

Accessibility – One of the Human Rights or the Means of Their Implementation

Accessibility is one of the pillars on which the Convention on the Rights of Persons with Disabilities (CRPD) is based. It is also one of the most complex and not yet fully recognized human rights institutions. The Convention defines accessibility as one of its general principles. It does not explicitly constitute a right to accessibility per se. However, interpretations of the norm of accessibility indicate divergent views on whether we are dealing with a new human right. Defining what accessibility is in terms of human rights is of utmost importance for implementing the Convention.

The Committee on the Rights of Persons with Disabilities in its General Comment No 2 (2014) „Article 9 Accessibility” does not provide a clear answer to the legal status of accessibility. The controversy that the right to access causes is part of the general concerns that “new” human rights have always raised. The reason for the lack of clear acknowledgment of accessibility as an inherent human right is the very nature of these rights. Human rights are dynamic and continue to evolve. The Convention blurs the distinction between civil and political rights as well as economic and social rights more clearly than previous treaties and, consequently, takes a holistic view of the idea of human rights.

Having analyzed the accessibility norm laid down in Article 9 of the CRPD, the Author shares the opinion that the CRPD reformulates the existing human rights and enriches their content to such an extent that it is possible to distinguish also new human rights on its basis, including the right to access per se. However, the scope and content of the right are still not entirely agreed upon. Nevertheless, it certainly contributes to greater social inclusion and the gradual phasing out of measures aimed at “special” treatment of people with disabilities in favour of removing barriers and implementing universal solutions for all.

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1. Accessibility in the Convention on the Rights of Persons with Disabilities

Accessibility is one of the pillars on which the Convention on the Rights of Persons with Disabilities (CRPD) is based. At the same time, it is one of the most complex and not yet fully recognized human rights institutions. The Convention defines accessibility as one of its general principles. It does not explicitly constitute a right to accessibility *per se*. However, interpretations of the norm of accessibility indicate divergent views on whether we are dealing with a new human right. Defining

what accessibility is in terms of human rights is of utmost importance for implementing the Convention.

The manner in which the principle of accessibility is developed in Article 9 of the Convention consists in a description of the purpose of accessibility, its scope, the measures taken to implement it, and the addressees of the norm. The expressions „accessibility” and „access to” are used interchangeably in the Convention: it mentions „accessibility” being facilitated, ensured, and promoted; „access to” places, rights, and services; and „accessible” places, programmes, technologies, formats, etc. The emphasis placed on accessibility as a general principle means that it has to be applied to all rights enshrined in the Convention. Nevertheless, some specific rights entail precise conditions for ensuring accessibility. Yet nowhere in the CRPD is accessibility directly equaled with the „right to access”.

In the course of work on the draft Convention, it was maintained that it would not establish new human rights, but would rather adapt existing ones to the situation of people with disabilities by changing the disability paradigm. The rights of persons with disabilities are enshrined in earlier human rights treaties, but they had not been exercised or with respect to group of people¹. The CRPD was even referred to as an „implementation convention”. Its adoption results from the lack of effective implementation of rights guaranteed by other conventions for persons with disabilities². This view was

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- 1 Press conference on convention protecting rights of persons with disabilities, 04/02/2005. https://www.un.org/press/en/2005/Disabilities_Press_Cfc_050204.doc.htm. [accessed: 18.02.2021]; Einat Albin, „Universalizing the Right to Work of Person with Disabilities: An Equality and Dignity Based Approach”, [in:] *The Right to Work*, ed. Virginia Mantouvalou (Oxford 2017); *Hebrew University of Jerusalem Legal Studies Research Paper Series*, No. 15-9 (2015): 7. Convention on the Rights of Persons with Disabilities Advocacy Toolkit. Professional Training Series No. 15, New York-Geneva, 2008, 10. https://www.ohchr.org/documents/publications/advocacytool_en.pdf. [accessed: 17.02.2021].
 - 2 Don MacKay, *Chairman of the Ad Hoc Committee on Convention on Persons with Disabilities, Committee negotiating convention on rights of disabled persons concludes current session*, 12.08.2005. <https://www.un.org/press/en/2005/soc4680.doc.htm> [accessed: 17.02.2021].

shared by Polish legal scholars, as well³. Yet, the position was not consistent. It was stressed out that the Convention primarily does not create new rights⁴.

2. Accessibility according to the Committee on the Rights of Persons with Disabilities

General comment No 2 (2014) „Article 9: Accessibility” is not helpful in answering the question on the legal status of accessibility. This provokes criticism. Instead of presenting a clear, consistent interpretation of accessibility that would facilitate its implementation, the Committee offers its ambiguous description. Thus, it reinforces the existing divisions in the understanding of accessibility: either as a human right *per se* or as a manner of interpreting human rights⁵. At this point, we cannot ignore the general criticism concerning the lack of consistency in the Convention’s stipulations and the fact that none of its provisions are sufficiently clear, precise, and unconditional to be able to grant rights to individuals, even though the Convention is referred to by secondary UE legislation⁶.

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- 3 Cf. Anna Błaszczak, „Zastrzeżenia i oświadczenia interpretacyjne Polski do Konwencji o prawach osób z niepełnosprawnościami”, [in:] *Prawa osób z niepełnosprawnością intelektualną lub psychiczną w świetle międzynarodowych instrumentów ochrony praw człowieka*, ed. Dorota Pudżianowska (Warszawa: Wolters Kluwer, 2014), 25; Joanna Połatyńska, Ewa Staszewska, „5.4. Prawo do pracy szczególnych grup społecznych w świetle prawa międzynarodowego”, [in:] *System Prawa Pracy. Vol. IX. Międzynarodowe publiczne prawo pracy. Standardy globalne*, ed. by Krzysztof Wojciech Baran (Warszawa: Wolters Kluwer, 2019) electronic edition: Wolters Kluwer LEX [accessed: 17.02.2021]; Julia Kapelańska-Pręgowska, „Wdrażanie, stosowanie i kontrola wykonywania Konwencji ONZ o prawach osób niepełnosprawnych”, [in:] *Zatrudnianie osób niepełnosprawnych. Regulacje prawne*, ed. Aneta Giedrewicz-Niwińska, Marzena Szablowska-Juckiewicz (Warszawa: Difin, 2014), 26.
 - 4 MacKay, Chairman of the Ad Hoc Committee on Convention on Persons with Disabilities, <https://www.un.org/press/en/2005/soc4680.doc.htm>.
 - 5 Maria Greco Gian, „On Accessibility as a Human Right, with an Application to Media Accessibility”, [in:] Anna Matamala, Pilar Orero, *Researching Audio Description. New Approaches* (Barcelona 2016): 18-19.
 - 6 Delia Ferri, „The UNCRPD within the EU legal system” (2012) – Conference “Human Rights of Persons with Disabilities in International and EU Law” organized by the EUI Human Rights Working Group and the EUI Academy of European Law (Florence: European University Institute, 27 April 2012), 76. https://www.academia.edu/26653617/The_UNCRPD_within_the_EU_legal_system_2012_Conference_

When indicating the legal nature of accessibility, General Comment No. 2. primarily emphasizes its function as a fundamental principle and its role in the observance of equality rights. Accessibility is seen as a way of investing as a way of investing in society and an integral part of the sustainable development agenda (para 4). Being one of the key fundamental principles, it is a prerequisite for the effective, equal, and unrestricted enjoyment by persons with disabilities of all rights, full and equal participation in society – a prerequisite for independent living (para 4, 14). The obligation to ensure accessibility by the states is an essential part of a new obligation to respect, protect and observe equality rights (para 4), which have been subject to a vital transformation in international law over the last decades (from formal through substantive to transformative equality⁷).

The Committee recognizes accessibility – depending on the context – as a basic principle that underlies the implementation of the remaining provisions (para 1), a precondition for persons with disabilities to participate fully and equally in society and to enjoy all human rights and fundamental freedoms, (2) as a principle, (3) as a measure, but also (4) as a human right in itself – the right to access⁸.

Human_Rights_of_Persons_with_Disabilities_in_International_and_EU_Law_organized_by_the_EUI_Human_Rights_Working_Group_and_the_EUI_Academy_of_European_Law_European_University_Institute_Florence_27_April_2012_. [accessed: 08.02.2021].

- 7 Andrew Byrnes, „Article 1”, [in:] *The UN Convention on the Elimination of All Forms of Discrimination Against Women*, ed. Marsha A. Freeman, Christine Chinkin, Beate Rudolf (Oxford University Press, New York, 2012), 56; Sandra Fredman, „Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights”, [in:] *Temporary Special Measures: Accelerating De Facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination against Women*, ed. Ineke Boerefijn (Intersentia, Antwerp, 2003), 56, 115; Andrea Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities* (Maastricht: Intersentia, 2015), 36. ebook version: <https://cris.maastrichtuniversity.nl/en/publications/the-long-and-winding-road-to-equality-and-inclusion-for-persons-w> [accessed: 17.02.2021].
- 8 General comment No. 2 (2014) Article 9: Accessibility, Committee on the Rights of Persons with Disabilities CRPD/C/GC/2, para 2, 3, 14. See also The Day of General Discussion on Accessibility, 7 October 2010, Committee on the Rights of Persons with Disabilities, Outline p. 1 with submissions, which precedes General comment No 2. <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD7102010.aspx> [accessed: 19.02.2021].

Describing accessibility as a right *per se* in General comment No. 2 may seem unclear and inconsistent, given that the Committee, on the one hand, emphasizes that the Convention does not create new rights for persons with disabilities (para 14) and, on the other hand, makes it clear that accessibility should be understood as a unique confirmation of the social aspect of the right to access (para 2 and 3). This inconsistency is only superficial. The Committee attempts to prove that, without establishing new rights, the Convention redefines and develops existing rights from the perspective of a new paradigm of disability. Accessibility is a right, yet by no means a new one.

The Committee cites examples of regulations concerning access to the physical environment and public transport as a prerequisite of freedom of movement and access to information and communication viewed as a precondition of freedom of opinion and freedom of speech as well as access to public service under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR). Evidence for the previously distinguished right of access is particularly Article 25(c) of the ICCPR, which, according to the Committee, may serve as a basis to incorporate the right of access into the core human rights treaties (para 2) and Article 5(fa) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Thus, in the view of the Committee, international human rights law established a precedent involving classifying the right to access as a right *per se* (para 3) years ago already. This way, the Committee „embedded” accessibility in previous treaty law and confirmed the existence of the right to access under the Convention on the Rights of Persons with Disabilities.

The validity of accessibility as a human right has been noted by the international community, as well⁹. The European Economic and Social Committee (EESC) adopted an opinion on Accessibility as a human right for persons with disabilities in 2014¹⁰. The EESC puts forward the idea to view accessibility as a human right in two ways: as a human right *per se* referring to the possibility to participate, act, communicate, and be informed independently and securely and as a human right that is crucial for the implementation of other human rights, which renders which renders it a fundamental stimulus facilitating their implementation.

The divergence concerning the legal nature of accessibility provokes discussion on whether the Convention on the Rights of Persons with

9 European Economic and Social Committee Hearing: Accessibility as a Human Right, 4 June 2013. <https://www.eud.eu/news/accessibility-human-right/>. [accessed: 10.04.2021].

10 Opinion of the European Economic and Social Committee on ‘Accessibility as a human right for persons with disabilities’ (own-initiative opinion), O.J. EU 2014/C/177/15.

Disabilities only codified the existing rights established under UN treaties in one legally binding international instrument or also created a new portfolio of rights, including the right to access.

3. The legal nature of the provision on accessibility in the CRPD

It seemed agreed that the Convention on the Rights of Persons with Disabilities introduced a new paradigm of disability, a new concept of equality, a new definition of non-discrimination, and new instruments of protection, but did not create any new or unique rights for persons with disabilities¹¹. Yet, since the Convention entered into force, attempts have been made to assess the undoubtedly broader scope of the conceptualization of human rights. It has been noted that some rights (Article 19) have no equivalents in earlier treaties¹². Next, there have been endeavors to include the standard of accessibility in the canon of human rights. Accessibility was proposed to be viewed as a socio-economic right. This interpretation of its nature was inferred from Article 3 and Article 21, even though the Convention omits to mention this right directly in these or other stipulations¹³.

In order to verify the normative character of accessibility, it was proposed to, by the process of elimination, establish what obligations and rights are created by the accessibility provisions of the Convention, to what extent accessibility may constitute a negative or a positive right, whether it is an individual or a group right, and to what generation of rights it should be assigned¹⁴. It was also remarked that the content of Article 9 does not justify acknowledging accessibility as either a negative or a positive right. Accessibility does not count among tangible or intangible goods *per se*, such as education, health care, housing, and employment. Accessibility relation to these goods is such that it is a condition (a precondition, as specified by the Committee) for their enjoyment¹⁵. According to another proposition, accessibility is a third-generation human right (a collective right). This, however, would

11 Theresia Degener, „Disability in a Human Rights Context” *Laws*, No. 5 (2016): 15.

12 Degener, *Disability*, 5-6; Cf. Arlene S. Kanter, *The Development of disability rights under International Law*, (London-New York: Routledge, 2015), 2-13. – she directly mentions the right to live in a community.

13 Francesco Seatzu, „Article 9 [Accessibility]”, [in:] *The United Nations Convention on the Rights of Persons with Disabilities. A Commentary*, ed. Valentina Della Fina, Rachele Cera, Giuseppe Palmisano (Switzerland: Springer, 2017), 225.

14 Greco, „On Accessibility as a Human Right, with an Application to Media Accessibility”, 14-15.

15 *Ibidem*, 19-20.

mean that accessibility is a right granted exclusively to the group of all persons with disabilities. At the same time, no individual right to accessibility as such exists, i.e., that specific subgroups (for instance, blind persons) have no right to accessibility¹⁶. The above interpretation promotes a ghetto effect concerning persons with disabilities and is contrary to the universal design approach¹⁷.

Classifications that categorize human rights are imperfect and arbitrary¹⁸. It is indisputable that the Convention furthers and at the same time strengthens the idea underlying the adoption of the Vienna Declaration of 1993¹⁹, according to which all human rights are indivisible, interdependent, and interrelated. The current tendency is to shift away from dealing with various categories of rights towards the actual and genuine enjoyment of human rights. The Convention rejects the founding, traditional dichotomies of human rights for the sake of a more holistic view on the idea of human rights²⁰. It evidently blurs boundary between civil and political rights on the one hand and economic and social rights on the other²¹. It underlines the concept of indivisibility and interdependence of rights to a greater extent than the earlier treaties do²². Considering its location in the CRPD, assigning Article 9 to

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- 16 Andrea Broderick, „Of rights and obligations: the birth of accessibility” *The International Journal of Human Rights*, No. 4 (2020): 400.
- 17 Greco, *On Accessibility as a Human Right, with an Application to Media Accessibility*, 20.
- 18 See Wiktor Osiatyński, *Prawa człowieka i ich granice* (Znak: Kraków 2011), 188.
- 19 Vienna Declaration and Programme of Action of the International Conference on Human Rights, 25 June 1993, A/CONF.157/23. https://ap.ohchr.org/documents/alldocs.aspx?doc_id=5819 [accessed: 22.03.2021].
- 20 Frederic Megret, „The Disabilities Convention: Towards a Holistic Concept of Rights” *International Journal of Human Rights*, No. 261 (2008): 3, 5.
- 21 Gauthier de Beco, „The indivisibility of human rights and the Convention on the rights of persons with disabilities” *International and Comparative Law Quarterly*, No. 1 (2019): 141.
- 22 Broderick, „Of rights and obligations”, 407. In the context of the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Discrimination against Women, and the UN Convention on the Rights of the Child, see Linda Hajjar Leib, „An overview of the characteristics and controversies of human rights”, [in:] *Human Rights*

one specific category of rights seems impossible. As a rule, it simultaneously affects all rights, irrespective of their classification.

However, it is a fact that the expressions „right to x” and „right of access to x” do appear concerning specific human rights (also in treaties preceding the CRPD). Consequently, a question arises whether these are two different rights. If that were so, the object of the „right to x” would be „x”, and the object of the „right of access to x” would be „access to x” as such. This approach is criticized for unnecessarily multiplying concepts. There are suggestions to at least „suspend” this theory until a thorough analysis from the perspective of human rights classification has been carried out.²³

It is true that previous provisions concerning the right to access mentioned by the Committee are subject to various interpretations: the right is seen as an element of a more general right to take part in public life (Article 25(c) of the ICCPR) or as an element of the obligation to ensure equality before the law in the enjoyment of the so-called right of access to any place or service intended for use by the general public (Article 5(f) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD))²⁴. The interpretation of the provisions of Article 9 CRPD takes a similar form, namely „access” should be viewed not as the object of the right but as the main element of its content (with its correlative obligation). An expression such as „right of access” to education does not refer to a right separate from the right to education, but emphasizes that one of the correlative obligations related to the right to education is providing access to education. It requires granting persons with disabilities access to some tangible or intangible goods to enjoy the rights they possess as human beings. This is a requirement that the responsible entity must meet so that the holder of the right to education may enjoy this right. In addition, Greco notes that the above interpretation of accessibility makes it possible to avoid the already mentioned ghetto effect²⁵ by facilitating social cohesion covering all citizens, not just persons with disabilities.

The reason for the lack of explicit acknowledgement of accessibility as an inherent human right is the very nature of these rights. Human rights are dynamic by nature and continue to evolve. As a result, they need to encompass new rights, and each generation should contribute to their evolution in

and the Environment, Philosophical, Theoretical and Legal Perspectives (2011) 52.

- 23 Greco, „On Accessibility as a Human Right, with an Application to Media Accessibility”, 21.
- 24 Broderick, „Of rights and obligations”, 398-399.
- 25 Greco, „On Accessibility as a Human Right, with an Application to Media Accessibility”, 22-23.

line with the aspirations and values of a given period²⁶. It namely lies in the nature of a dynamic society to shift its attention from one aspect of experience to another and to form various philosophical theories and world views²⁷. New human rights may emerge as a consequence of a change in circumstances that need greater protection, a change of the economic situation, technological progress or the emerging possibilities to cater to needs that could not be satisfied before or whose satisfaction would have been too difficult or too expensive. Moreover, each society and each era need their own frame of reference and own paradigms paired with the awareness that the emerging differences always fit in the context of a broader unity, which remains to some extent constant²⁸. New concepts of human rights and new claims are therefore incorporated into those fundamental, universal, constant and inalienable human rights. These human rights are extended or filled with new content, redefined, or provided with new control and enforcement mechanisms. New rights have often been perceived as a normative instrument or a prerequisite of implementing existing rights, a synthesis of various rights for a long time²⁹. Consequently, human rights evolve, sometimes so much that a formal distinction of new rights occurs³⁰.

Looking at the example of the Convention on the Rights of Persons with Disabilities, it is easier to accept the emergence of new obligations than the emergence of new rights³¹. And when it comes to rights, the Convention mainly provides certain rights with an additional semantic structure in that it explains how they should be applied to persons with disabilities. It outlines a range of crucial properties of rights it lists that were not defined in previous human rights treaties; it redefines and expands the content of the existing

26 Promotion and protection of all human rights, civil, Political, economic, social and cultural rights, including the right to development, Human rights and international solidarity, Note by the united nations high commissioner for human rights, HRC 12th Session, Report of the Independent Expert on International Solidarity, UN Doc A./HRC/12/27, 22 July 2009, para. 11.

27 Pennock, *Rights*, 21.

28 Pennock, *Rights*, 7, 22.

29 Such a sceptical view of new rights based on third-generation rights was expressed e.g. by P. Kowalski, „Nowe prawa człowieka. Perspektywy i zagrożenia” *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, No. 2 (1988): 69-71.

30 Osiatyński, *Prawa człowieka i ich granice*, 314.

31 Degener, *Disability*, 19-20; Broderick, „Of rights and obligations”, 407.

rights³². Yet, some scholars express a further-reaching view that a simple redefinition of rights would, in some instances, be insufficient and leave them without protection³³.

Notwithstanding their doubts, some authors take a decided position as to the character of the norm of accessibility. We cannot consistently maintain that attempts to adapt „prior” human rights to the situation of persons with disabilities involve merely confirming the existing rights and possibly redefining and expanding them. In the case of Article 9, the Convention entails the birth of a new human right – the right to accessibility³⁴. As a socio-economic norm, it becomes a key element of implementing equality. The duty to make reasonable adjustments and the obligations stipulated in Article 9 is the means to achieve the goal in a new right to accessibility. While Broderick shares concerns that the legal ground for a separate right to access in international human rights is questionable, she herself advocates the existence of a new right to accessibility and advances the thesis that states’ obligations may materialize in certain circumstances even before human rights themselves come true³⁵.

However, it is necessary to be aware of the issue with a proper interpretation of the right³⁶. Individual branches of law have their specific rules for encoding norms in legal provisions³⁷. Human rights in particular go beyond the classic understanding of a legal obligation viewed as a single manner of conduct specified for the addressee by the norm. This obligation consists rather in bringing about some states of affairs through a complex set of actions and omissions³⁸. Then, a norm construed exclusively as a principle of law points to ‘a certain course of argumentation rather than forces certain decisions’ and ‘has to be taken into consideration’, while a legal rule ‘requires that the solution which results from it is adopted’. How a provision is phrased does

32 Megret, „The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?”, 498, 503, 515.

33 Megret, „The Disabilities Convention: Human Rights”, 503.

34 Broderick, „Of rights and obligations”, 406.

35 Ibidem, 398, 407.

36 Ronald Dworkin, *Biorąc prawa poważnie* (Warszawa: Wydawnictwo naukowe PWN, 1998), 42 et seq.

37 Zygmunt Ziemiński, *Logiczne podstawy prawoznawstwa* (Warszawa: Wydawnictwo Prawnicze 1966), 125.

38 Bartosz Liżewski, „Europejska filozofia praw człowieka a konstytucyjna formuła obowiązków człowieka i obywatela” *Filozofia publiczna i Edukacja Demokratyczna*, No. 1 (2018): 209.

not always indicate whether the resulting norm is a principle or a rule³⁹. There is no dispute that Article 9 CRPD expresses a principle of law. At the same time, however, its content goes far beyond pointing to „a certain course of argumentation”. Compared to accessibility as presented in earlier treaties, Article 9 adds content to the norm⁴⁰. It imposes obligations and stipulates not only that appropriate measures need to be taken up but also what these measures cover when they should be applied and what goals should be attained through them⁴¹. The character of these goals makes Article 9 also a programmatic norm⁴², which includes guidelines as to legal policy. Numerous norms in human rights treaties take the form of programmatic norms, which define the objective in the form of an obligation that should be fulfilled, without specifying any behaviour patterns that the norm’s addressees should follow to achieve that objective. The addressee is supposed to choose the optimum set of actions that will enable them to meet the purposes specified by the programmatic norm⁴³.

The objectives specified in Article 9 CRPD do not exhaust the content of the norm of accessibility. The Convention creates specific obligations on the state and public entities (and, to a specific extent, also the obligations of private entities). What corresponds to these obligations are rights to assess specific legal solutions and actions in terms of their compliance with the requirements of accessibility and to demand that legislation that respects accessibility in the areas specified in the CRPD be enacted and that measures aiming to eliminate barriers be undertaken. These rights, however, are not tantamount to individual subjective rights. Yet human rights may be protected by way of *actio popularis*. The Committee assumed that actions in the public interest (*actio popularis*) are suitable measures that can protect persons who are incapable of defending themselves from discrimination even if

39 Ronald Dworkin, *Biorąc prawa*, 60, 63, 65. Cf. also rules (German: *Regeln*) and principles (German: *Prinzipien*); Robert Alexy, *A Theory of Constitutional Rights* (Oxford-New York 2002), 47-48, 60, 299-300.

40 Janet E. Lord, „Accessibility and Human Rights Fusion in the CRPD”: Assessing the scope and content of the accessibility principle and duty under The CRPD, Presentation for the General Day of Discussion on Accessibility CRPD Committee UN – Geneva, October 7, 2010, 6.

41 Dworkin, *Biorąc prawa*, 60, 63, 65-66.

42 According to some scholars, programmatic norms are principles by nature. Cf. Tomasz Stawecki, „Koncepcje wykładni konstytucji we współczesnych polskich naukach prawnych”, [in:] *Wykładnia Konstytucji. Inspiracje, teorie, argumenty*, ed. Tomasz Stawecki, Jan Winczorek (Warszawa: Wolters Kluwer 2014), 208-209.

43 Liżewski, „Europejska filozofia praw człowieka”, 209.

supported or whose abilities are considerably limited by a fear of negative consequences of such attempts⁴⁴.

Finally, a specific order or prohibition underlying individual rights of persons may be distinguished under Article 9. It is a fact that the subjective right to access usually accompanies the right to specific goods (right to education, to employment, to information, to health protection, etc.). When studying the status of the right to access, it is well-founded to cite the right to equality and non-discrimination – as established human rights – which do not constitute rights to specific goods but are meant to guarantee the enjoyment of rights without discrimination and on equal terms⁴⁵. At the same time, the right to access may be associated with the right to equal treatment and non-discrimination. Another example of the operation of rights that guarantee the exercise of other rights, apart from the right to equal treatment and non-discrimination, is the indisputable right to justice, which is subject to protection as a human right. It is enshrined, among others, in the International Covenant on Civil and Political Rights (Article 14) and the European Convention on Human Rights (Article 6(1)). The Convention on the Rights of Persons with Disabilities provides for access to justice (Article 13).

An allegation of a violation of the right to access does not always have to be combined with an alleged violation of the right to specific goods, e.g., the right to education in connection with school's inaccessibility. This understanding of the right to access is reflected in Polish law by the possibility to request that access be ensured under the Act of 19 July 2019 on providing access to persons with specific needs⁴⁶. Such a request is not related to an allegation of a violation of a specific right. Moreover, it is not necessary to prove legal interest – only real interest. While legal interest has to be based on a specific substantive rule, factual interest occurs when a person is truly interested in a specific decision being made. Yet, this person can find no particular legal rule that would support their demand⁴⁷. Factual interest does not have to be protected by existing legal norms. It is sometimes compared to a subjective need, as opposed to legal interest granted legal protection under the current

44 General Comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, para 52.

45 Broderick, „Of rights and obligations”, 400.

46 *Journal of Laws of 2020*, item 1062.

47 Judgment of the Supreme Administrative Court of 06/03/2013, II GSK 1163/12, Lex No. 1296020, of 17/11/2017, OSK 982/17, Lex No. 2417389.

provisions⁴⁸, which is viewed as a qualified form of factual interest⁴⁹. In this sense, a demand for the provision of accessibility is independent. The object of protection is factual interest in achieving accessibility. A person may demand access to the extent to which it is guaranteed to them by statutory law, and they do not need to prove that a specific right, e.g., their right to education, was violated.

Thus, the right to access constitutes a stand-alone entitlement of an individual. It covers the right to demand that accessibility in certain areas be provided. Therefore, it is not only a precondition for the enjoyment of a specific human right or a principle that determines how specific rights should be implemented. In addition, Article 9 of the Convention strengthens the rights in horizontal relations⁵⁰. The content of Article 9 CRPD may be a basis for

48 For more about factual interest as a subjective need, see M. Szydło, „Publicznoprawna ochrona zbiorowych interesów konsumentów” *Monitor Prawniczy*, No. 17 (2004): 793; Cezary Banasiński, Eugeniusz Piontek, *Ustawa o ochronie konkurencji i konsumentów. Komentarz* (Warszawa: Wolters Kluwer 2009), comment to Article 24, electronic edition LexisNexis [accessed: 17.02.2021].

49 Judgment of the Province Administrative Court in Białystok of 01/06/2006, II SA/Bk 13/06, Lex No. 928768, judgment of the Province Administrative Court in Krakow of 07/10/2008, II SA/Kr 655/08, LEX No. 1049570. Andrzej Sebastian Duda, *Interes prawny w polskim prawie administracyjnym*, Warszawa 2008, p. 63.

50 General comment No 2 (2014) Article 9: Accessibility, Committee on the Rights of Persons with Disabilities, CRPD/C/GC/2, para 11 and 18; Nyusti and Takacs v Hungary: decision of the UN Committee on the Rights of Persons with Disabilities and its description: Oliver Lewis, „Nyusti and Takacs v Hungary: decision of the UN Committee on the Rights of Persons with Disabilities”, *European Human Rights Law Review*, No. 4 (2013): 419-424; Megret, „The Disabilities Convention: Towards a Holistic Concept of Rights”, 13; Peter Bartlett, „The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law” *The Modern Law Review*, No. 5 (2012): 757. For Polish law, see Katarzyna Łasak, „Dostępność usług bankowych dla osób niedowidzących i niewidomych. Uwagi na tle opinii komitetu do spraw praw osób niepełnosprawnych w sprawie Szilvia Nyusti i Péter Takács przeciwko Węgrom” *Gdańskie Studia Prawnicze*, No. 1 (2016): 274. For general remarks on the subject of the horizontal effects, see Lottie Lane, „The Horizontal Effect of International Human Rights Law in Practice. A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies”

judicial control of secondary EU law⁵¹. The regulation of accessibility ought to be treated as a legal institution whose content is of varied nature. It determines the path of actions, outlines objectives, and, in some situations, establishes specific legal rules, including, in particular, the right to access *per se*.

4. Conclusions

Accessibility as a legal institution constitutes an element of one of the currently most effective concepts. This idea not only created a wide range of new methods of implementing human rights, but also generated new research areas that have gradually combined into one broader field of study, namely Accessibility Studies, which deal with a critical analysis of processes and phenomena related to accessibility as well as with designing, implementing, and assessing methodologies based on and aimed at accessibility⁵².

The controversy raised by the right to access is part of the general concerns that have always accompanied the emergence of „new” human rights, which make their way into the canon of human rights with difficulty. These rights are not always established through express acclamation in international treaties; they often emerge in international public debate. Varying levels of acceptance for and implementation of human rights, subject to political, socio-economic, and cultural factors, do not facilitate a cohesive understanding of human rights. Even if societies are essentially open to human rights, some of the rights encounter more significant difficulties before they gain acceptance⁵³.

The very concept of the newness of a right is relative, as well. It is sometimes a matter of semantics when it is said that new rights have emerged or that hidden rights have been acknowledged and morphed from an idea into real rights. Some rights arise because of society becoming aware of them⁵⁴. They are often preceded by a broad public debate in which arguments from various perspectives are made. This is why one can see the reasons for the Committee members’ doubts as to the extent to which the Convention creates new rights or for the cautious theses that rights which had been subject to

European Journal of Comparative Law and Governance, No. 5 (2018) and with regard to persons with disabilities, in particular 44-45.

51 Cf. Ferri, „The UNCRPD within the EU legal system”, 76.

52 Gian Maria Greco, „The nature of accessibility studies” *Journal of Audiovisual Translation*, No. 1 (2018): 219.

53 Louis Henkin, „The Universality of the Concept of Human Rights” *The Annals of the American Academy of Political and Social Science*, Vol. 506 (1989): 15.

54 Pennock, *Rights*, 7.

protection before were presented in the Convention from a new perspective⁵⁵ and that the CRPD is very close to „establishing new rights”⁵⁶, and finally, for the proposition to „suspend” any considerations on the right of access *per se* until a thorough analysis from the perspective of the classification of human rights has been carried out.⁵⁷

Finding a relevant legal regulation of accessibility does not solve all problems. It is not clear how this regulation should be worded precisely or even what expression should be used for that purpose. Various terms are employed, including: „right to access”⁵⁸, „right of access”⁵⁹, „right to have access to”⁶⁰, „accessibility as a right”⁶¹, „right to accessibility”⁶², and even „access to rights”⁶³ (I prefer to use the term „accessibility” with regard to the principle and the terms „right to access” or „right of access” with reference to the right). There is even less clarity concerning the scope and content of the concept.

55 Gerard Quinn, „Bringing the UN Convention on rights for persons with disabilities to life in Ireland”, *British Journal of Learning Disability*, No. 4 (2009): 246.

56 Megret, „The Disabilities Convention: Human Rights”, 508.

57 Greco, „On Accessibility as a Human Right, with an Application to Media Accessibility”, 21.

58 General comment No. 2 (2014) Article 9: Accessibility, Committee on the Rights of Persons with Disabilities CRPD/C/GC/2, para 2, 3, 14.

59 Art. 5 f) International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* 21 Dec. 1965, G.A. Res. 2106 (XX), U.N. GAOR, U.N. Doc. A/6014 (1966),

60 Committee on Economic, Social and Cultural Rights, General Comment No. 5, Persons with Disabilities, 09/12/94, para. 34.

61 Don MacKay, Chair of the Ad Hoc Committee on the Disability Convention, Daily Summaries, Sixth Session, 5 August 2005, volume 7(5). <https://www.un.org/esa/socdev/enable/rights/ahc6sum5aug.htm>. [accessed: 10.04.2021].

62 The Day of General Discussion on Accessibility, 7 October 2010, Committee on The Rights of Persons with Disabilities, Outline p. 1; International Disability Alliance, Submission to the Committee on the Rights of Persons with Disabilities, Day of General Discussion on Accessibility- Article 9 CRPD, 7 October 2010, p. 2. <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD7102010.aspx>. [accessed: 10.04.2021]; G. Quinn, „Bringing the UN Convention on rights for persons with disabilities to life in Ireland” *British Journal of Learning Disability*, No. 4 (2009): 248; Broderick, „Of rights and obligations”, 407.

63 Megret, „The Disabilities Convention: Human Rights”, 504.

Mere consensus as to the legal character of the norm of accessibility does not necessarily entail the content of the right. Yet if we accept the right to access, its content will undoubtedly be a step towards deghettoizing human rights with regard to persons with disabilities⁶⁴ and acknowledging the existence of a range of groups whose claims based on human rights require an adjustment of a general system of rights concerning their undue „uniformity” (it requires their plurality)⁶⁵. Let us conclude with the statement by Hannah Arendt that man as a human being has only one human right that transcends all other rights – the right not to be excluded from the rights guaranteed by their society⁶⁶.

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64 Gian Maria Greco, „On Accessibility as a Human Right, with an Application to Media Accessibility”, 16-17.

65 Such general remarks on the Convention have been expressed in F. Megret, „The Disabilities Convention: Human Rights”, 514-515.

66 Hannah Arendt, „Es gibt nur ein einziges Menschenrecht” *Die Wandlung*, 4 (1949): 768.

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