹³ the traditional approach to legal research which focuses on examination of the legislation, case law and all relevant legal materials.¹⁴ Socio-legal research can be described as a study of 'law in context'.¹⁵ This approach regards law as 'a social phenomenon', which is analysed through both theoretical and empirical perspectives to understand the actual situation in society.¹⁶ The doctrinal approach is still a necessary method for legal research, which discusses and

¹¹ Edward Eberle, 'The Method and Role of Comparative Law' (2009) 8(3) *Washington University Global Studies Law Review* 451.

¹² Borwornsak Uwanno, 'Direction of Legal Science Research for Country Development', (2003) 16(1) *Thai Journal of Research Methodology* 1.

¹³ Fiona Cownie and Anthony Bradney, 'Socio-legal studies - A challenge to the doctrinal approach' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 34; Naomi Creutzfeldt and others, 'Introduction: exploring the comparative in socio-legal studies' (2016) 12(4) *International Journal of Law in Context* 377.

¹⁴ Terry Hutchinson, 'Doctrinal research: Researching the jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) 8.

¹⁵ Cownie and Bradney (n 13) 35, citing Fiona Cownie, *Legal Academics: Culture and Identities* (Hart Publishing 2004) 58.

¹⁶ *ibid* 35, citing Economic and Social Research Council (ESRC), *Review of Socio-Legal Studies: Final Report* (ESRC 1994) 1.

structures the legal argument before proceeding to the empirical research to understand the operation of law in practice.¹⁷

Socio-legal methods were incorporated into the case studies of Thailand and Ireland to understand the consequences of their laws and regulations on access to civil justice for persons with disabilities. Doctrinal legal methodology was used to explore each jurisdiction's legal mechanisms and regulations, and this was supplemented by qualitative research to determine how these laws and regulations operate in practice.

The qualitative element of the research methodology employs a case study strategy to set a framework for collecting and examining data.¹⁸ Each case study focuses on the applicable legal mechanisms and regulations concerning access to civil justice for persons with disabilities between 2014 and 2018. Empirical data is collected through both desk-based research and the qualitative methods, specifically semi-structured interviews and ethnographic observations, to explore more information which cannot be obtained through the desk-based method and to understand the relationship between legal mechanisms and access to civil justice for persons with disabilities in practice.

The case study for this research was limited to two countries, to enhance the depth of knowledge in each case within the time constraint of the doctoral study. The Kingdom of Thailand is the primary country selected for conducting a case study in accordance with the purpose of the research funding received. The Republic of Ireland is selected as the key comparator as it is the location for the doctoral research, and the jurisdiction where networks were available to me to undertake the qualitative research. At the time when Ireland was selected for the comparative study, it had not yet ratified the UNCRPD, but had been working towards compliance with the Convention by undertaking a comprehensive review of its disability laws.¹⁹ Ireland finally ratified the UNCRPD in 2018

¹⁷ Hutchinson (n 14).

¹⁸ John Creswell, *Research Design: Qualitative, quantitative, and mixed methods approaches* (3rd edn, SAGA 2009).

¹⁹ 'Fitzgerald and Ó Ríordáin publish Roadmap to Ratification of the UN Convention on the Rights of Persons with Disabilities' (*Department of Justice and Equality*, 21 October 2015) <www.justice.ie/en/JELR/Pages/PR15000550> accessed 30 July 2018.

before this research was finalised.²⁰ Some differences between Thailand and Ireland, including their legal systems and regional mechanisms, provide more opportunities to learn about different perspectives and gain more understanding of how international human rights law can be universally applied to countries with different legal systems. Moreover, these variations may illustrate differences in the impact on access to civil justice for persons with disabilities. Their similarities, in terms of being members of the international human rights legal community, dualist countries with regard to international law, and constitutional democracies under the rule of law, are common criteria that facilitate using international human rights law as a standard for parallel analysis of each case study before conducting an analytical comparison between the cases.

This research involves human subjects in one of its methods for data collection, and engages the use of information provided by these participants for data analysis and research report. Therefore, to ensure appropriate protection for research participants, the research methodology was submitted for review to the Research Ethics Committee of the University which granted the approval to pursue this methodology. In accordance with this research methodology, the methods of data collection and data analysis are elaborated as follows.

1.3.1 Methods of Data Collection

The research employs three techniques for data collection: desk-based research, semi-structured qualitative interviews and ethnographic observation. The desk-based strategy is used to gather both primary (eg laws, regulations and cases) and secondary data, concerning theoretical conceptions of access to justice, the existing international guarantees on access to civil justice, and the operation of the civil justice systems of each country. These include, but are not limited to, books, journal articles, legal materials, policy reports and other written materials.

²⁰ 'Status of Treaties: Chapter IV Human Rights - 15. Convention on the Rights of Persons with Disabilities' (*UN*, 5 August 2018)

<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en> accessed 5 August 2018.

Data collection is also conducted through qualitative interviews with key informants working with, or knowledgeable about, the operation of the civil justice system in each country, and access to civil justice for persons with disabilities. The interview strategy is used to obtain additional information that does not exist in the secondary sources. Semi-structured interviews, with a list of themes and open-ended questions, were prepared to ensure consistency across both jurisdictions, while maintaining flexibility within the interview process.²¹ The list of questions varies among categories of participants due to the different objectives of the various interviews. All interviews were conducted in person. The interview guidelines for this research aimed for a one hour interview. However, in practice, the duration of each interview varied in accordance with the experience of each participant. Some interviews only lasted for half an hour, while others continued for more than two hours. This variation depended on many factors, such as the time available to the participants, the way in which the participant answered the questions, the amount of information they could give, the accessibility needs of the participants and the clarity of the interview questions asked. Details of the different categories of research participants are as follows.

Category 1: Disabled people’s organisations (DPOs) or parent/family groups or service providers for persons with disabilities

Participants in this category consisted of five sub-groups of organisations/individuals which represent a group of persons with physical/mobility impairments/disabilities, a group of blind/visually impaired persons, a group of Deaf persons or persons with hearing loss, a group of persons with experience of mental health services or psychosocial disabilities, and a group of persons with intellectual disabilities and/or autism. The priority in seeking interviewees in this category was to aim for DPOs because they are run and controlled by persons with disabilities themselves, so that the data collected can reflect more directly the experiences and perspectives of persons with disabilities. Nevertheless, the research had to recruit some representatives from parent/family groups or service providers, where some DPOs do not exist in the relevant jurisdictions or could not participate in this research. This approach was taken to include experiences

²¹ Alan Bryman, *Social Research Methods* (5th edn, OUP 2015).

and accommodate the opinions of persons with disabilities in this research as much as possible.

Category 2: Judges of the first instance court dealing with civil matters

The specification of the first instance court for participants in this category is because judges of this court, especially in Thailand, have more opportunities than judges of other courts to meet persons with disabilities in person through court proceedings. By contrast, judges of the appellate court tend to make their judgments based on evidence accepted by the first instance court and have very limited opportunities to meet persons with disabilities in a hearing.²²

Category 3: Court staff members of the first instance court dealing with civil matters

There are two sub-categories of participants in this category: frontline staff members and court clerks. This specification aims to include the experience of those who deal with persons with disabilities in court proceedings both before and during the court hearing.

Category 4: Lawyers

There are two sub-categories of participants in this category, which are the lawyers dealing with initial client contact and legal advice (solicitors) and the lawyers specialising in litigation and advocacy before the courts (barristers). However, in the Thai legal system, qualified lawyers can perform both roles; no such division of duties has been made among lawyers in Thailand.

Due to the time limitations of the study, the research targeted one interview for each sub-category. In practice, the total number of interviews from two case studies was 23, which is more than the initial plan due to the fact that some sub-categories required the recruitment of more participants to obtain comprehensive data. Further details of participants and their interview information is provided in Appendix 1. It is important to emphasise that the interview data for this research cannot represent the whole population of people in each category due to the small sample involved. These interviews purely aimed to gather some information that could not be obtained through the desk-

²² Civil Procedural Code (Thailand), s 240

based means and to get some examples of barriers and opportunities concerning access to civil justice for persons with disabilities.

In light of this very limited number of participants, the research aimed to recruit participants who would be able to represent broader views of persons with a similar kind of experience. For participants in category 1, the research recruited representatives of DPOs or parent/family groups or service providers for persons with disabilities with a national scope, which have a broad remit to represent the views of their members with disability in national policy development. This was to ensure that the participants could provide a broader representation of the relevant group of persons with disabilities. The objective of interviewing people in this category was to explore the difficulties, barriers and experiences of persons with disabilities in accessing civil justice and to obtain their opinions on what should be provided or amended in order to have better access to civil justice in their legal system.

The research recruited participants in categories 2 to 4 in a similar manner to the recruitment of participants in category 1, to reach those who would be able to provide a broader perspective for people in their category. For participants in category 2, the research recruited judges who represent the courts with the most extensive areas of jurisdiction or the entire circuit, ie the president of the court or his/her representatives. Similarly, participants in category 3 are recruited from those who are in positions of authority overseeing a number of frontline staff members or of court clerks. The research attempted to recruit participants in category 4 who are heads of a law office and might be able to share more experience of other lawyers in his/her office, but this feature could not be obtained for a barrister participant in Ireland as barristers in this jurisdiction normally practise independently.²³ The objective of interviewing people in these categories is to explore their experience in dealing with cases that involve persons with disabilities, barriers they faced and how these were resolved.

The last technique for data collection is ethnographic observation. This technique provides 'detailed and accurate description rather than explanation'.²⁴ This technique is only employed in the context of environmental accessibility of courthouses and

²³ 'About Us – The Bar of Ireland' (*The Law Library*) <www.lawlibrary.ie/About-Us.aspx> accessed 1 August 2018.

²⁴ Earl Babbie, *The Practice of Social Research* (14th edn, Cengage Learning 2016) 297.

courtrooms, to understand the actual situation and observe its compliance with the legislation in each of the case study countries. This technique also aims to fill some information gaps, which the research could not address through the desk-based and interview methods. To minimise possible bias, the research limits the scope of data from observations to only the facts that are objective and measurable. When utilising this data, the research has clearly identified the method of data collection. The observations conducted for this research were analysed by drawing on Smith's institutional ethnography approach,²⁵ a sociological method for understanding how the rules and policies of institutions impact upon the work of people within institutions, which can be easily applied to the operation of the justice system and in particular, the courts.

Since it was not feasible within this research to visit every courthouse and courtroom in both countries, the research set guidelines for ethnographic observation. According to these guidelines, observations should include at least one courthouse in each jurisdiction, where hearings of the first instance court dealing with civil matters are conducted. The specification of the first instance court for this observation is because this court is typically an initial court where persons with disabilities must have access to be present and participate in court proceedings. Moreover, in Thailand, the first instance court is the only court where oral hearings are conducted. In cases where additional evidence is required at the appeal level, the appellate court will order the first instance court to conduct oral hearings.²⁶

In light of the limitations of time and scope of the research, the ethnographic observations were conducted at courthouses in the capital city of both jurisdictions, ie Bangkok and Dublin City, where extensive cases are heard. The observations included visiting at least one courtroom where a hearing was being conducted to observe ongoing activities within the courtroom. The observation for the case study of Thailand included visiting a total of two courtrooms within two courthouses in Bangkok area, one for general civil cases and one for family law cases. The observation for the case study of Ireland was conducted at the Four Courts in Dublin, which included visiting a total of two courtrooms, one of the first instance courts and one of the higher courts. All observations were conducted within the same period when the qualitative interview data was collected. It is important to note

²⁵ Dorothy Smith, *Institutional Ethnography: A Sociology for People* (Rowman Altamira 2005).

²⁶ Civil Procedural Code (Thailand), ss 240 and 243

that the data collected through this observation can only illustrate some aspects of environmental accessibility of courthouses and courtrooms. Accessibility of other courts may be different. This depends on various factors, such as their architectural conditions or their heritage site status.

1.3.2 Methods of Data Analysis

According to the research questions, there are four main methods of analysis. The first approach analyses the existing conceptions of justice and those of access to justice for persons with disabilities. The data in this part are solely from desk-based research. This data is discussed and analysed to understand the meanings of “justice” and “access to justice”, then the research applies these meanings to the disability context. After analysing different conceptions of justice in the disability context, the research extracts the key strengths of these conceptions and adopts the most suitable meaning of “justice” for this research. The adopted conception is explained through its four dimensions (referred to as “four-dimensional conception of justice”). These dimensions are explained in section 2.1.4, and further utilised to develop a conception of access to justice for persons with disabilities for this research in section 2.2.3.

The second approach focuses on comparative legal research methods by analysing international human rights law. The data collected through this method includes desk-based research consisting of both primary (legal provisions and authoritative interpretation of international human rights bodies) and secondary data. This data is analysed through thematic²⁷ and doctrinal analysis to develop a set of principles for the right to access to civil justice in international human rights law. These principles are collectively referred to as “the six categories of the right to access to civil justice in international human rights law”. Further information on these categories is elaborated in Chapter 3. The UNCRPD is analysed separately in Chapter 4 as it is the disability-specific international human rights law and its provision on access to justice interlinks

²⁷ Virginia Braun and Victoria Clarke, 'Using thematic analysis in psychology' (2006) 3(2) *Qualitative Research in Psychology* 77, 79; Thematic analysis is described as 'a method for identifying, analysing and reporting patterns (themes) within data. It minimally organizes and describes your data set in (rich) detail.'

with other articles within the Convention which requires detailed discussion. After analysing all international human rights law,²⁸ the research identifies five key elements of effective access to civil justice for persons with disabilities by considering the findings from this analysis (Chapters 3 and 4) together with the theoretical conception of access to justice for persons with disabilities adopted for this research as identified in section 2.2.3. These elements are collectively referred to as “five-elemental conception of access to civil justice for persons with disabilities”. Further information on these five key elements is presented in section 4.3.

The third research approach is the analysis of case studies (Thailand and Ireland). Each case is analysed individually to deepen the insight into each country. The data in this part includes both desk-based and qualitative data. Doctrinal analysis is used to analyse legal provisions on access to civil justice, policy reports, and other written materials on the operation of these laws in practice. Thematic analysis is used to analyse and capture important information from the qualitative data.²⁹ This analysis consists of six phases: 1) ‘[f]amiliarizing yourself with your data’, 2) ‘[g]enerating initial codes’, 3) ‘[s]earching for themes’, 4) ‘[r]eviewing themes’, 5) ‘[d]efining and naming themes’, and 6) ‘[p]roducing the report’.³⁰ The results of the doctrinal analysis and the thematic analysis of qualitative data are further organised in accordance with the six categories of the right to access to civil justice for further evaluation. The research engages in comparative socio-legal analysis to assess whether these legal mechanisms and regulations align with international human rights law standards, and analyses through the qualitative interview data, court cases and other relevant information from secondary sources, whether these protections and guarantees of the right to access to civil justice for persons with disabilities are effective or not.

The final analysis examines the findings from both case studies to identify their similarities and differences, and report them by theme. The research also analyses the impact which these variations have on access to civil justice for persons with disabilities. It further analyses these findings through the four-dimensional conception of justice, the

²⁸ These international human rights laws are identified in the second sub-questions in section 1.2 of this chapter.

²⁹ Braun and Clarke (n 27).

³⁰ *ibid* 87.

theoretical conception of access to justice for persons with disabilities and the five-elemental conception of access to civil justice for persons with disabilities. The findings of the analysis in this part identify key elements for strengthening access to civil justice for persons with disabilities in Thailand and Ireland, which may have significant implications for other countries with similar social, economic, legal or cultural circumstances.

1.4 LIMITATIONS OF THE STUDY

Although the research was carefully designed, some limitations of the study remain, in terms of the methodological limitations and the other limitations of the research. These limitations are demonstrated here for the benefit of readers and for further research.

1.4.1 Methodological Limitations

There were two main limitations regarding the research methodology, which were the direct impact of the research design and the PhD study timeframe. These limitations concerned the sample size of interview data and the number of case study countries.

Since the research was designed to include all groups of persons with disabilities, as well as others who work in the justice system, it had to limit the sample size of interview participants in each category to a very small number and could not represent the views of general population in each category of participants. This qualitative data merely communicates the views of the research participants, which can be regarded as illustrative of how some people experienced the civil justice system concerning persons with disabilities and the challenges they encountered. Findings from the qualitative research must not be over-generalised or interpreted as the overall research results. A clear indicator of findings from the qualitative research is provided to distinguish this from the desk-based research findings.

Despite this issue, the research could not feasibly embrace a larger sample size of participants in each category within the scope of the PhD programme. This would have required a massive process of data collection as the data would be collected from a variety of groups of people in two countries. The reduction of participant categories to increase sample size of the remaining categories was not a suitable option as the four

categories of participants were designed to engage all relevant stakeholders in the study, as well as to minimise the risk of bias. Acknowledging this limitation, the research focused on recruiting participants who could represent broader populations within their category, such as the representatives from the DPOs with a national scope, or the president of the court of first instance with the extensive remit of jurisdiction, as explained in the participants' criteria in section 1.3.1.

The amount of case studies was limited to two countries as a result of the methods of data collection designed. Two cases is a rather small number to illustrate a comprehensive views on practices and challenges concerning access to civil justice for persons with disabilities, which can be different in other countries. However, a larger number of cases would not have been possible within the PhD study timeframe while maintaining the depth of analysis for both case studies. Accordingly, the research carefully chose two countries, (ie Thailand and Ireland), that were the most suitable for the aim and objectives of this study and would produce more beneficial research outcomes considering several limitations of the research, including time, budget and access to the data required. The research findings from these countries aim to be helpful for other countries similar to Thailand and Ireland, and provide a starting point for future research on other jurisdictions.

1.4.2 Other Limitations of the Research

Apart from the methodological limitations, the other limitations of this study include my background knowledge about the case study countries, language fluency, and some concerns during the interview process.

The first limitation concerned the different level of my background knowledge between Thailand and Ireland. I have very good background knowledge about Thailand, both in terms of its legal system and other contexts of the country as I am a Thai citizen, a law graduate of both bachelor and master degrees in Thailand and a government official at the Office of the Judiciary in Thailand for approximately 15 years. On the other hand, I have learned about the Irish legal system and the wider social context of Ireland during my PhD study programme from 2014 to 2018. There was therefore a big difference in my levels of knowledge of Thai and Irish contexts. This could make these two case studies unequal in the depth of their analysis. I was aware of this bias and made efforts to ensure consistency by keeping the same structure and sample size of interview data

for both cases as much as possible. Additionally, I endeavoured to analyse the cases based on the collected data, rather than on my subjective opinions, to minimise any potential bias. However, some of my observations on the facts within both cases are also included in this research. Furthermore, I attempted to enhance my understanding of the Irish legal system by seeking out the advice from my supervisor who is expert on the Irish legal system, from my Graduate Research Committee who provided annual review and recommendations for my research, and from some Irish lawyers who gave lectures at the Centre for Disability Law and Policy of the National University of Ireland Galway, or who participated in this research and were willing to give me further insight on the Irish legal system.

The second limitation was the different level of fluency in two dissimilar languages. Thai is my native language, while English is a foreign language which is not generally used in Thai communities. Most of the data, in terms of both interview and documentary data for the Thailand case study was in Thai. English was used for the Irish case study and for writing up the research report. Although I fulfilled the English language requirement of the University for the PhD course, my command of English was unequal to the skills of my native language. I was aware of this limitation and made more efforts to ensure that I understood some complicated English language data correctly, including by conducting all interviews in person rather than through other means, so that I could hear the interviewee more clearly and had more opportunities to ask for his/her clarification if I did not clearly understand his/her communication. I also made sure that I used the appropriate English language to accurately communicate my research study, especially in the part where the original data collected was in Thai. I discussed this issue with my supervisor who is a native English speaker and is aware of sensitive issues around the use of language in the disability context. I also discussed this issue with some of my research participants before starting the interview when I was uncertain about some terminology in the disability context. Decisions regarding specific terminology used in this research is explained in the next section.

The final limitation to be addressed here concerned the interview process. Some participants who consented to the interview did not give consent to be audio recorded. Accordingly, the notes of the interview had to be taken by hand, which lacked some detail and it was impossible to review the conversation. In this situation, it was more challenging to collect all the information provided in English because of my language skills. Accordingly, only information clearly recorded was used for data analysis.

1.5 RECOMMENDATIONS FOR FURTHER RESEARCH

Due to several limitations of the PhD study in terms of time, budget and access to the data required, this research had to limit its scope, sample size and number of case study countries as mentioned in the previous section. To achieve more comprehensive results and substantiate arguments for further reform, a more detailed analysis of the enforcement mechanisms of the civil justice system is recommended; as this aspect is also suggested in section 4.3 as a crucial element of the conception of access to civil justice for persons with disabilities. Further research could also include a larger sample size of interview participants, or include other methods of data collection, to embrace more experiences of persons with disabilities and people who work in the civil justice system. A greater number of case study countries, especially from other regions, eg Americas, African and Arab regions, would benefit the comparative legal perspective as each region has distinct regional mechanisms which differently influence domestic legal mechanisms and regulations.

Future research could also focus more on persons with disabilities' experience of the criminal and administrative law systems as many legal issues are intertwined. For example, a personal injury case may involve criminal law and/or administrative law (if the accused person is a government official who caused an injury in the exercise of his/her authority). Future studies may additionally include non-binding instruments at international, regional, and national levels as they may indirectly impact or influence legislation in each country.

Other future research may include how to effectively use alternative dispute resolution mechanisms, such as the Ombudsman and mediation systems, especially in terms of their enforcement. This research also suggests a study concerning measures to protect or safeguard fairness of private legal proceedings of civil cases and independence of tribunal system are also suggested to ensure effectiveness of access to civil justice for persons with disabilities. It is worth conducting other research on the supportive mechanisms, especially in light of the UNCRPD minimum requirements on accessibility, that are indispensable to enhance the capacity of persons with disabilities to assert their rights, participate in and access the justice system, and how to guarantee effectiveness of these mechanisms.

1.6 EXPLANATION OF TERMINOLOGY USED IN THIS RESEARCH

There are some terminologies in this research that should be clarified. These terms are presented as follows.

1.6.1 Disability

This research adopts the conception of disability reflected in the UNCRPD, which recognises ‘disability’ as a result of ‘the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.’³¹ This recognition echoes a social model of disability, rather than a medical model of disability which perceives impairments as direct causes of disability and focuses on the need for treatment or rehabilitation as the main response to disability.³² However, Theresia Degener argues that the UNCRPD is actually based on ‘the human rights model of disability’, which is an enhanced version of the social model of disability.³³ The human rights model emphasises human dignity of persons with disabilities and embraces ‘impairment as part of human diversity’, at the same time, it acknowledges the notion of social disablement reflected by the social model of disability.³⁴

In practice, different terms are used to refer to persons with disabilities. The UNCRPD, based on the human rights model of disability, uses the term “persons with disabilities” in its title and throughout the Convention, which seems to convey the same meaning as

³¹ UNCRPD, preamble (e).

³² Rosemary Kayess and Phillip French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8(1) *Human Rights Law Review* 1; Eudurne Iriarte, ‘Models of Disability’ in Eudurne Iriarte, Roy McConkey and Robbie Gilligan (eds), *Disability and Human Rights: Global Perspectives* (Palgrave 2015) 10; Theresia Degener, ‘A Human Rights Model of Disability’ in Peter Blanck and Eilionoir Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Taylor & Francis Group 2016) 31.

³³ Degener (n 32) 32.

³⁴ *ibid* 38.

the term “persons with impairments”.³⁵ On the contrary, many proponents of the social model of disability prefer to use the terms “people/persons with impairments” and “disabled people/persons”, based on the view that the term “disability” can only be used in singular form to demonstrate disadvantage and oppression experienced by people with impairments, and that the term “disabled” better exhibits how people are ‘disabled’ by the inaccessibility of society.³⁶ This distinction between “impairment” and “disability” is not reflected in the Thai language; however, scholars have recognised that the terminology used to describe persons with disabilities in Thailand must respect their human dignity and must not be offensive.³⁷

To reflect the terminology adopted by the UNCRPD, this research uses the term “persons with disabilities” to refer to persons with impairments in general. This term is accepted within the human rights model of disability proposed by Degener, and is also used worldwide by the States Parties to the Convention. While different individuals self-identify in different ways, this research uses the following general terms set out in the methodology above when referring to different groups of people with impairments: “persons with physical/mobility impairments/disabilities, blind/visually impaired persons, Deaf persons and persons with hearing loss, persons with experience of mental health services or psychosocial disabilities, and persons with intellectual disabilities and/or autism”.

It must be acknowledged that none of these terms is of universal application and many are contested by individuals who might be perceived to fall within one or more of these groups; however, they are relatively clear and well-known and have been widely used by the UN Committee on the Rights of Persons with Disabilities in Concluding Observations and General Comments. Therefore, it is appropriate, in keeping with the

³⁵ Kayess and French (n 32)

³⁶ *ibid*; Anna Lawson and Mark Priestley, ‘The Social Model of Disability: Questions for law and legal scholarship?’ in Peter Blanck and Eilionoir Flynn (eds) *Routledge Handbook of Disability Law and Human Rights* (Routledge 2016) 3, 7.

³⁷ Pira Pilarit, ‘Blind, persons with visual impairments, etc - which word should be used?’ (Benyalai Online Library, 16 January 2018) <www.benyalai.in.th/index.php/research-article/177-article4_benyalai_2560> accessed 13 August 2018.

human rights model of disability enshrined in the UNCRPD, to use these general terms throughout this research.

1.6.2 Civil Justice

As this research involves different jurisdictions and legal systems, it takes a broad approach to determine the meaning of the term “civil justice”. The Oxford Advanced Learner’s Dictionary does not define the term “civil justice”, but the term “civil” (in the legal sense) as ‘involving personal legal matters and not criminal law’.³⁸ It further refer to “civil law” as ‘law that deals with the rights of private citizens rather than with crime’.³⁹ According to these definitions, civil matters may also concern constitutional and administrative law. Some legal disputes may involve both civil and criminal aspects, such as claims for compensation for damage or loss from criminal offences. In that case, the research only focuses on the civil aspect of the dispute.

The term “civil justice” in this research includes all dispute settlement mechanisms for civil matters. These mechanisms include both judicial and non-judicial mechanisms. Therefore, the civil justice does not only refer to the court and tribunal systems, but also the systems of other competent authorities and alternative dispute settlement.

1.6.3 Lawyer

As this research involves different jurisdictions and legal systems, it adopts a broad, universally-understood meaning of the term “lawyer”. The Oxford Advanced Learner’s Dictionary defines “lawyer” as ‘a person who is trained and qualified to advise people about the law and to represent them in court, and to write legal documents’.⁴⁰ The terms “solicitor” and “barrister” are only used when the research needs to distinguish between the different roles of lawyers in some countries, eg Ireland. Otherwise the term “lawyer” is used to include both solicitors and barristers.

³⁸ *Oxford Advanced Learner’s Dictionary, 9th edition* (app edn, OUP 2015).

³⁹ *ibid.*

⁴⁰ *ibid.*

1.6.4 Competent/Competence/Competency

The terms “competent/competence/competency” have different meanings. In general, these terms refer to ability, skills or knowledge. This term is used in different contexts throughout this thesis, such as, legal capacity of persons with disabilities, the ability to be a witness, or the skills and knowledge of sign-language interpreter. However, when used in the context of “competent body/bodies” the term refers to the power to make legally binding decisions in a fair hearing.⁴¹ These concepts are further discussed in section 3.2.4.

1.6.5 Capability

This term is derived from Amartya Sen’s Capability Approach, discussed in Chapter 2. Throughout this research, “capability” does not refer to ‘the ability or qualities necessary to do something’,⁴² but signifies a real freedom or opportunity a person has, in order to achieve the state of being or doing, which that person has a reason to value.⁴³

1.7 RESEARCH OUTLINE

This final section of this chapter will highlight the structure of the remainder of this thesis. There are seven more chapters. The outline of each chapter is as follows.

Chapter 2: Conception of Access to Justice for Persons with Disabilities

The aim of this chapter is to find a suitable meaning of access to justice in disability context for this research. To achieve this goal, the research poses two questions – what is “justice”? and what is “access to justice” for persons with disabilities? The research begins by firstly exploring the meaning of “justice” through various theoretical

⁴¹ Sangeeta Shah, ‘Detention and Trial’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014) 259.

⁴² *Oxford Advanced Learner’s Dictionary* (n 38).

⁴³ Amartya Sen, *The Idea of Justice* (The Belknap Press 2009).

perspectives, including the Theory of Justice by John Rawls, the Capability Approach by Amartya Sen, and the principles of equality by Sandra Fredman.

To answer the second question, the research examines the existing meanings of “access to justice” as interpreted by various scholars and analyses how to apply these meanings to the disability context. It then sets out the conception of access to justice for persons with disabilities adopted for this research.

Chapter 3: Access to Civil Justice in the Core International Human Rights Law

This chapter continues to explore the meaning of access to justice through existing international human rights law, focusing only on civil justice. The chapter examines international human rights legal provisions and the interpretations of treaty bodies, extracts the components of the right to access to civil justice found across these laws, and clusters them into six categories. These categories are collectively referred to as the “six categories of the right to access civil justice” or “international human rights law standards on access to civil justice”. This chapter also identifies problematic issues in the application of these general human rights laws to the disability context.

Chapter 4: Access to Civil Justice under the UNCRPD

This chapter continues to explore the meaning of access to civil justice in international human rights law by specifically focusing on the UNCRPD, which recognises access to justice for persons with disabilities as a ‘substantive right’ for the first time in international human rights law.⁴⁴ The chapter contains three parts. The first part explores the right to access to justice guaranteed by the UNCRPD. It covers the drafting and negotiating history of article 13 on the right to access justice, the features of its final text, and its interrelationships with other articles of the UNCRPD. The second part assesses whether article 13, together with other related articles, covers all the elements of the six categories of the right to access to civil justice guaranteed in international human rights law. This assessment also identifies whether there is any new element of the right to access civil justice introduced by the UNCRPD. The final part summarises the key elements of access to civil justice by considering the findings from this chapter together with the findings of Chapters 2 and 3.

⁴⁴ Kayess and French (n 32) 29.

Chapters 5-6: Case Studies of Access to Civil Justice for Persons with Disabilities in Thailand and Ireland

Chapters 5 and 6 present the case studies on access to civil justice for persons with disabilities of Thailand and Ireland, respectively. Both chapters have the same structure. The first part of each chapter provides the background information on the country and its legal system. The second part illustrates demographic information about persons with disabilities in each jurisdiction. The third part includes all legal mechanisms and regulations relating to accessing civil justice for persons with disabilities in each country. The final part provides recommendations towards international human rights law standards and the UNCRPD principles on access to civil justice for each country.

Chapter 7: Cross-case Analysis

This chapter identifies the similarities and differences concerning access to civil justice for persons with disabilities across the two case studies. It also analyses whether the variations across cases impact in different ways on access to civil justice for persons with disabilities. The chapter also theoretically frames the research findings through the five-elemental conception of access to civil justice adopted in Chapter 4.

Chapter 8: Conclusion

This chapter concludes the research findings of all previous chapters to answer the main research question and its five sub-questions. It also highlights research contributions and provides final reflection on the theoretical framework of this thesis.

CONCLUSION

This research aims to find out how to strengthen access to civil justice for persons with disabilities in Thailand and Ireland, starting from when legal claims or disputes arise until the end of court proceedings, by adopting a comparative socio-legal research approach. It integrates the doctrinal and empirical approaches to answer the main research question and its five sub-questions presented in Chapter 2 to 7. This chapter presents the overview of how this research is conducted. Although the research is carefully designed to answer all the research questions, there are some limitations, which must be acknowledged and addressed for the benefit of readers and for further research. It also includes some recommendations for future research to achieve more

comprehensive results, which this research considers crucial for effective access to civil justice for persons with disabilities but which were beyond the scope of this thesis.

CHAPTER 2:

Conception of Access to Justice for Persons with Disabilities

INTRODUCTION

The ultimate aim of this chapter is to find a suitable definition of access to justice in the disability context. The two main questions in this chapter are 1) what is “justice”? and 2) what is “access to justice” for persons with disabilities? Accordingly, this chapter is divided into two main parts. The first part discusses the meaning of “justice” through theoretical conceptions drawing from the work of John Rawls and Amartya Sen. It also discusses principles of equality as these principles are very closely connected with the conceptions of justice which exist in human rights law. The second part discusses the meaning of “access to justice” for persons with disabilities through examining the existing interpretations suggested by various scholars and summarises the conception of access to justice adopted for this research.

2.1 WHAT IS “JUSTICE”?

The precise meaning of “justice” has been a matter of debate over centuries within different schools of thought, including ‘utilitarianism, contractarianism, and egalitarianism’.¹ The aim of this study is not to engage in such a debate in depth, but to find a suitable conception to be used as a framework for this research. This research regards “justice” as having two dimensions – a destination which persons with disabilities should be able to “access” (as an end), and a principle that controls and strengthens “access” (as a means) to justice. It is, therefore, vital to firstly determine what “justice” is,

¹ David Miller, ‘Justice’ (*The Stanford Encyclopaedia of Philosophy*, 26 June 2017) <<https://plato.stanford.edu/entries/justice/>> accessed 28 May 2018.

before meaningfully discussing the meaning of “access” in the second part of this chapter.

To understand “justice”, this research focuses on the conceptions of justice proposed by John Rawls and Amartya Sen, as well as the principles of equality, which are embedded in human rights law.² The rationale for choosing Rawls’ Theory of Justice for this study is that his theory is regarded as a crucial foundation for the development of human rights.³ However, Rawls’ theory faces some challenges when applied to the disability context; therefore, Sen’s Capability Approach is also discussed as it has very close connections with Rawls’ work and been widely used to combat inequality and enhance human development.⁴ Moreover, Sen’s approach is also interesting in the disability context as it adopts an ‘inclusive approach’, which firmly acknowledges the human diversity of persons with disabilities.⁵ Accordingly, this part includes four main sections – 1) Rawls’ Theory of Justice, 2) Sen’s Capability Approach, 3) Principles of Equality, and 4) the conception of “justice” for this study – as follows.

2.1.1 Rawls’s Theory of Justice: Justice as Fairness

A. Background to Rawls’ Theory

John Rawls proposes ‘justice as fairness’ as a conception of justice.⁶ His Theory of Justice is developed from social contract theory, as an attempt to find an alternative to

² Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011).

³ Jerome Shestack, ‘The Philosophic Foundations of Human Rights’ (1998) 20(2) *Human Rights Quarterly* 201.

⁴ Ingrid Robeyns, ‘The Capability Approach: a theoretical survey’ (2007) 6(1) *Journal of Human Development* 93.

⁵ Amartya Sen, ‘The Idea of Justice: From Idea to Action (Honorary Speech)’ (*Thai World Affairs Center*, 18 December 2010)

<www.thaiworld.org/enn/thailand_monitor/answera.php?question_id=1039> accessed 7 June 2018.

⁶ John Rawls, *Theory of Justice* (Rev. edn, Belknap Press 1999) xi.

utilitarianism's conception of justice.⁷ Utilitarianism as expressed by Jeremy Bentham views the purpose of justice as being 'to maximize happiness'.⁸ The 'principle of utility' is reaffirmed by Francis Hutcheson, who argues that the purpose of justice is to produce 'the greatest happiness for the greatest numbers',⁹ with the result that some minorities may be left behind. Rawls views that utilitarianism's principle ignores 'the basic rights and liberties of citizens as free and equal persons'.¹⁰ He uses a social contract approach as a fairer way to ensure citizens' liberty. His approach situates everyone in 'the original position of equality', where each individual decides upon and makes an agreement on the principles of justice 'behind a veil of ignorance'.¹¹ According to Rawls, this veil prevents the individual from knowing his/her own social status, abilities or other strengths and weaknesses. He believes that in this situation, people tend to choose the principles of justice on a neutral and fair basis, to avoid any extreme loss if it appears later that they belong to a disadvantaged group in society. Since the principles of justice are agreed neutrally and fairly without benefiting any particular person; therefore, they are fair to all. This fair condition is the central idea illustrating the conception of "justice as fairness".¹²

Rawls suggests that all individuals in the original position are free and equal because they possess two moral powers to cooperate in social activities.¹³ These moral powers are the 'capacity for a sense of justice' and the 'capacity for a conception of the good'.¹⁴ The capacity for a sense of justice refers to an 'ability to regard others as equal citizens and to engage with others on terms they could imagine others could accept'.¹⁵ This capacity creates an environment of trust among individuals, in which everyone can be

⁷ *ibid.*

⁸ Michael Sandel, *JUSTICE: What's the Right Thing to Do?* (Allen Lane 2009) 34

⁹ Rawls, *Theory of Justice* (n 6) 20, citing Francis Hutcheson, *An Inquiry Concerning Moral Good and Evil* (1725).

¹⁰ Rawls, *Theory of Justice* (n 6) xii.

¹¹ *ibid* 11.

¹² *ibid* 11.

¹³ Sophia Wong, 'Duties of Justice to Citizens with Cognitive Disabilities' (2009) 40 (3-4) *Metaphilosophy* 382.

¹⁴ Rawls, *Theory of Justice* (n 6) xii.

¹⁵ Wong (n 13) 386.

certain that the principles of justice agreed are respected.¹⁶ The capacity for a conception of the good refers to being 'rational in the sense of being able to determine their goals and take the most useful steps toward those goals'.¹⁷

In order to develop these moral powers, Rawls views that every person, including persons with disabilities, needs 'primary goods', as well as 'access to social and cultural opportunities'.¹⁸ The '[p]rimary goods, in his sense, are ... what persons need in their status as free and equal citizens and as normal and fully cooperating members of society over a complete life'.¹⁹ Rawls classified these goods into five kinds, which are:

(1) '[t]he basic rights and liberties', which are what people require to develop their moral powers;

(2) '[f]reedom of movement and free choice of occupation';

(3) '[p]owers and prerogatives of offices and positions of authority and responsibility';

(4) '[i]ncome and wealth'; and

(5) '[t]he social bases of self-respect'.²⁰

These goods are categorised as 'social primary goods', and Rawls believes that the basic structure of society must distribute them equally to everyone.²¹ These goods differ from 'natural [primary] goods', 'such as health and vigor, intelligence and imagination', which cannot be directly controlled by the basic structure of society.²² Rawls views it as

¹⁶ *ibid.*

¹⁷ *ibid* 386.

¹⁸ *ibid* 393.

¹⁹ Rawls, *Theory of Justice* (n 6) xiii.

²⁰ John Rawls, *Justice as Fairness: A Restatement* (edited by Erin Kelly, Belknap Press 2001) 58-59.

²¹ *ibid* 54.

²² *ibid* 54.

vital that 'citizens' basic needs be met, at least insofar as their being met is necessary for citizens to understand and to be able fruitfully to exercise those rights and liberties.'²³

This may include changing the structure of society to be more inclusive.²⁴ To clarify, Rawls refers to the 'basic structure of society' as a 'unified system of social cooperation' among 'main political, social, and economic institutions' of society,²⁵ and 'the way in which [these] institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.'²⁶ Examples of these institutions include 'the legal protection of freedom of thought and liberty of conscience,[²⁷] competitive markets, private property in the means of production, and the monogamous family'.²⁸ He views that '[t]he basic structure is the primary subject of justice' because it thoroughly connects to the whole life of each person.²⁹

Rawls proposes two principles of justice that he believes all moral persons would agree upon in the original position. These principles are:

(a) Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and

(b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be the greatest benefit of the least-advantaged members of society (the difference principle).³⁰

²³ John Rawls, *Political Liberalism* (Expanded edn, Columbia University Press 2005) 7.

²⁴ Wong (n 13).

²⁵ Rawls, *Political Liberalism* (n 23) 11.

²⁶ Rawls, *Theory of Justice* (n 6) 6.

²⁷ eg religious or other ethical beliefs.

²⁸ *ibid* 6.

²⁹ *ibid* 7.

³⁰ Rawls, *Justice as Fairness* (n 20) 42-43.

The first principle, the principle of justice, recognises that everyone has the same rights and liberties regardless of their attributes, positions or any other status in the society. This theoretically means that persons with disabilities also have same rights and liberties as others. The second principle, the principle of need, focuses more on people's different needs by allowing inequality in two circumstances. The first circumstance is to ensure fair equality of opportunity to enter public offices and social positions. Rawls elaborates that the purpose of this principle is 'to correct the defects of formal equality of opportunity'.³¹ It is insufficient only to open offices and positions to all to apply. Society must ensure that these offices and positions are attainable by everyone.³² In this regard, treating people differently is acceptable if it aims to provide fair equality of opportunity. The second circumstance in which inequality is allowed is where this aims to improve the situation of the least-advantaged members of society. Rawls does not use status or other features (such as income and wealth, gender, or race) as indicators for determining who are the least-advantaged, but acknowledges that these features are possibly shared among people in the least-advantaged group.³³ He suggests to separately consider each scheme of social cooperation. '[I]ndividuals who are worst off under that particular scheme' are considered the least-advantaged members, but they may not be as such under other schemes.³⁴ Rawls emphasises that each principle of justice has a different priority; with the first principle having the greatest priority.³⁵ It is impermissible to prioritise the social and economic advantages in the second principle of justice by ignoring or violating rights and liberties protected by the first principle. In the same way, fair equality of opportunity is to be arranged prior to the difference principle.³⁶

B. Discussion of Rawls's Theory in the Disability Context

When considering Rawls's Theory of Justice in the disability context, there is a debate as to whether his theory includes persons with disabilities or not. The main criticism is

³¹ *ibid* 43.

³² *ibid*.

³³ *ibid*.

³⁴ *ibid* 59.

³⁵ *ibid*.

³⁶ *ibid*.

that his theory excludes persons with disabilities, particularly those with cognitive impairments, because they seem to lack moral powers, which are prerequisite attributes of individuals to decide and agree on the principles of justice in the original position.³⁷ Further, while persons with physical impairments may not be perceived to lack moral powers, they may be regarded as 'not fully cooperating' members of society.³⁸ According to this perspective, Rawls's theory cannot be used as a foundation for creating a just society.

On the other hand, some scholars believe that Rawls' Theory of Justice is applicable to all persons with disabilities.³⁹ Noelin Fox argues that Rawls' requirement of rational capacity or possession of moral powers generally follows the traditional differentiation between human persons and other creatures, and attaches to 'the social contractarian notion of personhood' as a precondition of being a subject of justice.⁴⁰ She argues that, in the late 20th century, the social model of disability introduced evolutionary thinking to recognise persons with disabilities as equal subjects, in terms of their human rights and personhood. Drawing from the work of Eva Kittay, Gerard Quinn and advanced developments in psychological and medical knowledge,⁴¹ she contends that 'the possession of capacity is not a condition for the recognition of personhood'.⁴² She further suggests that Rawls does not dismiss the question of how justice applies to disabled

³⁷ Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press 2006); Cynthia Stark, 'How to Include the Severely Disabled in a Contractarian Theory of Justice' (2007) 15(2) *Journal of Political Philosophy* 127.

³⁸ Stark (n 37) 131.

³⁹ Wong (n 13); Noelin Fox, 'What's fair? Realising the right to Independent Living for people with intellectual disabilities: what Ireland needs to do' (PhD thesis, National University of Ireland, Galway 2013).

⁴⁰ Fox (n 39) 75.

⁴¹ *ibid* citing Eva Kittay, 'When Caring Is Just and Justice Is Caring: Justice and Mental Retardation' (2001) 13(3) *Public Culture* and Gerard Quinn, 'Rethinking Personhood: New Directions in Legal Capacity Law & Policy' (Paper presented at University of British Columbia, Canada, (29 April 2011).

⁴² *ibid* 89.

people, but postpones this issue in order to focus on identifying the principles of justice upon which everyone could agree,⁴³ as he expresses that:

While individuals presumably have varying capacities for a sense of justice, this fact is not a reason for depriving those with lesser capacity of the full protection of justice.⁴⁴

According to her arguments on personhood and equality of persons with disabilities and Rawls' sense of justice towards persons with disabilities, she believes that his theory is fully applicable to all persons with disabilities.⁴⁵

Sophia Wong also supports the application of Rawls' Theory of Justice to persons with disabilities by proposing the 'Potentiality View'.⁴⁶ She insists that everyone, including persons with cognitive impairments, has the potential to develop the two moral powers to become 'a fully cooperating member of society' when the 'Enabling Conditions', the appropriate supportive circumstances, are provided.⁴⁷ Although people who are in a coma or a deep unconscious state may seem unlikely to develop the two moral powers in any way, Wong argues that forthcoming advances in medical science might support them to develop the two moral powers.⁴⁸

Wong's approach recognises that persons with different impairments need different supportive conditions 'to develop the two moral powers', just as different '[s]eeds' need different conditions to grow.⁴⁹ Examples of Enabling Conditions include spending time with supportive family members to develop these skills; having opportunity to learn, interact with or be surrounded by others people who are exercising their moral powers;⁵⁰ and being treated 'as a moral subject rather than an object'.⁵¹ However, each person

⁴³ *ibid.*

⁴⁴ Rawls, *Theory of Justice* (n 6) 443.

⁴⁵ Fox (n 39).

⁴⁶ Wong (n 13) 387.

⁴⁷ *ibid* 388.

⁴⁸ *ibid.*

⁴⁹ *ibid* 389.

⁵⁰ *ibid.*

⁵¹ *ibid* 390.

may need varied amounts of time to develop his/her moral powers.⁵² In addition to the availability of Enabling Conditions, she argues that the blockages in individuals' 'developmental pathways' must be eliminated.⁵³ These blockages are, for instance, being surrounded by a hateful or dismissive environment (including within a family setting); being institutionalised where the person is kept away from his/her supportive family or community and never has an opportunity to make a choice (including in small matters of daily activities, such as what to wear or what to eat).⁵⁴

Wong believes that the 'Enabling Conditions' are ones of the basic needs suggested by Rawls, which must be provided for persons with disabilities to be able to develop their moral powers.⁵⁵ To meet the basic needs' requirement, the structure of society accordingly requires adaptation to be more inclusive and enable all persons with disabilities to effectively participate in their society. These conditions need to be fulfilled before the principles of justice can be accomplished.⁵⁶

According to Fox's argument and Wong's Potentiality View, I believe that Rawls' Theory of Justice includes all persons with disabilities, including those who are in a coma or a deep unconscious state, to be subjects of justice. I view that, as a human being, one is assumed to be free and equal without considering particular attributes or capacity; as a free and equal person, one is assumed to have a potential to develop the two moral powers through the Enabling Conditions provided. For a person who is in a coma or a deep unconscious state, the appropriate support and treatments are considered as Enabling Conditions to assist them in developing their moral powers. Additionally, as to Wong's argument, it seems better to overly extend moral status to include 'all living creatures', or even 'trees, rocks, rivers, and glaciers', rather than narrowly exclude them and risk the 'moral wrong', as the history shows the dangers of denying entire categories

⁵² *ibid.*

⁵³ *ibid* 394.

⁵⁴ *ibid.*

⁵⁵ *ibid* 389.

⁵⁶ *ibid.*

of persons previously considered to lack moral powers (including women and members of racial or ethnic minorities) full recognition under the law.⁵⁷

C. Other Critiques of Rawls

Apart from the disability critiques discussed in the previous section, there are some other critiques of Rawls' theory from a feminist perspective. Rawls' assumption, that 'heads of families' in the original position would represent benefits of their 'immediate descendants',⁵⁸ tends to refer to men as predominant decision makers on principles of justice.⁵⁹ Rawls seems not to deny that heads of families are referred to as men, which assumes that women would not be involved in making agreements on the principles of justice.⁶⁰ While men are deemed to be representatives of others, including women, in this respect, it still raises another concern on how they can adequately represent women's views without having the same experience as them or involving them directly in the process.⁶¹

Susan Okin perceives that Rawls' theory overlooks justice within the family, although the family is a part of basic structure of society that influences people's lives.⁶² Rawls admits that the principles of justice primarily focuses on the political sphere of basic structure as 'a unified system of social cooperation'; and recognises that the principles do not directly apply to family and other individual institutions within it.⁶³ His view is that the basic structure guarantees its members, as equal citizens, the basic rights and liberties and fair opportunities which cannot be deprived by family or other institutions. Although there is no direct application of the principles of justice to family matters, the political sphere still interferes in family situations, for example through legislation on domestic violence.

⁵⁷ *ibid* 396-97.

⁵⁸ Rawls, *Theory of Justice* (n 6) 111.

⁵⁹ Fox (n 39).

⁶⁰ *ibid*.

⁶¹ *ibid*.

⁶² Rawls, *Justice as Fairness* (n 20), citing Susan Okin, *Justice, Gender, and the Family* (Basic Books 1989).

⁶³ *ibid* 163.

He further argues that it would be absurd to direct parents to act according to political principles with their children.⁶⁴

Okin contends that, within a family setting, women face inequality due to their disproportionate responsibilities.⁶⁵ This inequality issue additionally affects their children's development of 'political virtues' as members of the society.⁶⁶ Rawls acknowledges the inequality women face due to 'the traditional division of labor within the family' and the need 'either to equalize their share or to compensate them for it', but he maintains that it is not the duty of the political philosophy to decide on what is the best solution.⁶⁷ He argues that both men and women within a family setting are equally protected as equal members of society within his theory of justice, which is reflected through the modern family law.⁶⁸

It has been shown that the central focus of justice on Rawls' theory is institutions within the basic structure of society. The main institutions relating to this study are legal institutions. These institutions provide all citizens, including persons with disabilities, with guarantees of basic rights and liberties and have created the justice system to protect these rights. In his principles of justice, Rawls values the principles of equality, but they are narrower than those elaborated by Sandra Fredman, which will be discussed further in section 2.1.3 below. The next section focuses on the meaning of justice proposed by Amartya Sen's Capability Approach.

2.1.2 Sen's Capability Approach: Justice as Freedom

A. Background to Sen's Approach

The Capability Approach proposed by Amartya Sen is another approach used for discussing the meaning of "justice", which has a very close connection with Rawls'

⁶⁴ *ibid.*

⁶⁵ *ibid* citing Susan Okin, *Justice, Gender, and the Family* (Basic Books 1989).

⁶⁶ *ibid* 166.

⁶⁷ *ibid* 167.

⁶⁸ *ibid.*

conception of justice. Sen expressly presents his critique of Rawls' theory in his book, *The Idea of Justice*, as well as acknowledging that '[Rawls]' ideas continue to influence [him] even when [he] disagree[s] with some of [Rawls]' conclusions.'⁶⁹ An acknowledgement of human diversity is recognised as a key strength of Sen's Capability Approach, whereas some other theories, including Rawls' Theory of Justice, seem to ambiguously take everyone into consideration.⁷⁰

In the Capability Approach, Sen focuses on how to enhance justice in current societies and eliminate injustice permanently, rather than trying to construct a system of perfect justice or 'just institutions' as Rawls does.⁷¹ Sen views that 'debates on the utopia of the perfectly just world can have very distracting and diverting effects on the pursuit of justice, in particular reduction of injustice, here and now'.⁷² He believes that just institutions cannot sufficiently assure that the social justice will be protected as those institutions might be intervened upon by corrupt authorities and lead to an unjust situation.⁷³ This may appear in the form of 'legal corruption',⁷⁴ whereby legislation aims to benefit some authorities, but not society as a whole. One example would be the enactment of a law permitting government to conclude contracts with foreign public companies without public procurement.⁷⁵

According to Sen, justice concerns people's lives rather than institutional structures. An appropriate choice of institutions is a mere contributor that enhances justice by

⁶⁹ Amartya Sen, *The Idea of Justice* (The Belknap Press 2009) xxi

⁷⁰ Ingrid Robeyns, 'The Capability Approach' (*Stanford Encyclopaedia of Philosophy*, 3 October 2016) <plato.stanford.edu/archives/win2016/entries/capability-approach/> accessed 19 June 2018.

⁷¹ Sen, *The Idea of Justice* (n 69) ix.

⁷² *ibid* 5-6.

⁷³ *ibid*.

⁷⁴ World Bank, 'Helping Countries Combat Corruption: The Role of the World Bank' (*World Bank*, September 1997) <www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf> accessed 22 June 2018, 8.; The World Bank defines the term "corruption" as 'the abuse of public office for private gain'.

⁷⁵ Nicholas Hildyard, *Corrupt but legal* (*Counter Balance – Challenging Public Investment Banks*, December 2016) <www.counter-balance.org/wp-content/uploads/2016/12/Corrupt-but-Legal_9Dec.pdf> accessed 22 June 2018.

supporting people to reach the life they want to live.⁷⁶ Sen proposes '[t]he use of a comparative perspective' to advance justice.⁷⁷ This approach assesses the distance between people's actual lives and the lives they want to live – the smaller the gap, the greater the justice.⁷⁸ Based on this approach, Sen develops two fundamental ideas of "functionings" and "capabilities".⁷⁹ Functionings are 'states of being and doing'.⁸⁰ Capabilities do not refer to any 'physical or mental ability',⁸¹ but 'a person's real freedoms or opportunities to achieve functionings' of his/her choice.⁸² These freedoms and opportunities must be also achievable in practice, which may require adequate resources to pursue these goals.⁸³ Mere formal opportunities open to all without support to achieve these goals are not sufficient according to Sen's Capability Approach.⁸⁴

However, the main focus of the Capability Approach is not on the resources people have (which Sen calls 'the means of living'), but on 'the actual opportunities a person has' as described.⁸⁵ This is the fundamental departure of Sen's approach from Rawls' theory focusing on distribution of primary goods.⁸⁶ Sen views that '[primary goods] are not valuable in themselves, but they can ... help the pursuit of what we really value.'⁸⁷ The more important factor is people's 'opportunities for converting' the available primary

⁷⁶ Sen, *The Idea of Justice* (n 69).

⁷⁷ *ibid* xi.

⁷⁸ Sarinee Achavanuntakul, 'Institution, human, and benefits – Justice in the view of Amartya Sen' (*Fringer*, March 2011) <www.fringer.org/sites/default/files/report/sen-justice.pdf> accessed 23 June 2018.

⁷⁹ Chad Kleist, 'Global Ethics: Capabilities Approach' (Internet Encyclopaedia of Philosophy) <www.iep.utm.edu/ge-capab/> accessed 3 May 2014.

⁸⁰ *ibid*.

⁸¹ Sophie Mitra, 'The Capability Approach and Disability' (2006) 16(4) *Journal of Disability Policy Studies* 236, 236.

⁸² Robeyns, 'The Capability Approach' (n 70).

⁸³ Achavanuntakul (n 78).

⁸⁴ Robeyns, 'The Capability Approach' (n 70).

⁸⁵ Sen, *The Idea of Justice* (n 69) 253.

⁸⁶ *ibid*.

⁸⁷ *ibid* 254.

goods or resources into the kind of life they value.⁸⁸ To illustrate this concept, Sen gives an example of a person with a severe physical impairment, who has a high income. This person may seem to have sufficient 'means of living well' due to high income, but she still faces stigma and prejudice and may spend much of her income overcoming barriers in society.⁸⁹ This issue of disability will be further discussed in the next section.

In order to know what injustice should be eliminated and how justice should be enhanced, Sen proposes the use of 'public reasoning', a rational discussion in public based on democracy.⁹⁰ The purpose of this process is not to establish the perfect system of justice, unlike Rawls' original position, but to make agreements that everyone can generally accept on how to decrease injustice or advance justice in society.⁹¹ Accordingly, the issues of justice and injustice will vary from one society to another. Democracy in the sense of public reasoning recognises both 'majority rule and the rights of minorities',⁹² which requires 'political participation, dialogue and public interaction' for its effectiveness.⁹³

B. Sen's Approach in the Disability Context

Sen further discusses the perception of disability in his approach. He regards disability as 'a deprivation in terms of capabilities or functionings'.⁹⁴ A deprivation can occur when a person cannot convert his/her available resources into capabilities or functionings, due to one or more factors, namely personal, social, and environmental factors.⁹⁵ Persons with disabilities experience personal, social and environmental factors⁹⁶ that can 'reduce one's ability to earn an income ... [and] make it harder to convert income into capability' because persons with disabilities 'may need more income ... to achieve the same

⁸⁸ *ibid* 254

⁸⁹ *ibid* 234.

⁹⁰ Sen, *The Idea of Justice* (n 69); Achavanuntakul (n 78).

⁹¹ Sen, *The Idea of Justice* (n 69).

⁹² *ibid* 352.

⁹³ *ibid* 326.

⁹⁴ Mitra (n 81) 237.

⁹⁵ *ibid*.

⁹⁶ Other handicaps include age, illness. See Sen, *The Idea of Justice* (n 69) 256.

functioning' as others (if it is possible to achieve such functioning).⁹⁷ This 'capability deprivation' is also linked to poverty experienced by persons with disabilities.⁹⁸ This matter demands public assistance because it diminishes a 'feature of humanity', and 'societal help and imaginative intervention' can prevent or reverse disadvantageous consequences of disability in many circumstances.⁹⁹

The Capability Approach is an inclusive approach that guides policymakers to consider disability as an influencing factor on people's quality of life.¹⁰⁰ It leads them to be aware of the existing abilities of individuals and available resources in society, in order to design meaningful policies that offer a just society for all, including persons with disabilities, which also induces sustainable development.¹⁰¹

C. Critiques of Sen

Although Sen's Capability Approach provides a useful framework for assessing the well-being and quality of life of persons with disabilities,¹⁰² there are some critiques of this approach from numerous scholars both inside and outside the Capabilities Approach. This study focuses on three significant critiques concerning its under theorisation, excessive individualisation, and deficiency in the conception of freedoms.

1) Under Theorisation

The first critique is that Sen's approach is 'under-theorised' and inadequate to be considered as a theory of justice because the basic capabilities have not been

⁹⁷ Sen, *The Idea of Justice* (n 69) 256.

⁹⁸ *ibid* 256.

⁹⁹ *ibid* 259.

¹⁰⁰ Parul Bakhshi and Jean Trani, 'The Capability Approach to Understanding Disability: Increasing Comparability, Defining Efficient Programs', <www.ucl.ac.uk/lc-ccr/lcstaff/jean-francois-trani/BakshiTraniAFD060306.pdf> accessed 19 May 2014.

¹⁰¹ *ibid*.

¹⁰² Mitra (n 81).

identified.¹⁰³ Accordingly it is difficult to set a clear target for a just society, as well as to assess the implementation of this approach.¹⁰⁴

Martha Nussbaum, another Capabilities Approach theorist, agrees with Sen's use of 'the capability space' to measure people's quality of life through their actual abilities of being or doing something with regard to the question of social equality and inequality. However, she believes that the measurement of functionings and capabilities alone is inadequate to achieve justice.¹⁰⁵ She proposes that Capabilities Approach must identify essential capabilities that illustrate 'human powers',¹⁰⁶ which emphasise the uniqueness of human beings.¹⁰⁷ For this reason, she proposes a list of capabilities, containing ten 'central requirements of life with dignity', based on 'a conception of the dignity of the human being and of a life that is worth of that dignity – a life that has available in it truly human functioning'.¹⁰⁸ The list of ten 'Central Human Capabilities' includes (1) 'Life', (2) 'Bodily Health', (3) 'Bodily Integrity', (4) 'Senses, Imagination, and Thought', (5) 'Emotions', (6) 'Practical Reason', (7) 'Affiliation', (8) 'Other Species', (9) 'Play', and (10) 'Control over One's Environment'.¹⁰⁹ This list aims to indicate 'a threshold level of capabilities' which a government has to offer to all citizens.¹¹⁰ However, she clearly states that her approach does not include 'inequalities above the threshold' and recognises that the list could be revised and changed over time.¹¹¹

¹⁰³ Thomas Wells, 'Sen's Capability Approach' (25 April 2012) <www.iep.utm.edu/sen-cap/> accessed 26 April 2014.

¹⁰⁴ *ibid.*

¹⁰⁵ Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000) 12

¹⁰⁶ Nussbaum, *Frontiers of Justice* (n 37) 218; Kleist (n 79).

¹⁰⁷ Kleist (n 79).

¹⁰⁸ Nussbaum, *Frontiers of Justice* (n 37) 74.

¹⁰⁹ *ibid* 76-78.

¹¹⁰ Nussbaum, *Women and Human Development* (n 105) 12.

¹¹¹ Nussbaum, *Frontiers of Justice* (n 37) 75.

Nussbaum remarks that Sen has never provided this kind of list,¹¹² and this makes his approach lack a sense of ‘human powers’.¹¹³ Although sometimes Sen has mentioned Marx’s and Aristotle’s ideas in his work, she remains uncertain whether Sen’s approach is based on ‘the Marxian/Aristotelian idea of truly human functioning’ as her work is or not.¹¹⁴

Nussbaum explains the conception behind her list of capabilities that ‘[t]he basic idea is that with regard to each of these, we can argue, by imagining a life without the capability in question, that such a life is not a life worthy of human dignity’.¹¹⁵ Although Nussbaum seems to provide this list as a minimum obligation of governments to their citizens, it can be interpreted as composition of human dignity. It leads to an understanding that, for those who are unable to develop some of capabilities, such as ‘Practical Reason’, due to their profound cognitive impairment, ‘their lives are incompatible with human dignity and cannot be made compatible with it, at least until some form of cognitive enhancement is developed’.¹¹⁶ Moreover, according to this interpretation, if the list of central capabilities can be changed over time, it is possible that one who currently has a life worthy of human dignity might not possess such life in the future if he/she lacks some capabilities included on the new list.

To respond the critique on under theorisation, it is arguable that Sen does not create a list of central capabilities nor identify any essential capabilities as he intends to leave the political sphere to decide this list for each specific society.¹¹⁷ Sen additionally admits that his approach ‘is not a theory of justice but rather an approach to the evaluation of effective freedom’.¹¹⁸ Sophie Mitra suggests that Sen intentionally leaves ‘the capability

¹¹² Nussbaum, *Women and Human Development* (n 105).

¹¹³ Kleist (n 79).

¹¹⁴ Nussbaum, *Women and Human Development* (n 105) 13.

¹¹⁵ Nussbaum, *Frontiers of Justice* (n 37) 78.

¹¹⁶ Jeff McMahan, “‘Human Dignity,’ Kantian Dignity, Suicide, and Assisting Others to Die’ in Sebastian Muders (ed) *The Role of Human Dignity in Assisted Death* (OUP) (forthcoming) <jeffersonmcmahan.com/wp-content/uploads/2012/11/Human-Dignity-Kantian-Dignity-Suicide-and-Assisting-Others-to-Die.pdf> accessed 24 June 2018.

¹¹⁷ Wells (n 103).

¹¹⁸ *ibid.*

approach incomplete [by not creating a single list of capabilities] to allow for plurality', in which different lists of capabilities can be flexibly created in accordance with the issues under consideration in distinctive circumstances.¹¹⁹

2) Excessive Individualisation

The second critique is that Sen's approach is 'excessively individualistic' by focusing on the real freedoms and opportunities of each individual.¹²⁰ Some communitarian theorists criticise that his focus lacks the awareness of communal interest and of the effects of individuals' freedoms on communities.¹²¹ Regarding this issue, Nussbaum also points out that Sen overlooks interrelated effects among individuals' freedoms. She suggests that, in a just society, it is important to balance or limit some freedoms where necessary.¹²²

In his response, Sen highlights that it is necessary to focus on each person individually as each one has different abilities to convert resources into functionings.¹²³ This individual approach aims to increase individuals' freedoms and to powers achieve their well-being.¹²⁴ Even if the focus is on individuals, he argues that their choices of functionings are actually derived from and influenced by the shared values within their community.¹²⁵ These values create different 'standards' among different communities and they influence choices of individuals' functionings that are important for their participation in the community.¹²⁶ Accordingly, Sen's approach does not ignore communal interest as individuals' freedoms and the values of their communities are inter-related. Therefore, institutions in society should maximise opportunities for individual

¹¹⁹ Mitra (n 81) 239.

¹²⁰ Wells (n 103).

¹²¹ *ibid.*

¹²² *ibid.*

¹²³ *ibid.*

¹²⁴ *ibid.*

¹²⁵ Sen, *The Idea of Justice* (n 69).

¹²⁶ *ibid* 255.

freedoms as the individual's development also impacts upon the values of community as a whole.

Concerning the interrelationship among individual freedoms, Sen explains that an effective freedom or capability consists of a combination of 'the ability to choose between different options' and 'an ethical evaluation of [the value] of the content of their options'. Therefore, the effective freedom or capability will not negatively affect the development of a just society.¹²⁷

3) Deficiency in the Conception of Freedom

The final critique of Sen arises from the republican perspective of freedom.¹²⁸ Sen's idea of freedom focuses on a person's ability to achieve his/her 'reasoned choice' or preference.¹²⁹ The effectiveness of preference can be the result of his/her own actions ('direct control'), or the result of other people's actions or their help ('indirect power').¹³⁰ These results affirm his/her freedom in the sense of 'effective power'.¹³¹ Where the preference is fulfilled coincidentally or by 'good luck' without any control (whether direct or indirect) nor any exercise of power, it cannot be considered effective – the core idea of freedom.¹³² This conception of Sen's is in line with the republican view of freedom.¹³³

The key element that makes the republican view of freedom different from Sen's view is the means to achieve one's choice. Sen views that substantive freedom includes achievement through 'the help and goodwill of others',¹³⁴ whereas republicanism excludes these means because of the risk of exposing the individual to 'arbitrary

¹²⁷ Wells (n 103).

¹²⁸ Some theorists may use the term "liberty" instead of "freedom", but pursue the same meaning. See Sen, *The Idea of Justice* (n 69) 304.

¹²⁹ Sen, *The Idea of Justice* (n 69) 301.

¹³⁰ *ibid* 301-2.

¹³¹ *ibid* 302.

¹³² *ibid* 303.

¹³³ *ibid*.

¹³⁴ *ibid* 308.

power'.¹³⁵ Republicanism views that reliance on the goodwill of others to assist a person to achieve freedom is problematic because he/she is not 'really free' to achieve his/her capabilities.¹³⁶ Although, at the end, that person achieved his/her freedom, during the process, if he/she depended on the arbitrary decisions of other people; this puts that person in a position of uncertainty and a vulnerable situation.¹³⁷

According to republican theory, the requirement of 'non-domination' goes beyond being free from 'intrusive interference by others' as suggested by Rawls.¹³⁸ Mere non-interference is insufficient to guarantee substantive freedom because it is not completely free from arbitrary power.¹³⁹ Republicanism views that 'freedom' equates to 'non-domination or the absence of arbitrary power'.¹⁴⁰ Arbitrary power differs from intrusive interference as it can exist without being 'actually exercised'.¹⁴¹ Arbitrary power exists in 'a relationship of dependency between the person who is being dominated and those dominating them',¹⁴² for example a relationship between a person with disabilities and those on whom they depend for their living.¹⁴³ '[D]ependency' is explained as a relationship that requires the dependent party who wants to leave that relationship to pay 'high exit costs', which could be in forms of financial, physical, emotional or psychological losses.¹⁴⁴ The fear of these costs also strengthens dependency and may prevent such a party from leaving the relationship.¹⁴⁵ This demonstrates how arbitrary power exists without being actually exercised, and shows the reason why republicanism cannot

¹³⁵ *ibid* 305.

¹³⁶ *ibid* 305.

¹³⁷ *ibid*.

¹³⁸ *ibid* 304.

¹³⁹ *ibid*.

¹⁴⁰ Frank Lovett, 'What counts as arbitrary power?' (2012) 5(1) *Journal of Political Power* 137, 141.

¹⁴¹ Sen, *The Idea of Justice* (n 69) 305.

¹⁴² Lucy Series, 'The Mental Capacity Act 2005 and the Institutional Domination of People with Learning Disabilities' (PhD thesis, University of Exeter 2013) 56, citing Frank Lovett, *A General Theory of Domination and Justice* (OUP 2010).

¹⁴³ *ibid*.

¹⁴⁴ *ibid* 56, citing Frank Lovett, *A General Theory of Domination and Justice* (OUP 2010).

¹⁴⁵ *ibid*.

accept reliance on help and goodwill of others to achieve substantive freedom – Sen calls this ‘capability without dependence’.¹⁴⁶ Republicanism proposes to use the rule of law to protect people from arbitrary power and facilitate the realisation of substantive freedom.¹⁴⁷

In response to the republican view, Sen points out that the main focus of the Capability Approach is whether the person can actually achieve the effectiveness of preference – to ‘really [be] able to do the things that [he/]she would choose to do and has reason to choose to do.’¹⁴⁸ This may depend on many factors, such as ‘public policy, ... national or local politics.’¹⁴⁹ Sen argues that:

*[w]e live in a world in which being completely independent of the help and goodwill of others may be particularly difficult to achieve, and sometimes may not even be the most important thing to achieve.*¹⁵⁰

He emphasises that freedom should not be viewed as ‘a single-focus understanding’ as it actually has ‘multiple elements.’¹⁵¹ Exclusion of the help and goodwill of others would lead to an understanding that ‘having a supportive society’ ‘cannot make any difference to anyone’s freedom’, which seems to create ‘a huge lacuna’ in a just society.¹⁵² Sen does not view the republican approach to freedom as a harmful proposal to the Capability Approach, but he is not inclined to narrow down the idea of freedom as suggested.¹⁵³ He believes that the broader the freedom approach, the better opportunities for people to achieve the capabilities they have reason to value.¹⁵⁴

¹⁴⁶ Sen, *The Idea of Justice* (n 69) 304.

¹⁴⁷ Frank Lovett, ‘Republicanism’ (*Stanford Encyclopaedia of Philosophy*, 4 June 2018) <plato.stanford.edu/entries/republicanism/> accessed 26 June 2018.

¹⁴⁸ Sen, *The Idea of Justice* (n 69) 307.

¹⁴⁹ *ibid* 307.

¹⁵⁰ *ibid* 308.

¹⁵¹ *ibid* 308.

¹⁵² *ibid* 307.

¹⁵³ *ibid*.

¹⁵⁴ *ibid*.

Although I agree with most of Sen's replies to the critiques of his Capability Approach, I view that the use of the rule of law principle, as suggested by republicanism, provides everyone with better and more certain opportunities to realise their capabilities. This perspective seems more compelling in the disability context, where history shows that persons with disabilities were 'treated as objects of pity [or] charity'.¹⁵⁵ The availability of assistance through other people's generosity exposes persons with disabilities to 'arbitrariness of the exercise of power' – power to decide whether to help or not.¹⁵⁶ This is also a reason for introducing the UNCRPD, which aims to 'shift away from a social welfare response to disability to a rights-based approach'.¹⁵⁷ In compliance with the republican approach to freedom, the existence of this Convention is to protect persons with disabilities from arbitrary power hidden behind charitable assistance, and to facilitate opportunities to achieve their capabilities (within the scope of human rights). The application of the rule of law principle is further discussed in the next chapter on access to civil justice in international human rights law. The next section focuses on the principles of equality elaborated by Sandra Fredman, which have very close connections with both Rawls' and Sen's conceptions of justice. After reviewing these principles together with Rawls' and Sen's conceptions of justice, the research will conclude, in the later section, the conception of justice adopted for this study.

2.1.3 Principles of Equality

The concept of equality has been developed over centuries.¹⁵⁸ It is widely embedded in both international and domestic human rights law.¹⁵⁹ Currently, it is accepted

¹⁵⁵ 'Disability and the Media – Promoting an accurate image and enhancing the voice of persons with disabilities in the media' <www.un.org/development/desa/disabilities/resources/disability-and-the-media.html> accessed 26 June 2018.

¹⁵⁶ Series (n 142) 57.

¹⁵⁷ Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8(1) Human Rights Law Review 1.

¹⁵⁸ Fredman, *Discrimination Law* (n 2).

¹⁵⁹ *ibid.*

internationally that ‘all human beings are ... equal’.¹⁶⁰ The aim of discussion on the principles of equality in this chapter is to clarify the meaning of “equality”, and understand its close connection with justice.¹⁶¹ The principles of equality are also the key principles of the UNCRPD, which also firmly guarantees the right to access to civil justice for persons with disabilities.¹⁶² This Convention will be further discussed in Chapter 4. Equality has been classified into two main categories – ‘formal equality’ and ‘substantive equality’ – as follows.¹⁶³

A. Formal Equality

Formal equality also known as ‘equality as consistency’ and reflects the idea of ‘consistent treatment’ by ‘treating likes alike’ to provide fairness.¹⁶⁴ However, according to Sandra Fredman, this principle raises at least four key concerns.¹⁶⁵ The first concern relates to legitimacy of indicators used to identify people’s similarities and distinctions.¹⁶⁶ These indicators are evolving conceptions developed over time.¹⁶⁷ Presently, it is internationally agreed that some distinctions, comprising ‘race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status’, including disability¹⁶⁸ are prohibited grounds for ‘inferior treatment’.¹⁶⁹ However, in the future, new indicators might develop or be recognised as prohibited grounds for inferior treatment. Secondly, formal equality only focuses on consistency of treatment, which allows ‘equally

¹⁶⁰ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), art 1.

¹⁶¹ Stefan Gosepath, ‘Equality’ (*Stanford Encyclopaedia of Philosophy*, 27 June 2007) <plato.stanford.edu/entries/equality/> accessed 27 June 2018; Miller (n 1).

¹⁶² Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (UNCRPD), arts 5 and 13

¹⁶³ Fredman, *Discrimination Law* (n 2) 8.

¹⁶⁴ *ibid* 8.

¹⁶⁵ *ibid*.

¹⁶⁶ *ibid*.

¹⁶⁷ *ibid*.

¹⁶⁸ UDHR, art 2; UNCRPD, arts 2 and 5.

¹⁶⁹ Fredman, *Discrimination Law* (n 2) 9.

[bad]' and 'levelling down'¹⁷⁰ treatments to escape attention.¹⁷¹ The third problem concerns 'the need to find a comparator' to demonstrate inconsistency of treatment.¹⁷² This raises a question of what standard will be used as a comparator and whether that standard can provide fairness among different groups.¹⁷³ The fourth concern is that formal equality does not require the treatment of people in accordance with their distinctions.¹⁷⁴ Accordingly, other attributions, such as gender, disability, socio-economic status, will not be taken into account, which may lead to unequal outcomes.¹⁷⁵ The principle of equality before the law falls into formal equality category.¹⁷⁶ However, it is arguable that the UNCRPD transforms the principle of equality before the law from the notion of formal equality into the notion of substantive equality, through Articles 5 (Equality and non-discrimination) and 12 (Equal recognition before the law). This issue will be further discussed in Chapter 4 when exploring access to justice under the UNCRPD.

B. Substantive Equality

Substantive equality is introduced to resolve some problems incurred when applying formal equality in practice.¹⁷⁷ Fredman suggests a multi-layered approach to substantive equality, consisting of equality of results, equality of opportunity, and dignity.¹⁷⁸ Substantive equality therefore has 'a four dimensional approach', aiming 'to redress disadvantage; address stigma, stereotyping, prejudice, and violence; enhance voice and

¹⁷⁰ '[L]evelling down' treatment refers to removal of benefit from people who are used to enjoy it or even from everyone. See Fredman, *Discrimination Law* (n 2) 10.

¹⁷¹ *ibid* 9-10.

¹⁷² *ibid* 10.

¹⁷³ *ibid*.

¹⁷⁴ *ibid*.

¹⁷⁵ *ibid*.

¹⁷⁶ *ibid*.

¹⁷⁷ *ibid*.

¹⁷⁸ *ibid*.

participation; and accommodate difference and achieve structural change.¹⁷⁹ These are discussed in more depth as follows.

1) *Equality of Result*

Equality of result allows different treatment by distributing benefits in a fairer way to achieve an equal outcome.¹⁸⁰ However, not all equal results satisfy the principle of substantive equality. Focusing only on the outcome may overlook some discriminatory issues hidden within the structure.¹⁸¹ For example, some persons with disabilities may be able to access information, not because the information is available in accessible formats, but because they endeavour to access such information at their own expense. Focusing only on the result that persons with disabilities can access the information will fail to notice a lack of accommodation for persons with disabilities in accessing information, which is guaranteed in international human rights law.¹⁸²

2) *Equality of Opportunity*

Equality of opportunity is also suggested by Rawls through his second principle of justice.¹⁸³ This formula of equality is in the 'middle ground between formal equality and equality of results.'¹⁸⁴ It aims at equalising the opportunities of all individuals at 'the starting point', but does not recognise the use of 'quotas' or similar systems to achieve diversity in an organisation.¹⁸⁵ In this regard, the treatment of individuals must be based on their 'qualities', not on other distinctions such as sex, race, etc.¹⁸⁶ Fredman suggests that equal opportunity should be offered through both procedural and substantive

¹⁷⁹ Sandra Fredman, 'Substantive equality revisited' (2016) 14(3) *International Journal of Constitutional Law* 712, 712.

¹⁸⁰ Fredman, *Discrimination Law* (n 2).

¹⁸¹ *ibid.*

¹⁸² UNCRPD, arts 9 and 21.

¹⁸³ Rawls, *Justice as Fairness* (n 20) 42-43.

¹⁸⁴ Fredman, *Discrimination Law* (n 2) 18.

¹⁸⁵ *ibid.* 18.

¹⁸⁶ *ibid.* 18.

dimensions. The procedural sense may remove barriers to individuals but cannot guarantee a substantively equal outcome, due to the impact of other related discrimination, such as educational disadvantage and family responsibility.¹⁸⁷ The substantive sense of equal opportunity, which provides 'positive measures such as education and training, and family-friendly measures', will enhance individuals' opportunities to obtain the "qualities"¹⁸⁸ required before entering a process of equal treatment or assessment.¹⁸⁹ Fredman views that the substantive sense of equal opportunity is rarely provided in legislation.¹⁹⁰ However, it is arguable that the UNCRPD acknowledges this deficiency from the disability rights perspective and provides a substantive sense of equality of opportunity through its provisions on accessibility and reasonable accommodation.¹⁹¹

3) Dignity

The notion of dignity is another element of substantive equality that should be taken into consideration in order to resolve problematic issues of formal equality and other formulas of substantive equality.¹⁹² It prevents an occurrence of 'equally bad', or 'levelling down' treatments, when considering the principle of formal equality.¹⁹³ Dignity can be also used as an indicator for violation of formal equality when no suitable comparator can be found in some situations.¹⁹⁴ For example, in a case of 'sexual harassment', Fredman argues that women should not have to use the treatment of men as a comparator to measure

¹⁸⁷ *ibid.*

¹⁸⁸ Fredman does not define the term "qualities", but seems to use this term interchangeably with the term "merits". In this context, the term "qualities" tends to refer to personal features or attributes of a person such as skills and knowledge to enter any assessment.

¹⁸⁹ *ibid* 19.

¹⁹⁰ *ibid.*

¹⁹¹ UNCRPD, arts 5 and 9.

¹⁹² Fredman, *Discrimination Law* (n 2).

¹⁹³ *ibid* 21.

¹⁹⁴ *ibid.*

whether an action violates women's equality or not, but could simply rely on respect for 'woman's basic dignity and humanity' to assess the situation.¹⁹⁵

However, dignity has its own difficulties. It has no definite meaning and has been interpreted in drastically different ways.¹⁹⁶ Moreover, it can create 'an additional burden on the claimant' to prove inequality; in other words, to prove his/her disadvantage due to an action that disrespects '[him/]her as a person', or accords him/her 'less value than others' in society.¹⁹⁷ Therefore, dignity should not be exclusively considered as a basis for equality, but can inform and strengthen other aspects of equality.¹⁹⁸

4) *Four-dimensional Approach of Substantive Equality*

This approach consists of '[r]edressing disadvantage',¹⁹⁹ '[r]edressing stigma, stereotyping and humiliation',²⁰⁰ '[t]he participative dimension',²⁰¹ and '[a]ccommodating difference and structural change'.²⁰² Fredman views that these dimensions are overlapping and are not ordered in terms of priority.²⁰³ The details of each dimension are as follows.

The redressing disadvantage dimension recognises that people may face disadvantages due to 'status or identity' of the group they belong to, such as disability or ethnic minority.²⁰⁴ Such disadvantages are negative consequences attached to that status or identity, such as 'social exclusion'.²⁰⁵ Abolishing such disadvantages may require some extra measures. This is acceptable in this respect although this may violate the principle

¹⁹⁵ *ibid* 22.

¹⁹⁶ *ibid*.

¹⁹⁷ *ibid* 24.

¹⁹⁸ *ibid*.

¹⁹⁹ Fredman, 'Substantive equality revisited' (n 179) 728.

²⁰⁰ *ibid* 730.

²⁰¹ *ibid* 731.

²⁰² *ibid* 732.

²⁰³ Fredman, *Discrimination Law* (n 2).

²⁰⁴ *ibid* 27.

²⁰⁵ *ibid* 26.

of formal equality, which emphasises consistency of treatment.²⁰⁶ Redressing disadvantage is not only about fixing ‘socio-economic disadvantage’ or ‘maldistribution of resources’, but should include issues of ‘domination, or structures which exclude people from participating in determining their actions’.²⁰⁷

Redressing stigma, stereotyping, and humiliation respects people’s ‘humanity’.²⁰⁸ Accordingly, ‘stigma, stereotyping, humiliation, and violence’ towards individuals due to their status or identity must be abolished to ensure their substantive equality.²⁰⁹ Fredman notes that this dimension is very similar to the notion of dignity, but focuses more on ‘recognition’ of identity, to emphasise individual’s core ‘value’ and avoid problematic issues arising from the dignity perspective.²¹⁰ This dimension focuses on ‘social consequences’, rather than ‘biological’ issues, which means that substantive equality recognises “disability” in term of its ‘social implications’, not the ‘impairment’.²¹¹

The participative dimension aims to facilitate individuals’ full participation in society, both socially and politically.²¹² Community inclusion and participation is an important aspect of human life.²¹³ In this sense, social participation requires measures to eliminate barriers to participation and enhance ability to be actively integrated into society.²¹⁴ Political participation is as important as the social aspects of participation to ensure that everyone’s interests and rights, especially those of minority groups, will be equally respected and protected.²¹⁵

²⁰⁶ *ibid.*

²⁰⁷ Fredman, ‘Substantive equality revisited’ (n 179) 729, citing Iris Young, *Justice and the Politics of Difference* (1990).

²⁰⁸ *ibid* 730.

²⁰⁹ *ibid* 730.

²¹⁰ *ibid* 730.

²¹¹ *ibid* 731.

²¹² *ibid.*

²¹³ *ibid.*

²¹⁴ *ibid* citing Catherine Barnard, ‘The Future of Equality Law: Equality and Beyond’, in Catherine Barnard and others (eds), *The future of labour law: Liber Amicorum Bob Hepple QC* (Hart 2004).

²¹⁵ *ibid.*

The dimension on accommodating difference and structural change respects diversity and value of group identities and accommodates their differences through social and structural change, instead of demanding for their conformity with 'the dominant norm'.²¹⁶ Its potential to transform social structures can be also called the 'transformative dimension' of equality.²¹⁷ The concept of universal design and accessibility standards in the UNCRPD are examples of this dimension that accommodate differences, rather than eradicating the identity of individuals with disabilities.²¹⁸

However, the implementation of this dimension is complicated in practice and may have some challenges.²¹⁹ The first issue concerns the cost to achieve equality. There are two related questions, (1) who should be responsible for the cost? and (2) can it be argued that it is too costly to provide equality?²²⁰ Fredman views that cost arguments are used as an excuse to balance 'the demand for accommodation' and the limitation of 'social resources'.²²¹ This excuse will raise another issue of how to determine 'reasonableness'. Even without structural change, a cost is always incurred – either on the members of the minority group themselves, or on the majority of people in society.²²² Fredman argues that these costs should be 'redistributed' in fairer ways by taking all dimensions of equality into consideration to achieve substantive equality.²²³

Another challenge is the question of '[a]t what point is it unreasonable or even wrong to accommodate difference, or tolerate minority cultures?'²²⁴ Some examples are the issues of trading human organs,²²⁵ or the institutionalisation of persons with

²¹⁶ *ibid* 733; Fredman, *Discrimination Law* (n 2) 30.

²¹⁷ Fredman, *Discrimination Law* (n 2) 30.

²¹⁸ UNCRPD, arts 2 and 9.

²¹⁹ Fredman, *Discrimination Law* (n 2).

²²⁰ *ibid*.

²²¹ Fredman, 'Substantive equality revisited' (n 179) 734.

²²² *ibid*.

²²³ *ibid* 734.

²²⁴ Fredman, *Discrimination Law* (n 2) 31.

²²⁵ Karen Hudson and Elizabeth Wheeler, 'Globalization and the Black Market Organ Trade: When Even a Kidney Can't Pay the Bills' (2008) 28(4) *Disability Studies Quarterly* <dsq-sds.org/article/view/143/143> accessed 2 July 2018; Martin Wilkinson, 'Sell organs to save

disabilities.²²⁶ Fredman suggests considering other dimensions of equality to address these situations. In any case, the aim to accommodate difference must not be fulfilled through '[p]ractices which compromise the basic dignity and humanity of individuals'.²²⁷

In summary, the principles of equality consist of two categories, formal equality and substantive equality. Substantive equality entails three formulas, equality of opportunity, equality of result, and dignity. To effectively enhance justice in society, both the principles and different formulas of substantive equality must be used altogether as each of them has its own challenges in providing effective equality. Substantive equality has a four-dimensional purpose, to redress disadvantage, stigma, stereotyping, and humiliation, accommodate difference and structural change, and promote participation and an inclusive society. These dimensions are overlapping; therefore, each dimension should not be used exclusively, but collaboratively with other dimensions to comprehensively resolve equality issues in this complex society consisting of diverse groups of people and communities. The next section will set out a conception of justice suitable for this study.

2.1.4 Conception of Justice for This Study

After considering the strengths and weaknesses of different conceptions of justice, this research adopts the conception of justice drawing from Sen's Capability Approach, which

lives' (*BBC News*, 27 August 2010) <www.bbc.com/news/health-10786211> accessed 2 July 2018; Kristin Houser, 'Black Market Bodies: How Legalizing the Sale of Human Organs Could Save Lives' (*Futurism*, 6 November 2017) <futurism.com/sale-human-organ/> accessed 2 July 2018.

²²⁶ Richard Fitzpatrick, 'Our shameful asylums' *Irish Examiner* (Cork, 7 February 2013); Kirstie McCrum, 'Mentally ill people are being chained and locked up in 'living hell' in Indonesia, warns report' (*The Mirror*, 21 March 2016) <www.mirror.co.uk/news/world-news/mentally-ill-people-being-chained-7601032> accessed 22 October 2018; Aoife Barry, "'We have always found ways to lock up mentally ill people": The disturbing history of Irish asylums' (*The Journal.ie*, 14 January 2017) <www.thejournal.ie/history-of-psychiatry-ireland-book-brendan-kelly-3177461-Jan2017/> accessed 2 July 2018.

²²⁷ Fredman, *Discrimination Law* (n 2) 31.

emphasises “capabilities”, or the ‘real freedoms or opportunities to achieve’ what individual has reason to value.²²⁸ It additionally includes the idea that these capabilities are based on the rule of law, which equally provides every person with legal guarantees and protection, in terms of their citizens’ basic rights and liberties, human rights, dignity and humanity.²²⁹ These legal guarantees must include supportive mechanisms that facilitate effective realisation of legal rights and protection.²³⁰ However, this does not mean that all existing laws can provide justice. Any legal provision that violates human rights, dignity, humanity or any aspect of the principles of equality must be abolished and replaced with provisions that can guarantee, protect and promote these rights. Additionally, the law must ensure that the basic structure of society is established and operates in line with the principles of justice and equality.²³¹

This conception of justice comprises four dimensions: institutional, capability, non-domination and equality dimensions (referred to as “four-dimensional conception of justice”). The institutional dimension is drawn from Rawls’ Theory of Justice. It emphasises an establishment of the basic structure of society, especially legal institution, in which legal provisions and the justice system are developed. They must be operated in line with the principles of justice and equality. The capability dimension reflects Sen’s Capability Approach. It focuses on the actual possibility of each person to achieve what that person wants to be or to do. The capability dimension requires supportive mechanisms to enable people to truly achieve their goals. The non-domination dimension is drawn from republicanism view of freedom. It is a supplement to the first two dimensions to ensure that legal institution is under the rule of law and provision of supportive mechanisms undertakes the rights-based approach, which means that the freedoms to achieve such goals do not rely on goodwill of other people. The equality dimension is based on the principles of equality. It elaborates what should be included in a rights-based approach and justifies that the existence of these rules is not to privilege any group or person, but to provide equality. The next part of this chapter focuses specifically on the meaning of “access to justice” for persons with disabilities.

²²⁸ Robeyns, ‘The Capability Approach’ (n 70).

²²⁹ Lovett, ‘Republicanism’ (n 147).

²³⁰ Sen, *The Idea of Justice* (n 69); Fredman, *Discrimination Law* (n 2).

²³¹ Rawls, *Theory of Justice* (n 6).

2.2 WHAT IS “ACCESS TO JUSTICE” FOR PERSONS WITH DISABILITIES?

This part contains two sections. The first section explores general meanings of “access to justice”. This term has different meanings, depending on the perspective used for interpretation. This section discusses the meaning of access to justice from three perspectives – its scope, context and components. The second section further discusses the meaning of access to justice in the context of disability. Each section is elaborated upon as follows.

2.2.1 General Meanings of “Access to Justice”

A. Scope

Yash Ghai and Jill Cottrell classify the scope of access to justice into three levels – narrow, intermediate, and broader perceptions.²³² The narrow view focuses on access to formal justice system,²³³ consisting of courts and other state-based justice institutions,²³⁴ such as administrative tribunals established by law to adjudicate specific claims and disputes.²³⁵ The intermediate level includes access to both formal and informal justice system.²³⁶ The informal system refers to alternative dispute resolution,²³⁷ such as mediation.²³⁸ The broadest scope embraces the narrow and intermediate scopes of access to justice. It additionally involves ‘the process of law making, the contents of

²³² Yash Ghai and Jill Cottrell, ‘The rule of law and access to justice’, in Yash Ghai and Jill Cottrell (eds), *Marginalized Communities and Access to Justice* (Routledge 2010).

²³³ *ibid.*

²³⁴ Ewa Wojkowska, ‘Doing Justice: How informal justice systems can contribute’ (UNDP 2006).

²³⁵ Graham Gooch and Michael Williams, *A Dictionary of Law Enforcement* (2nd edn, OUP 2015).

²³⁶ Ghai and Cottrell (n 232).

²³⁷ *ibid.*

²³⁸ Gooch and Williams (n 235).

the law, the legitimacy of the courts, [and] alternative modes of legal representation'.²³⁹ Most international entities, such as the United Nations Development Programme (UNDP), the World Bank and the Asian Development Bank also adopt the broader conception of access to justice.²⁴⁰

B. Context

Anna Lawson suggests that the term “access to justice” has different meanings depending on the context it is used for.²⁴¹ In most ‘academic stud[ies] of access to justice’, and civil rights movement or campaigning for accessible justice system, this term usually refers to the fair legal system that everyone can equally access.²⁴² In other words, the meaning in these contexts refers to a fundamental means under the rule of law that ensures both enjoyment and protection of human rights.²⁴³

Another meaning of “access to justice” rather confines to legal rights under the existing legal provisions, which contain ‘the bundle of rights relating to the justice system which are recognised in human rights law.’²⁴⁴ On the other hand, some laws may also refer to the same entitlements through other terms, such as ‘right to a fair trial’,²⁴⁵ ‘equal[ity] before the courts and tribunals’.²⁴⁶ These rights also fall within the same meaning of “access to justice” in this context. This issue will be discussed in the next chapter on access to civil justice in international human rights law.

²³⁹ Ghai and Cottrell (n 232) 3.

²⁴⁰ *ibid.*

²⁴¹ Anna Lawson, ‘Disabled People and Access to Justice - From disablement to enablement?’ in Peter Blanck and Eilionoir Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Taylor & Francis Group 2016) 88.

²⁴² *ibid* 89.

²⁴³ Stephanie Ortoleva, ‘Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System’ (2011) 17 *ILSA Journal of International & Comparative Law* 281.

²⁴⁴ Lawson (n 241) 90.

²⁴⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 6.

²⁴⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14.

C. Components

Another way to understand meaning of “access to justice” is to analyse its components. In the *Women’s Access to Justice* study, Reem Bahdi identifies access to justice as comprising three components, which are ‘substantive’, ‘procedural’, and ‘symbolic’ components.²⁴⁷ These components are unique but interconnected.²⁴⁸

The substantive component focuses on the effectiveness of legal guarantees at national level whether the law can actually provide equality for people in that State.²⁴⁹ This component links to the principles of equality discussed earlier in this chapter. Bahdi recommends applying the substantive equality principle, rather than the formal equality, in evaluating these guarantees as inequality may continue to exist due to disadvantages people face in reality.²⁵⁰ Discrimination law alone, although in line with formal equality principle, cannot improve the situation of those who are in a disadvantaged position because people still do not have adequate opportunity to enjoy equality.²⁵¹ Law makers should also consider the disadvantageous conditions that hinder people’s equal participation, and provide some measures that promote their equality.²⁵²

The procedural component focuses on the effective opportunities to bring claims into the justice system, either formal or informal justice system.²⁵³ It relates to laws, regulations, policies and practices in every aspect of justice system, including procedural rules, institutional mandate and regulations, and other factors (besides the substantive law) concerning people’s ability to access to the justice system.²⁵⁴ To fulfil this component, all

²⁴⁷ Reem Bahdi, ‘Background Paper on Women’s Access to Justice in the MENA Region’ (SSRN, October 31, 2007) <ssrn.com/abstract=1716864> accessed 12 May 2018, 3.

²⁴⁸ *ibid.*

²⁴⁹ *ibid.*

²⁵⁰ *ibid.*

²⁵¹ *ibid.*

²⁵² *ibid.*

²⁵³ *ibid.*

²⁵⁴ *ibid.*

barriers obstructing equal access to the procedure need to be identified and eliminated.²⁵⁵

The symbolic component ‘steps outside of doctrinal law and asks to what extent a particular legal regime promotes citizens’ belonging and empowerment.’²⁵⁶ Bahdi explains that the symbolic aspect aims at the social change to make the society more inclusive for diverse groups of people. Social change may be achieved through legal reform as law can influence the society in many ways although some laws may be difficult to enforce.²⁵⁷ Accordingly, legal reform is still crucial for social change even though it may be difficult to assess its impact or to estimate the time required to achieve such a change, or may take a long period of time before the differences can be perceived.²⁵⁸

2.2.2 Application of General Meanings to Disability Context

Regarding different perspectives on “access to justice” definition discussed above, many scholars in disability-related studies adopt the meaning of access to justice in the broader scope, which also fits in the context of academic study. They agree that “access to justice” is not merely about access to the courthouses or the proceedings, but covers all other matters relating to the entire justice system, such as information, communication, representation and participation.²⁵⁹ This is to facilitate effective access to justice, which

²⁵⁵ *ibid.*

²⁵⁶ *ibid.* 3.

²⁵⁷ *ibid.*

²⁵⁸ *ibid.*

²⁵⁹ Ortoleva (n 243); Eilionoir Flynn, ‘Making human rights meaningful for people with disabilities: advocacy, access to justice and equality before the law’ (2013) 17(4) *The International Journal of Human Rights* 491; Eilionoir Flynn and Anna Lawson, ‘Disability and Access to Justice in the European Union: Implications of the United Nations Convention on the Rights of Persons with Disabilities’ in Lisa Waddington, Gerard Quinn, and Eilionoir Flynn (eds) *European Yearbook of Disability Law* (Volume 4, Intersentia 2013) 7; Ramani Jayasundere, *Access to Justice Assessments in the Asia Pacific: A Review of Experiences and Tools from the Region*, (UNDP 2012).

ensures that persons with disabilities can enjoy all human rights as everybody else does.²⁶⁰

When applying Bahdi's component perspective of access to justice to the context of persons with disabilities, each component can be explained as follows. The substantive component requires an assessment of national legal provisions whether they can provide persons with disabilities with an equal enjoyment of access to justice as other people or not. The State needs to eradicate all discrimination against persons with disabilities in accessing justice, as well as to provide special measures that facilitate their ability to enjoy equal rights as others. For example, 'designation of quotas' to facilitate participation, and 'adjustments to accommodate personal needs.'²⁶¹ Moreover, disadvantages that persons with disabilities face must be identified and eradicated. Eilionoir Flynn and Anna Lawson suggest that direct involvement and 'full participation' of persons with disabilities in the justice system and the legislative process are also crucial to prevent an exclusion of 'unnoticed or unaddressed' matters that persons with disabilities experience in reality.²⁶²

To promote opportunities for persons with disabilities to take their claims to the justice system, the procedural component demands the State to eliminate barriers that prevent them from accessing the justice system, such as the issue on legal standing or the limitation of their legal capacity.²⁶³ They additionally need to be supported for effective participation, such as through advocacy services or communication assistance.²⁶⁴ Flynn and Lawson further suggest removing barriers at the structural level of society, such as those in the educational, political and social service systems.²⁶⁵

In term of the symbolic component, Flynn and Lawson suggest that this component promotes an inclusive society, which facilitates participation of persons with disabilities

²⁶⁰ Ortoleva (n 243).

²⁶¹ Kayess and French (n 157) 8.

²⁶² Flynn and Lawson (n 259) 15.

²⁶³ *ibid.*

²⁶⁴ *ibid.*

²⁶⁵ *ibid.*

on an equal basis with others.²⁶⁶ A monitoring mechanism is necessary to ensure that persons with disabilities remain included and effectively participate in the justice system.²⁶⁷ Legal reform is an option that Bahdi recommends in her analysis, but this component requires further integration of ‘political, social and cultural activities’ to empower persons with disabilities to be able to access the justice system.²⁶⁸

Further to substantive, procedural and symbolic components, Flynn and Lawson suggest the addition of a fourth component to the meaning of access to justice in the disability context – the ‘participatory component’.²⁶⁹ Bahdi does mention a participatory aspect within her three components, but does not adequately express its importance as an indispensable component.²⁷⁰ Flynn and Lawson emphasise that ‘equal access to participation in the justice system as a whole is significant’ for persons with disabilities in their effective access to justice.²⁷¹ This requirement also resonates with Article 4 of the UNCRPD, requiring a close consultation and active involvement of persons with disabilities ‘in the development and implementation of legislation and policies ... [on] issues relating to persons with disabilities’. Flynn and Lawson also highlight that equal opportunity to participate in the justice system demands a strong sense of citizenship to contribute as a member of the society.²⁷²

2.2.3 Conception of Access to Justice for Persons with Disabilities for This Study

As aforementioned, this research regards “justice” as a destination of what people can access, and as a principle that controls and strengthens access (as a means) to justice. The meaning of justice in the first dimension was discussed in part one of this chapter and summarised the conception of justice adopted in this study in the section 2.1.4. This

²⁶⁶ *ibid.*

²⁶⁷ *ibid.*

²⁶⁸ *ibid* 17.

²⁶⁹ *ibid* 28.

²⁷⁰ *ibid.*

²⁷¹ *ibid* 27.

²⁷² *ibid* 28.

section focuses on the second dimension of justice and summarises the conception of access to justice in disability context adopted in this study.

According to the meaning of justice adopted in this study and the broadest scope of “access to justice” for the academic purpose, it can be interpreted that “access to justice” is a “functioning” that persons with disabilities have reason to value in order to be able to achieve their rights and liberties protected by the rule of law.²⁷³ “Access to justice as a functioning” is broader than claiming one’s rights in the justice system. It includes many other aspects, such as a prevention from exposure to arbitrary power, the law making process, and participation in the justice system.²⁷⁴ The Capability Approach asks to identify the gap between the real situation of individuals with disabilities in accessing justice and their aim, and evaluate whether they have the real freedoms or opportunities to achieve such aim or not.²⁷⁵ Their real freedoms must be considered from various dimensions, with regard to the personal, environmental, and social factors of each person.²⁷⁶

The smaller the gap, the greater opportunities to achieve access to justice.²⁷⁷ To minimise this gap, persons with disabilities may need “supportive mechanisms”²⁷⁸ to facilitate their ‘opportunities for converting’ the primary goods (in Rawls’ sense) and resources they have into such functioning.²⁷⁹ These “supportive mechanisms” are necessary to replenish deprivation of capability that persons with disabilities face due to

²⁷³ Sen, *The Idea of Justice* (n 69).

²⁷⁴ Access to justice as participation in the justice system is not mentioned earlier when discussing the meaning of access to justice from its scope in section 2.2.1, but this notion is reflected in article 13 of the UNCRPD, further discussed in Chapter 4.

²⁷⁵ *ibid.*

²⁷⁶ *ibid.*

²⁷⁷ *ibid.*

²⁷⁸ The “supportive mechanism” refers to “assistance” in the discussion of Sen and Republicanism, but I prefer to use the term “supportive mechanism” because the term “assistance” can also refer to “help and goodwill of others”, which the republicanism rejects to recognise as substantive freedom. See Sen, *The Idea of Justice* (n 69).

²⁷⁹ *ibid* 254.

their disabilities.²⁸⁰ Although these additional mechanisms are only provided for persons with disabilities, the provision of these mechanisms is justified by the principle of substantive equality.²⁸¹ The “supportive mechanisms”, in this sense, can be in any form, such as effective education and employment system, services or participatory empowerment.²⁸² What is crucial is that these mechanisms must be provided on a legally binding basis with the aim of levelling opportunities of persons with disabilities, not privileging them. These mechanisms represent Bahdi’s symbolic component of access to justice, as well as Flynn and Lawson’s participatory component.

However, even where the supportive mechanisms are provided, access to justice as a functioning cannot be achieved without “just institutions” available in the society.²⁸³ In terms of access to justice, the main institutions are legal mechanisms and the justice system. To be just, these institutions must be ‘effectively and impartially administered’.²⁸⁴ These institutions represent Bahdi’s substantive and procedural components.²⁸⁵

CONCLUSION

The conception of justice for this study derives from a combination of various theorists’ interpretation of “justice”. It consists four dimensions: 1) institutional dimension drawn from Rawls’ Theory of justice, 2) capability dimension from Sen’s Capability Approach, 3) non-domination dimension from republicanism view of freedom, and 4) equality dimension based on the principles of equality. While each conception of justice has its strengths and weaknesses, they share a common goal in advancing people’s quality of life in a manner which is fair to all. A combination of all four approaches is the most suitable strategy for this study, where “justice” is regarded as both an end (a destination which persons with disabilities wish to be able to access) and a means (a principle that controls and strengthens access) to justice. This approach highlights the strengths of

²⁸⁰ *ibid.*

²⁸¹ Fredman, *Discrimination Law* (n 2).

²⁸² Flynn and Lawson (n 259).

²⁸³ Rawls, *Theory of Justice* (n 6) 28.

²⁸⁴ *ibid* 48.

²⁸⁵ Bahdi (n 247).

each theory to understand “justice” and collaboratively apply other theories to overcome the weaknesses of another theory.

This study takes the broadest scope of the conception of access to justice, which embraces both formal and informal justice systems, and other aspects concerning the justice system, such as the legislative process. The research views that keeping the scope of access to justice in this study as broad as possible offers a wider range of choices and greater benefits for persons with disabilities to achieve access to civil justice. Moreover, this scope also complies with the meaning mostly used in the context of academic studies, and is consistent with the four components of access to justice proposed by Bahdi and extended by Flynn and Lawson in the disability context. The four-dimensional conception of justice is further used to elaborate the meaning of access to justice for persons with disabilities. This study adopts Sen’s Capability Approach as its key theory, where access to justice is interpreted as a functioning that persons with disabilities want to achieve so that they can protect their rights and liberties. Due to the fact that disability may be a deprivation impeding persons with disabilities to achieve their functionings on an equal basis with others, supportive mechanisms are necessary to effectively equalise their opportunities to achieve functionings. The next two chapters continue to discuss the meaning of access to justice, by focusing on the meaning reflected in the core international human rights law, and the UNCRPD, respectively.

CHAPTER 3:

Access to Civil Justice in International Human Rights Law

INTRODUCTION

This research continues to examine the meaning of “access to justice” for persons with disabilities by exploring the key provisions of international human rights law which focus on access to civil justice. This examination is split into two chapters. This chapter explores the core international human rights law instruments in relation to access to justice. The next chapter will focus solely on the UNCRPD as the only disability-specific international human rights treaty and the only treaty which directly uses the term “access to justice” in its text.¹ The comparative law approach for these two chapters aims to serve the first purpose of this research mentioned in section 1.3, which is to develop a set of universal principles of access to civil justice for persons with disabilities in international human rights law. This chapter has two parts. The first part explains the research that has been conducted to arrive at six categories of the right to access to civil justice. Discussions of each category are presented in the second part of this chapter.

3.1 EXPLANATION OF PROCESS FOR ATTAINING SIX CATEGORIES OF THE RIGHT TO ACCESS TO CIVIL JUSTICE

Access to civil justice has been an international concern for decades. Various international human rights laws attempt to guarantee rights concerning this issue, but almost all of them, except the UNCRPD, do not directly use the term “access to justice”

¹ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (UNCRPD) art 13.

in the treaty texts.² The comprehensive scope of the right to access civil justice in international human rights law is still unclear because none of these treaties, including the UNCRPD, provides a definition of this term. Since the UNCRPD does not create any new rights but reaffirms the existing human rights,³ it is necessary to examine the guarantees in other international human rights treaties to understand its precise meaning. Therefore, this study explores the way in which the core international human rights law treaties (apart from the UNCRPD) recognise and guarantee the right to access civil justice although they do not use the term “access to justice”.

The study looked into the Universal Declaration of Human Rights (UDHR) and other core international human rights treaties,⁴ namely the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (UNCEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the Convention on the Rights of the Child (UNCRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED).⁵ It

² Stephanie Ortoleva, ‘Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System’ (2011) 17 *ILSA Journal of International and Comparative Law* 281; Frances Gibson, ‘Article 13 of the Convention on the Rights of Persons with Disabilities – a right to legal aid?’ (2010) 15(2) *Australian Journal of Human Rights Law* 123.

³ Rosemary Kayess and Phillip French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8(1) *Human Rights Law Review* 1; Degener (n 3); ‘Convention on the Rights of Persons with Disabilities: Questions and Answers’ (*OHCHR*) <www2.ohchr.org/english/issues/disability/docs/Q%26A.CRPD.doc> accessed 5 May 2018.

⁴ ‘The Core International Human Rights Instruments and Their Monitoring Bodies’ (*OHCHR*) <www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> accessed 26 August 2018.

⁵ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR); International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into

applied a thematic analysis⁶ by looking through provisions of each treaty and coding its relevant features on access to civil justice. As this process was conducted in the context of rights provided within the existing laws, the research regarded “access to justice” as ‘the bundle of rights relating to the justice system’.⁷ Once all treaties were explored and coded, the generated codes were grouped according to their similarity and classified into six categories according to their themes. A full list of these categories is addressed in the next part of this chapter.

Since the scope of the study primarily concentrates on the right to access to justice in civil cases between pre-court and court proceeding stages, these six categories do not include the components of the right to access to justice which concern post-court proceedings and enforcement processes or which apply merely to criminal cases without similar usage in civil cases. For example, while much of the access to justice elements of the right to liberty have emerged from criminal cases involving police detention, these

force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (UNCEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICMW); International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPED).

⁶ Virginia Braun and Victoria Clarke, ‘Using thematic analysis in psychology’ (2006) 3(2) *Qualitative Research in Psychology* 77.

⁷ Anna Lawson, ‘Disabled People and Access to Justice - From disablement to enablement?’ in Peter Blanck and Eilionoir Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Taylor & Francis Group 2016) 88, 90.

safeguards generally apply equally to civil detention cases, eg detention under mental health laws, and so come within the scope of this research.⁸

3.2 SIX CATEGORIES OF THE RIGHT TO ACCESS TO CIVIL JUSTICE IN INTERNATIONAL HUMAN RIGHTS LAW

The six categories of the right to access to civil justice arrived at in the analysis described in the previous part are: 1) right to equality before courts and tribunals; 2) right to legal assistance or representation; 3) right to communication assistance; 4) right to be heard or a fair hearing in personal presence by courts, tribunals or other competent bodies within a reasonable time or without delay; 5) right to a remedy, reparation or compensation; 6) right to complain, challenge or appeal. Many rights in these laws could fit in more than one category as they contain some overlapping elements. The following sections justify my decisions regarding where to place these elements based on their proximity to the rights and their interpretation in the General Comments of international human rights committees or academic literature. The research will identify overlapping elements between the categories and point out some concerns relating to application of these rights to disability context.

3.2.1 Right to Equality before Courts and Tribunals

Equality before courts and tribunals is a specific aspect of the principles of equality and non-discrimination.⁹ The UN Human Rights Committee considers this right, together with

⁸ Facundo Penillas, 'Global Consultation on the Right to Challenge the Lawfulness of Detention before Court' (*OHCHR*, 2 September 2014)

<www.ohchr.org/Documents/Issues/Detention/Consultation2014/FacundoChavez.pdf> accessed 12 March 2015; The Law Society (UK), *Identifying a deprivation of liberty: a practical guide – The psychiatric setting* (2015) <www.lawsociety.org.uk/Support-services/documents/Deprivation-of-liberty---chapter-5---psychiatric-setting/> accessed 27 August 2018.

⁹ Sangeeta Shah, 'Detention and Trial' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014) 259.

the right to a fair hearing, as ‘a key element of human rights protection’ to safeguard the rule of law and guarantee ‘the proper administration of justice’.¹⁰

Sangeeta Shah indicates that ‘the right of equal access to courts’ and ‘the rights of all parties to proceedings to equality of arms and to be treated without discrimination’ come within the overarching principle of equality before courts and tribunals.¹¹ The UN Human Rights Committee interprets that this principle encompasses the same rights and two other additional rights to ensure equality during judicial proceedings, which are the right to legal aid or legal assistance and representation, and the right to assistance of an interpreter.¹²

The specific term “equality before courts and tribunals” has only been used in the ICCPR¹³ and the ICMW.¹⁴ However, the other core international human rights treaties also mention particular aspects of equality before courts and tribunals. According to the UN Human Rights Committee’s interpretation, the right to equality before courts and tribunals contains five subcategories, which are 1) the right to equal access to courts and tribunals, 2) the right to equality of arms, 3) the right to equal treatment by courts and tribunals, 4) the right to legal assistance and representation, and 5) the right to assistance of an interpreter. The first three subcategories are discussed in this category, but the last two subcategories will be discussed in separate categories to emphasise their presence as essential elements of the right to access to civil justice.

A. Right to Equal Access to Courts and Tribunals

This right ensures that everyone has an equal opportunity to assert their legal rights by taking a case before a court or tribunal,¹⁵ but it only focuses on accessing first instance procedures.¹⁶ Only the law can limit access to courts or tribunals, and the restrictions

¹⁰ CtteeCPR ‘General Comment No 32’ (23 August 2007) UN Doc CCPR/C/GC/32 para 2.

¹¹ Shah (n 9) 273.

¹² CtteeCPR ‘General Comment No 32’ (n 10).

¹³ ICCPR, art 14.

¹⁴ ICMW, art 18.

¹⁵ Shah (n 9).

¹⁶ CtteeCPR ‘General Comment No 32’ (n 10).

must be reasonably justified and not based on any discriminatory distinctions.¹⁷ It should be noted that high level court and legal fees and the absence of legal assistance and representation also limit equal access to courts and tribunals. Due to some overlap with the right to legal assistance and representation, these issues will be discussed in the next category for clarity.

The right to equal access to courts and tribunals seems to be very similar to the right to be heard and the right to challenge or appeal as all these rights may relate to courts and tribunals in some respects. I would distinguish them by referring the right to equal access to courts and tribunals as the first step for beginning general court proceedings. At this stage, there is no guarantee that every case would be subsequently heard by courts and tribunals. The case may have some procedural errors, for example, if the claims are ambiguous or submitted to the wrong jurisdiction, or have already been lodged to another court and are being processed. The right to be heard would be in the later stage. Finally, the right to challenge or appeal would exclusively refer to formal objections regarding the legality or lawfulness of an action, order or decision of, including but not limited to, a higher court or tribunal, an administrative mechanism, such as internal appeal procedure of a State authority.

Beyond the extensive provisions of the right to equality before courts and tribunals, no other international human rights law explicitly mentions the right to equal access to courts and tribunals. However, I would argue that the provisions on equal access to public service¹⁸ include the right to equal access to courts and tribunals because judicial services and tribunals fall within the scope of State services provided to the public.¹⁹

When applying this right in a disability context, persons with disabilities are often not able to equally access courts and tribunals by themselves due to various barriers. For example, inaccessibility of information on procedures, or of the physical environment. Some persons with disabilities also face a restriction on their legal capacity to initiate a lawsuit resulting from a guardianship regime embedded within the national legal system,

¹⁷ *ibid.*

¹⁸ UDHR, art 21(2); ICCPR, art 25(c); ICERD, art 5(f).

¹⁹ Shah (n 9).

even though no international human rights law restricts litigation capacity of persons with disabilities.²⁰ These issues will be further discussed in Chapter 4.

B. Right to Equality of Arms

Even though equality of arms is a concept created in the context of regional human rights law by the European Court of Human Rights,²¹ the UN Human Rights Committee has also accepted it as a part of the right to equality before courts and tribunals.²² Equality of arms refers to a fair opportunity for all parties to present and defend their case.²³ In some cases, free legal aid,²⁴ free assistance of an interpreter,²⁵ or appropriate courtroom conditions, for instance a hostile-free atmosphere, free from public pressure,²⁶ are required to achieve this equality for all parties. Outside of the right to equality before courts and tribunals, there is no explicit provision on the right to equality of arms in civil proceedings. Nonetheless, I would argue that equality of arms could be also reflected through the equal treatment of courts and tribunals, which will be discussed further in the next subcategory.

The issues which relate to this right in disability context are that, apart from financial concerns, persons with disabilities may not be able to equally present or defend their case due to a lack of legal representation, communication assistance or other support facilities during court proceedings,²⁷ and that the courtroom environment may discourage

²⁰ Lucy Series, 'Legal Capacity and participation in litigation: Recent developments in the European Court of Human Rights' in Lisa Waddington, Gerard Quinn and Eilíonoir Flynn (eds), *European Yearbook of Disability Law* (Volume 5, Intersentia 2015) 103.

²¹ Jonathan Law (ed), *A Dictionary of Law* (8th edn, OUP 2015).

²² CtteeCPR 'General Comment No 32' (n 10).

²³ *ibid*; Shah (n 9); Law (ed) (n 21).

²⁴ S.M. Huang-Thio, 'Legal Aid—A Facet of Equality Before the Law' (1963) 12(4) *International and Comparative Law Quarterly* 1133; Law (ed) (n 21).

²⁵ CtteeCPR 'General Comment No 32' (n 10).

²⁶ Shah (n 9).

²⁷ Stanley Herr, 'Disabled Clients, Constituencies, and Counsel: Representing Persons with Developmental Disabilities' (1989) 67 *The Milbank Quarterly* 352.

persons with disabilities from equally participating in proceedings due to its formal setting or traditional practice.²⁸

C. Right to Equal Treatment by Courts and Tribunals

This right compels equal treatment without discrimination by courts, tribunals and all other organs administering justice, both in terms of equality between parties and equality among cases.²⁹ The principle of substantive equality must be applied here.³⁰ Treating everybody or every case the same way may not provide equality if parties or cases do not have the same conditions. Courts and tribunals must differentiate their treatment to pursue an equal and just outcome. Moreover, the differentiation must not cause either party or either case any advantage or disadvantage.

In addition to the provisions of equality before courts and tribunals mentioned earlier, some other core international human rights treaties particularly mention an aspect of “equal treatment”,³¹ but some are limited to criminal procedures only.³² I hold the view that the provisions concerning age-appropriate measures³³ or any reasonable accommodation, to ensure equality for all, are integrated as a part of equal treatment by courts and tribunals and as a prevention of any indirect or unintended discrimination that might incur during the proceedings.

Additionally, it can be considered that the equal treatment aspect embraces the dimensions of equality of arms and of equal access to the courts. This is because whether the parties have an equal opportunity to present or defend their cases, or whether they can equally bring their claims into the courts, depends on how the courts, tribunals or other bodies administering justice treat them; this includes their treatment

²⁸ Claire Edwards, Gillian Harold, and Shane Kilcommins, *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (National Disability Authority, February 2012) <nda.ie/ndasitefiles/NDA_Access_to_Justice.doc> accessed 27 August 2018.

²⁹ Shah (n 9).

³⁰ See section 2.1.3 for detail.

³¹ ICERD, art 5(a); UNCEDAW, art 15(2).

³² UNCAT, art 7(3); UNCRC, art 40(2)(b)(vii); ICPED, art 11(3).

³³ ICCPR, art 14(4); ICMW, art 18(4).

through imposition of rules and regulations. While some procedural rules, such as rules requiring courts to evaluate whether a witness has competence to testify or give statement, remain within the courts' discretion, some procedural rules imposed by the Legislature, such as rules regarding litigation capacity, which limit equal access to the courts, are beyond their remit.

There is evidence that some persons with disabilities have no opportunity to participate in proceedings because judges view that their participation and presence in court is unnecessary.³⁴ This example reflects unequal treatment by courts and tribunals through judges' personal negative attitudes towards disability. Therefore, the impartiality of courts and tribunals, especially in terms of the eradication of stereotypes or bias against any group of people, is extremely important to maintain the right to equal treatment between parties. The notions of competence, independence and impartiality of courts and tribunals are overlapping elements that apply to this category and everywhere mentioning courts or other adjudicative bodies. This issue will be discussed in more detail in the section on the right to a fair hearing.

D. Right to Equality before the Law

Ultimately, the provision of equality before the law, which is widely articulated in the UDHR and other international human rights treaties,³⁵ as well as in most domestic law of democratic states,³⁶ could be equated with the right to equality before courts and tribunals. It gives all persons an entitlement to the protection of their rights through the judiciary,³⁷ which is a vital feature in the rule of law principle.³⁸ However, the concept of the right to equality before the law, in terms of equal access to courts, is confined to the

³⁴ Series (n 20).

³⁵ UDHR, art 7; ICERD, art 5; ICCPR, art 26; UNCEDAW, art 15.

³⁶ Eilionoir Flynn, 'Making human rights meaningful for people with disabilities: advocacy, access to justice and equality before the law' (2013) 17(4) *The International Journal of Human Rights* 491.

³⁷ Huang-Thio (n 24); Yash Ghai and Jill Cottrell, 'The rule of law and access to justice', in Yash Ghai and Jill Cottrell (eds), *Marginalized Communities and Access to Justice* (Routledge 2010); Rhona Smith, *Textbook on International Human Rights* (5th edn, OUP 2012).

³⁸ Ghai and Cottrell (n 37).

principle of formal equality rather than the substantive equality or equality of its outcome. In other words, courts must be theoretically open to all without discrimination, whereas their real accessibility by all, in practice, is another issue beyond its scope.³⁹ For example, one might be unable to access to courts, not because of any legal restriction, but his/her financial constraint that prevents his/her ability to access.⁴⁰ According to this example, formal equality is fulfilled but not substantive equality. To accomplish substantive equality in this regard, international human rights law also guarantees the right to legal assistance or representation, whereby courts may assign legal assistance or other reasonable accommodation to persons in need, especially in criminal cases, so that they will have equal opportunity to present and defend their case. In the case where a grant for legal aid is beyond power of courts to determine, it remains the obligation of the State to make this assistance available to guarantee accessibility to courts and tribunals in practice. This right will be further discussed in the next category.

3.2.2 Right to Legal Assistance or Representation

The term “legal aid” usually refers to assistance in accessing legal services for people who have financial difficulty in acquiring legal advice or representation, in both civil and criminal contexts.⁴¹ This support might be provided for free or with a condition to return the funds after winning monetary compensation, depending on each country’s policy on funding allocation.⁴² Without this right, it is highly likely that justice will not be accessible to those with financial limitations; it can be said that the right to legal assistance or representation is a means of achieving substantive equality of access to courts and tribunals in practice,⁴³ and a means to ensure ‘equality of arms with the other party’.⁴⁴

³⁹ Huang-Thio (n 24).

⁴⁰ Walter Carrington, ‘Equality before the Law’ (1922) 8(7) *The Virginia Law Register*, New Series, 481; Huang-Thio (n 24).

⁴¹ Fiona Cownie, ‘Legal Aid’ in Peter Cane and Joanne Conaghan, *The New Oxford Companion to Law* (OUP 2009).

⁴² *ibid.*

⁴³ Carrington (n 40); Huang-Thio (n 24).

⁴⁴ Richard Clayton and Hugh Tomlinson, *Fair Trial Rights* (OUP 2001) 101.

Most of the provisions in the core international human rights law instruments that guarantee the right to legal assistance or representation are limited to criminal cases.⁴⁵ Only article 37(d) of the UNCRC can be interpreted as covering a right to free legal aid in civil cases, yet it is limited only to cases where a child is deprived of his/her liberty.

Despite this, the UN Human Rights Committee views that having legal assistance and representation is vital for meaningful access and participation in proceedings.⁴⁶ Consequently, it interprets that States Parties of the ICCPR have an obligation to provide 'free legal aid' if the case is necessary to achieve an effective remedy for violation of rights or freedoms recognised in the covenant,⁴⁷ and also encourages them to further provide this in all other cases, for people who cannot afford legal expenses.⁴⁸ The Committee also views that the absence of legal assistance, as well as the imposition of relatively high court fees, prevents access to courts and tribunals in practice and probably leads to a violation of the right to access to justice.⁴⁹

In the same way, the Committee against Torture (CtteeAT) recommends States Parties to provide 'adequate legal aid' to the victims of torture or ill-treatment who face financial difficulty for seeking redress.⁵⁰ Moreover, States Parties have to ensure that fees for civil proceedings and do not prevent or discourage the victims from pursuing redress.⁵¹ Providing a 'national fund' for redress is an example of a recommended mechanism to ensure that all victims of torture have access to redress.⁵²

Likewise, the Committee on the Elimination of Discrimination against Women also interprets that States Parties have a duty to provide 'legal aid and assistance as

⁴⁵ ICCPR, art 14(3)(d); UNCRC, art 40(2)(b)(iii); ICMW, art 18(3)(d).

⁴⁶ CtteeCPR 'General Comment No 32' (n 10).

⁴⁷ ICCPR, art 2(3).

⁴⁸ CtteeCPR 'General Comment No 32' (n 10) para 10.

⁴⁹ *ibid.*

⁵⁰ CtteeAT 'General Comment No 3' (19 November 2012) UN Doc CAT/C/GC/3 para 30.

⁵¹ *ibid.*

⁵² *ibid* para 29.

necessary' to women who cannot afford to seek remedies for a violation of their rights under the Convention.⁵³

Although some states may introduce simple court proceedings so parties can participate without lawyer's assistance,⁵⁴ the right to legal aid remains indispensable for many persons with disabilities to access legal assistance or representation. This may be needed as a reasonable accommodation, due to the inaccessibility of some formats of information or documents for these simplified proceedings, or where individuals have difficulty in following the proceedings or physically attending the hearing due to disability.⁵⁵

3.2.3 Right to Communication Assistance

I intentionally use the term "communication assistance" in this category, instead of the term "assistance of an interpreter" mentioned as a subcategory of the right to equality before courts and tribunals, and usually appearing in the legal provisions. The reason is that this term gives a broader meaning by including other means of communication, not only 'a spoken language interpreter' or translator but also 'sign-language interpreters' and other methods such as 'alternative and augmented communication' (ACC), other 'forms of unique communication' and 'facilitated communication'.⁵⁶ The detail of these means of communication will be discussed more in the next chapter.

Most international human rights treaties guarantee this right only in criminal cases.⁵⁷ Article 16(8) of the ICMW may be considered to include a guarantee of free assistance of an interpreter in the civil proceedings regarding deprivation of liberty but it is limited to

⁵³ Committee on Economic, Social and Cultural Rights (CESCR) 'General Recommendation No 28' (16 December 2010) UN Doc CEDAW/C/GC/28 para 34.

⁵⁴ Gibson (n 2).

⁵⁵ *ibid*; Asher Flynn and others, 'Legal Aid and Access to Legal Representation: Redefining the Right to a Fair Trial' (2016) 40 Melbourne University Law Review 207.

⁵⁶ Eilionoir Flynn, *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Ashgate 2015) 92-93.

⁵⁷ ICCPR, art 14(3)(a),(f); UNCRC, art 40(2)(b)(vi); ICMW, art 16(5), art 18(3)(f).

proceedings concerning the lawfulness of detention. Nevertheless, the Human Rights Committee expresses in its General Comment No. 32 that ‘the free assistance of an interpreter’ is essential to maintain fairness and equality of arms in criminal cases, but, in some cases, this is also required to achieve equality between parties in civil proceedings.⁵⁸ It is unclear whether the Committee would interpret this principle to include other means of communication. Despite this, it is rather clear that a sign-language interpreter is usually included within the meaning of an “interpreter” at national level for example, through constitutional guarantees.⁵⁹

In reality, persons with disabilities may use diverse means of communication beyond translation of spoken or sign-languages. This includes other communication methods as mentioned earlier in this section. As the scope of this right is still unclear, particularly with regard to whether it includes other forms of communication or not, it is generally within domestic courts’ discretion to determine how to treat parties with disabilities. Communication assistance might not be provided where judges view that their participation in court proceedings is unnecessary, or where judges are not sufficiently informed or educated about the need for this assistance to facilitate participation of persons with disabilities.

3.2.4 Right to be Heard or a Fair Hearing by Courts, Tribunals or Other Competent Bodies in Personal Presence within a Reasonable Time or Without Delay

Even though some legal provisions use the terms “to be tried” or “trial”, instead of the terms “to be heard” or “hearing”, in my opinion, the terms “to be heard” and “hearing” are more appropriate for the heading of this category. This is because these terms neutrally refer to both civil and criminal proceedings, whilst the ‘nature’ of fair trial rights originates from criminal cases.⁶⁰ Although most legal dictionaries define the term “trial” to include

⁵⁸ CtteeCPR ‘General Comment No 32’ (n 10) para 13.

⁵⁹ Flynn, *Disabled Justice?* (n 56).

⁶⁰ Clayton and Tomlinson (n 44) 2.

hearings in both civil and criminal cases,⁶¹ the term “hearing” is preferable to avoid any ambiguity as it includes the term “trial”.

The right to be heard or tried, including the right to a fair hearing or trial, by courts, tribunals or other competent bodies in civil cases has been embedded in the UDHR⁶² and almost all international human rights treaties.⁶³ Some provisions are limited only to cases of deprivation of liberty,⁶⁴ or do not explicitly use the terms “to be heard”, “to be tried”, “hearing” or “trial”, while conveying the same meaning.⁶⁵ Article 2(c) of the UNCEDAW is an example of the use of a different term which pursues the same purpose. Although the article only states that “to ensure legal protection of the rights ... through competent national tribunals and other public institutions”, the Committee on the Elimination of Discrimination against Women clarifies that this article emphasises the ‘fair hearing’ principle, and that this right has to be accessible by all women whose rights under the Convention have been violated.⁶⁶ At the same time, the Committee stresses that the ‘principle of equality’ has to be applied in court proceedings.⁶⁷

The only international human rights treaty that does not mention this right is the ICESCR; however, the UN Committee on Economic, Social and Cultural Rights still acknowledges the importance of roles of courts, tribunals and other competent bodies in the provision of appropriate remedies.⁶⁸ The details of its comment are presented in section 3.2.5 below.

Shah highlights that the main objectives of the right to a fair hearing are to guarantee the fair procedures in court, rather than a fair outcome, and to secure the appropriate structural organisation of the judicial system, based on the separation of powers

⁶¹ Law (ed) (n 21); Graham Gooch and Michael Williams, *A Dictionary of Law Enforcement* (2nd edn, OUP 2015).

⁶² UDHR, art 10.

⁶³ ICCPR, art 14; UNCAT, art 13; UNCRC, art 12(2); ICMW, art 18.

⁶⁴ ICCPR, art 9(4); UNCRC, art 37(d); ICMW, art 16(8); ICPED, art 17(2)(f).

⁶⁵ ICERD, art 6; UNCEDAW, art 2(c).

⁶⁶ CtteeEDAW ‘General Recommendation No 28’ (n 53) para 34.

⁶⁷ *ibid.*

⁶⁸ CtteeESCR ‘Draft General Comment No 9’ (3 December 1998) (Adopted at the 51st meeting on 1 December 1998) UN Doc E/C12/1998/24.

principle.⁶⁹ In other words, ‘the concept of fair [hearing] is a basic component of the wider notion of the separation of powers.’⁷⁰ Although some legal provisions refer only to the right to be heard by courts and tribunals but do not specifically mention a “fair” hearing, I would argue that those provisions are comparable as they have the same objective, that is to safeguard the rule of law through the judiciary. Accordingly, there are four sub-elements, relating to hearing, to be considered; those are 1) the notions of competence, independence and impartiality of courts and tribunals; 2) fairness and publicity; 3) personal presence; and 4) the timeliness of the proceedings.

A. Notions of Competence, Independence and Impartiality of Courts and Tribunals

The availability of competent, independent and impartial courts or tribunals is essential to guarantee the right to a fair hearing.⁷¹ The UN Human Rights Committee views that these qualifications are absolute requirements.⁷² To be competent, these bodies must have the power to make legally binding decisions; otherwise they are not considered as competent bodies to conduct a fair hearing.⁷³ To be independent, courts and tribunals, in terms of both the institution and individual judges, must be free from any external influence, especially those of the Executive and the Legislature.⁷⁴ Additionally, courts and tribunals must be established by law, which must include the rules on their jurisdiction, organisation and membership,⁷⁵ to prevent interference from the Executive branch.⁷⁶ The independence of judges has to be secured by law from the initial stage of appointment, throughout their tenure, until their termination, so that judges can perform

⁶⁹ Shah (n 9).

⁷⁰ Christos Rozakis, ‘The Right to a Fair Trial in Civil Cases’ (2004) 4(2) *Judicial Studies Institute Journal* 96, 96.

⁷¹ Clayton and Tomlinson (n 44).

⁷² CtteeCPR ‘General Comment No 32’ (n 10) para 18.

⁷³ Shah (n 9).

⁷⁴ UN, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (UN Publications 2003).

⁷⁵ CtteeCPR ‘General Comment No 32’ (n 10); Shah (n 9).

⁷⁶ UN (n 74); Shah (n 9).

their duties without fear or influence.⁷⁷ Independence also effects the impartiality of the courts and tribunals. There are two aspects of impartiality that courts and tribunals must possess; those are subjective and objective impartialities.⁷⁸ The attitude of judges without personal bias towards the case or any party is an example of subjective impartiality; their appearance to the public, through their judgments, actions and treatment of the parties, which show no bias or prejudice and can be seen to be impartial, is an example of objective impartiality.⁷⁹ The Committee against Torture (CtteeAT) further comments that ensuring the fairness and impartiality of all judicial proceedings and ‘strengthening the independence of the judiciary’ are necessary measures to guarantee effective reparation for and non-repetition of torture and ill-treatment.⁸⁰

The UDHR and some international human rights treaties explicitly guarantee all these qualifications of courts and tribunals,⁸¹ while some just mention some of these qualifications,⁸² or do not mention these at all but refer to the hearings of courts or tribunals.⁸³ According to my earlier observations on all three qualifications of courts and tribunals, the links among them can be seen as indispensable requirements for administering justice fairly. For this reason, I contend that all these qualifications are also guaranteed alongside the right to the fair hearing even where the provisions of certain instruments do not specifically mention all these qualifications of courts and tribunals.

As aforementioned, some elements among the different categories overlap. These notions of the competence, independence and impartiality of courts and tribunals represent one of those overlapping elements. All aspects are vital to guarantee the protection of human rights through the right to a fair hearing and the right to equality before courts and tribunals. The notions of independence, impartiality and competence of courts and tribunals must be applied to the right to equality before courts and tribunals as courts and tribunals are the main actors who ensure justice and equality between

⁷⁷ CtteeCPR ‘General Comment No 32’ (n 10).

⁷⁸ Shah (n 9).

⁷⁹ CtteeCPR ‘General Comment No 32’ (n 10); Shah (n 9).

⁸⁰ CtteeAT ‘General Comment No 3’ (n 50) para 18.

⁸¹ UDHR, art 10; ICCPR, art 14; ICMW, art 18; UNCRC, 37(d).

⁸² UNCAT, art 13.

⁸³ UNCRC, art 12(2); ICERD, art 6; UNCEDAW, art 2(c).

parties and among cases. These qualifications cannot be compromised, since their absence significantly impacts on the right to equality before courts and tribunals and subsequently leads to a violation of the right to access to justice as a whole. These elements must also be applied to the right to challenge or appeal, and the right to a remedy, reparation and compensation, when courts and tribunals are involved in the proceedings.

The issue of impartiality of courts and tribunal must be closely scrutinised when persons with disabilities are involved in the proceedings. Being neutral not only requires giving representatives of both parties equal opportunity to present and defend their case and giving no particular preference to any party, but judges must also be free from bias towards persons with disabilities as this such bias can lead to discrimination and unfair proceedings.

B. Fairness and Publicity

The UN Human Rights Committee additionally elaborates that the fairness and the publicity of the proceedings are other two core elements of a fair hearing that have to be guaranteed to achieve access to justice.⁸⁴

The procedure is considered to be fair when it has been pursued without any influence or pressure from either the parties or the public, including the jury.⁸⁵ At the same time, it must follow equality of arms principle,⁸⁶ and must proceed without delay.⁸⁷ Furthermore, fairness includes 'the right to attend the hearing',⁸⁸ which I will further discuss in the personal presence sub-element. More importantly, the principle of fairness must be applied to all proceedings.⁸⁹ Some overlapping areas emerge here with the

⁸⁴ CtteeCPR 'General Comment No 32' (n 10).

⁸⁵ *ibid.*

⁸⁶ Shah (n 9).

⁸⁷ CtteeCPR 'General Comment No 32' (n 10); Shah (n 9).

⁸⁸ Shah (n 9) 276.

⁸⁹ *ibid.*

independence and impartiality of courts and tribunals, equality of arms, timeliness of the proceedings and personal presence within this sub-element.

The purpose of publicity is to make proceedings transparent for ‘public scrutiny’ and to maintain public confidence by assuring them that ‘justice is being administered fairly’;⁹⁰ this is also to protect both the interests of the parties and of society as a whole.⁹¹ To be public, information about the time and place of the proceedings has to be available to the general public, and reasonable facilities have to be provided to facilitate public attendance.⁹² Nevertheless, in particular circumstances, publicity may not protect the interests of justice, for instance, in the cases relating to national security, private lives of the parties, or where publicity may harm the interests of justice; therefore, it is fairer to not hear some cases in public,⁹³ such as cases concerning ‘the interest of juveniles’.⁹⁴ Even if the proceedings are conducted in private, the judgment has to be public, unless it relates to ‘the interest of juvenile persons’, or ‘the proceedings concern matrimonial disputes or the guardianship of children.’⁹⁵ However, the decision as to whether to make judgments available to public remains within the discretion of courts. Even in cases relating to family matters or the interest of juveniles, courts may decide to publish their judgments, by anonymising names of parties and witnesses to protect their interests, for the purpose of ensuring transparency and better public understanding of court proceedings, which ultimately leads to public confidence in the justice system.⁹⁶

⁹⁰ Lauri Lehtimaja and Matti Pellonpää, ‘Article 10’ in Asbjorn Eide and Theresa Swinehart (eds), *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press 1992) 159, 165; Clayton and Tomlinson (n 44) 35.

⁹¹ CtteeCPR ‘General Comment No 32’ (n 10).

⁹² *ibid.*

⁹³ *ibid.*

⁹⁴ UN (n 74) 262.

⁹⁵ CtteeCPR ‘General Comment No 32’ (n 10) para 29.

⁹⁶ James Mundy, ‘Transparency in the Family Courts Publication of Judgments Practice Guidance’ (16 January 2014)

<www.familylaw.co.uk/system/redactor_assets/documents/1171/transparency-in-the-family-courts.pdf> accessed 26 March 2015.

All in all, when it comes into conflict between fairness and publicity, fairness will take precedence, as it is the core principle of a fair hearing, which is the foundation of the rule of law.⁹⁷

C. Personal Presence

The right to be heard in his/her presence is guaranteed in criminal cases by the ICCPR.⁹⁸ It has been applied to the civil proceedings with the view that ‘individuals will wish to monitor proceedings concerning their interests’, so they have the right to attend hearing as a part of the fair proceedings mentioned in the fairness sub-element.⁹⁹ However, the right to attend a hearing is not an absolute right. Failure to attend may not lead to a violation of the fairness principle if the absent party waives this right, such as by assigning a representative to attend the hearing or intentionally not participating in the proceedings, or if information about the hearing date and venue has been diligently and legally submitted to the party even if the absent party does not actually receive this information.¹⁰⁰ These exceptions for non-violation seem to overlook the fact that persons with disabilities may become a party to a dispute. Failure to attend a hearing may occur because that party cannot access the information about the hearing, which is claimed to be legally delivered, but is not delivered in a format which is accessible to a person with a disability. This may potentially violate the fairness principle in respect of the hearing.

D. Timeliness of the Proceedings

‘A delay of justice is often equal to no justice at all’,¹⁰¹ especially in criminal cases, whereby an accused person may be detained throughout the trial period until the final decision; until the outcome of the case is settled, the fate of an accused person remains uncertain even though that person is presumed innocent until proven guilty.¹⁰² Moreover,

⁹⁷ Smith (n 37).

⁹⁸ ICCPR, art 14(3)(d).

⁹⁹ Shah (n 9).

¹⁰⁰ *ibid.*

¹⁰¹ Lehtimaja and Pellonpää (n 90) 166.

¹⁰² *ibid* 159; Shah (n 9).

public confidence in the effectiveness of the justice system is undermined where the proceedings are significantly delayed.¹⁰³ Accordingly, the expeditiousness of the proceedings in criminal cases is guaranteed through various provisions of international human rights law in order to maintain the fairness of proceedings.¹⁰⁴ In civil cases, the expeditiousness of the proceedings is guaranteed only in proceedings relating to deprivation of liberty by some international human rights treaties.¹⁰⁵ However, the Human Rights Committee views that civil proceedings should also proceed without delay if there is no reasonable justification, such as 'the complexity of the case', as otherwise delays seem to derogate the principle of a fair hearing.¹⁰⁶ For instance, when a fair hearing is a necessary to seek a remedy through the court process, a delay in the hearing leads to delay in the remedy as well. Furthermore, in some circumstances, delay in the proceedings may disproportionately affect some parties with disabilities who may not survive until the end of proceedings, such as those with serious health conditions or those in a coma.

3.2.5 Right to a Remedy, Reparation or Compensation

The UDHR and other core international human rights laws explicitly guarantee this right.¹⁰⁷ Only the guarantee of an effective remedy in the UDHR covers all fundamental rights granted by the Constitution or by law, whilst the guarantees in the other instruments are limited only to the rights recognised in each treaty.¹⁰⁸

In addition to those explicit provisions, the Committee of the UNCAT, of the ICESCR, of the UNCEDAW and of the UNCRC also interpret that these Conventions include and

¹⁰³ *ibid.*

¹⁰⁴ ICCPR, arts 9(3) and 14(3)(c); ICMW, arts 16(6) and 18(3)(c); UNCRC, art 40(2)(b)(iii).

¹⁰⁵ ICCPR, art 9(4); ICMW, art 16(8); ICPED, art 17(2)(f); UNCRC, art 37(d).

¹⁰⁶ CtteeCPR 'General Comment No 32' (n 10) para 27.

¹⁰⁷ UDHR, art 8; ICERD, art 6; ICCPR, arts 2(3)(a)-(b) and 9(5); ICMW, arts 15, 16(9), 22(5) and 83(a); ICPED, arts 8(2), 20(2) and 24(4).

¹⁰⁸ Flynn, *Disabled Justice?* (n 56).

guarantee this right although they do not directly use the terms “remedy”, “reparation”, or “compensation”.

The Committee against Torture (CteeAT) clarifies that the term “redress” in article 14 of the UNCAT covers the concept of effective remedy and reparation.¹⁰⁹ The Committee further explains that States Parties have both procedural and substantive obligations to provide redress. To fulfil these obligations, they have to provide timely, effective and accessible procedural mechanisms for redress, as well as timely and effective measures for reparation, which should, at least, include ‘restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition’.¹¹⁰ The Committee notes with concern that compensation for ‘civil liability should be available independently of criminal liability.’¹¹¹

The Committee on Economic, Social and Cultural Rights adopts the view that the term “appropriate means” in article 2(1) of the ICESCR includes domestic legal remedies, especially judicial remedies, which are vital for strengthening the effectiveness of other means used; and if any State Party intends to exclude domestic legal remedies for violations of economic, social and cultural rights, it must ‘show either that such remedies are not “appropriate means” ... or that, in view of the other means used, they are unnecessary.’¹¹² The Committee does not express directly whether States Parties require these remedies or may exclude them, but I view that the Committee prefers States Parties to have these remedies available in their justice systems. The General Comment shows the Committee’s attempt to include these remedies by interpreting the term “all appropriate means” in a broad sense, by stating that ‘[i]t will be difficult to show this [justification]’, and by noting the likely ineffective outcome of excluding judicial remedies.¹¹³ Nevertheless, the Committee still leaves some room for alternative practices; perhaps because it views that the nature of economic, social and cultural rights, including their justiciability, depends on each State Party’s legal system, as this

¹⁰⁹ CteeAT ‘General Comment No 3’ (n 50).

¹¹⁰ *ibid* para 2.

¹¹¹ *ibid* para 26.

¹¹² CteeESCR ‘Draft General Comment No 9’ (n 68).

¹¹³ *ibid* para 3.

involves national resource allocation that should be dealt with political authorities rather than by the judiciary.¹¹⁴

In the same way, the Committee on the Elimination of Discrimination against Women interprets that article 2(b) of the UNCEDAW obliges States Parties to provide legislation that ensures appropriate remedies and reparation for 'women whose rights under the Convention have been violated'.¹¹⁵ The Committee also states that 'all appropriate measures to eliminate discrimination against women' in article 2(e) includes measures to enhance women's accessibility to effective remedies.¹¹⁶

The Committee on the Rights of the Child particularly emphasises the need to guarantee the availability of remedies if the right of the child to be heard is violated, as well as access to 'appeals and complaints procedures' for these remedies.¹¹⁷

It is found that most of the international human rights provisions guaranteeing the right to a remedy, reparation, or compensation only emphasise the competence of courts, tribunals and other authorities, which means that their decisions legally bind all concerned. I view that the absence of an explicit requirement that such bodies be independent and impartial may be because the decision-making authorities are not always judicial bodies; some are located within the Executive branch. However, where courts or other judicial bodies perform this duty, the notions of competence, independence and impartiality must still apply.

Additionally, the timeliness of an effective remedy is especially necessary for some persons with disabilities as stated in the previous category. It may also affect the conditions of their lives or their life expectancy.

¹¹⁴ *ibid.*

¹¹⁵ CtteeEDAW 'General Recommendation No 28' (n 53) para 32.

¹¹⁶ *ibid* 36.

¹¹⁷ CtteeRC 'General Comment No 12' (20 July 2009) UN Doc CRC/C/GC/12, para 47.

3.2.6 Right to Complain, Challenge or Appeal

The terms “complain”, “challenge” and “appeal” have been occasionally used interchangeably in some international human rights law provisions, including in the interpretation of international human rights bodies, as they usually intertwine and overlap. The common purpose of these terms is to have the dispute reviewed by an entity that could redress the individual’s concern or could provide a remedy. However, they seem to convey a slightly different meanings in different contexts. To highlight their variations, this research uses the term “complain” to refer to an action of giving or reporting the fact of an unsatisfactory incident to the relevant bodies or authorities, but not the judiciary. This process usually takes place before commencing court proceedings. It is found that the UNCAT and the ICPED guarantee the right to complain or to make an allegation, whereby the relevant bodies have to examine the allegation promptly and impartially, and the complainants must be protected against ill-treatment or intimidation as a consequence of their complaint.¹¹⁸

Both terms “challenge” and “appeal” refer to a formal objection of an action, order, or decision, of a person, State agency, or competent body (eg courts and tribunals) for being reviewed and decided by a competent body, including the body that causes the objected incident. Therefore, these terms seem to be interchangeable, but in most cases, an appeal in court or tribunal proceedings refers to a request for a revision of the first instance authority and a decision of the higher courts or tribunals.

Unfortunately, in international human rights law, the right to challenge in the civil context is only guaranteed in the case concerning deprivation of liberty¹¹⁹ or the claim to an effective remedy.¹²⁰ However, some civil matters may be already guaranteed within the scope of the right to equal access to courts and tribunals and the right to be heard if the challenge can be progressed through courts and tribunals.

¹¹⁸ UNCAT, art 13; ICPED, art 12(1).

¹¹⁹ ICCPR, art 9(4); ICPED, art 17(2)(f); UNCRC, 37(d); See text to n 7 for deprivation of liberty in civil context.

¹²⁰ ICMW, art 83(b).

When specifically discussing the right to be reviewed by a higher court or tribunal, this right is only guaranteed in the criminal context.¹²¹ The UN Human Rights Committee expresses clearly that the right to be reviewed by a higher tribunal in the ICCPR only applies to 'a criminal appeal process'.¹²² The reason for specifically focusing on appeal in criminal cases is probably because the nature of criminal punishments involves such a significant limitation on the rights to life and liberty, so these cases need greater 'due consideration'.¹²³

It can be argued that scope of the right in this category is more expansive compared to the interpretation of the UN Human Rights Committee regarding access to the courts as an element of equality before courts and tribunals mentioned earlier. In that interpretation, the Committee clearly expresses that '[t]he right of equal access to a court, embodied in article 14, paragraph 1 [of the ICCPR], concerns access to first instance procedures and does not address the issue of the right to appeal or other remedies.'¹²⁴ The right in this category is not limited to the first instance procedures, but the available guarantees in international human rights law seem marginal.

It could be seen that there are some overlapping areas when referring the right to challenge or appeal, the right to be heard or a fair hearing and the right to a remedy, reparation or compensation in some proceedings of judicial bodies. In that case, the notions of competence, independence and impartiality of courts and tribunal must also be applied.

In the disability context, the right to complain, challenge or appeal is a vital mechanism for persons with disabilities. Jurgen De Wispelaere and Judy Walsh argue that the right to challenge is required to ensure that rights of persons with disabilities are protected and enforceable in practice, otherwise governments may ignore the opinion of persons with disabilities and exercise their powers in arbitrary ways.¹²⁵

¹²¹ ICCPR, art 14(5); ICMW, art 18(5); UNCRC, art 40(2)(b)(v).

¹²² CtteeCPR 'General Comment No 32' (n 10) para 46.

¹²³ *ibid* para 48.

¹²⁴ *ibid* para 12.

¹²⁵ Jurgen De Wispelaere and Judy Walsh, 'Disability Rights in Ireland: Chronicle of a Missed Opportunity' (2007) 22(4) *Irish Political Studies* 517.

CONCLUSION

Although the UNCRPD clearly guarantees the right to access civil justice for persons with disabilities in its article 13, it is indispensable to examine the core international human rights law beyond the UNCRPD. These treaties suggest the same scope of the right to access civil justice in the UNCRPD, which does not create new rights but affirms that the existing human rights can be effectively applied in the disability context. The research classifies rights concerning access to civil justice in the core international human rights law into six categories. Most categories overlap and intertwine but are still distinct, and should be recognised as separate categories. The research also includes some General Comments/Recommendations of monitoring bodies of these Conventions that are relevant to the right discussed in each category, but does not include their Concluding Observations as these treaties are not specifically focused on the disability context. Such an inclusion would not greatly benefit this research in the light of its limitations.

Only the right to equality before the courts and tribunals, the right to a fair hearing by courts, tribunals or other competent bodies, and the right to a remedy, reparation or compensation are firmly guaranteed in civil cases by the existing legal provisions. The right to legal assistance or representation in civil cases is only guaranteed in the cases concerning deprivation of liberty of a child, but some monitoring bodies of the Conventions recommend making this right available in civil cases where people seek for effective remedy or redress. The right to communication assistance in civil cases is only guaranteed in cases concerning deprivation of liberty of migrant workers and members of their families. However, the Human Rights Committee recommends providing this right where the absence of this assistance would affect fairness and equality of arms between parties in some civil cases. The right to complain is only guaranteed in civil cases concerning torture, enforced disappearance, and the right of the child to be heard. The right to challenge in civil cases is only guaranteed in cases concerning deprivation of liberty, effective remedies for migrant workers and their families, and the right of the child to be heard. There is no legal guarantee nor recommendation from any monitoring body of the Conventions for the right to appeal to a higher tribunal in civil cases.

It can be seen that the international human rights law treaties discussed in this chapter provide less guarantees in accessing civil justice than they do in the criminal context. Moreover, the application of these guarantees in the disability context is still problematic

where persons with disabilities cannot equally enjoy these rights in the same manner as persons without disability. The next chapter will continue examining the meaning of “access to civil justice” in international human rights law by focusing on the UNCRPD and further evaluate whether the UNCRPD can effectively resolve problematic issues when applying international guarantees on access to civil justice in the disability context.

CHAPTER 4:

Access to Civil Justice under the Convention on the Rights of Persons with Disabilities (UNCRPD)

INTRODUCTION

This chapter continues to examine the meaning of “access to civil justice” in international human rights law by particularly examining the UN Convention on the Rights of Persons with Disabilities (UNCRPD) in detail. It consists of two main parts. The first part is to understand the right to access to justice under the UNCRPD. It firstly presents a drafting and negotiating history of article 13 on access to justice. Secondly, it discusses the final text of article 13, followed by its interrelationships with other articles within the Convention. In second part of this chapter, the right to access to civil justice under the UNCRPD is evaluated through the six categories of the right to access to civil justice presented in Chapter 3. This is to understand its implications for persons with disabilities and identify additional features of access to civil justice offered by the UNCRPD.

This research also examines the published General Comments and Concluding Observations of the Committee on the Rights of Persons with Disabilities. Although none of the published General Comments (General Comment No. 1 (2014) to No. 6 (2018)) is exclusively on article 13 of the Convention, the Committee incorporates some comments on access to justice in these General Comments.¹ The Concluding Observations examined in this research include the Committee’s Concluding Observations Reports for

¹ CtteeRPD ‘General Comment No 1’ (19 May 2014) UN Doc CRPD/C/GC/1, ‘General Comment No 2’ (22 May 2014) UN Doc CRPD/C/GC/2, ‘General Comment No 3’ (25 November 2016) UN Doc CRPD/C/GC/3, ‘General Comment No 4’ (25 November 2016) UN Doc CRPD/C/GC/4, ‘General Comment No 5’ (27 October 2017) UN Doc CRPD/C/GC/5, ‘General Comment No 6’ (26 April 2018) UN Doc CRPD/C/GC/6.

68 States Parties, published since 2011 to April 2018, providing recommendations on implementation of the right to access to justice guaranteed by the UNCRPD.² Findings from examination of these documents, concerning access to civil justice, are reported in relevant sections of this chapter.

4.1 UNDERSTANDING ACCESS TO JUSTICE UNDER THE UNCRPD

In addition to the international human rights law presented in the previous chapter, the UNCRPD is the latest international human rights law instrument specifically focusing on the rights of persons with disabilities.³ This Convention entered into force on 3 May 2008.⁴ It currently (August 2018) has 177 Member States, including Thailand and Ireland, the case study countries for this research, only 11 signatory countries have not yet ratified it and the other 10 countries have no action.⁵ This Convention was regarded as having the shortest period of negotiation in the history although involving the highest engagement from civil society.⁶ It does not create any new rights,⁷ but simply reaffirms all existing human rights and fundamental freedoms to ensure that persons with disabilities fully enjoy those rights and freedoms without discrimination.⁸ The central

² See Appendix 2 for the List of Concluding Observations Reports of the Committee on the Rights of Persons with Disabilities, included in this research.

³ Theresia Degener, 'A Human Rights Model of Disability' in Peter Blanck and Eilionoir Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Taylor & Francis Group 2016) 31.

⁴ 'Questions and answers' (*OHCHR*) <ohchr.org/EN/HRBodies/CRPD/Pages/QuestionsAnswers.aspx> accessed 4 May 2018.

⁵ 'Status of Ratification Interactive Dashboard – Convention on the Rights of Persons with Disabilities' (*OHCHR*, 20 August 2018) <<http://indicators.ohchr.org/>> accessed 31 August 2018.

⁶ Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8(1) *Human Rights Law Review* 1; Degener (n 3).

⁷ *ibid*; 'Convention on the Rights of Persons with Disabilities: Questions and Answers' (*OHCHR*) <www2.ohchr.org/english/issues/disability/docs/Q%26A.CRPD.doc> accessed 5 May 2018.

⁸ UNCRPD, preamble (c).

paradigm shift of this Convention is a change of attitude towards disability.⁹ It departs from the old conception of disability which focused on ‘impairment’, ‘individual deficits’, or viewed disability a ‘problem that needs to be fixed or cured’¹⁰ to an understanding that:

*disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.*¹¹

With this understanding, the Convention moves forward to ‘a rights-based approach’ by providing various measures, such as reasonable accommodation and awareness-raising, to ensure the effectiveness of the rights guaranteed.¹² It also clearly emphasises the aspects of person’s dignity, autonomy, difference and equality; full and effective participation and inclusion in society; accessibility; and equality of opportunity.¹³

The Convention establishes a Committee on the Rights of Persons with Disabilities (hereafter referred to as “CtteeRPD”),¹⁴ to monitor implementation of the Convention through States Parties’ reports¹⁵ and examine individual complaints pursuant to the Optional Protocol.¹⁶

The Convention explicitly uses the term “access to justice” in its article 13 to guarantee the right to access to justice for persons with disabilities, but does not provide a straightforward definition of this term. However, this is in keeping with the approach in other articles of the Convention. Only few specific terms used in the Convention are

⁹ Kayess and French (n 6).

¹⁰ Rannveig Traustadottir, ‘Disability Studies, the Social Model and Legal Developments’ in Oddny Arnardottir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (2009).

¹¹ UNCRPD, preamble (e).

¹² Kayess and French (n 6).

¹³ UNCRPD, art 3.

¹⁴ *ibid* art 34.

¹⁵ *ibid* art 35.

¹⁶ Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UNGA Res 61/106 Annex II, art 1.

defined in article 2. Likewise, none of the pre-existing international law instruments discussed in Chapter 3 give a definition of the term “access to justice”. To understand the right to access to civil justice under the UNCRPD, this section explores 1) drafting and negotiating history of access to justice under the UNCRPD; 2) final text of article 13; and 3) interrelationships between article 13 and other UNCRPD articles.

4.1.1 Drafting and Negotiating History of Access to Justice under the UNCRPD

The process to draft the UNCRPD started when the General Assembly of the United Nations decided at the 88th plenary meeting on 19 December 2001 to establish an Ad Hoc Committee ‘to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities’.¹⁷ The Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities is hereafter referred to as the “Ad Hoc Committee”. It consisted of ‘all Member States and observers of the United Nations’ and worked in collaboration with the other relevant bodies and organisations dealing with disability matter, such as the Special Rapporteur on disability of the Commission for Social Development, the relevant human rights treaty bodies, the regional commissions, and the intergovernmental and non-governmental organisations.¹⁸ The Ad Hoc Committee conducted eight sessions of meetings to complete the drafting process. The negotiation of the draft convention began at the Third Session of the Ad Hoc Committee.¹⁹

¹⁷ UNGA Res 56/168 (26 February 2002) UN Doc A/RES/56/168.

¹⁸ *ibid* 2.

¹⁹ Secretariat for the Convention on the Rights of Persons with Disabilities (SCRPD), ‘Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities’ <www.un.org/development/desa/disabilities/resources/ad-hoc-committee-on-a-comprehensive-and-integral-international-convention-on-the-protection-and-promotion-of-the-rights-and-dignity-of-persons-with-disabilities.html> accessed 7 May 2018.

The draft convention, presented to the Ad Hoc Committee at its Third Session, was prepared by a Working Group established by the Ad Hoc Committee at the end of the Second Session on 27 June 2003.²⁰ It was comprised of twenty-seven governmental representatives from five regional groups around the world, twelve non-governmental organisation representatives, particularly from organisations of persons with disabilities, and a representative from national human rights institutions.²¹ The Working Group was mandated to take account of 'all contributions submitted to the Ad Hoc Committee in advance of the meetings of the Working Group.'²² These contributions²³ had been compiled as the 'compilation of proposals for elements of the convention'²⁴ and were used as the documentation materials of the Working Group.²⁵ It could be said that the Working Group draft convention was developed through contributions of Member States of the United Nations, all regional groups and a diverse range of disability-related organisations, including disabled people's organisations and non-governmental organisations.

²⁰ UNGA 58/118 (3 July 2003) UN Doc A/58/118.

²¹ *ibid.*

²² *ibid* para 15.

²³ The contributions were comprised of the submissions by States, observers, regional meetings, relevant UN bodies, entities and agencies, regional commissions and intergovernmental organisations, as well as civil society including non-governmental organisations, national disability and human rights institutions and independent experts.

²⁴ Compilation of proposals for Elements of a Convention (15 January 2004) comprises the Compilation of proposals for a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities (A/AC.265/2003/CRP/13) and the non-governmental organisation contributions to the elements of a convention (A/AC.265/2003/CRP.13/Add.1). Available at: <www.un.org/esa/socdev/enable/rights/elementscomp.doc> accessed 7 May 2018 (Compilation of proposal).

²⁵ UNGA 'Report of the Working Group to the Ad Hoc Committee' (27 January 2004) UN Doc A/AC.265/2004/WG.1 (Report of the Working Group).

Although some ideas related to access to justice, such as the right to an effective remedy,²⁶ the right to judicial procedure,²⁷ and the right to judicial equality and protection,²⁸ had been suggested through the aforementioned compilation of proposals, the Working Group did not recommend the inclusion of a specific article on access to justice in its draft convention. This exclusion was the result of an existing debate on justiciability of economic, social and cultural rights.²⁹ The article in this draft text that seemed most relevant to access to justice for persons with disabilities was draft article 9, on equal recognition as a person before the law, which mentioned the support required for persons with disabilities to assert their rights and to act as witnesses.³⁰

During the negotiation of the draft text at the Third Session, various proposals concerning access to justice were suggested.³¹ In the discussions on article 9, on equal recognition as a person before the law, Japan (supported by Costa Rica, Mexico, Botswana and Disabled People International) suggested an additional section to provide measures that can eliminate physical and communication barriers and reduce the difficulties persons with disabilities may have in understanding judicial procedures.³² Japan additionally noted that persons with disabilities, especially those with mental, hearing and visual

²⁶ Proposed in article 5, Obligations in relation to remedies, of the Chair's Draft and Bangkok Draft; Compilation of proposal (n 24) 56.

²⁷ Proposed in section 12, Judicial Procedure, by DPI Japan; Compilation of proposal (n 24) 86.

²⁸ Proposed by the World Blind Union; Compilation of proposal (n 24) 101.

²⁹ As noted at a footnote of article 4 in the Working Group draft, the disagreement to include the provision on an effective remedy in this convention was because the convention contained both rights from the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, whereas these Covenants had no consensus on the availability of a provision on an effective remedy.; Eilionoir Flynn, *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Ashgate 2015).

³⁰ Report of the Working Group (n25).

³¹ Landmine Survivors Network (LSN), 'Daily summary of discussions related to Article 9 EQUAL RECOGNITION AS A PERSON BEFORE THE LAW' (*SCRPD*, 26 May 2004) <static.un.org/esa/socdev/enable/rights/ahc3sum9.htm> accessed 7 May 2018; LSN, 'Daily summary of discussions related to INTERNATIONAL COOPERATION' (*SCRPD*, 3 June 2004), <static.un.org/esa/socdev/enable/rights/ahc3sumic.htm> accessed 7 May 2018.

³² LSN, 'Daily summary – Art 9 (26 May 2004)' (n 31).

disabilities, were often at a disadvantage in ordinary proceedings as they faced barriers in communication which could possibly lead to misunderstanding and incorrect judgments.³³ Canada (welcomed by Argentina, the European Union, Costa Rica and India) proposed a new text to ensure equal treatment for persons with disabilities at all stages of court and tribunal proceedings.³⁴ The UN Economic and Social Commission for Asia and the Pacific noticed that there was no specific provision for remedies and suggested,³⁵ together with Costa Rica,³⁶ an additional text to ensure an effective remedy. The International Labour Organisation suggested specifically providing assistance for persons with disabilities to exercise their legal capacity in accessing justice, including access to an effective dispute prevention and settlement system, as well as to legal aid.³⁷ These proposals had been included in the Compilation text, Annex II of the Third Session report of the Ad Hoc Committee for further discussion at the Fourth Session.³⁸ Furthermore, in the discussion on international cooperation,³⁹ Chile presented that persons with disabilities faced difficulties in accessing justice and proposed a new article on access to justice, including requirements to provide appropriate training for judges and court staff.⁴⁰ However, this proposed article did not appear in the Compilation text, Annex II of the Third Session report of the Ad Hoc Committee.⁴¹

In the Fourth Session, the Ad Hoc Committee considered the revised proposals for the aspects of article 9 relating to access to justice made by Japan, Canada and Costa

³³ *ibid.*

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ SCRPD, 'Article 13 – Access to justice – Third Session – Comments, proposals and amendments submitted electronically'

static.un.org/esa/socdev/enable/rights/ahcstata13tscomments.htm accessed 7 May 2018.

³⁸ UNGA 'Report of the third session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities' (9 June 2004) UN Doc A/AC.265/2004/5 (The Third Session Report of the Ad Hoc Committee).

³⁹ LSN, 'Daily summary – International Cooperation (3 June 2004)' (n 31).

⁴⁰ *ibid.*

⁴¹ The Third Session Report of the Ad Hoc Committee (n 38).

Rica.⁴² During the discussions on article 9, Costa Rica withdrew its proposal to add a subparagraph on an effective remedy proposed at the Third Session, and proposed a new article on access to justice which maintained the provision of an effective remedy and increased the aspects of flexibility, adjustment and modification of rules, procedures and practice, and availability of reasonable accommodation.⁴³ Japan re-iterated the proposal it had made at the Third Session, but slightly amended its wording to explicitly refer to article 14 of the International Covenant on Civil and Political Rights (ICCPR).⁴⁴ Chile also suggested a specific and separate article on access to justice. It proposed a provision to guarantee adequate access to courts for persons with disabilities; this was to facilitate persons with disabilities' roles as both direct and indirect participants in court proceedings.⁴⁵ Furthermore, Venezuela, New Zealand, Mexico and National Human Rights Institutions also supported a proposal for a separate article on access to justice.⁴⁶ The International Disability Caucus proposed an addition to article 9 to ensure the equal right of persons with disabilities to participate in all stages of procedures in courts and tribunals.⁴⁷ The Landmine Survivors Network proposed adding a new paragraph to article 9 to ensure the equal treatment of persons with disabilities in all stages of procedures before courts, tribunals and other organs of the justice system.⁴⁸ People with Disabilities Australia commented that a section concerning access to justice in article 9 should clearly state the need to modify and adjust legal procedures and rules of evidence as, in practice, persons with disabilities could not enjoy equality before the law due to

⁴² UNGA 59/360 (14 September 2004) UN Doc A/59/360.

⁴³ LSN, 'Daily summary of discussions related to Article 9 Equal Recognition as a Persons before the Law' (*SCRPD*, 26 August 2004), static.un.org/esa/socdev/enable/rights/ahc4sumart09.htm accessed 7 May 2018.

⁴⁴ *SCRPD*, 'Contributions submitted by Governments in electronic format at the Fourth Session - Proposed Modifications to Draft Article 9' static.un.org/esa/socdev/enable/rights/ahc4da9.htm accessed 7 May 2018.

⁴⁵ *ibid.*

⁴⁶ LSN, 'Daily summary – Art 9 (26 August 2004)' (n 43).

⁴⁷ *SCRPD*, 'Article 13 – Access to justice – Fourth Session – Comments, proposals and amendments submitted electronically' static.un.org/esa/socdev/enable/rights/ahcstata13fscomments.htm accessed 7 May 2018.

⁴⁸ *ibid.*

the inappropriate legal procedures, rules and practices.⁴⁹ Nevertheless, the revision did not finish within the session, so there was no amended draft text presented in the report of the Fourth Session. The previous draft would be revisited during the Fifth Session.⁵⁰

During the Fifth Session, the Ad Hoc Committee discussed informally the need to clarify the remaining issues of the draft articles 7 to 15.⁵¹ During the informal discussion of draft article 9, Chile emphasised that the Convention was missing a guarantee of access to justice and to the judicial system, and then proposed an additional sentence on access to the courts.⁵² Costa Rica, Liechtenstein and Japan suggested that this issue should be placed as a separate article rather than in article 9 itself.⁵³ The Coordinator of the discussion agreed to work on Chile's proposal and opened discussion for further elaboration of access to justice as a separate article.⁵⁴ There were various suggestions for the terms used in the article, but the Ad Hoc Committee could not reach a mutual agreement on the wording; therefore, the Coordinator asked Chile, Australia and Japan to collaborate to develop a single text.⁵⁵ Finally, it was reported that the Ad Hoc Committee agreed to consider Costa Rica's proposal to provide for an effective remedy at a later stage in the negotiation.⁵⁶ The Committee decided to restructure draft article 9 of the Working Group's text by transferring the issues concerning access to justice to a new separate article, known as article 9 bis, ensuring the equality of persons with

⁴⁹ *ibid.*

⁵⁰ UNGA 59/360 (14 September 2004) UN Doc A/59/360.

⁵¹ UNGA 'Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its fifth session' (23 February 2005) UN Doc A/AC.265/2005/2 (The Fifth Session Report of the Ad Hoc Committee).

⁵² Rehabilitation International (RI), 'Daily summary of discussion at the fifth session 26 January 2005' (*SCRPD*, 26 January 2005) <static.un.org/esa/socdev/enable/rights/ahc5sum26jan.htm> accessed 7 May 2018.

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ The Fifth Session Report of the Ad Hoc Committee (n 51).

disabilities to receive effective access to justice and supporting their roles as direct and indirect participants in all legal proceedings.⁵⁷

At the Sixth Session, the Ad Hoc Committee focused its work on draft articles 15, 24bis, 15bis, and 16 through 25 and decided to continue reviewing the draft convention at the next session.⁵⁸ For this reason, there is no further progress on the access to justice article stated in the Sixth Session report.

Before the Seventh Session, the Chairperson of the Ad Hoc Committee disseminated a complete draft text of the Convention to all members for consideration.⁵⁹ This draft text was produced by considering the Working Group's draft, all discussion reports and proposals during the previous sessions and would be used as a basis for negotiation at the Seventh Session. The draft had restructured all article numbers and article 9 bis on access to justice had been changed to article 13. Access to justice had been addressed separately from an article on legal capacity as agreed.⁶⁰ The draft article 13 added an emphasis on the role of persons with disabilities as witnesses.⁶¹

At the Seventh Session, the Ad Hoc Committee used the Chairperson's draft text dated 7 October 2005 as a basis for revision.⁶² During the discussion on article 13 (access to justice), there were additional proposals from Israel and International Disability Caucus to include a provision on accommodation, especially on age appropriate aspects, as it was an essential instrument for persons with disabilities in accessing justice in practice.⁶³

⁵⁷ *ibid.*

⁵⁸ UNGA 60/266 (17 August 2005) UN Doc A/60/266.

⁵⁹ UNGA 'Letter dated 7 October 2005 from the Chairman to all members of the Committee' (14 October 2005) UN Doc A/AC.265/2006/1.

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² UNGA 'Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its seventh session' (13 February 2006) UN Doc A/AC.265/2006/2 (The Seventh Session Report of the Ad Hoc Committee).

⁶³ RI, 'Daily summary of discussion at the seventh session 18 January 2006' (*SCRPD*, 18 January 2006) <<https://static.un.org/esa/socdev/enable/rights/ahc7sum18jan.htm>> accessed 8 May 2018.

Chile further proposed to provide additional provisions on the training of judges, judicial administrative staff and police and on procedural adjustments for persons with distinct disabilities.⁶⁴ The Chairperson stated that it would be possible to incorporate these essential issues into the draft text. Eventually, it was reported that the draft article 13 was finally amended by integrating the provisions of procedural and age appropriate accommodations and recognising the need for appropriate training.⁶⁵ At the end of the session, the Ad Hoc Committee agreed to change the title of the draft text to the 'International Convention on the Rights of Persons with Disabilities: working text'.⁶⁶

At the Eighth Session, the final session, the draft Convention on the Rights of Persons with Disabilities was adopted by the Ad Hoc Committee without any changes to the text of article 13 (access to justice).⁶⁷ At the same session, the Ad Hoc Committee also proffered the draft Convention to the General Assembly of the United Nations for adoption.⁶⁸ The General Assembly adopted the Convention on the Rights of Persons with Disabilities (UNCRPD) and its Optional Protocol by consensus on 13 December 2006.⁶⁹ The Convention and its Optional Protocol, as well as article 13 of the Convention on access to justice, entered into force on 3 May 2008, pursuant to article 45 of the Convention and article 13 of its Optional Protocol.⁷⁰

4.1.2 Final Text of Article 13

The main article of the UNCRPD, guaranteeing the right to access to justice, is article 13. The final text of this article states that:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the

⁶⁴ *ibid.*

⁶⁵ The Seventh Session Report of the Ad Hoc Committee (n 62).

⁶⁶ *ibid.*

⁶⁷ UNGA 61/611 (6 December 2006) UN Doc A/61/611.

⁶⁸ *ibid.*

⁶⁹ UNGA Res 61/106 (24 January 2007) UN Doc A/RES/61/106.

⁷⁰ 'Questions and answers' (n 4).

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.

As aforementioned, a definition of “access to justice” has never been provided in international human rights law. Article 13 itself also expresses this term in a very broad sense. The text seems to elaborate on how to make access to justice practically effective as issues concerning its effectiveness repeatedly appeared during the drafting and negotiating process. The findings from the previous section on the drafting and negotiation history of access to justice show that definition of the term “access to justice” has not been discussed although many participants of the drafting process agreed with the existence of a provision on access to justice.⁷¹

According to the final text, article 13 guarantees equality and effectiveness of access to justice for persons with disabilities through the provision of procedural and age-appropriate accommodations for their effective participation. These facilities shall be available at all stages of legal proceedings as persons with disabilities are not limited to a role in the hearing alone.⁷² It protects and supports persons with disabilities in every role they perform in the justice system, whether as direct or indirect participants.

From the reports on the drafting history of article 13, there was no discussion or explanation of the phrase “direct and indirect participants”. This might be because the Ad Hoc Committee viewed that an explanation was unnecessary as the Convention must protect and support persons with disabilities in whatever role they may take. The Office

⁷¹ LSN, ‘Daily summary – International Cooperation (3 June 2004)’ (n 31); LSN, ‘Daily summary – Art 9 (26 August 2004)’ (n 43); SCRPD, ‘Contributions at Fourth Session’ (n 44); RI, ‘Daily summary - the fifth session (26 January 2005)’ (n 52).

⁷² Marianne Schulze, *Understanding the UN Convention on the Rights of Persons with Disabilities* (3rd edn, Handicap International 2010).

of the United Nations High Commissioner for Human Rights (OHCHR) suggests in its thematic study on article 13 of the UNCRPD (hereafter referred to as “OHCHR thematic report on article 13”) that direct participants refer to roles as ‘official parties to the proceedings’, such as plaintiffs/claimants or defendants/respondents, whereas indirect participants ‘refer to other roles that contribute to the administration of justice,’ such as witnesses, expert witnesses, judges, lawyers, jurors.⁷³ Persons with disabilities may get involved in the legal proceedings as public observers, but this role was not mentioned in the OHCHR’s definitions of either direct nor indirect participants. My impression is that “public observers” are not “participants” under article 13; therefore, States Parties do not have a duty to provide procedural and age-appropriate accommodations but still have a duty to provide accessibility or reasonable accommodation for proceedings that are open to the public.⁷⁴

Regarding the “provision of procedural and age-appropriate accommodation”, the Convention does not clearly specify whether this provision of accommodation is the same as reasonable accommodation defined in its article 2.⁷⁵ During the drafting process of article 13, there were proposals on reasonable accommodation from Canada and the International Disability Caucus.⁷⁶ Israel proposed to add a provision of accommodation, and following this, the International Disability Caucus changed the wording of its proposal to reflect a provision of accommodation rather than reasonable accommodation.⁷⁷ At the same drafting session, Israel clarified that the term “accommodation” referred to

⁷³ UNGA ‘Report of the Office of the United Nations High Commissioner for Human Rights: Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities’ (27 December 2017) UN Doc A/HRC/37/25, para 54 (OHCHR thematic report on article 13).

⁷⁴ UNCRPD, arts 5 and 9.

⁷⁵ Anna Lawson, ‘Disabled People and Access to Justice - From disablement to enablement?’ in Peter Blanck and Eilionoir Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Taylor & Francis Group 2016) 88.

⁷⁶ SCRPD, ‘Article 13 – Access to justice – Seventh Session – Comments, proposals and amendments submitted electronically’
<<https://static.un.org/esa/socdev/enable/rights/ahcstata13sevscomment.htm>> accessed 8 May 2018.

⁷⁷ *ibid.*

accommodation at the procedural level and accommodation for children, with the need to adjust and modify the system and processes for their flexibility, but explained that the term does not refer to “reasonable accommodation”.⁷⁸ On the age-appropriate aspect, the International Disability Caucus accentuated the fact that children with disabilities who are victims of crime, ‘are [often] deemed to be incompetent witnesses and denied the opportunity to be heard in court.’⁷⁹ There was also a suggestion from the Chair as to whether ‘reasonable accommodation would be the best term’,⁸⁰ but in the final text the term “reasonable accommodation” has not been adopted.⁸¹ According to these records, the provision of accommodations in article 13 seems different from reasonable accommodation. Some disability law scholars also interpret this in the same way and comment that the accommodations in article 13 are ‘more generic and less individualised’, and the State could not use unreasonableness, or a disproportionate or undue burden as an excuse for not providing them.⁸² Afterwards, the CtteeRPD produced General Comment No. 6 (2018) on equality and non-discrimination, which interprets clearly that ‘[procedural and age-appropriate] accommodations are distinguishable from reasonable accommodation in that procedural accommodations are not limited by disproportionality.’⁸³ This General Comment is in line with the comment of Israel and disability law scholars, but it still does not specify whether the accommodations under article 13 are more generic. The examples of these accommodations provided in the General Comment, in my opinion, refer to a more generic approach. An example of a procedural accommodation is ‘the recognition of diverse communication methods of persons with disabilities’ in court and tribunal proceedings; and an example of an age-appropriate accommodation is the use of age-appropriate and plain language for information concerning making complaints and

⁷⁸ RI, ‘Daily summary - the seventh session (18 January 2006)’ (n 63).

⁷⁹ SCRPD, ‘Art 13 – Seventh Session – Comments’ (n 76).

⁸⁰ RI, ‘Daily summary - the seventh session (18 January 2006)’ (n 63).

⁸¹ UNCRPD, art 13(1).

⁸² Eilionoir Flynn and Anna Lawson, ‘Disability and Access to Justice in the European Union: Implications of the United Nations Convention on the Rights of Persons with Disabilities’ in Lisa Waddington, Gerard Quinn, and Eilionoir Flynn (eds) *European Yearbook of Disability Law* (Volume 4, Intersentia 2013) 7, 25; Lawson, ‘Disable People and Access to Justice’ (n 75) 100.

⁸³ CtteeRPD ‘General Comment No 6’ (n 1) para 51.

accessing justice.⁸⁴ In some cases, it may require the modification the courtroom setting, procedures and practices to ensure the age-appropriateness of the proceedings.⁸⁵ The CtteeRPD recommends to clearly indicate the duty to provide these accommodations in domestic legislation.⁸⁶

The Convention does not specify whether “procedural and age-appropriate accommodations” are as same as “accessibility” in article 9. As yet there is no explicit comment on the distinction between these terms. Lawson’s only comments on procedural and age-appropriate accommodations are that they are ‘more generic and less individualised in nature’,⁸⁷ which, in my opinion, is somewhat similar to the purpose of accessibility that serves a group need rather than an individual need.⁸⁸ The OHCHR expresses that ‘[b]eyond accessibility, States Parties must make available the procedural and age-appropriate accommodations that persons with disabilities may require in accessing justice.’⁸⁹ The OHCHR further views that these accommodations are a fundamental element of the right to access to justice, and also reinforce the right to a fair trial and the right to participate in the administration of justice.⁹⁰ The examples of these accommodations from the OHCHR include ‘the provision of sign language interpretation, legal and judicial information in accessible formats, ... and video link testimony’.⁹¹ The OHCHR suggests that ‘specific requirements for participation’, such as the adjustment of procedural deadlines and formalities, as well as the provision of a sign-language interpreter for a juror who is Deaf, are ultimately based on ‘the free choice and preference

⁸⁴ *ibid.*

⁸⁵ OHCHR thematic report on article 13 (n 73).

⁸⁶ *ibid* fn 33 citing CRPD/C/KEN/CO/1, para 26(b), CRPD/C/ECU/CO/1, para 27(c), and CRPD/C/CHN/CO/1, para 24.

⁸⁷ Lawson, ‘Disable People and Access to Justice’ (n 75) 100.

⁸⁸ Anna Lawson, ‘Centre for Disability Studies, University of Leeds response to Draft General Comment on Article 9 of the Convention – Accessibility’ (OHCHR) <www.ohchr.org/Documents/HRBodies/CRPD/GC/CentreDisabilityStudiesUniversityLeeds_DG_C_Art9.doc> accessed 10 April 2014.

⁸⁹ OHCHR thematic report on article 13 (n 73) para 24.

⁹⁰ *ibid.*

⁹¹ *ibid.*

of the person concerned'.⁹² This suggestion may seem to accommodate particular needs, but my impression is that a choice of accommodations can still be provided through legislation, rules or regulations that accommodate a foreseeable group need. In this sense, procedural and age-appropriate accommodations are 'more generic and less individualised' as suggested by Lawson.⁹³ Accordingly, procedural and age-appropriate accommodations should be provided for via legal provision or at least an authoritative rule or guidance document. Enacting a law or creating rules concerning these accommodations may be a key element that makes procedural accommodation different from reasonable accommodation as these provisions will be available before a request has been made and will not be based on a consideration of 'reasonableness' for the service provider. On the other hand, an individualised request, even concerning a procedural aspect, should be arranged based on the principle of reasonable accommodation. This is to maintain the balance between the rights of the individual and the duty of the service provider. After all, both Lawson and the OHCHR agree that a disproportionate or undue burden cannot be used as a reason for not providing procedural accommodations,⁹⁴ which applies the same principle of an 'unconditional' obligation that applies to accessibility.⁹⁵

Article 13 further articulates a duty on States Parties to promote appropriate training for their officials in the justice system, to ensure effective access to justice for persons with disabilities. This duty also exists in the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)⁹⁶ and the Convention for the Protection of All Persons from Enforced Disappearance (ICPED).⁹⁷ The CtteeRPD elaborates some comments on training in relation to article 13 in its General Comments and Concluding Observations. It emphasises the importance of regular training programmes on a compulsory and on-going basis, in urban and rural

⁹² *ibid* paras 24 and 26.

⁹³ Lawson, 'Disable People and Access to Justice' (n 75) 100.

⁹⁴ OHCHR thematic report on article 13 (n 73) para 25; Lawson, 'Disable People and Access to Justice' (n 75).

⁹⁵ CtteeRPD 'General Comment No 2' (n 1) para 25.

⁹⁶ UNCAT, art 10.

⁹⁷ ICPED, art 23.

areas and remote communities.⁹⁸ Although the Committee accentuates training for people involved in the legal system, such as judges, legal professionals, social workers, justice and law enforcement officials, it also views training for persons with disabilities to increase their legal awareness as necessary under article 13.⁹⁹ The Committee also urges allocation of sufficient funding and financial resources for these forms of training.¹⁰⁰

Diverse training topics are suggested throughout the Committee's General Comments and Concluding Observations for effective access to justice. Their top priorities are on rights of persons with disabilities and the UNCRPD.¹⁰¹ The other interesting topics suggested by the Committee include:

- 1) the application of human rights standards specifically for persons with disabilities, including accessibility, procedural and reasonable accommodations,¹⁰² equal participation¹⁰³ and the right to a fair trial,¹⁰⁴ and the recognition of diversity among persons with disabilities and their individual requirements for their equal and effective access to justice;¹⁰⁵

⁹⁸ CRPD/C/CYP/CO/1, para 36; CRPD/C/DOM/CO/1, para 25; CRPD/C/SLV/CO/1, para 30(c); CRPD/C/ETH/CO/1, para 30; CRPD/C/GTM/CO/1, para 36; CRPD/C/HTI/CO/1, para 25(c); CRPD/C/HND/CO/1, para 34; CRPD/C/SVK/CO/1, para 42; CRPD/C/UGA/CO/1, para 25(c).

⁹⁹ CtteeRPD 'General Comment No 6' (n 1) para 55; CRPD/C/ARM/CO/1, para 22; CRPD/C/HTI/CO/1, para 25(d); CRPD/C/LUX/CO/1, para 27(d); CRPD/C/MDA/CO/1, para 27(b).

¹⁰⁰ CRPD/C/EU/CO/1, para 39; CRPD/C/PRT/CO/1, para 31; CRPD/C/URY/CO/1, para 30.

¹⁰¹ These findings base on the most repeated themes from the examination of the Committee's six General Comments and 68 Concluding Observations Reports as identified earlier in this chapter.

¹⁰² CRPD/C/COK/CO/1, para 26(c); CRPD/C/DEU/CO/1, para 28(c); CRPD/C/MUS/CO/1, para 24; CRPD/C/QAT/CO/1, para 26; CRPD/C/KOR/CO/1, para 24; CRPD/C/SVK/CO/1, para 42; CRPD/C/ARE/CO/1, para 26(a).

¹⁰³ CRPD/C/SVK/CO/1, para 42.

¹⁰⁴ CRPD/C/GAB/CO/1, para 31; CRPD/C/QAT/CO/1, para 26; CRPD/C/THA/CO/1, para 28; CRPD/C/ARE/CO/1, para 26(a).

¹⁰⁵ CtteeRPD 'General Comment No 6' (n 1) para 55.

- 2) the recognition of persons with disabilities as full persons before the law, including giving the same weight to complaints and statements from persons with disabilities as they would to non-disabled persons,¹⁰⁶ facilitating the testimony of persons with psychosocial and/or intellectual disabilities,¹⁰⁷ and combating harmful gender and disability stereotypes;¹⁰⁸
- 3) the ‘obligation to respect the legal capacity of persons with disabilities, including legal agency and standing’,¹⁰⁹ and ‘the individual autonomy of persons with disabilities and the importance of legal capacity for all’;¹¹⁰
- 4) the application of a human rights-based approach to disability;¹¹¹
- 5) the need and duty to provide access to justice for persons with disabilities on an equal basis with others;¹¹²
- 6) working with persons with disabilities;¹¹³
- 7) ‘measures adopted to ensure the effective training’ on the rights of persons with disabilities, for people who work in the justice system including lawyers, and sign-language interpreters;¹¹⁴

¹⁰⁶ CtteeRPD ‘General Comment No 1’ (n 1) para 39.

¹⁰⁷ CRPD/C/CAN/CO/1, para 30(a).

¹⁰⁸ CRPD/C/SVK/CO/1, para 42(d).

¹⁰⁹ CtteeRPD ‘General Comment No 1’ (n 1) para 39.

¹¹⁰ CtteeRPD ‘General Comment No 6’ (n 1) para 55.

¹¹¹ CRPD/C/ARG/CO/1, para 20; CRPD/C/MNE/CO/1, para 27(b); CRPD/C/SDN/CO/1, para 26(c).

¹¹² CRPD/C/MAR/CO/1, para 29(c); CRPD/C/OMN/CO/1, para 28(c); CRPD/C/KOR/CO/1, para 24; CRPD/C/UGA/CO/1, para 25(c).

¹¹³ CRPD/C/AUS/CO/1, para 28; CRPD/C/KOR/CO/1, para 24.

¹¹⁴ CtteeRPD ‘General Comment No 6’ (n 1) para 55.

- 8) '[t]he complexities of intersectionality and the fact that persons should not be identified purely on the basis of impairment';¹¹⁵ and
- 9) '[t]he centrality of effective and meaningful communications to successful inclusion'.¹¹⁶

Under international human rights law, rights that are now collectively recognised as the right to access to justice were not explicitly framed as such when initially introduced.¹¹⁷ These rights include 'the right to equality before the law without discrimination, equal protection under the law, the right to an effective remedy for violations of rights, the right to a fair and public hearing by an independent and impartial tribunal',¹¹⁸ and are civil and political rights under the ICCPR,¹¹⁹ and subject to immediate realisation.¹²⁰ Therefore, States Parties to the UNCRPD also have a duty to fulfil their obligations under article 13 immediately.

4.1.3 Interrelationships of Article 13 and Other Articles of the UNCRPD

Although article 13 is the main provision guaranteeing the right to access to justice for persons with disabilities, it does not provide an exhaustive list of all measures for ensuring the right to access to justice. In the same way, it does not confine the scope of access to justice within its final text. It is arguable that the UNCRPD has been designed to achieve an extensive concept of access to justice when considering article 13 in conjunction with other articles.¹²¹ The right to access to justice is also embedded in other

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ OHCHR thematic report on article 13 (n 73).

¹¹⁸ *ibid* para 9.

¹¹⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 2, 9, 14 and 26.

¹²⁰ *ibid* art 2; CtteeESCR 'General Comment No 3' (1 January 1991) UN Doc E/1991/23 para 9; OHCHR thematic report on article 13 (n 73).

¹²¹ Flynn and Lawson (n 82); Flynn, *Disabled Justice?* (n 29).

articles when applied to the justice system.¹²² Accordingly, article 13 needs to be read along with other articles of the Convention to embrace all aspects of access to justice.

Although the right to effective access to justice also relates to other areas, such as close consultation with persons with disabilities, awareness-raising, and participation in political and public life,¹²³ this section limits its discussion to three main areas within the UNCRPD that are most relevant and indispensable to the effective access to civil justice for persons with disabilities. These areas include 1) equality and non-discrimination, 2) equal recognition before the law, and 3) accessibility. Other areas which relate to article 13 but are not discussed here will be included in the next section when evaluating the right to access to justice of the UNCRPD.

1) *Equality and Non-discrimination*

Flynn and Lawson suggest that article 5 on equality and non-discrimination has a very close connection with article 13, as it elaborates the true meaning of the phrase “on an equal basis with others” in article 13. This phrase refers to the principle of equality and non-discrimination without repetition of its details.¹²⁴

As discussed in Chapter 2,¹²⁵ article 5 confirms both formal and substantive strands of equality.¹²⁶ The formal equality recognises the humanity of all persons by confirming that they are ‘equal before and under the law and are entitled ... to the equal protection and equal benefit of the law’ without regard to other differences that may lead to discrimination; and by prohibiting ‘all discrimination on the basis of disability’.¹²⁷ The substantive perspective confirms that ‘reasonable accommodation’ and ‘specific measures’, to achieve equality for persons with disabilities in practice, are not considered

¹²² Flynn and Lawson (n 82).

¹²³ UNCRPD, arts 4, 8 and 29; Flynn, *Disabled Justice?* (n 29).

¹²⁴ Flynn and Lawson (n 82).

¹²⁵ Section 2.1.3 on the principles of equality.

¹²⁶ UNCRPD ‘General Comment No 6’ (n 1) para 11; Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011).

¹²⁷ UNCRPD, art 5(1)-(2).

unfair discrimination.¹²⁸ The CtteeRPD further expresses in its General Comment No. 6 (2018) that the UNCRPD adopts the principle of ‘inclusive equality’, which reflects Fredman’s four-dimensional approach of substantive equality presented in section 2.1.3B.¹²⁹

It should be emphasised that article 5 and 13 use different wordings regarding “accommodation”. Article 5 uses the term “reasonable accommodation”, while article 13 uses the term “procedural and age-appropriate accommodations”. This issue that these accommodations impose different levels of duty on States Parties has been discussed in the previous section.¹³⁰ Nevertheless, both accommodations aim to fulfil effective access to justice for persons with disabilities.

The principle of equality and non-discrimination in article 5 is not limited to the provision of reasonable accommodation, but also embraces other aspects, including equal treatment, effective participation and transparency of the proceedings.¹³¹ Substantive equality allows ‘different treatment’¹³² towards persons with disabilities to provide ‘[t]ruly equal treatment’.¹³³ The UNCRPD only regards different treatment as ‘discrimination on the basis of disability’ when it negatively affects persons with disabilities.¹³⁴ The CtteeRPD views that effective access to justice on an equal basis with others ‘must allow participation’ of persons with disabilities in proceedings.¹³⁵ The measures for effective participation in this regard include accessibility of information, communication and physical environments, legal aid, and suitable protection measures against

¹²⁸ *ibid* art 5(3)-(4).

¹²⁹ CtteeRPD ‘General Comment No 6’ (n 1) para 11; Sandra Fredman, ‘Substantive equality revisited’ (2016) 14(3) *International Journal of Constitutional Law* 712.

¹³⁰ CtteeRPD ‘General Comment No 6’ (n 1) para 51; Flynn and Lawson (n 82); Lawson, ‘Disable People and Access to Justice’ (n 75).

¹³¹ CtteeRPD ‘General Comment No 6’ (n 1).

¹³² Kayess and French (n 6) 8.

¹³³ Washington State Access to Justice Board, *Ensuring Equal Access for Persons with Disabilities: A Guide to Washington Administrative Proceedings* (2011) 34.

¹³⁴ UNCRPD, arts 2 and 5(4).

¹³⁵ CtteeRPD ‘General Comment No 6’ (n 1) para 52.

discrimination.¹³⁶ Transparency of the proceedings is also a matter of equal access to justice. The CtteeRPD views that the States Parties must ensure availability and accessibility of information, including records and reports of ‘all relevant claims, cases and court orders’.¹³⁷

Additionally, in accordance with the principle of equality and non-discrimination, people who work in the justice system must be aware that persons with disabilities also have the same entitlements as other people. They must respect persons with disabilities as equal persons before the law.¹³⁸ Moreover, they must understand that different persons with disabilities may have different needs to effectively access justice and provide them with suitable accommodation.¹³⁹

2) Equal Recognition before the law

Article 12 guarantees persons with disabilities the right to equal recognition before the law. This reaffirms their ‘legal personality, which is a prerequisite for the recognition of a person’s legal capacity.’¹⁴⁰ It is one of many articles of the UNCRPD that influences the effectiveness of access to justice. ‘[W]ithout the recognition of legal personality, there can be no recourse to justice, without access to justice, the right to be recognized as equal before the law is meaningless since it cannot be asserted, applied to specific contexts or enforced’.¹⁴¹ These statements show the interdependence of article 12 and article 13.

Article 12 guarantees that States Parties must recognise the legal capacity of persons with disabilities in all aspects of their life.¹⁴² This protection of legal capacity is considered

¹³⁶ *ibid* paras 52-53.

¹³⁷ *ibid* para 54.

¹³⁸ This issue will be discussed in the next subsection.

¹³⁹ Janet Lord and others (eds), *Human Rights. YES!: Action and Advocacy on the Rights of Persons with Disabilities* (2nd edn, University of Minnesota Human Rights Center 2012).

¹⁴⁰ CtteeRPD ‘General Comment No 1’ (n 1) para 11.

¹⁴¹ Flynn and Lawson (n 82) 26.

¹⁴² UNCRPD, art 12(2).

the core element of the Convention.¹⁴³ It facilitates the effective access to justice of persons with disabilities in terms of the legitimacy of their legal actions, such as entering into a contract, instructing their lawyer, and taking their case to court.¹⁴⁴ In order to secure legal representation, a client requires legal capacity to establish a legal relationship with a lawyer and to authorise his or her lawyer to act as an agent.¹⁴⁵ In the same way, when taking a lawsuit, a person also needs legal capacity to demonstrate his or her legal standing, and the competency and legitimacy to file a case in court.¹⁴⁶ Therefore, legal capacity determines whether persons with disabilities who wish to pursue a legal action, can assert their rights and participate in legal proceedings.

Some persons with disabilities, especially those with intellectual or psychosocial disabilities in countries where guardianship regimes operate, may be deprived of their legal capacity; this may lead to a lack of legal standing if their guardian does not give consent to initiate legal proceedings.¹⁴⁷ This restriction is explained as a protection for persons with disabilities themselves, as well as for the courts and other litigants.¹⁴⁸ However, according to the principle of equal recognition before the law, Lucy Series questions why this restriction is needed whilst most countries also have mechanisms to prevent 'vexatious litigants.'¹⁴⁹ Oliver Lewis also views that '[d]enial of legal capacity locks an individual out from accessing justice systems on an equal basis with others.'¹⁵⁰

¹⁴³ Lucy Series, 'Legal capacity and participation in litigation: Recent developments in the European Court of Human Rights' in Lisa Waddington, Gerard Quinn and Eilionoir Flynn (eds), *European Yearbook of Disability Law* (Volume 5, Intersentia 2015) 103.

¹⁴⁴ *ibid.*

¹⁴⁵ Stanley Herr, 'Disabled Clients, Constituencies, and Counsel: Representing Persons with Developmental Disabilities' (1989) 67 *The Milbank Quarterly* 352.

¹⁴⁶ Reem Bahdi, 'Background Paper on Women's Access to Justice in the MENA Region' (*SSRN*, October 31, 2007) <ssrn.com/abstract=1716864> accessed 12 May 2018.

¹⁴⁷ Series, 'Legal capacity and participation in litigation' (n 143).

¹⁴⁸ *ibid.*

¹⁴⁹ *ibid* 110.

¹⁵⁰ Oliver Lewis, 'Advancing Legal Capacity Jurisprudence' (2011) 6 *European Human Rights Law Review* 700, 700.

The CtteeRPD notes that equal recognition of legal capacity is important for persons with disabilities to effectively access to justice as it gives them an equal standing, when they seek enforcement of their rights, give evidence in legal proceedings, or want to take key roles in the justice system, such as to be judges, lawyers or jurors.¹⁵¹

3) Accessibility

Before discussing accessibility in detail, it is necessary to look at whether accessibility is a new right created by the UNCRPD or just a UNCRPD principle.¹⁵² The CtteeRPD comments that '[a]ccessibility should be viewed as a disability-specific reaffirmation of the social aspect of the right of access', which has existed in international human rights law prior to the enforcement of the UNCRPD; and accessibility must be strictly implemented to ensure the right to access for persons with disabilities.¹⁵³ Considering the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms adopted by the General Assembly of the United Nations in 1998, its articles 1 and 2 show correlation between human rights and fundamental freedoms of the rights holders and a responsibility and duty of each State to protect, promote and implement all these human rights and fundamental freedoms.¹⁵⁴ This duty includes the adoption of necessary steps 'to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction ... are able to enjoy all those rights and freedoms in practice.'¹⁵⁵ According to the Declaration, accessibility is a duty of each State in order to protect, promote and

¹⁵¹ CtteeRPD 'General Comment No 1' (n 1) paras 38-39.

¹⁵² Frederic Megret, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30 *Human Rights Quarterly* 494; Flynn, *Disabled Justice?* (n 29).

¹⁵³ CtteeRPD 'General Comment No 2' (n 1) para 4; The CtteeRPD uses both terms "right to access" and "right of access" in this General comment and they seem interchangeable. These two terms might have different meanings in the literature, but I use them interchangeably here in a manner consistent with the General Comment.

¹⁵⁴ UNGA Res 53/144 (8 March 1999) UN Doc A/RES/53/144.

¹⁵⁵ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (adopted 9 December 1998) UNGA Res 53/144, art 2.

implement all human rights under the UNCRPD and to ensure that all persons with disabilities are able to enjoy these rights in practice. Accordingly, I would argue that “accessibility” is not a right in itself, but a “necessary step” emphasised by the UNCRPD (or “principle”) to ensure that the practicability of its rights is guaranteed. However, a further discussion of whether accessibility is a right under or a principle of, the UNCRPD is beyond the scope of this research. The focus of this section is to confirm that accessibility is a key supportive element for effective access to justice for persons with disabilities.

Both articles 9 and 21 concern matters of accessibility. The difference is that article 9 refers to all matters relating to accessibility, while article 21 specifically focuses on accessibility of information and communication. Article 9 covers equal access ‘to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public.’¹⁵⁶ States Parties also have duties to ensure that (1) facilities and services of private sectors which open for the public are accessible by persons with disabilities; (2) appropriate training on accessibility is provided; and (3) buildings and other facilities open to the public have accessible signage, live assistance and intermediaries, for persons with disabilities.¹⁵⁷ Article 21 gives more details on the accessibility of information and communication to ensure the real freedom of expression and opinion for persons with disabilities.¹⁵⁸ The overlapping guarantees of these two articles greatly reinforce accessibility for persons with disabilities; as a result, persons with disabilities may need less requests for additional reasonable accommodations.¹⁵⁹

Throughout the Convention, the UNCRPD employs three different terms concerning accessibility. These are “reasonable accommodation”,¹⁶⁰ “procedural and age-

¹⁵⁶ UNCRPD, art 9.

¹⁵⁷ *ibid* art 9(2).

¹⁵⁸ CtteeRPD ‘General Comment No 2’ (n 1) para 38.

¹⁵⁹ Flynn and Lawson (n 82); Flynn, *Disabled Justice?* (n 29); Lawson, ‘Disable People and Access to Justice’ (n 75).

¹⁶⁰ UNCRPD, arts 2, 5(3), 14(2), 24(2)(c), 24(5) and 27(1)(i).

appropriate accommodations”,¹⁶¹ and “accessibility”.¹⁶² All of them aim to eliminate disadvantages faced by persons with disabilities and to support their equality. However, these terms have some differences. The differences between “procedural and age-appropriate accommodations” and “reasonable accommodation”, and those between “procedural accommodation” and “accessibility” have been discussed earlier in section 4.1.2. This section focuses only on distinctions between “accessibility” and “reasonable accommodation”.

Lawson distinguishes between “accessibility” and “reasonable accommodation” arguing that accessibility concerns persons with disabilities’ needs as a group and that it is the duty of States Parties to foresee possible obstacles or to consult organisations of persons with disabilities even though there is no request for such facilities.¹⁶³ On the other hand, reasonable accommodation concerns individuals and States Parties’ duties will only apply when an accommodation is requested.¹⁶⁴ While States Parties may raise a disproportionate or undue burden as a justification for not providing reasonable accommodation without violating the principle of discrimination on the basis of disability, they have no such justification regarding accessibility.¹⁶⁵ The CtteeRPD has similarly distinguished “accessibility” and “reasonable accommodation” in its General Comment No. 2 (2014) stating that ‘States [P]arties ... have the duty to provide accessibility before receiving an individual request to enter or use a place or service’ by setting ‘accessibility standards’.¹⁶⁶ Moreover, States Parties have the duty to provide reasonable accommodation for individuals with rare impairments who cannot use the accessibility standards and this duty ‘is enforceable from the moment an individual with an impairment needs it in a given situation ... in order to enjoy her or his rights on an equal basis in a particular context’.¹⁶⁷

¹⁶¹ *ibid* art 13(1).

¹⁶² *ibid* preamble, arts 3(f), 9, and 31.

¹⁶³ Lawson, ‘Draft General Comment on Article 9’ (n 88).

¹⁶⁴ *ibid*.

¹⁶⁵ *ibid*.

¹⁶⁶ CtteeRPD ‘General Comment No 2’ (n 1).

¹⁶⁷ *ibid* paras 7-8.

In terms of implementation, Lawson suggests that States Parties ‘must set clear and concrete deadlines for compliance with relevant accessibility standards’¹⁶⁸ as it has a direct impact on the effectiveness of access to justice for persons with disabilities.¹⁶⁹ Prior to the deadline, reasonable accommodations must be provided to make the courthouse, as well as other places in the justice system, accessible and all obstacles that prevent persons with disabilities from accessing justice must be eliminated.¹⁷⁰ Providing a portable ramp is an example of reasonable accommodation that facilitates the physical accessibility of a building for the wheelchair users, and that does not amount to an undue burden on the service provider.¹⁷¹ The CtteeRPD views that, if necessary, these obligations may be gradually achieved although they are ‘precondition[s] for the effective enjoyment’ of the right to access to justice,¹⁷² which is a civil and political right¹⁷³ and requires immediate realisation under international human rights law.¹⁷⁴ In this case, it is recommended that States Parties implement a short/medium-term framework for continuously and systematically removing obstacles and barriers concerning accessibility together with ‘national accessibility standards’.¹⁷⁵ States Parties are obliged to establish these minimum national accessibility standards for services, provided by both public and private entities, concerning access to justice.¹⁷⁶ It is recommended that these standards are implemented along with ‘a legislative framework with specific, enforceable, time-bound benchmarks for monitoring and assessing’ the implementation.¹⁷⁷ These must also be done ‘in close consultation with persons with

¹⁶⁸ Lawson, ‘Draft General Comment on Article 9’ (n 88).

¹⁶⁹ Lord and others (eds) (n 139).

¹⁷⁰ *ibid.*

¹⁷¹ *ibid.*

¹⁷² CtteeRPD ‘General Comment No 2’ (n 1) para 27.

¹⁷³ ICCPR, art 2(3), 9, 14 and 26.

¹⁷⁴ *ibid* art 2; CtteeESCR ‘General Comment No 3’ (n 120) para 9; OHCHR thematic report on article 13 (n 73).

¹⁷⁵ CtteeRPD ‘General Comment No 2’ (n 1) para 28.

¹⁷⁶ UNCRPD, art 9(2)(a).

¹⁷⁷ CtteeRPD ‘General Comment No 2’ (n 1) para 30.

disabilities and their representative organizations',¹⁷⁸ and by considering the different needs of different groups of persons with disabilities, their age and gender.¹⁷⁹

The CtteeRPD expands on the phrase "closely consult with and actively involve persons with disabilities" in article 4(3) stating that the State must recognise the 'legal capacity [of persons with disabilities] to take part in decision-making process' and provide supported decision-making mechanisms for them if these are necessary to facilitate 'their personal autonomy and self-determination'.¹⁸⁰ Consultation should be timely and done openly, so that persons with disabilities have 'access to all the spaces of public decision-making' and 'all relevant information' is provided in accessible formats for every group of persons with disabilities, with a provision of reasonable accommodation if required.¹⁸¹

The CtteeRPD further expresses that the term "representative organizations" in article 4(3) refers to 'organizations of persons with disabilities'.¹⁸² These organisations also require some specific characteristics, which include:

- 1) being 'led, directed and governed by persons with disabilities';
- 2) aiming to act, express, promote pursue and/or defend the rights of persons with disabilities;
- 3) not being 'affiliated ... to any political party' and 'independent from public authorities and any other non-governmental organizations'.¹⁸³

They may be '[u]mbrella organization of persons with disabilities', '[c]ross disability organization[s]', '[s]elf-advocacy organizations', '[o]rganizations including both persons with disabilities and family members and/or relatives of persons with disabilities',

¹⁷⁸ *ibid*; UNCRPD, art 4(3).

¹⁷⁹ CtteeRPD 'General Comment No 2' (n 1) para 13.

¹⁸⁰ CtteeRPD 'General Comment No 7' (21 September 2018) UN Doc CRPD/C/GC/7, para 21.

¹⁸¹ *ibid* para 22.

¹⁸² *ibid* para 10.

¹⁸³ *ibid* para 11.

'[o]rganizations of women and girls with disabilities', or '[o]rganizations and initiatives of children and young persons with disabilities'.¹⁸⁴

The United Nations Development Group (UNDG) recommends the early involvement of persons with disabilities and their representative organisations, for the better effectiveness of the implementation process.¹⁸⁵ It suggests some actions that should be included when developing an action plan for the task requiring consultation with persons with disabilities and their representative organisations. These include:¹⁸⁶

- 1) identify key actors, by involving organisations that represent all groups with disabilities, including advocacy groups and umbrella organisations, especially those representing people in remote and rural areas;
- 2) provide support and accommodation to facilitate the different needs of persons with disabilities, with more attention to those groups with disabilities who may be marginalised in their communities due to their additional intersectionality, such as ethnic minorities, sexual orientation, and consult directly with these participants to ensure that their particular requirements are met;
- 3) ensure that the information provided, and communication methods are in accessible formats;
- 4) promote the wider participation of representative organisations of persons with disabilities; and
- 5) ensure that venues for activities and events are easily reached and accessible, including having accessible toilets, signage and adequate assistants.

¹⁸⁴ *ibid* para 12.

¹⁸⁵ UNDG, *Including the rights of persons with disabilities in United Nations programming at country level: A Guidance Note for United Nations Country Teams and Implementing Partners* (UN 2011).

¹⁸⁶ *ibid*.

The four main aspects of accessibility, commented on by the CtteeRPD as significant elements for effective access to justice, are accessibility of buildings, services, information and communication.¹⁸⁷ As article 13 imposes a duty to ensure effective access to justice on States Parties, it is clear that state entities which administer justice, such as 'law-enforcement agencies and the judiciary', have a duty to provide these accessibility measures for persons with disabilities.¹⁸⁸ The areas which must be accessible include courtrooms and other areas open to the public such as hallways, elevators, lavatories.¹⁸⁹ Article 9 does not directly place this duty on private entities, but rather on States Parties to ensure that private entities 'take into account all aspects of accessibility for persons with disabilities'.¹⁹⁰ These private entities include those whose facilities and services 'are open or provided to the public',¹⁹¹ regardless of the ownership of the buildings or related facilities.¹⁹² Accordingly, law offices and other private entities, such as non-governmental organisations providing legal assistance or advocacy services, also have to ensure this accessibility for persons with disabilities.

While the existence of steps and the absence of ramps and lifts are the most common environmental barriers for persons with disabilities,¹⁹³ they are not the only obstacles that cause buildings and services to be inaccessible for persons with disabilities. For buildings and services to be truly accessible, they also need signage in formats accessible for different groups of persons with disabilities, such as in Braille and easy to read.¹⁹⁴ Buildings or services which are open to the public may also need 'live assistance and intermediaries', such as 'guides, readers and professional sign language interpreters, to facilitate accessibility'.¹⁹⁵

¹⁸⁷ CtteeRPD 'General Comment No 2' (n 1).

¹⁸⁸ *ibid* para 37.

¹⁸⁹ Lord and others (eds) (n 139).

¹⁹⁰ UNCRPD, art 2(2)(b).

¹⁹¹ *ibid*.

¹⁹² CtteeRPD 'General Comment No 2' (n 1) para 13.

¹⁹³ *ibid* para 3.

¹⁹⁴ UNCRPD, art 9(2)(d).

¹⁹⁵ *ibid* art 9(2)(e).

The accessibility of buildings and services sometimes depends on the surrounding, atmosphere and setting. Some courtrooms may need adaptation to facilitate the particular needs of a group. An example of this could be installing screens around the witness box, or providing a separate room with live video link system witnesses with autism to give evidence.¹⁹⁶ Flynn notes that, adjustments for accessibility may require careful consideration in some cases as a facilitation for one person may cause inaccessibility for another person. For example, one person may need brighter light in the courtroom to facilitate his/her visual impairment, while another person in the same room may be very sensitive to bright light due to his/her disability;¹⁹⁷ or ramps can facilitate accessibility for persons with disabilities who use wheelchairs, but some persons with mobility difficulties for example those who use walking sticks may find more difficulty in using ramps and prefer steps.¹⁹⁸

While physical access to buildings is important, access to information and communication cannot be overlooked. It would be meaningless if persons with disabilities could physically access the courtroom, but could not understand or communicate during the proceedings due to the lack of appropriate accommodations.¹⁹⁹ Therefore, it is a duty of States Parties to ensure accessibility of information and communication²⁰⁰ that facilitates effective participation of persons with disabilities for whatever roles they take in the justice system and in all legal proceedings.²⁰¹

Accessibility of information is not limited to legal knowledge or information on legal proceedings in the context of access to justice. It includes all other information, such as, information on other rights relating to the right to access to justice, contact details of

¹⁹⁶ Katie Maras and others, 'Brief Report: Autism in the Courtroom: Experiences of Legal Professionals and the Autism Community' (2017) 47(8) *Journal of Autism and Developmental Disorders* 2610; These examples are from the criminal case setting, but they also reflect some particular needs of persons with autism.

¹⁹⁷ Flynn, *Disabled Justice?* (n 29).

¹⁹⁸ Uganda National Action on Physical Disability, *Accessibility Standards: A practical guide to create a barrier-free physical environment in Uganda* (KOBÉ Entrante 2010).

¹⁹⁹ CtteeRPD 'General Comment No 2' (n 1).

²⁰⁰ UNCRPD, arts 9 and 21.

²⁰¹ *ibid* art 13.

‘disability counsel’ or lawyers with the required level of expertise in disability issues,²⁰² and existing supports for persons with disabilities who seek justice, provided by public, private or non-profit organisations. Nevertheless, legal knowledge is of equal importance to other information and this is a precondition for effective access to justice as persons with disabilities should be able to identify their dispute issues and decide on the legal solutions or remedies they prefer.²⁰³

An example of accessible information could be the provision of information in formats, such as easy to read, audio, Braille, or sign-language video guides.²⁰⁴ Some examples of communication accessibility are a ‘cognitive interpreter’, who assists in ‘translating complicated language and circumstances’;²⁰⁵ an ‘independent non-legal advocate’, who is normally appointed by State under the law to support a person communicating his/her views and asserting his/her rights;²⁰⁶ ‘facilitated communication’, a technique of communication for a person who uses communication board or keyboard with a support of a facilitator who provide either physical assistance or emotional support, or both;²⁰⁷ ‘alternative and augmented communication’ (AAC), a collective term of alternative methods of communication to speech, which includes various methods of communication such as ‘gestures, forms of sign [(not sign-language)], communication boards, voice output communication aids, and ... web-based application’ enabling communication.²⁰⁸

It has been shown that all these aspects of accessibility are intertwined and support each other’s effectiveness. For example, a sign-language interpreter, a kind of intermediary, is a vital facilitator in accessing justice for Deaf persons, who use sign-language as their first language and may not use written language. This support can be used to access

²⁰² Herr (n 145) 356.

²⁰³ CtteeRPD ‘General Comment No 2’ (n 1); Frances Gibson, ‘Article 13 of the Convention on the Rights of Persons with Disabilities – a right to legal aid?’ (2010) 15(2) *Australian Journal of Human Rights Law* 123.

²⁰⁴ CtteeRPD ‘General Comment No 2’ (n 1).

²⁰⁵ Washington State Access to Justice Board (n 133) 16.

²⁰⁶ Flynn, *Disabled Justice?* (n 29) 95.

²⁰⁷ *ibid* 93.

²⁰⁸ *ibid* 92.

wayfinding information for the courthouse, or to understand the signage used (accessibility of buildings, services and information), to understand court rules and proceedings or make a request to court staff members or judges (accessibility of services, information and communication), or to give evidence (accessibility of services and communication). Therefore, every aspect of accessibility for persons with disabilities must be taken into account to achieve the right to access to justice guaranteed by article 13.

In conclusion, to effectively achieve access to justice, article 13 must be read and applied together with other articles of the UNCRPD, especially those on equality and non-discrimination, equal recognition before the law, and accessibility.²⁰⁹ These three elements are indispensable to persons with disabilities in effectively accessing justice, as they ensure their equality and participation in every stage of legal proceedings.²¹⁰

4.2 EVALUATION OF THE UNCRPD TOWARDS THE SIX CATEGORIES OF THE RIGHT TO ACCESS TO CIVIL JUSTICE

As discussed in the previous chapter, apart from the UNCRPD, the right to access to civil justice has been guaranteed in other international human rights law through different features, which I categorised into six main categories. This section analyses whether the UNCRPD embraces every aspect of the right to access to civil justice in those six categories and whether it can potentially resolve the problematic issues occurring when applying international human rights law guarantees on access to civil justice to the disability context.

²⁰⁹ UNCRPD, arts 5, 9, 12 and 21.

²¹⁰ CtteeRPD 'General Comment No 2' (n 1); Flynn and Lawson (n 82); Series, 'Legal capacity and participation in litigation' (n 143).

4.2.1 Right to Equality before Courts and Tribunals

This category embraces all aspects of equal access to courts and tribunals, including access to legal proceedings and environmental accessibility; equality of arms; equal treatment by courts and tribunals; and equality before the law.

The findings from the previous chapter show that the right to equal access to proceedings of courts and tribunals is guaranteed in international human rights law without any restrictions on legal capacity.²¹¹ However, the main concern when applying this right to the disability context is the restriction of legal capacity within domestic law (eg guardianship regimes) that causes some persons with disabilities, especially those with intellectual and psychosocial disabilities, to lack the legal standing to initiate legal proceedings. The UNCRPD clearly guarantees the legal capacity of all persons with disabilities, including those with intellectual and psychosocial disabilities.²¹² When reading article 12 on legal capacity together with article 13 on effective access to justice, it reaffirms that all persons with disabilities are recognised as having ‘equal standing in courts and tribunals.’²¹³ Moreover, the UNCRPD strives to ensure that this guarantee will be effective in practice by imposing States Parties a duty to provide persons with disabilities support in exercising their legal capacity.²¹⁴

As discussed in the section on the interrelationship of article 13 and article 9 on accessibility, it shows that the UNCRPD covers the environmental accessibility dimension of the right to equal access to courts and tribunals. If this guarantee is strictly and effectively implemented in the States Parties, the prior issues on environmental accessibility of persons with disabilities concerning access to civil justice will accordingly be resolved.

Equality of arms, as a fair opportunity to present and defend one’s case, concerns diverse conditions, including accessibility of places, services, information and

²¹¹ Equal before courts and tribunals: ICCPR, art 14 and ICMW, art 18; equal access to public service: UDHR, art 21(2), ICCPR art 25(c) and ICERD, art 5(f).

²¹² UNCRPD, art 12(2).

²¹³ CtteeRPD ‘General Comment No 1’ (n 1) para 38.

²¹⁴ UNCRPD, art 12(3).

communication; availability of communication and legal assistance; equal treatment in the proceedings; ‘opportunity to adduce and challenge evidence’.²¹⁵ Apart from the communication and legal assistance issues, which will be discussed in the next subsections, the UNCRPD fulfils these conditions for persons with disabilities to enjoy the rights to equality of arms through its article 13 in conjunction with article 5 guaranteeing equal treatment, article 9 on all aspects of accessibility, and article 12 recognising legal capacity and legal standing of persons with disabilities. In particular, the provision of procedural and age-appropriate accommodations in article 13 is a measure to ensure that, in practice, persons with disabilities have equal opportunity to effectively participate in all legal proceedings, including to give evidence.²¹⁶ In this respect, persons with disabilities, especially those with intellectual or psychosocial disabilities, must have their credibility and capacity to testify respected and must not be subjected to a competency test which discriminates in purpose or effect against persons with disabilities.²¹⁷ It is evident that this concept has been adopted by the Canadian Supreme Court, which allows persons with intellectual disabilities to ‘testify in criminal cases on the basis of a promise to tell the truth’, rather than a test to see if they understand the meaning of the truth.²¹⁸

Equal treatment by courts and tribunals is guaranteed by article 13 together with article 5 on equality and non-discrimination and article 2, which clarifies the meaning of “discrimination on the basis of disabilities”. Moreover, the UNCRPD tries to prevent indirect discrimination towards persons with disabilities in access to justice by educating people who work in the justice system, by raising awareness of every sector in society, and by combatting negative attitudes towards disability.²¹⁹

Ultimately, according to my argument in the previous chapter that the right to equality before courts and tribunals could be addressed within the right to equality before the law, the UNCRPD also guarantees the right to equality before the law through article 5 on

²¹⁵ OHCHR thematic report on article 13 (n 73) para 24.

²¹⁶ *ibid* para 24.

²¹⁷ *ibid* para 56.

²¹⁸ *ibid* para 56; This example is from the criminal case perspective, but it shows the good practice in implementation of the UNCRPD obligations, which can be also applied to civil cases.

²¹⁹ UNCRPD, arts 8 and 13(2).

equality and non-discrimination, which confirms that persons with disabilities are entitled to equal protection of the law without any discrimination, on an equal basis with others.

4.2.2 Right to Legal Assistance or Representation

Although the findings from the previous chapter show that the right to legal assistance or representation is included in some civil proceedings, it is very limited in some cases, such as those concerning the deprivation of liberty of a child,²²⁰ or an ineffective remedy for violation of civil and political rights, rights under the Convention on the Elimination of All Forms of Discrimination against Women, and for victims of torture or ill-treatment.²²¹ The absence of legal representation could possibly affect the right to a fair hearing and equality of arms. Without legal representation, persons with disabilities may not be able to present and defend their case as equally and effectively as their opponents, as most legal proceedings are complex and may require assistance from trained lawyers.²²² Frances Gibson also argues that legal aid in civil cases is vital for persons with disabilities to enjoy their basic citizens' rights due to their disadvantaged position in society.²²³ It is as important as legal awareness and legal representation for effective access to justice.²²⁴

The right to legal assistance or representation is not explicitly articulated in the UNCRPD. However, the CtteeRPD also elaborates that persons with disabilities must 'have access to legal representation on an equal basis with others'.²²⁵ From my perspective, this does not impose a requirement on States Parties to provide additional legal aid for persons

²²⁰ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC), art 37(d).

²²¹ CtteeCPR 'General Comment No 32' (23 August 2007) UN Doc CCPR/C/GC/32 para 10; CtteeEDAW 'General Recommendation No 28' (16 December 2010) UN Doc CEDAW/C/GC/28 para 34; CtteeAT 'General Comment No 3' (19 November 2012) UN Doc CAT/C/GC/3 para 30.

²²² Gibson (n 203); Asher Flynn and others, 'Legal Aid and Access to Legal Representation: Redefining the Right to a Fair Trial' (2016) 40 Melbourne University Law Review 207.

²²³ Gibson (n 203).

²²⁴ *ibid.*

²²⁵ CtteeRPD 'General Comment No 1' (n 1) para 38.

with disabilities, but they must ensure that persons with disabilities can access the existing legal aid on an equal basis with others. However, under the UNCRPD, providing disability-specific legal aid would also be permitted as a specific measure 'necessary to accelerate or achieve de facto equality of persons with disabilities'.²²⁶ The CtteeRPD also views the right to legal aid as essential to enabling persons with disabilities to participate in legal proceedings and to achieve effective access to justice.²²⁷ However, the Committee has only suggested that legal aid and appropriate legal advice must be provided in cases where persons with disabilities 'seek to enforce their rights to live independently in the community',²²⁸ and where they need to challenge an interference of their right to legal capacity.²²⁹ The list of cases where legal aid is required seems gradually extended since the Committee has not yet specifically rendered an exclusive General Comment on article 13 and still continuously gives recommendations concerning implementation of the UNCRPD obligations in its Concluding Observations. The Committee also repeatedly suggests to States Parties to ensure persons with disabilities have access to free or affordable quality legal aid,²³⁰ especially for those who live in residential institutions.²³¹ The Committee specifically recommended that China allocate the necessary human and financial resources to its legal aid service centres,²³² and requested that the United Kingdom removes court and employment tribunal fees for persons with disabilities to ensure their effective access to justice.²³³

²²⁶ UNCRPD, art 5(4).

²²⁷ CtteeRPD 'General Comment No 5' (n 1) para 81; CtteeRPD 'General Comment No 6' (n 1) para 52.

²²⁸ CtteeRPD 'General Comment No 5' (n 1) para 66.

²²⁹ CtteeRPD 'General Comment No 1' (n 1) para 38.

²³⁰ CtteeRPD 'General Comment No 6' (n 1) paras 31 and 73; CRPD/C/ARM/CO/1, para 22; CRPD/C/COK/CO/1, para 26(b); CRPD/C/SLV/CO/1, para 30(a); CRPD/C/KEN/CO/1, para 26(a); CRPD/C/SVK/CO/1, para 41; CRPD/C/UGA/CO/1, para 25(a); CRPD/C/GBR/CO/1, para 33(c).

²³¹ CRPD/C/LVA/CO/1, para 23(c); CRPD/C/MEX/CO/1, para 26(b); CRPD/C/MDA/CO/1, para 27(c).

²³² CRPD/C/CHN/CO/1, para 23.

²³³ CRPD/C/GBR/CO/1, para 33(c).

Unaffordable legal services are not the only cause preventing persons with disabilities from securing legal representation, there are also other dilemmas arising when persons with disabilities need legal representation for legal action.²³⁴ These include a lack of information on disability rights by specialised lawyers, as their availability is limited,²³⁵ communication barriers between lawyers and clients with disabilities, especially those with psychosocial or intellectual disabilities,²³⁶ and environmental inaccessibility of law offices.²³⁷ In some cases, lawyers may refuse to directly represent a client whose capacity to instruct a lawyer is in question, but only agree to represent the person with a disability through his/her proxy or legal guardian.²³⁸

The communication barriers between lawyers and their clients with disabilities may impede effective access to justice.²³⁹ Many legal professionals may not know how to effectively communicate with persons with disabilities because, most likely, they have not been trained on this particular topic in law school.²⁴⁰ The communication issue is already addressed in some countries, such as the United States, where the Americans with Disabilities Act requires all law offices to accommodate effective communication with their clients with disabilities through the use of auxiliary aids and services, without extra charge, to ensure equal opportunity of persons with disabilities to access these services.²⁴¹ The use of 'third-party support and assistance' is also suggested to eliminate the difficulty in communication between the lawyers and clients with disabilities from an

²³⁴ Jane McGillivray and Barry Waterman, 'Knowledge and Attitudes of Lawyers Regarding Offenders with Intellectual Disability' (2003) 10(1) *Psychiatry, Psychology and Law* 244.

²³⁵ Herr (n 145).

²³⁶ *ibid.*

²³⁷ Gibson (n 203).

²³⁸ Herr (n 145) 364, citing William Simon 'Ethical Discretion in Lawyering' (1988) 101(6) *Harvard Law Review* 1083.

²³⁹ *ibid.*

²⁴⁰ Gibson (n 203).

²⁴¹ Trevor Finneman and Michelle Uzeta, 'Serving Clients with Disabilities: An Accessibility Guide for Law Firms', (*LawPracticeToday*, July 2013)

<www.americanbar.org/content/newsletter/publications/law_practice_today_home/lpt-archives/july13/serving-clients-with-disabilities.html> accessed 1 September 2018.

early stage.²⁴² This support assists in clarifying the wishes of persons with disabilities and giving them emotional support, as well as giving practical guidance to the lawyer.²⁴³ This may include support from a family member or a close friend who is familiar with the person with disabilities, or an advocacy service, either provided by State (such as the National Advocacy Service for People with Disabilities in Ireland),²⁴⁴ or by peer support group (such as '[s]elf-advocacy groups').²⁴⁵ In this respect, the advocacy service provides both communication assistance for persons with disabilities and support in exercising their legal capacity, which represents their will and preferences.²⁴⁶

The reasons why lawyers may refuse to directly represent a client with questionable capacity may vary in different jurisdictions. For example, in the United States, lawyers will have additional responsibilities if they represent a client with 'mental or physical condition' that causes such a client inability to make a decision on his/her own behalf.²⁴⁷ Despite that, their legal professional codes of conducts provide inadequate guidance on what lawyers could do to represent such a client.²⁴⁸ In England and Wales, lawyers may be found negligent when taking instruction directly from persons with disabilities themselves, rather than arranging for an appointment of a litigation guardian, who can assist and protect benefits of persons with disabilities in legal proceedings and settlements.²⁴⁹

According to my discussion, the UNCRPD seems to include the right to legal aid as a measure to ensure effective access to justice, but it seems it is not an absolute right for every type of civil case. This right still very much relies on the interpretation of other international human rights law. However, the UNCRPD perspective adequately responds to problematic issues in other areas relating to legal assistance or representation through

²⁴² Herr (n 145) 359.

²⁴³ *ibid.*

²⁴⁴ Citizens Information Board, 'National Advocacy Service for People with Disabilities' <www.citizensinformationboard.ie/en/services/advocacy/> accessed 21 May 2018.

²⁴⁵ Herr (n 145) 367.

²⁴⁶ UNCRPD, art 12(3)-(4).

²⁴⁷ ABA Model Code of Professional Responsibility (1983), EC 7-12

²⁴⁸ Herr (n 145).

²⁴⁹ Series, 'Legal capacity and participation in litigation' (n 143).

its guarantees on accessibility and legal capacity of persons with disabilities. This also includes accessibility to facilities and services of private entities such as law offices and non-government organisations.²⁵⁰ It also reaffirms the legal capacity of persons with disabilities in all aspects of their life, which includes legal capacity to instruct lawyers and pursue litigation, and guarantees persons with disabilities the support they may need in exercising this legal capacity, with safeguards to ensure that their will and preferences are respected.²⁵¹

4.2.3 Right to Communication Assistance

According to the findings in the previous chapter, this right is somewhat guaranteed in international human rights law, but very limited in civil matters. It is also unclear whether this right covers other forms of communication (other than spoken and sign-languages), which may be required by some persons with disabilities.

During the drafting process of the UNCRPD, the International Disability Caucus illustrated the importance of communication accessibility by presenting a story of a victim with an intellectual disability in Israel whose testimony was disregarded because of her inability to correctly answer questions; as a result the abuser was deemed not guilty.²⁵² In response to those limitations and ambiguities, article 13 imposes the duty to provide procedural and age-appropriate accommodations to facilitate effective participation of persons with disabilities, including in the role of a witness, which may include ‘the recognition of diverse communication methods of persons with disabilities’ in court and tribunal proceedings.²⁵³ Moreover, the UNCRPD imposes the duty to provide communication accessibility and reasonable accommodation, which has been earlier discussed in this chapter. Accordingly, the right to communication assistance for persons with disabilities is well recognised by the UNCRPD as an essential element of the right

²⁵⁰ UNCRPD, art 9; CtteeRPD ‘General Comment No 2’ (n 1) para 13.

²⁵¹ UNCRPD, art 12.

²⁵² RI, ‘Daily summary - the seventh session (18 January 2006)’ (n 63).

²⁵³ CtteeRPD ‘General Comment No 6’ (n 1) para 51.

to access to civil justice and eliminates uncertainty concerning this right in other international human rights instruments.

4.2.4 Right to be Heard or to a Fair Hearing by Courts, Tribunals or Other Competent Bodies in Personal Presence within a Reasonable Time or without Delay

This right includes four aspects, which are the notions of competence, independence and impartiality of courts and tribunals; fairness and publicity; personal presence; and timeliness of the proceedings.

The guarantees on competence and independence of courts and tribunals are firmly established in international human rights law and do not seem to be particular concerns within the disability context. The UNCRPD seems to focus more on impartiality issues, which may be affected by lack of knowledge or misunderstanding about disability. Accordingly, the UNCRPD emphasises, in its article 13, the need for appropriate training for everyone who works in the justice system, as well as the awareness-raising, in article 8, to raise awareness throughout society' on rights and dignity of persons with disabilities and 'to combat stereotypes, prejudices and harmful practices relating to persons with disabilities ... in all areas of life'.²⁵⁴

In terms of fairness and publicity, the broad concept of article 13 guaranteeing effective access to justice on an equal basis with others clearly resonates with this concept in international human rights law. The inclusion of 'the provision of procedural and age-appropriate accommodations' to facilitate effective participation of persons with disabilities in all legal proceedings firmly enhances the application of this concept into practice,²⁵⁵ as well as the equality of arms principle.²⁵⁶ Article 13 in conjunction with article 12 also affirms legal capacity of persons with disabilities, especially those with intellectual and psychosocial disabilities, to be witnesses and to have the validity of their

²⁵⁴ UNCRPD, arts 8 and 13.

²⁵⁵ UNCRPD, art 13(1).

²⁵⁶ OHCHR thematic report on article 13 (n 73) para 24.

testimony respected,²⁵⁷ and guarantees availability of supportive measures for exercising these rights.²⁵⁸

The right to effective participation of persons with disabilities in all legal proceedings recognised in article 13 is directly relevant to the personal presence element of the right to a fair hearing in international human rights law, whereby, in civil cases, persons directly affected by legal proceedings have the right to attend a hearing concerning their interests.²⁵⁹ The provisions of accessibility, procedural accommodation, and reasonable accommodation play an important role to accommodate their presence in the proceedings.²⁶⁰ These provisions correct the fairness issues on the right to attend a hearing by persons with disabilities, which were overlooked by international human rights law, such as a presupposition on the receipt of the hearing information in inaccessible formats. In addition to physical presence in the proceedings, the UNCRPD further advances the personal presence element, by allowing persons with disabilities to give their testimony at their residence or through video link,²⁶¹ and by respecting the person's will and preferences or pursuing the 'best interpretation of the will and preference' when the person cannot express them directly.²⁶²

On the issue of timeliness of the proceedings, the UNCRPD does not clearly emphasise this aspect in article 13, but it seems to be included in broad sense of "effective access to justice", which the CtteeRPD has interpreted to require 'timely remedies for rights violations'.²⁶³ However, timeliness does not always refer to rapidity as some persons with disabilities may need more time to make a particular decision,²⁶⁴ communicate

²⁵⁷ *ibid* para 56.

²⁵⁸ UNCRPD, art 12(3).

²⁵⁹ Sangeeta Shah, 'Detention and Trial' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014) 259; See section 3.2.4 in Chapter 3 for detail.

²⁶⁰ UNCRPD, arts 5, 9 and 13.

²⁶¹ OHCHR thematic report on article 13 (n 73) paras 24 and 30.

²⁶² CtteeRPD 'General Comment No 1' (n 1) paras 20 and 21; OHCHR thematic report on article 13 (n 73) para 49.

²⁶³ OHCHR thematic report on article 13 (n 73) para 3.

²⁶⁴ Herr (n 145) 364-68.

effectively,²⁶⁵ or meaningfully participate in the proceedings (such as by adjusting the hearing timetable and taking additional breaks during the sessions).²⁶⁶

All in all, it can be said that the UNCRPD covers all aspects of the right to be heard in this section, and further advances the personal presence aspect as mentioned.

4.2.5 Right to a Remedy, Reparation or Compensation

Article 13 does not directly mention the right to a remedy. The drafting history of the UNCRPD shows that the wording of “effective remedy” was also proposed,²⁶⁷ but not adopted due to its composition of both civil and political rights and economic, social and cultural rights.²⁶⁸ However, it might be difficult to reject the arguments that ‘an effective remedy is a central component of the right to access to justice’ and that it is a reason why people seek justice.²⁶⁹ In terms of civil justice, this right refers to any kind of redress, reparation, and compensation. The CtteeRPD emphasises the importance of ‘availability and accessibility’ of legal remedies in discrimination cases, which ‘should aim at changing attitudes’ and preventing further discriminatory actions.²⁷⁰ In this regard, the accessibility guarantee is crucial to support this requirement.²⁷¹ Thus, it can be interpreted that the UNCRPD guarantees the right to a remedy, reparation or compensation for persons with disabilities and reinforces the requirement of accessibility to accommodate specific needs of persons with disabilities.

²⁶⁵ Lawson, ‘Disable People and Access to Justice’ (n 75) 94.

²⁶⁶ *ibid* 100.

²⁶⁷ LSN, ‘Daily summary – Art 9 (26 May 2004)’ (n 31).

²⁶⁸ Flynn, *Disabled Justice?* (n 29).

²⁶⁹ OHCHR thematic report on article 13 (n 73) para 43.

²⁷⁰ *ibid* para 48, citing CRPD/C/BEL/CO/1, para 12.

²⁷¹ UNCRPD, art 9.

4.2.6 Right to Complain, Challenge or Appeal

Similar to the right to a remedy, article 13 does not explicitly emphasise the rights in this category, but there is evidence that the UNCRPD guarantees these rights, through a number of recommendations, in both its General Comments and Concluding Observations, and through diverse contexts. However, these comments do not represent an exhaustive list of circumstances as the CtteeRPD is continuously developing its General Comments and Concluding Observations to States Parties.

The CtteeRPD refers to the right to complain in many contexts, including discrimination,²⁷² deprivation of liberty,²⁷³ torture and ill-treatment,²⁷⁴ education,²⁷⁵ and abuse or violence.²⁷⁶ The specific dimensions of these individual rights and complaining about violations of these specific rights are outside scope of this research. However, the CtteeRPD repeatedly emphasises the availability and accessibility of independent formal complaint mechanisms, which States Parties can strengthen within existing national mechanisms (eg human rights bodies, equality tribunals, or the Ombudsman) or by establishing a new mechanism, in order to receive, investigate and remedy complaints

²⁷² CtteeRPD 'General Comment No 3' (n 1) para 18; CtteeRPD 'General Comment No 6' (n 1) para 73(i); CRPD/C/BEL/CO/1, para 12; CRPD/C/BOL/CO/1, para 12; CRPD/C/COL/CO/1, para 15(c); CRPD/C/COK/CO/1, para 18(a); CRPD/C/DNK/CO/1, paras 15 and 17; CRPD/C/HTI/CO/1, para 9(c); CRPD/C/HND/CO/1, para 14; CRPD/C/JOR/CO/1, para 14(a); CRPD/C/LUX/CO/1, para 13(b); CRPD/C/MNE/CO/1, para 11; CRPD/C/NZL/CO/1, para 10; CRPD/C/THA/CO/1, para 14.

²⁷³ CRPD/C/BIH/CO/1, para 31; CRPD/C/CZE/CO/1, para 33; CRPD/C/LTU/CO/1, para 33(b).

²⁷⁴ CRPD/C/RUS/CO/1, para 35.

²⁷⁵ CtteeRPD 'General Comment No 4' (n 1) para 65; CRPD/C/DNK/CO/1, para 55; CRPD/C/TKM/CO/1, para 4(d).

²⁷⁶ CRPD/C/BRA/CO/1, para 33; CRPD/C/CHN/CO/1, para 91; CRPD/C/DOM/CO/1, para 33(b); CRPD/C/GAB/CO/1, para 39; CRPD/C/DEU/CO/1, para 36; CRPD/C/HTI/CO/1, para 31(b); CRPD/C/ITA/CO/1, para 44; CRPD/C/LUX/CO/1, para 33(f); CRPD/C/MNE/CO/1, para 33; CRPD/C/SVK/CO/1, para 48; CRPD/C/TKM/CO/1, para 30(a); CRPD/C/UGA/CO/1, para 31(a).

for violations of the rights of persons with disabilities.²⁷⁷ In some circumstances, such as concerning violence or the right to life, the Committee has specified, in its Concluding Observation Reports for Cyprus and Montenegro, that these mechanisms should be anonymous or confidential.²⁷⁸ The Committee suggests some measures which should be introduced to reinforce complaints mechanisms. These include the protection from negative consequences after making complaints, which should be embedded in national legislation;²⁷⁹ and the accessibility of information, communication and support services, concerning complaint mechanisms and how to access to these mechanisms.²⁸⁰

On the right to challenge or appeal, the CtteeRPD mostly comments on this guarantee in the context of deprivation of liberty, where persons with disabilities, especially those with psychosocial or intellectual disabilities, have been involuntarily detained or

²⁷⁷ CtteeRPD 'General Comment No 4' (n 1) para 65; CtteeRPD 'General Comment No 6' (n 1) para 73(h); CRPD/C/BEL/CO/1, para 29; CRPD/C/BOL/CO/1, para 12; CRPD/C/BIH/CO/1, para 31; CRPD/C/BRA/CO/1, para 33; CRPD/C/CHN/CO/1, para 91; CRPD/C/COK/CO/1, para 18(a); CRPD/C/CYP/CO/1, para 40; CRPD/C/CZE/CO/1, para 33; CRPD/C/DNK/CO/1, paras 15, 41 and 55; CRPD/C/ECU/CO/1, paras 15 and 37(c); CRPD/C/ETH/CO/1, para 36(b); CRPD/C/EU/CO/1, para 29; CRPD/C/GAB/CO/1, para 39; CRPD/C/DEU/CO/1, para 36; CRPD/C/GTM/CO/1, para 46; CRPD/C/HTI/CO/1, paras 9(c) and 31(b); CRPD/C/JOR/CO/1, paras 14(a-b) and 32(b); CRPD/C/LTU/CO/1, paras 33(b) and 35; CRPD/C/LUX/CO/1, para 11; CRPD/C/MEX/CO/1, para 20(b); CRPD/C/MNE/CO/1, paras 21(a) and 33(a); CRPD/C/MAR/CO/1, para 35(a); CRPD/C/OMN/CO/1, paras 32(b) and 60(c); CRPD/C/PRT/CO/1, para 23; CRPD/C/RUS/CO/1, para 35; CRPD/C/THA/CO/1, para 14; CRPD/C/TUN/CO/1, para 17(b); CRPD/C/TKM/CO/1, para 30(a); CRPD/C/UGA/CO/1, para 31(a); CRPD/C/ARE/CO/1, para 32(e).

²⁷⁸ CRPD/C/CYP/CO/1, para 40; CRPD/C/MNE/CO/1, paras 21 and 33(a).

²⁷⁹ CtteeRPD 'General Comment No 6' (n 1) paras 31(c) and 73(i).

²⁸⁰ CtteeRPD 'General Comment No 5' (n 1) para 85; CtteeRPD 'General Comment No 6' (n 1) para 51; CRPD/C/CHN/CO/1, para 91; CRPD/C/ETH/CO/1, para 12; CRPD/C/ITA/CO/1, para 12; CRPD/C/LUX/CO/1, para 13(c); CRPD/C/MNE/CO/1, para 11(a); CRPD/C/MAR/CO/1, para 35(a); CRPD/C/OMN/CO/1, para 32(b); CRPD/C/UGA/CO/1, para 31(a); CRPD/C/ARE/CO/1, para 32(e).

institutionalised.²⁸¹ In this respect, it recommends that States Parties ensure that people who are involuntarily detained can access courts to challenge these actions. However, the Committee aims for the ultimate abolition of legislation and practices concerning involuntary treatment and their replacement with health-care services based on free and informed consent.²⁸² The Committee also comments on the right to challenge or appeal in the area of education, in terms of the availability of mechanisms to review decisions and information on how to access these mechanisms, for which information must be widely disseminated and publicised to persons with disabilities and their representative organisations.²⁸³ Moreover, the Committee has noted that the right to challenge or appeal must also be guaranteed in the contexts of interference with the right to legal capacity and in situations where a support person in exercising this right does not act in accordance with the will and preferences of the person concerned.²⁸⁴ It further emphasises this right in the area of independent living in the community,²⁸⁵ and denial of reasonable accommodation and other forms of disability-based discrimination.²⁸⁶ The Committee suggests that the Republic of Moldova publishes information about the cases concerning discrimination on the basis of disability and their outcomes, in accessible formats.²⁸⁷ Accordingly, the interpretations of the Committee seem to extend the right to challenge or appeal in the civil context in international human rights law to include other areas beyond the cases concerning deprivation of liberty or an effective remedy.²⁸⁸

In conclusion, the findings from the analysis in this section show that the UNCRPD embraces every aspect of the right to access to civil justice in the six categories of the right to access to civil justice in international human rights law. The UNCRPD gives

²⁸¹ CRPD/C/SLV/CO/1, para 31; CRPD/C/LVA/CO/1, para 25(b); CRPD/C/MNE/CO/1, para 29; CRPD/C/SYC/CO/1, para 30; CRPD/C/UKR/CO/1, para 31; CRPD/C/KOR/CO/1, para 26; CRPD/C/TUN/CO/1, para 25.

²⁸² *ibid.*

²⁸³ CtteeRPD 'General Comment No 4' (n 1) paras 52, 63(l) and 65; CRPD/C/ESP/CO/1, para 44(d).

²⁸⁴ CtteeRPD 'General Comment No 1' (n 1) paras 29(d) and 38.

²⁸⁵ CtteeRPD 'General Comment No 5' (n 1) para 81.

²⁸⁶ CRPD/C/MDA/CO/1, para 11.

²⁸⁷ *ibid.*

²⁸⁸ See text to nn 118-119 in section 3.2.6.

solutions to problematic issues which occur when international guarantees are applied in the disability context, and reinforces the effectiveness of access to civil justice for persons with disabilities through diverse guarantees throughout the Convention. The phrase “effective access to justice for persons with disabilities on an equal basis with others” in article 13 is the core guarantee of the right to access to justice for persons with disabilities. Its effectiveness is strengthened by other guarantees within the UNCRPD, including equality and non-discrimination, equal recognition before the law, the provisions of accessibility and reasonable accommodations, training and awareness-raising, and participation.

4.3 KEY ELEMENTS OF ACCESS TO CIVIL JUSTICE IN MY VIEW

According to the conception of access to justice for persons with disabilities in Chapter 1, the meaning of access to civil justice shown in international human rights law in Chapter 2 and the meaning of access to civil justice under the UNCRPD in this chapter, the key elements of access to civil justice for persons with disabilities in my view consist of:

- Element 1: effective and enforceable legal mechanisms that promote, protect, and guarantee the human rights of persons with disabilities – eg international, regional and domestic law;
- Element 2: a justice system based on the principles of competence, independence and impartiality of both the institutions themselves and their proceedings – eg courts, tribunals and alternative dispute resolution system;
- Element 3: supportive mechanisms that enhance the capacity of persons with disabilities to assert their rights (through legal mechanisms in element 1) and to access the justice system (element 2) – eg legal aid, advocacy services, training, accessibility of locations, services, information and communication;
- Element 4: positive and inclusive attitudes towards persons with disabilities, which respect the dignity, will and preferences of persons with disabilities, support their participation in all activities (including legislation activities of the

element 1 and activities in the justice system within the element 2), accept their diversity, and take their different needs into account on an equal basis with others; and

Element 5: effective enforcement mechanisms, which can guarantee that persons with disabilities are able to enforce their rights (guaranteed in the legal mechanisms in element 1) in accordance with the decisions or outcomes provided through the justice system (established in element 2). However, a detailed analysis of the enforcement mechanisms of the justice system are beyond the scope of this research, which only focuses on the stages before and during legal proceedings.

These five elements must be collaboratively operationalised to serve the ultimate aim of achieving “access to civil justice functioning” that persons with disabilities have reason to value in their lives. Each element cannot be fulfilled by solely applying Sen’s Capability Approach, but by harmoniously integrating different conceptions of justice and international human rights law as follows.

Element 1 on the effective and enforceable legal mechanisms is considered, in Sen’s approach, to include social and environmental factors that influence opportunities and freedoms of persons with disabilities to achieve access to civil justice. It also needs the just legislative institutions, from Rawls’ perspective, to create legal mechanisms that equally provide guarantees of rights and liberties to persons with disabilities. Current international human rights law, including the UNCRPD, endeavours to exhibit these abstract conceptions into a more practical framework to be applied at the national level. The way in which it works at the domestic level will be demonstrated through the case studies of Thailand and Ireland in chapter 5 and 6, respectively.

Element 2 on the justice system also represents social and environmental factors in Sen’s approach. The way in which the justice system is established and operated has a significant impact on people’s freedoms and opportunities to achieve effective access to civil justice. For example, a justice system that lacks the notions of competence, independence and impartiality cannot guarantee either party to a dispute that his/her rights will be justly protected, which means that the existing legal guarantees in the element 1 are likely ineffective and unenforceable without the proper justice system. From Rawls’ sense, institutions within the justice system must equally provide legal protection to people in their society. These institutions must also be controlled under the

rule of law to prevent an exercise of arbitrary power, which is unacceptable from a republicanism perspective. Moreover, the principles of equality must be applied to ensure that these institutions provide everyone, including persons with disabilities, with equality. International human rights law provides minimum standards to ensure that the justice system in every country can provide adequate protection for everyone equally and effectively protect the rule of law principle. The case study chapters will illustrate how this element is applied in practice.

Element 3 on supportive mechanisms is primarily drawn from Sen's Capability Approach to enhance individuals' capacity to achieve their functionings. This element is extended by republicanism to ensure that the available assistance to achieve people's goals is not exposed to arbitrary power, by providing the assistance (which I prefer to call "supportive mechanisms" as explained) through legislation. Therefore, this element partially overlaps with element 1. Current international human rights law, including the UNCRPD, provides some supportive mechanisms which can be used in relation to access to civil justice. The case study chapters will further discuss how Thailand and Ireland apply this element in their domestic law.

Element 4 on positive and inclusive attitudes toward persons with disabilities is drawn from Sen's Capability Approach, which considers this element a crucial demand for an effective democracy and a fair society,²⁸⁹ as well as the principles of equality, especially their substantive strand aiming to 'enhance voice and participation' of persons with disabilities, who experience exclusion from the society due to their group identity.²⁹⁰ International human rights law, the UNCRPD in particular, stresses the necessity of this element for persons with disabilities to enjoy their human rights, including effective access to civil justice.

Element 5 on effective enforcement mechanisms is drawn from Sen's Capability Approach, which has as its ultimate goal to enhance justice in current societies and eliminate injustice permanently.²⁹¹ This element overlaps with the demands in element 1 on legal mechanisms and element 2 on the justice system. Although this research is not

²⁸⁹ Amartya Sen, *The Idea of Justice* (The Belknap Press 2009).

²⁹⁰ Fredman, 'Substantive equality revisited' (n 129) 712.

²⁹¹ Sen (n 289).

further extended to the enforcement aspect of justice, it still needs to look ahead to enforceable outcomes as a result of effective access to civil justice. These outcomes should be foreseeable to justify the effectiveness of access to civil justice.

These elements will be implicitly reflected in case studies of Thailand and Ireland in the next two chapters, through the evaluation of applicable legislation, of each country, concerning access to civil justice. The evaluation of these elements will be revisited in the cross-case analysis in chapter 7.

CONCLUSION

The UNCRPD adopts an ‘inclusive equality’ approach, which reflects Fredman’s four-dimensional approach of substantive equality. This approach aims to recognise and redress disadvantages, stigma, stereotyping and humiliation faced by persons with disabilities, to facilitate their full, effective and inclusive participation in society, and to accommodate their difference as a part of human diversity. To comply with this approach, article 13 of the UNCRPD, which is the main article guaranteeing the right to access to civil justice for persons with disabilities, must be read in conjunction with other articles in the Convention.

It can be said that the UNCRPD comprehensively guarantees the rights in the six categories of the right to access to civil justice in international human rights law and resolves all the issues when applying the rights in the six categories to the disability context. The UNCRPD transforms the notion of equality before the law in international human rights law, which aims to redress the inequality faced by persons with disabilities, including where individual’s legal capacity has been restricted or denied within domestic law. It recognises the universal legal capacity of persons with disabilities, which ensures persons with disabilities their rights to equality before courts and tribunals, in terms of their equal access to courts and tribunals, equality of arms, equal treatment by courts and tribunals, and equality before the law as a whole. It further ensures that this right is not only protected in theory but that persons with disabilities can enjoy it in practice through measures supporting their exercise of legal capacity and safeguarding them against possible abuse. Moreover, the UNCRPD especially strengthens the right to communication assistance and the personal presence element of the right to a fair hearing in international human rights law. It equally provides such assistance in both

criminal and civil cases and expands the perception of communication assistance to cover a wider means of communication beyond spoken and sign-language interpretations. Furthermore, it transforms the personal presence element in civil cases from a non-absolute right to attend a hearing into a right to effective participation of persons with disabilities in all legal proceedings. The effectiveness of this transformation is supported by the provisions of accessibility, procedural accommodation, and reasonable accommodation guaranteed within the Convention.

Considering the meaning of “access to civil justice” in this chapter together with the findings in the previous chapters, the research summarised five core elements of effective access to civil justice in the disability context. These elements include 1) effective and enforceable legal mechanisms, 2) a justice system based on the principles of competence, independence and impartiality, 3) supportive mechanisms, 4) positive and inclusive attitudes towards persons with disabilities, and 5) effective enforcement mechanisms. They can be collectively called the five-elemental conception of access to civil justice for persons with disabilities. This conception will be used to analyse findings from the next two chapters (Chapters 5-6) in Chapter 7.

CHAPTER 5:

Case Study of Thailand

INTRODUCTION

This chapter presents and discusses access to civil justice for persons with disabilities in the Kingdom of Thailand. It is divided into four parts: (1) information on Thailand and its legal system, including significant implications of the Constitution of the Kingdom of Thailand BE2560 (2017 Constitution) on the right to access to civil justice;¹ (2) demographic information about persons with disabilities in Thailand; (3) legal mechanisms and regulations relating to access to civil justice for persons with disabilities (referring to the six categories of the right to access to civil justice -- each category consists of (a) the existing laws and regulations on the right to access to civil justice, (b) the analysis of their application based on the interview research of four groups of respondents and my observation, (c) the evaluation of these laws and regulations in terms of whether they meet international and regional human rights law standards on the rights to access to civil justice for persons with disabilities); and (4) recommendations towards achieving compliance with international human rights law standards, and the UNCRPD principles on access to civil justice.

It should be noted that the interviews for this research were conducted under the Constitution of the Kingdom of Thailand (Interim) BE2557 (2014 Interim Constitution).² After the interviews were completed, the 2014 Interim Constitution was replaced by the 2017 Constitution on 6 April 2017; the implications of which will be discussed in section 5.1.3.

¹ Constitution of the Kingdom of Thailand BE2560(2017) (6 April 2017) GG 134(40gor) 1 (Constitution 2017).

² Constitution of the Kingdom of Thailand (Interim) BE2557(2014) (22 July 2014) GG 131(55gor) 1 (Interim Constitution 2014).

5.1 INFORMATION ON THAILAND AND ITS LEGAL SYSTEM

This section consists of five subsections introducing overall information on Thailand and summarising information on its legal system, court system, tribunal systems and Ombudsman system as follows.

5.1.1 General Information

The Kingdom of Thailand is located in the Asia-Pacific region, specifically in the Southeast Asia sub-region.³ The total area of Thailand is approximately 513,000 square kilometres.⁴ Thailand consists of 77 provinces within six geographical regions,⁵ which are north, northeast, east, central, west and south.⁶ Each region has different customs and dialects, but all regions are under the same legal and justice system.⁷ The population of Thailand is approximately 65 million; around 5.6 million people are in Bangkok, the capital city.⁸ Thailand has been in the group of upper-middle income economies

³ 'Overview: A Vibrant and Growing Economy' (*Thailandtoday*)

<www.thailandtoday.in.th/economy/overview> accessed 8 February 2016.

⁴ Thekob (ed), 'Basic Information of Thailand' (*AEC Tourism Connectivity*, 9 January 2013)

<th.aectourismthai.com/tourismhub/932> accessed 8 February 2016.

⁵ Other regional divisions may differ from the geographical division of regions. For example, the Courts of Justice divide their jurisdiction into nine regions besides the capital city, while the National Statistical Office divides its records through four regions, including the capital city within one of those regions.

⁶ Kullaya Vivitsevi, 'Chapter 1: Introduction' in Department of Geography, *GE253 Geography of Thailand* (Ramkhamhaeng University 2007).

⁷ *ibid.*

⁸ Declaration of the Central Registration Office on the Number of Overall Population in Thailand according to the Civil Registration at 31 December 2015 (25 February 2016) GG 133(48ngor) 27 <www.ratchakitcha.soc.go.th/DATA/PDF/2559/E/048/27.PDF> accessed 8 April 2016.

according to the World Bank method through measuring the gross national income per capita.⁹

5.1.2 Legal System

Thailand's current legal system is based on the civil law system.¹⁰ However, there is evidence that the common law system had some influence over the Thai legal system prior to law reform and codification (1897-1935) since many leading Thai lawyers graduated with law degrees from England.¹¹ It appears that the notion of precedence in the common law system still influences the Thai legal system. The earlier judgments of the Supreme Court seem to have more value than examples of court's interpretation and tend to lead decisions in the following cases in the same direction, although there is no binding regulation on this practice in Thai legislation.¹² As a law student since 1997, I observe that legal study in law schools and the Thai Bar Association also emphasises the importance of studying previous Supreme Court judgments in addition to legal principles and legal codes.

In theory, the Constitution is at the pinnacle of the hierarchy of Thai domestic law.¹³ However, during this research, Thailand has experienced intermittent political challenges. It is currently ruled under the 2017 Constitution, introduced by the military

⁹ 'Countries and Lending Group' (*World Bank*) <<http://data.worldbank.org/about/country-and-lending-groups>> accessed 12 May 2016.

¹⁰ Kamthorn Kamprasert and Sumet Chanpradub, *Thai Legal History and Major Legal System* (Ramkhamhaeng University 2000); Winatta Saengsook and Thitiporn Limlaemthong, *Introduction to Law (LW104)* (Ramkhamhaeng University 2006).

¹¹ Saengsook and Limlaemthong (n 10); 'Law Reform in the Reign of King Rama V' (*Thai Junior Encyclopaedia*, Vol 30 Ch 4 First Thai Enacted Law) <<http://kanchanapisek.or.th/kp6/sub/book/book.php?book=30&chap=4&page=t30-4-infodetail07.html>> accessed 15 November 2015.

¹² Saengsook and Limlaemthong (n 10).

¹³ Songkhla Vijaykadga, 'Philosophical Foundations of Constitutional Law' (*Sukhothai Thammathirat Open University*) <<http://law.stou.ac.th/dynfiles/Ex.41711-1.pdf>> accessed 25 September 2018.

government (also called “the National Council for Peace and Order”) which entered into force on 6 April 2017 after the 2014 interim Constitution had been in place for three years. This is the 20th Constitution of Thailand since the first Constitution in 1932.¹⁴ Since all interview data for this case study was collected in the context of the 2014 Interim Constitution, this thesis needs to discuss such Constitution (although it is no longer applicable) to reflect the interview context. The 2014 Interim Constitution did not introduce new rights, but acknowledged all prior guarantees and protection of human dignity, rights, liberties and equality, which were previously protected under the democratic regime and international obligations.¹⁵ This acknowledgement seems to refer to the guarantees and protection under the previous Constitution, the Constitution of the Kingdom of Thailand BE2550 (2007 Constitution).¹⁶ Without repetitively mentioning the acknowledgement of the 2014 Interim Constitution, the guarantees and protection under the 2007 Constitution will be referenced with the term “2007/2014 Constitutions”.

Both 2014 and 2017 Constitutions emphasise 1) the democratic regime of government with the King as the Head of the State; 2) the sovereign power, belonging to the Thai citizens and exercised by the King through the Legislature, the Executive and the Judiciary; and 3) the protection of human dignity, rights, liberties and equality.¹⁷ Despite these claims, the implementation of these principles in both Constitutions is not in line with most understandings of democracy as those who actually exercise legislative and administrative powers have not been elected through a democratic process, but rather appointed by nomination of the military coup.¹⁸ Under the 2017 Constitution, the military government and parliament will stay active until the new government and parliament are set up through a national election.¹⁹ The judicial power seems to be the only State’s authority operating without an intervention by the military government in the appointment

¹⁴ Kanin Boonsuwan, ‘The 20th Constitution of Thailand’ (*Matichon Online*, 22 May 2017) <www.matichon.co.th/columnists/news_563933> accessed 28 March 2018.

¹⁵ Interim Constitution 2014, art 4.

¹⁶ Constitution of the Kingdom of Thailand BE2550(2007) (24 August 2007) GG 124(47gor) (Constitution 2007).

¹⁷ Constitution 2017, arts 2-4; Interim Constitution 2014, arts 2-4.

¹⁸ Interim Constitution 2014, arts 6, 28 and 44.

¹⁹ Constitution 2017, arts 263-268.

process of the Judiciary.²⁰ Further, the 2014 Interim Constitution provided the military government with the absolute power to order, restrain, or perform any act, which is honoured by the 2017 Constitution until the new government is established.²¹ This power could interfere with the legislative, administrative or judicial enforcement.²² Additionally, the changes of the 2017 Constitution have significant implications for the previous guarantees on the right to access to justice in Thailand. These will be discussed in section 5.1.3.

Thailand is a dualist system with regard to international law, whereby international obligations need to be integrated into domestic law for their justiciability in the national courts.²³ Domestic law can only be enacted with the approval of the Parliament.²⁴ There is no evidence that the Parliament directly implements any treaty or international agreement into domestic law but, it does enact new legislation and amend existing laws in accordance with these obligations.²⁵

5.1.3 Implications of the 2017 Constitution

This section discusses the major differences between the guarantees on the right to access to civil justice under the 2017 Constitution (the current Constitution) and those under the 2007/2014 Constitutions (the applicable Constitutions during the time when the interview data for this research was collected).

Article 4 of the 2014 Interim Constitution recognised citizens' rights to judicial proceedings guaranteed in Article 40 of the 2007 Constitution. In respect of civil proceedings, these rights include:

²⁰ Constitution 2017, art 188; Interim Constitution 2014, art 26.

²¹ Constitution 2017, art 265.

²² Interim Constitution 2014, art 44.

²³ Constitution 2017, art 178.2; Phijaisakdi Horayangkura, 'Short-Form Legislation for the Implementation of International Agreements' (2015) 6(1) Assumption University Law Journal 58.

²⁴ Constitution 2017, art 81.

²⁵ Horayangkura (n 23).

(1) a right to easily, conveniently, expeditiously, and comprehensively access to judicial proceedings;

(2) fundamental rights in legal proceedings, which requires minimum guarantees for a public hearing, a right to be adequately informed of the facts and to inspect documents, a right to present his/her facts, defence and evidence, a right to challenge a judge, a right to have his/her case heard by a full quorum of judges, and a right to be informed of the reasons for a judgement or order;

(3) a right to an accurate, speedy and fair hearing;

(4) a right to be treated appropriately in accordance with his/her role as a participant, including as a party to a dispute, an interested person or a witness, in legal proceedings, including to be properly, speedily and fairly investigated and to withhold self-incriminating testimony;

(5) a right of an injured person and a respondent to be protected and assisted as necessary and appropriately from the State, including the provision of remuneration, compensation and necessary expenses as provided by law;

(6) a child, juvenile, woman, elderly person, or person with disability has a right to be appropriately protected in judicial proceedings and be appropriately treated in cases concerning sexual violence; and

(7) a right to appropriate legal assistance in civil cases from the State.²⁶

The 2017 Constitution does not guarantee these rights to judicial proceedings as citizens' rights. Instead, it introduces new categories of constitutional provisions: the duties of the State and the national reform strategy. Hence, there are four categories of the provisions in the 2017 Constitution concerning access to civil justice: citizens' rights, the duties of the State, State policies, and the national reform strategy. The 2017 Constitution has four significant changes on access to civil justice as follows.

Firstly, the guarantees on access civil justice in the 2007/2014 Constitutions were articulated as citizens' rights. These guarantees covered almost all elements of the six

²⁶ Constitution 2007, art 40.

categories of the right to access to civil justice, except the right to communication assistance and the personal presence principle.²⁷ Instead of continuing to guarantee these elements as citizens' rights, the 2017 Constitution shifts some of them into the State policy category of the Constitution.

The difference between citizens' rights and State policies is tremendous. The 2017 Constitution guarantees that a person whose rights or liberties guaranteed by the Constitution are violated, can pursue a case before the courts to seek a remedy.²⁸ As the right to present his/her facts, defence and evidence, the right to legal assistance and the right to a fair hearing are no longer guaranteed by the 2017 Constitution as citizens' rights, a person for whom these rights are violated cannot argue that the violation of these rights is unconstitutional before the courts; however, that person may still argue that their rights are protected by other legislation.

Secondly, although access to justice is not guaranteed as a citizens' right by the 2017 Constitution, it appears in the State policy principle which every government should follow and implement accordingly, including by enacting new legislation as required.²⁹ The 2017 Constitution states clearly that all provisions in its State policy chapter are 'guidance for the State to enact new legislation or to plan the public administration'.³⁰ In this regard, the 2017 Constitution still protects access to justice at some level. As a result, the existing statutory guarantees, which align with the State policies, should remain active or be improved. Cancelling or diminishing these guarantees might conflict with the constitutional State policies. There is evidence that the Constitutional Court has jurisdiction over matters concerning State policies under the Constitution, but the case law to date has not found existing legislation to be in conflict with the provisions of the State policies.³¹

The 2017 Constitution provides a monitoring mechanism to ensure that the government follows the constitutional State policies. This mechanism imposes a duty on the

²⁷ *ibid* arts 28, 40, 32, 61 and 62.

²⁸ Constitution 2017, art 25.3.

²⁹ *ibid* art 68.

³⁰ *ibid* art 64.

³¹ Constitutional Court Decision No 37/2542(1999) and 48/2545(2002).

government to declare its public administration plan to the Parliament within 15 days after taking office.³² This plan must be consistent with the duties of the State, the State policies and the national strategy under the 2017 Constitution.³³ The government has a duty to comply with the Constitution, legislation, and its public administration plan declared to the Parliament,³⁴ otherwise the office of government or an individual minister may be terminated through the majority vote of no-confidence in a general debate of the House of Representatives.³⁵ However, this procedure might be meaningless where the government is set up by a large political party that has an overall majority in the House of Representatives.³⁶

Thirdly, the 2017 Constitution provides a new chapter on the duties of the State, which include the duty to provide a remedy for damage or nuisance to natural resources, environment quality, health, hygiene and quality of life caused by any action of the State or its authorised person.³⁷ Meechai Ruchuphan, the Chairperson of the Constitution Drafting Commission claims that, when the Constitution is written in this way, people automatically obtain their rights. He further views that the State agencies intentionally ignore their constitutional duties if they do not comply with these provisions.³⁸ The rationale behind this constitutional drafting strategy is from the experience that many rights provided as citizens' rights in most of previous Constitutions were not implemented in practice. The Drafting Commission views that, in this way, people can be more certain that the State agencies must comply with constitutional provisions.³⁹

³² Constitution 2017, art 162.

³³ *ibid* art 162.

³⁴ *ibid* art 164.

³⁵ *ibid* arts 151.4 and 170(3).

³⁶ Kraipon Arunrat, 'Enforcement of State Policy under the 2007 Constitution' (*Public Law Net* 15 August 2010) <<http://public-law.net/publaw/view.aspx?id=1491>> accessed 28 May 2017.

³⁷ Constitution 2017, art 58.

³⁸ 'Summary of the draft Constitution: When "citizens' rights" were rewritten to "state duties"' (*Internet Law Reform Dialogue*, 27 July 2016) <www.ilaw.or.th/node/4214> accessed 22 May 2017.

³⁹ *ibid*.

However, Kaewsan Atibodhi and Phairoj Pholphet, the members of the former drafting committee of the 1997 and 2007 Constitutions oppose the transformation of citizens' rights into duties of the State or State policies. They point out that the earlier Constitutions believe that the citizens' rights are the inherent rights existing before the existence of the State and the State must respect and protect them.⁴⁰ People can claim these rights against the State, other people and private entities. They view that, when the rights are written as duties of the State, it reflects that only the State has duties to fulfil the rights, but people cannot claim these as rights against other citizens or private entities.⁴¹ I agree with this view and would contend that access to justice should be guaranteed as part of the citizens' rights in the Constitution and should be confirmed as duties of the State to make these guarantees enforceable in practice.

Finally, reform of the justice system is one of the national reform strategy goals imposed by the 2017 Constitution.⁴² On the aspect of access to civil justice, there is a set of minimum goals to be achieved. These goals include the imposition of clear time frames for all proceedings to ensure that people can access justice without delay, the availability of mechanisms on legal aid and effective law enforcement, and the strengthening and improving of organisational culture (particularly on the aspects of convenient and expeditious services) of all relevant organisations within the justice system. The strength of the provisions within the national reform strategy is that the 2017 Constitution mandates the State to enact new legislation imposing detailed procedures, including a timeframe for implementation and assessment of the reform, which shall be achieved within five years.⁴³ Accordingly, the National Reform Plans and Procedures Act BE2560 was enacted in 2017 and the national reform plan on law and justice administration, which included public hearings in its drafting process, was approved by the Cabinet and announced in April 2018.⁴⁴ As to its detailed planning, the national reform strategy seems to reinforce implementation of the State policies in the Constitution in practice. This is

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² Constitution 2017, art 258.d.

⁴³ *ibid* art 259.

⁴⁴ National Reform Plans and Procedures Act BE2560(2017) (31 July 2017) GG 134(39gor) 13; Declaration of the Office of the Prime Minister on the Announcement of the National Reform Plan (6 April 2018) GG 135(24gor) 1 (National Reform Plan).

still at the initial stage of implementation, and therefore cannot be evaluated within the timeframe of this PhD study. However, it generally appears that the constitutional provisions within the national reform strategy seem stronger than those of the State policies, as they impose more concrete frameworks and timeframes for implementing the reform plan, while these structures are not available for the implementation of the State policies.

Despite this, the fact is still that the constitutional guarantees on access civil justice in the 2017 Constitution are at a lower level of the legal hierarchy in comparison with those of the 2007/2014 Constitutions. Without a statutory provision guaranteeing access to civil justice, people cannot assert the 2017 Constitution as a protection since only limited elements of the right to access to civil justice is protected as citizens' rights.

5.1.4 Court Systems

The Judiciary in Thailand consists of four main court systems: the Constitutional Court, the Administrative Courts, the Courts of Justice and the Military Courts. These systems are distinct and operate independently.⁴⁵ The Constitutional Court and the Administrative Courts were initially introduced by the Constitution of the Kingdom of Thailand BE2540 (1997 Constitution).⁴⁶ Prior to the 1997 Constitution, the Courts of Justice had jurisdiction over all cases, except the cases under the jurisdiction of the Military Courts,⁴⁷ and cases under the jurisdiction of the Complaints Commission of the Council of State,⁴⁸ which was

⁴⁵ Constitution 2017, arts 194, 197, 199 and 210; Constitution 2007, arts 197 to 228.

⁴⁶ Nantawat Boramanand, *Transitory Provision of the Constitution and Political Reform* (Institute of Public Policy Studies 1998).

⁴⁷ Chot Atsawalapsakun, 'Thai Court System' (*Public Law Net*, 8 May 2011) <<http://public-law.net/publaw/view.aspx?id=1582>> accessed 3 May 2017.

⁴⁸ Council of State Act BE2522(1979), s 7(2); The Council of State is the legal advisory body of the government, chaired by the Prime Minister. Prior to the establishment of the Administrative Courts in 1999, the Complaint Commission of the Council of State had an authority to adjudicate 1) disputes, arising or may arise, that were caused by government officials, and 2) appeals of legal issues against decisions of tribunals appointed by law. Presently, the Council of State has only authorities 1) to prepare legal bill according to the order of the Prime Minister or

later replaced by the Administrative Courts established in 1999 in accordance with the 1997 Constitution.

The Constitutional Court is the only court established by the 1997 Constitution; the other courts are set up by statutes.⁴⁹ The Constitutional Court deals with matters relating to the Constitution, for examples, violation of rights and liberties guaranteed by the Constitution⁵⁰ and the constitutionality of a statute.⁵¹

The Administrative Courts have two levels: the first instance and the supreme levels.⁵² They deal with issues relating to the exercise of administrative authority of administrative agencies and government officers.⁵³ These issues include decision making of tribunals, wrongful actions, and unfair discrimination caused by such agencies or officers,⁵⁴ such as on the ground of disability or health conditions.⁵⁵

the Cabinet, 2) to provide legal opinion as requested by governmental organisations, and 3) to provide legal opinion and comments for the Cabinet in relation to introducing a new law, amending, improving or repealing law.

⁴⁹ Atsawalapsakun (n 47).

⁵⁰ Constitution 2017, art 213; Constitution 2007, art 212.

⁵¹ Constitution 2017, art 210(1); Interim Constitution 2014, art 45; According to the Constitutional Court Decision No 27/2544(2001), “statutes” include acts, organic acts under the Constitutions, emergency decrees, royal decrees enacted in accordance with the Constitution.

⁵² Establishment of Administrative Courts and Court Procedure Act BE2542 (EACCPA 1999), s 7.

⁵³ *ibid* s 3; “Administrative agencies” refers to government organisations, state enterprises established by statutes or royal decrees, and other organisations assigned to exercise administrative authority or perform administrative activities. For instance, the Lawyers Council, the Medical Council and other private entities providing public services. “Government officers” refers to government officials, people who work in administrative agencies, tribunals, committees or individuals with authority to enact rules, orders, or other decisions affecting people, including those who are controlled or monitored by aforementioned people, tribunals and committees, or by administrative agencies.

⁵⁴ EACCPA 1999, s 9.

⁵⁵ Constitution 2017, art 27.3; Constitution 2007, art 30.3.

The Courts of Justice have three levels: the first instance, the appeal and the supreme levels.⁵⁶ They have jurisdiction over all cases, with exceptions of cases under jurisdictions of the other court systems.⁵⁷ Most civil and criminal cases are within the jurisdiction of the Courts of Justice. There are two categories of the courts of first instance, which are general courts and specialised courts. The specialised courts are the Intellectual Property and International Trade Court, the Tax Court, the Labour Courts, the Bankruptcy Court and the Juvenile and Family Courts.⁵⁸ These courts are established by specific statutes and have their own unique court procedures;⁵⁹ however, they are all within the Courts of Justice system.⁶⁰

Finally, the Military Courts have three levels: the first tier, the middle tier and the highest tier.⁶¹ They are dealing with criminal cases under the military law or whereby the offender is under the Military Courts jurisdiction when committing the crime.⁶² An exception to this rule is made where there is another mutual offender who is not under the Military Courts jurisdiction, or where the case intertwines with the jurisdiction of other courts or should be conducted within the Juvenile and Family Courts.⁶³

In brief, the Courts of Justice are the most relevant courts when discussing the general issue of access to civil justice for persons with disabilities, while the Constitutional Court and the Administrative Courts may be relevant in some specific cases such as cases on unfair discrimination by administrative authority or a violation of rights and liberties

⁵⁶ Law for the Organisation of Courts of Justice BE2543(2000), s 1.

⁵⁷ Constitution 2017, art 194; Constitution 2007, art 218.

⁵⁸ 'Judicial System' (*Courts of Justice*) <www.coj.go.th/systemcoj.html> accessed 3 May 2017.

⁵⁹ Establishment of Labour Courts and Court Procedure Act BE2522(1979); Establishment of Tax Court and Court Procedure Act BE2528(1985); Establishment of Intellectual Property and International Trade Court and Court Procedure Act BE2539(1996); Establishment of Bankruptcy Court and Court Procedure Act BE2542(1999); Juvenile and Family Courts and Court Procedure Act BE2553 (JFCCPA 2010).

⁶⁰ 'Judicial System' (n 58).

⁶¹ Organisation of Military Courts Act BE2498(1955), s 6.

⁶² Constitution 2017, art 199; Constitution 2007, art 228; Organisation of Military Courts Act BE2498(1955), ss 13 and 16.

⁶³ Organisation of Military Courts Act BE2498(1955), s 14.

guaranteed by the Constitution. There are some interesting cases in the Constitutional Court and the Administrative Courts relating to persons with disabilities, so these courts will be included for further discussion and analysis.⁶⁴ The Military Courts will be excluded, as there is no publicly accessible data from these courts relating to persons with disabilities.

5.1.5 Tribunal Systems

There are two main types of tribunals in Thailand: administrative tribunals and arbitration tribunals. Both types are established by law to decide claims and disputes in accordance with specific provisions. This research focuses only on the administrative tribunals, which closely relate to access to civil justice for persons with disabilities.

An administrative tribunal is appointed by a statute on the establishment of a particular organisation, which also provides a procedure for adjudicating matters relating to legal rights and duties.⁶⁵ Examples of these tribunals are commissions of governmental organisations which have a power to adjudicate and discipline their officers in accordance with the code of conduct; committees of professional councils which have the power to control and discipline their members in accordance with their professional conduct and ethics, such as the Committee of the Medical Council, the Committee of the Lawyers Council,⁶⁶ and particular committees which have authority to adjudicate matters in relation to specific legislation, for example, the Appeal Tribunal of the Building Control Act,⁶⁷ the Appeal Tribunal of the Mental Health Act (MHA Appeal Tribunal),⁶⁸ and the National Committee for Empowerment of Persons with Disabilities.⁶⁹ In other words, an

⁶⁴ The respondents interviewed for this research do not include judges and court staff member of these courts.

⁶⁵ Administrative Procedure Act BE2539 (APA 1996), s 5.5.

⁶⁶ Kongtuch Parkporn, *Control of Decisions of the Administrative Adjudicatory Committees by the Administrative Courts in Thailand* (Ramkhamhaeng University 2002).

⁶⁷ Building Control Act BE2522(1979), ss 50-51(1) (as amended).

⁶⁸ Mental Health Act BE2551(2008) (20 February 2008) GG 125(36gor) 51, ss 43-44 (MHA 2008).

⁶⁹ Persons with Disabilities Empowerment Act BE2550(2007) (PDEA 2007), s 6(5).

administrative tribunal is a public authority,⁷⁰ whose actions, including making orders and decisions, are under the jurisdiction of the Administrative Courts.⁷¹

5.1.6 Ombudsman System

The Ombudsman system was initially established by the 1997 Constitution⁷² and has continued to exist in both 2007/2014 and 2017 Constitutions.⁷³ The system consists of three Ombudsmen appointed by the King through political selection with the approval of the Senate.⁷⁴ The Ombudsmen have powers to investigate any action taken by or on behalf of State agencies and report the findings to the Cabinet, and both Houses of the Parliament.⁷⁵ They also have power to file a case to the Constitutional or Administrative Courts for the case concerning constitutionality of legislation, regulations, orders or any action of State agencies and State officials.⁷⁶ Additional powers of the Ombudsmen in the 2017 Constitution are to recommend the relevant State agencies to amend law, rules, regulations, orders or their working procedures, which cause grievance or unfairness, or undue burden to the people; and to report the unreasonable non-compliance, of any agency, with their recommendations to the Cabinet for further enforcement.⁷⁷

⁷⁰ EACCPA 1999, s 3.2.

⁷¹ *ibid* ss 9(1) and 11(1).

⁷² Choksuk Kornkittichai, *Academic Focus: Ombudsman* (The Secretariat of the House of Representatives 2017) <library2.parliament.go.th/ejournal/content_af/2560/jul2560-4.pdf> accessed 20 August 2018.

⁷³ Constitution 2017, art 228; Constitution 2007, arts 242-243.

⁷⁴ *ibid*.

⁷⁵ Constitution 2017, art 230; Constitution 2007, art 244.

⁷⁶ Constitution 2017, art 231; Constitution 2007, art 245.

⁷⁷ Constitution 2017, art 230.

5.2 DEMOGRAPHIC INFORMATION ABOUT PERSONS WITH DISABILITIES IN THAILAND

The Persons with Disabilities Empowerment Act BE2550 (PDEA 2007) is the disability-specific legislation defining the term “persons with disabilities”. This Act was enacted to replace the previous disability law, the Rehabilitation of Disabled Persons Act BE2534 (Rehabilitation Act 1991) to comply with the State’s obligations under the UNCRPD. According to section 13 of the PDEA 2007, the Department of Empowerment of Persons with Disabilities (DEP) is the focal point for matters related to persons with disabilities.⁷⁸ It is a governmental organisation operating under the umbrella of the Ministry of Social Development and Human Security.⁷⁹ The PDEA 2007 defines “persons with disabilities” as individuals who have limitations in performing their daily activities or participating in society due to their impairments, as well as other barriers, and those who need some particular support to be able to perform their daily activities or participate in society on an equal basis with others.⁸⁰ The Ministry classifies disabilities into seven categories, which are 1) visual disabilities, 2) hearing or communicating disabilities, 3) mobility or physical disabilities, 4) psychosocial or behavioural disabilities, 5) intellectual disabilities, 6) learning disabilities and 7) autism.⁸¹ Criteria for each category refer to a person’s limitation with regard to his/her daily activities or participation in social activities due to an impairment based on a medical diagnosis.⁸²

⁷⁸ UNCRPD, art 33(1).

⁷⁹ This Ministry has duties in relation to social development, equality and fairness in society, empowerment of quality and security in life, family and community. The Department of Empowerment of Persons with Disabilities (DEP) is a part of this Ministry. This Department is formerly known as the National Office for Empowerment of Persons with Disabilities (NEP).; Organisation of Ministries, Sub-Ministries and Departments Act BE2545 (2002), ss 16-17 (as amended).

⁸⁰ PDEA 2007, s 4.1.

⁸¹ Declaration of the Ministry of Social Development and Human Security on Types and Criteria of Disabilities (29 May 2009) GG 126(77ngor) 2, r 3 (as amended).

⁸² *ibid* rr 4-9 and 9/1 (as amended).

Current statistics from the DEP report show that the individuals who registered as persons with disabilities number slightly over 1.7 million (2.64 percent of the overall population in Thailand).⁸³ Only 4 percent of them live in Bangkok, the capital city, while the major population (almost 40 percent) is in the northeast region. An approximate number of people in each group, out of the total population with disabilities can be presented as follows:

- 50 percent for mobility or physical disabilities (the largest group)
- 17 percent for hearing or communication disabilities
- 11 percent for visual disabilities
- 7 percent for psychosocial or behavioural disabilities
- 7 percent for intellectual disabilities
- 0.5 percent for autism
- 0.4 percent for learning disabilities (the smallest group)

In addition to these numbers, around 7 percent of all persons with disabilities have more than one type of disability and around 1.3 percent do not identify their specific disabilities in the survey.⁸⁴

The majority of persons with disabilities (almost 52 percent) is aged over 60. The second largest group is aged between 22 and 59 (nearly 40 percent). Nearly half of people in these groups have mobility or physical disabilities. The smallest group of persons with disabilities (approximately 8 percent) is aged under 22. Most people in this group are those with intellectual disabilities.⁸⁵

It should be noted that around 2 percent of registered persons with disabilities are absent from the statistics on education of persons with disabilities. Almost 43.5 percent of persons with disabilities do not attend school.⁸⁶ Most of those who have the opportunity to study only attend primary school (slightly over 46 percent of the total). Only 6 percent

⁸³ DEP, 'Report on disability in Thailand' (31 December 2015)

<http://dep.go.th/sites/default/files/files/news/REPORT_PWDS_Dec58.pdf> accessed 4 May 2017.

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ Less than one percent of this number are underage.

attend secondary school. Around 1.3 percent have a vocational certificate or diploma. Less than one percent graduate with a Bachelor's degree or a higher level.⁸⁷

Approximately 790,000 persons with disabilities (45 percent) are working age population (aged 15 to 60). Only 32 percent of them are in employment. The other 46 percent are classified as having the ability to work but are not in employment. Nearly 22 percent of persons with disabilities reported that they cannot work due to their severe impairments. Those who are in employment are mostly self-employed or work in agriculture. Only 1.5 percent work in governmental organisations or public enterprises.⁸⁸

The DEP Report does not provide further analysis of these statistics, but it seems to present some linkage between their education and employment rate. For example, the report notes that the employment rate in governmental organisations or public enterprises is very low as these organisations likely require a vocational certificate or diploma as a minimum qualification.⁸⁹

5.3 LEGAL MECHANISMS AND REGULATIONS RELATING TO ACCESS TO CIVIL JUSTICE FOR PERSONS WITH DISABILITIES

Legal mechanisms and regulations on access to civil justice for persons with disabilities are in the 2007/2014, 2014 and 2017 Constitutions, and in other laws. This section will explore all Thai law in relation to access to civil justice by referring to the six categories of the right to access to civil justice. Each subsection will include the existing laws and regulations, practical experience of persons with disabilities in Thailand and of people who work in justice system in dealing with cases involving persons with disabilities, as well as my observations and evaluation of the domestic law towards international human rights law standards. It should be noted that there is no legally binding human rights

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ 'A road to government careers' (*Office of the Civil Service Commission*) <www.ocsc.go.th/civilservant/exam> accessed 28 September 2018.

instrument concerning access to civil justice in this region, either in the Asia-Pacific region or the Southeast Asia sub-region.

Thailand (called “Siam” in 1948) was one of 48 countries that voted in favour of the adoption of the draft Universal Declaration of Human Rights.⁹⁰ Thailand has also acceded to most of international human rights laws that have been used for classifying these six categories, except for two Conventions. It has neither signed, acceded nor ratified the ICMW and has only signed the ICPEP.⁹¹

Since the proclamation of the first Constitution in 1932, Thailand has had the same principle of parliamentary approval to sign an international agreement whereby legal enactment is needed to fulfil the international obligations.⁹² It acceded to the UNCEDAW in 1985, the UNCRC in 1992, the ICCPR in 1996, the ICESCR in 1999, the ICERD in 2003 and the UNCAT in 2007.⁹³ Due to the concept of dualism, these international obligations need to be integrated into domestic legislation before being enforceable in the national courts.⁹⁴ To date, obligations under these treaties have been implemented through very diverse pieces of legislation. There is no single statute directly implementing the conventions. The requirements of the conventions have been incorporated through both constitutional and legislative provisions. The relevant provisions will be addressed in each subsection. Thailand ratified the UNCRPD in July 2008.⁹⁵ The PDEA 2007 and the Education for Persons with Disabilities Act

⁹⁰ UNGA 183rd plenary meeting (10 December 1948) UN Doc A/PV183.

⁹¹ ‘Reporting status for Thailand’ (*OHCHR*)

<https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=THA&Lang=EN> accessed 25 September 2018.

⁹² Constitution of the Kingdom of Thailand BE2475 (1932), art 54.3; Constitution 2017, art 178.

⁹³ ‘International Human Rights Treaties that Thailand became a Member State’ (*Ministry of Foreign Affairs*) <www.mfa.go.th/humanrights/human-rights-obligation/international-human-rights-mechanism> accessed 21 March 2016.

⁹⁴ Constitution 2017, art 178; Interim Constitution 2014, art 23.

⁹⁵ ‘Status of Treaties: Chapter IV Human Rights - 15. Convention on the Rights of Persons with Disabilities’ (*UN*, 5 August 2018)

<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-15&chapter=4&clang=_en> accessed 5 August 2018.

BE2551(2008) are the pieces of disability-specific legislation enacted to fulfil the obligations under the UNCRPD. The six categories of the rights to access to civil justice will be discussed as follows.

5.3.1 Right to equality before courts and tribunals

This right includes the aspects of equal access to courts and tribunals, equality of arms, equal treatment by courts and tribunals, and equality before the law. There is no extensive provision in Thai law assuring the right to equality before courts and tribunals; however, various pieces of legislation guarantee each aspect as follows.

A. Right to equal access to courts and tribunals

This right is limited to accessing procedures of first instance courts and tribunals.⁹⁶ In the disability context, the issue of equal access to courts can be considered in three aspects: access to legal proceedings and other related court services, the environmental accessibility of courthouses and courtrooms, and accessibility of information. The information accessibility will be discussed below in the right to equality of arms subsection 5.3.1B.

Access to legal proceedings and other related court services

Both 2007/2014 and 2017 Constitutions guarantee that a person whose rights and liberties recognised by the Constitution are violated can exercise their rights through the courts, including filing a lawsuit against State agencies.⁹⁷ These constitutional guarantees cover both civil and criminal aspects of access to justice.

Additionally, the 2007/2014 Constitutions specifically guaranteed a right to easily, conveniently and expeditiously access to legal proceedings in the justice system,⁹⁸ whereas the 2017 Constitution only recognises access to justice as a State policy, in

⁹⁶ CtteeCPR 'General Comment No 32' (23 August 2007) UN Doc CCPR/C/GC/32.

⁹⁷ Constitution 2017, arts 25; Constitution 2007, art 28.

⁹⁸ Constitution 2007, art 40.

which the State should provide fair, effective and non-discriminatory administration of justice and should ensure that people can access justice conveniently and expeditiously without unreasonably high costs.⁹⁹ While the 2007/2014 Constitutions specifically guaranteed access to legal proceedings as a citizens' right, the 2017 Constitution simply imposes it as a State policy, which has a weaker enforcement mechanism than a constitutional right. The difference between a citizens' right and a State policy was already discussed in section 5.1.3.

The Civil Procedure Code (CPC) and the Establishment of Administrative Courts and Court Procedure Act BE2542 (EACCPA 1999) also mention that a person has a right to submit his/her case to the relevant court if there is a controversial issue in relation to civil rights or duties.¹⁰⁰ Furthermore, persons with disabilities can request State agencies, which include court and tribunal services, to provide, support, or perform any action to facilitate their access to public services provided by such agencies, the refusal to such request may constitute unfair discrimination on the ground of disability.¹⁰¹

Although the 2007/2014 and 2017 Constitutions and the procedural laws guarantee equal access to courts and their services, both Constitutions allow legal restrictions on this right. The 2007/2014 Constitutions acknowledge the restrictions previously imposed by law, such as a limited timeframe to file a case or a prohibition against filing the same dispute which has already been considered by another court in procedural laws.¹⁰² The 2017 Constitution allows restrictions of this right through legislation, on the conditions that it does not conflict with the rule of law, not excessively increase a burden or limit

⁹⁹ Constitution 2017, art 68; There was a similar State policy provision in Article 81 of the 2007 Constitution (including the legal assistance aspect), but the 2014 Interim Constitution did not acknowledge the State policies in the 2007 Constitution.

¹⁰⁰ Civil Procedure Code (CPC), s 55; EACCPA 1999, s 42.

¹⁰¹ PDEA 2007, ss 15 and 20/1; A discrimination will not be considered unfair if there is a support on an academic, customary or public reason to appropriately or necessary do so, but that person with disability shall receive a remedy or a protection of his/her rights or benefits, as far as necessary and practicable.

¹⁰² Constitution 2007, art 28.

person's rights and liberties, not affect human dignity, not intend to be applicable to a specific person or case.¹⁰³

The existing restriction of the right to access to legal proceedings that specifically concerns persons with disabilities is a legal capacity restriction through the guardianship regime, which fully or partially limits some persons with disabilities' ability to exercise this right autonomously. The Civil and Commercial Code (CCC) is the main legislation concerning legal capacity of a person.

Under full guardianship, a person with mental disorder or of unsound mind may be declared by the court to be an 'incompetent person'.¹⁰⁴ His/her legal actions after the court order are voidable, which might be declared null and void afterwards,¹⁰⁵ or completely invalid if those actions are prohibited by law, such as getting married,¹⁰⁶ or making a will.¹⁰⁷ To make the legal action of an incompetent person valid, the court-appointed guardian must act on behalf of the incompetent person. The guardian cannot simply give consent for an incompetent person to take legal action independently.¹⁰⁸ The guardian also needs the permission of the court to proceed with some specific legal transactions relating to the assets of an incompetent person, for instance, to lend money, to sell real estate, and to settle disputes through mediation or arbitration.¹⁰⁹ In comparison, the actions of a person with mental disorder or of unsound mind who has not been declared an incompetent person are voidable only if that action is made while his/her mental condition is not in a normal state and another party knows of that condition.¹¹⁰

¹⁰³ Constitution 2017, art 26.

¹⁰⁴ Civil and Commercial Code (CCC), s 28.

¹⁰⁵ *ibid* ss 175-176.

¹⁰⁶ *ibid* ss 1449 and 1495.

¹⁰⁷ *ibid* s 1704.

¹⁰⁸ Kamthorn Kamprasert and Mallika Pinitchan, *Principles of Private Law* (Ramkhamhaeng University); Thawat Suthisomboon, 'Acting on behalf of persons who lack legal capacity' (*Courts of Justice E-Library*) <http://elib.coj.go.th/Article/d20_4_8.pdf> accessed 7 May 2017.

¹⁰⁹ CCC, ss 1574, 1598/15 and 1598/18; Suthisomboon (n 108).

¹¹⁰ CCC, s 30.

The partial guardianship system means that a person may be declared by a court to be a 'quasi-incompetent person' if he/she cannot manage his/her affairs or may cause negative effect to personal or family assets due to a physical disability or mental deficiency.¹¹¹ Subsequently, this person needs consent from his/her guardian for some specific legal transactions, otherwise such transactions are voidable.¹¹² Examples of these transactions include borrowing or lending money or valuable assets, filing a lawsuit, being a party in court proceedings, and settling disputes through mediation or arbitration.¹¹³

This guardianship regime can affect some legal actions in accessing justice, such as appointing an attorney or authorising someone to act as his/her representative. In filing a case to the Courts of Justice or becoming a party to court proceedings, the person with restricted legal capacity must fulfil the guardianship rules by letting the guardian act on his/her behalf (under full guardianship), or by submitting the written consent of the guardian to court (under partial guardianship).¹¹⁴ Without fulfilling the guardianship rules, his/her action in court proceedings is not void or voidable, but the court will order the person with restricted legal capacity to rectify his/her action in accordance with the guardianship rules within a reasonable time.¹¹⁵ If the guardian cannot proceed with the case on the person's behalf, the court may appoint an ad hoc representative for the incompetent person, which can be a prosecutor or an administrative official.¹¹⁶ If the guardian does not allow a quasi-incompetent person to file a court case or participate in court proceedings without reasonable justification, the quasi-incompetent person can request the court's permission to proceed with those actions.¹¹⁷ The court may permit the party with restricted legal capacity to proceed with court proceedings while simultaneously rectifying the procedure according to guardianship law, but cannot make a judgement before the guardianship rules have been fulfilled.¹¹⁸ A person with restricted

¹¹¹ *ibid* s 32.

¹¹² *ibid* s 34.

¹¹³ *ibid* s 34.

¹¹⁴ CPC, s 56.1.

¹¹⁵ *ibid* s 56.2.

¹¹⁶ *ibid* s 56.4.

¹¹⁷ CCC, s 35.

¹¹⁸ CPC, s 56.3.

legal capacity must fulfil the guardianship rules likewise when filing a case before the Administrative Courts.¹¹⁹

It appears from interview data for this research that not all persons with intellectual or psychosocial disabilities, autism, or brain injury were declared incompetent or quasi-incompetent. Such declarations were mostly requested against those who have significant assets and needed someone to manage them on their behalf, or needed some form of protection,¹²⁰ or for preventing them from accidentally entering into a contract.¹²¹ There was no comment on accessing other court services from research participants.

As a result, persons with some disabilities who are under partial or full guardianship will not be able to access civil justice independently. The guardianship regime, which may limit the individual's constitutional right on access to courts and tribunals, was permitted by the 2007/2014 Constitutions,¹²² but the substituted decision-making within this regime conflicts with the UNCRPD principles, especially on equal recognition before the law.¹²³ The 2017 Constitution does not impose the same permission to restrict a constitutional right on access to courts and tribunals as the 2007/2014 Constitutions did, but provides general conditions for legislation restricting people's rights and liberties.¹²⁴ However, the issue of whether the existing guardianship regime in Thailand conflicts with the 2017 Constitution or not, requires detailed analysis and discussion which are beyond the scope of this study.

Concerning accessibility of other related court services, there is only a provision, in legislation, on reasonable accommodation upon request to facilitate access for persons

¹¹⁹ Regulation of the Supreme Administrative Court's Plenary Session on Administrative Case Procedure BE2543(2000) (17 November 2000) GG 117(108gor) 30, r 26.

¹²⁰ Interview with Respondent TDP, a representative of a disabled people's organisation of persons with physical and mobility impairments (Pathum Thani, Thailand, 5 October 2015); Interview with Respondent TL2, a lawyer (barrister & solicitor) (Bangkok, Thailand, 3 August 2016).

¹²¹ Interview with Respondent TDA, a representative of an organisation for persons with autism (Bangkok, Thailand, 21 October 2015).

¹²² See text to n 102.

¹²³ UNCRPD, art 12.

¹²⁴ Art 26; See text to n 103.

with disabilities to public services.¹²⁵ Nevertheless, there was not sufficient data to evaluate this aspect of accessibility, but it seems not to be a concern among research participants.

Environmental accessibility of courthouses and courtrooms

There are two statutes concerning environmental accessibility for persons with disabilities: Building Control Act BE2522 (BCA 1979) and PDEA 2007. Both statutes provide details of facilities for persons with disabilities in their ministerial regulations.¹²⁶

However, the ministerial regulation under the BCA 1979 has a transitional provision ensuring that this regulation does not apply to buildings that were built or were permitted to be built before the enforcement of this regulation,¹²⁷ ie before 31 August 2005.¹²⁸ As a result, only the courthouses built after this period have a duty to comply with this law.

According to the ministerial regulation under the PDEA 2007, courthouses are included on the list of buildings where accessibility and disability facilities shall be provided, as these buildings are open to the public for governmental activities.¹²⁹ However, it is unclear whether the duty to provide accessibility and disability facilities under the PDEA 2007 covers the buildings built before the enforcement of the PDEA ministerial regulation or not, ie before 16 January 2013.¹³⁰ That is because the PDEA ministerial regulation does not have a transitional provision on time limitation of the law, but it refers to the use of the building control law *mutatis mutandis*,¹³¹ which means that the main principles of

¹²⁵ PDEA 2007, s 20/1.

¹²⁶ Ministerial Regulation Imposing Facilities in Building for Persons with Disabilities and Elderly Persons BE2548(2005) (2 July 2005) GG 122(52gor) 4 (BCA Regulation on Facilities 2005); Ministerial Regulation Imposing Qualification of Devices, Facilities, or Services in Building, Place, or Other Public Services, to Facilitate Accessibility of Persons with Disabilities BE2555(2012) (16 January 2013) GG 130(4gor) 1 (PDEA Regulation on Facilities 2012).

¹²⁷ BCA Regulation on Facilities 2005, r 29.

¹²⁸ *ibid* r 1.

¹²⁹ PDEA Regulation on Facilities 2012, rr 1.4 and 3.

¹³⁰ PDEA 2007, s 45.2.

¹³¹ PDEA Regulation on Facilities 2012, r 3.

the model law should not be changed when applying to another law.¹³² This provision requires legal interpretation to clarify its meaning but there has been no court ruling on this matter at the time of writing. However, it can be compared to a similar case of the Supreme Administrative Court, concerning accessibility for persons with disabilities within a public transport system under the Rehabilitation Act 1991 (replaced by the PDEA 2007).¹³³ The Court rules that a public service provider has a duty to comply with the accessibility standard for persons with disabilities under the ministerial regulations on the Rehabilitation Act although the contract on concession for public services was concluded before the enforcement of this law. The Court reasons that the Rehabilitation Act has no transitional provision that waives the duty of any public service provider operating before the enforcement of the Act. Therefore, the service provider has the duty to provide accessibility for persons with disabilities within its system once the law is activated.

A significant difference here is that the ministerial regulation of the Rehabilitation Act has its own accessibility requirements for persons with disabilities,¹³⁴ while the PDEA ministerial regulation does not have this, but refers to the building control law.¹³⁵ The PDEA ministerial regulation also provides another list of devices, facilities or services that governmental organisations should provide in their buildings to facilitate accessibility of persons with disabilities.¹³⁶ Such list seems to give choices for the organisations to select and provide at least one item on the list, which would generally not be sufficient to facilitate accessibility to courthouses or courtrooms for persons with disabilities. The similarity of the Rehabilitation Act and the PDEA 2007 is that they have no transitional provision that waives the duty to comply with the law for any building existing before the enforcement of such law. The main purpose of the PDEA 2007 is to fulfil the State's obligations under the UNCRPD. The reference to the building control law seems merely

¹³² Pakorn Nilrapunt, 'Tips of legal drafting process: Application of provisions of other law *mutatis mutandis*' (30 April 2014) <http://lawdrafter.blogspot.ie/2014/04/blog-post_30.html> accessed 7 May 2017.

¹³³ Supreme Administrative Court Decision No (red) Oor650/2557(2014).

¹³⁴ Ministerial Regulation No 4 (BE2542(1999)) under the Rehabilitation of Disabled Persons Act BE2534(1991) (17 December 1999) GG 116(129gor) 7.

¹³⁵ PDEA Regulation on Facilities 2012, r 3.

¹³⁶ *ibid* r 5.

to avoid repetition of the details on accessibility and disability facilities. Moreover, the provision that waives the duty on existing buildings before the enforcement of the building control law is in the transitional provision section, but not in the main provisions of the law. If the exempt provision under the building control law would also be applied to the PDEA 2007, the obligations under the PDEA 2007 would be meaningless, because the building control law gives the better guarantees for persons with disabilities.

Regarding accessibility of the courthouses, according to interview data for this research, no groups of persons with disabilities viewed that access to courthouses was a barrier in accessing justice.¹³⁷ However, in interview data from respondents who are court staff, as well as during my survey of courthouses in Bangkok conducted as part of this research, it did appear that, for courthouses older than ten years, there was a flight of stairs to the main public entrance to the hallway (usually located on the first floor, not on the ground floor), and no ramp to such entrance was usually in place.¹³⁸ Courts usually provided signage redirecting wheelchair users to an alternative entrance with an elevator located on either side of buildings, which was located on the ground floor and normally permitted access by judges and court staff only. There was a security guard facilitating at this alternative entrance for wheelchair users and the guard would take that person to the hallway, but this journey might pass through court offices or some restricted areas.¹³⁹ If the wheelchair users did not want to access the court through the alternative entrance

¹³⁷ Interview-TDP (n 120); Interview with Respondent TDV, a representative of a disabled people's organisation of persons with visual impairments (Bangkok, Thailand, 13 October 2015); Interview with Respondent TDH, a representative of a disabled people's organisation of Deaf persons (Bangkok, Thailand, 21 October 2015); Interview with Respondent TDS, a representative of an organisation for persons with psychosocial disabilities (Nonthaburi, Thailand, 17 October 2015); Interview-TDA (n 121); Interview with Respondent TDI, a representative of an organisation for persons with intellectual disabilities (Bangkok, Thailand, 28 September 2015).

¹³⁸ Interview with Respondent TSC(C), a court staff (court clerk) of the first instance court (general civil matters) (Bangkok, Thailand, 28 October 2015); Interview with Respondent TSF(C), a court staff (court clerk) of the first instance court (juvenile and family in civil matters) (Bangkok, Thailand, 29 October 2015).

¹³⁹ Interview-TSC(C) (n 138).

provided, they were allowed to be lifted in their wheelchairs up the steps to the main entrance, with the assistance of security guards if needed.¹⁴⁰

While the court staff are doing their best and making an effort to facilitate accessibility for persons with disabilities, what was provided for persons with disabilities does not meet accessibility requirements in international human rights law and minimum accessibility requirements under the ministerial regulations of the BCA 1979 and the PDEA 2007.¹⁴¹ These physical environment arrangements for persons with disabilities within the court system cannot be considered as fulfilling the State's duties to provide environmental accessibility or reasonable accommodation. The main structure of the elevators (the width of elevator door is approximately 90 centimetres and the width of interior space is approximately 150 x 160 centimetres) may meet the minimum requirements of the Thai law¹⁴² and international guidelines.¹⁴³ However, the facilities provided may not be accessible by some persons with disabilities whose wheelchairs are too big to enter the elevators or too heavy to be lifted up the long steps without a high risk of damage. Moreover, while these elevator facilities aim to provide wheelchair users' access to courts, persons with other disabilities, such as those who have difficulty climbing stairs, may feel embarrassed or hesitate to ask for this service. Accessing the courthouse through the public entrance may also not be convenient for them as the steps are made of polished stone, which are slippery when they are wet from rain, and as the provided handrails are not installed all the way along the steps.

The interview data shows that access to courtrooms is not a problematic issue for persons with disabilities as parties, witness, lawyers, court staff or public observers

¹⁴⁰ Interview-TDP (n 120); Interview-TSC(C) (n 138).

¹⁴¹ BCA Regulation on Facilities 2005; PDEA Regulation on Facilities 2012.

¹⁴² BCA Regulation on Facilities 2005, r 10; The elevator cab is wide no less than 110x140 centimetres and entry door is wide no less than 90 centimetres.

¹⁴³ 'Accessibility for the Disabled – A Design Manual for a Barrier Free Environment' (*UN Enable*) <www.un.org/esa/socdev/enable/designm/AD2-02.htm> accessed 8 May 2017; The acceptable size of elevator cab is 95x120 centimetres and elevator door opening is 75 centimetres.

because most courtrooms are wheelchair accessible.¹⁴⁴ However, in courtrooms with traditional design, the witness stand is usually raised and inaccessible to people in wheelchairs. In that case, witness who is a wheelchair user does not have to position himself/herself in the stand.¹⁴⁵ Judges' benches in all courtrooms are accessed by steps, and not accessible to people in wheelchairs.¹⁴⁶ A respondent who is a judge expressed that, although there is no judge with physical impairments as yet, non-accessibility to judges' benches by wheelchair can be a barrier for some judges who have temporary mobility impairments due to an accident.¹⁴⁷ The height of judges' benches can be a barrier for a lawyer who uses wheelchair, as he/she may not be able to hand documents in to the bench by himself/herself.¹⁴⁸ If there is no other authorised person to proceed with the case (for instance the party himself/herself, a representative of the party, other lawyer appointed by the party), in principle, such lawyer shall appoint any person as a proxy to hand in the documents.¹⁴⁹ However, some judges may allow a non-proxy person to hand in the document once the lawyer is also in the courtroom.¹⁵⁰ There is no incident that this permission will be opposed by the opponent lawyer, nor will lead to an illegal court proceeding.¹⁵¹ Therefore, it is not a barrier within courtrooms whereby lawyers with disabilities would have to recuse themselves from cases.

As discussed, most accommodations provided in the courthouses and the courtrooms are mainly for wheelchair users. Although there is no complaint about environmental

¹⁴⁴ Interview-TDA (n 121); Interview-TDH (n 137); Interview-TDI (n 137); Interview-TDS (n 137); Interview-TDP (n 120); Interview-TDV (n 137); Interview-TSC(C) (n 138); Interview-TSF(C) (n 138).

¹⁴⁴ Interview-TSC(C) (n 138); Interview-TSF(C) (n 138).

¹⁴⁵ Interview with Respondent TJC, a judge of the first instance court (general civil matters) (Bangkok, Thailand, 27 October 2015); Interview with Respondent TJC, a judge of the first instance court (juvenile and family in civil matters) (Bangkok, Thailand, 2 November 2015); Interview-TSC(C) (n 138); Interview-TSF(C) (n 138).

¹⁴⁶ Interview-TJC (n 145).

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid.*

¹⁴⁹ CPC, ss 1(11), 62, 64, 69.

¹⁵⁰ Interview-TJC (n 145).

¹⁵¹ *ibid.*

accessibility to the courthouses by persons with disabilities as yet, there are still many factors, according to my observation (before 2017), that may be barriers in accessing justice for some persons with disabilities. For example, Deaf persons with limited literacy who travel alone may experience difficulties in obtaining some information, such as being alerted in emergency situations if they need to evacuate the court. Visually impaired people may not be able to navigate around the courthouse by themselves as there is no appropriate signage or audio information in place, such as voice information in some elevators. These barriers can also obstruct their access to or participation in court proceedings in the first place.

My research findings indicate that the existing legal mechanisms and regulations cannot truly guarantee persons with disabilities the right to equal access to courts and tribunals in terms of environmental accessibility, and are not in line with the UNCRPD. There is no direct provision on legal enforcement or a fine if the building owner does not comply with the BCA 1979 or the PDEA 2007 regarding environmental accessibility for persons with disabilities.¹⁵² The BCA 1979 only assesses the legal compliance of the building design before getting a permission for constructing a new building or modifying an old building, while the PDEA 2007 offer an incentive through tax credit scheme for those who complies with the environmental accessibility regulations.¹⁵³ Inaccessibility of the physical environment is a form of indirect discrimination causing inequality in providing public services. That is because the physical location of courts and tribunals only serve some groups of people, while leaving other groups behind, such as persons with disabilities. Additionally, environmental inaccessibility of the courthouses and the courtrooms can cause inequality between persons with disabilities and those without disabilities. This inequality does not only hinder some groups with disabilities from equal access to courts and tribunals, but also from equality of arms, as the inaccessibility may prevent, or at least discourage, an opportunity to effectively exercise their procedural rights or to fully participate in court proceedings.

¹⁵² Jitra Sirisomboonlarb, 'Guidelines on providing accessibility for persons with disabilities to facilitate the integration of ASEAN Community' (*Department of Empowerment of Persons with Disabilities*) <<http://dep.go.th/sites/default/files/files/document/แนวทางการจัดตั้งอำนวยความสะดวกสำหรับคนพิการในประเทศไทย.pdf>> accessed 9 May 2017.

¹⁵³ PDEA 2007, s 37.2.

B. Right to equality of arms

The core of this right is the equal opportunity of all parties to present and defend their case.¹⁵⁴ There are several factors that can affect equality of arms of persons with disabilities. For example, understanding of the legal process, knowing about their rights, being able to access legal assistance and communication assistance, being treated by courts and tribunals equally with other parties, validity of their testimonies and accessibility and appropriate condition of courthouses and courtrooms. These issues are related to equality of arms because they reflect whether persons with disabilities have a fair opportunity to present and defend their case. Equality of arms concerning environmental accessibility of courthouses and courtrooms was discussed in the previous subsection. Its aspects concerning the right to legal assistance, communication assistance, the right to be heard and equal treatment by courts and tribunals will be discussed in those sections. This subsection will focus on equal opportunity to present and defend the case, and information accessibility.

The 2007/2014 Constitutions guaranteed a right to be adequately informed of the facts and inspect documents and a right to present his/her facts, defences and evidence.¹⁵⁵ The 2017 Constitution does not have these guarantees; it only mentions the general principle on the right to know and access public information in the possession of State agencies, which was also guaranteed in the 2007/2014 Constitutions.¹⁵⁶ This guarantee is confirmed by the Official Information Act BE2540(1997). This Act confirms that State agencies have duties to publish organisational information and their regulations in the Government Gazette,¹⁵⁷ to provide other information (eg their working plans, projects, budgets, decisions and orders) for public access,¹⁵⁸ and to disclose other information

¹⁵⁴ Jonathan Law (ed), *A Dictionary of Law* (8th edn, OUP 2015); Sangeeta Shah, 'Detention and Trial' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014) 259; CtteeCPR 'General Comment No 32' (23 August 2007) UN Doc CCPR/C/GC/32.

¹⁵⁵ Constitution 2007, art 40(2).

¹⁵⁶ Constitution 2017, art 41(1); Constitution 2007, art 56.

¹⁵⁷ Official Information Act BE2540(1997), s 7.

¹⁵⁸ *ibid* s 9.

when requested by an individual¹⁵⁹ unless that information is sensitive under the non-disclosure regulations.¹⁶⁰ To support information accessibility for persons with disabilities, the PDEA 2007 guarantees that persons with disabilities have the right to information accessibility from State agencies and any private entities which are subsidised by the State.¹⁶¹ Where these organisations cannot make all public information available in accessible formats and through accessible channels for all groups of persons with disabilities, they must provide reasonable accommodation by adapting, modifying and improving accessibility by considering diverse needs of different groups of persons with disabilities.¹⁶²

It appears from the interview data that access to information was a challenging issue for persons with disabilities which affects their equality of arms and equal access to courts and tribunals. This information includes knowledge about their right to a remedy,¹⁶³ how to pursue a case,¹⁶⁴ availability of their arguments or defences regarding disability,¹⁶⁵ and understanding of court proceedings.¹⁶⁶ One respondent stated that some blind persons did not have an opportunity to attend court proceedings because they could not access information on the hearing date, as it was contained in a written document, which is inaccessible for visually impaired persons.¹⁶⁷ Some respondents argued that State agencies did not publicise their work and services sufficiently and effectively.¹⁶⁸ State agencies might provide written information through their website for the public access

¹⁵⁹ *ibid* s 11.

¹⁶⁰ *ibid* ss 14-15; APA 1996, s 32.

¹⁶¹ PDEA 2007, s 20(6); Ministerial Regulation Imposing Terms, Procedures and Conditions on Accessibility and Utilisation of Information, Communication, Telecommunication Services, Information and Communication Technology, and Information and Communication Access Technology for Persons with Disabilities BE2554(2011) (20 May 2011) GG 128 (38gor) 9 (PDEA Regulation on Information and Communication 2011), r 3.

¹⁶² PDEA Regulation on Information and Communication 2011, r 3.2.

¹⁶³ Interview-TDS (n 137); Interview-TDP (n 120); Interview-TL2 (n 120).

¹⁶⁴ Interview-TDA (n 121); Interview-TDS (n 137); Interview-TDP (n 120); Interview-TL2 (n 120).

¹⁶⁵ Interview-TDA (n 121); Interview-TDS (n 137); Interview-TDP (n 120).

¹⁶⁶ Interview-TDA (n 121); Interview-TDH (n 137); Interview-TDV (n 137).

¹⁶⁷ Interview-TDV (n 137).

¹⁶⁸ *ibid*; Interview-TDS (n 137).

but not every blind person could access information through internet,¹⁶⁹ and many Deaf persons could not read.¹⁷⁰ Some respondents pointed out that, although persons with disabilities knew which organisations they should contact for assistance concerning their rights, some officials did not have sufficient knowledge to provide them adequate information and services.¹⁷¹ Several respondents noted that many State agencies organised free workshops, talks or seminars to disseminate necessary knowledge about people's rights and information about their services to the public, but most persons with disabilities could not join these activities because they did not know about the events or hesitated to attend as most of the events took place in hotels or other formal settings.¹⁷² Some events only invited a few representatives from disable people's organisations; therefore, this knowledge and information could not reach persons with disabilities at grassroots levels.¹⁷³

In addition to the information accessibility aspect, some conditions of the courtrooms also can affect equality of arms. Apart from the environmental conditions of the courtrooms discussed in the previous subsection, the other condition that might affect equality of arms, raised by the respondents interviewed for this research, was a tense atmosphere in courtroom, caused by the opponent lawyer's tactics or the strict approach of judges.¹⁷⁴

The research findings show that the current legal mechanisms and regulations merely focus on information accessibility for persons with disabilities, but do not explicitly guarantee a right to present and defend one's case. These do not sufficiently guarantee the right to equality of arms of persons with disabilities, protected in international human rights law. Moreover, despite the existing of legal guarantees on information

¹⁶⁹ Interview-TDV (n 137); Braille is neither an accessible format for every blind person. The respondent suggested that an audio format is more accessible for most blind people in Thailand.

¹⁷⁰ Interview-TDH (n 137).

¹⁷¹ Interview-TDA (n 121); Interview-TDP (n 120).

¹⁷² Interview-TDP (n 120); Interview-TL2 (n 120).

¹⁷³ Interview-TDA (n 121); Interview-TDP (n 120); Interview-TL2 (n 120).

¹⁷⁴ Interview-TDP (n 120); Interview-TDV (n 137).

accessibility, it still appears from the research findings that accessing information is still a problematic issue for every group of persons with disabilities.

C. Right to equal treatment by courts and tribunals

This right covers the treatment of judges or tribunal members and all other bodies administering justice.¹⁷⁵ It emphasises an equal and just outcome of individual treatment, so that treating different groups of people differently to pursue this aim is acceptable,¹⁷⁶ such as by providing age-appropriate measures or reasonable accommodations.¹⁷⁷ The fulfilment of this right will also support the effectiveness of the right to equality of arms.

The 2007/2014 Constitutions guaranteed that a participant in a legal case, whether a party, an injured person, an interested person or witness, had a right to be treated appropriately.¹⁷⁸ They also emphasised that persons with disabilities shall be properly protected in legal proceedings and be appropriately treated in cases related to sexual violence.¹⁷⁹ These guarantees are absent in the 2017 Constitution. The only constitutional guarantee relating to equal treatment by courts and tribunals, which is also carried forward from the 2007/2014 Constitutions, is a general constitutional provision on non-discrimination on the grounds of disability, physical and health conditions.¹⁸⁰ The provision on non-discrimination in the 2017 Constitution also commands other persons who work in the justice system to deliver equal treatment without any discrimination to all groups of people and to take into consideration other elements that might disadvantage them in order to eliminate barriers. The PDEA 2007 further prohibits any

¹⁷⁵ Shah (n 154).

¹⁷⁶ Reem Bahdi, 'Background Paper on Women's Access to Justice in the MENA Region' (SSRN, October 31, 2007) <ssrn.com/abstract=1716864> accessed 12 May 2018.

¹⁷⁷ UNCRPD, arts 5(3) and 13.

¹⁷⁸ Constitution 2007, art 40(4).

¹⁷⁹ *ibid* art 40(6); Article 40 of the 2007 Constitution did not explicitly use the terms "equality" or "equal treatment/protection"; it instead used the terms "appropriate", "proper", "suitable" treatment and protection. It was more about adapting to become equal, but did not use that language. However, Article 30 of the 2007 Constitution is another provision that guaranteed equality before the law and equal protection of the law.

¹⁸⁰ Constitution 2017, art 27.3; Constitution 2007, art 30.3.

person or organisation from doing (or not doing) anything that results in unfair discrimination toward persons with disabilities.¹⁸¹

Both 2007/2014 and 2017 Constitutions impose on everyone appointed as a judge an obligation to make a solemn declaration before the King that he/she will faithfully perform the duty without any kind of partiality and will comply with every respect of law.¹⁸² This declaration respects the principle of independence and impartiality of judges, which will be further discussed in the subsection of the notions of competence, independence and impartiality of courts and tribunals.

The interview data for this research shows that there was no specific training on disability available for either judges and court staff.¹⁸³ In practice, for cases involving persons with disabilities, judges and court staff will try to support disabled participants wherever they can,¹⁸⁴ while also being aware of the need to maintain impartiality as to the outcome of the proceedings.¹⁸⁵ One respondent who is a lawyer also mentioned that court proceedings could be undertaken more flexibly when disabled participants were involved.¹⁸⁶ All respondents from the perspective of persons with disabilities perceived that judges and court staff treated them equally with others, but one respondent noted from his viewpoint that he could not assure whether all judges did genuinely understand all persons with disabilities.¹⁸⁷ However, several respondents confirmed that, within court

¹⁸¹ PDEA 2007, s 15; Some discrimination is not considered unfair. See n 83.

¹⁸² Constitution 2017, art 191; Constitution 2007, art 201.

¹⁸³ Interview-TJC (n 145); Interview-TJF (n 145); Interview with Respondent TSC(F), a court staff (frontline) of the first instance court (general civil matters) (Bangkok, Thailand, 28 October 2015); Interview with Respondent TSF(F), a court staff (frontline) of the first instance court (juvenile and family in civil matters) (Bangkok, Thailand, 29 October 2015); Interview-TSC(C) (n 138); Interview-TSF(C) (n 138).

¹⁸⁴ Interview-TDA (n 121); Interview-TDH (n 137); Interview-TDI (n 137); Interview-TDS (n 137); Interview-TDP (n 120); Interview-TDV (n 137); Interview-TJC (n 145); Interview-TJF (n 145); Interview-TSC(F) (n 183); Interview-TSF(F) (n 183); Interview-TSC(C) (n 138); Interview-TSF(C) (n 138).

¹⁸⁵ Interview-TJC (n 145); Interview-TJF (n 145); Interview-TSC(F) (n 183); Interview-TSF(F) (n 183); Interview-TSC(C) (n 138); Interview-TSF(C) (n 138).

¹⁸⁶ Interview-TL2 (n 120).

¹⁸⁷ Interview-TDV (n 137).

proceedings, courts always gave persons with disabilities an adequate opportunity to present their case.¹⁸⁸ For example a party or a witness whose disabilities affected his/her ability to communicate through speech, or who was a sign-language user, may need more time in communicating with the court. Those interviewed for this study said that judges would give persons with disabilities adequate time in giving testimony and presenting their evidence.¹⁸⁹ Nevertheless, some people might not be able to use this opportunity because they did not obtain the requisite evidence in the first place, such as documentary evidence for a loan agreement, due to their ignorance of the law,¹⁹⁰ or obtained the document but could not read it because it was in an inaccessible format.¹⁹¹ This aspect also reflects the close connection between the right to equal treatment by courts and tribunals and the right to equality of arms, especially the importance of information accessibility.

The 2007/2014 Constitutions seem to give the better guarantee on the right to equal treatment by courts and tribunals than the 2017 Constitution does. Although there is no other specific legislation concerning equal treatment of judges or tribunal members, the constitutional provisions and the existing legislation are arguably adequate to generally guarantee the right to equal treatment by courts and tribunals and effective enough to comply with international human rights law standards.

D. Right to equality before the law

The right to equality before the law could be equated with the right to equality before courts and tribunals because it gives everyone an entitlement to the protection of rights through the judiciary.¹⁹² Both 2007/2014 and 2017 Constitutions guarantee that all

¹⁸⁸ Interview-TDA (n 121); Interview-TDH (n 137); Interview-TDI (n 137); Interview-TDS (n 137); Interview-TDP (n 120); Interview-TDV (n 137); Interview-TL2 (n 120).

¹⁸⁹ Interview-TDH (n 137); Interview-TDP (n 120); Interview-TJC (n 145); Interview-TL2 (n 120).

¹⁹⁰ Interview-TDH (n 137); Interview-TDS (n 137).

¹⁹¹ Interview-TDV (n 137).

¹⁹² S.M. Huang-Thio, 'Legal Aid – A Facet of Equality Before the Law' (1963) 12 *International and Comparative Law Quarterly* 1133; Yash Ghai and Jill Cottrell, 'The rule of law and access to justice', in Yash Ghai and Jill Cottrell (eds), *Marginalized Communities and Access to Justice* (Routledge 2010); Rhona Smith, *Textbook on International Human Rights* (5th edn, OUP 2012).

persons are equal before the law and shall enjoy equal protection under the law.¹⁹³ This means that persons with disabilities are also guaranteed the right to equality before courts and tribunals.

Despite this constitutional guarantee of equality before the law, many legal provisions do not treat everyone equally. In terms of access to civil justice, persons with disabilities may experience restrictions or denial of their legal capacity. The guardianship regime restricts their contractual ability,¹⁹⁴ and capacity to file a lawsuit and proceed with the court proceedings independently.¹⁹⁵ Persons with psychosocial disabilities, profound deafness, significant visual impairments and persons who cannot speak, cannot be witnesses in a will.¹⁹⁶ Persons who cannot understand nor reply to questions also cannot be witnesses in all court proceedings.¹⁹⁷ This issue will be discussed in section 5.3.4 on the right to be heard or a fair hearing. These provisions demonstrate the inferior legal status of some persons in the eyes of the law due to their disabilities, which does not comply with the principle of equality before the law set out in international human rights law.

In summary, Thailand has attempted to guarantee every aspect of the right to equality before courts and tribunals in its legal mechanisms and regulations. However, it appears from the research findings that, in practice, there are still many issues that require the State to pay more attention and rectify to fulfil international human rights law standards. Only the aspect of the right to equal treatment by courts and tribunals seems acceptable but it still needs more supportive mechanisms to ensure its effective implementation. Recommendations for compliance with international human rights law standards will be provided in section 5.4.

¹⁹³ Constitution 2017, art 27; Constitution 2007, art 30.

¹⁹⁴ CCC, ss 28 and 32.

¹⁹⁵ CPC, s 56.3.

¹⁹⁶ CCC, s 1670.

¹⁹⁷ CPC, s 95.

5.3.2 Right to legal assistance or representation

The term “legal aid” is used interchangeably with the term “legal assistance” to refer to free services (or with some conditions) on legal advice and representation.¹⁹⁸ The right to legal assistance or representation is an indispensable supportive element to achieve the right to equality of arms for people who have financial limitations,¹⁹⁹ including many persons with disabilities who face these difficulties due to their limited access to education and employment.²⁰⁰

The 2007/2014 Constitutions specifically guaranteed the right to receive appropriate legal assistance from the State in civil cases.²⁰¹ The 2017 Constitution only mentions legal assistance as a State policy and a part of the national reform strategy on the law and justice.²⁰² The implication of their differences was already discussed in section 5.1.3.

Although the right to legal assistance in civil cases is no longer one of the citizens’ rights in the 2017 Constitution, it remains guaranteed by lower legislation. However, the State may change, limit or repeal this right anytime since it is not a constitutional right. There are two different kinds of legal aid service in Thailand: legal aid provided for all, and legal aid provided specifically for persons with disabilities.

Regarding the general legal aid scheme, there is no specific legislation on this nor a single organisation in charge of the legal aid system. At least four main State agencies provide free services for legal advice: 1) Ministry of Justice, 2) Office of the Attorney General 3) Thai Bar, and 4) Lawyers Council.²⁰³ However, each organisation has different eligibility criteria for free legal aid. A common criterion across these

¹⁹⁸ Fiona Cownie, ‘Legal Aid’ in Peter Cane and Joanne Conaghan, *The New Oxford Companion to Law* (OUP 2009).

¹⁹⁹ Richard Clayton and Hugh Tomlinson, *Fair Trial Rights* (OUP 2001).

²⁰⁰ DEP (n 83).

²⁰¹ Constitution 2007, art 40(8).

²⁰² Constitution 2017, art 68.3; Constitution 2017, art 258.c-d.

²⁰³ National Office for Empowerment of Persons with Disabilities (NEP), *Manual for legal assistance and legal representation service for persons with disabilities* (D-Suwan Supply Service 2011).

organisations is that the applicant must be in financial difficulty where pursuing the case himself/herself.²⁰⁴ Except for the Ministry of Justice, most organisations also require that the reason to file or defend the case is that the applicant suffered from injustice.²⁰⁵ The Thai Bar, the Lawyer Council and the Office of the Attorney General are only responsible for attorney fees and attorney expenses,²⁰⁶ while the Ministry of Justice also covers court fees and other relevant expenses for the case,²⁰⁷ such as expenses for scientific tests, expenses for materials and devices for obtaining facts and evidence, and expenses for document preparation.²⁰⁸

All organisations have rather clear regulations that their legal aid services are for both civil and criminal cases. No organisation mentions whether their legal aid includes constitutional cases or not. Only the Ministry of Justice explicitly includes a legal aid service for administrative cases, while other organisations have no clear regulation on this matter. Nevertheless, all these organisations can provide their legal aid for other cases where injustice is concerned. By analogy with its regulations on free legal aid in criminal cases, the Office of the Attorney General tends not to provide legal aid in administrative cases. This is because public prosecutors have duties to pursue administrative cases on behalf of the Government and State's agencies,²⁰⁹ so the Office will be an opponent in the case, which would constitute a conflict of interest.

²⁰⁴ Lawyers Act BE2528(1985) (19 September 1985) GG 102 (129) 1, s 78; 'Legal Aid Office of the Thai Bar' (*The Thai Bar*) <www.thethaibar.or.th/thaibarweb/index.php/th> accessed 4 October 2018, citing Regulation of the Thai Bar on Administration of the Legal Assistance Office BE2541 (1998); Regulation of the Department of Public Prosecution on Legal Assistance BE2533(1990) (DPP Regulation on Legal Assistance 1990), r 30(2); Justice Fund Act BE2558(2015) (27 October 2015) GG 132(102gor) 1, s 5.

²⁰⁵ *ibid.*

²⁰⁶ NEP (n 203); Rules of the Lawyers Council on Legal Assistance BE2529(1986) (2 July 1986) GG 103 (114) 16; DPP Regulation on Legal Assistance 1990, rr 11 and 37.

²⁰⁷ Justice Fund Act BE2558(2015), s 27.

²⁰⁸ Regulation of Justice Fund Commission on Terms, Procedures and Conditions on Provision of Legal Assistance BE2559(2016) (23 August 2016) GG 133(185ngor) 8, r 9(4-5).

²⁰⁹ Organisation and Public Prosecutor Act BE2553(2010), s 14(3)-(5).

Although some legal aid funding will not cover court fees, the CPC provides support for a party who cannot afford the initial court fee through a court fee exemption scheme. A motion for this scheme can be submitted together with the complaint, the defence, or the petition for appeal.²¹⁰ The decision for the exemption is at the discretion of the court, which may be granted fully or partially or dismissed, depending on the evidence shown.²¹¹ The exemption covers only the initial court fee for filing the case, the granted party is still liable for other expenses incurred during the proceedings such as the cost of delivering a summons, witness fees and traveling expenses, and cost of examining documents by experts.²¹² This exemption is available for all to apply, but persons with disabilities may have a better opportunity as the assessment is based on the applicant's ability to pay the fee and persons with disabilities are frequently 'the poorest of the poor', especially in countries with limited resources.²¹³ In consumer cases, there is also an exemption for all court fees for the plaintiffs who are the consumers, including their representatives, with exceptions for some cases in accordance with judicial discretion, such as where the case is filed unreasonably, or the plaintiff attempts to unnecessarily prolong the case.²¹⁴ In administrative cases, there is also an exemption for the initial court fee, with exceptions for cases with a request for compensation by paying money or delivering other assets.²¹⁵ A party who cannot afford the initial court fee may request a full or partial exemption from the court fee.²¹⁶

In addition to the services for all, the PDEA 2007 is the main legislation guaranteeing the right to legal assistance or representation of persons with disabilities.²¹⁷ This includes free legal advice and legal representation in civil matters. The legal aid funding covers

²¹⁰ CPC, ss 155-156.

²¹¹ *ibid* s 156/1.

²¹² International Affairs Division, *Civil Procedure (Thai – English)* (Office of the Judiciary) <<http://elib.coj.go.th/Ebook/data/Ebook10112010.pdf>> accessed 28 December 2014.

²¹³ Amartya Sen, *The Idea of Justice* (The Belknap Press 2009) 258.

²¹⁴ Consumer Case Procedure Act BE2551(2008), s 18.

²¹⁵ EACCPA 1999, s 45.4

²¹⁶ *ibid* s 45/1.

²¹⁷ PDEA 2007, s 20(5).

attorney fees and expenses, court fees and other necessary expenses for the case.²¹⁸ However, each category has a cap on funding, and the applicant must either have his/her income lower than a specific amount as specified by law or be an injured party resulting from discriminatory action.²¹⁹ Moreover, the applicant must be deemed to have an opportunity to win the case to qualify for this funding.²²⁰

Additionally, persons with disabilities, as well as relevant disability related organisations acting on behalf of persons with disabilities, are exempt from all court fees for pursuing civil cases for damages resulting from unjust discriminatory actions against persons with disabilities.²²¹ These fees include the initial fee for starting a lawsuit, the fee for a hearing or examining evidence out-of-court, witnesses fees, travel expenses, accommodation expenses of witness, expert witnesses, interpreters, court staff, attorney fees, expenses for court proceedings and other fees or expenses imposed by law.²²² The meaning of disability related organisations refers to both disabled people's organisations and non-governmental organisations for persons with disabilities.²²³ There is no specification of these organisations but they shall at least have legal personality, such as being an association or a foundation,²²⁴ because legal personality is a fundamental requirement to be a party in court proceedings.²²⁵ Although the purposes of their organisations do not

²¹⁸ Regulation of the National Committee for Empowerment of Persons with Disabilities on Legal Assistance and Providing an Attorney for Persons with Disabilities BE2552(2009) (27 July 2009) GG 126(105ngor) 14, r 11.

²¹⁹ *ibid* rr 12-13; PDEA 2007, s 20(5); Declaration of the National Office for Empowerment of Persons with Disabilities on List of Expenses and Their Limits for Legal Assistance and Providing an Attorney for Persons with Disabilities (30 November 2010) GG 127(138ngor) 60, r 1(2).

²²⁰ *ibid* r 12(2).

²²¹ PDEA 2007, s 17.2.

²²² CPC, s 149.

²²³ Regulation of the National Committee for Empowerment of Persons with Disabilities on Standardisation, Certification and Revocation of Certification of Disability Related Organisations or Other Disability Service Provider Organisations BE2552(2009) (24 June 2009) GG 126 (89ngor) 13, r 3.3.

²²⁴ CCC, ss 83 and 122.

²²⁵ CPC, ss 1(11) and 55.

include providing legal representation, they can be a representative for cases within their organisational framework, such as to promote or protect the rights of persons with disabilities.²²⁶ There is no further difference whether a case is filed by an individual with disabilities or by disability related organisations. This exemption is compulsory under the PDEA 2007. The courts have no discretionary authority to decide whether to grant it or not, unlike the exemption provided under the CPC. Nevertheless, there is no legal provision imposing a duty on court staff to inform persons with disabilities of this exemption. Presently, there are no court guidelines available on this matter, so it is possible that if court staff or persons with disabilities do not know of its existence, persons with disabilities may not be able to avail and claim it.

For clarity, unjust discriminatory actions against a person on the basis of disability, or physical or health conditions are constitutionally prohibited.²²⁷ These actions refer to segregation, obstruction, or restriction of rights due to disability, by violating fundamental rights and liberties of a person with disability. These rights must be accessible to persons with disabilities on an equal basis with others, with regard to economic, social, cultural, civil aspects and others. The unjust discriminatory actions also include all other forms of unfair discrimination, denial of reasonable accommodation,²²⁸ and omission of any action on the ground of disability.²²⁹ For example, the omission to employ persons with disabilities in accordance with the quota in employment law,²³⁰ and the omission to provide a lift for wheelchair users to access an aircraft.²³¹

There are various options to obtain legal assistance or representation for civil matters, but some respondents with disabilities interviewed for this research viewed that very few

²²⁶ CCC, s 66; Supreme Court Decision No 263/2503(1960).

²²⁷ Constitution 2017, art 27.3; Constitution 2007, art 30.3.

²²⁸ Regulation of the National Committee for Empowerment of Persons with Disabilities on Principle, Method, and Requirement for Requesting, Collecting Evidence, Mediating, Remunerating and Making a Decision of the PDEA Sub-committee or Mediators, in Relation to Unjust Discriminatory Actions Against Persons with Disabilities BE2556(2013) (16 December 2013) GG 130(182ngor) 25 (NEP Regulation on Evidence and Mediation 2013).

²²⁹ PDEA 2007, s 15.2.

²³⁰ PDEA Sub-committee Decision No 1/2558 (13 March 2015).

²³¹ PDEA Sub-committee Decision No 4/2558 (13 March 2015).

persons with disabilities or their family members recognised the availability of these options since information on these matters was very limited and not in an accessible format for persons with disabilities.²³² Moreover, legal representation provided by legal aid service organisations were volunteer attorneys. The respondents viewed that the quality of these attorneys was problematic but persons with disabilities may need to accept these free services if they cannot afford attorney fees.²³³ Most volunteer attorneys in Thailand were new lawyers²³⁴ and respondents interviewed for this research suggested that they often lack experience, and that they inadequately devote themselves to the case.²³⁵ One respondent revealed that a volunteer attorney mentioned that he/she could only give basic legal advice, and that if the applicant wanted to discuss the case in detail or to pursue the case, the applicant must contact him/her privately, which was no longer on a free of charge basis.²³⁶ One respondent who is a lawyer suggested that this practice was against the Attorney's Code of Ethics as that person was already paid by the Lawyers Council to perform the voluntary duty.²³⁷ Generally, where persons with disabilities want to get a more experienced lawyer, they need to pay for a privately hired attorney. They may request financial support for attorney fees in accordance with the PDEA 2007 if they meet all the requirements aforementioned, or some lawyers might be willing to assist without attorney fees.²³⁸ One respondent noted that the support of the PDEA 2007 for professional fee of an attorney was insufficient as the normal charge for privately hired attorney for a non-complex case was usually double the amount the PDEA 2007 provide.²³⁹ Some other risks were that not all attorneys had specific knowledge on disability law, and only few persons with disabilities or disabled people's organisations

²³² Interview-TDA (n 121); Interview-TDH (n 137); Interview-TDS (n 137); Interview-TDP (n 120); Interview-TDV (n 137).

²³³ Interview-TDA (n 121); Interview-TDH (n 137); Interview-TDI (n 137); Interview-TDS (n 137); Interview-TDP (n 120); Interview-TDV (n 137).

²³⁴ Kamnod Soponwasu, 'Dignity of Volunteer Attorney' (5 October 2010) <www.oknation.net/blog/ThaiLawFirm/2010/10/05/entry-1> accessed 23 January 2016.

²³⁵ Interview-TDA (n 121); Interview-TDP (n 120).

²³⁶ Interview-TDA (n 121).

²³⁷ Interview-TL2 (n 120).

²³⁸ *ibid.*

²³⁹ Interview-TDS (n 137).

had good connections with attorneys who are expert on disability matters.²⁴⁰ A few respondents indicated that although the PDEA 2007 included legal aid for civil cases, it did not cover every type of cases. For examples, it excludes cases involving divorce, division of marital property, alimony, child maintenance, cases where applicants were civil respondents, and cases relating to land.²⁴¹

The right to legal assistance or representation is not only about availability of free legal aid services, but these services must also be of good quality. If persons with disabilities have legal representation with below average quality, their right to equality of arms will not be fulfilled, as legal representation is an essential element of a fair opportunity to present and defend oneself in court.²⁴² Therefore, to effectively guarantee the right to legal assistance or representation, both availability of services and their quality need to be taken into consideration.

There are diverse options and choices for legal assistance or representation in civil cases available in Thailand in compliance with the guarantee of the 2007/2014 Constitutions. However, the findings of this research show that the current legal mechanisms and regulations cannot ensure persons with disabilities accessibility of this right, due to many obstacles, including a lack of information, an inadequate quality of the lawyers and poor mechanisms for quality control, and an ambiguity of the service provision based on the discretion of a committee. It seems the existing laws on the right to legal assistance or representation are not wholly satisfactory from the perspective of the requirement of international human rights law standards. However, it appears that the State acknowledges these concerns and is working towards the constitutional provisions on State policies and national reform strategy to improve the situation.²⁴³

²⁴⁰ Interview-TDP (n 120); Interview-TDV (n 137).

²⁴¹ Interview-TDP (n 120); Interview-TDV (n 137).

²⁴² Clayton and Tomlinson (n 199).

²⁴³ National Reform Plan (n 44).

5.3.3 Right to communication assistance

The term “communication assistance” includes the assistance of a spoken language interpreter or translator, or as sign-language interpretation. It includes other means of communication and methods, such as alternative and augmented communication (ACC), and other forms of unique communication and facilitated communication.²⁴⁴ This right is another vital feature that affects equality of arms of persons with disabilities because communication is a means to present and defend their cases.

The PDEA 2007 is the main legislation guaranteeing the right to communication assistance for persons with disabilities. There are two types of communication assistance for persons with disabilities to facilitate their accessibility to public services, including the justice system. The first type includes information and communication technology, and communication assistive technology for persons with all types of disabilities;²⁴⁵ the second type is sign-language interpretation.²⁴⁶

Examples of communication and communication assistive technologies include assistive communication devices, braille printers, braille displays, reading devices for persons with disabilities and computer software for converting braille, screen reading and screen magnifying.²⁴⁷ These are available for lending or distributing to persons with disabilities under the ministerial regulation.²⁴⁸ At present, there is no specific regulation on the use of these technologies and devices in court. However, testimony through this method will not conflict with the current rules of evidence if the person who gives testimony can understand and reply to questions.²⁴⁹ It appears from interview data for this research that judges will consider whether these technologies and devices are reliable. Permission

²⁴⁴ Eilionoir Flynn, *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Ashgate 2015).

²⁴⁵ PDEA 2007, s 20(6).

²⁴⁶ *ibid* s 20(7).

²⁴⁷ PDEA Regulation on Information and Communication 2011, attachment (list of devices and instruments).

²⁴⁸ *ibid*.

²⁴⁹ CPC, s 95.

may be granted if these technologies and devices are used with the purpose to facilitate communication; however, this is within judges' discretion.²⁵⁰

A sign-language interpretation service is available for free for Deaf persons when attending legal proceedings, including when applying for legal assistance or attending mediation proceedings.²⁵¹ However, courts will not arrange a sign-language interpretation service in civil cases because it is the duty of a Deaf party or having a party who has a Deaf witness, who also cannot read and write, to acquire an interpreter himself/herself.²⁵² One respondent interviewed for this research contended that Deaf persons could also avail of a sign-language interpretation service when meeting with a lawyer or attending court proceedings.²⁵³ It was still free of charge but Deaf persons had to arrange this themselves.²⁵⁴ A reservation for sign-language interpretation should be made at least three days in advance, unless in an emergency, at the National Association of the Deaf.²⁵⁵

Concerning the quality of the service in general, the literature shows that the quantity of interpreters is not problematic although the ratio of sign-language interpreters to Deaf persons is around 1:500 (or up to 1:1,500 if adjusted to include unregistered Deaf persons).²⁵⁶ This literature suggests that only 20 percent of Deaf persons, who are in 'the new generation' and have a good command of sign-language, request the service, while another 80 percent are living in remote areas and most of them are not sign-

²⁵⁰ Interview-TJC (n 145).

²⁵¹ 'Sign-language Interpretation Service for Deaf Persons' (NEP) <http://nep1.dep.go.th/sign/service_step.php> accessed 4 October 2018.

²⁵² CPC, s 46.4.

²⁵³ Interview-TDH (n 137).

²⁵⁴ *ibid.*

²⁵⁵ *ibid.*

²⁵⁶ 'Variety of Stories about Sign-Language Interpreter: Improving and Developing to an Equal Language' (*Blue Rolling Dot*, 29 July 2014) <www.bluerollingdot.org/articles/scoop/241> accessed 24 January 2016.

language users.²⁵⁷ The quality aspect becomes an issue because of the lack of skills assessment to become registered sign-language interpreters.²⁵⁸

Regarding sign-language interpretation for law, the literature indicates that there was an attempt in 2007 to produce a sign-language dictionary of law to assist Deaf persons in legal proceedings.²⁵⁹ This project was a collaboration between the National Association of the Deaf, the Thai Disabled Development Foundation, the Lawyers Council and Ratchasuda College (the centre of expertise in disability studies in Mahidol University). The necessity to produce such a dictionary was due to ineffective communication in legal issues through general sign-language.²⁶⁰ Due to the lack of official sign-language for law, the sign-language interpreters generated their own sign-language to communicate with Deaf persons, but this also created a risk of misunderstanding.²⁶¹ One respondent to this research advised that the quantity of words in sign-language was a lot less than those of spoken or written language. This became problematic, especially when dealing with legal terminologies, which were more complicated to understand.²⁶² The production of such a dictionary was finished but could not be distributed as it was found afterward that many words were misinterpreted. For example, the sign-language of the word “defendant/respondent” was closer to the meaning of ‘loser’; therefore, the Lawyers Council could not certify it for public distribution.²⁶³

Presently, there are only interpreters of sign-language and foreign spoken languages in court proceedings in Thailand. If a person with communication disabilities can use spoken language, although his/her language may not be very clear to understand, respondents to this research indicated that the court will make an effort to listen to that person,²⁶⁴ but will not allow a family member or a carer of that person to act as interpreter

²⁵⁷ *ibid.*

²⁵⁸ *ibid.*

²⁵⁹ Suchit Muangsuk, ‘Sign-Language Dictionary to Assist Persons with Disabilities in Court’ *KaoSod Newspaper* (Bangkok, 30 September 2007).

²⁶⁰ *ibid.*

²⁶¹ *ibid.*

²⁶² Interview-TDH (n 137).

²⁶³ *ibid.*

²⁶⁴ *ibid.*; Interview-TJC (n 145); Interview-TL2 (n 120).

because this might cause a distortion of the testimony.²⁶⁵ There is no recorded request for the use of unconventional language interpreters in court proceedings.²⁶⁶

Respondents to this research further noted that some spoken language users with disabilities also faced difficulties in communicating with lawyers. These difficulties could be caused by lack of understanding of disability issues and of persons with disabilities,²⁶⁷ legal terminologies used in the conversation,²⁶⁸ emotional stress on persons with disabilities due to the dispute,²⁶⁹ or low literacy skills of persons with disabilities.²⁷⁰ In practice, disabled people's organisations could give support as coordinators in communicating with lawyers to ease these difficulties, but there were some cases where the organisations could not get involved because persons with disabilities did not contact them for assistance.²⁷¹ One respondent who is a lawyer expressed that most of his clients with disabilities could not understand his explanation the same way as those without disabilities; therefore, he would spend more time to explain and make them understand clearly. His impression was that this was because they received and perceived information differently, for example, he said that a visually impaired client would not be able to give details of places and colours. In most cases, his clients with disabilities were accompanied by their family members or carers to his consultations, and he recalled that he would speak with both but usually got more information from their companions.²⁷²

The Lawyers Council was also aware of these issues, and arranged a 4-day training programme called "Human Rights Lawyers Specialised on Children, Women, Elderly Persons and Persons with Disabilities".²⁷³ According to the programme outline, this

²⁶⁵ Interview-TJC (n 145).

²⁶⁶ *ibid*; Interview-TJF (n 145).

²⁶⁷ Interview-TDA (n 121); Interview-TDV (n 137).

²⁶⁸ Interview-TDV (n 137).

²⁶⁹ Interview-TDA (n 121).

²⁷⁰ Interview-TDH (n 137); Interview-TL2 (n 120).

²⁷¹ Interview-TDA (n 121); Interview-TDH (n 137); Interview-TDI (n 137); Interview-TDS (n 137); Interview-TDP (n 120); Interview-TDV (n 137).

²⁷² Interview-TL2 (n 120).

²⁷³ Information from corresponding letter with the Lawyers Council dated 29 October 2015.

programme aimed to give trained lawyers an insight and awareness of issues relating persons with disabilities to some extent. Unfortunately, this programme ran only once in 2014 with capacity of 115 participants and there was no such training in the following years.²⁷⁴ A wide range of lawyers would have a better understanding of disability issues if the Council could extensively arrange this kind of programme. Additionally, if the Council could make a list of qualified lawyers who had received this training available to the public, which is not available as yet, persons with disabilities and disabled people's organisations would have better information on specialised lawyers to facilitate their cases.

Presently, the right to communication assistance for persons with disabilities in Thai legal proceedings is limited to the right to a sign-language interpreter. There is no communication assistance guarantee for other persons with disabilities who do not use spoken, written or sign-languages. As a result, some persons with disabilities who can understand and reply to questions but in different formats, such as easy-read versions, gestures, or pictures and symbols, might be excluded as witnesses if there is no appropriate assistance to support their communication. In this case, the lack of assistance will also affect their right to equality of arms because they will not be able to present and defend their case effectively due to communication barriers. Moreover, they could not fully participate in the proceedings although attending or being physically present at the court hearing.

The research findings show that the existing guarantees on the right to communication assistance in civil cases are limited to sign-language interpretation. Although the use of other communication assistance does not conflict with the rules of evidence, the permission to use these depends on consideration of the presiding judge in each case. Since there is no clear regulation on this matter, permission to use other communication assistance is still uncertain and each case may be treated differently. Accordingly, the current legal mechanisms and regulations in Thailand cannot fulfil the UNCRPD requirement, which explicitly guarantees communication accessibility, as well as effective access to justice for persons with disabilities.

²⁷⁴ *ibid.*

5.3.4 Right to be heard or a fair hearing by courts, tribunals or other competent bodies in personal presence within a reasonable time or without delay

The right to be heard or a fair hearing aims to ensure fair proceedings in the court process.²⁷⁵ This right has four sub-elements to be considered: 1) competence, independence and impartiality of courts and tribunals, 2) fairness and publicity, 3) personal presence, and 4) the timeliness of the proceedings. Legal mechanisms and regulations of each sub-element are as follows.

A. Notions of Competence, Independence and Impartiality of Courts and Tribunals

Competence, independence and impartiality of courts and tribunals are essential for guaranteeing a fair hearing.²⁷⁶ Competence of courts and tribunals demonstrates their power to make legally binding decisions.²⁷⁷ Independence is about being free from any influence, interference or political power.²⁷⁸ Impartiality refers to unbiased attitude of an individual judge, as well as the impartial appearance of judges to the public showing no bias or prejudice.²⁷⁹

Apart from a requirement for all judges to make a solemn declaration before the King upon their appointment,²⁸⁰ both 2014 and 2017 Constitutions guarantee that judges are independent in the hearing and adjudication of cases.²⁸¹ The 2007/2014 Constitutions guaranteed that the appointment, transfer, promotion, emolument, disciplinary

²⁷⁵ Shah (n 154).

²⁷⁶ Clayton and Tomlinson (n 199).

²⁷⁷ Shah (n 154).

²⁷⁸ UN, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (UN Publications 2003).

²⁷⁹ CtteeCPR 'General Comment No 32' (23 August 2007) UN Doc CCPR/C/GC/32; Shah (n 154).

²⁸⁰ See text to n 181.

²⁸¹ Constitution 2017, art 188.2; Interim Constitution 2014, art 26.

procedures or removal from office of judges have to be conducted in accordance with the law.²⁸² The 2017 Constitution maintains the independent principle of personnel administration of judges of the Courts of Justice²⁸³ and Administrative Courts,²⁸⁴ but does not specifically mention this principle for judges of the Constitutional Court and the Military Courts. The 2007/2014 Constitutions also guaranteed the citizens' right to challenge judges if there is a cause that may affect independence or impartiality of judges,²⁸⁵ or to request for an investigation of a State agency or of its official regarding their exercising of authority,²⁸⁶ but this right does not appear in the 2017 Constitution. The 2017 Constitution only mentions in its State policy chapter that the State should educate people on democracy principle and encourage them to participate in monitoring process of the exercising of authority.²⁸⁷ However, the right to challenge judges remains guaranteed in procedural laws, such as when a judge has a close relationship with a party, or where there are other serious causes that may lead to an unfair proceeding.²⁸⁸

To be appointed as a judge of the Courts of Justice or the Administrative Courts, a person must fulfil the minimum requirements (eg academic qualification, work experience and fitness to work), pass written and oral examinations of their legal knowledge and professional ethics, and pass one-year of professional training.²⁸⁹ Judges of the Constitutional Court are appointed by approval of the Senate through suggestion of the

²⁸² Constitution 2007, arts 197.3, 200 and 202.

²⁸³ Constitution 2017, art 196.

²⁸⁴ *ibid* art 198.

²⁸⁵ Constitution 2007, art 40(2).

²⁸⁶ *ibid* art 62.

²⁸⁷ Constitution 2017, art 78.

²⁸⁸ CPC, ss 11-12; Regulation of the Supreme Administrative Court's Plenary Session on Quorum, Assignment of Cases, Transfer of Cases, Conduct of Judges in Administrative Cases, Challenge Judges, Conduct of Administrative Court Officials, and Authorisation of Conducting Administrative Cases BE2544(2001) (16 February 2001) GG 118(11gor) 9, r 14; Constitutional Court Procedures Organic Act BE2561(2018) (2 March 2018) GG 135(12gor) 1, s 32 (CCPOA 2018).

²⁸⁹ Judicial Service of the Courts of Justice Act BE2543(2000), ss 15, 26-29; EACCPA 1999, ss 13-21.

judicial nomination committee established by the Constitution.²⁹⁰ The Constitution also sets minimum qualification requirements for these nominees.²⁹¹

Regarding the tribunal system, the law on the establishment of each administrative tribunal sets the minimum requirements of its tribunal's members to guarantee their competence, independence and impartiality. This research uses the National Committee for Empowerment of Persons with Disabilities (PDEA National Committee), and the Sub-committee on Elimination of Unfair Discrimination against Persons with Disabilities (PDEA Sub-committee) as examples of administrative tribunals due to their close connection with disability issues. The National Committee is established by the PDEA 2007 with authority to revoke or prohibit unjust discriminatory actions of State agencies, private bodies and individuals against persons with disabilities.²⁹² The National Committee consists of the Prime Minister as the chairperson, the Minister of Social Development and Human Security as the vice chairperson. Its members consist of Permanent Secretaries of the ministries, the Director of the Bureau of the Budget, seven representatives of national disability organisations and six experts appointed by the Prime Minister.²⁹³ The National Committee has delegated its authority on this matter to the Sub-committee,²⁹⁴ which consists of 1) disability experts, not exceeding five persons, nominated by a mutual agreement between Disabilities Thailand²⁹⁵ and other national disability organisations, and 2) other experts, not exceeding four persons.²⁹⁶ The National Committee will appoint the Sub-committee by taking into consideration each expert's expertise and experience either in law, political science, education, science and

²⁹⁰ Constitution 2017, arts 200-208; Constitution 2007, arts 204-209.

²⁹¹ *ibid.*

²⁹² PDEA 2007, ss 15 and 16.3.

²⁹³ *ibid* s 5.

²⁹⁴ Order of the National Committee for Empowerment of Persons with Disabilities on Appointment of the Sub-committee on Elimination of Unfair Discrimination against Persons with Disabilities No 5/2557(2014) (21 October 2014).

²⁹⁵ Disabilities Thailand is the national umbrella disabled people's organisation.

²⁹⁶ NEP Regulation on Evidence and Mediation 2013, r 6.1.

technology, architecture, engineering, public administration, human rights, conflict management, empowerment of persons with disabilities, or social welfare.²⁹⁷

The term of office of the Sub-committee is four years; although each member's term may end sooner due to resignation, or by subsequently becoming a political official, an executive or staff of a political party, a member of the House of Representative or a senator, or dismissal by the National Committee²⁹⁸ due to serious negligence of duty or serious misbehaviour.²⁹⁹ Accordingly, the independence of the tribunal may be in question since the National Committee is made up of and appointed by the Executive. In the same way, although members of the Sub-committee cannot take up political office as mentioned, they are still appointed or dismissed by the Executive, which might possibly affect their independence. However, the Sub-committee's members nominated by the disability organisations, and those appointed by the National Committee can keep some balance among executive power, the interests of persons with disabilities and of those without disability. There is evidence that, in a case where a person with disability made a complaint against 17 ministries and 21 state enterprises due to unfair discrimination in employment, the Sub-committee made a decision not in favour of these governmental organisations.³⁰⁰ Nevertheless, the Administrative Procedure Act BE2539(1996) sets some fundamental principles, such as the procedure to challenge the tribunal's findings, procedural rules, and basic qualification, quorum, removal of the tribunal, to guarantee the impartiality of the tribunal.³⁰¹ Furthermore, the powers and decision making of both the National Committee and Sub-committee are under the Administrative Courts' jurisdiction as mentioned.³⁰²

From the interview data, all respondents representing the perspective of persons with disabilities had no concerns about the competence, independence and impartiality of

²⁹⁷ *ibid* r 6.4.

²⁹⁸ *ibid* r 9.

²⁹⁹ APA 1996, s 78.

³⁰⁰ PDEA Sub-committee Decision No 1/2558 (13 March 2015).

³⁰¹ APA 1996, ss 13-16, 26-33, 75-84.

³⁰² See text to n 71.

courts in Thailand.³⁰³ However, one respondent mentioned that a person with a disability did doubt whether some judges really understand the concept of unfair discrimination on the ground of disability. The respondent relayed an experience of a member of the organisation the respondent represented that a judge of the Administrative Court dismissed a request for an emergency injunction by reasoning that the petitioner's right had not yet been violated.³⁰⁴ This case related to a government organisation's job announcement for an official position. The announcement was specifically to recruit a person with disability into the position, as required by the public-sector employment quota, but it limited the call to applicants with physical or mobility impairment only. The announcement stated openly that applicants must not have visual, hearing or communication disabilities to apply for this position. According to the job description, the petitioner viewed that he could perform the duties, despite his visual impairment. Nevertheless, he did not have an opportunity to apply for this position because, in the online application, there were only choices of being a person with either physical impairment or mobility disability. The petitioner viewed that he was unfairly discriminated against due to his disability.³⁰⁵

According to the findings of this research, guarantees of the competence, independence and impartiality of the court systems significantly differ from those of the tribunal systems. Since the military government still has absolute power which could interfere in judicial enforcement,³⁰⁶ other guarantees on the notions of competence, independence and impartiality of courts are meaningless and cannot fulfil the requirements of international human rights law standards. This absolute power will be terminated by an establishment of the new government through national election under the 2017 Constitution, which is estimated to take place in February 2019, or not later than May 2019.³⁰⁷ Subsequently, the existing guarantees on the notions of competence, independence and impartiality of

³⁰³ Interview-TDA (n 121); Interview-TDH (n 137); Interview-TDI (n 137); Interview-TDS (n 137); Interview-TDP (n 120); Interview-TDV (n 137).

³⁰⁴ Interview-TDV (n 137).

³⁰⁵ *ibid.*

³⁰⁶ See text to nn 19-22.

³⁰⁷ Amy Sawitta, 'Thailand will stick to 2019 date for general election, deputy PM says' *Reuters* (Bangkok, 3 October 2018).

courts could be considered adequate and effective enough to meet the requirements of international human rights law standards.

Although the laws endeavour to guarantee independence and impartiality of administrative tribunals through various mechanisms, they cannot entirely guarantee those. This is because the sources of their adjudicative powers derive from the authorities of the Executive on public administration. As a result, there is a high possibility that the tribunals may adjudicate in favour of the owner of the source of power. The jurisdiction of the Administrative Courts over the tribunals' decisions seems to be another protection against non-independence and partiality of tribunals, but this may affect timeliness of the proceedings, also protected in international human rights law.

B. Fairness and Publicity

Fairness of the proceedings relies on many factors, for instance, independence and impartiality of courts and tribunals, equality of arms, the personal presence principle and timeliness of the proceedings.³⁰⁸ Publicity is another element that supports fairness as it makes the proceedings transparent to the public.³⁰⁹ However, to maintain fair proceedings, some civil cases with sensitive information, such as juvenile and family cases,³¹⁰ will not be heard in public.³¹¹ The demand of publicity cannot override the fairness obligation, which is a core principle of the right to a fair hearing protected in international human rights law.³¹²

The 2007/2014 Constitutions guaranteed that a person has the right to a fair and public hearing and to know the reasoning behind a judgment, decision or order of his/her

³⁰⁸ CtteeCPR 'General Comment No 32' (23 August 2007) UN Doc CCPR/C/GC/32; Shah (n 154).

³⁰⁹ Lauri Lehtimaja and Matti Pellonpää, 'Article 10' in Asbjorn Eide and Theresa Swinehart (eds), *The Universal Declaration of Human Rights: A Commentary* (OUP 1992) 159, 165; Clayton and Tomlinson (n 199) 35.

³¹⁰ JFCCPA 2010, s 108.

³¹¹ CtteeCPR 'General Comment No 32' (23 August 2007) UN Doc CCPR/C/GC/32.

³¹² Rhona Smith, *Textbook on International Human Rights* (5th edn, OUP 2012).

case.³¹³ These rights are not guaranteed as citizens' rights under the 2017 Constitution; there is a mere State policy mentioning that the State should administer justice in a fair, effective and non-discriminating manner.³¹⁴ However, the principle of fairness is still assured through various procedural rules of court proceedings and the right to challenge judges.³¹⁵

The rules of evidence are fundamental principles of a fair hearing as they decide whether particular evidence or a witness' testimony is admissible or not. These rules also overlap with other issues. For instance, legal capacity of a witness is also a matter of equality before the law, and availability of communication assistance for a witness with disability also relates to the right to communication assistance. There are three main rules of evidence which should be discussed when considering fairness of a case involving persons with disabilities.

Firstly, witnesses in court proceedings must swear an oath in accordance with their religions or beliefs, or affirm their commitment to tell the truth before giving evidence,³¹⁶ otherwise their testimonies are illegal.³¹⁷ However, there are exceptions for some persons who do not have to swear or take the oath. People with some disabilities might fit into some of these exceptions. The exceptions apply to a person under the age of 15, a person whom the court considers as lacking the cognitive ability to understand the difference between right and wrong, and a person for whom both parties in the dispute agree to waive this duty.³¹⁸ Secondly, only the testimony of a witness who can understand and reply to questions is admissible.³¹⁹ There is an interesting Supreme Court decision ruling that testimony of a witness with intellectual disability, who was unable to understand complicated matters, but could communicate with the court to

³¹³ Constitution 2007, art 40.

³¹⁴ Constitution 2017, art 68.

³¹⁵ See text to n 287.

³¹⁶ CPC, s 112.

³¹⁷ Supreme Court Decision No 824/2492(1949).

³¹⁸ CPC, s 112(2),(4).

³¹⁹ *ibid* s 95(1).

some extent, is acceptable as evidence.³²⁰ However, if an eligible witness for unsworn evidence (from an exception of the first rule) cannot understand and reply to questions, he/she cannot give evidence in the case at all. Finally, witnesses must give their testimony verbally, and cannot read any prepared text without the permission of the court.³²¹ For witnesses who are deaf, unable to speak, or both deaf and unable to speak, they can be questioned or reply to questions, by writing or other suitable methods, such

³²⁰ Supreme Court Decision No 1199/2526(1983); The witness with intellectual disability in this case, who was able to communicate on easy matters but not on complicated ones, was a victim of a gang rape. There is no record of whether she took the oath before giving the evidence or not. According to the court's reasoning, her testimony was accepted as evidence because she could tell the court according to the facts of what she had consented or not consented to. Moreover, her testimony was in line with the testimonies of her parents, whom she had told what happened to her after the incident. The court viewed that, although she had intellectual disability, her testimony was acceptable as she told the truth without any reason to slander or to condemn the defendants.

³²¹ CPC, s 113; Or otherwise being an expert witness.

as by gesture,³²² and their testimonies through these methods are admissible.³²³ This provision seems open for alternative communication methods in giving testimony for those whose communication methods are not spoken or written languages.

In general, civil, administrative and constitutional cases must be heard publicly.³²⁴ There are only few exceptions where a private hearing is permitted. First, cases under the jurisdiction of juvenile and family courts, for example cases concerning guardianship, or family law, have to be heard in camera, which means that only relevant persons can attend the proceedings.³²⁵ Judgments or decisions of these cases shall be also made in camera.³²⁶ The publishing of judgment or decision, whether in written or in verbal form, shall not identify or pursue any action that can identify the respondent who is a child or juvenile, unless it is permitted by the court.³²⁷ Nevertheless, an order of the court for a

³²² There are two cases in relation to giving evidence by gesture. The first case is the Supreme Court Decision No 81/2531(1988). In this case, the witness was the only one present when the victim was killed. The witness was deaf since birth and could not use conventional sign-language. During the police investigation, the brother of the witness got involved by asking her questions through using gestures. For example, to identify the murderer, the witness lifted her hand over her head to say that the murderer was tall, pointed to underneath her nose to say that the murderer had a moustache, lifted her hand to the end of her eyebrow to say that the murderer was a soldier. When the police brought her to the defendant's home, she saw his motorcycle and pointed at it with delight to express that it belonged to the murderer. In the court proceedings, the witness was questioned through two teachers from a school for Deaf persons using a blackboard to facilitate communication. The court viewed that the witness' testimony in the police investigation and in the court proceedings matched. Therefore, her testimony was acceptable as evidence and proved that the defendant was the murderer.

The second case is the Supreme Court Decision No 6655/2538(1995). In this case, the victim was suffering from paralysis and could not speak or make sounds. The court allowed the plaintiff to examine the witness by asking leading questions and the witness to rely by nodding the head, raising eyebrows, or remaining silent. These methods of communication were accepted as legally-binding in the court procedure.

³²³ CPC, s 96.

³²⁴ CPC, s 36; EACCPA 1999, s 60; CCPOA 2018, s 59.

³²⁵ JFCCPA 2010, s 108.

³²⁶ *ibid* s 135.

³²⁷ *ibid* s 136.

person to be placed under adult guardianship must be published in the Government Gazette according to the Civil and Commercial Code (CCC).³²⁸ For other family law proceedings, it is at the discretion of the court whether the case should be opened to public or not, for example in divorce cases, adultery cases, or child legitimation cases.³²⁹ If the court views that publicity is inappropriate or may affect public interests, the court can prohibit the public from attending parts of or the entirety of the hearing, and can forbid the publication of facts and related information from the case.³³⁰ However, the judgment or decision in such case must be given in a public hearing, and must be published neutrally and accurately,³³¹ with an exception for some judgments or decisions of administrative courts whereby the courts consider that their publicity may affect public order, morality or public interests.³³² These provisions do not apply to decisions of the Constitutional Court, which must be published in the Government Gazette.³³³

On the issue of publicity of the tribunal hearing, there is no general rule on this. It depends on the level of sensitivity of the issue. An individual may request information on a case from the administrative tribunal in accordance with the Official Information Act BE2540(1997),³³⁴ but the tribunal may not be able to reveal some information that is not permitted by law to be disclosed, such as information relating to national security, international relations, national economic and financial security.³³⁵ However, the tribunal has duty to make its decisions which have a direct effect on an individual available for

³²⁸ CCC, ss 28 and 32.

³²⁹ Presently these example cases are within jurisdiction of the Juvenile and Family Courts (JFCCPA 2010, s 10), but these examples still appear in the CPC as it has been used prior to the establishment of the Juveniles and Family Courts. Adultery cases can be file as a part of divorce cases (CCC, s 1523.1) or without the request for divorce or separation (CCC, s 1523.2). Child legitimate cases refer to cases where a child born out of marriage seeks for an acknowledgement and legitimation of child by his/her actual father.

³³⁰ CPC, s 36; EACCPA 1999, s 60.2; CCPOA 2018, s 59.

³³¹ CPC, s 36.3; EACCPA 1999, s 69; CCPOA 2018, s 75.

³³² EACCPA 1999, s 60.3.

³³³ CCPOA 2018, s 75.

³³⁴ Official Information Act BE2540(1997), s 11.

³³⁵ *ibid* ss 14-15.

public inspection, but if some parts of these decisions are not permitted to be disclosed, those parts shall be deleted before being publicised.³³⁶

According to the interview data, all respondents representing the perspectives of persons with disabilities viewed that courts treated persons with disabilities fairly in court proceedings.³³⁷ No respondent was able to comment on the fairness of administrative tribunals as there are only few decisions rendered as yet which involve persons with disabilities.

According to the existing laws, the principles of fairness and publicity of court proceedings have been guaranteed and in line with the international human rights law standards. Regarding the proceedings of tribunals, the provisions of the procedural rules, official information disclosure and jurisdiction of the Administrative Courts guarantee the principle of fairness and publicity protected in the international human rights law.

C. Personal Presence

The UNCRPD extends the mere guarantee of the right to attend hearings in civil cases by international human rights law to include the aspect of effective participation of persons with disabilities.³³⁸ This issue closely relates to information accessibility for persons with disabilities where they must be able to obtain accessible information about the hearing date and venue.

In accordance with the public hearing principle, Judges shall conduct a hearing by giving the best opportunity for all parties who wish to attend a hearing and by allowing them exercising their procedural rights concerning such hearing.³³⁹ However, there are several exceptions to the right to attend hearings, whereby the court may not conduct a hearing in a party's presence.

³³⁶ *ibid* s 9.

³³⁷ Interview-TDA (n 121); Interview-TDH (n 137); Interview-TDI (n 137); Interview-TDS (n 137); Interview-TDP (n 120); Interview-TDV (n 137).

³³⁸ See section 4.2.4.

³³⁹ CPC, s 103; EACCPA 1999, s 55; CCPOA 2018, s 27.

The first exception is that a party is prohibited to be in the courtroom due to his/her behaviour or action that is considered to constitute contempt of court or obstruction of proceedings.³⁴⁰ Another exception is where a party, legally informed of the hearing date, does not attend the hearing without applying for permission of postponement.³⁴¹ In these circumstances, court can conduct a hearing without that party's presence. In the Courts of Justice, the specific procedural rules for hearing in absentia are applied, which may lead to a different outcome compared to ordinary proceedings.³⁴² In certain cases, specifically small claims cases and non-complex cases, the presence of a party may affect the whole proceeding.³⁴³ In that case, if a plaintiff is absent without permission of postponement by court, it is deemed that he/she does not wish to pursue the case and the court shall dispose of the case.³⁴⁴ The absence of a respondent without permission of postponement by court will lead to a particular procedural rule for hearing in absentia, in which the judgment will be made without hearing the respondent's evidence.³⁴⁵

In guardianship cases, the law does not require a person whose legal capacity is in question to be present in court. If there is any suspicion as to the person's capacity, it is within the court's authority to summon the person in question to appear in court, or to examine the witness outside of court or through video conference if necessary.³⁴⁶

³⁴⁰ CPC, ss 33 and 36; EACCPA 1999, s 64; CCPOA 2018, ss 38-39.

³⁴¹ CPC, s 40; EACCPA 1999, s 59.2; CCPOA 2018, s 64.

³⁴² CPC, ss 197-209.

³⁴³ According to section 196 of the CPC, non-complex cases refer to cases that plaintiff solely requests for fixed amount of payment: 1) a bill of exchange, a promissory note, or a cheque whereas its payment had been rejected; or 2) a written contract, which can be considered as an authentic and enforceable agreement, and courts view that these cases are not complicated, so that the CPC allows courts to apply the procedure of small claims cases with these cases, even though the amount of money claimed exceeds THB300,000 (approximately EUR7,500).

³⁴⁴ CPC, ss 193bis and 196.

³⁴⁵ *ibid.*

³⁴⁶ JFCCPA 2010, ss 6 and 188(2); CPC, s 102; EACCPA 1999, s 47.4; CCPOA 2018, ss 27 and 63; Rules of the President of the Supreme Court on Guidance for Examining Evidence and Witness through Video Conference BE2556(2013) (7 June 2013) GG 130(49gor) 7 (Court Rules on Video Conference 2013).

Several respondents suggested that most persons with disabilities would like to attend the court proceedings and to know about the progress of their cases, but they might have to weigh up the benefits of their presence in court against the cost involved, including the loss of their earnings due to court attendance.³⁴⁷ Respondents who are judges or court staff members expressed that, in most cases, petitioners for guardianship order would only attach photos, medical records and medical expert's opinion to the petition, and that the person subject to the guardianship order would not attend court.³⁴⁸ Courts usually considered, whether that person should be under guardianship, and whether the guardianship should be full or partial, through this evidence.³⁴⁹ One respondent who is a lawyer noted that this process was rather quick and not meticulous; this could lead to an abuse of guardianship power as those who assumed the guardianship power did not truly understand their duties and responsibilities towards the wards.³⁵⁰ Respondents who are judges expressed that, in some cases, both general civil cases and guardianship cases, the courts might examine a witness outside of court due to the illness of the witness,³⁵¹ but one respondent who is a lawyer noted this rarely happened due to time constraints and the extra costs involved.³⁵² Respondents who are judges further noted that where the person in question attends court proceedings, whether due to court summons or the petitioner's intention, the court would examine that person as a witness only if he/she could communicate with court.³⁵³ However, respondents who are lawyers expressed that the presence of persons with disabilities in court proceedings was beneficial to their cases because the courts were curious to see the person in question and would have a better understanding of their arguments.³⁵⁴ Even though some persons

³⁴⁷ Interview-TDH (n 137); Interview-TDP (n 120); Interview-TDV (n 137); Interview-TL2 (n 120).

³⁴⁸ Interview-TJF (n 145); Interview-TSF(F) (n 183); Interview-TSF(C) (n 138).

³⁴⁹ Interview-TJC (n 145); Interview-TJF (n 145).

³⁵⁰ Interview-TL2 (n 120).

³⁵¹ Interview-TJC (n 145); Interview-TJF (n 145).

³⁵² Interview-TL2 (n 120).

³⁵³ Interview-TJC (n 145); Interview-TJF (n 145).

³⁵⁴ Interview (via telephone) with Respondent TL1, a lawyer (barrister & solicitor) (Bangkok, Thailand, 20 November 2015); Interview-TL2 (n 120).

with disabilities could not communicate well, the courts usually made efforts to communicate with them.³⁵⁵

According to the research findings, it appears that the existing legal mechanisms and regulations are not sufficient to guarantee personal presence and participation of persons with disabilities, and do not comply with international human rights law, especially the UNCRPD. In practice, the format of information on the hearing date and venue sent to the parties in written form is not accessible to everyone, especially people with visual impairments or those whose communication method is not the conventional written language. It would be unfair to deem that they acknowledge the hearing date but do not wish to attend the hearing, while it is impossible for them to access the information by themselves in reality. Moreover, the personal presence of persons with disabilities, whether in civil or guardianship cases, seems not to be considered as important as expert evidence. Their presence is considered as optional evidence to support the court's decision. The lack of communication with persons with disabilities, where communication is possible and the persons wish to do so, would conflict their right to participate in the court proceedings and their presence might benefit to their case as it should be.

D. Timeliness of the Proceedings

The delay in civil cases can affect fairness where it causes a delay in remedy, which may be worthless for some people whose living condition depends on an immediate remedy. Timeliness, together with fairness, of the proceedings was guaranteed as a part of the rights to judicial proceedings in the 2007/2014 Constitutions.³⁵⁶ This matter is now only a State policy and an aspect of the national reform strategy in the 2017 Constitution.³⁵⁷ However, timeliness is still an issue of concern in civil proceeding and guaranteed throughout the CPC. The CPC provides a number of procedural rules to make the civil proceedings faster, for instance, specific procedures for small claims cases, non-

³⁵⁵ Interview-TL2 (n 120).

³⁵⁶ Constitution 2007, art 40(2).

³⁵⁷ Constitution 2017, arts 68 and 258.d(1).

complex cases, hearings in absentia,³⁵⁸ and the court's authority to regulate procedural and court rules to prevent delay of the proceedings.³⁵⁹ Timeliness of the proceedings is also required of cases in Administrative Courts, with a balance of parties' opportunity to present and defend their case.³⁶⁰ This is also a matter of concern for the Constitutional Court's proceedings.³⁶¹ Nevertheless, fairness is always an issue of consideration in those provisions for timeliness of the proceedings. It will be unfair to parties if their cases are dealt with quickly but they do not have sufficient time to present or defend their case.

According to interview data collected for this research, all respondents viewed that disabilities were not typical causes of delay in court proceedings.³⁶² The length of proceedings usually depended on the complexity of the case and behaviour of parties, such as frequent requests for postponement of hearings.³⁶³ Some respondents suggested that most cases involving persons with disabilities took at least three years,³⁶⁴ and some cases took between five and eight years for the Supreme Court's judgment.³⁶⁵ Delay of court proceedings for reasons unrelated to disability nevertheless affects some persons with disabilities in terms of, their earnings, emotional stress, and the effectiveness of a court decision.³⁶⁶

As to my observation of some prominent cases of persons with disabilities in the Administrative Courts, a Supreme Administrative Court decision in one case took less

³⁵⁸ CPC, ss 189-209.

³⁵⁹ *ibid* ss 30, 103/2-103/3.

³⁶⁰ EACCPA 1999, s 55.

³⁶¹ CCPOA 2018, ss 23, 27, 38 and 61.

³⁶² Interview-TDA (n 121); Interview-TDH (n 137); Interview-TDI (n 137); Interview-TDS (n 137); Interview-TDP (n 120); Interview-TDV (n 137); Interview-TJC (n 145); Interview-TJF (n 145); Interview-TSC(F) (n 183); Interview-TSF(F) (n 183); Interview-TSC(C) (n 138); Interview-TSF(C) (n 138); Interview-TL1 (n 354); Interview-TL2 (n 120).

³⁶³ Interview-TDA (n 121); Interview-TDH (n 137); Interview-TDI (n 137); Interview-TDS (n 137); Interview-TDP (n 120); Interview-TDV (n 137).

³⁶⁴ Interview-TDP (n 120); Interview-TDV (n 137).

³⁶⁵ Interview-TDP (n 120).

³⁶⁶ Interview-TDA (n 121); Interview-TDH (n 137); Interview-TDI (n 137); Interview-TDS (n 137); Interview-TDP (n 120); Interview-TDV (n 137).

than three years,³⁶⁷ while another took more than seven years.³⁶⁸ For some well-known cases of persons with disabilities in the Constitutional Court, the court's rulings in two cases took less than a year,³⁶⁹ while another case of the same matters took around two years.³⁷⁰

Every court system acknowledges the timeliness aspect of the fair proceedings and endeavours to fulfil this principle. The Courts of Justice endeavours to decrease the caseload by applying consecutive hearing practices and encouraging in-court mediation in all court levels.³⁷¹ They also proposed new laws and amendment of current laws in relation to extra court official hours in the evening and at weekends,³⁷² and established more new courts of first instance in remote areas and a specialised court of appeal.³⁷³ In-court mediation and extra court official hours were already implemented by all court levels and they significantly assisted in reducing the number of pending cases.³⁷⁴ Additionally, the Administrative Courts also made an effort to accelerate the pending

³⁶⁷ Supreme Administrative Court Decision No(red) Oor142/2547(2004) regarding unfair discrimination on the ground of physical disability toward an applicant applying the national entrance exam on a public prosecutor position.

³⁶⁸ Supreme Administrative Court Decision No(red) Oor650/2557 (2014) regarding accessibility provision for persons with disabilities of the public transport system, the BTS sky-train.

³⁶⁹ Constitutional Court Decisions No 16/2545(2002) and 44/2545(2002) regarding the constitutionality of statutes concerning the non-discrimination principle guaranteed by the Constitution.

³⁷⁰ Constitutional Court Decision No 15/2555(2012) regarding the constitutionality of a statute concerning the non-discrimination principle guaranteed by the Constitution.

³⁷¹ Regulation on Judicial Service of the Courts of Justice on Guideline of Consecutive Hearing and Hearing by a Full Bench BE2545(2002) (11 November 2002) GG 119(112gor) 18, rr 6-7(4); 'Secretary General of the Office of the Judiciary announced the outcomes of 2014' (*Manager Online*, 20 January 2015)

<www.manager.co.th/Crime/ViewNews.aspx?NewsID=9580000007526> accessed 9 April 2016.

³⁷² 'Courts of Justice declared that decisions of more than a million cases were made in BE2555' (*Manager Online*, 11 January 2013)

<<https://mgronline.com/crime/detail/9560000004262>> accessed 22 October 2018.

³⁷³ *ibid.*

³⁷⁴ 'Secretary General of the Office of the Judiciary' (n 371).

cases by imposing a guideline for all judges to finish each case within two years, which lead to a decrease in the number of more than two years pending cases.³⁷⁵ For the Constitutional Court, recent records show that there has been no pending case since 2014.³⁷⁶

These reforms will be useful for all, including persons with disabilities, as they facilitate the timeliness of the court proceedings. As a result, the parties in disputes will get a remedy or compensation sooner with less expense because the process is not excessively lengthy. Moreover, persons with disabilities will have better opportunities to participate in court proceedings and can access court services more conveniently as the court hours are more flexible for those who cannot attend the court during normal office hours, or who live far away from the courts. Furthermore, a specialised court of appeal, established by law since December 2015, consists of five departments which cover all specialised cases of the first instance courts.³⁷⁷ This will also improve the effectiveness of the right to appeal as the appealed cases from the first instance specialised courts will be reviewed by the specialised judges of the higher court, especially cases concerning legal capacity under the Juvenile and Family Courts' jurisdiction, in which persons with disabilities tend to get involved.

Although the courts are making every effort to ensure the timeliness of the proceedings, proceedings of many cases are still prolonged, which affects not only the timeliness principle, but also the effectiveness of the right to a remedy. Ultimately, this affects the principle of fairness as a whole. In this regard, there may be some issues that the current legal mechanisms and regulations are not sufficient to guarantee the timeliness principle protected in international human rights law. This could be the reason why the 2017 Constitution puts a State duty to ensure timeliness of administration of justice in its State

³⁷⁵ Office of the Administrative Courts, 'The Administrative Court Annual Report 2013' (Grey Matter 2014)

<www.admincourt.go.th/admincourt/upload/webcms/ReportYear/ReportYear_171215_134040.pdf> accessed 18 January 2016.

³⁷⁶ 'Statistics of the Constitutional Court Case from 11 April 1998 until 13 July 2015' (*Constitutional Court*) <www.constitutionalcourt.or.th/th/occ_web/sub.php?nid=773> accessed 9 February 2016.

³⁷⁷ Establishment of the Specialised Court of Appeal Act BE2558(2015), s 5.2.

policy and national reform strategy. However, it is not clear from the interview data that timeliness is a priority issue for the participants in this research. Any improvement that can be made on this regard may entirely benefit the whole population. All in all, this issue should be treated with caution as decreasing the time of a case may contradict reasonable accommodation or accessibility requirements for some persons with disabilities, and will also affect the equality of arms principle.

Although the courts endeavour to fulfil all constitutional guarantees, in practice, some element of this right, ie timeliness of the proceedings, still do not meet the requirements of international human rights law. When considering the constitutional guarantees of both 2007/2014 and 2017 Constitutions, and the existing legal mechanisms and regulations, these guarantees still do not cover all elements of this right protected in international human rights law, in particular the rule of personal presence and participation aspects in civil cases. Moreover, none of these elements is guaranteed in respect of the tribunal system. Although the 2017 Constitution does not guarantee this right as a citizens' right, it still gives some benefits by tackling this issue through the provisions of State policies and national reform strategy. However, the State will need both additional guarantees and further actions to achieve compliance with international human rights law standards.

5.3.5 Right to a remedy, reparation or compensation

A remedy, reparation or compensation can take various forms, including restoration, 'rehabilitation, satisfaction and guarantees of non-repetition'.³⁷⁸ To be effective, it needs to have accessible procedural mechanisms and to be delivered in a timely manner, so that it could serve some people whose living condition may depend on an instant remedy.³⁷⁹ As remedies can be both judicial and extra-judicial, this research will point out some extra-judicial remedies but will not analyse them in detail.

In Thailand, a remedy, reparation or compensation in civil matters can be sought through the courts, the administrative agencies or tribunals, or some statutory funds. The right to a remedy through the court system is guaranteed in both 2007/2014 and 2017

³⁷⁸ CtteeAT 'General Comment No 3' (19 November 2012) UN Doc CAT/C/GC/3 para 2.

³⁷⁹ *ibid.*

Constitutions.³⁸⁰ The 2017 Constitution further imposes on the State a duty to a remedy for damage or nuisance to natural resources, environmental quality, health, hygiene and quality of life caused by any action of the State or its authorised person.³⁸¹ Moreover, the 2017 Constitution includes a State policy to provide a remedy for persons with disabilities on the issues of violence and unfair discrimination.³⁸²

The Courts of Justice can provide remedies in civil disputes between private parties.³⁸³ These remedies usually concern monetary compensation based on the actual loss, which may include the payment of interest;³⁸⁴ declarations concerning status of a person, a private entity or property possession;³⁸⁵ and specific performance such as delivering specific property, evacuating from a place, or refraining from doing a particular action.³⁸⁶ The Administrative Courts can provide remedies in disputes between private entities and State agencies in the same manner as the Courts of Justice, and also have the authorities to revoke rules and orders of administrative agencies or government officers.³⁸⁷ The Constitutional Court can repeal unconstitutional legislation or draft legislation, or impose other remedies as requested by the petitioner of the case concerning compliance with the State's constitutional duties.³⁸⁸

Remedies provided by the Courts of Justice and the Administrative Courts are issued in enforcement orders which accompany their judgments.³⁸⁹ The orders will impose a timeframe within which the action must be completed.³⁹⁰ If the enforcement orders are

³⁸⁰ Constitution 2017, art 25; Constitution 2007, art 28.

³⁸¹ Constitution 2017, art 58.

³⁸² Constitution 2017, art 71(3).

³⁸³ CCC, s 55; Law for the Organisation of Courts of Justice BE2543(2000), ss 18-23.

³⁸⁴ CPC, s 142; Dilok Sermwiriyaikul, 'The Addition of Punitive Damages for the Wrongful Act to the Civil and Commercial Code' (*Courts of Justice E-Library*)

<http://elib.coj.go.th/Ebook/data/judge_report/2553-28.pdf> 27 December 2014.

³⁸⁵ CPC, s 145.

³⁸⁶ CPC, s 142 and 276.

³⁸⁷ EACCPA 1999, ss 9, 11 and 72.

³⁸⁸ CCPOA 2018, ss 7 and 74.

³⁸⁹ CPC, s 272; EACCPA 1999, s 69(7).

³⁹⁰ CPC, s 273.1; EACCPA 1999, s 72(3).

not fulfilled within the time limit, the applicants for a remedy have to initiate the execution process by notifying the court that the judgement has not been performed, and that what method should be applied to execute the judgement,³⁹¹ such as by forcing to the assets or by imprisoning the person who does not comply with the judgement concerning a specific performance.³⁹² A remedy provided in a Constitutional Court decision becomes effective on the day of its announcement, which is also final and binding on the Parliament, the Cabinet, other courts and all State agencies.³⁹³

Remedies from administrative agencies and tribunals are provided as specified by law. These remedies need to be exhausted before a person can file a case to the Administrative Courts.³⁹⁴ In general, each administrative agency can provide a remedy through its internal appeal mechanism if there is no specific tribunal established for that matter. This mechanism will be discussed in section 5.3.6 on the right to complain, challenge or appeal. When a specific tribunal is established, it can provide a remedy as specified by the law of its establishment. The study will discuss two main administrative tribunals which closely relate to disability matters: the PDEA Sub-committee and the MHA Appeal Tribunal.

The PDEA Sub-committee can provide remedies in relation to disability discrimination by revoking, prohibiting or ordering a cease of any discriminatory practice or action against persons with disabilities, but cannot make a monetary award.³⁹⁵ Damages resulting from these actions can be sought through a relevant court separately. The court has authority to impose other damages that may not be pecuniary damages for persons with disabilities who are discriminated against; and the court can impose the punitive damages, but not exceeding four times of the actual damages, if the unjust discriminatory actions are done deliberately or with severe carelessness.³⁹⁶ Punitive damages are not

³⁹¹ CPC, s 275; EACCPA 1999, s 72.5.

³⁹² CPC, ss 278, 296quarter-298 and 300; EACCPA 1999, s 72.5.

³⁹³ Constitution 2017, art 211.4; CCPOA 2018, s 76.

³⁹⁴ EACCPA 1999, s 42.2.

³⁹⁵ PDEA 2007, ss 6(5) and 16; NEP Regulation on Evidence and Mediation 2013, r 12(1),(4).

³⁹⁶ PDEA 2007, s 16.2.

normally allowed to be imposed in ordinary cases, as Thailand has adopted the principle of compensatory damages for the calculation of awards.³⁹⁷

The MHA Appeal Tribunal is established under the Mental Health Act BE2551 (MHA 2008). It consists of Director-General of the Department of Mental Health as the chairperson and other eight members: three persons from non-governmental organisations with an objective to protect persons with ‘mental disorder’ and five persons, appointed by the Minister of Public Health, one of each expert in psychiatry, clinical psychology, medical social work, psychiatric mental health nursing, and law.³⁹⁸ This tribunal has a duty to consider an appeal against the order of the mental health board of an infirmary admitting a person for treatment or extending the treatment period.³⁹⁹ It is not clear from the MHA 2008 what remedy the Tribunal can provide, but it seems to be a revocation of the order and the release of the person from involuntary admission as the Tribunal can only consider an appeal against an admission or extension order, not a case where a person is refused a treatment.

Decisions of these administrative tribunals are final with immediate effect upon receipt by the relevant person.⁴⁰⁰ If the decision is not complied with, the tribunals have authority to use administrative enforcement upon the person who has responsibility to provide a remedy as to the decision.⁴⁰¹ Any petitioner who is not satisfied with the tribunal’s decision can further challenge such decision in the Administrative Courts.⁴⁰²

³⁹⁷ Sermwiryakul (n 384).

³⁹⁸ MHA 2008, ss 3 and 43; The Act defines the term “mental disorder” as ‘any symptom of mental disorder exposed through behaviour, mood, thought, memory, intelligence, neuro-perception or perception of time, place or person, including any symptom of mental disorder resulting from alcoholic drinks or other psychotropic substances’ (unofficial translation by Pakorn Nilprapunt <www.omhc.dmh.go.th/law/files/thaimentalhealthlaw_unofficial_translation_english.pdf> accessed 11 October 2018).

³⁹⁹ *ibid* s 44.

⁴⁰⁰ APA 1996, ss 5.3 and 42.

⁴⁰¹ *ibid* s 56.

⁴⁰² EACCPA 1999, ss 9 and 11.

In some civil disputes involving criminal offences, injured persons may seek a remedy, reparation or compensation from a particular funds established by law, without having to wait for a final court decision. These funds are extra-judicial remedies. For examples, victims of road accidents can request basic compensation for medical treatment, funeral expenses or other essential expenses to alleviate distress, which must be paid within seven days after the request although the legal responsibility of the person who cause an accident has not yet been proved.⁴⁰³ There is a similar fund for compensation for medical treatment and funeral expenses to victims of crime, limited to sexual offences, homicide and offences against the person.⁴⁰⁴ The amount of the compensation and the decision of whether to grant it are within the consideration of the Committee established by this law.⁴⁰⁵ Unlike the road accident remedy, there is no clear timeframe when these compensations must be paid, and the applicant must return the money if it later appears that the cause for compensation is not a criminal offence.⁴⁰⁶

One respondent to this research from persons with disabilities perspectives remarked that some persons with disabilities obtained a judgment in their favour, but they did not achieve an effective remedy because the respondents had no assets to pay the award.⁴⁰⁷ Most respondents representing the perspectives of persons with disabilities noted that many disputes involving persons with disabilities were solved through a mediation process.⁴⁰⁸ One respondent advised that remedies through particular funds established by law were also practical alternatives to court proceedings but they are not available in all areas of disputes, eg the injury by medical professionals' practice, which was a recurrent cause of disabilities.⁴⁰⁹

⁴⁰³ Road Accident Victims Protection Act BE2535(1992), ss 20 and 25.

⁴⁰⁴ Compensation for Injured Persons and Compensation and Costs to Defendants in Criminal Cases Act BE2544(2001), s 17 and attachment to the Act.

⁴⁰⁵ *ibid* s 18.2.

⁴⁰⁶ *ibid* s 19.

⁴⁰⁷ Interview-TDH (n 137).

⁴⁰⁸ Interview-TDA (n 121); Interview-TDH (n 137); Interview-TDS (n 137); Interview-TDP (n 120); Interview-TDV (n 137).

⁴⁰⁹ Interview-TDP (n 120).

There are interesting cases involving persons with disabilities who sought a remedy for enabling them to enrol on the entrance exams for the positions of a public prosecutor and of a judge in the Courts of Justice.⁴¹⁰ These cases show that the existing mechanisms for a remedy are complex and cannot guarantee non-repetition. The complexity of the remedy mechanisms is caused by the complicated jurisdiction of the different courts. In these cases, the Constitutional Court has the jurisdiction to nullify the unconstitutional statutes, but has no jurisdiction over unconstitutional rules and regulations and cannot revoke the actions or orders of the administrative bodies that violate the constitutional provisions. Similarly, the Administrative Courts can revoke such actions or orders of administrative bodies and have a jurisdiction to nullify unconstitutional rules and regulations, but have no jurisdiction over unconstitutional statutes.

Regarding the non-repetition issue, the Administrative Courts may prohibit administrative agencies from reiterating illegal actions through their judgments.⁴¹¹ However, this cannot guarantee that the same or similar incidents will not occur again in other administrative bodies. Moreover, the revocation of the unconstitutional law and regulations by the

⁴¹⁰ These cases relate to attorneys with physical disabilities sought a remedy for enrolling on the entrance exams for the positions of a public prosecutor and of a judge of the Courts of Justice. The commission of each organisation rejected them to enter for the exams by arguing that they were unqualified for the positions due to their physical disabilities. They sought a nullification of an unconstitutional provision of the organisational law of the Courts of Justice that forbid persons with physical disabilities to be a judge (Constitutional Court Decision No 16/2545(2002)). One of these lawyers sought a revocation of the public attorney commission's order through the Administrative Courts (Supreme Administrative Court Decision No(red) Oor142/2547(2004)). During the proceedings of the first instance Administrative Court, the court submitted a case to the Constitutional Court to consider the constitutionality of the organisational law of the Office of the Attorney General (Constitutional Court Decision No 44/2545(2002)). The Constitutional Court in both cases and the first instance Administrative Court dismissed the cases. Once the new Constitution 2007 was introduced, one of these attorneys sought a nullification of a provision of the Courts of Justice again (Constitutional Court Decision No 15/2555(2012)). In the later case, the Constitutional Court ruled that such provision of the Courts of Justice was unconstitutional. The Supreme Administrative Court also revoked the order of the public attorney commission due to its discrimination against the plaintiff.

⁴¹¹ EACCPA 1999, s 72(1).

courts only affects the law and regulations in question, but does not automatically affect others even though they may have the same unconstitutional provisions. This will require the initiation of another lawsuit, or other advocacy efforts to encourage the State to undertake similar law reform. Likewise, most judgments of the Courts of Justice will not bind other people outside of the cases, with some exceptions such as judgements relating to legal capacity of a person or the ownership of property.⁴¹²

There is another case where a group of persons with disabilities won a lawsuit in the Administrative Courts against Bangkok Metropolitan Administration (BMA) and the service provider of the BTS sky-train system.⁴¹³ In this case, the plaintiff sought a remedy through submitting a complaint to the service provider since 2005 but no progress was made. Then the plaintiff initiated a lawsuit at the Administrative Courts in September 2007. The final decision of the Supreme Administrative Court was issued in January 2015 that BMA has a duty to provide elevators and accessibility facilities for persons with disabilities at every station of the sky-train system, and must complete this within one year, which was due in January 2016. By January 2017, the work on installation of elevators and other facilities was still not complete; therefore, a group of persons with disabilities filed a class action case against BMA to the Civil Court for damages. Another issue then arose as to whether the case for damages is under the jurisdiction of the Courts of Justice or the Administrative Courts. The Committee on Jurisdiction of Courts ruled that this case is under the jurisdiction of the Administrative Courts as it concerns negligence of a State agency in providing public services.⁴¹⁴ Accordingly, a group of persons with disabilities filed a case against BMA for damages to the Administrative Court in May 2018 as BMA's duty under the Supreme Administrative Court's decision was overdue more than three years.⁴¹⁵ There is no result of this case as yet, but it

⁴¹² CPC, s 145.2.

⁴¹³ Supreme Administrative Court Decision No(red) Oor650/2557(2014).

⁴¹⁴ Decision of the Committee on Jurisdiction of Courts No 161/2560(2017) (23 January 2018) in 'Office of the Secretariat of Committee on Jurisdiction of Courts Newsletter' 18(4) April 2018 <www.oscj.go.th/doc/data/oscj/oscj_1524714693.pdf> accessed 7 October 2018.

⁴¹⁵ 'People with disabilities file a case against BMA concerning inaccessibility of the BTS sky-train' *Dailynews* (Bangkok, 9 May 2018); 'Replay 26 years of fighting for BTS accessibility+Infographic' (*ThisAble*, 21 January 2018) <<https://thisable.me/content/2018/01/361>> accessed 7 October 2018.

demonstrates that an effective remedy cannot be automatically fulfilled although persons with disabilities have secured a judgment in their favour. Moreover, the process for obtaining the remedy is also very time consuming.

The available sources for a remedy, reparation and compensation in civil cases sometimes overlap with the right to access to courts and tribunals. Most available remedies focus on the repayment of damages incurred and the revocation of the illegal actions or law, but cannot certainly guarantee the non-repetition, which is also protected in international human rights law. The effective remedy also depends on timeliness of court proceedings, especially for some persons with disabilities whose life expectancy may be affected if they cannot access an appropriate remedy in time. Moreover, in practice, the complexity of enforcement of judgments and tribunal decisions, where people need to constantly assert their rights before the courts and the courts need to constantly monitor the process seems to be a significant barrier of an effective remedy. The existing legal mechanisms and regulations seem not to be sufficient regarding the requirements of international human rights law.

5.3.6 Right to complain, challenge or appeal

The meaning of the terms “complain”, “challenge” and “appeal” were described in detail in section 3.2.6. In summary, these terms are intertwined and overlapping. They commonly lead to a review of the incident or dispute by an entity that could relieve the situation or provide a remedy. “Complain” is an action of giving or reporting the fact of a dissatisfactory incident incurred to the relevant bodies or authorities but not the judiciary. “Challenge” and “appeal” refer to a more formal objection on the legality of an action, order, or decision of a person, State agency, or competent body (eg courts and tribunals) for being reviewed and decided by a competent body, including the body that causes the objection incident.

Regarding these meanings, the right to complain in Thailand is guaranteed in both 2007/2014 and 2017 Constitutions by confirming that everyone has a right to complain to a relevant State agency and receive the outcome without delay, but no specific detail

is provided on how to arrange this complaints mechanism.⁴¹⁶ Both Constitutions further establish the Ombudsman system and the National Human Rights Commission as constitutional organs.

The Ombudsman system can receive complaints from people who are affected by grievance or unfairness arising from non-compliance with the law or ultra vires acts of State agencies or State officials.⁴¹⁷ The Ombudsman has a duty to investigate the complaint and can further submit the case to the Constitutional Court or the Administrative Courts for their consideration of constitutionality of the matter in question.⁴¹⁸ According to the 2007/2014 Constitutions, the Ombudsman can only report the investigative results together with his/her remarks to the Cabinet and both Houses of the Parliament, and publicise this report to the public.⁴¹⁹ The 2017 Constitution provides the Ombudsman with powers to recommend the relevant State agencies to eliminate or deter such grievance or unfairness, as well as to revise any law, rules, regulations, order, or any operative procedure causing grievance or unfairness, or imposing undue burden on people; and to report the cases in which the State agencies unreasonably neglect the Ombudsman's recommendation, or do not fulfil the State's constitutional duties.⁴²⁰

The National Human Rights Commission can receive complaints concerning a violation of human rights for further examination and report together with its recommendation to the Parliament and the Cabinet, which can be further publicised to the public.⁴²¹ It cannot provide any remedy to the complainant but can suggest the development of appropriate remedy in such report.⁴²²

⁴¹⁶ Constitution 2017, art 41(2); Constitution 2007, art 59.

⁴¹⁷ Constitution 2017, art 230; Constitution 2007, art 244; Declaration of the National Council for Peace and Order on the Termination of the Constitution No 11/2557(2014) (26 May 2014) GG 131(84ngor) 10.

⁴¹⁸ Constitution 2017, art 231; Constitution 2007, art 245.

⁴¹⁹ Constitution 2007, art 245(4).

⁴²⁰ Constitution 2017, art 230.

⁴²¹ Constitution 2017, art 247; Constitution 2007, art 257.

⁴²² *ibid.*

The right to challenge or appeal is guaranteed in Thai legal system, where a person can request a competent body to review a specific decision he/she believes to result in a violation of rights. This right overlaps the right to equal access to courts and tribunals for the first instance proceedings, but extends to include a review by a higher court or tribunal. It also links to the right to a remedy where a remedy is obtained through challenge or appeals proceedings. The available mechanisms for a challenge or appeal are the internal appeal mechanism of each State agency, the tribunal system, and the Judiciary.

A challenge or appeal against an order of a State agency or a State official, where no specific administrative tribunal is established, can be made to the internal appeal mechanism of that State agency, ie to the officer who issued such order.⁴²³ That officer has a duty to consider the application without delay and can fully or partly change his/her order if agrees with the request. If the officer does not uphold the complaint, he/she must proffer his/her opinion and reason for the decision to a person who has authority to reconsider this appeal.⁴²⁴ The persons who have such authority normally have the authority to command or supervise that officer.⁴²⁵ This procedure is a prerequisite for further challenging the unsatisfactory outcome of such appeal to the Administrative Courts.⁴²⁶

In cases where an administrative tribunal is established for a specific matter, an appeal can be made directly to such tribunal. For example, the PDEA Sub-committee can receive an appeal concerning unfair discrimination toward persons with disabilities, either a case among private entities or one between private and public entities; and

⁴²³ APA 1996, s 44.

⁴²⁴ *ibid* s 45.

⁴²⁵ Ministerial Regulation No 4 (BE2540(1997)) under the Administrative Procedure Act BE2539(1996) (22 May 1997) GG 114(17gor) 34; Chanchai Sawangsak, *Law on Administrative Procedure and Liability for The Wrongful acts of Officials* (2nd edn, Ramkhamhaeng University 2008).

⁴²⁶ EACCPA 1999, ss 9 and 42.2; Supawat Singsuwong, 'An Appeal of Administrative Order', (*Public Law Net*, 14 July 2013) <www.pub-law.net/publaw/view.aspx?id=1866> accessed 14 February 2016.

facilitate dispute settlement or further proceed with an adjudication.⁴²⁷ The person with disability who is directly affected by such discrimination or his/her carer can also request an organisation for/of persons with disabilities to proceed with this appeal, as well as to file a court case for damages, on behalf of persons with disabilities.⁴²⁸ This entitlement is an exception to the ordinary legal standing rules, which facilitates easy access to justice for persons with disabilities. The MHA Appeal Tribunal is another example of administrative tribunals, established to facilitate the right to challenge of persons with disabilities who are involuntarily detained in a psychiatric hospital.⁴²⁹ The decisions of the Sub-committee, the MHA Appeal Tribunal and other administrative tribunals are final at the tribunal level and can be further challenged by application to the Administrative Courts.⁴³⁰

Apart from a challenge or appeal in the context of the right to equal access to the first instance courts and tribunals as discussed in section 5.3.1A, the right to challenge or appeal to a higher court is also provided, with some conditions and time limits, for both civil cases under the jurisdiction of the Courts of Justice and of the Administrative Courts. Only Constitutional Court decisions cannot be appealed.⁴³¹

In the Courts of Justice system, only eligible cases can be appealed on a question of facts to the Courts of Appeal, or on a question of law directly to the Supreme Court. To be eligible for an appeal on a question of facts, the dispute in appeal must either have monetary values higher than a certain amount specified by the law; or concern personal status, a right in family matters, or non-monetary awards; or be permitted by an authoritative judge as specified by the law.⁴³² The Supreme Court will only permit an appeal against a Court of Appeal decision or a direct appeal on a question of law from the first instance courts when this question needs to be reviewed. This would include

⁴²⁷ PDEA 2007, s 16.

⁴²⁸ *ibid* ss 15-17; Section 4 of the PDEA 2007 defines “carer” to include parents, sons/daughters, spouse, relatives, siblings, or other person who takes care of or support that person with disability in his/her living.

⁴²⁹ MHA 2008, s 42.

⁴³⁰ PDEA, s 16; MHA 2008, s 42; EACCPA 1999, ss 9 and 11.

⁴³¹ Constitution 2017, art 211.

⁴³² CPC, s 224.

questions where the issue concerns public order or interest, a Court of Appeal decision has some conflict between various important legal principles or with the precedent of the Supreme Court, or the consideration will create precedent on a new matter or improve legal interpretation.⁴³³

All orders and decisions of the first instance Administrative Court can be appealed to the Supreme Administrative Court. However, the Supreme Administrative Court will only accept cases with a substantial question of facts or legal rules for further consideration.⁴³⁴

It appears from the interview data for this research that some persons with disabilities did not know about their right to complain,⁴³⁵ and some people knew it but did not dare to complain because they were afraid of a negative consequence that might follow.⁴³⁶ On the aspect of the PDEA 2007, no respondents were able to comment on the effectiveness of the Sub-committee or the other administrative tribunals as there were so few decisions rendered as yet which involved persons with disabilities.

No respondent commented on the Ombudsman System. It appears from the literature that the Ombudsman system before the 2017 Constitution did not seem to meet the public expectation as an effective mechanism for remedies due to its non-binding decision-making power and insufficient follow-up and monitoring mechanisms.⁴³⁷ There is no available data concerning effectiveness of the Ombudsman reform under the 2017 Constitution as of the time of writing.

There was only a remark from the respondents on the right to challenge or appeal that an appeal of court cases might take between five and eight years to reach the Supreme Court's judgment.⁴³⁸

⁴³³ *ibid* ss 247 and 249.

⁴³⁴ EACCPA 1999, s 73.

⁴³⁵ Interview-TDS (n 137).

⁴³⁶ Interview-TDI (n 137); Interview-TDS (n 137).

⁴³⁷ Siriya Promradyod, 'The problem of legal status and authority of Ombudsman under the Constitution of the Kingdom of Thailand' (LLM thesis, Thammasat University 2010); 'Ombudsman: erasing the image of a paper tiger' *Komchadluek* (Bangkok, 18 March 2015).

⁴³⁸ Interview-TDP (n 120).

According to the research findings, the existing laws seem sufficient to guarantee the right to complain, challenge or appeal and comply with international human rights law as they provide at least a means to make a complaint and various mechanisms for every matter to be reviewed and a decision on its lawfulness issued by a competent body.

5.4 RECOMMENDATIONS

According to the analysis of legal mechanisms and regulations on access to civil justice for persons with disabilities in Thailand discussed in section 5.3, several issues need to be rectified to align with international human rights law standards on access to civil justice, especially the UNCRPD. The recommendations to fulfil these standards and to enhance the effectiveness of the current mechanisms are suggested for Thailand as follows.

A. Accessibility

The State must review the accessibility of legal proceedings, physical environment, information and communication, and services of all State agencies, as each agency has at least to provide an internal appeal mechanism concerning its duties. This includes reviewing the relevant laws and regulations. The State must set accessibility standards that are enforceable and can accommodate every group of persons with disabilities.⁴³⁹ This must be done in consultation with representative organisations of persons with disabilities to establish a clear implementation timeframe and monitoring mechanism to ensure the progress.

As accessibility is a part of the right to access to justice, which is a civil and political right, the State has a duty to fulfil its obligations immediately.⁴⁴⁰ However, the State may

⁴³⁹ CtteeRPD 'General Comment No 2' (22 May 2014) UN Doc CRPD/C/GC/2.

⁴⁴⁰ ICCPR, art 2; CtteeESCR 'General Comment No 3' (1 January 1991) UN Doc E/1991/23 para 9; UNGA 'Report of the Office of the United Nations High Commissioner for Human Rights: Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities' (27 December 2017) UN Doc A/HRC/37/25.

gradually implement the accessibility standards if necessary,⁴⁴¹ with provisions of reasonable accommodations while the implementation has not yet been complete.⁴⁴²

The revised laws and regulations must be applied to all buildings and places where public services are provided, especially courthouses, and clearly indicate that these laws shall apply to all of those regardless of when they were built. Otherwise, the construction date of the building may be raised as an excuse for not complying with the law. This may lead to another lawsuit for a court ruling, which is time-consuming and high costs involved.

The State must ensure that rules and procedures for making a claim to courts and tribunals or applying for other services within the justice system can be accessible by different groups of persons with disabilities. The relevant information must also be available in accessible formats for different groups of persons with disabilities. This must be available even where there is no specific request for this; and reasonable accommodation still needs to be available for some persons who have unique accessibility needs. This information should also be disseminated through reachable channels for persons with disabilities.

B. Communication assistance

The State must ensure that the existing sign-language interpretation service can provide accurate communication, especially in legal proceedings. This may include an assessment of sign-language interpreters' skills, or an establishment of a professional body to control and monitor professional ethics and standards.

Moreover, the State must provide communication assistance for persons with disabilities who use other communication methods, where both quality and quantity of the service must be guaranteed. This is to ensure that will, preferences and testimony of some people who use other means of communication can be heard by the courts and other relevant entities. At the same time, judges and lawyers need to be certain of the validity of communication outcomes through this service. Although the current rules of evidence do not conflict with the use of communication assistance, a specific legal provision on

⁴⁴¹ CtteeRPD 'General Comment No 2' (n 439) para 27.

⁴⁴² UNCRPD, art 5(3).

communication assistance must be in place to prevent any ambiguity on the validity of its use in court proceedings. This will ensure that communication assistance can be equally applied to all cases, not merely depending on the discretion of a particular judge.

C. Legal assistance or representation

The State must ensure that the legal aid system for persons with disabilities is accessible and effective, in terms of quality of legal assistance or representation provided, sufficient funding for each case, and accessibility of information about the scheme. The assistance should be available for more comprehensive types of civil cases. Moreover, information concerning professional ethical and conduct of lawyers within the scheme must be accessible for persons with disability and ensure that they could make a complaint regarding lawyer malpractice.

D. Legislation and enforcement

The State must review the existing laws and regulations, and abolish or reform those conflicting with the UNCRPD principles, especially those limiting legal capacity of adults with disabilities. The new regime must conform to the UNCRPD, which requires the replacement of substitute decision-making mechanisms with supported decision-making mechanisms that respect the individual's rights, will and preferences and comply with article 12 of the UNCRPD.⁴⁴³ This reform will enhance autonomy of persons with disabilities in accessing civil justice and recognise their equality before the law. The obligations under article 12 'are subject to immediate realization', where the State must 'take steps to immediately realize those' obligations.⁴⁴⁴

Moreover, all existing laws and regulations that protect, promote or guarantee the right to access to civil justice of persons with disabilities must also be equipped with effective monitoring and enforcement mechanisms. The enforcement mechanism should be uncomplicated, so that persons with disabilities could achieve their justice goals. The

⁴⁴³ CtteeRPD 'General Comment No 1' (19 May 2014) UN Doc CRPD/C/GC/1.

⁴⁴⁴ *ibid* para 30.

State must ensure that the right to a remedy is effective and comprehensive, and could also provide a remedy for non-repetition.

E. Monitoring mechanisms

According to some problematic issues found in the research findings, the research suggests additional mechanisms to ensure quality and effectiveness of the existing services.

The State should provide recruitment and monitoring mechanisms that can provide preliminary safeguards against an issue on independence or impartiality of administrative tribunal members. These mechanisms are not to replace the Administrative Courts, which have jurisdiction over decision of administrative tribunals, but to ensure the quality of tribunal members. These mechanisms may include a set of stricter criteria for being an administrative tribunal member, a code of conduct, and disciplinary procedures.

The State should also focus on enhancing the quality of all existing mechanisms that support accessing civil justice of persons with disabilities, such as mediation mechanism, statutory funds for an immediate remedy, sign-language interpreting service and legal aid scheme. In this regard, the State should have a monitoring mechanism in place to ensure their quality and effectiveness, including proficiency of all staff members. For some mechanisms where expertise of the service provided are necessary, such as sign-language interpretation, the State should also have assessment system or a professional body to guarantee and oversee the quality of the service.

F. Training programmes and awareness-raising

The State must ensure that its officials have adequate knowledge to perform their duties by providing them with adequate and effective trainings and assessments. The training programmes must be delivered to all persons who work in the justice system and those who are involved in accessing civil justice of persons with disabilities. These may include, but are not limited to, court staff, lawyers, judges, tribunal members and members of every organisation providing services concerning civil justice. The training programmes must include all aspects of disability rights, equality and non-discrimination on the ground of disability, disability issues and awareness, and disability orientation. This aims to

enhance their ability to provide services that truly accommodate different needs of persons with disabilities, and to prevent unintentionally discrimination or unfair treatment due to a lack of disability awareness.

Disability awareness-raising programmes must also be in place to provide people who work in State agencies, the general public and persons with disabilities themselves, with the better understanding of disability issues and diversity of persons with disabilities, and the ability to recognise disability rights and equality. Particularly persons with disabilities must be sufficiently empowered to understand their rights and how to pursue these rights through available channels.

G. Participation of persons with disabilities

The State must ensure that persons with disabilities can access public information concerning access to civil justice, especially information on court hearing dates sent to them. Moreover, both judges and lawyers must take account of persons with disabilities' presence in court proceedings (either physical presence or through video conference if possible) rather than relying solely on the expert witness report. Whenever possible, judges should be meeting with persons with disabilities who are the subject of the case. Persons with disabilities must be encouraged to participate in the court proceedings; and at the same time, the State must provide accessibility, including effective communication assistance to facilitate their participation in the court proceedings.

CONCLUSION

Thailand has been attempting to guarantee the right to access to civil justice for persons with disabilities in its Constitution and other legislation. However, the instability of its Constitution is a major issue causing uncertainty of the rights guaranteed. The change in the new Constitution, especially the transformation of the citizens' rights to the duties of the State, gives people less constitutional guarantees of their rights as they cannot enforce these State duties against other citizens or private entities. Despite this, the introduction of the national reform strategy in the current Constitution seems to strengthen reform of the justice system as it sets detailed procedures and timeframe, and includes participation from the public in its process. However, this reform is at the initial stage of implementation and its effectiveness cannot be evaluated by this study.

Only the aspects of equal treatment by courts and tribunals, notions of competence, independence and impartiality of courts and tribunals, principles of fairness and publicity, and the right to complain, challenge, or appeal are sufficiently guaranteed in Thailand according to international human rights law standards. There is still evidence from qualitative data showing that, in practice, some persons with disabilities could not fully enjoy other aspects of the right to access to civil justice. Although there is no complaint about environmental accessibility and the restriction of legal capacity, my observation suggests that many issues are still problematic for persons with disabilities and do not comply with international human rights law standards. Moreover, the guardianship regime operated within the Thai legal system is not in line with the UNCRPD and can hinder some persons with disabilities from effectively accessing civil justice.

Another significant barrier concerns accessibility, in terms of information and communication. The lack of accessible information is a key issue that affects abilities of persons with disabilities abilities to recognise and pursue their rights through the justice system. Similarly, this study finds inadequate information for people who work in the justice system to make them fully aware of disability issues, as well as the lack of appropriate training programmes. This also negatively impacts the way in which the provision of accessibility is arranged to accommodate persons with disabilities accessing civil justice. The assistance for communication accessibility is limited to spoken language and sign-language interpreters. Other means of communication seem to be overlooked and appropriate assistance is not available. Furthermore, the validity of these mechanisms for use in court proceedings is also uncertain as it heavily depends on consideration of the presiding judge.

The legal guarantee on legal assistance or representation in civil cases is available for persons with disabilities in Thailand, but it does not cover all civil cases and cannot guarantee that persons with disabilities can fully enjoy this right and obtain a high quality service. This problematic issue is significant, not only for persons with disabilities but for all persons seeking to access justice in Thailand, and needs to be reformed according to the current Constitution.

Legal mechanisms and regulations in Thailand do not sufficiently fulfil the guarantees on the right to equality of arms, the aspects of personal presence and participation of persons with disabilities in all legal proceedings, and non-repetition aspect of the right to a remedy, reparation or compensation. These issues are equally important, in

comparison to other issues, for persons with disabilities to achieve effective access to civil justice. The State must take more steps to make these rights available and ensure that the relevant guarantees are effective in practice.

It has been shown that the international human rights law obligations are not legally binding in the Thai jurisdiction until they are implemented into the domestic legal system. Therefore, only the provisions of the Constitution and domestic legislation can provide guarantees concerning the right to access to civil justice for persons with disabilities in Thailand. However, the international obligations and political relationship within regional mechanisms may influence the development of the rights guaranteed in Thailand in the future. In the next chapter, the research presents a parallel case study of Ireland, in which its regional mechanisms have significant roles in shaping and monitoring the domestic guarantees on the right to access to civil justice for persons with disabilities in Ireland.

CHAPTER 6:

Case Study of Ireland

INTRODUCTION

This chapter presents and discusses access to civil justice for persons with disabilities in the Republic of Ireland. It is divided into four parts: (1) information on Ireland and its legal system; (2) demographic information about persons with disabilities in Ireland; (3) legal mechanisms and regulations relating to access to civil justice for persons with disabilities (referring to the six categories of the right to access to civil justice); and (4) recommendations towards international and regional human rights law standards, and the UNCRPD principles on access to civil justice.

6.1 INFORMATION ON IRELAND AND ITS LEGAL SYSTEM

This section consists of five subsections introducing overall information on Ireland and summarising information on its legal system, court system, tribunal systems and Ombudsman system. Each subsection is presented as follows.

6.1.1 General Information

The Republic of Ireland is located in the European region with the total area of approximately 70,000 square kilometres.¹ According to the Census 2011 Reports, Ireland consists of 29 counties/administrative counties and five cities.² All counties and cities are under the same legal and justice system. This does not include Northern Ireland, which is a separate jurisdiction within the United Kingdom, and is not part of this

¹ William Nolan, 'Geography of Ireland' (*Government of Ireland*)

<www.gov.ie/en/essays/geography.html> accessed 7 May 2016.

² Central Statistics Office (CSO), *Profile 1 Town and Country* (Stationery Office 2012).

research. The population of Ireland is approximately 4.6 million; around 1.3 million people are in Dublin, the capital city.³ Ireland has been classified as a high-income economy country according to the World Bank method through measuring the gross national income per capita.⁴

6.1.2 Legal System

Ireland's current legal system is the common law system.⁵ The 1937 Constitution is at the pinnacle of the hierarchy of Irish domestic law.⁶ It emphasises the democratic regime of the State⁷ and guarantees fundamental rights to all Irish citizens.⁸ The sovereign power of the State, which belongs to the Irish people, is exercised through the institutions established by this Constitution, ie the Legislature, the Executive and the Judiciary.⁹ The Constitution gives exclusive authority to the Parliament (Oireachtas) to enact law.¹⁰ As a dualist country with regard to international law,¹¹ the Parliament has exclusive power to incorporate international obligations of the State into the domestic law to ensure their legitimacy in the national courts.¹² The European Convention on Human Rights Act 2003 (ECHR 2003) is an example of how the Parliament exercised this power, by acknowledging the obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights (ECHR).¹³ Accordingly, the State's organs and the Irish courts shall perform their

³ 'Population of each County and City, 2011' (CSO)

<www.cso.ie/multiquicktables/quickTables.aspx?id=cna23> accessed 12 May 2016.

⁴ 'Countries and Lending Group' (*World Bank*) <<http://data.worldbank.org/about/country-and-lending-groups>> accessed 12 May 2016.

⁵ Allison Kenneally and John Tully, *The Irish Legal System*, (Clarus Press 2013).

⁶ Art 15.4.2°.

⁷ Art 5.

⁸ Arts 40-44.

⁹ Art 6.

¹⁰ Art 15.2.1°.

¹¹ Kenneally and Tully (n 5).

¹² Constitution of Ireland 1937 (as amended) (Constitution), art 29.6.

¹³ European Convention on Human Rights Act 2003 (ECHR 2003), ss 2-4.

duties compatibly with the guarantees under the ECHR.¹⁴ Any persons whose rights under the ECHR are violated in Ireland can seek a remedy at the competent court to recover damages.¹⁵ In any proceedings, the High Court, the Court of Appeal and the Supreme Court, when exercising their appellate jurisdiction, have the authority to declare any statutory provision incompatible with the ECHR upon the request of a party or by its own motion.¹⁶ After exhausting all available remedies within Ireland, a person who claims that his/her rights under the ECHR are still infringed, can further submit an application to the European Court of Human Rights (ECtHR) for a decision.¹⁷ However, the proceedings of the ECtHR are beyond the scope of this research.

In addition to statute law, case law and European Union law (EU law)¹⁸ are other sources of law operating in Ireland.¹⁹ Case law is a vital part of common law system. It contains legal principles developed by judges through their adjudication over periods of years.²⁰ The rule of precedent has a great contribution to the development of case law.²¹ Generally, a subsequent case must follow previous decisions of the higher courts. However, some precedents are merely persuasive, for example decisions of inferior courts. Judges in a later case can decide whether to follow them.²² Most significant case law in Ireland derives from judgments of the Irish superior courts, ie the Supreme Court, the Court of Appeal and the High Court.²³ EU law became another source of law and took direct effect in Ireland, without any further legislative process, because the

¹⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), arts 5, 6 and 13.

¹⁵ ECHR 2003, s 3(2).

¹⁶ *ibid* s 5 (as amended).

¹⁷ ECHR, arts 34-35.

¹⁸ The European Union is a result of integration in 1965 of the three European communities, the European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community. Law of these communities is presently known as European Union law.

¹⁹ Kenneally and Tully (n 5).

²⁰ *ibid*.

²¹ *ibid*.

²² *ibid*.

²³ *ibid*.

Constitution gave this authority following an amendment in 1972.²⁴ The Constitution also emphasises supremacy of the EU law over other constitutional provisions and domestic laws.²⁵ However, different sources of EU law have different applications and effects on the Irish legal system.²⁶ This research will only discuss these sources when analysing EU law concerning access to civil justice.

6.1.3 Court Systems

Ireland has a single court system with a comprehensive jurisdiction over all types of cases, including cases concerning constitutionality of bills or statutes.²⁷ The current Irish courts were established by the Courts (Establishment and Constitution) Act 1961 in pursuance of Article 34 of the Constitution. The Courts consist of Courts of First Instance, a Court of Appeal and a Court of Final Appeal.²⁸ The Courts of First Instance include courts of local and limited jurisdiction, ie the Circuit Court and District Court.²⁹ A judge of these courts has limited jurisdiction upon geographical areas and the nature of the cases.³⁰ The Courts of First Instance also include the High Court, which has ‘full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal’,³¹ including a judicial review,³² as well as the jurisdiction to the question of constitutionality of the law.³³ The Court of Appeal was established in 2014 in accordance with the Thirty-third Amendment of the Constitution (Court of Appeal) Act 2013 and the Court of Appeal Act 2014.³⁴ It has appellate jurisdiction over both civil and

²⁴ The Third Amendment of the Constitution Act 1972, s 1.

²⁵ Constitution, art 29.4.6°.

²⁶ Kenneally and Tully (n 5).

²⁷ Constitution, art 26 and 34.3.

²⁸ *ibid* art 34.2.

²⁹ Raymond Byrne and Paul McCutcheon, *The Irish Legal System* (6th edn, Bloomsbury Professional 2014).

³⁰ *ibid*.

³¹ Constitution, art 34.3.1°.

³² RSC Ord 84 (as amended).

³³ Constitution, art 34.3.2°.

³⁴ Court of Appeal Act 2014 (Establishment Day) Order 2014, SI 2014/477.

criminal cases, and the constitutionality of the law.³⁵ Finally, the Court of Final Appeal, or the Supreme Court, has appellate jurisdiction from Court of Appeal decisions, and of High Court decisions in special circumstances where the Supreme Court allows a direct appeal to it.³⁶ The Supreme Court also has jurisdiction over cases concerning the constitutionality of the law,³⁷ and of a Bill referred by the President under Article 26 of the Constitution.

6.1.4 Tribunal Systems

There are three main types of tribunals in Ireland: tribunals of inquiry, rights tribunals and arbitration tribunals. They have different status and functions. This research focuses only on rights tribunals, which closely relate to access to civil justice for persons with disabilities.

Rights tribunals are permanently established by particular legislation as alternatives to courts for dispute resolution.³⁸ The legislation of establishment normally gives the details concerning the tribunal, including its composition, procedural rules and powers. Most tribunals also have the power to make binding decisions. Their specialities are that the tribunal members have the expertise in the subject matter of the dispute, and that proceedings of the tribunals are faster, less formal and less expensive than court proceedings.³⁹ Examples of rights tribunals include:

- the Mental Health Tribunal, reviewing and determining involuntary admission of a person to a hospital or facility due to mental illness or disorder;⁴⁰

³⁵ 'The Court of Appeal' (*Courts Service*)

<<http://courts.ie/Courts.ie/Library3.nsf/PageCurrent/8189B0D4120A08BE80257FBC004C7D35?opendocument&l=en>> accessed 18 July 2017.

³⁶ Constitution, art 34.5.4°.

³⁷ *ibid* art 34.3.2°.

³⁸ Kenneally and Tully (n 5).

³⁹ *ibid*.

⁴⁰ Mental Health Act 2001 (MHA 2001), ss 17 and 48.

- the Adjudication Officer of the Workplace Relations Commission (WRC), adjudicating complaints or disputes discrimination in employment, provisions of goods and services, accommodation, access to education;⁴¹
- the Social Welfare Appeals Office, hearing and determining appeals concerning a decision of the Department of Social Protection;⁴²
- the Social Welfare Tribunal, adjudicating cases specifically concerning jobseeker's benefit and allowance;⁴³
- the Personal Injuries Assessment Board, assessing the amount of damages in personal injuries matters.⁴⁴

6.1.5 Ombudsman Systems

There are different types of Ombudsmen in Ireland. The main Ombudsman in Ireland was established by the Ombudsman Act 1980, as amended by subsequent legislation.⁴⁵ This Ombudsman has powers to investigate and make findings on any action taken by or on behalf of State authorities and of most state-funded bodies.⁴⁶ Examples of the actions to be investigated are those concerning improper exercise of authority, improper discrimination or actions causing negligence.⁴⁷ Additionally, the Ombudsman also has powers under the Disability Act 2005 (DA 2005) to investigate complaints against public bodies concerning access to public buildings, heritage sites, information, services and services supplied to a public body, and sectoral plans of the specified ministries under

⁴¹ Workplace Relations Act 2015, s 41(5)(a); 'Disputes about equality and discrimination' (*Citizens Information Board (CIB)*, 26 February 2016) <citizensinformation.ie/en/employment/enforcement_and_redress/equality_tribunal.html> accessed 8 August 2017.

⁴² *Social Welfare Appeals Office – An Introduction*

⁴³ 'Social Welfare Tribunal' (*Department of Social Protection*, 21 November 2011) <welfare.ie/en/Pages/Social-Welfare-Tribunal.aspx> accessed 9 August 2017.

⁴⁴ Personal Injuries Assessment Board Act 2003, s 53 and 54.

⁴⁵ Ombudsman (Amendment) Acts 1984 and 2012.

⁴⁶ Ombudsman Act 1980 (as amended) (OA 1980), ss 4 and 6.

⁴⁷ *ibid* s 4(2)(b).

this Act.⁴⁸ The powers of the Ombudsman are similar to powers of a judge, but the distinction is that the findings or recommendation of the Ombudsman has no direct binding effect.⁴⁹ On the other hand, the Ombudsman may pursue an indirect sanction by reporting findings to the Parliament in a special report and an annual report,⁵⁰ about his/her recommendations to the State authorities and their non-compliance with the recommendations.⁵¹

Other types of Ombudsmen are also established by legislation for other specific matters which are not covered by the Ombudsman Acts 1980 to 2012.⁵² These include the Financial Services Ombudsman, dealing with unresolved complaints from financial

⁴⁸ 'The Ombudsman and the Disability Act 2005' (*Office of the Ombudsman*)

ombudsman.ie/en/Publications/Information-leaflets/The-Ombudsman-and-the-Disability-Act-2005/ accessed 16 August 2017.

⁴⁹ Byrne and McCutcheon (n 29); Accordingly, the Ombudsman's recommendation is not under a judicial review, but the OA 1980, s 2(3)(b) provides that the Ombudsman may be removed from office by the President upon resolutions of both Houses of the Parliament, due to 'stated-misbehaviour, incapacity or bankruptcy'.

⁵⁰ OA 1980, s 6(5),(7).

⁵¹ An example of the Ombudsman's indirect sanction in this regard is an incident concerning the 'Mobility Allowance' provided by the Health Service Executive (HSE) for persons with a severe disability. The HSE excluded those over the age of 66 years from eligibility for the benefit. The Ombudsman viewed that this exclusion violated the Equal Status Act 2000 on the ground of age discrimination. In 2011, the Ombudsman published a special report, *Too Old to be Equal?*, and another follow up special report in 2012. The Ombudsman has also constantly provided updates on this incident in its annual reports since 2011. At the time of writing this research, the latest report, which still provides update on this incident, is the Annual Report 2017. These reports are available for the public and are also publicised through the media. In response to the Ombudsman's report, the Government agreed to introduce a new, non-discriminatory scheme (2013). However, to date this has not been introduced, although the mobility allowance was closed to all new applicants following the Ombudsman's report.

⁵² Byrne and McCutcheon (n 29).

service consumers⁵³ and the Ombudsman for Children, dealing with complaints made by or on behalf of a child against public bodies, schools and voluntary hospitals.⁵⁴

In December 2004, the Health Service Executive of Ireland (HSE) introduced a similar system to the Ombudsman through the 'National Policy and Procedures on Safeguarding Vulnerable Persons at Risk of Abuse'.⁵⁵ This Policy designates an independent person, called the "Confidential Recipient", to receive, advise and assist with the referral and examination of concerns and allegations involving a risk of abuse toward elderly persons or persons with disabilities in residential care of, or funded by, the HSE.⁵⁶ The Recipient takes the role to ensure that all cases of concern have been investigated and addressed appropriately by the relevant HSE National Director.⁵⁷

6.2 DEMOGRAPHIC INFORMATION ABOUT PERSONS WITH DISABILITIES IN IRELAND

There is no single agreed definition of disability in the Irish law. Each given definition is used for specific context.⁵⁸ For example, the DA 2005 provides that the term "disability", in relation to a person, means a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment".⁵⁹ On the other hand, the definitions of disability in the

⁵³ Central Bank and Financial Services Authority of Ireland Act 2004, s 16.

⁵⁴ Ombudsman for Children Act 2002, ss 4, 8-10.

⁵⁵ 'Safeguarding Vulnerable Adults' (HSE)

<hse.ie/eng/about/Who/socialcare/safeguardingvulnerableadults/> accessed 27 September 2017.

⁵⁶ 'Confidential Recipient' (HSE)

<hse.ie/eng/services/yourhealthservice/feedback/Complaints/ConfidentialRecipient/> accessed 27 September 2017.

⁵⁷ *ibid.*

⁵⁸ 'Definitions' (National Disability Authority) <<http://nda.ie/Disability-overview/Definitions/>> accessed 31 August 2017.

⁵⁹ DA 2005, s 2.

Employment Equality Act 1998 and the Equal Status Act 2000 (ESA 2000), while they appear more focused on descriptions of medical impairments, are broader to include past, future and imputed disabilities.⁶⁰ The demographic information about persons with disabilities in Ireland presented in this chapter is from the Census 2011 results conducted by the Central Statistics Office (CSO).⁶¹ According to the Census report, the statistics of persons with disabilities are derived from the information provided by the householder or any adult member of the household, who completed the questionnaire.⁶² This report classifies persons with disabilities into seven types – visual, hearing, physical, intellectual, learning⁶³ and psychological disabilities, and chronic illness.

The Census 2011 shows that 13 percent (slightly over 595,000) of the total population in Ireland has a disability.⁶⁴ Most persons with disabilities, 13.2 percent of overall persons with disabilities (almost 79,000), are in Dublin City, the capital of Ireland. An approximate number of people in each group, out of the total population with disabilities can be presented as follows:

- 46 percent for chronic illness (the largest group)
- 41 percent for physical disability
- 23 percent for learning difficulty
- 16 percent for psychological disability
- 15.5 percent for deafness or hearing loss
- 10 percent for intellectual disability
- 8.7 percent for blindness or visually impairment (the smallest group)

Some persons within each group may have more than one disability.

⁶⁰ Employment Equality Act 1998, s 2(1); Equal Status Act 2000 (as amended) (ESA 2000), ss 2(1) and 3(1).

⁶¹ CSO, *Profile 8 Our Bill of Health* (Stationery Office 2012).

⁶² A person identified as having a disability may not be the person completing the questionnaire.

⁶³ Question 16 of the Census 2011 Questionnaire provides different categories for an intellectual disability and a learning disability, but does not give a definition of these terms. The category of learning disability includes 'a difficulty with learning, remembering or concentrating', of which lasts or is expected to last at least six months, or reoccurs regularly.

⁶⁴ CSO, *Profile 8* (n 61).

The Census 2011 analysis on education of persons with disabilities excludes data of those aged 50 and over (approximately 340,000 persons or 57 percent of total persons with disabilities)⁶⁵ since the statistics show that disability developed as the person aged.⁶⁶ The report illustrates that around 25 percent of persons with disabilities ages 15 to 49 obtained third level education degrees, slightly over 22 percent completed lower secondary school, and around 16 percent educated no higher than primary school.⁶⁷

Around 163,000 persons with disabilities are considered eligible for employment.⁶⁸ Only 69 percent of them are at work, and around 31 percent are unemployed.⁶⁹ For the overall population, the Census 2011 results also reports a significant linkage between education and unemployment rate; population attaining higher education level has much lower unemployment rate than those with primary education.⁷⁰

6.3 LEGAL MECHANISMS AND REGULATIONS RELATING TO ACCESS TO CIVIL JUSTICE FOR PERSONS WITH DISABILITIES

This section will explore legal mechanisms and regulations on access to civil justice for persons with disabilities in both regional and domestic levels by referring to the six categories of the right to access to civil justice. Each subsection will include the existing laws and regulations, practical experiences of persons with disabilities in Ireland and of people who work in justice system in dealing with cases involving persons with disabilities, and evaluation of the domestic law towards international and regional human rights law standards.

⁶⁵ Calculated by using Table 6A: Persons, classified by age group and type of disability. See *ibid* 52.

⁶⁶ *ibid*.

⁶⁷ *ibid*.

⁶⁸ The labour force includes persons with disabilities age 15 to 64 only.

⁶⁹ CSO, *This is Ireland – Highlights from Census 2011, Part 2* (Stationery Office 2012).

⁷⁰ *ibid*.

Although Ireland was not involved in the adoption process of the draft universal declaration of human rights of the United Nations in 1948, its 1937 Constitution emphasises the fundamental principles of the rights contained in the Universal Declaration of Human Rights.⁷¹ Ireland has also ratified or acceded to most of international human rights law treaties used for classifying these six categories, except for two Conventions. It has neither signed nor ratified the ICMW and has only signed the ICPED.⁷² It acceded to UNCEDAW in 1985, and ratified the ICCPR and ICESCR in 1989, the UNCRC in 1992, the ICERD in 2000, and the UNCAT in 2000.⁷³ However, in accordance with the concept of dualism, these international obligations need to be enacted domestically to be enforceable.⁷⁴ To date, obligations under these conventions were implemented and integrated through diverse pieces of legislation. The UNCAT was implemented through the Criminal Justice (United Nations Convention Against Torture) Act 2000. The UNCRC was fulfilled through the enactment of the Children Act 2001,⁷⁵ and through amendments to the Constitution⁷⁶ in addition to other law and State policy.⁷⁷ The requirements of the other conventions have been incorporated through existing legislation, for example, some obligations under the UNCEDAW were incorporated

⁷¹ 'Human rights in Ireland' (*Department of Foreign Affairs and Trade*) <dfa.ie/our-role-policies/international-priorities/human-rights/human-rights-in-ireland/> accessed 28 November 2017.

⁷² 'Ratification Status for Ireland' (*OHCHR*) <internet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=83&Lang=en> accessed 28 November 2017.

⁷³ *ibid.*

⁷⁴ Constitution, art 29.6.

⁷⁵ Eilionoir Flynn, 'Ireland' in Lisa Waddington and Anna Lawson (eds), *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts* (OUP 2018) (forthcoming).

⁷⁶ Constitution, art 42A.

⁷⁷ Irish Human Rights and Equality Commission (IHREC), 'Ireland and the United Nations Convention on the Rights of the Child' (Report to the UN Committee on the Rights of the Child on Ireland's Combined Third and Fourth Periodic Reports, December 2015) <ihrec.ie/download/pdf/ireland_and_the_united_nations_convention_on_the_rights_of_the_child.pdf> accessed 14 December 2017.

through equality legislation.⁷⁸ The UNCRPD was ratified in 2018, with some declarations and reservations, which will be addressed in the relevant subsection of the right to access to civil justice.⁷⁹ It should be noted that the qualitative data from interview participants was collected before Ireland ratified the UNCRPD, but it was working in preparation for such ratification, which includes the enactment of new legislation and amendment of existing legislation as needed to meet the requirements of the Convention.⁸⁰ The relevant provisions on access to civil justice applicable in Ireland will be addressed in each subsection. The European legal instruments will also be used along with international human rights law standards for analysing access to civil justice in Ireland. The six categories of the rights to access to civil justice will be discussed as follows.

6.3.1 Right to equality before courts and tribunals

This right embraces the aspects of equal access to courts and tribunals, equality of arms, equal treatment by courts and tribunals, and equality before the law. There is no extensive provision in regional instruments of the European region and Irish law guaranteeing the right to equality before courts and tribunals, but various legal provisions guarantee each aspect as follows.

⁷⁸ IHREC, 'Ireland and the Convention on the Elimination of All Forms of Discrimination Against Women' (Submission to the UN Committee on the Elimination of Discrimination Against Women on Ireland's combined sixth and seventh periodic reports, January 2017)

ihrec.ie/app/uploads/2017/02/ihrec_cedaw_final_230117.pdf accessed 28 November 2017.

⁷⁹ 'Status of Treaties: Chapter IV Human Rights - 15. Convention on the Rights of Persons with Disabilities' (UN, 5 August 2018)

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en accessed 5 August 2018.

⁸⁰ 'Roadmap to Ratification of the UNCRPD' (*Department of Justice and Equality*, 21 October 2015)

justice.ie/en/JELR/Roadmap%20to%20Ratification%20of%20CRPD.pdf/Files/Roadmap%20to%20Ratification%20of%20CRPD.pdf accessed 9 November 2017.

A. Right to equal access to courts and tribunals

The right to equal access to courts and tribunals can be considered in three aspects: access to legal proceedings and other related court services, the environmental accessibility of courthouses and courtrooms, and accessibility of information. The information accessibility will be discussed at the right to equality of arms subsection.

At the regional level, the ECtHR expresses in *Golder v UK* that although the text of article 6 of the ECHR 'does not state a right of access to the courts or tribunals in express terms', it includes other rights that 'stem from the same basic idea', which may not be 'defined in the narrower sense of the term.'⁸¹ The Court concludes that this article 'secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal', which includes 'the right to institute proceedings before courts in civil matters'.⁸² In this case, the Court does not go beyond the aspect of access to the proceedings, but the Council of Europe (CoE), which adopted the ECHR, also provides guidelines and a checklist concerning efficiency and quality of justice, by including environmental accessibility and accessibility of information and other related court services.⁸³ These materials further demonstrate their concern regarding equal access to justice, but an assessment of these materials is beyond the scope of this research.

In the disability context, the ECtHR confirms that the right to access to court includes the 'direct access to a court' to restore legal capacity regardless of the guardian's consent,⁸⁴

⁸¹ *Golder v UK* (1975) Series A no 18, para 28.

⁸² *ibid* para 36.

⁸³ European Commission for the Efficiency of Justice (CEPEJ), 'CEPEJ Guidelines' (Compilation edn) <coe.int/t/dghl/cooperation/cepej/textes/Guidelines_en.pdf> accessed 29 December 2017; CEPEJ, 'Checklist for promoting the quality of justice and the court' CEPEJ(2008)2.

⁸⁴ Lucy Series, 'Legal Capacity and participation in litigation: Recent developments in the European Court of Human Rights' in Lisa Waddington, Gerard Quinn and Eilionoir Flynn (eds), *European Yearbook of Disability Law* (Volume 5, Intersentia 2015) 103, 112 citing *Shtukaturov v Russia* (2012) 54 EHRR 27.

or to directly challenge the lawfulness of involuntary placement of a person with disability in an institution without having to firstly restore his/her legal capacity.⁸⁵

At the national level, Ireland has legal mechanisms and regulations concerning each aspect of equal access to courts and tribunals as follows.

Access to legal proceedings and other related court services

The Constitution guarantees the administration of justice in public,⁸⁶ which generally refers to the right to access to courts by all.⁸⁷ However, this right can be constitutionally restricted for the proper administration of justice, for example by imposing a limited timeframe to file a case, or by not allowing an individual to file the same dispute which has already been considered by another court.⁸⁸

Furthermore, all public bodies, including courts and tribunals,⁸⁹ have a duty to ensure that their services are accessible to both persons with and without disabilities, and that assistance is available if persons with disabilities request it.⁹⁰ However, the provision of assistance is subject to the 'practicable' and 'appropriate' requirements.⁹¹ The public body shall also appoint an officer to act as 'access officer' to provide, arrange and co-ordinate the provision of assistance.⁹² In addition to the duty on service accessibility, the equality legislation also requires service provider to provide reasonable accommodation for persons with disabilities, which in its application to providers of goods and services means that the accommodation should not exceed a nominal cost.⁹³ In considering

⁸⁵ *ibid* 113 citing *Stanev v Bulgaria* (2012) 55 EHRR 22.

⁸⁶ Art 34.1.

⁸⁷ *Byrne and McCutcheon* (n 29).

⁸⁸ *ibid*.

⁸⁹ DA 2005, s 2(1); 'The Disability Act' (*Office of the Ombudsman*) <ombudsman.ie/en/About-Us/Legislation/The-Disability-Act/> accessed 14 August 2017.

⁹⁰ DA 2005, s 26(1).

⁹¹ *ibid* s 26(1).

⁹² *ibid* s 26(2).

⁹³ ESA 2000, s 4; In *Re Article 26 and the Employment Equality Bill 1996* ([1997] 2 IR 321), the Supreme Court held that a provision imposing employer a duty to provides reasonable accommodation for an employee with disability up to the point where its cost does not amount

whether the cost is beyond nominal, the size of the business and budget of the service provider will be taken into account.⁹⁴ A refusal or failure to comply with this provision may constitute discrimination on the ground of disability.⁹⁵

There is evidence that a number of persons with disabilities have taken their cases to Irish courts, alleging violations of constitutional or other rights. Although some cases are successful⁹⁶ and some cases are unsuccessful,⁹⁷ the emergence of these cases demonstrates the ability of at least some persons with disabilities to exercise their right to access courts, in practice. The reasons for success or failure in these cases cannot be attributed solely to the litigants' disabilities, but is interconnected with many other factors, such as the lack of legal guarantees on substantive rights, legal representation or communication assistance. These factors may affect the right of persons with disabilities to access civil justice as a whole, but must not be viewed in isolation as evidence of a violation of the right to equal access to court proceedings.

Despite the guarantee of a right to access the courts and their services, some people may not be able to exercise this right independently due to legal capacity restrictions. At

to undue hardship to the employer is unconstitutional. Because of this court decision, the Employment Equality Act 1998, s 16(3)(c) only imposed the employer's duty to provide such accommodation up to 'a nominal cost'. The Act was later amended by s 9, Equality Act 2004, which states that such accommodation must not impose 'a disproportionate burden on the employer'. This amendment was introduced in response to Ireland's need to transpose Council Directive 2000/78/EC into domestic law.

⁹⁴ IHREC, 'Your Equal Status Rights Explained: Guide to the Equal Status Acts 2000-2012' (IHREC, September 2015)

<www.ihrec.ie/download/pdf/ihrec_equal_status_rights_explained.pdf> accessed 23 September 2018.

⁹⁵ ESA 2000, s 4.

⁹⁶ For example, *Sinnott v Minister for Education* [2001] IESC 63; *Joan Clarke v Galway County Registrar*, The High Court, Record No 1338JR/2006; *G v District Judge Murphy* [2011] IEHC 445, [2011] 3 IR 748; *DX v Judge Buttimer* [2012] IEHC 175; *Sinnott v Minister for the Environment* [2017] IEHC 214; *PL v Clinical Director of St Patrick's University Hospital* [2018] IECA 29.

⁹⁷ For example, *Fleming v Ireland* [2013] IESC 19, [2013] 2 IR 417, [2013] 2 ILRM 73; *Cahill v Minister for Education and Science* [2017] IESC 29; *Nano Nagle School v Daly* [2018] IECA 11.

the time of writing, legislation concerning legal capacity is in transition. The Assisted Decision-Making (Capacity) Act 2015 (ADMA 2015) was signed into law in December 2015. This Act introduces a new approach towards decision-making capacity of persons with disabilities. Its commencement will end the wardship of persons aged 18 and over, which operates based on substituted decision-making, and will additionally introduce supported decision-making options, which respect the will and preferences of each individual.⁹⁸ The Act is an outcome of the State's action in preparation for ratification of the UNCRPD.⁹⁹ However, since this Act introduces a changeover to the new decision-making system, a lot of preparation needs to be done before it can be fully active. This includes appointment of the Director of the Decision Support Service¹⁰⁰ (appointed in October 2017),¹⁰¹ who has significant roles throughout the Act.¹⁰² Once section 7 of this Act commences, it repeals two significant pieces of legislation: the Marriage of Lunatics Act 1811 and the Lunacy Regulation (Ireland) Act 1871.¹⁰³ These laws restrict legal capacity of persons under the meaning of 'lunatic'¹⁰⁴ and of those under wardship.¹⁰⁵ The Act requires the review of capacity of adults under the wardship system within 3 years once Part 6 (Wards) of the Act commences.¹⁰⁶

⁹⁸ CIB, 'Assisted Decision-Making (Capacity) Act 2015' (2016) 43(4) *Relate*.

⁹⁹ 'Roadmap to Ratification of the UNCRPD' (n 80).

¹⁰⁰ Assisted Decision-Making (Capacity) Act 2015 (ADMA 2015), s 94.

¹⁰¹ 'Director of the Decision Support Service' (*Mental Health Commission*)

<mhcirl.ie/DSS/dir_dss/> accessed 5 December 2017.

¹⁰² ADMA 2015, s 95.

¹⁰³ *ibid* s 7.

¹⁰⁴ Section 2 of the Lunacy Regulation (Ireland) Act 1871 refers the term "lunatic" to 'any person found by inquisition idiot, lunatic, or of unsound mind, and incapable of managing himself or his affairs'.

¹⁰⁵ Wardship is a system where the court orders a person as 'a ward of court' due to his/her mental incapacity. See 'Wards of Court', (*Courts Service*)

<courts.ie/offices.nsf/0/19111E254B2EF547802573D2006CCF26?OpenDocument> accessed 8 November 2017.

¹⁰⁶ ADMA 2015, s 54.

Since both section 7 and Part 6 of the Act are not yet active, some persons who are under the wardship system still experience limitations of their legal capacity.¹⁰⁷ For example, they are not permitted to manage their assets, travel abroad freely or marry, if they are under wardship, due to 'mental incapacity'.¹⁰⁸ Apart from initiating the legal process to be discharged from wardship, they can only commence a lawsuit through their 'Committee' with a permission of the court,¹⁰⁹ and they cannot instruct a lawyer while lacking mental capacity.¹¹⁰

When the Act is fully in force and the wardship system for adult subsequently ends, some persons may still be declared to lack capacity for decision-making,¹¹¹ and have restricted legal capacity in certain areas. They can also be detained under the Mental Health Act 2001 (MHA 2001) on the basis of 'mental disorder'.¹¹²

The interview data for this research shows that some persons with disabilities face barriers to access legal proceedings. The paper-based procedures can impede persons with visual impairments to bring a case to a court or tribunal independently.¹¹³ Although a sighted person may help them with this matter, the respondent representing the perspective of visually impaired people expressed that some blind persons felt uncomfortable to sign a document or a form which they could not access by themselves.¹¹⁴ The respondent further noted an impact of getting help that:

it's nice for people helping each other, ... but it's better to create conditions where people don't need that help. It's an unequal

¹⁰⁷ ADMA 2015 (Commencement of Certain Provisions) Order 2016, SI 2016/515; ADMA 2015 (Commencement of Certain Provisions) (No 2) Order 2016, SI 2016/517.

¹⁰⁸ 'Wards of Court' (n 105).

¹⁰⁹ *ibid*; A committee of a person under wardship is a person appointed by the court to act on behalf of the ward. The committee has functions limited to the court permission.

¹¹⁰ Law Society of Ireland, *A Guide to Good Professional Conduct for Solicitors* (3rd edn, Law Society of Ireland 2013).

¹¹¹ ADMA 2015, s 55.

¹¹² *ibid* ss 107-108.

¹¹³ Interview with Respondent IDV, a representative of a disabled people's organisation of visually impaired people (Dublin, Ireland, 19 May 2017) (Interview-IDV).

¹¹⁴ *ibid*.

*relationship when one of dependency, because a blind person is not seen as being equal when they're being helped.*¹¹⁵

Regarding the appointment of an access officer, it appears, for example, that the Courts Service, the Ombudsman Office, the Legal Aid Board and the Mental Health Commission provide contact details of their access officers on their websites.¹¹⁶ One respondent mentioned that, although the DA 2005 already required all public bodies to have an access officer in their organisation, a person with disabilities still found that no such officer in one public body, ie the Legal Aid Board.¹¹⁷ However, the Board subsequently managed to appoint an access officer in compliance with the Act.¹¹⁸

Concerning the issues of legal capacity, *A Guide to Good Professional Conduct for Solicitors* published by the Law Society of Ireland suggests that every person needs legal capacity to instruct a solicitor.¹¹⁹ It is also a duty of the solicitor to evaluate whether that person has capacity to instruct him/her or not.¹²⁰ Persons under the wardship is deemed to lack mental capacity,¹²¹ for other persons, their mental capacity also depends on the type of legal transaction concerned.¹²² The solicitor should consider their mental capacity 'at the time the client is giving instructions and at the time of the execution of any document' as it can be fluctuated.¹²³ In the interview data for this research, the respondents who are lawyers explained that, everybody is presumed by the common

¹¹⁵ *ibid.*

¹¹⁶ 'Accessibility' (*Courts Service*)

<courts.ie/Courts.ie/Library3.nsf/PageCurrent/1C65B6A925A43A4A80257FB8004AEFDB?openDocument> accessed 8 March 2018; 'Access Officer Details' (*Office of the Ombudsman*) <ombudsman.ie/en/about-us/policies-and-strategies/accessible-services/access-officer-details/> accessed 8 March 2018; 'Access Officer' (*Legal Aid Board*) <www.legalaidboard.ie/en/Contact-Us/Access-Officer/> accessed 10 September 2018; 'Accessibility' (*Mental Health Commission*) <mhcir.ie/Accessibility/> accessed 8 March 2018.

¹¹⁷ Interview-IDV (n 113).

¹¹⁸ *ibid.*

¹¹⁹ Law Society of Ireland (n 110).

¹²⁰ *ibid.*

¹²¹ 'Wards of Court' (n 105).

¹²² Law Society of Ireland (n 110).

¹²³ *ibid.* 12.

law to have legal capacity and entitled to bring proceedings before the court on the same basis as other persons.¹²⁴ To be able to instruct a lawyer, the person must understand what he/she was about to do and fully appreciate what was happening.¹²⁵ Once the lawyer considered that the person was able to instruct him/her, it was unusual for the opposing side to challenge in the court proceedings on the issue of legal capacity, or for the court to make an observation on this.¹²⁶ There was no further comment on this issue from interviews with persons with disabilities.

It appears that court and tribunal proceedings in Ireland do not seem fully accessible to everybody, especially for visually impaired people due to the paper-based system. The unavailability of an access officer in any public body violates the obligation under the DA 2005; however, there was no clear evidence of which organisations were not compliant with this law. This issue can significantly impact on effectiveness of access to civil justice for persons with disabilities as all public bodies have at a minimum, a duty to provide internal complaints mechanisms accessible to persons with disabilities. The impact on access to civil justice for persons with disabilities will be even greater if that public body has a duty to provide tribunal services. The requirement regarding mental capacity impedes some persons with disabilities to access to civil justice as they are deemed to lack legal capacity to instruct a lawyer for their legal proceedings. These findings illustrate that there is still a gap in the current situation for Ireland to be fully aligned with both regional and domestic guarantees on access to legal proceedings in courts and tribunals, and that the current applicable law restricting legal capacity of some persons with disabilities is still in conflict with the UNCRPD requirement. However, when ratifying the UNCRPD, Ireland has reserved its 'right to permits [supported and substitute decision-making] arrangements in appropriate circumstances and subject to appropriate and effective safeguards'.¹²⁷ A more detailed analysis to determine how the law

¹²⁴ Interview with Respondent IL1, a lawyer (barrister & solicitor) (Dublin, Ireland, 18 October 2016) (Interview-IL1); Interview with Respondent IL2, a lawyer (barrister & solicitor) (Dublin, Ireland, 23 January 2017) (Interview-IL2).

¹²⁵ *ibid.*

¹²⁶ Interview-IL1 (n 124).

¹²⁷ 'Status of Treaties-UNCRPD' (n 79).

concerning legal capacity in Ireland could be brought into compliance with Article 12 despite this reservation is, however, beyond the scope of this thesis.

Environmental accessibility

There are two main legislative acts concerning environmental accessibility for persons with disabilities: the Building Control Act 1990 (BCA 1990) and DA 2005. The BCA 1990 consists of various regulations. The main regulations concerning environmental accessibility for persons with disabilities are in Part M of the Building Regulations. Part M has been amended several times.¹²⁸ Its original version in 1991 specified its heading as “access for disabled people”, whereas the latest amendment in 2010 uses the phrase “access and use”, which is claimed to adopt ‘an inclusive approach’, emphasising accessibility for all ‘regardless of age, size or disability’.¹²⁹ As Part M is a very broad framework, the *Technical Guidance Document M* (TGD-M) is published as guidance on compliance with its requirements.¹³⁰ The fulfilment of the TGD-M shall be initially construed as compliance with the requirements of Part M.¹³¹

Part M imposes minimum accessibility requirements to facilitate environmental accessibility for persons with disabilities. These requirements apply to new buildings and existing buildings with extensions or material alterations with immediate effect.¹³² The responsibility to comply with these regulations is mainly on the owners and designers of the buildings.¹³³ Those who manage the building have no specific duty under these regulations, but are suggested to also enhance accessibility of the building, for instance, ‘arranging furniture appropriately’, ‘conducting staff training and awareness campaigns on peoples specific needs and the use of assistive equipment in buildings’ and ‘providing

¹²⁸ Building Regulations 1991, SI 1991/306; Building Regulations 1997, SI 1997/497; Building Regulations (Amendment) Regulations 2000, SI 2000/179; Building Regulations (Part M Amendment) Regulations 2010, SI 2010/513.

¹²⁹ Environment, Heritage and Local Government, *Building Regulations 2010: Technical Guidance Document M – Access and Use* (Stationery Office, 2010) 9.

¹³⁰ *ibid*; Building Regulations 1997, SI 1997/497, art 7(1).

¹³¹ Building Regulations 1997, SI 1997/497, art 7(2).

¹³² *ibid* arts 10, 11 and part M (as amended).

¹³³ *ibid* art 9.

information on the accessibility features of the building'.¹³⁴ A building can be inspected by an authorised person under the BCA 1990, and may require alteration or other actions under an enforcement notice issued by the inspector, to fulfil the requirement of the Building Regulations. The building or a part of it may be prohibited to be used until the required alternations have been completed. However, the enforcement notice cannot be served after the expiration of the period of five years since the completion of the building or the work, or the material change of use of the building.¹³⁵

According to the DA 2005, a building is considered a 'public building' if it (or a part of it) is occupied, managed or controlled by a public body, regardless of its ownership.¹³⁶ The DA 2005 imposes on all public bodies a duty to ensure that their public buildings are accessible to persons with disabilities.¹³⁷ This duty is based on practicability, meaning numerous circumstances should be taken into account, such as condition of the existing structure and its stability, and effect on the historical element of the building.¹³⁸ Unless it is already required by the BCA 1990, buildings that become public buildings on, or after, 31 December 2005 must be brought into compliance with Part M by 31 December 2015 and also have ten years to ensure compliance after any further amendment of Part M comes into effect.¹³⁹ Despite this, some public buildings may be granted permission, by 'a Minister of the Government',¹⁴⁰ not to comply with Part M if they will be used temporarily or for not more than 3 years, or if the cost of alteration for accessibility is unreasonable considering the usage of the building.¹⁴¹

¹³⁴ Environment, Heritage and Local Government (n 129) 16.

¹³⁵ Building Control Act 1990, ss 8 and 11 (as amended).

¹³⁶ DA 2005, s 25(6).

¹³⁷ *ibid* s 25.

¹³⁸ Environment, Heritage and Local Government (n 129).

¹³⁹ DA 2005, s 25(3).

¹⁴⁰ Section 2(1) of the DA 2005 generally defines the term "Minister" as the Minister for Justice, Equality and Law Reform. Section 24 uses this term and the term "Minister of the Government", which seems not to refer to the general definition, but include any Minister of the Government whose responsibilities relate to the public building concerned.

¹⁴¹ *ibid* s 25(4).

For a public building considered to be a heritage site, a public body, that owns, manages or controls such a building, has a duty to ensure that parts of the building, which open for the public, are accessible by persons with disabilities. This duty is also based on the practicability principle, but the provision of accessibility shall not apply if it would have a significant adverse effect or compromise the characteristics of the site.¹⁴²

According to the Courts Service Act 1998, the Courts Service was established¹⁴³ with a function to provide, manage and maintain court buildings. Therefore, under the DA 2005, the Courts Service is a public body and courthouses are public buildings.¹⁴⁴ The Courts Service has a duty to ensure that:

- courthouses with heritage site status due to their 'protected structures'¹⁴⁵ are accessible to persons with disabilities, on the condition that the provision of accessibility is practicable and not in conflict with alteration rules of heritage site;¹⁴⁶
- other existing courthouse buildings with extensions or material alterations, and new courthouses are designed and constructed in compliance with Part M of the Building Regulations;¹⁴⁷
- other existing courthouse buildings that are currently in use as public buildings are brought into compliance with Part M, including its amendments, unless they are granted permission not to comply with Part M;¹⁴⁸ and

¹⁴² *ibid* s 29(1).

¹⁴³ Courts Service Act 1998, s 4.

¹⁴⁴ DA 2005, ss 2(1)(h)(i) and 25(6).

¹⁴⁵ 'Architecture and heritage' (*Courts Service*)

<courts.ie/Courts.ie/Library3.nsf/pagecurrent/68CD9D02C0AB3F9580257FC30055A7D7?open> accessed 30 October 2017.

¹⁴⁶ DA 2005, s 29.

¹⁴⁷ Building Regulations 1997, SI 1997/497, arts 10, 11 and Part M (as amended).

¹⁴⁸ DA 2005, s 25(3)-(4).

- courthouse buildings that are granted not to comply with Part M, as to the exception in the previous category, are accessible to persons with disabilities, so long as the provision of accessibility is practicable.¹⁴⁹

This duty is also applied to other public bodies providing tribunal services which have similar functions to the Courts Service.

According to interview data, a respondent who is a court staff member identified that some courthouses which are old buildings might still have accessibility issues. For example, there were 'steps everywhere'; therefore, a 'special arrangement' was needed, such as putting in place temporary ramps to facilitate accessibility.¹⁵⁰ The respondent noted that the Courts Service was continuously redeveloping all buildings. This process would take several years; however, the respondent believed that all buildings would be gradually brought up to meet the legal specifications.¹⁵¹ The respondent emphasised that access requests with an advance notice were mostly fulfilled. This also applied to the requests of judges, court staff members, and lawyers with disabilities, such as hearing aids or mobility facilities. The respondent shared an experience in dealing with accessibility of an extra-large wheelchair that:

You would have seen me on my hands and knees in a courtroom with a measuring tape to make sure that the courtroom was big enough for [the person with an extra-large wheelchair] to actually not just get into the courtroom but get the whole way up, so [that person] could talk to a judge.¹⁵²

¹⁴⁹ *ibid* s 25(1),(4); There is no clear interpretation as yet, whether the buildings that are granted permission not to comply with Part M still have to comply with section 25(1) of the DA 2005 or not. My interpretation is that sub-s (1) is a minimum accessibility requirement for all public buildings, including those granted such a permission. It seems more justifiable to interpret section 25 in this way, otherwise these buildings will have less responsibility, compared to the responsibility of buildings with heritage site status.

¹⁵⁰ Interview with Respondents IF, a group of three court staff members of the Courts Services (Dublin, Ireland 7 July 2017) (Interview-IF).

¹⁵¹ *ibid*.

¹⁵² *ibid*.

A respondent from the perspective of persons with physical disabilities contended that there had been improvements since the Courts Service took over the running of the court system. In this respondent's view, there was more clarity on the legal obligations of the court and the court service was more organised than it was before.¹⁵³

However, some respondents from the perspective of persons with disabilities observed that accessibility of the courtrooms was still problematic. Firstly, most witness boxes were raised from the ground level with steps.¹⁵⁴ A witness who could not access the witness box was allowed to give evidence from his/her wheelchair beside the witness box.¹⁵⁵ This seemed to be flexible for witnesses with disabilities, but a respondent representing persons with disabilities viewed that it actually put the witness at a disadvantage.¹⁵⁶ By not getting into the witness box, the person would give evidence at a much lower position from the level of the judge's bench, while the opponent who could access the witness box would give evidence at eye-level with the judge. This could psychologically affect the witness in the wheelchair to feel unequal or inferior to other witnesses when testifying.¹⁵⁷ Moreover, the person outside the witness box would not be able to access the microphone.¹⁵⁸ Due to the lower physical position of the speaker, his/her voice might not be projected and heard properly by the judge.¹⁵⁹ It was noted that persons with disabilities had represented this issue to the Courts Services and the

¹⁵³ Interview with Respondent IDP, a representative of a disabled people's organisation of persons with physical and mobility impairments (Dublin, Ireland, 26 January 2017) (Interview-IDP).

¹⁵⁴ *ibid*; Interview with Respondent IDH, a representative of an organisation for Deaf persons and/or persons with hearing loss (Galway, Ireland, 16 May 2017) (Interview-IDH); There is evidence of wheelchair accessible witness box, but was not mentioned by any interview participants. This witness box is larger to accommodate wheelchair accessibility and equipped with 'a platform lift', which is level with the courtroom floor and can be raised up a slightly higher in the same way as traditional witness box. See National Disability Authority, *Access: Improving the accessibility of historic buildings and places* (Stationery Office 2011) 103-4.

¹⁵⁵ Interview-IL1 (n 124); 'Accessibility' (n 116).

¹⁵⁶ Interview-IDP (n 153).

¹⁵⁷ *ibid*.

¹⁵⁸ The microphone system is normally installed and fixed at the witness box.

¹⁵⁹ *ibid*.

Department of Justice, but the Courts Service argued that it was not obliged to make every courtroom accessible owing to a list of buildings in the Four Courts.¹⁶⁰ Secondly, the courtroom setting and the microphone system were impracticable when a witness was facilitated by a sign-language interpreter.¹⁶¹ It was explained that the Deaf witness would be sent to the witness box and the interpreter stood on the floor in the distance where the witness could see the interpreter and other interactions going on around the courtroom.¹⁶² However, the interpreter still needed to be near to the microphone to interpret the witness's signs. Most microphones for a witness box were fixed to face the person in the box, and were sometimes impossible to bend down towards the interpreter on the ground, so that the interpretation might not be heard properly.¹⁶³ It was mentioned that sign-language interpreters also had some difficulties in hearing the conversation when the proceedings were conducted in older courthouses with high ceilings, which was not good acoustically for sound.¹⁶⁴ The space within the courtroom could also put an interpreter in a difficult situation as when the interpreter tried to face the Deaf witness, the interpreter had to turn his/her back to the barrister; or when the interpreter tried to look at the judge and barrister and hear what was going on, the interpreter had to turn his/her back to the witness.¹⁶⁵ Lastly, although the signage within courthouse and contact details for court offices are available in braille,¹⁶⁶ there was a comment of a respondent from the perspective of visually impaired people that only a limited amount of people in their group could read braille.¹⁶⁷ The respondent further expressed that 'the court is completely inaccessible to me by myself independently.'¹⁶⁸ According to ethnographic observation for this research, I observed the same barriers, including inaccessible witness boxes by wheelchair users, the height of judge's bench from the room's floor,

¹⁶⁰ *ibid.*

¹⁶¹ Interview-IDH (n 154).

¹⁶² *ibid.*

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

¹⁶⁵ Interview-IDH (n 154).

¹⁶⁶ 'Accessibility' (n 116).

¹⁶⁷ Interview-IDV (n 113).

¹⁶⁸ *ibid.*

the difficulty in hearing court proceeding from the public gallery in the courtroom. No other new barrier was discovered from the observation.

The respondents who are court staff members suggested that advance notice of the service users' particular needs would allow them to make the necessary alterations and deliver a better service. The notice could be given to the registrar, the office manager or an access officer, including through telephone communication.¹⁶⁹ One of them further shared an experience concerning an instant or on-demand request from a Deaf person, which could not be fulfilled due to the time factor of his other duties. The respondent stated that 'I realised afterwards, that if the persons who want to provide the service and find that they can't provide the service, they would feel just as aggrieved as the person who doesn't benefit from the service.'¹⁷⁰ On the other hand, one respondent representing persons with physical disability noted that they would signal the accessibility needs to the court in advance when filing the case. In practice, some cases were still assigned to an inaccessible courtroom. If the accessible courtroom was available, the case would be moved to that room in the morning of the hearing date, but sometimes judges could be 'very annoyed' about having to move; and if the room was unavailable, the case had to be adjourned to another day.¹⁷¹

It could be perceived that court staff were doing their best and making an effort to facilitate accessibility for persons with disabilities. However, these arrangements under advance notice seem to be provisions of reasonable accommodations rather than those of accessibility. As to the research findings, the environmental accessibility within the court system for persons with disabilities cannot be considered to meet accessibility principle of the UNCRPD. Although the Building Control Acts seem to have adequate enforcement mechanisms, there are still some gaps preventing its application to old buildings which have no extensions or material alteration or change of use. Moreover, the latest TDG-M (2010) of the Building Regulations seems to not adequately address the needs of Deaf persons and persons with intellectual disabilities.¹⁷² Whereas the DA

¹⁶⁹ Interview-IF (n 150).

¹⁷⁰ *ibid.*

¹⁷¹ Interview-IDP (n 153).

¹⁷² 'Will recent changes in Irish legislation ensure accessible and usable signage is provided in buildings for all people and not just people with disabilities?' (*O'Herlihy Access Consultancy*)

2005 is applied to all buildings being used as public buildings, its enforcement mechanism is not as direct as that of the Building Control Acts. The enforcement mechanism of the DA 2005 will be further discussed in the right to complain section.

Further problematic issues regarding courtroom accessibility include evidence that the existing legal mechanisms and regulations cannot truly guarantee persons with disabilities the right to equal access to courts and tribunals in terms of environmental accessibility. These issues also affect the right to equality of arms as persons with disabilities are at the disadvantage in comparison to other parties. Therefore, the current legal mechanisms and regulations on environmental accessibility are not in line with international human rights law standard guaranteeing the right to access to civil justice for persons with disabilities.

B. Right to equality of arms

Various factors can affect equality of arms of persons with disabilities, including the availability of legal assistance and communication assistance in the legal process, the treatment of courts and tribunals, and the accessibility of courthouses and courtrooms. This subsection will focus only on equal opportunity to present and defend the case and information accessibility.

At the regional level, the ECtHR interprets article 6 (right to a fair trial) of the ECHR to include the right to equality of arms, by confirming that ‘everyone who is a party to ... proceedings shall have a reasonable opportunity of presenting his case to the Court under conditions which do not place him at substantial disadvantage vis-à-vis his opponent’, including in civil matters.¹⁷³ Regarding the right to information, the EU Directive only guarantees this right in criminal proceedings.¹⁷⁴

<accessconsultancy.ie/WillrecentchangesinIrishlegislationensureaccessibleandusablesignageis providedinbuildingsforallpeopleandnotjustpeoplewithdisabilities> accessed 10 March 2018.

¹⁷³ Christos Rozakis, ‘The Right to a Fair Trial in Civil Cases’ (2004) 4(2) Judicial Studies Institute Journal 96, 101, citing *Kaufman v Belgium* (1986) 50 DR 98, 115.

¹⁷⁴ Council Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.

At the national level of Ireland, the DA 2005 is the main legislation concerning information accessibility of persons with disabilities. It sets requirements for information accessibility that contents of any communication of a public body shall be accessible to the person concerned, whether the communication is to one or more persons. The Act specifies that a person who 'has a hearing impairment' can request accessible format of contents communicated to him/her orally.¹⁷⁵ A person with 'a visual impairment' can also request the same of contents communicated to him/her in writing, including in the compatible formats for his/her adaptive technology when electronically communicating.¹⁷⁶ The published information relating to persons with intellectual disabilities shall be clear and easy to understand by persons with intellectual disability.¹⁷⁷ However, all these provisions are based on the "practicability principle".¹⁷⁸ Additionally, the reasonable accommodation for persons with disabilities under the ESA 2000 also applies here.¹⁷⁹ The National Disability Authority (NDA) further publishes the *Code of Practice on Accessibility of Public Services and Information provided by Public Bodies*, which was prepared through 'a National Consultation Process' to be used as guidance and examples for public bodies to meet their obligations under the DA 2005.¹⁸⁰

It appears from interview data that many groups of persons with disabilities faced different barriers in accessing information. It was pointed out that '[Lacking] information about justice system, [persons with disabilities] are starting off so much more disadvantaged than the average person.'¹⁸¹ A respondent suggested that most Deaf persons had very little access to information because most sign-language users needed information in sign-language, and very little information was available in this format.¹⁸²

¹⁷⁵ DA 2005, s 28.

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*

¹⁷⁸ *ibid.*

¹⁷⁹ ESA 2000, s 4.

¹⁸⁰ Disability Act 2005 (Code of Practice) (Declaration) Order 2006, SI 2006/163; The consultation process was carried out in compliance with the DA 2005, s 30(2), but the NDA did not mention what were other persons or bodies the NDA considered appropriate in addition to all government departments.

¹⁸¹ Interview-IDH (n 154).

¹⁸² *ibid.*

While other people, including persons with intellectual disabilities, can have some knowledge of courts and the court system through news and television programmes,¹⁸³ these were not available in accessible format for Deaf persons.¹⁸⁴ A respondent from the perspective of persons with intellectual disabilities expressed the impression that persons with intellectual disabilities would be able to ask for help from various organisations, such as the Citizens Information Centre and the Centre for Disability Law and Policy at the National University of Ireland Galway, when they needed some information.¹⁸⁵ The information would be accessible for them if there was somebody to assist their process of understanding. For the situation where persons with intellectual disabilities had to go to court but never did so, they would want a solicitor who would be 'very patient' to explain, or may have to explain it to them repeatedly.¹⁸⁶

Most of the court proceedings and documentation operate on a paper basis, including court orders, hearing transcriptions, judgements and documentary evidence.¹⁸⁷ A respondent indicated that when a visually impaired person requested an accessible format of document, it was firstly sent out in a PDF format, which was not accessible to most screen reader users with visual impairment. Therefore, the person needed to re-request an accessible format, such as in HTML or Microsoft Word formats.¹⁸⁸ Respondents who are court staff members explained that, if the documents were in PDF format, the Courts Service would reproduce them into an accessible format without extra fees, but most documentation in High Court was already in Microsoft Word format.¹⁸⁹

Some respondents gave examples of situations where a right to equality of arms was breached during a hearing session in court proceedings. One respondent explained that, in one case, an opposing lawyer took an advantage of a blind witness by asking such witness to confirm the contents of documentary evidence which the witness could not

¹⁸³ Interview with Respondent IDI, a representative of a disabled people's organisation of persons with intellectual disabilities (Dublin, Ireland, 3 November 2016) (Interview-IDI).

¹⁸⁴ Interview-IDH (n 154).

¹⁸⁵ Interview-IDI (n 183).

¹⁸⁶ *ibid.*

¹⁸⁷ Interview-IF (n 150).

¹⁸⁸ Interview-IDV (n 113).

¹⁸⁹ Interview-IF (n 150).

access during the court examination.¹⁹⁰ The witness found out after having an opportunity to review the document at home that the opponent lawyer intentionally omitted some wording, and used other words to mislead its meaning. Therefore, at the following hearing, the witness informed the judge, requested to revisit that issue again, and requested that all further documents referred to by the opposing lawyer must be available in an accessible format for the witness to review during the court proceedings.¹⁹¹ Another respondent revealed one case where a person perceived to have psychosocial disability, being subject to a court hearing, challenged the lawfulness of detention in a psychiatric hospital in 2008. That person thought she would have had an opportunity to speak in court as she thought she was capable of giving evidence.¹⁹² She found that the court proceeding ended quickly and she had never been asked any question nor had any opportunity to give evidence. Eventually, she was told by her lawyer that ‘the patient never gives evidence in these cases.’¹⁹³

In some cases, persons with disabilities may have an opportunity to give evidence, but the courtroom conditions, especially the witness box and microphone system were inaccessible, which causes inequality of arms. Many people, including lawyers with less disability awareness, may not realise that these conditions could be disadvantageous to persons with disabilities.¹⁹⁴

The research findings show that the right to equality of arms of persons with disabilities is protected in both regional and domestic legislation. However, according to the fact that equality of arms can be affected by various elements, current legal mechanisms and regulations cannot ensure the protection of equality of arms in practice. Moreover, legislative provisions, such as the DA 2005, still have some limitations which cannot fully

¹⁹⁰ In normal situation, a witness without visual impairment has an opportunity to see the document during the court proceedings before confirming its accuracy.

¹⁹¹ Interview-IDV (n 113).

¹⁹² Interview with Respondent IDS, a representative of a disabled people’s organisation of persons with psychosocial disabilities (Galway, Ireland, 11 January 2017) (Interview-IDS).

¹⁹³ *ibid.*

¹⁹⁴ Interview-IDP (n 153).

ensure accessibility of information of all persons with disabilities according to the UNCRPD.

C. Right to equal treatment by courts and tribunals

This right covers the treatment of judges or tribunal members and all other bodies administering justice. At the regional level, there is no specific provision on the right to equal treatment by courts and tribunals but the ECHR and the Charter of Fundamental Rights of the European Union (CFREU) provide the protection against discrimination on any ground, including disability and other status.¹⁹⁵

By interpreting the non-discrimination provision together with the fair hearing guarantees,¹⁹⁶ it could be considered that the right to equal treatment by courts and tribunals is also protected at the regional level as it is impossible for courts and tribunals to fulfil their duty on a fair hearing without equal treatment.

At the national level, the Irish Constitution does not specifically use the term “equal treatment”, but it allows the State to further enact laws in recognition of differences due to capacity, physical and moral, and of social function.¹⁹⁷ This aligns with the principle of equal treatment, which focuses on the equal and just outcome of individual treatment.¹⁹⁸ The Constitution imposes on everyone appointed as a judge an obligation to make and subscribe a declaration promising that he/she will perform the duty ‘without fear or favour, affection or ill-will towards any man’.¹⁹⁹ This declaration respects the principle of independence and impartiality of judges, which will be further discussed in the

¹⁹⁵ ECHR, art 14; Charter of Fundamental Rights of the European Union (CFREU), art 21; The ECHR uses the term ‘other status’, which seems to include the ground of disability, while the CFREU specifically mentions the ground of disability.

¹⁹⁶ ECHR, art 6; CFREU, art 47.

¹⁹⁷ Constitution, art 40.1.

¹⁹⁸ Sangeeta Shah, ‘Detention and Trial’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, OUP 2014) 259.

¹⁹⁹ Constitution, art 34.6.

subsection of the notions of competence, independence and impartiality of courts and tribunals.²⁰⁰

The ESA 2000 imposes non-discrimination obligations on service providers, even if only a portion of the public can avail of the specific service.²⁰¹ This applies to courts and tribunals in the provision of their services. The Act emphasises the necessity of different treatment for persons with disabilities who need support to access the service, through the provision of special treatment or facilities.²⁰² A refusal or failure to provide these may constitute discrimination on the ground of disability, unless it would exceed a nominal cost as discussed above.²⁰³ The DA 2005 imposes an obligation on all public bodies to ensure that their service is accessible by everybody and that assistance to access services is available for persons with disabilities, if requested, on the basis of “practicability and appropriateness”.²⁰⁴ The aforementioned *Code of Practice* prepared by the NDA also applies here.²⁰⁵ The Act clearly states that ‘any service provided by a court or other tribunal’ is a service of a public body.²⁰⁶ Accordingly, the Courts Service, as a public body and a service provider, has responsibility under both the ESA 2000 and the DA 2005 to treat persons with disabilities equally in its service provision.

Respondents who are judges identified that there was a benchbook entitled ‘Equal Treatment of Persons in Court’, which outlines to judges the importance of respect for diversity, but it is not available to the public.²⁰⁷ Similarly, respondents who are court staff members specified that they carried out their duties in the Courts Service with recognition of the equality legislation where discrimination against disability was not permitted.²⁰⁸

²⁰⁰ ‘Impartiality’ (*Association of Judges of Ireland (AJI)*) <aji.ie/the-judiciary/the-judicial-role/impartiality/> accessed 24 November 2017.

²⁰¹ ESA 2000, s 5(1).

²⁰² *ibid* s 4(1).

²⁰³ *ibid* s 4(2).

²⁰⁴ DA 2005, s 26(1).

²⁰⁵ See text to n 176.

²⁰⁶ *ibid* s 2(1).

²⁰⁷ Interview with Respondents IJ, a group of four judges of the first instance courts (Dublin, Ireland, 8 February 2017) (Interview-IJ).

²⁰⁸ Interview-IF (n 150).

Many respondents commented that judges generally were very accommodating to persons with disabilities when specific needs were raised.²⁰⁹ Examples given included where judges remind a legal team to stop treating persons with disabilities improperly or aggressively.²¹⁰ A respondent who is a court staff member expressed that 'I have never seen that scenario where the judge got annoyed or frustrated' when an accommodation was requested by persons with disabilities.²¹¹ However, some respondents commented that they perceived that some judges might feel slightly 'annoyed' or 'unhappy'²¹² for instance, when a case had to be postponed due to the lack of a sign-language interpreter, or inaccessibility of the assigned courtroom; or when a case had to be moved to another accessible courtroom.²¹³ There was also a comment that some judges might be sometimes 'a bit patronising'.²¹⁴ One respondent recounted an incident where a judge took a paternalistic 'best interest' approach toward a person with psychosocial disability.²¹⁵ There was no comment from any respondent on treatment of persons with disabilities by tribunal members.

Although there is no specific legislation concerning equal treatment for judges or tribunal members, the constitutional provision concerning impartiality of judges and non-discrimination legislation arguably guarantees the equal treatment aspect. The principle of impartiality may not be achieved if the principle of equal treatment is not applied. Accordingly, the current legal mechanisms and regulations in Ireland are generally adequate to guarantee the right to equal treatment by courts and tribunals and effective enough to comply with international human rights law standards, except for the practice based on the 'best interest' of persons with disabilities. Although this practice is allowed

²⁰⁹ *ibid*; Interview-IL1 (n 124); Interview-IL2 (n 124); Interview-IDV (n 113).

²¹⁰ Interview-IF (n 150); Interview-IDV (n 113).

²¹¹ Interview-IF (n 150).

²¹² Interview-IDH (n 154); Interview-IDP (n 153); Interview-IDV (n 113).

²¹³ Interview-IDH (n 154); Interview-IDP (n 153).

²¹⁴ Interview-IDP (n 153).

²¹⁵ Interview-IDS (n 192).

by the MHA 2001,²¹⁶ this Act conflicts with the UNCRPD principle respecting will and preferences of persons with disabilities.²¹⁷

D. Right to equality before the law

The right to equality before the law is clearly articulated by the Constitution for all citizens,²¹⁸ as well as by the CFREU.²¹⁹ Although as previously mentioned the Constitution allows different treatment due to certain differences, the principle of equality before the law still requires the State to apply the rule of law to all citizens equally.²²⁰ This gives all persons an entitlement to the protection of their rights through the judiciary.²²¹ It means that persons with disabilities are also guaranteed the right to equality before courts and tribunals.

DX v Judge Buttimer is an example of how the Irish court applies the principle of equality before the law in the Constitution to the context of access to justice for persons with disabilities.²²² In this case, the High Court views that ‘practical and feasible’ ‘reasonable accommodation’ for litigants with disabilities must be provided to fulfil the constitutional guarantee on equality before the law, where the State must ensure that disability is not a cause of inferiority in litigation, in comparison to opponents without disability.²²³ A

²¹⁶ MHA 2001, ss 4(1), 21(2) and 58(3).

²¹⁷ CteeRPD ‘General comment No 1’ (19 May 2014) UN Doc CRPD/C/GC/1.

²¹⁸ Constitution, art 40.1.

²¹⁹ CFREU, art 20.

²²⁰ Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press, 2008).

²²¹ S.M. Huang-Thio, ‘Legal Aid – A Facet of Equality Before the Law’ (1963) 12 *International and Comparative Law Quarterly* 1133; Yash Ghai and Jill Cottrell, ‘The rule of law and access to justice’ in Yash Ghai and Jill Cottrell (eds), *Marginalized Communities and Access to Justice* (Routledge 2010); Rhona Smith, *Textbook on International Human Rights* (5th edn, OUP 2012).

²²² Gerard Hogan and others, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) 1590 citing *DX v Judge Buttimer* [2012] IEHC 175; The High Court rules, in this case, that a judge’s failure to permit a litigant with a speech impediment to be assisted in court proceedings by a friend who is familiar with his manner of speaking infringes Article 40.1 of the Constitution.

²²³ *ibid* 1590.

similar example is also found in *G v District Judge Murphy*.²²⁴ This case also concerns discrimination on the ground of disability and violation of the equality principle protected by the Irish Constitution.

As repeatedly mentioned, restriction or denial of legal capacity is a significant issue that conflicts with the principle of equality before the law. Although the Constitution and the EU Charter of Fundamental Rights guarantee the right to equality before the law, the current wardship system in Ireland, as mentioned in the access to legal proceedings subsection, does not acknowledge the legal capacity of everyone equally. Even though the ADMA 2015 will abolish the wardship system, some legal provisions that deny legal capacity of persons with cognitive or psychosocial disabilities still exist. These include the provisions concerning capacity to marry, make a will or detain a person on a ground of 'mental disorder'.²²⁵ However, in terms of access to civil justice, the lack of legal capacity in these areas may not directly affect the individual's ability to instruct lawyers or proceed with the court proceedings, so long as that person is not under wardship and the lawyer perceives that he/she is able to give legal instruction as previously mentioned.²²⁶ However, this may still indirectly prevent that person to have legal standing to seek justice in relation to these issues.

Additionally, EU Directive 2000/78/EC establishes a general framework for equal treatment in employment and occupation, by imposing a provision of reasonable accommodation for persons with disabilities.²²⁷ It expands the meaning of the right to equality before the law by including a requirement for reasonable accommodation. It defines the concept of reasonable accommodation to apply in EU law. These accommodations include, but are not limited to, 'effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources'.²²⁸ This Directive is not applicable outside of employment; therefore, it is not

²²⁴ *ibid* 1590 citing *G v District Judge Murphy* [2011] IEHC 445, [2011] 3 IR 748.

²²⁵ ADMA 2015, ss 107-108, 138, 140 and 143; Succession Act 1965, s77(1)(b).

²²⁶ Interview-IL1 (n 124); Interview-IL2 (n 124).

²²⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16, art 5.

²²⁸ *ibid* preamble (20).

relevant to all issues pertaining to accessing civil justice of persons with disabilities in Ireland. However, it must be applied in relation to the employment of persons with disabilities in the justice system. Where there has been some case law of the Court of Justice of the European Union concerning the disability context, the majority of the case law has focused on the definition of persons with disabilities and the definition of discrimination on the basis of disability.²²⁹ None of these cases are specifically relevant to accessing justice; therefore, the research will not further discuss these cases.

In summary, Ireland has attempted to guarantee every aspect of the right to equality before courts and tribunals in its legal mechanisms and regulations. However, it appears from the research findings that, in practice, there are still a lot of unsettled issues in this area, which require State action. One of the most significant issues here concerns the failure to recognise the legal capacity of persons with disabilities on an equal basis with others. Only the aspect of the right to equal treatment by courts and tribunals seems currently compatible with international and regional human rights standards but this still needs more supportive mechanisms to ensure its effective implementation.

6.3.2 Right to legal assistance or representation

At the regional level, the CFREU guarantees the right to legal aid, in all cases concerning rights guaranteed by EU law,²³⁰ for people 'who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'.²³¹ The ECHR does not specifically mention this right in its text; however, its case-law considers that legal aid is

²²⁹ For example, *Chacon Navas v Euresit Colectividades SA* (C-13/05) [2006] ECR I-6467; *S Coleman v Attridge Law and Steve Law* (C-303/06) [2008] ECR I-5603; and *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab* (C-335/11) and *HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S* (C-337/11) (jointed case) [2013] 11 April 2013.

²³⁰ Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

²³¹ CFREU, art 47(3).

required for the provision of a fair hearing.²³² According to the ECtHR, legal aid can be in a wide range of forms, such as ‘free representation or assistance by a lawyer and/or dispensation from paying the costs of proceedings, including court fees’.²³³ However, the provision of legal aid is not compulsory under the ECHR; it depends on circumstances of each case.²³⁴ The absence of legal aid may cause a violation of the right to a fair hearing if the assistance is indispensable, for example, due to complexity of the legal proceedings.²³⁵

Airey v Ireland is a landmark case where the ECtHR emphasises that access to justice must be ‘practical and effective’ and not ‘theoretical and illusory’.²³⁶ It held that Ireland violated the right to access to the courts under Art 6(1) of the ECHR by not providing legal aid for the plaintiff who sought a judicial separation.²³⁷ This was justified by the plaintiff’s necessity to have legal assistance in pursuing her case due to the legal complexity of the case, the need to adduce expert evidence and potential cross-examination, as well as ‘an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court.’²³⁸ However, the European Court held that it is not an absolute requirement for the State to provide everyone with civil legal aid, where alternative solutions that effectively facilitate the right to access to the courts are justified.²³⁹

In the Irish legal context, state-funded legal assistance or representation is available for both civil and criminal matters, but both schemes operate separately.²⁴⁰ According to the

²³² Rozakis (n 173); European Union Agency for Fundamental Rights and Council of Europe (FRA and CoE), *Handbook on European law relating to access to justice* (Publications office of the European Union 2016).

²³³ FRA and CoE (n 232) 58.

²³⁴ *ibid.*

²³⁵ *ibid.*

²³⁶ *Airey v Ireland* (1979) ECHR 3, para 24.

²³⁷ *ibid.*

²³⁸ *ibid* para 24.

²³⁹ Byrne and McCutcheon (n 29).

²⁴⁰ Civil Legal Aid Act 1995 (CLAA 1995); Criminal Justice (Legal Aid) Act 1962.

research scope, this research will focus only on the civil aspect of legal assistance or representation.

Since the success of the case *Airey v Ireland* in 1979, Ireland introduced a state-funded civil legal aid scheme, which later became a statutory right in the Civil Legal Aid Act 1995.²⁴¹ This Act is the main legislation for general state-funded civil legal assistance or representation. It established the Legal Aid Board to provide legal aid and advice for persons of insufficient means in civil cases.²⁴² The Act uses the term “legal advice” to mean oral or written advice and the term “legal aid” to mean representation; these services are provided by a solicitor of the Board or by a solicitor or barrister engaged by the Board.²⁴³ The services are not free; the applicant must pay ‘contributions’, which are determined by the amount of his/her income and assets, but the Board can partially or fully waive them at its discretion.²⁴⁴ If the case is successful, the Board is entitled to reimburse its actual costs incurred from the provision of the services.²⁴⁵

The legal advice service of the Board is available for most civil legal matters, while the legal aid service is more restricted. The legal aid excludes, for example, civil cases concerning defamation, licensing, conveyancing, rights and interests in or over land, civil cases within the jurisdiction of the District Court (Small Claims Procedure) Rules 1993, and class action cases.²⁴⁶ Additionally, it also excludes most tribunal proceedings except

²⁴¹ Free Legal Advice Centres (FLAC), *Civil Legal Aid in Ireland: Forty Years On* (FLAC 2009); Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, Institute of Public Administration 2015).

²⁴² CLAA 1995, s 5.

²⁴³ CLAA 1995, ss 25 and 27.

²⁴⁴ *ibid* s 29; Civil Legal Aid Regulations 1996, SI 1996/273.

²⁴⁵ CLAA 1995, ss 33-34.

²⁴⁶ *ibid* s 28(9).

for those of the International Protection Appeals Tribunal (asylum).²⁴⁷ However, legal advice is still available for tribunal proceedings.²⁴⁸

Although the legal aid service of the Legal Aid Board does not cover legal proceedings of most tribunals, other bodies may have civil legal aid schemes for certain tribunal proceedings. Those bodies include the Mental Health Commission, the Irish Human Rights and Equality Commission (IHREC), the Bar of Ireland, and the Free Legal Advice Centres (FLAC).

To obtain legal aid or advice for eligible cases from the Legal Aid Board, an applicant must pass three criteria: 1) general principle, 2) 'means' test, and 3) 'merits' test.²⁴⁹ The general principle checks the reasonableness of the request for such a service. The case must be one that a 'reasonable person' would normally pursue if he/she had to pay the costs by himself/herself; and where a reasonable solicitor/barrister would likely advise that person to pursue that case.²⁵⁰ The means test refers to financial eligibility of the applicant, which is assessed through the amount of his/her income and assets.²⁵¹ If the applicant passes the means test, the amount of his/her income and assets also determines the amount of 'contributions' he/she has to pay for the service.²⁵² The merits test refers to reasonable grounds for the case as a matter of law for pursuing the proceedings, the tendency to be successful, cost effective and the most satisfactory means used for the case.²⁵³ However, the criteria for legal aid and advice under the ADMA 2015 are slightly different. A party to an application concerning declarations as to

²⁴⁷ *ibid* s 27(2)(b); Civil Legal Aid (International Protection Appeals Tribunal) Order 2017, SI 2017/81.

²⁴⁸ Law Society Legal Aid Taskforce, 'Civil Legal Aid in Ireland: Information for the Profession' (Law Society of Ireland 2008) <www.lawlibrary.ie/media/lawlibrary/media/civil-legal-aid-booklet.pdf> accessed 13 September 2018.

²⁴⁹ *ibid*.

²⁵⁰ CLAA 1995, s 24.

²⁵¹ *ibid* s 29.

²⁵² *ibid* s 29.

²⁵³ *ibid* s 28(2); When the case concerns the welfare of a child, Section 28(3) waives the aspects of the cost effective and the likelihood to be successful.

capacity of a person, is eligible for legal advice.²⁵⁴ The criteria on financial eligibility, the likelihood of a successful outcome and the criteria of cost effectiveness do not apply for obtaining legal aid services under the 2015 Act.²⁵⁵

The Mental Health Commission has a duty to provide free legal representation for a person who is involuntarily detained in an 'approved centre', which is a hospital or other in-patient facility for the care and treatment concerning mental illness or disorder.²⁵⁶ The assigned legal representative represents such a person both in the proceedings of the Mental Health Tribunal (where the admission order is reviewed), and in court proceedings (if the decision of the Tribunal is appealed).²⁵⁷

The IHREC can provide legal aid and advice, but this is limited to cases relating to the protection of human rights where the legal assistance could not be obtained under the Civil Legal Aid Act 1995 or by any other means.²⁵⁸

The Bar of Ireland, a professional body of barristers in Ireland, provides free legal aid through its 'Voluntary Assistance Scheme' (VAS) on a pro bono basis since 2004.²⁵⁹ The request for legal aid must come from an organisation, such as a charitable or non-governmental organisation or a civic society group. The request can be for a dispute involving the organisation itself or one of its clients. However, barristers cannot engage clients directly in contentious matters,²⁶⁰ but must do so through solicitors.²⁶¹ Moreover, this scheme covers only specific areas of law, outside the state-funded legal aid

²⁵⁴ CLAA 1995, s 26(3)(c) (as amended).

²⁵⁵ *ibid* s 28(3A) (as amended).

²⁵⁶ MHA 2015, s 17(1)(b).

²⁵⁷ *ibid* ss 18-19.

²⁵⁸ Irish Human Rights and Equality Commission Act 2014, s 40.

²⁵⁹ 'Voluntary Assistance Scheme' (*Bar of Ireland*) <www.lawlibrary.ie/Legal-Services/Voluntary-Assistance-Scheme.aspx> accessed 23 October 2017.

²⁶⁰ According to section 99 of the Legal Services Regulation Act 2015, contentious matter is a matter of dispute between two or more parties to the proceedings before court, tribunal or other competent body.

²⁶¹ Legal Services Regulation Act 2015, s 101; Code of Conduct for the Bar of Ireland 2016, r 3.6.

schemes. These areas include issues concerning debts, housing, landlord and tenant law, prison-related queries, social welfare appeals, employment law and equality law.²⁶²

Apart from those statutory bodies, FLAC is a non-governmental organisation, assisting people who seek state-funded legal aid to apply for the most eligible system regarding their dispute.²⁶³ It also provides initial free legal advice by solicitors, but does not aim to replace the state-funded services.²⁶⁴ Although FLAC does not provide legal representation for individuals, it runs a project called “PILA” (Public Interest Law Alliance) to support strategic and public interest litigation since 2009 through its ‘Pro Bono Referral Scheme’.²⁶⁵ There is evidence that, instead of securing legal representation through state-funded legal aid, some persons with disabilities secured their legal representation from the assistance of FLAC or PILA.²⁶⁶

Although the government makes legal aid services available, delays in operating the service are problematic. In *O’Donoghue v The Legal Aid Board, Minister for Justice & Equality and the Attorney General*, the High Court found that the delay in providing such a service constitutes a violation of constitutional rights.²⁶⁷ The court stresses that ‘[i]t is not enough to set up a scheme for the provision of legal aid to necessitous persons and then to render it effectively meaningless for a long period of time’.²⁶⁸ The FLAC Report on *Accessing Justice in Hard Times* further points out that, due to the economic crisis

²⁶² ‘How VAS Provides Assistance’ (*Bar of Ireland*) <www.lawlibrary.ie/legal-services/voluntary-assistance-scheme/how-vas-provides-assistance.aspx> accessed 23 October 2017.

²⁶³ ‘FLACsheet: Civil Legal Aid in Ireland’ (FLAC, August 2015) <www.flac.ie/download/pdf/civil_legal_aid_guide_final.pdf> accessed 22 September 2017.

²⁶⁴ *ibid.*

²⁶⁵ ‘Get help’ (*Public Interest Law Alliance*) <www.pila.ie/help/> accessed 5 October 2017.

²⁶⁶ FLAC, *FLAC Annual Report 2009* (FLAC 2010) citing *Joan Clarke v Galway County Registrar*, The High Court, Record No 1338JR/2006 and *William Hennessey v Network Catering* (2009) The Equality Tribunal Decision No DEC-S2009-029 (ES/2001/439); FLAC, *FLAC Annual Report 2017* (FLAC 2018); ‘High Court vindicates right to a secret ballot in elections for people with visual impairment’ (*Public Interest Law Alliance*, 30 March 2017) <www.pila.ie/news-events/2017/03/30/high-court-vindicates-right-to-a-secret-ballot-in/> accessed 16 January 2019.

²⁶⁷ FLAC, *Accessing Justice in Hard Times* (FLAC 2016).

²⁶⁸ *ibid* citing *O’Donoghue v Legal Aid Board, Minister for Justice Equality and Law Reform, Ireland and the Attorney General* [2004] IEHC 413, [2006] 4 IR 204.

across Europe, the Irish Government cut the budgets of many public services, including that of the Legal Aid Board, since 2008.²⁶⁹ As a result, waiting lists and waiting times for the legal aid and advice services constantly increased between 2007 and 2013.²⁷⁰ The Report also shows that since the recession, there is greater need and demand for legal services in the areas of debt, housing, social welfare and employment, but most of these issues are excluded from the remit of the civil legal aid scheme of the Legal Aid Board.²⁷¹

People who cannot secure a legal representation may bring along another person to the proceedings, subject to the court approval. This companion, known as a 'McKenzie Friend', may provide moral support for the litigant in court proceedings, take notes, or quietly give advice.²⁷² However, the McKenzie Friend cannot represent or advocate for the litigant, and cannot interact with the court on behalf of the litigant.²⁷³ Moreover, the court still has the power to refuse such assistance if it conflicts with the interest of justice and fairness or impedes the administration of justice.²⁷⁴

Regarding court fees in civil cases, court fees are only exempted in family law case.²⁷⁵ The Supreme Court held in one case that 'reasonable charges for court services were not in breach of the right of access to courts under Article 40.3 of the Constitution'.²⁷⁶ However, this may still discourage some persons with financial difficulty from pursuing a

²⁶⁹ *ibid.*

²⁷⁰ *ibid.*

²⁷¹ *ibid.*

²⁷² PD CC19; PD HC72.

²⁷³ *ibid.*

²⁷⁴ *ibid.*

²⁷⁵ 'The most common court fees' (*Courts Service*, 12 December 2017)

courts.ie/Courts.ie/Library3.nsf/PageCurrent/E599306E44C5443880257FB2003837B6?opendocument&l=en accessed 3 April 2018.

²⁷⁶ *Byrne and McCutcheon* (n 29) 440, citing *Murphy v Minister for Justice* [2001] IESC 29, [2001] 2 ILRM 144.

lawsuit, especially those who cannot obtain civil legal aid,²⁷⁷ as there is evidence that a minimum contribution to civil legal aid was still unaffordable for some persons.²⁷⁸

According to interview data for this research, most respondents representing the perspective of persons with disabilities, except a respondent representing persons with intellectual disabilities, did not have a specific lawyer or law firm whom they could contact if they were subject to legal proceedings.²⁷⁹ Respondents who are lawyers explained that there was no specific training on disability awareness for lawyers, but some legal professional organisations would occasionally arrange additional trainings, such as for ‘continuing professional development training’, on specific legal topics concerning persons with disabilities.²⁸⁰ Some lawyers who were interested in human rights law might obtain some knowledge around disability from working with clients with disability or from talking to other professionals.²⁸¹ It did appear that some lawyers, including those who had client with disabilities did not have adequate awareness around disability issues. It was commented that a lawyer in one case did not realise that sign-language has different structures from spoken language and it could not be interpreted word for word;²⁸² and that some lawyers who represented a visually impaired person still had some prejudices against persons with disabilities.²⁸³

The interview data shows that the quality of lawyers,²⁸⁴ in terms of their professional ethics and legal knowledge, was not a matter of concern to any respondent for this research. However, the quality of their legal advice was a different issue.²⁸⁵ A respondent representing the perspective of persons with psychosocial disability revealed that, in one case, a person with psychosocial disability had no doubt about legal knowledge and

²⁷⁷ *ibid.*

²⁷⁸ Fiona Gartland, ‘Free legal aid court fee of €130 too expensive for some’ *The Irish Times* (Dublin, 22 July 2014).

²⁷⁹ Interview-IDH (n 154); Interview-IDV (n 113); Interview-IDS (n 192); Interview-IDI (n 183).

²⁸⁰ Interview-IL1 (n 124).

²⁸¹ Interview-IL1 (n 124); Interview-IL2 (n 124).

²⁸² Interview-IDH (n 154).

²⁸³ Interview-IDV (n 113).

²⁸⁴ These include lawyers from any legal aid scheme.

²⁸⁵ Interview-IL2 (n 124).

expertise of a solicitor appointed to her under the MHA 2001, but she repeatedly experienced that her solicitor didn't know the practical consequences for her of challenging the detention.²⁸⁶

One respondent from persons with disabilities perspective viewed that, to be able to address legal issues, be equal with an opponent and be successful in a case submitted to a tribunal, having legal representation remained indispensable.²⁸⁷ This was especially so in cases against public bodies because the public body opponents always had a legal team representing them.²⁸⁸ The respondent further expressed that these cases often had no legal aid nor provision for legal cost awarded in the favour of the successful party; and it was 'so difficult to get legal aid in Ireland generally.'²⁸⁹ While most persons with disabilities had financial difficulties, they had to pay for the legal representation themselves.²⁹⁰ One respondent who is a lawyer expressed that:

the reality is legal action is perpetually expensive, it is risky and everybody takes a risk when you commence legal proceedings. And it's just making it more available to a person with a disability. ... [W]e have to be creative and imaginative in terms of ensuring that people are not put off taking actions because of their disability, but rather they don't take action because they don't have a good case on the same basis as the rest of us wouldn't take action.²⁹¹

Although there are some options for legal assistance and representation in civil cases available in Ireland, there is evidence that the state-funded legal aid system is not sufficiently accessible for persons with disabilities due to many limitations described. Moreover, the absence of the civil legal aid for tribunal cases cannot be justified in light of the European Court's decision, because legal representation is still essential in these

²⁸⁶ Interview-IDS (n 192).

²⁸⁷ Interview-IDP (n 153); This issue is also addressed in FLAC, *Accessing Justice in Hard Times* (n 267).

²⁸⁸ Interview-IDP (n 153); Interview-IDV (n 113).

²⁸⁹ Interview-IDP (n 153).

²⁹⁰ *ibid.*

²⁹¹ Interview-IL1 (n 124).

cases as suggested.²⁹² Accordingly, the existing legal mechanisms and regulations cannot guarantee persons with disabilities a right to legal assistance or representation and cannot fulfil the requirement of international and regional human rights law standards.

6.3.3 Right to communication assistance

The right to communication assistance in Ireland derives from both regional and national legislation concerning interpretation and advocacy services. Regarding interpreting assistance, at the regional level, the ECHR has established the right to free assistance of an interpreter in criminal cases as a part of the right to a fair trial.²⁹³ The interpreter in this regard is the spoken language interpreter. There is no clear evidence that this provision includes a sign-language interpreter. Within the European Union system, the EU Directive 2010/64/EU confirms that ‘the right to interpretation’ includes other languages used by persons with hearing or speech impediments,²⁹⁴ for example a sign-language.²⁹⁵ The later EU Directive 2012/26/EU focuses more on victims who have difficulties not only in communicating but also in ‘understanding’ due to a disability.²⁹⁶ These provisions do not apply to civil cases. However, as the right to a fair trial and the fairness principle apply to both civil and criminal cases, an interpretation service seems necessary in some civil cases if its absence would affect the protection of these rights.

²⁹² *Airey v Ireland* (n 236).

²⁹³ ECHR, art 6(3)(e).

²⁹⁴ Council Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1, art 2(3).

²⁹⁵ Justicia European Rights Network, ‘Training Manual: Trainer – Implementation of the right to Interpretation and translation services in criminal proceedings’ (Justicia European Rights Network 2013)

<http://eujusticia.net/images/uploads/pdf/ICCL_JUSTICIA_Right_to_Interpreter_Trainer.pdf> accessed 23 September 2018.

²⁹⁶ Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57, preamble (21).

At the national level, currently, the only direct provision on the requirement of an interpreter in legal proceedings is that of the Criminal Justice Act 1984, which requires an interpreter for interviewing an arrested person who is deaf or where his/her hearing ability is in doubt.²⁹⁷ In civil proceedings, there is no direct provision for the right to interpretation. However, it can be considered that sign-language interpretation should be provided as a reasonable accommodation in accordance with the ESA 2000 and the DA 2005 to facilitate equality of Deaf persons.

The ESA 2000 imposes an obligation on all service providers to provide reasonable accommodation for persons with disabilities who face difficulty or are unable to use the service without such an accommodation,²⁹⁸ which includes a provision of sign-language interpreter.²⁹⁹ The refusal or failure to provide this constitutes discrimination on the ground of disability.³⁰⁰ However, there is an exception to not provide such an accommodation if its cost is more than 'nominal',³⁰¹ when considering the business size and budget of the service provider.³⁰²

The DA 2005 also sets some requirements for public bodies³⁰³ to integrate provision of access to the service for both persons with and without disability, and to provide assistance for person with disability if requested.³⁰⁴ Moreover, they shall make the contents of an oral communication with a person who 'has a hearing impairment', or of a written communication with a blind person, in an accessible format if requested.³⁰⁵

²⁹⁷ Criminal Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987, SI 1987/119, art 12(8).

²⁹⁸ ESA 2000, s 4(1).

²⁹⁹ IHREC, 'Your Equal Status Rights Explained' (n 94).

³⁰⁰ ESA 2000, s 4(1).

³⁰¹ *ibid* s 4(2),(3).

³⁰² IHREC, 'Your Equal Status Rights Explained' (n 94).

³⁰³ According to the DA 2005, s 2, "public body" includes Departments of State, the Office of the President, the Office of the Attorney General, the Office of the Comptroller and Auditor General, the Houses of the Oireachtas Service, local authorities, the Executive, persons, bodies or organisations (other than the Defence Forces) established by or under any enactment.

³⁰⁴ DA 2005, s 26(1).

³⁰⁵ *ibid* s 28(1).

Since the Courts Service is established by the Courts Service Act 1998,³⁰⁶ it is within the definition of ‘public body’, and its services are also included within the definition of ‘service’ under the DA 2005.³⁰⁷

The Irish Sign Language Act 2017 (ISLA 2017) was enacted in December 2017 but has not been commenced at the time of writing. However, there is a commitment that it will be fully commenced by December 2020.³⁰⁸ This Act recognises Irish sign-language (ISL) as a native language of its users, and imposes ‘the corresponding duty on all public bodies to provide Irish sign language users with free interpretation when availing of or seeking to access statutory entitlements and services.’³⁰⁹ Therefore, each public body has a duty to ‘do all that is reasonable to ensure’ that a free service of ISL interpretation is provided for an ISL user who cannot hear or understand English or Irish, ‘when that person is seeking to avail of or access statutory entitlements or statutory services’ of that public body.³¹⁰ A ‘remote, web-based service’ is sufficient to fulfil this obligation if the user agrees.³¹¹ The Minister for Justice and Equality may provide regulations concerning the procedure for the ISL services, including a notification period which the user must notify the public body prior to availing of such services.³¹² The Minister for Employment Affairs and Social Protection may provide funds³¹³ to facilitate ISL users in accessing social, educational and cultural events, services (including medical), or other activities, which will be specified in guidelines made by the relevant Minister of the Government.³¹⁴

The Courts Service is a ‘public body’ according to the ISLA 2017 as it is established by an enactment, ie the Courts Service Act 1998.³¹⁵ ISL can be used in any court

³⁰⁶ Courts Service Act 1998, s 4.

³⁰⁷ DA 2005, s 2(1).

³⁰⁸ Irish Sign Language Act 2017 (ISLA 2017), s 11(2).

³⁰⁹ *ibid* s 3(1).

³¹⁰ *ibid* s 6(1)-(2).

³¹¹ *ibid* s 6(4).

³¹² *ibid* ss 1 and 6(3).

³¹³ This provision must be with the consent of the Minister for Public Expenditure and Reform, and will be paid out of moneys provided by the Parliament.

³¹⁴ *ibid* s 9.

³¹⁵ ISLA 2017, s 1; Courts Service Act 1998, s 4.

proceedings and every court has ‘the duty to do all that is reasonable to ensure’ that a ISL user who cannot hear or understand English or Irish has a choice to be heard in ISL.³¹⁶ If appropriate, the court may provide the simultaneous or consecutive interpretation of proceedings into ISL.³¹⁷ The ISL interpretation service provided by a court, the Court Service, or any public body, shall be conducted by an interpreter whose competence is verified and accredited by ‘an accreditation scheme funded by the Minister for Employment Affairs and Social Protection’.³¹⁸

The ISLA 2017 reinforces the obligations of public bodies under the ESA 2000 and the DA 2005, but it does not cover the interpretation other than that of the ISL. Moreover, it seems the Act does not allow the use of ‘appropriateness and practicability’ as a justification for not providing ISL interpretation services.

Advocacy services which provide communication assistance in Irish legal proceedings are available in different formats, including those of ‘Next Friend’, ‘guardian ad litem’ and service of the National Advocacy Service for People with Disabilities (NAS). A Next Friend or a guardian ad litem can be appointed in civil cases when a child³¹⁹ or ‘a person of unsound mind’³²⁰ are involved in the case.³²¹ According to the Court Rules, a Next Friend is a person who initiates a case on behalf of these persons, while the guardian ad litem is appointed by the court to defend the case on their behalf.³²² Therefore, the Next Friend is more likely to be used for civil cases whereas guardian ad litem was originally considered to apply in criminal cases or where the person was a respondent in civil litigation.³²³ In current practice, the term “Next Friend” is more likely to be used for a

³¹⁶ ISLA 2017, s 4.

³¹⁷ *ibid* s 4(3).

³¹⁸ *ibid* s 7.

³¹⁹ A person under the age of 18 years.

³²⁰ The Court Rules do not define this term, but it relates the wardship proceedings and the Lunacy Regulation (Ireland) Act 1871, which may involve persons with intellectual or psychosocial disabilities.

³²¹ Child Care Act 1991, s 26; RDC Ord 43, r 7(1).

³²² RDC Ord 7, r 8; RDC Ord 43, rr 8-9(1).

³²³ Eilionoir Flynn, *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Ashgate 2015).

representative of an adult with disability, whereas “guardian ad litem” refers to a representative of a child regardless of disability.³²⁴ However, both Next Friend and guardian ad litem have very similar roles and the terms are often used interchangeably.³²⁵

In *HSE v DK*, the Court states the ‘twofold’ functions of the guardian ad litem, which are ‘to place the views of the child before the court’ and ‘to give the guardian’s views as what is in the best interests of the child.’³²⁶ Ultimately, the final decision is at the court’s discretion.³²⁷ This interpretation refers to the guardian ad litem in children’s cases, which will not be appropriate to directly apply to cases involving adult with disability. In this regard, my impression is that the guardian ad litem may assist persons with disabilities to communicate their views to the court, but their recommendation to the court should not be based on the ‘best interest’ as this conflicts with the UNCRPD principle in which will and preferences of adults with disabilities must be respected.³²⁸

The advocacy service provided by NAS is limited to persons with disabilities, especially for those who ‘have communication differences’ or ‘have limited informal or natural supports’.³²⁹ NAS is funded by the Citizens Information Board.³³⁰ It does not currently have statutory powers.³³¹ The NAS has experience in providing support for parents with

³²⁴ *ibid.*

³²⁵ *ibid.*

³²⁶ *HSE v DK* [2007] IEHC 488, para 59.

³²⁷ Freda McKittrick, ‘The role of the Guardian ad Litem – to express a view on the child’s best interests or to relay the views of the child?’ (*Legal Aid Board*) <legalaidboard.ie/en/About-The-Board/Press-Publications/Conferences/The-role-of-the-Guardian-at-Litem-to-express-a-view-on-the-child-s-best-interests-or-to-relay-the-views-of-the-child-.pdf> accessed 29 October 2017.

³²⁸ Flynn, *Disabled Justice?* (n 323) 100.

³²⁹ CIB, ‘National Advocacy Service for People with Disabilities (NAS) Annual Report 2016’ (*CIB*, June 2017) 3

<www.citizensinformationboard.ie/downloads/advocacy/NAS_AnnualReport_2016.pdf> accessed 11 September 2018.

³³⁰ ‘NAS’ (*CIB*) <citizensinformationboard.ie/en/services/advocacy/> accessed 21 October 2017.

³³¹ The Citizens Information Act 2007 introduced the Personal Advocacy Service as a statutory organisation, but it has not been established due to insufficient fund allocation. For the meanwhile, NAS carries out some of the Personal Advocacy Service. See Eilionoir Flynn, ‘NAS

disabilities in court cases concerning child care,³³² for persons with disabilities who wish to be discharged from wardship, including accompanying the person to meet the solicitor, exploring the option of legal aid, and liaising with Ward of Court office.³³³ Although the NAS has been recognised as providing good quality services in legal proceedings, it needs a lot of resources in dealing with these cases due to time consuming nature and complexity of the legal proceedings.³³⁴ The use of an advocate to support persons with disabilities in court proceedings is fairly new in Ireland, but it proves significantly beneficial to both persons with disabilities and courts in understanding and communicating with each other.³³⁵

For persons who attain legal aid from the Legal Aid Board and have 'impaired capacity', a solicitor can suggest an appointment of a professional advocate to assist communication concerning the legal proceedings.³³⁶ The Board also covers fees and expenses for this advocacy service, but the advocate must not be a guardian ad litem, nor personally connected to the person.³³⁷ The roles of the advocate are strictly to assist or support the person in understanding and communicating with the solicitor and other persons in relation to the proceedings, and not to act on behalf of the person.³³⁸ There have been many cases referred to the NAS by the Legal Aid Board for this service.³³⁹

in the Spotlight' (*Human Rights in Ireland*, 31 October 2012 <humanrights.ie/mental-health-law-and-disability-law/national-advocacy-service-in-the-spotlight/> accessed 21 October 2017.

³³² CIB, 'NAS Annual Report 2016' (n 329).

³³³ Louise Loughlin, 'NAS – Legal Capacity Conference' (Legal Capacity Conference, 9 April 2016) <www.ucc.ie/law/docs/mentalhealth/conferences/11.30-Louise-Loughlin.pdf> accessed 21 October 2017.

³³⁴ CIB, 'NAS Annual Report 2012' <www.citizensinformationboard.ie/downloads/advocacy/NAS_AnnualReport_2012.pdf> accessed 29 October 2017.

³³⁵ Flynn, *Disabled Justice?* (n 323) 99.

³³⁶ Legal Aid Board, 'Circular on Legal Services: A guide to decision making and best practice' (9th edn, Legal Aid Board 2016) 8-88; At least, the person must have some capacity to instruct the solicitor. A professional assistance is only to facilitate effective communication.

³³⁷ *ibid.*

³³⁸ *ibid.*

³³⁹ CIB, 'NAS Annual Report 2012' (n 334).

In *DX v Judge Buttimer*, the High Court views that the assistance of a friend who is familiar with the litigant with a speech difficulty can be considered a reasonable accommodation for his effective communication in court proceedings. This assistance is also necessary to provide equality before the law for persons with disabilities, guaranteeing by Article 40.1 of the Irish Constitution.³⁴⁰

According to interview data for this research, people involved in civil legal action generally had to arrange their own sign-language interpreter.³⁴¹ In some cases, such as in family law matters,³⁴² the Courts Service may provide and pay for an interpreter due to 'the principles of equal access before the law.'³⁴³ However, the respondent from the perspective of Deaf persons commented that it was quite difficult to get an interpreter in civil law cases and responsibility for paying the cost of the interpreter was still disputed.³⁴⁴

Live transcription service during the court proceedings was another option for Deaf persons and persons with hearing loss. This option was good for those who could read and understand written language, but respondents for this research noted that Irish sign-language (ISL) interpretation should still be a priority because some ISL users might not understand written language very well. Moreover, text translation could not show intonation, such as sarcasm, whereas a sign-language interpreter could reflect that in his/her facial expression.³⁴⁵

Nevertheless, there were some difficulties when using ISL interpretation in a legal setting due to the different structures of spoken and sign-languages. There was a high possibility that different interpreters signed the same legal terms differently; therefore, there was

³⁴⁰ Hogan and others (n 222) 1590 citing *DX v Judge Buttimer* [2012] IEHC 175; 'Submission from the Centre for Disability Law and Policy, NUI Galway on the General Scheme of the Equality/Disability (Miscellaneous Provisions) Bill' (*Centre for Disability Law and Policy*) <[www.nuigalway.ie/media/centrefordisabilitylawandpolicy/files/Final-CDLP-Submission-to-the-Equality-Disability-\(Misc\)Bill.docx](http://www.nuigalway.ie/media/centrefordisabilitylawandpolicy/files/Final-CDLP-Submission-to-the-Equality-Disability-(Misc)Bill.docx)> accessed 1 January 2019.

³⁴¹ Interview-IF (n 150).

³⁴² *ibid.*

³⁴³ Interview-IJ (n 207).

³⁴⁴ Interview-IDH (n 154).

³⁴⁵ *ibid.*

an attempt to have a fixed way of signing.³⁴⁶ The 'Justisigns' project was an example of this development to facilitate the right to interpretation under the EU Directive 2010/64/EU and to ensure consistency of sign-language interpretation, but this project focused more on criminal cases.³⁴⁷ The sign-language interpreters also had a duty to inform the judge of this difficulty and ask for further information to prevent misinterpreting or leading the witness.³⁴⁸ For example, to interpret the word 'hit' in sign-language, it needed more context of hitting, what body part was struck and what was used for hitting, it could not be signed as a stand-alone word.³⁴⁹ Another difficulty derived from the complexity of legal terminology itself. Therefore, apart from acquiring a degree from Centre for Deaf Studies at Trinity College Dublin to be qualified ISL interpreters, some ISL interpreters further obtained a law degree to work more efficiently in a court setting. For those who did not have a law degree, some training courses and workshops are available around legal terminology, but these interpreters may still find it a challenge when interpreting in the court.³⁵⁰ While the number of ISL interpreters was very limited, some specialised interpreters might not be able to be an interpreter for some Deaf persons because of conflicts of interest. For example, the interpreter might be a family member or a close friend of that person, which was quite likely as the Deaf community was very small; or if he/she already acted as an advocate for the Deaf person, he/she could not act as an interpreter for the same person at the same time.³⁵¹

For hearing aid users, respondents from the court services indicated that the induction loop system was installed in all new courtrooms and all redeveloped buildings.³⁵² However, this system can only be used with headsets provided by the court due to some technical errors in the previous version of induction loop system whereby hearing aid

³⁴⁶ *ibid.*

³⁴⁷ 'About' (*Justisigns*) <justisigns.com/JUSTISIGNS_Project/About.html> accessed 15 March 2018.

³⁴⁸ Interview-IDH (n 154).

³⁴⁹ *ibid.*

³⁵⁰ *ibid.*

³⁵¹ *ibid.*

³⁵² Interview-IF (n 150).

users outside the courtroom could also hear the proceedings which affected the confidentiality of private proceedings.³⁵³

A court staff respondent for this research observed that, in a case where a person used unconventional communication methods, such as gestures to communicate, the court accommodated his communication by allowing his family member who knew him very well to be an intermediary.³⁵⁴ However, this situation was very difficult as the court needed to ensure that he was accurately represented.³⁵⁵

A respondent who is a lawyer also expressed that, although communication with a person with profound speech disability would be difficult, his/her own statement on the factual matters of the case was the best evidence in court. If necessary, a person who knew him/her well and could tell what he/she was saying might act in the same manner as an interpreter by taking the oath and informing the court of what he/she was saying.³⁵⁶ However, giving evidence in court would still be a challenge for him/her 'because so much of the evidence [was] given orally', but in her view, the court would be very facilitating of that. She noted that it was important that the lawyer made a preliminary application to bring the court's attention to extraordinary circumstances where a person used unconventional communication methods, such as gesture or specific technology.³⁵⁷

Regarding non-legal advocacy services in court proceedings, respondents to this research noted that an advocate could provide different supports to a person depending on the circumstance of each individual. For example, an advocate might help in simplifying the questions into accessible language.³⁵⁸ A lawyer respondent observed that the National Advocacy Service (NAS) was 'really overwhelmed with the work' and it

³⁵³ *ibid.*

³⁵⁴ In this case, the applicant was deaf and visually impaired, could not communicate directly to the judge, but was not a ward of court. His money was lodged to the court for compensation for damage done to him by the State. He was looking for his money to be paid out of court. The judge ultimately decided to release the money in portions and asked them to come back to court with invoices and bills to be certain that everything had been spent as planned.

³⁵⁵ *ibid.*

³⁵⁶ Interview-IL1 (n 124).

³⁵⁷ *ibid.*

³⁵⁸ Interview-IL2 (n 124).

seemed to exceed its capacity to further provide the service in court settings, which mostly related to child protection and welfare cases. These cases could take a long period of time to conclude and the advocate would be likely needed to attend most meetings and court proceedings.³⁵⁹ Respondents representing blind people and persons with psychosocial disabilities felt that the advocacy service was not available for people in their community.³⁶⁰ Deaf persons might be able to have an advocate from some of their service providers.³⁶¹ A respondent representing persons with physical disabilities commented that personal assistance services which people obtained to enable them to live in the community could provide communication assistance to facilitate access to justice. However, the time spent on the legal proceedings would then be deducted from the amount of time allocated for personal assistance per week, which means that they would get less assistance for their daily living.³⁶² A respondent representing the perspective of persons with intellectual disabilities noted that an advocate could be someone who knows the person very well, but he was still concerned that some advocates may communicate their own opinion based on the best interest of the person, rather than projecting the actual opinion of persons with intellectual disabilities.³⁶³

It appears from interview findings that the existing guarantees on the right to communication assistance in civil cases are very limited and focus is mainly on the aspect of sign-language interpretation. Although the State also provides advocacy services for persons with disabilities, it is primarily for those with intellectual disabilities and seems not sufficient to support every group with disability to access justice. The absence of these guarantees is not in line with UNCRPD obligations and it can also affect the principle of the right to a fair trial under the ECHR.

³⁵⁹ Interview-IL1 (n 124).

³⁶⁰ Interview-IDV (n 113); Interview-IDS (n 192).

³⁶¹ Interview-IDH (n 154).

³⁶² Interview-IDP (n 153).

³⁶³ Interview-IDI (n 183).

6.3.4 Right to be heard or a fair hearing by courts, tribunals or other competent bodies in personal presence within a reasonable time or without delay

The right in this category comprises four aspects: 1) competence, independence and impartiality of courts and tribunals, 2) fairness and publicity, 3) personal presence, and 4) timeliness of the proceedings. Legal mechanisms and regulations concerning each aspect can be described as follows.

A. Notions of competence, Independence and Impartiality of Courts and Tribunals

At the regional level, both ECHR and CFREU require an independent and impartial tribunal established by law to provide a fair hearing.³⁶⁴ Although the notion of competence is not further defined, the tribunal must possess this attribute as it refers to the power to make legally binding decisions.³⁶⁵ All three qualifications are absolute requirements in the view of the UN Human Rights Committee.³⁶⁶ The term “tribunal” used in the ECHR and the CFREU is not limited to the “tribunal system” mentioned in section 6.1.4, but covers broader bodies which administer justice including courts. The ECtHR views that a body with judicial and other functions (but not executive functions) can be considered a tribunal under the ECHR.³⁶⁷ However, the same body may not be considered a tribunal in different cases; the ECtHR still needs to determine the facts of each case individually.³⁶⁸

Competence, independence and impartiality are essential parts of the conduct of judges in Ireland.³⁶⁹ The Irish Constitution imposes on every person appointed as a judge a duty

³⁶⁴ ECHR, art 6(1); CFREU, art 47.

³⁶⁵ Shah (n 198).

³⁶⁶ CtteeCPR ‘General Comment No 32’ (23 August 2007) UN Doc CCPR/C/GC/32 para 18.

³⁶⁷ FRA and CoE (n 232).

³⁶⁸ *ibid.*

³⁶⁹ ‘Judicial Conduct’ (*AJI*) <<https://aji.ie/the-judiciary/the-judicial-role/judicial-conduct/>> accessed 3 January 2018.

to make and subscribe a declaration that he/she will perform his/her duty 'without fear or favour, affection or ill-will towards any man'.³⁷⁰ If any judge declines or neglects to make such declaration, the Constitution deems that he/she has vacated his/her office.³⁷¹ The Constitution also emphasises the duty of independence and impartiality of all judges in the exercise of judicial functions, subject only to the Constitution and the law.³⁷²

Extra protection of judicial independence is also provided through a system concerning remuneration and removal of judges from office. Regarding the remuneration of judges, the Constitution guarantees that it 'shall not be reduced during their continuance in office', with exceptions for only two circumstances.³⁷³ These exceptions are 1) that the reductions relate to 'the imposition of taxes, levies or other charges that are imposed by law on persons generally or persons belonging to a particular class, and 2) that the reductions are 'made by law to the remuneration of persons belonging to classes of persons whose remuneration is paid out of public money and such law states that those reductions are in the public interest, provision may be made by law to make proportionate reductions to the remuneration of judges'.³⁷⁴ The exceptions are limited to only these circumstances to safeguard judicial independence against arbitrary reductions of remuneration of judges.³⁷⁵ Regarding the removal of judges from their office, judges can only be removed from their office due to 'stated misbehaviour or incapacity' upon resolutions passed by both Houses of the Parliament.³⁷⁶ Until now, judges have never been removed from their office and the courts have never interpreted the terms "stated misbehaviour" and "incapacity".³⁷⁷

³⁷⁰ Constitution, art 34.6.1°.

³⁷¹ *ibid* art 34.6.4°.

³⁷² *ibid* art 35.1.

³⁷³ *ibid* art 35.5.

³⁷⁴ *ibid* art 35.5.2-3°.

³⁷⁵ 'Judicial Independence' (*AJI*) <<https://aji.ie/the-judiciary/the-judicial-role/judicial-independence/>> accessed 3 January 2018.

³⁷⁶ Constitution, art 35.4; Courts of Justice Act 1924, s 39; Courts of Justice (District Court) Act 1946, s 20.

³⁷⁷ Byrne and McCutcheon (n 29); 'Removal from Judicial Office' (*AJI*) <<https://aji.ie/the-judiciary/removal-from-judicial-office/>> accessed 3 January 2018.

Regarding impartiality, judges must also appear to the public as such by avoiding any situation (including in their private lives) that may lead to a question of their impartiality.³⁷⁸ For example, this requires treating everyone in each case with respect; not socialising with any lawyer or person involved or closely connected in his/her cases; recusing himself/herself from any case where he/she may have a personal connection; refraining from making a comment;³⁷⁹ not participating in politics in any way; and not offering legal advice.³⁸⁰

According to the Constitution, judges are appointed by the President based on the advice of the Government.³⁸¹ This seems to raise a question of judicial independence, but the Irish judiciary is internationally recognised for its independence.³⁸² The legitimacy of judicial appointment by the Executive is also internationally recognised, for example by the UN Basic Principles of Judicial Independence 1985 and the Mount Scopus International Standards of Judicial Independence 2008. Although certain qualifications of a person to be appointed as a judge are required and set by legislation,³⁸³ politics in judicial selection in Ireland is still an ongoing matter of concern.³⁸⁴ In 1995, the Judicial Appointments Advisory Board (JAAB) was established as an independent body to identify and inform the Government of choices of suitable persons for judicial appointment.³⁸⁵ It consists of the Chief Justice as the chairperson, the Presidents of other courts, the Attorney General, a practising barrister and solicitor nominated by the Head of each professional organisation, and three persons³⁸⁶ appointed by the Minister for

³⁷⁸ 'Impartiality' (n 200).

³⁷⁹ There is evidence showing that, in recent years, some judges are willing to give public speeches or media interviews and it is more common to give public speeches at conferences or university concerning legal significance, although these practices may lead to public controversy. See Byrne and McCutcheon (n 29); 'Impartiality' (n 200).

³⁸⁰ 'Impartiality' (n 200).

³⁸¹ Constitution, arts 13.9 and 35.

³⁸² Jennifer MacNeill, *The Politics of Judicial Selection in Ireland* (Four Courts Press 2016).

³⁸³ Courts (Supplemental Provisions) Act 1961, ss 5, 17, 29 and 35 (as amended).

³⁸⁴ MacNeill (n 382).

³⁸⁵ Courts and Court Officers Act 1995, s 13(1).

³⁸⁶ Who have knowledge or experience of commerce, finance, administration, or experience as consumers of the services provided by the courts.

Justice.³⁸⁷ Despite this, the Irish Council for Civil Liberties has criticised the candidate screening process conducted by the JAAB, on its lack of ‘transparency, meritocracy and precision’.³⁸⁸ The ultimate decision on an appointment lies with the government which has the authority to advise the President on the appointment of a judge.³⁸⁹ MacNeill also suggests that, although ‘a merit principle’ is already provided in the selection process, ‘a measure of subjective assessment’, based on the decision-makers’ personal knowledge of the candidates, still pervades the process.³⁹⁰ She additionally contends that ‘a personal or professional connection’ or ‘being known to the decision-makers’ is more important than ‘a connection to party politics’.³⁹¹ Further proposals have been made for reform of the judicial appointment system, but these have not been enacted at the time of writing.³⁹²

In addition to courts, tribunals are other adjudicative bodies ‘prescribed by law’ to administer justice ‘in such special and limited cases’.³⁹³ The Constitution does not require tribunal members to make a declaration concerning independence and impartiality similar to that of judges. Although tribunals exercise administrative power rather than judicial power, they still need to ‘act judicially’ if their action affects an individual, which means they must act ‘within their powers’ and ‘comply with basic rules of natural justice or fair procedures’.³⁹⁴ Accordingly, competence of the tribunals is decided by the scope of their powers. Their impartiality also seems indispensable to fulfil the fairness principle. Conversely, the notion of independence seems problematic. Although most tribunals are established as independent bodies, there was a critique of the Refugee Appeals Tribunal³⁹⁵ regarding its transparency, fairness and independence due to its refusal to publish its decisions and the lack of transparency in the system for determining

³⁸⁷ Courts and Court Officers Act 1995, s 13(2).

³⁸⁸ Byrne and McCutcheon (n 29) 174.

³⁸⁹ Constitution, arts 13.9 and 35; Courts and Court Officers Act 1995, s 16(6).

³⁹⁰ MacNeill (n 382) 212-13.

³⁹¹ *ibid* 213.

³⁹² Judicial Appointments Bill 2018.

³⁹³ Constitution, art 34.1.

³⁹⁴ Byrne and McCutcheon (n 29) 387-88.

³⁹⁵ It was established under the Refugee Act 1996, but its duties now transferred to the International Protection Appeals Tribunal by the International Protection Act 2015.

appointment and tenure of its members.³⁹⁶ This is not to say that all tribunals have the same deficiency, but to show the existence of concerns regarding independence. Some other tribunals, such as the Equality Tribunal,³⁹⁷ have been recognised for their transparency.³⁹⁸

From the interview data, no respondent had a concern about competence, independence and impartiality of courts. Nonetheless, an issue regarding independence of some tribunals was raised by a respondent from the perspective of persons with disabilities. The respondent commented with an impression that '[t]he Social Welfare Appeals Office ... was supposed to be independent, but wasn't actually a proper independent appeal office.' The ultimate appeal decision should not be from within the same organisation, but a proper independent appeal body.³⁹⁹

While the competence of courts and tribunals is not an issue of concern, the current legal mechanisms and regulations guaranteeing their independence and impartiality have significantly different standards. The guarantees concerning courts are comprehensive and effective enough to meet international and regional human rights law standards, while those for various tribunal systems seem to raise some issues in practice and cannot completely fulfil the ECHR requirements.

B. Fairness and Publicity

Many factors affect fairness of the proceedings, including independence and impartiality of courts and tribunals, the personal presence principle and timeliness of the proceedings, which will be discussed in detail in their specific subsections. This

³⁹⁶ Tanya Ward, 'Independence, Accountability and the Irish Judiciary' (2008) 8(1) *Judicial Studies Institute Journal* 1.

³⁹⁷ It is now replaced by the Workplace Relation Commission under the Workplace Relations Act 2015.

³⁹⁸ Ward (n 396).

³⁹⁹ Interview-IDP (n 153); FLAC also reflects the same perspective by indicating that all of the Social Welfare Appeals Officers are from the Department of Social Protection and remain its employees. See FLAC, *Not Fair Enough: Making the case for reform of the social welfare appeals system* (Executive Summary, FLAC 2012).

subsection will focus on the rules of evidence to analyse their impacts on the fairness element of the right to a fair hearing.

Fairness of the proceedings has been guaranteed in both regional and domestic legislation. At the regional level, the ECHR clearly guarantees this right in article 6 on the right to a fair trial for both civil and criminal cases. The CFREU also guarantees the same in article 47 for all cases under the EU law.⁴⁰⁰ The ECHR does not elaborate on the content of the rules of evidence, but leaves this matter to be administered at the domestic level of each member state.⁴⁰¹ National courts have a duty to ensure that their proceedings and administration of evidence comply with the fairness principle,⁴⁰² which can be further scrutinised under the ECHR.⁴⁰³

At the national level, the Supreme Court, in *Re Haughey*, interprets that 'basic fairness of procedures' is guaranteed by Article 40.3 of the Constitution.⁴⁰⁴ This guarantee is not limited to the court proceedings but also includes 'any adjudicative processes where a persons' rights are at issue.'⁴⁰⁵

In Ireland, the rules of evidence, especially those concerning competence of a witness in court and the rules against hearsay, are fundamental procedural rules to protect the fairness of proceedings. Competence of a witness is the core requirement to give admissible evidence. It concerns two elements, which are the witness' capabilities to understand the nature and consequences of the oath and to give intelligible testimony.⁴⁰⁶ The general common law compels the witness to give evidence on oath or affirmation;

⁴⁰⁰ FRA and CoE (n 232).

⁴⁰¹ Jurisconsult, 'Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb)' (*ECtHR*, April 2017) <echr.coe.int/Documents/Guide_Art_6_ENG.pdf> accessed 18 December 2017.

⁴⁰² *ibid.*

⁴⁰³ Nuala Mole and Catharina Harby, 'The right to a fair trial: A guide to the implementation of Article 6 of the European Convention on Human Rights' (2nd edn, CoE 2006).

⁴⁰⁴ *Re Haughey* [1971] IR 217, 264.

⁴⁰⁵ Law Reform Commission (LRC), *Consultation Paper: Hearsay in Civil and Criminal Cases* (LRC CP 60-2010) 54.

⁴⁰⁶ John Healy, *Irish Laws of Evidence* (Thomson Round Hall 2004); Declan McGrath, *Evidence* (Thomson Round Hall 2005).

however, there is a legislative exemption to this rule for certain witnesses.⁴⁰⁷ The Oaths Acts 1888 and 1909 are general legislation administering the oath or affirmation. The Children Act 1997 provides an exception for not taking the oath or affirmation before giving evidence. This exception applies to civil proceedings concerning ‘a child who has not attained the age of 14 years’, and ‘a person with mental disability^[408] who has attained the age of 14 years⁴⁰⁹ but cannot live independently.⁴¹⁰ The court may receive unsworn evidence of such a person if it ‘is satisfied that [that person] is capable of giving an intelligible account of events which are relevant to the proceedings.’⁴¹¹ The existence of communication difficulties does not mean that a witness automatically lacks competence to testify; in this case, the testimony may be given through the assistance of an interpreter.⁴¹² However, the person still must understand the questions and be able to communicate his/her responses.⁴¹³ In the same way, the existence of an intellectual, cognitive or psychosocial disability cannot automatically mean the witness is incompetent to testify.⁴¹⁴ The person is incompetent as a witness only if his/her ability to understand and give intelligible testimony appears to be affected by such a disability, medication or other conditions.⁴¹⁵ If an issue of witness’ competence is raised, the trial judge will determine this matter, but the party introducing such witness has the burden of proving the witness’ competence.⁴¹⁶

⁴⁰⁷ McGrath (n 406).

⁴⁰⁸ The Children Act 1997 does not define the term “mental disability”. The existing legal definition which may be used as a guidance for interpreting this term is from the MHA 2001. Section 3 of the MHA 2001 defines the term “mental disorder” to include psychosocial, intellectual and cognitive disabilities.

⁴⁰⁹ Children Act 1997, s 28(1),(3).

⁴¹⁰ McGrath suggests applying section 20(b) of the Children Act 1997 as guidance for understanding the scope of “mental disability” in section 28. See McGrath (n 406) 71.

⁴¹¹ Children Act 1997, s 28(1),(3).

⁴¹² McGrath (n 406).

⁴¹³ *ibid.*

⁴¹⁴ Healy (n 406).

⁴¹⁵ McGrath specifies these conditions by focusing on ‘the period of intoxication or mental illness’. See McGrath (n 406) 64.

⁴¹⁶ Healy (n 406).

The rules of best evidence prefer original or 'direct evidence', ie the fact of what the witness directly perceived concerning the case,⁴¹⁷ than hearsay evidence, which reports a statement⁴¹⁸ made out-of-court.⁴¹⁹ The rules of evidence aim to exclude hearsay evidence because it seems unreliable due to possibilities of fabrication, inaccuracy and misperception of the message relayed.⁴²⁰ Moreover, hearsay evidence is not given on oath or affirmation, in which the truth is better ascertained, and cannot be cross-examined to determine its truthfulness.⁴²¹ The Children Act 1997 provides an exception on hearsay evidence for a statement made by a child in civil cases concerning the welfare of a child.⁴²² This admissibility of hearsay evidence applies in two circumstances 1) where 'the child is unable to give evidence by reason of age', and 2) where 'the giving of oral evidence', either in person or through a live television link, would affect welfare of the child.⁴²³ Therefore, a child who is considered a competent witness must give direct evidence if doing so does not affect his/her welfare.⁴²⁴ However, admissibility of such hearsay evidence is still within the discretion of the court, which will consider circumstances including fairness of proceedings and the interests of justice in making its decision.⁴²⁵

One interpretation of section 20(b) of the Children Act is that every provision in Part III of the Act applies to civil cases concerning the welfare of an adult with mental disability who cannot live independently, in the same way as it applies to a child, with some modifications if necessary.⁴²⁶ Therefore, the exception on hearsay evidence applying to a child will accordingly applies to an adult with mental disability who cannot live

⁴¹⁷ Jonathan Law (ed), *A Dictionary of Law* (8th edition, OUP 2015) 191.

⁴¹⁸ These include any form of statements, whether made in oral, writing, or other communicative conducts.

⁴¹⁹ McGrath (n 406).

⁴²⁰ *ibid* 215.

⁴²¹ LRC, *Consultation Paper: Hearsay* (n 405).

⁴²² Children Act 1997, ss 20(a) and 23(1).

⁴²³ *ibid* s 23(1).

⁴²⁴ McGrath (n 406).

⁴²⁵ Children Act 1997, s 23(2).

⁴²⁶ *ibid* s 20(b).

independently. This view is consistent with the view of the Law Reform Commission.⁴²⁷ However, another view seems to suggest that the exception does not apply to an adult with mental disability because the legal provision on hearsay exception does not so define.⁴²⁸

The Children Act 1997 also provides other facilities which the court can permit to be used in the civil proceedings concerning welfare of a child. These facilities are 'a live television link' and use of 'an intermediary',⁴²⁹ which can be seen as mechanisms facilitating both fairness of the proceedings and the right to communication assistance. With the permission of the court, a child can give evidence through a live television link.⁴³⁰ Besides the use of television link, the court may also direct or permit the use of an intermediary (appointed by the court) if satisfied that the question should be asked through an intermediary regarding the age or mental condition of the person.⁴³¹ According to my interpretation of section 20(b), these facilities also apply to civil cases concerning the welfare of an adult with mental disability who cannot live independently. In contrast, some scholars suggest that these facilities only apply to a child as these provisions do not specifically include the cases of persons with mental disability, whereas section 28 on unsworn evidence does specifically include such persons.⁴³² It was suggested that the exclusion might be 'a mistake on the part of the drafters of the Act'.⁴³³ On the other hand, the drafters possibly intended not to repeat in every provision the application to adults with mental disability as they already set out the application of the Part in general to such adults in section 20(b). Furthermore, section 28(3) needs to mention the application to a person with mental disability specifically because it otherwise only applies to a child 'with mental disability who has attained the age of 14 years', which is not covered by section 20(b) referring only to an adult with mental disability.⁴³⁴

⁴²⁷ LRC, *Consultation Paper: Hearsay* (n 405).

⁴²⁸ Healy (n 406) 57-58.

⁴²⁹ Children Act 1997, ss 21-22.

⁴³⁰ *ibid* s 21.

⁴³¹ *ibid* s 22.

⁴³² Ruth Cannon and Niall Neligan, *Evidence* (Thomas Round Hall 2002); Healy (n 406).

⁴³³ Cannon Neligan (n 432) 74.

⁴³⁴ Children Act 1997, s 28(3).

Regarding tribunal proceedings, the fairness principle must also be applied as the tribunals still need to 'act judicially' even though they do not exercise judicial power.⁴³⁵ However, their proceedings and the rules of evidence are not as formal as those of the courts.⁴³⁶

On the aspect of publicity, at the regional level, both ECHR and CFREU include the publicity component to a fair hearing.⁴³⁷ It is rather clear that publicity is not an absolute obligation under the ECHR. The press and public can be excluded from a hearing in order to protect 'the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require', or where strictly necessary to protect the interests of justice.⁴³⁸ The domestic courts need to consider the necessity of a public hearing with regards to the nature of each case and the protection of litigants 'against the administration of justice in secret with no public scrutiny'.⁴³⁹

At the national level, the Constitution expresses clearly that '[j]ustice ... shall be administered in public', except for special and limited cases prescribed by law.⁴⁴⁰ The cases which may be heard in private include applications of an urgent nature for relief by way of habeas corpus, bail, prohibition or injunction; matrimonial causes and matters; lunacy⁴⁴¹ and minor matters;⁴⁴² proceedings involving the disclosure of a secret manufacturing process;⁴⁴³ and cases concerning an exercise of power of company directors in an oppressive manner towards their members.⁴⁴⁴ As a result, only limited

⁴³⁵ Byrne and McCutcheon (n 29) 387.

⁴³⁶ *ibid.*

⁴³⁷ ECHR, art 6(1); CFREU, art 47.

⁴³⁸ ECHR, art 6(1).

⁴³⁹ *Jurisconsult* (n 401) 59.

⁴⁴⁰ Constitution, art 34.1.

⁴⁴¹ The Lunacy Regulation (Ireland) Act 1871, which governs lunacy matters will be repealed when section 7 of the ADMA 2015 is fully active.

⁴⁴² These matters include some cases of family law and cases of the Children Court where most criminal offences committed by children are prosecuted.

⁴⁴³ Courts (Supplemental Provisions) Act 1961, s 45(1).

⁴⁴⁴ Companies Act 1963, s 205(7).

persons can attend the hearing in camera. In general, members of the public and representatives of the media will not be allowed to attend the courtroom for these cases. Disclosure of the case information may result in contempt of court if the disclosed information is sensitive or if the identity of parties to the proceedings is revealed.⁴⁴⁵

In family law cases, courts proceedings in public or in camera, vary in accordance with legislation. For example, proceedings under the Judicial Separation and Family Law Reform Act 1989 and the Family Law (Maintenance of Spouses and Children) Act 1976 shall be heard privately,⁴⁴⁶ while the Family Law Act 1995 does not strictly require hearings to be conducted in camera.⁴⁴⁷ Report of the proceedings or the court decision in family law cases can be published on condition that such report or decision does not contain any information identifying the parties to the proceedings or any child to which the proceedings relate.⁴⁴⁸ Hearings of applications regarding declarations as to capacity of a person under the ADMA 2015 shall also be heard and determined not in public. The proceedings shall be conducted with the least formality where judges and legal practitioners shall not wear wigs or gowns.⁴⁴⁹

Regarding the rules of evidence, it did not appear from interview data that the current rules of evidence posed barriers for persons with disabilities to give evidence in court proceedings. However, it should be noted that a respondent representing persons with intellectual disabilities had no information on experience of persons with intellectual disabilities giving evidence in court; and that a respondent representing persons with psychosocial disabilities mentioned that ‘the patient never gives evidence in these cases.’⁴⁵⁰ A respondent who is a lawyer believed that, in some case where a family member was the only person who could understand a person with an unconventional communication method, using the family member as an interpreter would not be a problem if this issue was brought to the attention of the judge and that person had sworn

⁴⁴⁵ Byrne and McCutcheon (n 29).

⁴⁴⁶ Judicial Separation and Family Law Reform Act 1989, s 34; Family Law (Maintenance of Spouses and Children) Act 1976, s 25(1).

⁴⁴⁷ Family Law Act 1995, s 33(2).

⁴⁴⁸ Civil Liability and Courts Act 2004, s 40(3).

⁴⁴⁹ ADMA 2015, s 36(10)-(11).

⁴⁵⁰ Interview-IDS (n 192).

the oath in the same manner as an interpreter.⁴⁵¹ The respondent further explained some situations where a party could not communicate due to intellectual or psychosocial disability that ‘in cases like that the court will appoint a counsellor to act as what called a legitimate contradictor , someone who would legitimately contradict the arguments purely to ensure that the court heard two sides.’⁴⁵² However, a respondent who is a court staff member commented that the reliability of evidence where a family member acted as an interpreter was still under the court’s discretion.⁴⁵³

There were a further comments on fairness of court proceeding that judges would not allow anything to proceed that would affect fairness of the proceedings,⁴⁵⁴ for example, where a visually impaired person could not read a document during the court proceedings,⁴⁵⁵ or where there was no sign-language interpreter for a Deaf person.⁴⁵⁶ A respondent who is a judge also expressed that judges could assist with any requests for disability support or assistance if it was on a legal basis or required by fair procedures, but must be aware of their key role as neutral decision makers.⁴⁵⁷

According to the research findings, fairness and publicity of court proceedings are adequately protected by the existing legal mechanisms and due consideration of judges for individual circumstances, which is in line with international and regional human rights law standards. However, the research has no sufficient data to evaluate fairness and fair procedure of private hearings. Moreover, fairness could also be negatively affected if other elements such as equality of arms and accessibility of the court proceedings are not fulfilled.

⁴⁵¹ Interview-IL1 (n 124).

⁴⁵² *ibid*; This person is also called “legitimus contradictor”. See Child Care Law Reporting Project, ‘Social work reports are not “relevant court documents”’ <www.childlawproject.ie/publications/social-work-reports-are-not-relevant-court-documents/> accessed 17 September 2018.

⁴⁵³ Interview-IF (n 150).

⁴⁵⁴ *ibid*.

⁴⁵⁵ *ibid*; Interview-IDV (n 113).

⁴⁵⁶ Interview-IF (n 150); Interview-IDH (n 154).

⁴⁵⁷ Interview-IJ (n 207).

C. Personal Presence

As mentioned in section 3.2.4C, international human rights law only guarantees the right to be heard in his/her personal presence in civil cases by reference to the right to attend hearings. However, this right has been expanded by interpretation of European regional human rights bodies.⁴⁵⁸ There is an indicator of an acknowledgement of ‘personal presence’ since 1959 in *X v Sweden* by the European Commission of Human Rights, later replaced by the European Court of Human Rights by Protocol No. 11 to the ECHR.⁴⁵⁹ In this case, the Commission interprets article 6 of the ECHR to cover the personal presence guarantee; however, the Commission does not state that ‘the right to be present in person’ is guaranteed in all civil cases, but it can be applied in some cases ‘where the personal character and manner of life of the party concerned is directly relevant to the formation of the Court’s opinion on the point which it is called upon to decide’, such as a case involving a child custody after a divorce of his/her parents.⁴⁶⁰ There is evidence that the ECtHR adopts this interpretation by acknowledging this requirement through its decisions in several cases, especially in cases where the decisions tend to cause ‘serious consequences for a person’s private life’, such as determination of his/her legal capacity or of his/her involuntary detention in a psychiatric hospital.⁴⁶¹ In other words, the ‘rule of personal presence’ guarantees that judges have an opportunity to observe or examine a person as primary evidence before making any decision concerning him/her, as well as to ensure that the dignity of the person in question has been protected by having a sufficient means to present his/her case

⁴⁵⁸ Shah (n 198).

⁴⁵⁹ *ibid* citing *X v Sweden* (1959) 2 YB 354.

⁴⁶⁰ *ibid*; Arthur Robertson, *Human Rights in Europe: Being an Account of the European Convention for the Protection of Human Rights and Fundamental Freedoms Signed in Rome on 4 Nov. 1950, of the Protocol Thereto and of the Machinery Created Thereby: the European Comm. of Human Rights and the European Court of Human Rights* (Manchester University Press 1963) 24.

⁴⁶¹ Lucy Series, ‘The participation of the relevant person in proceedings in the Court of Protection: A briefing paper on international human rights requirements’ (Cardiff University 2014) 4; FRA and CoE (n 232).

effectively and being independent from any person or representative who may have conflict of interest.⁴⁶²

This rule is emphasised in the ADMA 2015 for court hearings in relation to declarations as to capacity, enduring powers of attorney, advance healthcare directives and a review of a detention order by the wardship court.⁴⁶³ Nevertheless, this rule is not yet commenced⁴⁶⁴ and even after its commencement, this rule can be omitted in accordance with the court's opinion, for example, if it 'would not cause an injustice to the relevant person.'⁴⁶⁵

To begin proceedings for a civil case, written notice must be served to the other side before submitting the case to the court.⁴⁶⁶ If the case cannot be settled at this stage, the plaintiff must submit the pleading and other written documents required by the court rules of the specific court. The procedures of serving these documents to the other side may differ slightly among different courts.⁴⁶⁷

It appears from interview data that paper-based proceedings of courts were problematic for blind people. In these cases, the person might not recognise the proceeding in the first place. Although an accessible format of documents could be provided later as requested, all documents were initially and officially served in paper format.⁴⁶⁸

⁴⁶² Dovydas Vitkauskas and Grigoriy Dikov, 'Protecting the right to a fair trial under the European Convention on Human Rights: Council of Europe human rights handbooks' (CoE 2012); Lucy Series, Phil Fennel and Julie Doughty, 'The Participation of P in Welfare Cases in the Court of Protection' (Cardiff University 2017) 9.

⁴⁶³ ADMA 2015, s 139.

⁴⁶⁴ 'Commencement of the ADMA 2015' (*Electronic Irish Statute Book*, 4 September 2018) <www.irishstatutebook.ie/eli/isbc/2015_64.html> accessed 19 September 2018.

⁴⁶⁵ ADMA 2015, s 139(1)(a).

⁴⁶⁶ Byrne and McCutcheon (n 29) 284.

⁴⁶⁷ 'Taking a civil case' (*CIB*) <citizensinformation.ie/en/justice/civil_law/taking_a_civil_case_intro.html> accessed 18 March 2018.

⁴⁶⁸ Interview-IF (n 150); Interview-IDV (n 113).

Regarding attendance at court proceedings, all respondents agreed that it was important, but might be difficult for some persons to encounter their opponent in courtroom, or to quietly listen to the opponent's testimony which they perceived to be false.⁴⁶⁹ A respondent from persons with intellectual disabilities perspective commented that being in court might be a challenge for some people who had never been to court and they might feel uncomfortable talking openly while many people were listening to their evidence.⁴⁷⁰ A respondent who is a lawyer viewed that personal presence of persons with disabilities in court showed commitment as a citizen and the commitment to justice; and would represent inclusive participation. The judge might have some questions to ask the person but the legal examination would be conducted by the lawyer. Personal presence in court proceedings would be very helpful to an applicant for a personal injury case, and the respondent also believed that this would impact the case positively.⁴⁷¹ A respondent representing perspective of persons with psychosocial disabilities remarked on one case where a person perceived to have psychosocial disability attended her case hearing with an expectation of an opportunity to give oral evidence as she perceived herself to be capable enough of giving evidence. Although she appeared in court, she was not called as a witness and her lawyer told her afterwards that 'the patient never gives evidence in these cases.'⁴⁷²

According to the research findings, the existing legal mechanisms and regulations seem not sufficient to guarantee the right to attend hearings. They cannot ensure that every person, especially visually impaired persons, can access information on the written documents sent to them, which may lead to an absence from court proceedings even if they wish to attend. Although the rule of personal presence created by the regional human rights law does not apply to all civil cases, it applies in the cases where the court decision greatly influences a person's life. The research cannot acquire adequate data on how this rule is applied in civil cases in Ireland, but some qualitative data shows that the presence and participation of the person are separate issues. However, that data was collected before Ireland has ratified the UNCRPD. It can be argued that the

⁴⁶⁹ Interview-IDH (n 154); Interview-IDS (n 192).

⁴⁷⁰ Interview-IDI (n 183).

⁴⁷¹ Interview-IL1 (n 124).

⁴⁷² Interview-IDS (n 192).

UNCRC further develops the rule of personal presence to include the effective participation of persons with disabilities in a fair hearing. Accordingly, a presence in the proceedings without an opportunity to participate or the absence of adequate guarantees on effective participation of the person in question in the relevant proceedings (if his/her participation is possible) can be considered a violation of the right to be heard or a fair hearing guaranteed in international human rights law standards.

D. Timeliness of the Proceedings

This aspect of a fair hearing is guaranteed at the regional level by both ECHR and CFREU.⁴⁷³ In civil proceedings, the phrase “within a reasonable time” normally counts from ‘the moment an action is instituted before a tribunal’ to the point ‘when the determination becomes final’.⁴⁷⁴ In some cases where the litigant needs to take specific actions before proceeding with the court case, such as in administrative cases, the time taken to complete these actions may be included for consideration. Neither the ECHR nor CFREU specifies what can be regarded as a reasonable timeframe, but they adopt four criteria to gauge reasonableness of each case individually.⁴⁷⁵ These criteria are ‘(i) the complexity of the case; (ii) the complainant’s conduct; (iii) the conduct of the relevant authorities; (vi) what is at stake for the complainant.’⁴⁷⁶ Additionally, the ECHR requires that ‘the lawfulness of [one’s] detention shall be decided speedily by a court’.⁴⁷⁷ This provision relates to both criminal and civil aspects. The Convention also includes the detention of ‘persons of unsound mind’, for example, in psychiatric settings, which is an example of the detention relating to civil cases.⁴⁷⁸

At the national level, timeliness of the proceedings is guaranteed by the ECHRA 2003 where the provisions of ECHR are precisely embedded into the Irish legal system. Moreover, the establishment of the Court of Appeal in 2014 also aims to reduce caseload

⁴⁷³ ECHR, art 6(1); CFREU, art 47(2).

⁴⁷⁴ FRA and CoE (n 232) 136.

⁴⁷⁵ *ibid.*

⁴⁷⁶ *ibid* 140.

⁴⁷⁷ ECHR, art 5(4).

⁴⁷⁸ *ibid* art 5(1)(e).

and delays in the Supreme Court.⁴⁷⁹ Alternative dispute resolution mechanisms (ADR), such as mediation and conciliation, are also available as effective alternative or integrated mechanisms to formal dispute resolution.⁴⁸⁰ Apart from being expeditious, the ADR is regarded as being less adversarial, and more focused on confidentiality and the real interests of both parties.⁴⁸¹

It appears from interview data that the speed of cases depends on many circumstances. Some cases where a person sought a remedy which was time-specific, such as accessing education or health services, needed to be accelerated, as the breach would also be continuing. A respondent who is a lawyer viewed that these result needed to be delivered quickly, so that the person could get forward and move on with his/her life.⁴⁸² In some other cases, judges might have to provide appropriate time for litigants who had communication difficulties as a result of an intellectual disability,⁴⁸³ or to adjourn the case due to accessibility issues, such as availability of sign-language interpreters or accessible courtrooms, to maintain fairness of the proceedings.⁴⁸⁴ A respondent from the perspective of persons with psychosocial disability noted that the court proceeding in some cases was very quick and some person with, or perceived to have psychosocial disability, wondered if his/her legal team had adequate time to properly prepare and present the case.⁴⁸⁵ Another respondent from visually impaired persons' perspective noted that the proceedings, before a case could be submitted to the court, could take from three to eight years due to difficulties in finding legal advice and legal assistance, or the requirement to exhaust all available remedies.⁴⁸⁶

⁴⁷⁹ Richard Willis, David Strahan and Jennifer Slowey, 'Ireland's New Court of Appeal' (*Arthur Cox*, 18 September 2014) <arthurcox.com/publications/irelands-new-court-appeal-september-2014/> accessed 8 January 2018.

⁴⁸⁰ LRC, *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010).

⁴⁸¹ *ibid.*

⁴⁸² Interview-IL2 (n 124).

⁴⁸³ Interview-IJ (n 207).

⁴⁸⁴ Interview-IF (n 150); Interview-IDH (n 154); Interview-IDP (n 153).

⁴⁸⁵ Interview-IDS (n 192).

⁴⁸⁶ Interview-IDV (n 113).

Regarding ADR mechanisms, a respondent who is a lawyer noted that mediation was regarded as a good mechanism to settle disputes amicably and speedily, but it was infrequently used in Ireland.⁴⁸⁷ A respondent representing persons with disability perspective revealed that the WRC would definitely direct cases very strongly towards mediation, but the settlements were not always genuinely made upon the principle of mediation.⁴⁸⁸ It was explained that some applicants had to accept settlements unwillingly, because the case had already been proceeding for many years due to a number of adjournments.⁴⁸⁹ In some cases where the applicant did not want to settle, he/she would need to take the case to a tribunal against a legal team for which that person was no match.⁴⁹⁰

According to the research findings, timeliness of the proceedings is still a dilemma. Whether fast or slow, proceedings can affect the fairness principle. The current legal mechanisms and regulations seem not to sufficiently guarantee the timeliness principle protected in international and regional human rights law.

6.3.5 Right to a remedy, reparation or compensation

At the regional level, both ECHR and CFREU guarantee the right to an effective remedy,⁴⁹¹ but leave the choice of remedies to be determined by each State.⁴⁹² The remedy must be 'effective in practice as well as in law.'⁴⁹³ The ECHR requires it to 'be accessible; be capable of providing redress in respect of the applicant's complaints; offer reasonable prospects of success';⁴⁹⁴ whereas the CFREU requires it to meet the

⁴⁸⁷ Interview-IL1 (n 124).

⁴⁸⁸ Interview-IDP (n 153).

⁴⁸⁹ *ibid.*

⁴⁹⁰ *ibid.*; Interview-IDV (n 113).

⁴⁹¹ ECHR, art 13; CFREU, art 47.

⁴⁹² FRA and CoE (n 232).

⁴⁹³ *ibid.* 95.

⁴⁹⁴ *ibid.* 95.

principles of effectiveness and of equivalence.⁴⁹⁵ The scope of an effective remedy under the ECHR and the CFREU differ. The ECHR guarantees the availability of ‘an effective remedy before a national authority’ for a violation of the rights under the ECHR.⁴⁹⁶ The guarantee under the CFREU ‘is based on Article 13 of the ECHR’ on the right to an effective remedy,⁴⁹⁷ but is more expansive, by covering not only the rights under the Charter but all rights under EU law, and requiring the proceedings to be conducted through a fair hearing of a tribunal.⁴⁹⁸ Although the ‘national authority’ under the ECHR requires less strict criteria compared to those of a tribunal, it must have, at least, ‘institutional independence’ and ‘the power to make binding decisions’.⁴⁹⁹

Compensation is also a form of remedy or reparation, which may be needed to redress the violation of the rights under the ECHR.⁵⁰⁰ It may not be an effective remedy on its own in some situations, such as where the applicant is in detention and applies for release.⁵⁰¹ After all, the ECHR guarantees a right to compensation for a victim of detention in contravention of its provisions,⁵⁰² whereby proof of damage may be required in determining the amount of compensation.⁵⁰³

In Ireland, a remedy, reparation or compensation in civil matters can be sought through the courts or the specific tribunals, such as the WRC, the Mental Health Tribunal, or the Personal Injuries Assessment Board. There are four main types of remedies: damages, injunctions, declarations and specific performance.⁵⁰⁴ Damages refer to monetary

⁴⁹⁵ ‘The principle of effectiveness requires that domestic law does not make it impossible or excessively difficult to enforce rights under EU law. The principle of equivalence requires that the conditions relating to claims arising from EU law are not less favourable than those relating to similar actions of a domestic nature.’ See *ibid* 96.

⁴⁹⁶ ECHR, art 13.

⁴⁹⁷ Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

⁴⁹⁸ CFREU, art 47.

⁴⁹⁹ FRA and CoE (n 232) 100; The later aspect was earlier referred to as “competence” in section 6.3.4A.

⁵⁰⁰ *ibid*.

⁵⁰¹ *ibid*.

⁵⁰² ECHR, art 5(5).

⁵⁰³ FRA and CoE (n 232).

⁵⁰⁴ *Kenneally and Tully* (n 5).

compensation.⁵⁰⁵ The general concept of damages is to compensate for actual loss,⁵⁰⁶ although a court may include the payment of interest⁵⁰⁷ in the award.⁵⁰⁸ The court may award 'exemplary or punitive damages' in exceptional circumstances, including where the violation of rights is done deliberately or with an intention to make a profit.⁵⁰⁹ In personal injuries cases, two types of damages are awarded. These are special damages referring to 'pecuniary losses such as medical expenses or loss of earnings, including loss of earnings in the future', and general damages referring to 'non-pecuniary loss', which includes 'pain and suffering, loss of amenities^[510] and loss of expectation of life.'⁵¹¹ The 'Book of Quantum' is used by both Personal Injuries Assessment Board and courts as general guidelines when assessing damages for pain and suffering.⁵¹²

Injunctions are orders for a party in disputes to do or not to do something, including an order for non-repetition in the future.⁵¹³ These remedies may be more effective when the respondent has no assets to pay damages.⁵¹⁴ Injunctions can be awarded before or after the full hearing. The injunctions before the full hearing are temporary, but necessary in some cases to prevent or minimise damages incurring before the case ends. However, the party which obtains the injunction award in his/her favour may have to pay damages if it ultimately appears that the request is invalid.⁵¹⁵

⁵⁰⁵ *ibid*; Byrne and McCutcheon (n 29).

⁵⁰⁶ Byrne and McCutcheon (n 29).

⁵⁰⁷ Court Act 1981, s 22(1); 'on the whole or any part of the sum in respect of the whole or any part of the period between the date when the cause of action accrued and the date of the judgement'.

⁵⁰⁸ Court Act 1981, s 22(1); Courts Act 1981 (Interest on Judgment Debts) Order 2016, SI 2016/624; The rate of interests at the time of writing (January 2018) is 2% per year.

⁵⁰⁹ Byrne and McCutcheon (n 29) 445.

⁵¹⁰ This refers to 'the loss of the use of a limb', which the damages may be increased if the loss also prevents that person from participating in his/her prior activities. See *ibid* 444.

⁵¹¹ *ibid* 444.

⁵¹² *ibid* 445.

⁵¹³ *ibid*; Kenneally and Tully (n 5).

⁵¹⁴ Byrne and McCutcheon (n 29).

⁵¹⁵ *ibid*.

A declaration is another type of remedy relating to the rights or status of a person. For example, the declaration concerning capacity of a person under the ADMA 2015,⁵¹⁶ or invalidity of any law concerning its constitutionality.⁵¹⁷

Specific performance is an order to fulfil obligations under an agreement, such as lease or purchase agreements of a particular subject matter. However, if the obligation of a personal service or monetary compensation is an adequate remedy, the court will generally not grant specific performance.⁵¹⁸

According to interview data collected during this research, various kinds of remedies sought through courts, administrative tribunals and the Ombudsman. The WRC (previously known as the Equality Tribunal) seemed to be the most frequently used option by persons with disabilities.⁵¹⁹ However, this did not mean it was the most effective one; the respondents to this research viewed that it often could not provide effective remedies as it could not deliver fair mediation or hearing procedures, and the timeliness of the proceeding could not be guaranteed.⁵²⁰ Furthermore, its fair procedure was also negatively affected by the fact that lay applicants would not have equality of arms and legal representation in comparison to opponents from public bodies;⁵²¹ and some respondents felt that the tribunal did not truly understand disability rights and discrimination on the ground of disability.⁵²² One respondent further commented that some other tribunals had issues of accessibility, genuine independence and stereotypical attitudes towards persons with disabilities.⁵²³ However, one respondent noted that, although some cases were not successful at the tribunal process, they were a good platform for persons with disabilities to address their difficulties in accessing public services as these cases had no tribunal fee and no risk of litigation costs for unsuccessful applicants. It was also noted that some public bodies would also take a

⁵¹⁶ ADMA 2015, s 55.

⁵¹⁷ Constitution, art 34.3.2°.

⁵¹⁸ Kenneally and Tully (n 5); Byrne and McCutcheon (n 29).

⁵¹⁹ Interview-IDP (n 153); Interview-IDV (n 113).

⁵²⁰ *ibid.*

⁵²¹ *ibid.*

⁵²² Interview-IDV (n 113).

⁵²³ Interview-IDP (n 153).

better approach in their service provision to prevent further disputes or legal action.⁵²⁴ The Ombudsman was also another mechanism for a remedy mentioned by the respondents, but it was not regarded by many persons with disabilities interviewed as an effective mechanism for a remedy.⁵²⁵ It was also not considered under the same category as courts and tribunals because its decisions are not directly binding. Issues relating to the Ombudsman will be further discussed in the subsection of the right to complain.

According to the research findings, the court system generally meets international and regional human rights law standards on the right to a remedy. However, the tribunal system seems to require further development to assure the public that all administrative tribunals are accessible and can provide an effective remedy for persons with disabilities.

6.3.6 Right to complain, challenge or appeal

At the regional level, the right to complain or challenge in civil matters seems encompassed by article 13 of the ECHR, although it does not clearly express this. The ability to complain and challenge can be considered the means of getting an effective remedy, particularly as a remedy under article 13 can be sought through a national authority. Therefore, it aligns with the definition of “complain”, in which the fact of a dissatisfactory incident is reported to a non-judicial body.⁵²⁶ Additionally, the ECHR guarantees the right to challenge in cases concerning the lawfulness of detention,⁵²⁷ which includes ‘the involuntary detention of people with psychosocial disabilities.’⁵²⁸ The right to appeal in civil matters is not specifically guaranteed in the regional mechanism, but the ECtHR views that a right of appeal to a judicial body must be available if the

⁵²⁴ Interview-IDV (n 113).

⁵²⁵ *ibid*; Interview-IDP (n 153); Interview-IDS (n 192).

⁵²⁶ See section 3.2.6 for the full definition.

⁵²⁷ ECHR, art 5(4).

⁵²⁸ FRA and CoE (n 232) 166.

existing administrative body cannot guarantee the right to a fair trial under the ECHR,⁵²⁹ and that the fair trial principle must be also applied to appeal proceedings.⁵³⁰

At the national level, Ireland guarantees the right to complain, challenge or appeal through various pieces of legislation. For instance, a complaint concerning employment or disability discrimination in the provision of goods and services can be made to the WRC.⁵³¹ Likewise, a complaint against public bodies in relation to access to public building, information or services can be made to the head of relevant public body.⁵³² This complaint may be further made to the Ombudsman if the issue is still not resolved.⁵³³ These complaints will be dealt differently in accordance with the specific legislation. Complaints to the WRC can be referred for mediation or adjudication;⁵³⁴ while complaints to a public body or the Ombudsman will be investigated and the body itself will make a determination.⁵³⁵ The Ombudsman can only investigate cases against public bodies specified in the Ombudsman Acts. The Ombudsman shall not investigate cases which can be appealed, referenced or reviewed by courts or tribunals, or are under court proceedings, or exceed the expiration of 12 months, unless there is special circumstance whereby the Ombudsman considers it proper to investigate the case.⁵³⁶

Regarding a tribunal's decision, the review of its decision varies according to its regulating legislation. For example, the decision of the Mental Health Tribunal regarding an admission order of a person to a psychiatric hospital can be appealed to the Circuit

⁵²⁹ *ibid* 31, citing *Albert and Le Compte v Belgium* App no 7299/75 and 7496/76 (ECtHR, 10 February 1983).

⁵³⁰ *ibid* citing *Monnell and Morris v UK* App no 9562/81 and 9818/82 (ECtHR, 2 March 1987).

⁵³¹ ESA 2000, ss 2, 4 and 21 (as amended); Workplace Relations Act 2015, ss 41 and 66.

⁵³² DA 2005, ss 25-26, 28 and 38.

⁵³³ OA 1980, s 4.

⁵³⁴ Workplace Relations Act 2015, ss 39 and 41.

⁵³⁵ DA 2005, ss 38-39; OA 1980, ss 4 and 6.

⁵³⁶ OA 1980, s 5.

Court.⁵³⁷ In the absence of provisions on appeal, any tribunal's decision can be referred to the Ombudsman,⁵³⁸ or challenged by means of a judicial review to the High Court.⁵³⁹

The Ombudsman system is regarded as 'an alternative method of reviewing the decisions of public/adjudicative bodies' but less expensive than judicial review or other court proceedings.⁵⁴⁰ Although the Ombudsman's recommendation is not legally binding, there is evidence that the Ombudsman mechanism can be effective in many cases,⁵⁴¹ but few persons with disabilities pursue this method.⁵⁴²

On the aspect of the right to challenge, the Constitution guarantees the right to challenge an unlawful detention before the High Court or any judge.⁵⁴³ Judicial review is also another mechanism guaranteeing the right to challenge, whereby the legality of proceedings of a lower court or tribunal (ie jurisdiction and compliance with 'the basic rules of natural justice or fair procedures')⁵⁴⁴ is reviewed by the High Court.⁵⁴⁵ According to Raymond Byrne and Paul McCutcheon, judicial review may be the only option to review a decision of an adjudicative body in many cases, but it cannot 'provide a comprehensive means of remedying faulty decision-making'.⁵⁴⁶ This is because the court only assesses whether such a decision is made within the adjudicative body's powers and using fair procedures, but does not concern itself with the facts of the case or the rationale behind the decision.⁵⁴⁷

⁵³⁷ MHA 2001, s 19.

⁵³⁸ OA 1980, s 5.

⁵³⁹ RSC Ord 84 (as amended).

⁵⁴⁰ Kenneally and Tully (n 5) 354-55; David Morgan and Paul Daly, *Hogan and Morgan's Administrative Law* (4th edn, Round Hall 2012) 240.

⁵⁴¹ Byrne and McCutcheon (n 29) 409.

⁵⁴² Flynn, *Disabled Justice?* (n 323).

⁵⁴³ Constitution, art 40.4.2°.

⁵⁴⁴ Byrne and McCutcheon (n 29) 461.

⁵⁴⁵ RSC Ord 84 (as amended).

⁵⁴⁶ Byrne and McCutcheon (n 29) 407-8.

⁵⁴⁷ *ibid.*

The right to appeal is guaranteed by the Constitution as prescribed by law.⁵⁴⁸ There are two forms of appeal which are a full rehearing (de novo hearing) and an appeal on a point of law.⁵⁴⁹ In general, a civil case heard at first instance in the District Court can be appealed for a full rehearing to the Circuit Court and a case heard at first instance in the Circuit Court can be appealed to the High Court. The decision of these appellate courts are 'final and conclusive and not appealable'.⁵⁵⁰ Although final, the decision of the Circuit Court (as an appellate court) may be under judicial review by means of Article 34.3.1° of the Constitution,⁵⁵¹ and the High Court decision can be appealed on a point of law to the Court of Appeal.⁵⁵² The appeal on a point of law can also be proffered to the higher court by means of a case stated.⁵⁵³ Such an appeal can be proffered from the District Court to the High Court,⁵⁵⁴ and from the Circuit Court to the Court of Appeal.⁵⁵⁵

Appeals in civil cases are likely on the issue of liability or amount of compensation awarded.⁵⁵⁶ The appellate court may order the High Court (by different judge) to conduct a re-hearing when the appeal concerns liability.⁵⁵⁷ On the issue of compensation, the main consideration is whether the amount awarded was reasonable; in some cases where the amount was excessive, the appellate court might correct this by awarding less.⁵⁵⁸

The Supreme Court is the final appellate court, and its decision cannot be further appealed.⁵⁵⁹ The Supreme Court will consider an appeal from the Court of Appeal if the

⁵⁴⁸ Constitution, art 34.3.4°.

⁵⁴⁹ Byrne and McCutcheon (n 29).

⁵⁵⁰ Courts of Justice Act 1924, s 84 (as amended); Courts of Justice Act 1936, ss 38-39.

⁵⁵¹ Byrne and McCutcheon (n 29) 346.

⁵⁵² Constitution, art 34.4.

⁵⁵³ Byrne and McCutcheon (n 29).

⁵⁵⁴ Courts (Supplemental Provisions) Act 1961, s 52(1).

⁵⁵⁵ Court of Justice Act 1947, s 16; Courts (Supplemental Provisions) Act 1961, s 7A(2) (as amended).

⁵⁵⁶ Byrne and McCutcheon (n 29).

⁵⁵⁷ *ibid.*

⁵⁵⁸ *ibid.*

⁵⁵⁹ Constitution, art 34.5.

Supreme Court is satisfied that ‘the decision involves a matter of general public importance, or in the interests of justice it is necessary that there be an appeal to the Supreme Court.’⁵⁶⁰ Although the Court of Appeal normally has ‘appellate jurisdiction from all decision of the High Court’,⁵⁶¹ the Supreme Court may accept a direct appeal from the High Court ‘if the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it’ and there is either or both precondition factors as required in other cases.⁵⁶²

In addition to the domestic appellate system, any of the Irish Courts may request the Court of Justice of the European Union (CJEU) to consider and determine a point of EU law, which is similar to a case stated.⁵⁶³ Decisions of the CJEU in this regard ‘are binding on all courts in the [EU] member states, including the Supreme Court in Ireland’.⁵⁶⁴ Furthermore, a person may pursue his/her case to the ECtHR where all domestic remedies are exhausted.⁵⁶⁵ Nevertheless, the proceedings of the CJEU and of the ECtHR are beyond the scope of this research.

It appears from interview data that some persons with disabilities thought that making a complaint would just waste time and afford no positive result;⁵⁶⁶ while some were very reluctant to make a complaint because they were afraid of subsequent negative effects. For example, they were afraid that their complaint on the courtroom accessibility to judges might negatively affect the judgement of their case,⁵⁶⁷ or their complaint against public bodies might affect the vital support provided by those bodies for their living.⁵⁶⁸ Others were concerned that some public bodies would just ignore the complaint due to lack of awareness of disability rights. In one case, the officer whom the complainant

⁵⁶⁰ Constitution, art 34.5.3°.

⁵⁶¹ Constitution, art 34.4.1°.

⁵⁶² Constitution, art 34.5.4°.

⁵⁶³ Treaty on the Functioning of the European Union 2008 (consolidated version), art 267; Byrne and McCutcheon (n 29).

⁵⁶⁴ Byrne and McCutcheon (n 29) 835.

⁵⁶⁵ See text to n 17.

⁵⁶⁶ Interview-IDH (n 154).

⁵⁶⁷ *ibid*; Interview-IDP (n 153).

⁵⁶⁸ Interview-IDP (n 153).

made a complaint against was appointed as an inquiry officer under the DA 2005.⁵⁶⁹ In another case, a public body fiercely disagreed with the complaint, and challenged the complainant to take legal action.⁵⁷⁰ There were further comments that a tribunal, ie the Disabled Drivers Medical Board of Appeal, tended to make their decision based on medical model point of view since it was composed of all medical practitioners;⁵⁷¹ and that another tribunal, ie the Social Welfare Appeals Office, was not actually a proper independent appeal office because the initial appeal decision was from within the same organisation.⁵⁷²

Although the Ombudsman would welcome persons with disabilities making more complaints,⁵⁷³ one respondent representing persons with disabilities commented that persons with disabilities were not sufficiently empowered to bring matter to the attention of the Ombudsman as there was no provision for costs or assistance.⁵⁷⁴ Moreover, some people were afraid to make a complaint against public bodies due to their vulnerable position as recipients of vital support for their living.⁵⁷⁵ Another respondent also commented that some staff members of the Office of the Ombudsman were ignorant of disability rights and refused to take a complaint.⁵⁷⁶ A few respondents argued that, in some cases, the Ombudsman did not really investigate the complaints.⁵⁷⁷ A respondent

⁵⁶⁹ Interview-IDV (n 113).

⁵⁷⁰ *ibid.*

⁵⁷¹ Interview-IDP (n 153); See Disabled Drivers and Disabled Passengers (Tax Concessions) Regulations 1994, SI 1994/353, reg 6 (as amended).

⁵⁷² *ibid.*

⁵⁷³ DA 2005, s 40; Office of the Ombudsman, 'Annual Report 2012' - 'Annual Report 2017' (Office of the Ombudsman 2013 - 2018).

⁵⁷⁴ Interview-IDP (n 153).

⁵⁷⁵ *ibid.*

⁵⁷⁶ Interview-IDV (n 113); The complaint was made against a public body which appointed a person whom the complainant complained against as an inquiry officer under the Disability Act. Initially a staff member of the Office of the Ombudsman refused to take the complaint as she could not see if the Office could do anything for the complainant. After consulting with her colleague, she called the complainant back as her colleague agreed with the complainant's argument.

⁵⁷⁷ *ibid.*; Interview-IDS (n 192).

stated that '[t]hey hear your side and then they go and ask the other side what they think and they will repeat word for word the other side in their verdict and say this is the explanation.'⁵⁷⁸ Another respondent mentioned that a copy of a complaint to the Ombudsman regarding the way the complainant was treated in a psychiatric hospital was sent immediately to the consultant, so the case went nowhere.⁵⁷⁹

It was mentioned that, persons with disabilities also experience some cases where judicial review was the only avenue available if the complainant was unsatisfied with the decision, but it involved several requirements and considerable costs.⁵⁸⁰ Moreover, 'the State [had a] very hard reputation in terms of defending judicial review cases that [were] taken against it' by using the best legal team and vigorously going after the losing party for litigation costs.⁵⁸¹

There was only one comment on the appeal to the court from the perspective of persons with psychosocial disability that one person wanted to appeal her case, but no legal aid is available for appeals.⁵⁸² Moreover, when she requested to access the case file in the court, it contained only a few documents, which were not useful. Since the case was heard in private, there was no transcription available to review.⁵⁸³

Even though there are several criticisms of the current system, the existing legal mechanisms and regulations (except for those concerning mental health law matters) adequately guarantee the right to complain, challenge or appeal in civil matters and comply with international and regional human rights law standards. Although the legislation provides mechanisms to review the lawfulness of detention through both court and tribunal systems, the 'best interest' approach, embedded within current mental health law and practice, tends to provide decision makers with discretionary powers to justify the detention within the psychiatric system. In light of the UNCRPD principles and Ireland's declarations and reservations of the UNCRPD, the current mental health law

⁵⁷⁸ Interview-IDV (n 113).

⁵⁷⁹ Interview-IDS (n 192).

⁵⁸⁰ Interview-IDP (n 153); See text to n 529.

⁵⁸¹ *ibid.*

⁵⁸² Interview-IDS (n 192).

⁵⁸³ *ibid.*

and practice in Ireland cannot genuinely accomplish the right to challenge in the context of the involuntary detention of persons with psychosocial disability as these law and practice cannot ensure ‘appropriate and effective safeguards’ that respect will and preferences of persons with disabilities.⁵⁸⁴

6.4 RECOMMENDATIONS

According to the analysis of legal mechanisms and regulations on access to civil justice for persons with disabilities in Ireland discussed in section 6.3, several issues need to be enhanced to align with international and regional human rights law standards on access to civil justice, especially the UNCRPD. The recommendations to fulfil these standards are suggested for Ireland as follows.

A. Accessibility

Accessibility relates to procedures, physical environment, information and services of all public bodies. Every public body must appoint an access officer in accordance with the DA 2005 and provide contact details of its access officer in accessible formats for persons with disabilities. This is not only to ensure that their service users can generally access their service, but also their internal complaint mechanism is accessible when a dispute arises.

The State must review the accessibility of legal proceedings, physical environments, information and services and set standards that can ensure accessibility for all persons with disabilities. This must be done in consultation with organisations of persons with disabilities, along with an implementation timeframe and monitoring mechanism to ensure it progresses. The issues of accessibility of the witness box, judges’ bench, space for sign-language interpreters, microphones and sound systems within the courtroom identified by interview participants must be addressed.

The State must review its rules and procedures in relation to making a claim to courts and tribunals and an application to use services within the justice system, and provide

⁵⁸⁴ ‘Status of Treaties-UNCRPD’ (n 79).

mechanisms that accommodate different accessibility needs of different groups of persons with disabilities. The State must make information available in various accessible formats to accommodate the access of different groups of persons with disabilities. This must be available before a specific request is made; and reasonable accommodation still needs to be available for some persons who have unique accessibility needs.

B. Communication assistance

The State must provide sufficient funds to ensure communication assistance for persons with disabilities in all processes related to accessing justice. This includes, but not limits to, sign-language interpreter and advocacy service for every group of persons with disabilities. This assistance must also be specialised for legal proceedings. The development of agreed ISL signs for civil law proceedings should be encouraged to ensure consistency in approach throughout the justice system for Deaf persons in Ireland.

C. Legal assistance or representation

The State must provide sufficient funds to ensure legal representation for all and must ensure that persons with disabilities can access this. This could be achieved, for example, by introducing 'an outreach [legal aid] programme' for persons with disabilities due to their disadvantaged position as a marginalised group.⁵⁸⁵ Legal assistance must be also made available for more comprehensive types of civil cases, including tribunal proceedings, to also ensure equality of arms for persons with disabilities.

D. Legislation and enforcement

The State must review existing laws and regulations, and ensure abolition of all legislation and regulations conflicting with the equality principle. Although Ireland has reserved the right to permit substitute decision-making arrangements, Ireland is still encouraged to work toward an abolition of any law limiting legal capacity of adults with

⁵⁸⁵ Whyte (n 241) 471.

disability or allowing substituted decision-making (including the best interest interpretation); and to subsequently withdraw its reservation to fully comply with the UNCRPD. Additionally, all existing laws and regulations that protect, promote or guarantee the right to access to justice for persons with disabilities must have effective monitoring and enforcement mechanisms.

E. Independent review mechanism

The State must provide mechanisms that can guarantee the competence, independence and impartiality of all adjudicative bodies, including tribunals (except the court system, for which such mechanisms are already in place). One respondent suggested the establishment of ‘a single appeal panel’ or an independent review body to deal with all complaints concerning a decision of a public body after its internal complaints mechanism to ensure consistency of standards, procedures and decisions.⁵⁸⁶ It is also important that a person who takes the case to this appeal panel/review body must be sufficiently empowered to take the action and protected from negative consequences of his/her complaint. Other barriers unfairly impeding a person with a disability taking a case must be addressed. These include the complexity of the procedure, the costs of the proceedings, the costs of legal representation, and the risk of paying the litigation costs if the case is unsuccessful. Measures must be taken to ensure that the person who takes the case will have equal opportunities in the justice system with opponents, including public bodies.

F. Training programmes and awareness-raising

Appropriate and effective training programmes must be provided for all persons who are involved in accessing the justice system. These includes lawyers, judges, court staff, and all staff members of all entities who provide services related to accessing justice, for instance, inquiry officers who review internal complaints regarding a public body under the DA 2005, staff members of the Office of the Ombudsman, the Legal Aid Board, or any administrative tribunal. The training programme must include all aspects of disability rights, equality and non-discrimination on the ground of disability, disability issues and

⁵⁸⁶ Interview-IDP (n 153); Byrne and McCutcheon (n 29) 402.

awareness, and disability orientation. Disability awareness-raising programmes must be included, so that persons with disabilities themselves, other people working in public bodies and general public will be able to recognise disability rights. In particular, persons with disabilities must be sufficiently empowered to be able to exercise their rights to access to civil justice through different available channels.

G. Participation of persons with disabilities

The State must ensure participation of persons with disabilities in two aspects. The first aspect relates to the right to be heard or a fair hearing. Persons with disabilities must be able to, not only attend or be present at the court hearing, but also effectively participate in the proceedings if they could and wish, with an appropriate support available. The second aspect concerns their opportunity to actively participate in decision process if they wish, such as in the process of reviewing accessibility of courtroom and information accessibility, or in the court or tribunal proceedings.

H. ADR mechanisms

The State must ensure that existing ADR mechanisms, such as mediation proceedings in the WRC tribunal, operate in line with international standards. The State may provide more of these mechanisms and encourage their usage.

CONCLUSION

Ireland has both regional and domestic legal mechanisms guaranteeing the right to access to civil justice for persons with disabilities. Both the EU and the CoE are significant influential factors upon the Irish legal system. The case study shows that most aspects relating to judiciary, ie their competence, independence and impartiality; equal treatment by courts; fairness and publicity of the legal proceedings, as well as the right to a remedy, reparation or compensation and the right to complain, challenge or appeal in civil matters, are sufficiently guaranteed according to international and regional human rights law standards. However, there are still issues concerning mental health law, as the best interest approach can be applied against the will and preferences of persons with disabilities, which is not in line with the principles of UNCRPD. Similarly, concerns

remain with the maintenance of forms of substitute decision-making in Irish law, including in the Assisted Decision-Making (Capacity) Act 2015, which has an impact on the ability of persons with disabilities to access civil justice.

The findings from the qualitative data show that some persons with disabilities could not fully enjoy all aspects of this right in practice due to various issues. Many groups of persons with disabilities raised concerns over the current tribunal system, where the system cannot truly guarantee independence of tribunals. Moreover, the right to equality of arms between the parties cannot be assured as no state-funded legal aid is available for these cases. Although quality of state-funded legal and communication assistance appears not to be an issue in Ireland, the amount of services the State can provide is still not sufficient to ensure that persons with disabilities would be able to avail of these for effective access to civil justice. Additionally, the available communication assistance cannot comprehensively support every group of persons with disabilities to effectively access civil justice. This may affect the right to a fair trial guaranteed under European and international human rights law.

Most groups of participants in this research seem to agree that the integrity of judges in Ireland meets international human rights law standards. However, participants representing persons with disabilities and those who are court staff members still had different views regarding environmental accessibility of the courthouses/courtrooms and of other related court services. These require further attention from the State and collaboration among different groups of stakeholders to resolve the issues. Furthermore, the State still needs to pay more attention on the issue of personal presence and participation of persons with disabilities in all legal proceedings to ensure full compliance with European and international human rights law standards. In the next chapter, the research presents a comparative analysis of case studies of Thailand and Ireland, and revisits the five-elemental conception of access to civil justice previously adopted in chapter 4.

CHAPTER 7:

CROSS-CASE ANALYSIS

INTRODUCTION

The comparative law approach in this chapter aims to serve the second purpose of this research mentioned in section 1.3, which is to facilitate the development of reforms on access to civil justice for persons with disabilities in Thailand and Ireland. The two case study countries, Thailand and Ireland, have significant differences in terms of their legal systems and regional legal mechanisms, but both are constitutional democracies under the rule of law and members of the international human rights legal community. Their differences are perceived as benefits for this study as they elicit new understandings of different legal systems and how these systems operate in practice. Diverse angles of these legal systems have been observed and analysed to understand whether these affect access to civil justice for persons with disabilities. This chapter employs thematic analysis to examine the findings of the two case studies. Their similarities and differences are reported in the first three headings and followed by a theoretical discussion of the research findings through the five-elemental conception of access to civil justice adopted in section 4.3.

7.1 LEGAL SYSTEM

It appears that both countries have mixed sources of law, including written law and judicial precedent. The written law is a priority, especially the Constitution, which is at the pinnacle of the hierarchy of legal norms. Significant differences between these countries include the stability of their Constitutions, the framework of their regional mechanisms, and the entry into force of domestic law.

7.1.1 Stability of the Constitution

Although there have been several amendments to the 1937 Irish Constitution, there is a clear continuity of the rule of law guaranteed in the Irish legal system, whereas this guarantee was intermittently interrupted by military coups in Thailand.¹ There was no evidence that the changes to the Thai Constitution directly affected the existing statutory guarantees on access to civil justice for persons with disabilities, but some of the changes revoked the prior constitutional guarantees on this issue described in section 5.1.3.

7.1.2 Framework of regional mechanism

It appears that the European regional mechanisms provide legally binding instruments that protect and guarantee the right to access to civil justice for persons with disabilities in Ireland, while no such instrument is available in the Asia-Pacific region or the Southeast Asia sub-region where Thailand belongs. The instruments of the European Union and the European Convention on Human Rights, which are legally binding in Ireland, provide a meaningful monitoring and protection system for the right to access to justice in Ireland. These instruments indirectly monitor Irish domestic activities to ensure that they comply with regional standards. In comparison, there are regional cooperation and political instruments in the Asia-Pacific region and the Southeast Asia sub-region, but these have no legally binding effect on Thai domestic legislation,² and as such are beyond the scope of this study.

¹ Nine out of thirteen military coups caused the repeals of the entire Constitutions; ‘85 Years of Thai Constitution: When will the Military Coup Stop?’ (*BBC News*, 6 April 2017) <bbc.com/thai/thailand-38263329> accessed 28 March 2018.

² These include the Incheon Strategy to “Make the Right Real” for Persons with Disabilities in Asia and the Pacific 2012, the Ministerial Declaration on the Asian and Pacific Decade of Persons with Disabilities (2013-2022), the Beijing Declaration on Disability-inclusive Development 2012, the Asian Human Rights Charter 1998 (A Peoples’ Charter), the ASEAN Human Rights Declaration 2012 and the Bali Declaration on the Enhancement of the Role and

7.1.3 Entry into force of domestic law

The commencement of legislation in these countries occurs in notably different ways. After legislation is enacted, Thai Acts state the specific time for commencement, while Irish Acts specify that the legislation will come into operation when the commencement order is issued by the relevant Minister in accordance with the provisions of the Act. Accordingly, some legislation in Ireland or some parts of it may not be commenced, even many years after enactment. For example, a provision concerning the 'Personal Advocacy Service', enacted in the Citizens Information Act 2007, is not commenced as yet.³ Therefore, enactment of legislation is no guarantee that it is in force in Ireland. However, this issue does not relate to practicability or effectiveness of enforcement of legislation in both jurisdictions. This requires separate assessment, which can be seen through the findings of the qualitative research of each case study.

7.2 JUSTICE SYSTEM

The types of civil justice institutions available in both countries are alike, but each institution may differ in some respects. The main institutions include the court, tribunal and Ombudsman systems. Alternative dispute resolution (ADR) mechanisms, such as arbitration and mediation, are available in both countries, but they have not been discussed in detail in the case studies. Distinctions and similarities of the main institutions are as follows.

7.2.1 Court system

The court systems of Thailand and Ireland vary in several aspects due to the differences in each legal system. Thailand has a parallel judicial system, in which the Courts of Justice, the Constitutional Court, the Administrative Courts and the Military Courts

Participation of the Persons with Disabilities in ASEAN Community and Mobilisation Framework of the ASEAN Decade of Persons with Disabilities (2011-2020), 2011.

³ n 331 in ch 6.

operate independently. In contrast, the Courts Service of Ireland has exclusive jurisdiction over every type of cases, including through appeal or judicial review proceedings of cases initially heard under tribunal proceedings as specified by law. Judges of these countries are recruited differently, but each judiciary respects the notions of competence, independence and impartiality. Although different, the research findings show that both systems are legitimate and meet international and regional human rights law standards.⁴ Integrity of the court system in both countries seems to be well respected by most persons with disabilities in these countries according to the qualitative research.⁵

7.2.2 Tribunal system

The administrative tribunals in Thailand are comparable to the rights tribunals in Ireland. In both countries, each tribunal is established by legislation as an independent institution and its findings are subjected to the courts' review.⁶ However, a question regarding independence of some tribunals still exists in both jurisdictions as noted.⁷ One distinction between tribunal systems in Thailand and Ireland is that there is a specific tribunal on discrimination against persons with disabilities in Thailand, while tribunals in Ireland deal with comprehensive issues on equality. The research findings cannot clearly indicate how effective such a tribunal in Thailand is as it has only been established in 2009.⁸ The findings of qualitative research in the Irish case study show some concerns over some tribunals on the issues of their independence and attitudes towards persons with disabilities.⁹

⁴ Sections 5.3.4 and 6.3.4.

⁵ Ch 5-6.

⁶ By the Administrative Courts in Thailand, or by the Courts Service in Ireland

⁷ Sections 5.3.4 and 6.3.4.

⁸ n 294 in ch 5.

⁹ Texts to nn 395-396, 399, 571-572 in ch 6.

7.2.3 Ombudsman system

A difference between the Ombudsman system in both countries is that in Thailand it is established by the Constitution, while it is established through legislation in Ireland. However, the functions of the Ombudsmen in both jurisdictions are very similar and their decisions are not legally binding. In the Thailand case study, there is no information on the operation of this system in practice in the qualitative research, while the desk-based research shows that, historically it could not sufficiently protect people's rights.¹⁰ From the desk-based research in the Irish case study, this system seems to be an effective choice for accessing civil justice in general, but the qualitative research findings suggest that this system does not seem to be an effective channel for persons with disabilities in accessing civil justice.¹¹

7.3 LEGAL MECHANISMS AND REGULATIONS

Similarities and differences in the right to access to civil justice for persons with disabilities in both countries will be presented through the six categories of the right to access to civil justice as follows.

7.3.1 Right to equality before courts and tribunals

A. Equal access to courts and tribunals

The main concern in both countries is the limitation of legal capacity of persons with disabilities to access courts and tribunals independently. Ireland has recently introduced a law that supports decision-making of persons with disabilities, but it is not yet fully commenced.¹² Despite this, substituted decision-making regimes are still in operation in both countries through legislation that limits legal capacity of persons with certain

¹⁰ Text to n 437 in ch 5.

¹¹ Texts to nn 541, 574-579 in ch 6.

¹² n 107 in ch 6.

disabilities,¹³ including persons with psychosocial, cognitive or intellectual disabilities. As a result, they cannot access courts and tribunals independently. This limitation, in both countries, violates the principle of equality before the law as those whose legal capacity is restricted or denied are not recognised by law as being equal to other people.

Another concern relates to the accessibility of services related to accessing justice. This is still problematic when a service provider, such as the courts service, cannot accommodate minimum accessibility requirements of each group of persons with disabilities. For example, the paper-based requirements of the court service are not accessible for visually impaired people in either jurisdiction.¹⁴ The issue of environmental accessibility of the service affects not only persons with physical disability but also those with other disabilities. For instance, some courtrooms do not provide appropriate space for sign-language interpreters who facilitate a Deaf person in court proceedings.¹⁵ In this respect, building control laws play a significant role in setting environmental accessibility standards. Both countries have such laws but the requirements differ in detail. The monitoring system which allows for a building inspection following construction, is a good feature of the Irish building control law to ensure that existing buildings also comply with accessibility standards. However, challenges remain present for numerous buildings that are exempted from these standards, particularly historical buildings (which include many courthouses). The State must ensure that the usage of these buildings will not violate the right to access to justice for persons with disabilities, which is protected by international human rights law standards.

B. Equality of arms

In both case studies, the issue of information accessibility was discussed in this subsection. Access to information is a major challenge for persons with disabilities in accessing justice in both countries. Some persons with disabilities do not know what rights they have; therefore, they cannot exercise these rights. Both countries have disability-specific legislation imposing on the State a duty to provide information in

¹³ Texts to nn 114-119 in ch 5 and nn 111-112 in ch 6.

¹⁴ Texts to n 167 in ch 5; text to nn 113 and 468 in ch 6.

¹⁵ n 165 in ch 6.

accessible formats for persons with disabilities if requested. The qualitative research findings show that the passive role of State agencies in providing accessible formats of information upon request was not sufficient to facilitate access to civil justice for persons with disabilities.

C. Equal treatment by courts and tribunals

This aspect of the right to equality before courts and tribunals is protected through legal provisions concerning non-discrimination and impartiality of courts and tribunals. The findings from the qualitative research in both countries show that judges were perceived to generally provide equal treatment in court proceedings for persons with disabilities. However, equal treatment can be affected by the decisions of judges in some situations, such as where persons with disabilities are considered not having legal capacity to give evidence or participate in the court proceeding, or where judges take paternalistic best interest approaches rather than respecting the will and preferences of persons with disabilities.¹⁶ This indirect discrimination may be incurred due to a lack of disability awareness or understanding.

D. Equality before the law

It is very clear that equality before the law is guaranteed by the Constitutions of both countries, but the legal capacity of some persons with disabilities is not equally recognised as aforementioned.¹⁷

7.3.2 Right to legal assistance or representation

Both countries provide state-funded legal advice and representation in civil cases for people who have financial difficulties, through their legislation. However, persons with

¹⁶ Text to n 217 in ch 6.

¹⁷ Text to n 13.

disabilities still face many challenges in accessing these services. There are some points in the system of each country to which the State must pay more attention.

A. Legal advice

State-funded legal advice in both countries is available for most civil matters. The difference is that it is not free in Ireland and there is no specific scheme for persons with disabilities. There are several State agencies providing free legal advice in Thailand and there is a statutory scheme specifically available for persons with disabilities. However, in both countries, there is still a question regarding expertise of lawyers on disability issues because training on disability-related matters is not compulsory or widespread. Moreover, the connection between organisations of/for persons with disabilities, or individuals with disabilities and lawyers who are experts on disability matters seems very limited.¹⁸

B. Legal representation

In both countries, state-funded legal representation for civil matters operates in the same way as the legal advice system, but excludes some civil matters. An applicant needs to pay contributions for legal representation in Ireland, while an applicant in Thailand receives some amount of financial support towards the court fees and attorney fees, which may not cover the actual costs incurred.

In Ireland, cases under the jurisdiction of tribunals are not eligible for the State-funded legal representation, but some other organisations, such as the Bar of Ireland and the Free Legal Advice Centres (FLAC), may be able to provide legal representation or assistance for some tribunal cases. In Thailand, these cases are covered by the State-funded legal aid scheme but under the same limitations on financial support as for court cases, which might not be sufficient to guarantee effective access to justice.

In Thailand, there were some concerns over the quality of lawyers on the legal aid scheme, whereas this matter is not a concern in Ireland, according to participants in the

¹⁸ Texts to nn 232-241 in ch 5 and nn 279-283 in ch 6.

qualitative research, who focused more on its accessibility and delays in accessing the service. Apart from particular cases without court fees, there is a statutory provision in Thailand allowing the court to exempt some litigants with financial difficulties from the court fees if requested. This option is not available in Ireland.

7.3.3 Right to communication assistance

Sign-language interpretation is available for civil proceedings in both countries, but there are some challenges with its use in civil law matters due to the lack of centralised standards in sign-language for certain legal terms. The quality of the sign-language interpreters is still a matter of concern in Thailand because there is no skills assessment to become a registered sign-language interpreter. This is not an issue in Ireland as all registered interpreters must be assessed and possess a specific qualification.¹⁹

Advocacy services provide another form of effective communication assistance in Ireland. However, the availability of this service is not sufficient, in terms of its quantity, to facilitate all persons with disabilities in legal proceedings. This service is not currently available in Thailand, but the rules of evidence do not forbid the use of this assistance in court proceedings.

The use of intermediaries is another form of communication assistance available in Ireland for civil cases concerning the welfare of a person with psychosocial, intellectual or cognitive disabilities who cannot live independently,²⁰ but the findings from qualitative research show that it is not widely used in Ireland. The court may allow a family member to act as an intermediary for a person who uses unconventional communication methods, but this usage is very limited as the court still needs to ensure that such a person is accurately and independently represented. This is not currently available for civil cases concerning persons with disabilities in Thailand, but the court may allow its usage upon request as it is not prohibited by the rules of evidence.

¹⁹ Text to n 350 in ch 6.

²⁰ Texts to nn 426-434 in ch 6.

In both countries, other means of communication assistance can be introduced in court proceedings as their rules of evidence have no prohibition on this matter. However, it is still within the court's consideration whether a particular communication assistance should be allowed or not. This is to protect fairness of the proceedings.

7.3.4 Right to be heard or to a fair hearing

A. Notions of competence, independence and impartiality of courts and tribunals

In both countries, this issue seems to be the main strength of the judicial system to ensure persons with disabilities the right to access to civil justice. Although both legal systems are different, the notions of competence, independence and impartiality of courts and tribunals are well protected through the respective Constitutions. The competence of judges is ensured through the legally binding effect of their judgements.²¹ Their independence is safeguarded, whereby their promotion, remuneration, or removal from office cannot be determined by the government.²² The appointment procedures of judges in these countries may differ in detail, but both prove their merit and require the same qualifications to become judges, consisting of both legal knowledge and integrity. Impartiality of judges is guaranteed through their independence and professional ethics, and all judges in both countries are required to make a declaration concerning independence and impartiality before taking office.

These aspects are less strict in the tribunal system since tribunals exercise administrative power, not judicial power. However, they still need to act judicially in compliance with basic rules of natural justice and fair procedures. Most tribunals are established as independent entities, but there is no requirement for their members to make a declaration on their independence and impartiality. Moreover, each tribunal has specific requirements for its members' qualifications, and different systems for

²¹ The notion of competence in this context refers to the power to make legally binding decision. See section 1.6.4 for detail.

²² Texts to nn 282-284 in ch 5 and nn 373-377 in ch 6.

determining the appointment and tenure of its members. Therefore, each tribunal is subjected to a different controlling and monitoring mechanism. As mentioned in the first section of this chapter, all tribunals are ultimately subject to the courts' jurisdiction. In summary, the legislation cannot guarantee the notions of independence and impartiality the tribunals as it does for those of the courts. As a result, it could not ensure that the right to be heard or to a fair hearing of persons with disabilities is well protected in the proceedings of every tribunal.

B. Fairness and publicity

Fairness is the core principle for court proceedings, which is protected in both countries. It is also embedded in all other elements of access to civil justice. In any case where there is no legislation, judges may make further provisions to maintain fair procedures. This includes adaptation of the hearing procedure to enable effective participation of persons with disabilities, provided that it does not conflict with the rules of evidence. However, this still greatly relies on the individual discretion of each judge and the legislation cannot clearly ensure that will and preferences of persons with disabilities will be respected equally in all cases.

Publicity is guaranteed in both jurisdictions to ensure transparency of court proceedings. However, both countries allow for private hearings in some sensitive cases, such as cases concerning family matters or the legal capacity of a person, to protect the privacy and interests of some groups of people. Any media publication concerning these cases in both jurisdictions can only be published without identifying the protected person. The only difference between these countries is that, in Thailand, the court order placing a person under a guardianship regime must be published in the Government Gazette, while such publication is prohibited by the Irish law.

C. Personal presence

In both countries, this principle is not absolute in civil cases, but provides a minimum guarantee that all parties have an equal opportunity to attend the proceedings if they wish to do so. A problem remains that some persons with disabilities do not actually have the opportunity to appear in person because information concerning the court case sent to them is not in an accessible format. When a person with disability has an opportunity to be present and participate in the proceedings, the qualitative research indicates that

it most likely leads to a positive outcome for his/her case.²³ Ireland further requires applying the “rule of personal presence” developed by its regional mechanism, the ECtHR, in some civil cases where the private life of the person in question would be seriously impacted by the court’s decision. This rule is also appeared in the ADMA 2015 for the case concerning persons’ legal capacity.²⁴ However, neither the right to attend the proceedings or the rule of personal presence can sufficiently ensure that persons with disabilities can effectively participate in all legal proceedings as required by the UNCRPD.²⁵

D. Timeliness of the proceedings

The timeliness of the proceedings is an issue of concern which both States endeavour to guarantee through legislation. The aim of this principle is to provide an appropriate timeframe for each specific case. Some cases may need more time for their proceedings to facilitate different needs of the litigants, while some cases may need quicker proceedings to access an immediate remedy, such as cases concerning access to education or health services.²⁶ However, excessively fast or slow proceedings may impact the fairness principle; therefore, it is the duty of the court to determine the right balance for each individual case. A question of fairness of the proceedings was raised in the qualitative research where the court proceedings concluded quickly, where one respondent was concerned that a legal team might not have had adequate time to prepare the case and the person in question did not have an opportunity to present his/her case.²⁷

²³ Texts to n 354 in ch 5 and n 471 in ch 6.

²⁴ See texts to nn 458-465 for detail.

²⁵ Texts to nn 259-262 in ch 4.

²⁶ Text to n 482 in ch 6.

²⁷ Text to n 485 in ch 6.

7.3.5 Right to a remedy, reparation or compensation

In both countries, remedies are guaranteed through court and tribunal systems. Compensation is awarded based on the actual loss experienced by the litigant, but the court can award punitive damages in some circumstances specified by law. In Ireland, punitive damages can be awarded in cases where the violation of rights is done deliberately or with the intention to make a profit.²⁸ In Thailand, this can be awarded in specified cases, including cases where the unjust discriminatory actions against persons with disabilities are done deliberately or with severe carelessness.²⁹ Other remedies, namely injunctions, declarations and specific performance, can be sought through court and tribunal systems as specified by law.

These remedies are available in both countries, but their effectiveness mostly depends on enforcement mechanisms, where assessment of their effectiveness is beyond the scope of this research. However, some comments arose in the Thai case study that, in some cases where persons with disabilities can access courts or tribunals, this cannot guarantee that they will get an effective remedy because of barriers to the enforcement process. For example, the enforcement process may be too complicated, or the respondent ignores the judgement or does not have any assets from which to pay the compensation. More effective remedies include extra-judicial remedies, such as a fund for victims of road accidents in Thailand, where an applicant can apply for immediate support to alleviate the problem, or mediation, where both parties are truly willing to find an amicable solution. In the Irish case study, there was no comment on enforcement processes from the participants in the qualitative research, but it appears from their views that mediation is still not widely or effectively used in cases concerning persons with disabilities.

²⁸ Text to n 509 in ch 6.

²⁹ Text to n 396 in ch 5.

7.3.6 Right to complain, challenge or appeal

The requirement for guaranteeing this right in international human rights law standards is not very strict in civil cases, but the State is advised to provide independent formal complaints mechanisms, which are accessible for persons with disabilities.³⁰ There are similar complaints mechanisms in both countries. These include internal complaints mechanism to the relevant public body, specific tribunals, and the Ombudsman system. In Thailand, there is a specific tribunal considering unfair discrimination against persons with disabilities. There is also a similar tribunal in Ireland, but it has a broader remit to consider several types of discrimination cases, including discrimination on the ground of disability. The Ombudsman is available as an independent formal complaints mechanism in both countries, but it does not seem to have achieved significant change in terms of disability matters according to the qualitative research.³¹ It appears in both countries that the main obstacles that impede persons with disabilities to exercise their rights to complain are a lack of information on this right and a fear of negative consequences that might incur if a complaint is made against a public body.

Mechanisms to facilitate the right to challenge or appeal are available in both countries. These include the judicial system where tribunals' decisions are under the jurisdiction of the Administrative Courts for full reviews in Thailand, and under the means of a judicial review in Ireland, whereby the High Court will only review the tribunal's procedure but not interfere with the facts of the case.³² Another mechanism concerning the right to challenge is the tribunal system reviewing detention orders in mental health law cases. The main difference between the mental health tribunals of these countries is that the case will be reviewed automatically in Ireland, while it operates upon request in Thailand. Moreover, an issue of detention in mental health law is not widely discussed in the context of civil justice in Thailand.

³⁰ Text to n 277 in ch 4.

³¹ The desk-based research of Ireland case study suggests that Ombudsman is a useful alternative justice mechanism in general matters. There is no data from qualitative research of Thailand case study regarding the Ombudsman mechanism on access to civil justice concerning persons with disabilities.

³² Text to n 547 in ch 6.

The right to challenge or appeal to a higher court are available similarly in both countries. Most cases are subjected to an appeal on the facts and/or on a point of law. The qualitative research showed that an appeal to a higher court in Thailand may take up to eight years to reach the Supreme Court's decision, and judicial review in Ireland may be the only avenue to challenge or appeal in some cases, where the procedure involved considerable costs and often incurred lengthy delays.³³

7.4 DISCUSSION OF THE RESEARCH FINDINGS THROUGH THE THEORETICAL CONCEPTION OF ACCESS TO JUSTICE

This section further discusses some issues from research findings of the two case studies that impact significantly on the ability of persons with disabilities in both countries to access civil justice. The discussion is based on the five-elemental conception of access to civil justice adopted in Chapter 4 as a set of elements to be considered to achieve the “access to justice functioning” of persons with disabilities. In brief, the five-elemental conception of access to civil justice for persons with disabilities is drawn from the four-dimensional conception of justice adopted in chapter 2, comprising institutional, capability, non-domination and equality dimensions.³⁴ The five elements of conception of access to civil justice include 1) effective and enforceable legal mechanisms that

³³ Texts to n 438 in ch 5 and nn 580-581 in ch 6.

³⁴ In short, the institutional dimension emphasises the existence of legal institution, in which legal provisions and the justice system are developed. The capability dimension focuses on the actual possibility of persons with disabilities to access to civil justice. This possibility entails the real freedoms and opportunities of persons with disabilities to achieve civil justice, which require appropriate supportive mechanisms to achieve these freedoms. The non-domination dimension is a supplement to the first two dimensions to ensure that legal institution is under the rule of law, and provision of supportive mechanism undertakes the rights-based approach to ensure that the freedoms to achieve access to civil justice for persons with disabilities do not rely on goodwill of other people. The equality dimension elaborates what rights to be included in the right-based approach and justifies that their existence is not to privilege any group or person, but to provide equality.

promote, protect, and guarantee human rights of persons with disabilities; 2) a justice system based on the principle of competence, independence and impartiality of the institutions and their proceedings; 3) supportive mechanisms enhancing capacity of persons with disabilities to assert their rights and access to the justice system; 4) positive and inclusive attitudes towards persons with disabilities, respecting their dignity, will and preferences and open for their participation; and 5) effective enforcement mechanisms guaranteeing that outcomes of the justice system are enforceable. These elements overlap and intertwine. As noted, element 5 is essential to evaluate the effectiveness of access to civil justice as a whole, but a detailed investigation of its application is beyond the scope of this research. Elements 1 to 4 can be reflected through the research findings of the two case studies as follows.

7.4.1 Element 1: effective and enforceable legal mechanisms

Both countries operate under the rule of law principle and agree, through their ratification or accession to various instruments, to respect, protect and fulfil the rights and freedoms contained in the treaties. The previous section has already summarised how the case study countries realise their international and regional obligations concerning the right to access to civil justice. According to this element, effective and enforceable legal mechanisms will only exist where there is respect for other substantive human rights as they are an indispensable ground for persons with disabilities to assert their rights through the justice system. However, a detailed analysis of the availability of these rights and their effectiveness is beyond the scope of this research.

The research findings of the two case studies further demonstrate that stability of the Constitution is another condition that can affect the effectiveness of legal mechanisms, especially those concerning the right to access to justice. In terms of the institutional dimension of justice, the Constitution is a vital tool within a democratic legal system to ensure that the right to access to justice is firmly guaranteed and will not be constantly or easily changed by the State. The Constitution of both countries sets out how judicial power is operated. It also sets up justice institutions, with the Judiciary as the main, but not exclusive, institution. Nullity of the Constitution, which has happened many times in Thailand, leads to uncertainty within justice institutions and impacts on the right to access to justice. Statutory guarantees can be amended more easily than constitutional guarantees to access justice. After a change to the Constitution, it is possible that the

existing statutory guarantees might not align with or be supported by the new constitutional provisions. This will affect the capability, non-domination, and equality dimensions of justice if the change impacts on any guarantee that previously supports these dimensions, such as the right to legal aid, employment and education.

7.4.2 Element 2: competent, independent and impartial justice system

This element emphasises the importance of the capability, institutional and non-domination dimensions for persons with disabilities to access civil justice. On the capability dimension, justice institutions must be practically accessible by persons with disabilities. Complexity of the proceedings and of the overall justice system is one of many factors that needs to be addressed to enable persons with disabilities to have real freedoms and opportunities to access civil justice. In both countries, some of their civil justice mechanisms are complex and not easy to access without adequate information or assistance from a legal professional. Some proceedings require a plaintiff to fulfil prerequisite conditions, such as the exhaustion of all available remedies.³⁵ The availability of choices for access to civil justice may be a barrier to persons with disabilities if the proceedings of each institution are different and support or information is not adequately provided. Moreover, the existence of a variety of choices may not provide real freedom to choose if some of those choices are not easy to access, cannot provide a high quality of service, or if their outcome is not enforceable.

On the institutional dimension, justice institutions must produce an effective justice outcome, and have adequate guarantees of their competence, independence and impartiality. International, regional and domestic laws share a mutual endeavour to establish justice institutions that can effectively protect the rule of law, which guarantees persons with disabilities all of their rights. Independence and impartiality of justice

³⁵ For example, a person must seek remedies from administrative agencies and tribunals before he/she can file a case to file a case to the Administrative Courts (in the Thai jurisdiction, text to n 394 in ch 5); or to the High Court for judicial review (in the Irish jurisdiction, text to n 580 in ch 6 and see RSC Ord 84 (as amended) (Ireland) for further details).

institutions are required to ensure that the proceedings and outcome are based on the equality principle, while competence is needed to ensure the enforceability of such outcomes.

The civil justice institutions established by these laws are mainly the judiciary, tribunals and Ombudsman systems. However, the characteristics of these institutions are different. The court systems in both countries are firmly established with the guarantees of their competence, independence and impartiality. Despite this, there are still many barriers impeding persons with disabilities in accessing the court system. The laws in both countries attempt to ensure that tribunals fulfil the same requirements for competency, impartiality and independence as the judiciary, but this is very challenging due to the different origins of tribunals' authority. The Ombudsman system in both countries is established by law. Its characteristics are different from those of courts and tribunals, especially in terms of its competence to make legally binding decisions. However, it is counted as a choice of justice institutions which could alternatively provide access to justice. Apart from these main justice institutions, there are also other ADR mechanisms in both countries, such as mediation and arbitration. However, a detailed analysis of the operation of these mechanisms is beyond the scope of this study.

For the non-domination dimension, availability and accessibility of these institutions in the justice system are the key factors to ensure that persons with disabilities have effective channels to protect their rights from violations. The research findings from both case studies show that the court system is the most reliable justice institution for persons with disabilities, in terms of its competence, independence and impartiality. However, it might not be accessible if support for accessing civil justice is unavailable for persons with disabilities.

7.4.3 Element 3: supportive mechanisms

This element is essential for persons with disabilities to achieve their access to civil justice functioning as it enhances their capacity to assert their rights and access the justice system. The supportive mechanisms can include a wide range of options. Apart from the supportive mechanisms within the legal mechanisms and regulations discussed earlier, broader supportive mechanisms are required; for example, through the

establishment of an equitable social welfare system, access to education, access to information, and rights empowerment.

Social welfare system

The welfare system can be seen as a factor that supports both freedom and opportunity of the person to achieve access to civil justice. This issue has not been discussed in detail in either case study as it does not directly relate to legal mechanisms and regulations on access to civil justice. However, the interview data from the perspective of persons with disabilities in Thailand shows some connections between social welfare and opportunities to achieve access to civil justice. It was mentioned that it was not easy for persons with disabilities to think about how to fight for their rights when they were still struggling with their basic needs.³⁶ If they could choose, some participants stated that they would prefer to use the time spent in court to earn more income for their living.³⁷

On the other hand, the interview data in the Irish case study also suggested that some persons with disabilities who were receiving some social welfare benefits may not want to make a complaint or take a case against a public body because they were afraid of losing those benefits.³⁸ From the non-domination dimension perspective, this characterises a form of arbitrary power that prevents persons with disabilities to have a real freedom in accessing civil justice. The fear of losing the indispensable benefit for their living is an environmental factor that prevents persons with disabilities to pursue opportunities to access the justice system and achieve the functioning they desire. In this case, to be considered as a support mechanism, the social welfare benefit provided to them must be guaranteed by law if the individual meets certain criteria and be free

³⁶ Interview with Respondent TDV, a representative of a disabled people's organisation of persons with visual impairments (Bangkok, Thailand, 13 October 2015)

³⁷ *ibid*; Interview with Respondent TDP, a representative of a disabled people's organisation of persons with physical and mobility impairments (Pathum Thani, Thailand, 5 October 2015); Interview with Respondent TL2, a lawyer (barrister & solicitor) (Bangkok, Thailand, 3 August 2016); Interview with Respondent TDH, a representative of a disabled people's organisation of Deaf persons (Bangkok, Thailand, 21 October 2015)

³⁸ Text to n 575 in ch 6.

from the exercise of arbitrary power of on the part of service providers who could decide whether to give such a benefit to the person or not.

Access to education

The right to education is outside the scope of this research, but I would argue that access to education is a significant supplement to many other factors that enhance access to civil justice, including access to information, employability, and financial resources. From my understanding and experience, education, at least, provides the person who can access it with skills in acquiring meaningful information. Accordingly, persons with disabilities who can access education will be able to use these skills to gather information concerning access to civil justice. Likewise, training is a form of education that provides people who work in the justice system with greater awareness and understanding of disability rights and issues, as well as knowledge and skills in providing accessible information and services for persons with disabilities.

The statistics in the Ireland case study suggest a significant linkage between education levels and unemployment rates, as the higher the education level, the lower the unemployment rate.³⁹ According to this trend, it is likely that the unemployment rate will be much greater in the group of people who do not attend school, and approximately 40 percent of persons with disabilities in both countries have no opportunity to attend school.⁴⁰ This may lead them to a financially difficult situation. Besides, many persons with disabilities have higher costs of living to fulfil their specific needs.⁴¹ Without financial assistance, the high cost of litigation can be a great barrier for persons with disabilities in accessing civil justice.

The cost of litigation nonetheless presents a major barrier in accessing civil justice for persons with disabilities and others. Joachim Zekoll suggests that in systems where each party is responsible for his/her own legal costs, there are lower barriers in accessing civil justice for plaintiffs who have financial difficulties.⁴² It encourages more settlement as

³⁹ Text to n 70 in ch 6.

⁴⁰ Sections 5.2 and 6.2.

⁴¹ Amartya Sen, *The Idea of Justice* (The Belknap Press 2009).

⁴² Joachim Zekoll, 'Comparative Civil Procedure' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 1327.

this may cost less than the respondent's litigation costs that cannot be recovered.⁴³ The criticism of this approach is that '[I]itigation without financial risks to plaintiffs encourages the pursuit of unwarranted and frivolous claims, ... [where] defendants[/respondents] may be forced into early settlements that do not necessarily reflect the merits of the case.'⁴⁴ In comparison, systems where the losing party pays all legal costs, including reimbursing the costs of the winning party, may discourage some litigants with limited resources, whose case has a chance of success.⁴⁵ Litigants may also be discouraged from taking cases in which their opponents are superior in terms of equality of arms, particularly where opponents are public bodies with access to significant legal resources to defend the case. Zekoll views that financial assistance 'may promote litigiousness', but 'poorly developed' assistance will also preclude accessing justice through litigation.⁴⁶

The concepts of education, employability, finance, access to information and access to civil justice are intrinsically linked. Therefore, education is an essential factor that gives persons with disabilities a real opportunity to access civil justice considering the capability dimension.

Access to information

This issue has been discussed in both case studies. Access to information is extremely crucial from the initial stage of access to civil justice. Without information, some people do not know that they have a particular right, or that it has been violated; some people may know their rights but do not know what steps they should take when their rights are violated; and some people do not know that their actions violate other people's rights. When it relates to persons with disabilities, this issue must be given serious attention, not only regarding the contents of information, but also its formats and channels of access. This concerns both providers and recipients of information. Therefore, awareness-raising and trainings concerning disability issues are essential for both people in the justice system and persons with disabilities themselves. Additionally, understanding of disability matters is also important to prevent direct and indirect

⁴³ *ibid.*

⁴⁴ *ibid* 1356.

⁴⁵ *ibid.*

⁴⁶ *ibid* 1357.

discriminatory actions on the ground of disability. This includes understanding the issues of accessibility, reasonable accommodation, disability rights, disability equality and disability awareness. On the capability dimension, both access to information and understanding of disability matters are key factors affecting real freedoms and opportunities of persons with disabilities to access to civil justice.

Rights empowerment

Rights empowerment for access to civil justice is another mechanism that can be achieved through various arrangements. This includes opportunities to exercise the rights in the six categories of the right to access to civil justice discussed in the previous section, such as the right to personal or communication assistance, advocacy, legal assistance and legal aid. This reiteration is to emphasise that the rights empowerment should be available for any justice mechanism, including complaints processes and ADR mechanisms. Empowerment is a crucial feature of the capability dimension to ensure that persons with disabilities have real freedoms to choose among the justice institutions available and real opportunities to access the justice mechanism of their preference. This must be considered together with the non-domination dimension by guaranteeing that empowerment does not depend on the good will of others or on the basis of charity, but that persons with disabilities have an established right to obtain such support if needed. The support in exercising legal capacity guaranteed in article 12 of the UNCRPD is an example illustrating the rights empowerment in this respect. Likewise, this support must be available to empower persons with disabilities to exercise their right to access to civil justice.

7.4.4 Element 4: positive and inclusive attitudes

Some negative attitudes that prevent persons with disabilities from accessing civil justice may stem from persons with disabilities themselves, as well as from others in society. The research findings from case studies show that the attitudinal barriers from persons with disabilities themselves include the views that accessing justice is useless or a waste of time.⁴⁷ It further appears in the qualitative data that some persons with disabilities

⁴⁷ Text to n 566 in ch 6.

perceived that they should stay quiet and take whatever is offered, instead of troubling others.⁴⁸ The first view reflects a lack of confidence in the justice system, whilst the second view echoes internalisation of a negative mindset against disability. The attitudinal barriers from other people in society, including the best interest approach, can develop from stereotypes of disability, and a lack of real understanding of disability or disability rights. Within the capability dimension, these attitudes are factors that obstruct persons with disabilities from exercising real freedoms and opportunities to achieve access to justice. It will be more difficult to overcome these barriers if a choice to access to justice relies upon somebody else's decision, such as through a substituted decision-making regime. On the non-domination dimension, it cannot be considered that persons with disabilities have real freedoms and opportunities to access civil justice if it can only happen because somebody else considers that it is in their best interest to do so.

By contrast, the research findings in both case studies indicate that persons with disabilities will have a better opportunity to access to the justice system and participate in the legal proceedings when people who work in the justice system have positive and inclusive attitudes towards them by respecting their human dignity and taking their will and preferences into account. This can be achieved in many different ways, for instance, by respecting their legal capacity to give evidence, or accommodating their specific needs, such as adjusting timetable of their case, allowing a trusted support to facilitate their communication, or giving them adequate time to present their case. The outcomes of the case where persons with disabilities have an opportunity to participate in the proceedings tend to be even more positive for persons with disabilities as they have better opportunities to present their case.⁴⁹ This reflects how the equality dimension of justice, which accommodates differences among people, plays an important role in advancing the capability of persons with disabilities to access civil justice.

⁴⁸ Interview with Respondent TDI, a representative of an organisation for persons with intellectual disabilities (Bangkok, Thailand, 28 September 2015)

⁴⁹ n 23.

CONCLUSION

The discussions in this chapter have shown both similarities and differences that impact the effectiveness of access to civil justice for persons with disabilities in their countries. The differences between legal systems, while important, is not determinative of the right to access to civil justice for persons with disabilities. Legal mechanisms concerning the right to access to civil justice are essential but these alone cannot ensure that persons with disabilities will have real freedom and opportunity to achieve access to civil justice. Effectiveness of access to civil justice for persons with disabilities in each country depends on numerous factors. These factors include the State's obligations under international and regional human rights law and its fulfilment of these obligations, domestic legal mechanisms that both equally guarantee people's rights and facilitate their opportunity to exercise those rights effectively, the creation of a justice system which is practically accessible for all, and political and social policies and practices that enhance integration and participation of persons with disabilities in social life and community activities.

The comparative legal methodology pursuing in this research gives the greater benefits than separate studies of each country would provide. It assists the study to explore the same issue from different angles and contexts. It offers each country knowledge from experiences of another country, without having to expose itself to similar risks. By using a comparator, this methodology facilitates each country to observe its strengths that should be maintained or further developed, as well as its weaknesses that should be corrected. It also raises the awareness of each country regarding some issues that may be otherwise overlooked. By pursuing this method, each country may take the good practices of another country and further develop or adapt them to suit its own context. In the same way, pitfalls experienced by another country are precautions preventing repetition of the same mistakes.

The main commonality of Thailand and Ireland, which is also their strength, is the integrity of their judiciary. This is reflected through their competence, independence and impartiality. In this respect, learning from the experiences of another country can further strengthen their own qualities. Both countries have some guarantees that can support access to civil justice for persons with disabilities, but these still need to be improved to align with international human rights law standards. The common weakness is that both countries take a more passive approach in providing support to accommodate individual

CHAPTER 7: *Cross-case Analysis*

requests, which seems problematic to achieve the accessibility standards required by international human rights law. Moreover, court staff members in both countries felt that they did not have adequate training on disability issues, while trying their best to provide accessibility for court users with disabilities. Persons with disabilities in both countries also shared the view that they could not get enough information and assistance from the State to effectively access civil justice.

The research findings also show that there are tremendous differences concerning access to civil justice in these two countries. Each country can learn from both the good practice and pitfalls of one another. The good practices that Thailand can learn from Ireland include the supportive mechanisms that Ireland provides to persons with disabilities, which significantly enhance their opportunities to effectively access to civil justice, for example the social welfare system, the advocacy services and the high standard of legal aid provision. At the same time, Thailand can observe that these mechanisms require substantial financial and other resources. Although these mechanisms are good, Ireland still faces some challenges to fulfil the rights to access justice of persons with disabilities. Thailand may have to take the differences of country's economic status into consideration before adopting the same strategy, or may need other creative options to achieve the same goals.

Likewise, Ireland can learn from some good practices of Thailand, in terms of its widespread use of mediation as an alternative to the formal justice system. Another good practice Ireland can learn from is the development of the Administrative Courts system in Thailand, which provides people with better opportunities to access the judiciary to appeal decisions of administrative tribunals. The difficulties faced by persons with disabilities in Thailand offer some cautions that Ireland may consider in order to avoid similar mistakes. For example, the introduction of new dispute resolution options in Ireland, either within the informal or formal justice system, should not place more burden on those who seek justice, or cause the overall justice system to become too complicated for individuals to access.

The comparative legal methodology would provide greater benefits if the study could include more case studies of different countries. However, such inclusion is beyond the capacity of this study, but is still recommended for future research as presented earlier in section 1.5. The next chapter is the final chapter of this research. It concludes all findings of the research questions and original contributions to knowledge of this study.

CHAPTER 8:

Conclusion

INTRODUCTION

This chapter consists of three sections. The first section concludes the research findings, by reference to the research questions set out in Chapter 1. The five research sub-questions are presented prior to the main research question as their findings support the answers to the main research question. The second section summaries the original contributions to knowledge made by this research. The last section provides a reflection on the theoretical framework of this thesis presented in chapter 2.

8.1 CONCLUSION OF THE RESEARCH FINDINGS

The right to access to civil justice for persons with disabilities is clearly guaranteed by the UNCRPD, which is ratified by both Thailand and Ireland. To discover how to strengthen this right in both countries, the main question of this research aimed to find out **“what are the key elements for strengthening access to civil justice for persons with disabilities in Thailand and Ireland?”** To answer this question, the research combined a socio-legal approach, which incorporated an empirical study to understand the actual situations in each jurisdiction, with a doctrinal comparative approach, which studied international human rights law, and employed case studies methodology to investigate two countries and learn from their similarities and differences. Before the main question could be concluded, the research had five more sub-questions to be investigated. The study of these sub-questions was presented in Chapters 2 to 6. A summary of each sub-question and the answers to each is presented here.

Sub-question 1: What does access to justice for persons with disabilities mean?

The examination for this question was conducted in Chapter 2 by exploring the major conceptions of justice proposed by John Rawls and Amartya Sen, and the principles of equality, which are closely connected with the conceptions of justice and embedded in current human rights law. After analysing strengths and weaknesses of these

CHAPTER 8: *Conclusion*

conceptions in the disability context, the research adopted Sen's Capability Approach as the main framework. It also incorporated Rawls' notion of just institutions, the non-domination principle of republicanism, and the principles of equality. These were summarised as "the four-dimensional conception of justice", comprising of institutional, capability, non-domination and equality dimensions.

Once a conception of justice had been determined, the chapter continued to discuss the existing meanings of access to justice interpreted by various scholars. The study concluded afterwards that the meaning of "access to justice" for persons with disabilities should be regarded as a "functioning" (according to Sen's Capability Approach) that persons with disabilities had reason to value in order to be able to achieve their rights and liberties protected by law. This required "supportive mechanisms", which must be provided on a legally binding basis, to equalise opportunities of persons with disabilities for achieving their access to civil justice. This meaning complied with the broadest scope of access to justice, the meaning mostly used in the context of academic studies, and the four components of access to justice proposed by Bahdi and extended by Flynn and Lawson in the disability context.

Sub-questions 2: What are the guarantees of the right to access to civil justice in international human rights law?

This question was investigated in Chapter 3. The meaning of access to justice in this chapter was narrower than it was in the answer of sub-question 1. In the context of the existing legal provisions, access to justice only referred to the rights relating to the justice system as explained in Chapter 1.

Chapter 3 explored core international human rights law, apart from the UNCRPD. The examination in this chapter showed that these laws did not explicitly use the term "access to justice", but guaranteed some components of the right to access to justice through various provisions and used diverse terms. The research clustered those legal guarantees concerning access to civil justice into six groups which were 1) the right to equality before courts and tribunals; 2) the right to legal assistance or representation; 3) the right to communication assistance; 4) the right to be heard or a fair hearing in personal presence by courts, tribunals or other competent bodies within a reasonable time or without delay; 5) the right to a remedy, reparation or compensation; 6) the right to complain, challenge or appeal. These rights were collectively called "the six categories of the right to access to civil justice".

Sub-question 3: What are the additional features supporting access to civil justice for persons with disabilities provided by the UNCRPD?

This question was examined in Chapter 4. This chapter took the same meaning of access to justice as the previous chapter did as it still dealt with the context of the existing legal provisions.

Chapter 4 focused on the right to access to civil justice in the UNCRPD. The research found that the UNCRPD embraced every aspect of access to civil justice shown in the six categories of the right to access to civil justice described in Chapter 3. The phrase “effective access to justice for persons with disabilities on an equal basis with others” in article 13 of the UNCRPD is the core feature reinforcing the effectiveness of this right. The additional features supporting access to civil justice for persons with disabilities in the UNCRPD were the emphasis of accommodations for participation of persons with disabilities in all legal proceedings, the appropriate training for people who work in the justice system, as well as its interrelationships with other articles within the Convention guaranteeing equality and non-discrimination, equality recognition before the law, the provisions of accessibility and reasonable accommodations, awareness-raising, and active participation of persons with disabilities.

Sub-question 4: To what extent have the current laws and regulations of the case study countries, Thailand and Ireland, complied with international human rights law standards, including the UNCRPD on access to civil justice for persons with disabilities?**Sub-question 5: What are the issues to be rectified for the case study countries to achieve effective access to civil justice for persons with disabilities?**

Both sub-questions 4 and 5 were answered through Chapter 5 for the case study of Thailand, and Chapter 6 for the case study of Ireland. In these chapters, legal mechanisms and regulations on access to civil justice of each country were identified and compared with international human rights law standards presented in the six categories of the right to access to civil justice. Their effectiveness was also evaluated through the analysis of empirical data reflecting the current situation and the lived experience of laws and regulations, of different groups of persons with disabilities and people who work in the civil justice system, on the issues concerning access to civil justice for persons with disabilities. The findings of each case showed that, except for

CHAPTER 8: *Conclusion*

the law and regulations that limited legal capacity of some groups of persons with disabilities to exercise their right to access to civil justice independently, most legal mechanisms and regulations were not in conflict with international human rights law standards but could not firmly guarantee, in practice, effective access to civil justice for persons with disabilities due to insufficient supportive mechanisms to ensure that persons with disabilities could effectively access to and exercise their legal rights.

The answers of these five research sub-questions led to the analysis in Chapter 7 that answered the main research question. The findings from Chapter 7 considered in depth four out of the five elements of “the five-elemental conception of access to civil justice for persons with disabilities” presented in Chapter 4. This analysis demonstrated that these four elements were vital for strengthening access to civil justice for persons with disabilities in Thailand and Ireland. Element 5 on enforcement mechanisms could not be fully explored as its context was outside the scope of this study. It seems logically necessary for effective access to civil justice, but this needs to be proved by future research. The five elements of the conception of access to civil justice for persons with disabilities are as follows:

- 1) effective and enforceable legal mechanisms that promote, protect, and guarantee the human rights of persons with disabilities;
- 2) a justice system based on the principle of competence, independence and impartiality of both the institutions themselves and their proceedings;
- 3) supportive mechanisms that enhance capacity of persons with disabilities to assert their rights and to access the justice system;
- 4) positive and inclusive attitudes towards persons with disabilities, which respect the dignity, will and preferences of persons with disabilities, support their participation in all activities, accept their diversity, and take their different needs into account on an equal basis with others; and
- 5) effective enforcement mechanisms, which can guarantee that persons with disabilities are able to enforce their rights in accordance with the decisions or outcomes provided through the justice system.

The first four elements from this list have emerged as specific findings of this research for strengthening access to civil justice in the case studies of Thailand and Ireland. These

elements may also be useful for other countries with similar social, economic, legal or cultural circumstances.

8.2 RESEARCH CONTRIBUTIONS

The main contributions of this research are its interpretation of access to civil justice as a functioning under Sen's Capability Approach, a set of universal principles for the right to access to civil justice in international human rights law, its proposal of a five-elemental conception of access to civil justice for persons with disabilities, and the findings from the in-depth analysis of the case studies of Thailand and Ireland.

The research proposed an interpretation of access to civil justice as a functioning that persons with disabilities have reason to value according Sen's Capability Approach. Within this framework, it integrated Rawls' Theory of Justice, the Republicanism view of freedom and Fredman's substantive equality principle and proposed the meaning of justice in disability context for this study, consisted of four dimensions: institutional, capability, non-domination, and equality dimensions. An additional reflection on this theoretical framework is elaborated in the next section.

The research also developed a set of universal principles for access to civil justice from examination of the core international human rights law treaties (apart from the UNCRPD). This was called "the six categories of the right to access to civil justice". These six categories reflected the guarantees within international human rights law, and suggested keys aspects that States should pay attention to when considering the right to access to civil justice. Although the UNCRPD has already guaranteed the right to access to civil justice for persons with disabilities, the research needs to examine other core international human rights law treaties first because the UNCRPD is the only treaty using the broad term "access to justice" while claiming not to create a new right. The findings showed access to civil justice guarantees under the UNCRPD and other treaties were consistent.

The research proposed the five-elemental conception of access to civil justice for persons with disabilities, which was developed, into a less abstract version, from the integration of the four components of access to justice proposed by Bahdi and extended by Flynn and Lawson in the disability context, and the four-dimensional conception of

justice based on Sen's Capability Approach, the Republicanism view of freedom, Rawls' Theory of Justice and Fredman's substantive equality.

The original contribution of this research also derived from the in-depth analysis of the case studies of Thailand and Ireland. These case studies included analysis of data from existing legal mechanisms and qualitative research that revealed some experiences of core groups of persons with disabilities, as well as of those who work in the civil justice system, concerning civil proceedings that persons with disabilities have experienced. Each case study addressed the problematic issues which arise when applying the legal guarantees in practice and provided some recommendations to each country for greater compliance with international human rights law standards. The research also included a comparative legal study between these countries, which showed similarities and differences of how international human rights law was applied at the domestic level of countries with different legal systems (common law and civil law).

8.3 REFLECTION ON THE THEORETICAL FRAMEWORK OF THIS THESIS

The key five elements for strengthening access to civil justice proposed are the overall findings of this study, which is conducted based on its theoretical framework presented in chapter 2. The research regards access to civil justice as a "functioning" that persons with disabilities have reason to value in order to be able to achieve their rights and liberties protected by the rule of law. This must be considered together with the four-dimensional conception of justice – recognising the institutional, capability, non-domination and equality dimensions. The research pursues the meaning of access to justice in the broadest scope which goes beyond accessing formal and informal justice systems. This scope includes other aspects of access to justice, for example participating in law making process concerning procedural or substantive law, or working in the justice system. Sen recommends assessing whether persons with disabilities have "capabilities" – the real freedoms or opportunities to achieve this functioning. He acknowledges disability is usually a "deprivation" of capabilities or functionings, which causes persons with disability to have less opportunities to convert their available resources into the functioning they want to achieve. This can be due to stigma and prejudice within society against persons with disabilities or the need to spend more

resources than others do to achieve the same things. Therefore, the supportive mechanisms, which reflect both capability and equality dimensions, are required to provide persons with disabilities equality in achieve this functioning.

As access to civil justice as a functioning is within the broadest scope of access to justice, the supportive mechanisms provided must also be comprehensive enough to enhance any aspect of this functioning. In each case study chapter, the research recommends some mechanisms that must be in place to fulfil legal obligations on access to civil justice under the international human rights law standard, such as accessibility, communication assistance and legal assistance or representation.¹ However, these obligations cover only some aspects of the broadest scope of access to civil justice. The research also suggests including other supportive mechanisms. While these additional mechanisms may not be explicitly specified in international human rights law for achieving the right to access to civil justice for persons with disabilities, this research finds that they are vital for persons with disabilities to have real freedoms or opportunities to achieve access to civil justice. One such supportive mechanism is an equitable social welfare system which adequately supports the basic needs of persons with disabilities and which ensures that persons with disabilities are not exposed to arbitrary power if they make a complaint or take a case against a welfare or social service provider.² Another supportive mechanism is effective access to education as this supplements many other factors concerning access to civil justice, including effective participation in the justice system.³ A further supportive mechanism is knowledge about rights and empowerment for access to civil justice, which provides persons with disabilities more opportunities to effectively access any justice mechanism, including complaints processes and ADR mechanisms.⁴

The equality dimension, based on Fredman's concept of substantive equality, is the principle that controls and justifies what a State must provide for persons with disabilities to achieve access to civil justice as a functioning. This dimension is necessary because most supportive mechanisms require financial resources, and most government expenditure in democratic countries is subjected to public scrutiny. Furthermore, the

¹ Section 5.4 for the case study of Thailand, and section 6.4 for the case study of Ireland.

² "Social welfare system" sub-heading in section 7.4.3.

³ "Access to education" sub-heading in section 7.4.3.

⁴ "Access to information" and "Rights empowerment" sub-headings in section 7.4.3.

equality dimension can ensure that the supportive mechanisms provided are not designed to privilege someone or some groups of people, but to ensure equality for all. This is because the substantive equality principle is applied to redress disadvantages, stigma, stereotyping and humiliation faced by persons with disabilities, as well as to accommodate their differences and enhance their full participation in society. Accordingly, a state-funded legal aid scheme for persons with disabilities, a quota system for persons with disabilities to work in the justice system, or some regulations allowing more frequent breaks during court proceedings, for example, are considered fair and reasonable if these measures are to ensure substantive equality for persons with disabilities.

According to the non-domination dimension, these supportive mechanisms must operate based on rights, such as those established through legislation, where people can be certain that they will be able to obtain such support upon their eligibility, and will not rely on arbitrary or discretionary decision-making. Otherwise, persons with disabilities will need to depend on goodwill of others, and their opportunities to achieve their functionings are uncertain. This dimension is as important as the other dimensions. Many examples of practice in the case studies demonstrate that persons with disabilities still need to rely on the goodwill of others to secure efficient legal representation, such as through pro bono schemes as they cannot obtain legal representation due to limitations of the state-funded legal aid system.⁵ This example also reflects, on the other hand, that some persons with disabilities may not be so fortunate as to have the required supportive mechanism. In that case, they are less likely to have an opportunity to effectively access civil justice regarding their other challenges due to disability. This example is to illustrate that the non-domination dimension must always be taken into consideration to ensure that any supportive mechanism offered can really provide the real freedoms or opportunities for persons with disabilities to achieve access to civil justice.

The institutional dimension is the last dimension that must also be considered in order to provide persons with disabilities with the real freedoms or opportunities to achieve access to civil justice. This dimension includes both legislative and organisational aspects. Although important, international human rights law standards on access to civil

⁵ Section 5.3.2 for the case study of Thailand and section 6.3.2 for the case study of Ireland.

justice for persons with disabilities discussed throughout this thesis only fulfil a part of the legislative aspect required to ensure institutional justice. The legislative aspect also requires equal and effective guarantees on the substantive rights of persons with disabilities, for example, a right to legal capacity, a right to vote or be elected. Without these guarantees, some persons with disabilities may not be able to instruct a lawyer, have legal standing, or participate in law making processes. In the same way, the organisational aspect of the justice system is also essential for persons with disabilities in achieving their access to civil justice functioning. For instance, a competent body possessing independent and impartial qualities must be available for persons with disabilities who wish to seek justice through a formal justice system; and a democratic political system must exist and be open for persons with disabilities to take part in it, according to the broadest scope of access to civil justice.

It has been shown through this theoretical framework that there are many dimensions that State must take into consideration when developing a strategy to ensure effective access to civil justice for persons with disabilities. Legislation is an important tool for persons with disabilities to achieve this functioning goal, but any strategy to achieve this goal needs to integrate and reflect every dimension of justice. Otherwise, it cannot sufficiently provide real freedoms and opportunities for persons with disabilities to achieve access to civil justice functioning as has been demonstrated by the case studies in this study.

CONCLUSION

This comparative socio-legal study applied a combination of conceptions of justice and of access to justice, together with the core international human rights law treaties to analyse the implication of legal guarantees on access to civil justice for persons with disabilities in Thailand and Ireland. Its ultimate aim was to find effective ways to improve access to civil justice for persons with disabilities in each jurisdiction, as access to justice is vital to ensure that persons with disabilities can equally enjoy their human rights and are protected against violations of their rights.

The study discovered that there were five key elements that are essential for strengthening access to civil justice for persons with disabilities. These elements, collectively called “five-elemental conception of access to civil justice for persons with

CHAPTER 8: *Conclusion*

disabilities”, included 1) effective and enforceable legal mechanisms, 2) competent, independent and impartial justice system, 3) supportive mechanisms, 4) positive and inclusive attitudes towards persons with disabilities, and 5) effective enforcement mechanisms. Although the case studies could only confirm that the first four elements were indispensable for both Thailand and Ireland in strengthening access to civil justice for persons with disabilities, the research contended that the fifth element on effective enforcement mechanisms was equally important and must be included due to the interrelationship of all these elements.

The detailed recommendations within this study are based on the case studies of Thailand and Ireland; however, they may also be useful for some countries sharing similar situations or aspects with these two countries. The analysis of the UNCRPD offered both explanation and practical recommendations from the CtteeRPD of how the States Parties, and any Non-Party States wishing to advance this issue, could provide effective access to civil justice for persons with disabilities. Furthermore, the five-elemental conception of access to civil justice for persons with disabilities was developed from theoretical conceptions and international human rights law standards and compatible with any countries acknowledging international human rights law. This research hopes that its contributions to knowledge would offer scholars on access to justice more detail on the civil justice perspective, as well as on the disability context where, in reality, persons with disabilities face multiple challenges and barriers to effectively access justice. All findings, especially the five-elemental conception, could also benefit or be used as practical guidance for strengthening access to civil justice for persons with disabilities, in any country, as well as for any other groups facing similar challenges in accessing civil justice. Last but not least, the research expects that its findings and recommendations would be further implemented to facilitate the development of reforms on access to civil justice for persons with disabilities, at least in Thailand, to fulfil the central goal of the funding which supported this study.

Appendices

APPENDIX 1: LIST OF INTERVIEW PARTICIPANTS

Case Study of Thailand

Interview with Respondent TDA, a representative of an organisation for persons with autism (Bangkok, Thailand, 21 October 2015)

Interview with Respondent TDH, a representative of a disabled people's organisation of Deaf persons (Bangkok, Thailand, 21 October 2015)

Interview with Respondent TDI, a representative of an organisation for persons with intellectual disabilities (Bangkok, Thailand, 28 September 2015)

Interview with Respondent TDS, a representative of an organisation for persons with psychosocial disabilities (Nonthaburi, Thailand, 17 October 2015)

Interview with Respondent TDP, a representative of a disabled people's organisation of persons with physical and mobility impairments (Pathum Thani, Thailand, 5 October 2015)

Interview with Respondent TDV, a representative of a disabled people's organisation of visually impaired people (Bangkok, Thailand, 13 October 2015)

Interview with Respondent TJC, a judge of the first instance court (general civil matters) (Bangkok, Thailand, 27 October 2015)

Interview with Respondent TJF, a judge of the first instance court (juvenile and family in civil matters) (Bangkok, Thailand, 2 November 2015)

Interview with Respondent TSC(F), a court staff (frontline) of the first instance court (general civil matters) (Bangkok, Thailand, 28 October 2015)

Interview with Respondent TSC(C), a court staff (court clerk) of the first instance court (general civil matters) (Bangkok, Thailand, 28 October 2015)

Interview with Respondent TSF(F), a court staff (frontline) of the first instance court (juvenile and family in civil matters) (Bangkok, Thailand, 29 October 2015)

Interview with Respondent TSF(C), a court staff (court clerk) of the first instance court (juvenile and family in civil matters) (Bangkok, Thailand, 29 October 2015)

Interview (via telephone) with Respondent TL1, a lawyer (barrister & solicitor) (Bangkok, Thailand, 20 November 2015)

Interview with Respondent TL2, a lawyer (barrister & solicitor) (Bangkok, Thailand, 3 August 2016)

Case Study of Ireland

Interview with Respondent IL1, a lawyer (barrister & solicitor) (Dublin, Ireland, 18 October 2016)

Interview with Respondent IL2, a lawyer (barrister & solicitor) (Dublin, Ireland, 23 January 2017)

Interview with Respondent IDH, a representative of an organisation for Deaf persons and/or persons with hearing loss (Galway, Ireland, 16 May 2017)

Interview with Respondent IDI, a representative of a disabled people's organisation of persons with intellectual disabilities (Dublin, Ireland, 3 November 2016)

Interview with Respondent IDS, a representative of a disabled people's organisation of persons with psychosocial disabilities (Galway, Ireland, 11 January 2017)

Interview with Respondent TDP, a representative of a disabled people's organisation of persons with physical and mobility impairments (Dublin, Ireland, 26 January 2017)

Interview with Respondent IDV, a representative of a disabled people's organisation of visually impaired people (Dublin, Ireland, 19 May 2017)

Interview with Respondents IJ, a group of four judges of the first instance courts (Dublin, Ireland, 8 February 2017)

Interview with Respondents IF, a group of three court staff members of the Courts Services (Dublin, Ireland 7 July 2017)

**APPENDIX 2: LIST OF CONCLUDING OBSERVATIONS
REPORTS OF THE COMMITTEE ON THE RIGHTS OF PERSONS
WITH DISABILITIES**

Country	Report Title	Publication Date
Argentina	CRPD/C/ARG/CO/1	22 Oct 2012
Armenia	CRPD/C/ARM/CO/1	08 May 2017
Australia	CRPD/C/AUS/CO/1	24 Oct 2013
Austria	CRPD/C/AUT/CO/1	30 Sep 2013
Azerbaijan	CRPD/C/AZE/CO/1	11 May 2014
Belgium	CRPD/C/BEL/CO/1	27 Oct 2014
Bolivia (Plurinational State of)	CRPD/C/BOL/CO/1	04 Nov 2016
Bosnia and Herzegovina	CRPD/C/BIH/CO/1	02 May 2017
Brazil	CRPD/C/BRA/CO/1	29 Sep 2015
Canada	CRPD/C/CAN/CO/1	08 May 2017
Chile	CRPD/C/CHL/CO/1	12 May 2016
China	CRPD/C/CHN/CO/1	15 Oct 2012
China	CRPD/C/CHN/CO/1/Corr.1	14 Nov 2012
Colombia	CRPD/C/COL/CO/1	29 Sep 2016
Cook Islands	CRPD/C/COK/CO/1	15 May 2015
Costa Rica	CRPD/C/CRI/CO/1	11 May 2014
Croatia	CRPD/C/HRV/CO/1	15 May 2015
Cyprus	CRPD/C/CYP/CO/1	08 May 2017
Czech Republic	CRPD/C/CZE/CO/1	15 May 2015
Denmark	CRPD/C/DNK/CO/1	29 Oct 2014
Dominican Republic	CRPD/C/DOM/CO/1	08 May 2015

Country	Report Title	Publication Date
Ecuador	CRPD/C/ECU/CO/1	26 Oct 2014
El Salvador	CRPD/C/SLV/CO/1	07 Oct 2014
Ethiopia	CRPD/C/ETH/CO/1	03 Nov 2016
European Union	CRPD/C/EU/CO/1	02 Oct 2015
Gabon	CRPD/C/GAB/CO/1	02 Oct 2015
Germany	CRPD/C/DEU/CO/1	13 May 2015
Guatemala	CRPD/C/GTM/CO/1	29 Sep 2016
Haiti	CRPD/C/HTI/CO/1	28 February 2018*
Honduras	CRPD/C/HND/CO/1	04 May 2017
Hungary	CRPD/C/HUN/CO/1	22 Oct 2012
Iran (Islamic Republic of)	CRPD/C/IRN/CO/1	10 May 2017
Italy	CRPD/C/ITA/CO/1	05 Oct 2016
Jordan	CRPD/C/JOR/CO/1	15 May 2017
Kenya	CRPD/C/KEN/CO/1	30 Sep 2015
Latvia	CRPD/C/LVA/CO/1	10 Oct 2017
Lithuania	CRPD/C/LTU/CO/1	10 May 2016
Luxembourg	CRPD/C/LUX/CO/1	10 Oct 2017
Mauritius	CRPD/C/MUS/CO/1	30 Sep 2015
Mexico	CRPD/C/MEX/CO/1	26 Oct 2014
Mongolia	CRPD/C/MNG/CO/1	13 May 2015
Montenegro	CRPD/C/MNE/CO/1	22 Sep 2017
Morocco	CRPD/C/MAR/CO/1	25 Sep 2017
Nepal	CRPD/C/NPL/CO/1	13 Apr 2018
New Zealand	CRPD/C/NZL/CO/1	30 Oct 2014
Oman	CRPD/C/OMN/CO/1	17 Apr 2018

Country	Report Title	Publication Date
Panama	CRPD/C/PAN/CO/1	29 Sep 2017
Paraguay	CRPD/C/PRY/CO/1	15 May 2013
Peru	CRPD/C/PER/CO/1	16 May 2012
Portugal	CRPD/C/PRT/CO/1	19 May 2016
Qatar	CRPD/C/QAT/CO/1	02 Oct 2015
Republic of Korea	CRPD/C/KOR/CO/1	28 Oct 2014
Republic of Moldova	CRPD/C/MDA/CO/1	18 May 2017
Russian Federation	CRPD/C/RUS/CO/1	09 Apr 2018
Serbia	CRPD/C/SRB/CO/1	23 May 2016
Seychelles	CRPD/C/SYC/CO/1	16 Apr 2018
Slovakia	CRPD/C/SVK/CO/1	13 May 2016
Slovenia	CRPD/C/SVN/CO/1	16 Apr 2018
Spain	CRPD/C/ESP/CO/1	19 Oct 2011
Sudan	CRPD/C/SDN/CO/1	10 Apr 2018
Sweden	CRPD/C/SWE/CO/1	11 May 2014
Thailand	CRPD/C/THA/CO/1	12 May 2016
Tunisia	CRPD/C/TUN/CO/1	13 May 2011
Turkmenistan	CRPD/C/TKM/CO/1	13 May 2015
Uganda	CRPD/C/UGA/CO/1	12 May 2016
Ukraine	CRPD/C/UKR/CO/1	02 Oct 2015
United Arab Emirates	CRPD/C/ARE/CO/1	02 Oct 2016
United Kingdom of Great Britain and Northern Ireland	CRPD/C/GBR/CO/1	03 Oct 2017
Uruguay	CRPD/C/URY/CO/1	30 September 2016

Remark: * Advance unedited version

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