

Committee on the Rights of Persons with Disabilities

Day of General Discussion on the Right to Accessibility

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Section I

Accessibility to the Physical environment



The ATLAS Council

(Redefining Disability)

Accessibility and reasonable accommodation:

Balancing between “reasonableness” and “undue burden” in
granting accessibility to the physical environment

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Introduction

In 2006, at the time of adoption of the Convention on the Rights of Persons with Disabilities by the UN General Assembly, former Secretary General, Mr. Kofi Annan speaking of the importance of the new treaty said “too often those living with disabilities have been seen as objects of embarrassment, and at best, of condescending pity and charity...on paper, persons with disabilities have enjoyed the same rights as others; in real life, they have often been relegated to the margins and denied the opportunities that others take for granted.”

The CRPD Convention aims to contribute to redressing the profound social disadvantage of persons with disabilities by providing them the same opportunities that others take for granted. In other words the main purpose of the Convention is to define ways through which access to these opportunities can be granted for persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres in equal terms with others in the society.

1. Disability as the main barrier in the way of full enjoyment of human rights

In 1982 in the World Program of Action concerning Disabled Persons, disability was defined for the first time in official UN documents as “a function of the relationship between persons with disabilities and their environment.”¹

Disability as a function of the interaction between impairments and the environment is viewed itself as the main barrier preventing persons with disabilities from enjoying their human rights.

Since there is an obligation on the part of the state to ensure for all citizens the full enjoyment of their human rights, it is important to remove disability as a barrier that prevents them from enjoying their human rights.

When states and societies cannot remove the impairments, they should concentrate on removing the environmental and attitudinal barriers.

¹ UN GA resolution 37/52 of 3 December 1982, World Program of Action

a) *The Principle of inherent dignity and self-worth of human beings*

The fundamental principle guiding the work of societies and states is the *principle of inherent dignity and self-worth* of each and every human being, and therefore, their inherent equality which finds expression in the UN Charter and in the UN Universal Declaration of Human Rights. This fundamental principle requires creating for persons with disabilities all the conditions for an autonomous and independent life in society in equal terms with the others.

b) *The principle of non-discrimination*

In other words, letting disability preventing citizens from enjoying their fundamental human rights would be a violation of the fundamental obligation of states to provide for the exercise, protection and promotion of human rights by all irrespective of any distinctive criterion such as race, color, sex, ethnicity, but also disability. In other words, it would amount to a violation of the general principle of non-discrimination, an obligation *erga omnes* that each and every state owes towards not only each of its own citizens, but also towards the international community as whole.

Accordingly the obligation incumbent on states and societies to remove barriers in the way of full enjoyment of their human rights by persons with disabilities is a fundamental one, since not doing so would be in itself a violation of the human rights of persons with disabilities.

2. Removing attitudinal and environmental barriers

Attitudinal barriers such as negative stereotypes can be removed by developing an intense awareness-raising campaign that portrays a positive image of persons with disabilities; and which promotes an image of persons with disabilities as capable and active contributing members of society.

On its side, removing environmental barriers, in particular physical barriers is essential for the realization of the self-worth of persons with different forms of disabilities. Removing physical barriers is primordial since this enables independent personal mobility of persons with disabilities, essential for the realization of human rights in practically all other spheres of human life from education, to employment, recreation and leisure. An accessible physical environment has therefore the potential to guarantee the autonomy, independence, and full participation of persons with disabilities in all other activities.

Usually when we talk about the need to remove physical barriers we think about *inter alia* the need for states to develop standards and guidelines and to consider enacting legislation and perform the relevant work in order to ensure accessibility to various areas in society, such as housing, buildings, public transport services and other means of transportation, streets and other outdoor environments; to include accessibility requirements in the design and construction of the physical environment.

States also need to adapt schools and workplaces and promote the use of facilitating new technologies and the development and production of assistive devices that can enable persons with disabilities to become competitive in schools and in employment.²

3. Reasonable accommodation

Obviously granting such an accessible environment specially in already existing public spaces requires an enormous amount of investments. The question of how much needs to be invested in the removal of physical barriers so that a state can be deemed to meet its obligation to grant to persons with disabilities the enjoyment of their human rights remains at the centre of any discussion about promoting human rights of persons with disabilities.

Is there a duty to provide accommodation in absolutely any circumstance, or special factors could be considered? If so who measures the degree of consideration of special factors?

² See Standard Rules of equalization of opportunities for persons with disabilities, rules 5,7, UN SC res 48/96, 20 December 1993.

States agreed in the Convention that there is no requirement of an “absolute” accommodation. They qualified the notion of “accommodation” with the indication that it should be “reasonable”, which is explained in the Convention as meaning “necessary” but not imposing “a disproportionate or undue burden”.³

Since the realization of the right of accessibility depends in great deal on the degree of accommodation that can be provided in certain cases, it is fair to state that accessibility in the ultimate instance is a measure of balancing between “reasonableness”, “necessary” and “undue burden” in the requirement of reasonable accommodation.

The Convention itself does not define, what should be considered “undue burden”, but it says that the accommodating efforts should not be “disproportionate.”

Is it ethical balancing between “necessary” and “undue burden” when at issue is the need to grant the self – worth of human beings?

However this does not solve the problem since the question can be asked: “*disproportionate with regard to what?*”

If the purpose of conducting the necessary modifications in the physical environment is at the end of the day enabling the realization of the *inherent dignity* of persons with disabilities as human beings entitled to *full autonomy and independent life in society*, “disproportionality” and “undue burden” become no longer a monetary exercise.

In fact it would be a question of measuring whether the investment in an accessible physical environment is *disproportionate to the self-worth* of persons with disabilities as human beings. And if this is so then the answer will always be that these investments in accessibility of the physical environment and reasonable accommodation *are never disproportionate*.

³ Article 2 of the CRPD Convention reads: "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".

Therefore it can be said that at the end of the day reasonable accommodation means putting yourself the question whether a person with disabilities will be able, otherwise, to perform an autonomous and independent life without the adaptations required.

If this can be assured otherwise, this gives the measure of “reasonableness” of the decisions.

If this cannot be assured otherwise, then not doing anything, does not provide satisfaction to the requirement of providing “accessibility” and “reasonable accommodation” for persons with disabilities since the other side of the *proportionality equation* is the *inherent dignity and self-worth* of persons with disabilities as human beings itself, which should be ensured under any circumstance, as an *erga omnes* good.