

Tina Minkowitz

30 June 2017

**Submission for CRPD Day of General Discussion on Article 5**

**Organization and author of comments**

The Center for the Human Rights of Users and Survivors of Psychiatry (CHRUSP) is a DPO and human rights organization that aims to provide strategic leadership in human rights advocacy, implementation and monitoring relevant to people experiencing or labeled with madness, mental health problems or trauma. In particular, CHRUSP works for full legal capacity for all, an end to forced drugging, forced electroshock and psychiatric incarceration, and for support that respects individual integrity and free will.  CHRUSP has been granted Special Consultative Status with ECOSOC and has engaged actively with the CRPD Committee and other mechanisms in the field of human rights and disability. See [www.chrusp.org](http://www.chrusp.org).

Tina Minkowitz is a lawyer and survivor of psychiatry who contributed to the drafting and negotiation of CRPD on behalf of the World Network of Users and Survivors of Psychiatry. She is President and Founder of CHRUSP. Contact at info@chrusp.org.

**Summary**

This submission is organized in 4 parts, as a sequential examination of the paragraphs of Article 5 and its linkage with other articles.

Part 1, ‘Article 5.1 as right and principle’, relates to paragraphs 4, 5, and 6 of the draft outline.

Part 2, covering Article 5.2 and 5.3, relates to paragraphs 4, 7(a) and (b), 8, 19, 21, and sections III and IV of the draft outline. Part II is further divided into subsections (a), (b) and (c).

Part 2 subsection (a), ‘Prohibition of discrimination must effectively reach discriminatory practices that are condoned by domestic law’, relates to paragraphs 7(a) and 19 of the draft outline, and possible addition to section III.

Part 2 subsection (b), ‘Purpose/effect and complex discrimination’, relates to paragraph 7(a) and (b) of the draft outline and possible addition to section III.

Part 2 subsection (c), ‘CEDAW framework of formal, substantive and transformative equality’, relates to paragraphs 1, 3, and 21 of the draft outline, and proposed addition to section IV.

Part 3, ‘Article 5.4 substantive equality measures; avoiding charge of ‘reverse discrimination’; no ‘best interests’ determinations in policy,’ relates to paragraphs 2, 3 and 9 of the draft outline.

Part 4, ‘Linkage with other articles,’ proposes additions to to section III of the draft outline.

1. **Article 5.1 as right and principle**

This section relates to paragraphs 4, 5, and 6 of the outline.

Article 5 contains both principles and rights; both aspects can be elaborated for the maximum value to the Convention and the rights of persons with disabilities.

Article 5.1 *recognizes* equality before the law and the entitlement of persons with disabilities to equal protection; in context of the CRPD this establishes an entitlement for persons with disabilities that is comparable to ICCPR Article 26. Any acts of discrimination based on disability contained in the laws of states parties, or discriminatory application of such laws to the disadvantage of persons with disabilities, violate Article 5.1.

Article 5.1 can also be viewed as a statement of principle establishing that persons with disabilities have the same rights as others and the same obligations as others. This can be relevant to a discussion of criminal responsibility and civil responsibility. In my view both of these issues also arise under Article 12 and 13, as well as Article 14 with respect to criminal responsibility that puts the person in jeopardy of deprivation of liberty; the Committee has utilized Articles 13 and 14 to comment on the obligation to abolish declarations of incapacity to be held criminally responsible. However, Article 5 can potentially strengthen this jurisprudence by grounding responsibility as well as rights in the concept of equality before the law and equal protection. The premise of mutual responsibility as enshrined in UDHR Article 29[[1]](#footnote-1) can be invoked to inform the discussion.

The Committee could address both these matters, 5.1 as establishing a residual right to non-discrimination comparable to ICCPR Article 26, and the principle of responsibility as well as rights constituting equality before the law and necessary for equal protection of the law, as part of the normative content of 5.1.

1. **Obligations in 5.2 and 5.3; discriminatory laws and practices; complex regimes of discrimination; actual and perceived impairment; CEDAW framework of formal, substantive and transformative equality**

This section relates to paragraphs 4, 7(a) and (b), 8, 19, 21, and generally sections III and IV of the draft outline. See subheadings (a) – (c) for details.

Paragraphs 2 and 3 contain specific obligations imposed on states to prohibit all discrimination on the basis of disability, to guarantee to persons with disabilities effective protection both against disability-based discrimination and against other forms of intersecting and multiple discrimination, and to ensure the provision of reasonable accommodation. These obligations for the benefit of persons with disabilities share the legal character of a right, and should be enforceable as such.

1. **Prohibition of discrimination must effectively reach discriminatory practices that are condoned by domestic law**

This subsection relates to paragraphs 7(a) and 19 of the draft outline, and possible addition to section III.

I would suggest that the Committee discuss the nature of state obligations arising from 5(2) as linked with the obligations in Article 4.1(b) to repeal or modify all discriminatory laws and practices. The obligation to prohibit discrimination cannot be achieved if the state’s own laws are contradictory, for example if a disability non-discrimination law exists simultaneously with laws that directly authorize discrimination, such as incapacity and guardianship laws, mental health legislation provisions that permit forced treatment and detention, laws that discriminate in areas such as voting and parental rights. People with disabilities should not be required to proactively go to court to challenge the compatibility of discriminatory laws with a non-discrimination law or to establish the supremacy of the non-discrimination law. While the Committee should specify standards for non-discrimination laws so as to reach all forms of discrimination including by establishing the supremacy of such a law over conflicting provisions in other laws, and by ensuring that it is framed with consideration of the various areas of law in which such conflicts may arise, it should also be stated that people with disabilities should not bear the burden of the state’s compliance with Article 4.1(b) obligations that is necessary to uphold their rights under Article 5 as well. This discussion links with paragraph 19 in the Committee’s outline of the draft General Comment, as the legislative obligations should be specified as argued here and also expanded to include repeal and modification of existing legal provisions so as to eliminate all discrimination contained in existing laws. The Committee might include in section III a mention of Article 4.1(b) or find another way to introduce it into the discussion.

1. **Purpose/effect and complex discrimination**

This subsection relates to paragraph 7(a) of the draft outline and possible addition to section III.

In its discussion of 5(2) under Normative Content, the Committee raises issues that link to the definition of disability-based discrimination in Article 2, which should be directly referenced. The concepts of ‘purpose’ and ‘effect’ mentioned in Article 2 are not exactly equivalent to direct and indirect, and should be included for discussion in paragraph 7(a). Purposeful enactment of a law that is designed so as to target persons with psychosocial disabilities for adverse treatment, or that has will inevitably have an adverse disproportionate impact on persons with disabilities, should be prohibited under Article 5 as well as any other substantive rights that are invoked, such as Articles 12 and 14. This is not merely a theoretical possibility; some academics have seized on the notion of ‘disability-neutral’ legislation as a way to circumvent the requirements of full and equal rights of persons with disabilities as explained by the Committee in General Comment No. 1 and the Guidelines on Article 14, so as to permit protectionist interventions against the will of the person concerned and the application of security measures outside the ordinary procedures of the criminal justice system.[[2]](#footnote-2) The Committee should affirm that evidence of a discriminatory purpose motivating facially neutral legislation, and/or a disproportionate adverse effect flowing from facially neutral legislation, will constitute discrimination under Article 5, and that the Committee will not condone such stratagems for avoidance of states parties’ obligations.

In its discussion of discrimination in paragraph 7(a), the Committee should include complex forms of discrimination such as discriminatory regimes of detention and state-condoned violence that violate multiple rights of the Convention. In the drafting and negotiation of the CRPD, people with psychosocial disabilities broke down the discriminatory regime of mental health detention, forced treatment and legal incapacitation into its component parts that violated specific rights by discriminating against persons with disabilities. Yet the regime continues to function as a whole, and we are disadvantaged in some respects, when we have to argue separately under each article as to the normative content, violations, and state obligations. There is precedent in the view of the Special Rapporteur on Torture that the detention of recreational drug users, sometimes linked to treatment, amounts to a regime of torture and other ill-treatment.[[3]](#footnote-3) In that instance, the World Health Organization had joined civil society experts in rejecting the application of coercion in the context of substance abuse, as now WHO has similarly called for the abolition of coercion in mental health services, along with the Committee, the Working Group on Arbitrary Detention, the Special Rapporteur on the Rights of Persons with Disabilities and the Special Rapporteur on Health. The detention and forced treatment of persons with psychosocial disabilities based on mental health laws or condoned by states’ inaction, and their legal incapacitation through guardianship and substitute decision-making as well as the removal of numerous rights based on stereotypes of ‘danger’ and ‘unsound mind’ that the Committee has soundly rejected, constitutes a regime of legal inferiority and violently-enforced control by the state, by medical professionals, by religious authorities, and by families and communities. The General Comment should acknowledge this complex regime of discrimination against persons with psychosocial disabilities, which is continually reproduced by stereotypes that continue to infuse law, politics, societal attitudes, customs and practices in communities, services, and all societal institutions.

With regard to 7(b), the Committee should affirm its jurisprudence to date that accepts that discrimination based on ‘actual or perceived impairment’ is prohibited by the Convention. This is important to the rights of people with psychosocial disabilities for two reasons. First, regulatory measures that target us for discrimination, such as legal incapacitation, commitment and forced treatment regimes, are imposed on individuals based on the perception of the operators of such systems that a person meets the criterion for a psychiatric diagnosis or mental health condition, which constitutes an actual or perceived impairment from the point of view of the individual so targeted. The individual may well not experience him or herself as having an impairment, but is nevertheless subjected to a brutal human rights violation that the CRPD prohibits. Furthermore, many people with psychosocial disabilities reject the ideological framework of psychiatric diagnoses and the concept of ‘mental illness,’ and prefer to describe their situation in neutral experiential terms such as hearing voices, experiencing serious distress, experiencing an altered state of consciousness, feeling suicidal, or similar narrative and experiential phrases. No one should be required to accept the validity of medical model labels in order to claim their rights under the Convention; to do so would be entirely contrary to the spirit and intent.

1. **CEDAW framework of formal, substantive and transformative equality**

This subsection relates to paragraphs 1, 3, 21, and proposed addition to section IV of the draft outline.

The discussion I propose could be rooted in the analysis of ‘distinction, exclusion and restriction’ proposed by the Committee (linked to the Article 2 definition), and would also benefit from incorporation of the three-pronged approach to equality taken by the CEDAW Committee, in particular the articulation of obligations of formal, substantive and transformative equality. Permit me to digress by explaining the CEDAW jurisprudence, based on my study of CEDAW General Recommendations 25 and 28, and a survey of additional General Recommendations and Concluding Observations.

Under CEDAW, formal equality requires equal treatment of women compared with men, e.g. equal legal capacity, non-discrimination in hiring and equal pay for equal work. Substantive equality obligates states to take programmatic measures beyond formal equality to take account of both the biological differences between women and men (e.g. attention to women’s health care needs – not only sexual and reproductive health, but sex-linked differences in manifestation of strokes and heart attacks), and the disadvantages women have experienced due to centuries of systemic oppression and subordination by men. Transformative equality requires states to take measures for systemic transformation of social practices and transformation of attitudes and customs that perpetuate male domination and gender stereotypes. An example of transformative equality might be the design of child-care policy and employment policy so as to encourage men to do their equal share of child-rearing and encourage women to pursue careers, including non-traditional ones from which they were excluded by custom or stereotyping.

While CEDAW jurisprudence is linked to provisions in that Convention, such as CEDAW Article 5(a), which requires states to modify patterns of conduct based in stereotypes or in superiority or inferiority of the sexes, comparable principles are found in CRPD in the provisions of Article 8 on awareness-raising and Article 4.1(b) which requires abolition or modification of discriminatory customs and practices as well as discriminatory laws. Similarly to discrimination against women, discrimination against people with psychosocial disabilities is deeply rooted in structures of societal institutions and laws, as well as customary attitudes. Discrimination against people with disabilities has taken a particular form of charity-based exclusion and control, followed historically by medically-based exclusion and control that perpetuates archaic stereotypes in modernized terminology and technologies. Systems of institutionalization, guardianship, paternalistic coercive interventions, forced hospitalization and treatment, practiced against people with psychosocial disabilities, people with intellectual disabilities, older people, and extending more or less widely depending on historical context of a particular society, exemplify this regime of ‘distinction, exclusion and restriction’ that can be reached by a comprehensive approach to formal, substantive and transformative equality. We need formal equality so that charity-based and medical-model thinking does not undermine the enjoyment of all rights (e.g. legal capacity without any restriction based on alleged limitations in mental capacity, repeal of laws that target people with psychosocial disabilities for restriction and exclusion), and we need substantive equality guarantees and programmatic measures so that the benefits of formal equality are not limited based on the experiences and ‘paradigms of power’ of non-disabled people (e.g. support for the exercise of legal capacity as a component of the civil right, right to reasonable accommodation). Substantive equality is complementary to, and does not replace, formal equality;[[4]](#footnote-4) this principle is key to successful implementation and understanding of Article 5 particularly in its linkage with Articles 12, 14 and 19, where formal equality has not yet been established in most countries and requires particular emphasis and guidance.

Transformative equality allows us a framework to think beyond single provisions of the Convention, to analyze systemic practices of complex discrimination and design appropriately comprehensive remedies. I have addressed the potential of the reparations framework in this regard, to shape and catalyze political will and action on the elimination of coercive psychiatric interventions as a widespread and systematic human rights violation against people with psychosocial disabilities, comprising a politically, socially and economically marginalized minority population. Reparations are relevant to the question of remedies and enforcement (paragraph 21) but have an even greater potential when approached comprehensively to target a set of linked injustices against a particular group, invoking Articles 4 and 8 along with substantive rights violated. Article 5 provides the rationale and general framework to institute such analyses and measures.

1. **Article 5.4 substantive equality measures; avoiding charge of ‘reverse discrimination’; no ‘best interests’ determinations in policy**

This section relates to paragraphs 2, 3 and 9 of the draft outline.

Paragraph 4 does not contain a positive obligation but permits states to take measures in favor of persons with disabilities, subordinate to the aim of achieving de facto equality. In my recollection of the drafting process, we intended to cover measures such as affirmative action as well as positive entitlements by persons with disabilities to support services and support arrangements that may be needed on an ongoing or permanent basis.[[5]](#footnote-5) The obligation to take such measures is not found in paragraph 4 but in other provisions, such as the entitlements for disability-related needs in Articles 12, 19, 24, 25, 26, and 28. Paragraph 4 ensures that such measures are not considered discrimination against non-disabled persons, and does not permit states to take measures that restrict the rights of persons with disabilities or that contravene the objectives and principles of the Convention, including the principle of respect for individual autonomy.[[6]](#footnote-6) As the Committee clarified in General Comment No. 1, paragraph 21, the ‘best interests’ paradigm cannot be applied to determinations regarding adults. This holds for policymaking that implicates the rights of persons with disabilities, as well as determinations regarding individuals. The necessity for substantive equality measures should always be considered from the perspective of persons with disabilities, as one component of an approach to equality that is complementary to formal and transformative equality and cannot be considered the whole of states parties’ obligations. It will be helpful in this regard if the Committee clarifies, similarly to CEDAW, that CRPD requires states to ultimately realize ‘formal and substantive equality’ between disabled and non-disabled persons.[[7]](#footnote-7)

CEDAW General Recommendation No. 25, on temporary special measures, is useful for comparative purposes and an example of equality jurisprudence that similarly to CRPD must reject paternalism as well as other forms of discrimination. There are differences between CEDAW and CRPD that should be noted, however. The understanding of disability as a social construct similar to gender does not map precisely onto the sex/gender distinction; while sex-linked needs are ‘biological’ in nature, the same cannot be said for impairment-related needs. The Committee should avoid any such implications, which would be both scientifically inaccurate and ideologically destructive as applied to people with psychosocial disabilities.[[8]](#footnote-8) In addition, the consultation mandate in Article 4.3 is an advance beyond CEDAW and needs to be emphasized in the design of policy, laws and programs for substantive equality under the CRPD.

Paragraph 4 of Article 5 articulates a principle that affects the obligations in paragraphs 1-3, and is also applicable transversally throughout the CRPD. For example, the temporary infusion of resources necessary to assist persons with disabilities to leave institutions may require the state to prioritize the allocation of social protection funds in mainstream as well as disability-specific programs towards people with disabilities, affecting the state’s obligations under the ICESCR to maintain an adequate standard of living for everyone. This should not be considered discrimination; rather it is a temporary measure to remedy past systemic discrimination against persons with disabilities. (This would apply both in respect of involuntary institutionalization, which has an absolutely immediate timeframe for realization (to immediately stop actions that prevent people from leaving, such as keeping them locked inside), and in respect of institutionalization that is not a deprivation of liberty but nevertheless violates the individual’s right to live independently and be included in the community.)

1. **Linkage with other articles**

This section relates to section III of the draft outline.

I am surprised to see no mention of Article 14 and 15 in section III. The Committee should understand that these articles are essential to an equal enjoyment of the right to equality and non-discrimination by persons with psychosocial disabilities. The fact that there exists substantial jurisprudence to date from this Committee and other bodies following the Committee’s approach to absolute prohibition of impairment-based detention and forced treatment does not justify omitting any mention of those issues here. Rather that jurisprudence can be concisely summarized and affirmed, so that the violations routinely perpetrated against persons with psychosocial disabilities can be squarely mainstreamed within equality and non-discrimination jurisprudence, just as the rights of persons with psychosocial disabilities are mainstreamed and not segregated in the Convention itself. I have written extensively on these issues and am more than happy to provide suggested wording if so requested.

1. UDHR Article 29 states:

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations. [↑](#footnote-ref-1)
2. I critique these proposals in CRPD and Transformative Equality, *International Journal of Law in Context, Vol. 13(1), pp. 77–86, March 2017 doi:10.1017/S1744552316000483*, available at:

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2930553>. [↑](#footnote-ref-2)
3. A/HRC/22/53, paragraphs 40-44. I participated in a related expert meeting and contributed to the discussion of forced psychiatric interventions, the rights of people with psychosocial disabilities and the CRPD framework, which is also addressed though imperfectly in the report. [↑](#footnote-ref-3)
4. See CEDAW General Recommendations No. 25 and 28, which set out comprehensively a framework for non-discrimination measures and treat formal and substantive equality as complementary. See especially GR25 paragraphs 6, 8, 9, and 11, and GR28 paragraph 24. [↑](#footnote-ref-4)
5. Compare Article 5 with the Working Group text for equality and non-discrimination <http://www.un.org/esa/socdev/enable/rights/ahcwgreporta7.htm>. The Committee may want to research the remainder of the negotiation archives for discussion and views expressed on this provision. [↑](#footnote-ref-5)
6. During the negotiations, at least one attempt was made to invoke the state’s view of measures that would ‘benefit’ persons with disabilities to justify an exception to the core right of equal recognition before the law. In particular it was proposed to add to Article 12 a provision that would have made equality measures subject to the caveat, ‘without prejudice of the differential treatment they may receive in their benefit.’ This provision was proposed and rejected in the 8th session, for which daily summaries are not available. See <http://www.un.org/esa/socdev/enable/rights/ahc8gpcart12.htm>. [↑](#footnote-ref-6)
7. See CEDAW GR28 paragraph 24. [↑](#footnote-ref-7)
8. It would be a grave error and injustice towards persons with psychosocial disabilities to characterize their disability-related needs as ‘biological’. See Special Rapporteur on Health (2017) A/HRC/35/21, paragraphs 16-20; see also WNUSP Statement on Psychosocial Disability, <http://www.chrusp.org/media/AA/AG/chrusp-biz/downloads/199123/Psychosocial_disability.docx> and see Minkowitz ‘On Defining Mental Health’ <http://www.chrusp.org/file/326313/On_Defining_Mental_Health.docx>. [↑](#footnote-ref-8)