

Survey Report on Remedies

Gaining a brief overview of legal remedies

A report written by Disability Rights Defenders (DRD) in cooperation with the project Artikel 19 som verktyg (Article 19 as a Tool).



**DISABILITY
RIGHTS
DEFENDERS**
know your rights, use them

Picture caption: Article 19 as a Tool logo and Disability Rights Defenders Logo.

Both are projects of the Independent Living Institute (ILI) in Stockholm, Sweden.



Picture caption: Independent Living Institute Logo.

The projects
are funded by:



Picture caption: Three logos of the funders: Allmänna Arvsfonden, Bentes Skansgårds - the Independent Living Fond and UOBA - Independent Living Norge.

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List of abbreviations

CRPD	UN Convention on the Rights of Persons with Disabilities (CRPD)
ILI	Independent Living Institute
DRD	Disability Rights Defenders (Network)
CSO	Civil Society's Organization
DPO	Disabled People's Organization
etc.	Et cetera; and so forth
e.g.	Exempli gratia; for example

1. Preamble

Even though most countries have ratified the CRPD, the rights of disabled people get violated daily all over the world. In almost every country there are national laws and international agreements which should assure the same rights for disabled people. But the *“main problems are: [...] laws are widely unenforced”*.

“That is why remedies are needed!”, says Ola Linder, lawyer and project leader of ‘Article 19 as a Tool’.

There is a need for deeper discussions on tools for strategic litigation, including effectiveness of legal and injunctive remedies, different forms of compensation for violations of human rights and procedural strategies for impact, as important tools to fight against violations of disability rights. Thereby, every law system and country has different ways and possibilities to redress violations.

This report is based on a survey conducted with the aim to gain an overview of the topic of remedies, to see where and what law systems in general are lacking or which remedies can be transferred from one country to another for better effectiveness in using the law as a tool for social change and individual justice.

The Independent Living philosophy and the Human Rights model of disability require an effective and strong system for recognition and enforcements of disabled people's rights. Therefore it is fundamental to have a well functioning court system which is able to provide remedies that combat discrimination and other types of human rights violations effectively. Even though Sweden is internationally known as a support paradise for disabled people, human rights violations happen here as well. In reality the rights based approach is not always the way for dealing with disability issues in Sweden. Instead, the welfare state approach is prevalent. Sweden does not protect the rights of disabled people as much as it provides care for the ‘groups that can not take care of themselves’. It is called for a stronger system for the protection and enforcement of rights where disabled people are fully treated as legal entities and not care packages.

This report provides an overview of some legal remedies to enable interested readers to learn from other countries' experiences as well as to gain knowledge about other types of remedies which might be more effective for ensuring protection and enforcement of rights.

2. Questionnaire

This report analyses and summarizes the results of a questionnaire on remedies. The questionnaire was shared through the Facebook group of the Disability Rights Defenders Network and the newsletter lists of both projects. Further, it was sent to different stakeholders and lawyers mostly situated in Europe.

Since the aim of the survey is to gain an overview over the topic of remedies, this random sampling of participants was sufficient to reach reliable answers and a first impression of the topic. This report does not claim to provide a complete overview of the topic, but it can be used to access the research field and analyse where and how further research is needed.

All questions in the survey were open questions, which could be answered with a long, self-written text (no multiple choice or selection of answers). No question was compulsory. The questionnaire contained the following six questions:

- 1) Where do you come from? / To which law system do you refer to?
- 2) What remedies are available to different issues within disability rights related matters in your country? (for example: damages for discrimination, injunctions for inaccessibility or appeals of negative decisions on applications for personal assistance)
- 3) Which remedies are often used, which ones are rarely used? Why?
- 4) What are you lacking in your country regarding remedies for addressing disability rights violations and why?
- 5) What deters people in your country from taking court actions?
- 6) Do you think a discussion on remedies would be helpful when fighting for disability rights? Or what do you suggest would be helpful?



SURVEY of REMEDIES

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Thank you for your participation and contribution!

Picture caption: the banner of the survey. It says: "Survey of Remedies. Thank you for your participation and contribution!"

Where do you come from? Or to which law system do you refer to?

Your answer _____

What remedies are available to different issues within disability rights related matters in your country? (for example: damages for discrimination, injunctions for inaccessibility or appeals of negative decisions on applications for personal assistance)

Your answer _____

Which remedies are often used, which ones are rarely used? Why?

Your answer _____

What are you lacking in your country regarding remedies for addressing disability rights violations and why?

Your answer _____

What deters people in your country from taking court actions?

Your answer _____

Do you think a further discussion on remedies would be helpful when fighting for disability rights? Or what do you suggest would be helpful?

Your answer _____

Picture caption: Screenshot of the questionnaire of the survey. This picture shows a screenshot of the questionnaire and how it was displayed in the survey. You can see that all questions are open questions.

The first question concerning the referred law system sets the frame to understand and classify the information given by the answers to the subsequent questions.

The subsequent questions asked about the situations in the countries. The answers were mostly judgmental and therefore difficult to analyse and summarize, since the opinions differ from country to country and are based on cultural reliance to the law system.

The last question can be seen as implicit for the questionnaire since the participants already show their interest in a discussion on this matter by participating and filling in the survey. By setting up this survey the topic was already assessed to be worth and helpful when fighting for disability rights.

Nevertheless, this question aims to collect opinions from other persons and further ideas. The results can be used to confirm and backup the aim to support a discussion on remedies as a tool to address disability rights violations.

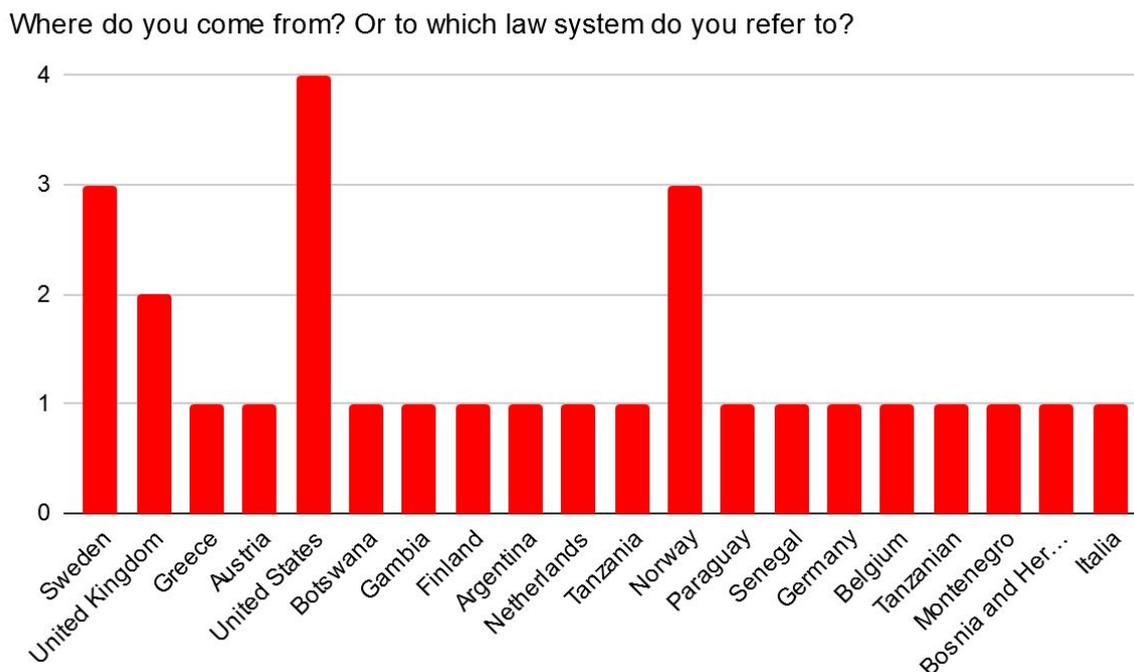
The answers to the questionnaire were collected anonymously from the end of February until the end of March 2020.

3. Answers to the questionnaire

30 persons participated in this survey by answering the questionnaire. The amount of participants can be seen as an existing interest in the topic. Though, not every participant answered all questions.

3.1 Where do you come from?

The 30 participants come from 20 different countries. The following chart shows the distribution of countries to which the participants refer their answers.



Picture caption: This picture shows the distribution of countries for the question "Where do you come from? Or to which law system do you refer to?". Mostly only one person from a country participated in the survey. Except for Sweden (3), the United Kingdom (2), the United States (4) and Norway (3).

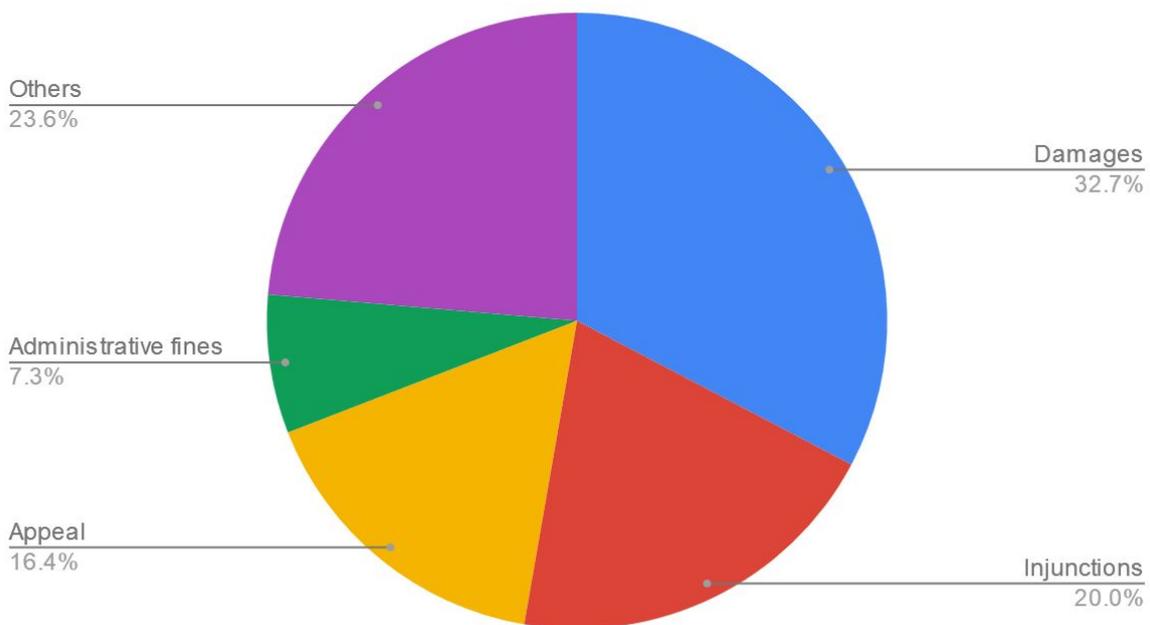
Out of 30 participants 10 come from the United States, Sweden or Norway. This is one third of the total number of responses and reflects the situation of the DRDs Network most active disability rights activists and our target group.

To verify the answers of the questionnaire, it would be helpful to direct the same or slightly tweaked questions to other lawyers in the corresponding countries.

3.2 What remedies are available?

In regards to the second question (What remedies are available to different issues within disability rights related matters in your country?), it became clear that particularly damages, injunctions and appeals in varying degrees seem to be the trends in the different countries (Although it is questionable whether an appeal can heal the status of a victim of a violation). The following pie chart shows the different remedies that are available.

What remedies are available?



Picture caption: This graphic shows the distribution of the available remedies. Damages (32,7%), Injunctions (20%), Appeal (16,4%), Administrative fines (7,3%) and others (23,6%).

As an especially interesting result it was mentioned that it is possible to get “a declaration that you have been discriminated against (rarely applied for)”. This could be used for further research.

The answers showed the wide range of available remedies in an explanatory and problematising way. The following answer provides an insight to remedies available in the USA.

“[...] in the U.S., inaccessibility is considered a form of discrimination, so I don't differentiate between those kinds of cases. Injunctions and declaratory relief are always available. Damages, including economic and non-economic, are available for most kinds of discrimination (notably not for public

accommodation discrimination under federal law). There is some disagreement in the courts about exactly what a plaintiff has to prove to get non-economic damages in a discrimination case, and at least one court has suggested they may not be available in some cases. Punitive damages can be available [...]. Attorney fees are almost always available under federal law, although not in public benefits cases. Public benefit denials (e.g., social security disability benefits, Medicaid, veteran's disability) can always be appealed. The federal government also has the right to intervene in discrimination cases and seek its own remedies.”

Some answers open up further questions, for example *“damages where there is ‘deliberate indifference’”*. This could be an interesting threshold, but it is unclear how it is measured and defined and what actually constitutes ‘deliberate indifference’.

It seems tempting when reforming the law system to ‘translate’ measures from other countries into one's own law system. For example one person mentioned an alternative review system to detect miscarriages of the administrative system. The comparison to the Justitieombudsmannen in Sweden, was therefore nearby. On closer inspection it becomes obvious that the Swedish ombudsman is weak in comparison, since this position holds no real corrective or remedial effect for the individual seeking redress and support. This example shows that it is not as easy as it seems to apply measures from one country to another. Nevertheless, it gives good examples and ideas which need further development.

Furthermore, the answers to this second question make it clear that this topic is linked to access to justice matters.

3.3 Which remedies are often used, which rarely? Why?

According to the participants, the remedies which are available most often are also the ones that are often used. Damages and injunctions are used the most. Nevertheless, it varies according to the countries and law systems.

Additionally, this question is highly linked to access to justice matters and the question concerning the barriers to take court actions (question number five). Further research is needed to analyse the link between those questions, answers and topics. The answers to this question show that in many countries, there is a similar situation as in the United Kingdom, where *“the most common remedy for discrimination in employment and goods and services is damages for ‘injury to feelings’ and more rarely, ‘personal injury’”*.

But besides that, there were also interesting referrals to the role of tribunals in different countries. In some countries, it was pointed out that the tribunal can issue certain recommendations which can be followed up by means of the award.

Injunctions are also a common remedy and often rated as strategically beneficial for the promotion of disability rights and accessibility. A huge drawback is the fact in the United Kingdom that it is *“only possible to get an injunction for a very narrow and specific issue that you face”*. This means that mostly only injunctions regarding personal matters or based on personal requirements are available, which have to be claimed individually and not for general purposes.

In this second question as well as in subsequent questions, the remedy of getting *“a declaration that you have been discriminated against”* was mentioned. This declaration would be a way of building up legal precedent and clarifying the legislation through court action. The court also clarifies further what exactly constitutes discrimination by formulation these declarations. However, this remedy does not seem to have any effect as a compensation for the losses of the claimant. Further, it does not seem to have an effect as a remedy to compel the defendant to cease the discriminatory act or practice. Summing up, it gets clear that there is further discussion needed on the advantages and disadvantages of such a declaration.

The role of the discrimination ombudsman was also mentioned two times in referral to this question. One provoking statement from Sweden *“The discrimination ombudsman is no longer an ombudsman”* and rather acknowledging statement from Montenegro, where the participant indicated that proceedings before the Ombudsman of Montenegro are used mostly, together with administrative procedures before the state’s and local institutions and civil court proceeding.

3.4 What are you lacking in your country regarding remedies?

A main result of this question is that damages are often too low to prevent discrimination.

A suggestion to fill this lack was to establish an *“enforcement body to take complaints too, who have the power to address discriminatory employers or service providers”*. Here it would be necessary to discuss how this body could be positioned in the system. The following quote highlights the wish for better enforcements: *“We need a stronger government entity to provide enforcement.”*

Another suggestion from Finland was to strengthen amicable arrangements: *“Easy access low cost bodies with full decision making power”*. In Finland people have access to effective legal procedures and they prefer these procedures over court procedures.

A major problem occurred to be that DPOs *“[...] do not have a strategic litigation strategy.”* And furthermore, only a *“[...] few have funding to give legal advice”*.

Sometimes it is not the lack of remedies but it turns out to be rather an enforcement or usage issue: *“There are enough types and numbers of remedies, but institutions in charge to use them are passive and without any responsibility”*. This backs up the hypothesis that this topic is closely connected to the issue of access to justice.

Another problem that was pointed out is the dependence on political influence. As DPOs need to get fundings and cooperate with political figures to be able to implement suggestions and changes they are at risk to lose their independence as a person critically mentions: *“Too many leaders of disabled people's associations are not independent of politicians”*. This opens up another discussion on the independence or dependency of civil rights organizations on current political influences and how politicians are viewed - as enemies or allies?

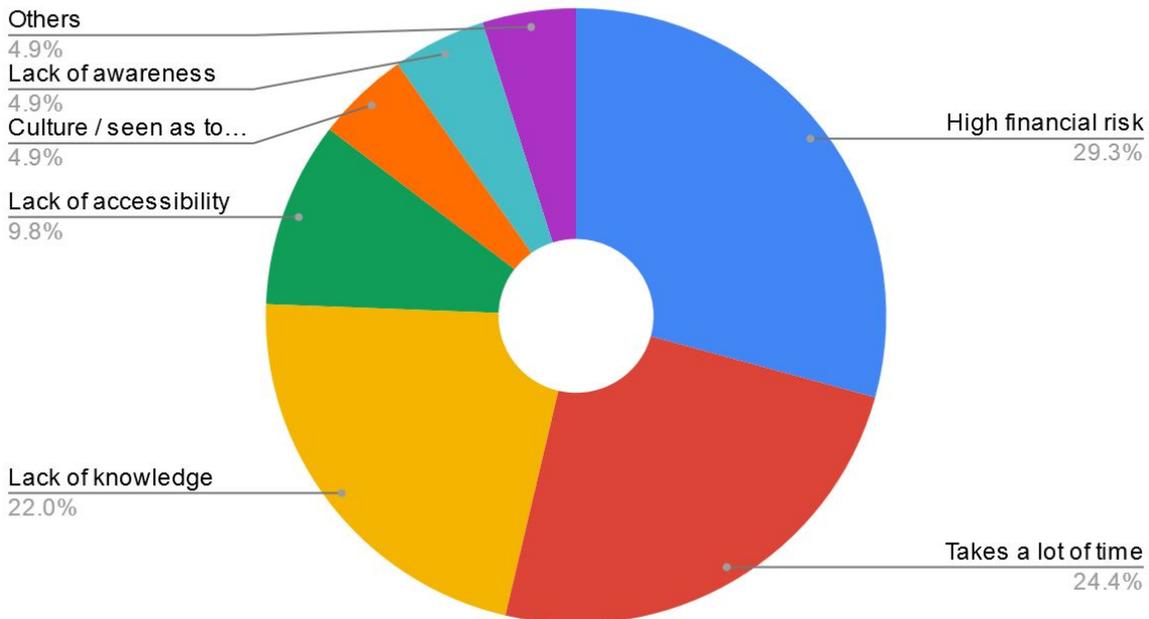
One person from Greece complaint, that the *“civil Society is weak”* and therefore the awareness of discrimination is lacking. Another person stated this awareness as a lack of confidence: *“The confidence of disabled people to fight and address their rights systematically”*. Low awareness and empowerment of disabled people lead to the next question, what deters people from taking court actions.

3.5 What deters people in your country from taking court actions?

The main barriers of taking court actions are the high financial risk and the amount of time that is needed. Further, the lack of knowledge was also assessed to deter people from taking court actions. The lack of knowledge and awareness can be found within the following concise quote: *“People are not aware of their rights”*.

The following pie chart visualizes what deters people from taking court actions.

What deters people in your country from taking court actions?



Picture caption: This graphic shows what deters people from taking court actions. High financial risk (29,3%), takes a lot of time (24,4%), lack of knowledge (22%), lack of accessibility (9,8%), culture / seen as too extreme step (4,9%), lack of awareness (4,9%) and others (4,9%).

The following statement from France shows how personal resources, access to justice and actual court actions cohere:

“Even if recourse to administrative justice is almost free in France, studies on this point show that individuals with the least cultural and economic capital do not seek it”.

3.6 Further discussion on remedies

Yes, further discussion on remedies is seen as necessary. All participants stated that a deeper discussion on remedies is useful and should be continued. It was suggested to also discuss further topics which go hand in hand with the topic of remedies:

- Access to justice
- Trainings for lawyers and DPOs
- More law clinics
- More awareness on human rights and disability rights

There are also needs for proactive measures and *“a more cooperative approach rather than an aggressive one. [In other words,] proposing alternatives to non-functioning remedies”*. The Independent Living philosophy - *“creating solutions and having alternatives”* - can provide an appropriate alternative and answer, says

Ola Linder. This issue can be linked to a further discussion on structured negotiations.

Additionally, to make this discussion more accessible, it needs to open up to other languages than English.

4. Summary of the results

As a main problem it got clear that access to justice is an important issue when looking at this survey. First of all, it needs to be clarified what is meant by 'access for justice'. Second, it shows its close link to personal resources of people like knowledge, financial resources, resilience etc. Often "*people are not aware of their rights*". This problem can be addressed by civil society. It shows the need to mobilise legal resources within civil society. Civil society organizations should play an "*active role in providing access and support to law and justice by providing legal assistance.*"

Besides the non-governmental side and the means of CSOs, "*we need a stronger government entity to provide enforcement.*" This could be displayed in the figure of a strong ombudsman.

Furthermore on the state level, there is a demand to anchor the CRPD within the national constitution or legal system. The legal status of the CRPD varies in different countries. For example, in Sweden the CRPD does not have legal status of a national law, but rather an international treaty that is not directly applied by the courts; only by means of treaty conform interpretation of national laws. In Sweden a ratification of a treaty is not done by an incorporation of the treaty's text to national law but through adoptions, changes or complements of the existing laws in accordance to the treaty (Kap. 10, § 3 Regeringsformen). In contrast, in Germany a treaty is ratified through a national law requiring approval (Art. 59 II GG). Through this law the Convention gets incorporated into national law and, therefore, gets legally binding in Germany. It would be interesting to discuss the different legal status and its consequences for the implementation of the CRPD¹.

This report cannot give recommendations for each country but it can try to apply the results of the survey to the Swedish system. Concerning different remedies, Sweden could concentrate more on general damages for a general purpose, "*a declaration that you have been discriminated against*", a stronger ombudsman, amicable arrangements and tribunals.

¹ For further reading, see The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts, edited by Anna Lawson and Lisa Waddington, 2018, Oxford University Press.

Furthermore, establishing the use of injunctions as a remedy could be useful for the development in Sweden.

The survey showed the prevalence of an array of remedies in many countries². This survey gives additional light on the need for several possibilities, and that the remedies are fairly useless if people don't have sufficient resources to use them. A critical question may be to ask if a remedy is really a true remedy if it can't properly be accessed and used without risking too much money and time?!

5. Further discussions

Conducting and analysing this survey provided many ideas and impulses to work on. It did not only give an overview of how remedies are constructed on a general level, but also to some extent how they work and how people use, or not use, them. The survey shows that the topic of remedies cannot fully be distinguished from **access to justice** matters. It even shows that 'access to justice' can be drilled down to several issues like 'usage of justice and laws' and 'implementation of laws' etc.

Also the **strategies and the focus of DPOs** was questioned, since apparently not many DPOs have strategic litigation strategies and funding for legal advice. Also their role in **cooperation with politicians** or state agencies, needs to be discussed further. This refers to the issue of political independence of DPOs and their possibilities to criticize the government without negative consequences.

The survey provided a great insight on different remedies available in different countries. Nevertheless, further discussion is needed on the strengths and weaknesses of different remedies and how they can support the enforcement of legislation on the rights of disabled people.

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You are welcome to share this document with friends, interested people or colleagues. If you have any further comments, suggestions or questions please contact drdn@independentliving.org.

² See the Equinet survey from 2015 on discrimination sanctions;
https://www.archive.equineteurope.org/IMG/pdf/sanctions_regime_discrimination_-_final_for_web.pdf
accessed June 11 2020.