



Center for the Human Rights of  
Users and Survivors of Psychiatry

## **CHRUSP submission to OHCHR Consultation on CRPD Article 5: Equality and Non-discrimination**

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June 21, 2016

1. The CRPD was drafted with a transversal overarching principle of equality and non-discrimination that is reflected in the structure and content of every substantive article (the majority of articles begin with the recognition of a substantive right to be enjoyed by persons with disabilities on an equal basis with others, and elaborate on the barriers to be eliminated and other obligations of states parties with respect to the right in question). An examination of how equality is understood with respect to substantive rights in the CRPD will surely contribute to jurisprudence on Article 5 and generally on the right to equality and non-discrimination in human rights law.
2. Here I will point out three components of equality and non-discrimination, and some significant applications in the CRPD context, so that they can better understand their obligations generally and with respect to Articles 12, 14, and 15 in particular.
3. It should be explained that formal and substantive equality work together and do not contradict each other, that both are aspects of the obligations under CRPD Article 5. Substantive equality generally applies once formal equality is met and is found insufficient; substantive equality never entails formal inequality of persons with disabilities but goes beyond formal equality to provide equalizing measures of a positive nature. For example, in relation to legal capacity, formal equality lies in the recognition of the full legal capacity of persons with disabilities without any restriction or limitation, and the elimination of declarations of incapacity and substitute decision-making. Substantive equality lies in the provision of support and accommodations that people with disabilities may need in exercising their legal capacity. There is no validity to measures that claim to pursue substantive equality for persons with disabilities while denying them formal equality, contrary to the arguments made by the psychiatrists writing in *The Lancet Psychiatry* in opposition to CRPD General Comment No. 1, and also by the Mexican Supreme Judicial Court in its judgment in the Adair case, which

treated interdiction and guardianship as a form of reasonable accommodation.

4. A further level of equality has been identified by the CEDAW Committee as transformational equality or the elimination of stereotypes that persist “in law and in legal and societal structures and institutions” (General Recommendation No. 25 para 7). This corresponds to what I have also called the application of the universal design principle to laws and social institutions, for example with respect to criminal responsibility.<sup>1</sup> Going beyond both formal equality within a framework designed without having in mind the needs, perspectives, or lived experiences of persons with disabilities, and substantive equality that aims to equalize opportunities and outcomes as an add-on, transformational equality or universal design eliminates discriminatory concepts and stereotypes and re-creates laws, social structures and institutions based on the underlying aims and the diverse perspectives of multiple users including persons with disabilities. Comprehensive legal capacity reform that eliminates functional criteria for the capacity to act also by necessity operates at the level of transformational equality or universal design if it is to be successful (see Peruvian legal capacity reform proposal as an example of good practice).
5. At times it is necessary simply to insist on formal equality, and to prohibit laws or practices that target persons with disabilities for disadvantageous treatment. Article 14 is a good example; detention under mental health laws based on alleged danger or alleged need for treatment singles out persons with disabilities for a disability-specific detention regime. Yet masking the underlying nature and purpose of the regime by enacting laws that are superficially disability-neutral (in the health field, like Italy’s Law no. 180, or a preventive detention regime applying to certain persons with psychosocial disabilities, terrorists, and others considered to be impervious to criminal law, as suggested by Christopher Slobogin<sup>2</sup>) nevertheless runs afoul of the definition of discrimination in Article 2, as it has both a discriminatory purpose and a disproportionate discriminatory effect on persons with psychosocial disabilities. Furthermore, such laws do nothing to change the character of the detention regime itself; a psychiatric detention regime will always be a regime that discriminates based on disability as it treats the characteristics associated with psychosocial disability as negatives warranting deprivation of a person’s liberty (either alone or in combination with other factors), and the treatment meted out in the regime (forced and

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<sup>1</sup> Norms and Implementation of CRPD Article 12 (available on academia.edu); also Rethinking Criminal Responsibility from a Critical Disability Perspective, 23 *Griffith Law Review* 434 (2014)

<sup>2</sup> A Defense of the Integrationist Test as a Replacement for the Special Defense of Insanity, 42 *Texas Tech Law Review* 523 (2010).

- coerced interventions with psychiatric drugs, electroshock, restraint and seclusion, etc.) similarly aims at changing the course of the person's development against his or her will, rather than offering support to the person for chosen healing or self-nurture.
6. What is called for is a robust formal equality, it is not limited to superficial elimination of language that refers directly to disability, and is not satisfied by superficial attempts at "disability-neutral" language. It calls for abolition of the underlying regimes and practices that deliberately target persons with disabilities for disadvantageous treatment, in addition to repeal of the laws that have legalized practices of abuse and discrimination.
  7. A final aspect to equality implied in the discussion of Article 14 is the right to be different. This is also an explicit component underlying the groundwork on which Article 15 jurisprudence condemning forced psychiatric interventions as torture or other ill-treatment has been built. The theory behind the characterization of forced psychiatric interventions as torture was in large part the targeting of persons with disabilities for elimination of those characteristics that society viewed as undesirable, leading to the phrase "forced interventions aimed at correcting or alleviating an impairment" which was ultimately adopted by Special Rapporteur on Torture Manfred Nowak in a 2008 groundbreaking report that found such interventions, including the administration of psychiatric drugs or electroshock, may constitute torture or ill-treatment when done without the free and informed consent of the person concerned. The right to be different was recognized in the UNESCO Declaration on Racial Discrimination, and it resonates also in the international standard for granting asylum, which refers to persecution on account of a characteristic the person cannot or should not be required to change. For persons with psychosocial disabilities, the pivot point is autonomy and self-determination, being empowered to seek healing or carry out a healing or development process from a basis of full acceptance rather than being made into an object to be tinkered with to society's specifications. The gender components of this are significant as well, as socialization and media tend to strongly encourage women and girls to doubt ourselves; this negative message is amplified by forced psychiatry and requires women and girls with psychosocial disabilities to heal from multiple trauma, abuse, and destructive objectification.
  8. The right to be different is recognized in CRPD Article 3(d), and needs to be understood as an autonomy right and not an excuse for limitation of rights in the name of substantive equality. In Article 15 jurisprudence we see the result of the right to be different, given content as the right to retain one's physical and mental integrity, with respect to those aspects of oneself that constitute an actual or perceived impairment. In owning these characteristics, persons with disabilities assert a right to wholeness, to be seen and to develop ourselves as full human beings and not be controlled or

intervened with by medical professionals whether they have good or ill intentions. This brings us back to transformational equality and the need to comprehensively transform the relations between society and personal with psychosocial disabilities, including by eliminating negative stereotypes, measures which will involve Articles 8 and 19 as well.

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The **Center for the Human Rights of Users and Survivors of Psychiatry (CHRUSP)** provides strategic leadership in human rights advocacy, implementation and monitoring relevant to people experiencing 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.

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