*November 30, 2017*

*Harumi Fuentes*

Committee on the Rights of Persons with Disabilities

Groups in Focus Section

Human Rights Council and Treaties Division

Office of the United Nations High Commissioner for Human Rights

52 Rue de Paquis

1201 Geneva, Switzerland

Re: *Draft General Comment on equality and non-discrimination [Draft*].

Dear *Ms. Fuentes***:**

My name is Stephen L. Mikochik. I am a Professor Emeritus of Constitutional Law at Temple Law School in Philadelphia. Before joining the Temple Faculty, I was an attorney with the Civil Rights Division, U.S. Department of Justice, where I enforced laws prohibiting discrimination against people with disabilities. I have published extensively on disability issues and am myself blind.

Let me first commend the Committee for its highly professional effort at “clarify[ing] the obligations of States parties in relation to non-discrimination and equality as enshrined in article 5 of the Convention.”[[1]](#footnote-1)That said, I will limit my comments on the Draft to two matters of particular concern.

First, the *Draft* takes an unwarranted step toward outlawing discrimination based on sexual orientation and gender identity under international law. Article 5 requires that States Parties “guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.”[[2]](#footnote-2) As the *Draft* construes it, “all possible grounds of discrimination and their intersections have to be taken into account[,]”[[3]](#footnote-3) including, but “not limited to[,]”[[4]](#footnote-4) grounds, such as race and ethnicity, elsewhere prohibited under United Nations law, and grounds, such as sexual orientation and gender identity, that are not.

Foremost, however, Article 5 recognizes that “all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.”[[5]](#footnote-5)As the Draft puts it, “[e]quality and non-discrimination are at the heart of the Convention and run like a golden thread through all its substantive articles via the phrase ‘on an equal basis with others’.”[[6]](#footnote-6) By affording persons with disabilities greater legal protection than others, the Draft contravenes the very article it was meant to enforce.

Second, the Draft categorically maintains that “disability is a social construct[.]”[[7]](#footnote-7)If meant as support for the further contention that “impairment must not be taken as legitimate ground for the denial or restriction of human rights[,]” [[8]](#footnote-8) the claim is unexceptional. If meant, however, as a step toward rejecting a necessary connection between impairment and disability or toward recognizing disability, like race and gender, as itself a positive human characteristic, it is hard to imagine that many of the 175 States Parties to the Convention had this in mind when they ratified its provisions.

Further, accepting disability as a positive aspect of being human could have pernicious consequences. It could affect how medical research is funded. If taken to the limit of its logic, it could even transform attempts to “cure” into acts of discrimination, a position the *Draft* seems to endorse in its criticism of prevailing practices.[[9]](#footnote-9)

Let me express my appreciation for the Committee’s consideration of the concerns I have outlined above. I trust they will be addressed in any revisions to the Draft the Committee issues in the future.

Respectfully submitted,

*Stephen L. Mikochik*

1. *Draft*, para. 1. [↑](#footnote-ref-1)
2. *Convention on the Rights of Persons with Disabilities* [CRPD], Art. 5, subpara. 2. [↑](#footnote-ref-2)
3. *Draft*, para. 22. [↑](#footnote-ref-3)
4. *Ibid.* [↑](#footnote-ref-4)
5. CRPD, Art. 5, subpara. 1. [↑](#footnote-ref-5)
6. *Draft*, para. 8. [↑](#footnote-ref-6)
7. *Ibid.*, *para. 11.* [↑](#footnote-ref-7)
8. *Ibid.* [↑](#footnote-ref-8)
9. *Ibid.*, para. 2. [↑](#footnote-ref-9)