IDA’s concluding statement for the Day of General Discussion

IDA welcomes the opportunity provided by the Committee on the Rights of Persons with Disabilities to deliver a closing statement on its Day of General Discussion on CRPD’s article 5 on equality and non discrimination. we comment by stressing some key points we particularly ask to be considered by the Committee.

**1- Article 5 of the CRPD and transformative equality**

Article 5 of the CRPD, and the CRPD as a whole, reflects the evolution of the notions of equality and non-discrimination in human rights law. Human rights law has long ago moved beyond formal equality. Instead, substantive equality seeks to ensure equality of enjoyment of rights focused not only on equal treatment but rather on outcomes, including “special measures” favouring a group to promote equality, without entailing discrimination. More recently, the notion of ***transformative equality*** has beengaining ground, distinguishing from substantive equality. While substantive equality “seeks to combat discriminatory behaviour, structures and systems, the transformative equality concept targets changing these structures and systems with a variety of positive measures.” In this way, transformative equality is consistent with the human rights based approach to disability, which seeks removal of barriers to participation and enjoyment of rights leading to structural and systemic changes (i.e. inclusive education).

**Ida would like to encourage the Committee to formally adopt the language of “transformative equality,” as this is the notion that better reflects the paradigm shift and the obligations brought by the CRPD, making explicit that formal equality and substantive equality have still a role to play in preventing and addressing discrimination**.

**2- the key role of participation of organisations of persons with disabilities**

Ensuring persons with disabilities the enjoyment of their rights on equal basis with others constitutes both the *raison d´etre* and major goal of the CRPD. Many dimensions can be highlighted such as the need to make environments, transportation, communication and information accessible, and raising awareness on the rights among persons with disabilities, professionals and society in general to remove attitudinal barriers, as key preconditions for the exercise of rights by all persons with disabilities. From an individual perspective, enabling rights, such as equal recognition before the law and inclusive education, are also key to foster exercise of other rights on equal basis with others.

A key element of the human rights based approach is participation of rights holders in the design, implementation and evaluation of legislations and policies. Article 4.3 of the CRPD requires “close consultation with and active involvement of persons with disabilities, through their representative organisations.” **IDA believes that this crucial element needs to be stressed from the outset, as to constitute the mandatory frame in which all elements are developed**.

IDA underlines **the relevance and momentum of the Sustainable Development Agenda and Goals in fostering equality and non-discrimination**. Building the bridge between human rights, including the proposed notion of transformative equality, and development, to ensure the CRPD compliant implementation of SDGs, would require an explicit reference to SDGs in this initial part of the general comment.

**3- The right to equality and non-discrimination: an autonomous right**

The issue of whether equality and non-discrimination is a principle or a right is connected to the issue of its autonomy vis-à-vis other rights under the CRPD. The specific issue to address is ultimately whether CRPD Article 5 on equality and non-discrimination can be invoked within a standing alone claim and not necessarily in connection with other rights recognised in the CRPD.

CRPD counts first with general provisions referring to equality and non-discrimination, including Articles 3(b), (e) and (g), 4(1), 4(1)(b) and (e), and secondly, with Article 5, specific on equality and non-discrimination. Being this the case, **IDA believes that the CRPD Committee should simultaneously adopt the language of “right to equality and non-discrimination” under Article 5 and uphold its autonomous character.**

**4-Covering all kinds of discrimination, including discrimination by association**

IDA welcomes the initiative of the Committee to include all kind of discriminations mentioned in the outline that seeks to provide the widest protection possible against discrimination on the basis of disability, and also other grounds. IDA encourages the Committee to include explicitly: multiple and intersectional forms of discrimination, denial of access, denial of procedural accommodation, denial of reasonable accommodation by association, and disability based violence.

Disability based discrimination may be compounded or aggravated when other prohibited grounds of discrimination operate or interact. In particular, IDA asks the Committee to particularly note the link between poverty and discrimination, and how these two are mutually aggravating, and how these multiple and intersectional dimensions particularly affect persons with intellectual, psychosocial and multiple disabilities, women, girls, hoys and sexually diverse persons with disabilities, including intersex persons.

The CRPD Committee has stated that “**denial of access** to the physical environment, transportation, information and communication, and services open to the public constitutes an act of disability-based discrimination that is prohibited by article 5 of the Convention.” Consistently, it should be included as a form of discrimination. IDA believes, however, that this concept needs clarification to prevent misunderstandings in connection with the kind of obligations under non-discrimination (immediate) and under accessibility (“gradual implementation”).

Turning to including **disability-based violence as a form of discrimination**, IDA observes the criteria adopted by the CEDAW Committee regarding gender-based violence: “Discrimination against women on the basis of sex and gender comprises, […], gender-based violence, namely, violence that is directed against a woman because she is a woman or violence that affects women disproportionately.” IDA invites the CRPD Committee to do likewise.

**5- Reasonable accommodation and its denial as a form of discrimination**

Reasonable accommodation and its denial as a form of discrimination emerged within national practices, notably in the USA, and was referred for the first time in human rights law by the CESCR Committee. Other developments have occurred before and after the CRPD, at both the national and international levels, including legislation and jurisprudence. However, States reviews andcertain developments show there is a lack of clear understanding of the concept, its implications, its distinction from other concepts, its applicability to all rights and areas of life and the obligations emanating from it. In this sense, IDA encourages the Committee to refer the OHCHR´s thematic study, to address the following points:

**a) Make absolutely clear that reasonable accommodation is of immediate application:**

Non-discrimination provides for immediate obligations. Articles 2 and 5 of the CRPD show that the duty to provide reasonable accommodation is part of non-discrimination, entails an individual approach and its denial constitutes discrimination. Consequently, the general comment must state clearly that the duty to provide reasonable accommodation **is of immediate application and not subject to progressive realisation**, in line with previous Committee´s jurisprudence, and notably its recent general comment no. 4 on Article 24: Right to inclusive education.

**b)The concept of “disproportionate or undue burden” is one only concept and frames the any eventual discussion on resources for reasonable accommodation**

CRPD negotiations show that “disproportionate or undue burden” is one and only concept. The phrasing constitutes a compromise to easily relate to different national practices. To prevent any further discussion, IDA highly encourages the Committee to always use the written form **“disproportionate or undue burden”**, as done in the very beginning of its jurisprudence.

In connection to the previous point (immediate application of reasonable accommodation, and no subjection to progressive realisation), it is important to highlight, in order to prevent any further confusions, that **any eventual discussion on financial resources for the implementation of reasonable accommodation will fall under the concept of “disproportionate or undue burden” and the elements that the Committee further elaborates on it**.

**c) Regulate criteria and develop guidance on the duty to provide reasonable accommodation.**

In occasions, the CRPD Committee has mentioned the need to regulate criteria for the provision of reasonable accommodation**.**

It is crucial to require States to clearly set out in legislations, regulations and guidance documents the rights and duties of right holders and persons/entities obliged, procedures, time frames when appropriate, and the criteria to assess requests, offers and denials of reasonable accommodation.

OHCHR has stressed the importance that the proportionality test be objective, and Human Rights Watch has emphasized that the burden of the proof when reasonable accommodation is denied lies entirely on the obligated entity and be resolved only after all reasonable options have been exhausted.

In particular, IDA would like to highlight, firstly, that the obligation to provide reasonable accommodation must not be assessed in isolation from other CRPD related obligations. Therefore, **the existence of “concurring” or related obligations (e.g. on accessibility or provision of support) should weigh in favour of rejecting the claim of a “disproportionate or undue burden.”**

Secondly, it is extremely important, regarding both the State as a whole and the private sector entities, to note that “overall assets rather than just the resources of a unit or a department within an organizational structure must be considered.”

**d) Distinction from other concepts:**

As the Committee has done previously, reasonable accommodation should be clearly distinguished from **accessibility**, including explicitly in terms of obligations (immediate vs progressive).

Reasonable accommodation also distinguishes from **“specific measures” (CRPD Article 5.4), which includes but is not limited to “affirmative actions.”**.

Thirdly, **in the context of Article 13** (access to justice), the CRPD refers to “procedural accommodations”. CRPD negotiations show that the adjective “reasonable” was deliberately left aside. As noted by OHCHR, procedural accommodations “are not limited by the concept of ‘disproportionate or undue burden’,” key distinction as “the right of access to justice acts as the guarant or for the effective enjoyment and exercise of all rights.” Consequently, as anticipated in section 4, denial of “procedural accommodation” must be considered an specific form of discrimination in the context of access to justice, which could lead to denial of justice, lack of effective remedies and overall lack of protection of rights.

Fourthly, IDA encourages the Committee to adopt the criteria by OHCHR on the interaction between reasonable accommodation and support measures in the exercise of rights (e.g. Articles 12, 19 and 24), which is indeed analogous to that adopted by the CRPD Committee in connection to accessibility: “As support systems or services may not yet be developed, **reasonable accommodation may function as a means of providing support in a particular case**.”

**e) Reasonable accommodation by association**

Discrimination by denial of reasonable accommodation to persons with disabilities and discrimination by association to persons with disabilities lead to the issue of whether associates of persons with disabilities (e.g. parents) are entitled to reasonable accommodation in the exercise of their own rights and why. The Committeeaddressed this issue recommending the European Union “to ensure that all **employees** of the European Union **who** are persons with disabilities, or **have family members with disabilities**, receive the reasonable accommodation they need to enjoy **their rights from the labour** and related relationships on an equal basis with others.”

IDA believes that the Committee should elaborate on this issue in order to ensure that associates to persons with disabilities are provided reasonable accommodation in the exercise of their rights when necessary to ensure any right of a person with disability, in the particular case (e.g. employment schedule accommodation for parents of children with disabilities when necessary to ensure that the latter count with support if no other option is made available by the State for the time being).

**6- Recommendations**

Based on the previous considerations, IDA encourages the Committee to:

- Incorporate the notion of *transformative equality* that better reflects the paradigm shift brought by the CRPD, making explicit that formal equality and substantive equality have still a role to play in preventing and addressing discrimination.

- Call on States to ensure close consultation and active involvement of persons with disabilities, through its representative organisations, in the design, implementation and evaluation of policies directed to increase equality for persons with disabilities, **explicitly** referring to the processes of implementation of the Sustainable Development Goals, by stressing these elements in the introductory part of its draft general comment.

- Adopt a position on, and call States to respect, the “**right** to equality and non-discrimination” as a right, and its autonomous character, in order to ensure the broadest scope of application possible of Article 5 of the CRPD at the national level, independently from other CRPD provisions.

- Call States to protect persons with disabilities from all forms of discrimination, including, multiple and intersectional discrimination, denial of access, denial of procedural accommodation under Article 13 of the CRPD, denial of reasonable accommodation by association in the exercise of rights of associates to prevent restrictions of rights of persons with disabilities, and disability based violence.

- Call States to ensure provision of reasonable accommodation and that its denial is considered a form of discrimination, by stressing its immediate application, clarifying related concepts, and requiring States to regulate and develop guidance on the duty to provide reasonable accommodation. The Committee should also address and provide guidance on the issue of “reasonable accommodation by association,” calling States to ensure its provision when necessary to ensure any right of a person with disability in a particular case.