

Research Article

The Adoption of Supportive Decision-Making System As a Substitute to Amnesty for People With Mental Disabilities in the Indonesian Legal System

Anang Zubaidy^{1*}, Muhammad Addres Akmaluddin², Daffa Prangsi Rakisa Wijaya Kusuma²

¹Department of Constitutional Law, Universitas Islam Indonesia

²Faculty of Law, Universitas Islam Indonesia

ORCID

Zubaidy: (<https://orcid.org/0000-0003-0111-562X>)

Akmaluddin: (<https://orcid.org/0000-0001-5835-8193>)

Kusuma: (<https://orcid.org/0000-0001-5541-4575>)

Abstract.

This paper analyzed the weaknesses of the support system for people with mental disabilities in Article 433 of the Indonesian Civil Code. For persons with mental disabilities who are competent, all legal actions (mainly in the civil aspect) are performed by their guardians. This is contrary to the decision of the Constitutional Court of the Republic of Indonesia Number 135/PUU-XIII/2015 which allowed people with mental disabilities to be able to exercise their right to vote in general elections (Pemilu). Theoretically, everyone is guaranteed their constitutional right to get recognition, protection, fair legal certainty, and equal treatment before the law, and is free from discriminatory treatment, including for people with mental disabilities. This constitutional right cannot be fully implemented because of the amnesty system as referred to in Article 433 of the Indonesian Civil Code. This normative research examined the provisions of Article 433 of the Civil Code which is conceptually related to the Constitution's guarantees for people with mental disabilities. The data was collected through secondary data from primary, secondary, and tertiary legal materials. The results found that with advances in treatment technology and support from the environment, people with mental disabilities could carry out their activities independently, especially those with episodic disorders. Therefore, there is an opportunity to adopt a system of substitute for forgiveness with a technique commonly known as supported decision-making in the Indonesian legal system. However, the implementation of supported decision-making must be based on adequate indicators and considerations.

Keywords: Persons with Mental Disabilities, Amnesty, Supportive Decision Making

Corresponding Author: Anang Zubaidy; email: anangzubaidy@uii.ac.id

Published 26 May 2023

Publishing services provided by Knowledge E

© Anang Zubaidy et al. This article is distributed under the terms of the [Creative Commons Attribution License](#), which permits unrestricted use and redistribution provided that the original author and source are credited.

Selection and Peer-review under the responsibility of the ICASI Conference Committee.

OPEN ACCESS

1. Introduction

One of the persons with disabilities who experience various problems with stigmatization, lack of human rights protection, and discrimination are those with mental disabilities. Stigmatization and degrading treatment are often experienced, especially those who live in rehabilitation centers. Persons with mental disabilities are also not free to exercise their rights (especially in the civil aspect) which are basic human rights guaranteed by the constitution when they are the empowered party. Discriminatory treatment is increasingly visible, especially with closer look at the provisions of Article 433 of the Indonesian Civil Code which states: *"Every adult, who is always in a state of stupidity, madness or dark eyes, must be placed under guardianship, even though he is sometimes able to use his mind"*.

The Law on Persons with Disabilities provides limits on the understanding of persons with mental disabilities as people with *impaired thought, emotion, and behavior, including: a. psychosocial including schizophrenia, bipolar, depression, anxiety, and personality disorders; and b. Developmental disabilities that affect social interaction skills include autism and hyperactivity*. In other terms, it is also called Persons with Psychosocial Disabilities (ODP), namely people with mental health conditions that inhibit routine activities for a long period of time, and are not limited to psychological and physiological conditions but also social and cultural barriers.[1]

The Constitutional Court through Decision Number 135/PUU-XIII/2015 has opened up opportunities for persons with non-permanent mental disabilities to exercise their right to vote in elections. However, the decision limits persons with permanent mental disabilities so that they cannot exercise their right to vote. [2] This limitation was given based on the consideration of the Court which stated that *firstly*, some persons with mental disabilities can restore their mental condition or memory to almost one hundred percent or at least feel recovery so that they can carry out daily activities both physically and psychologically. *Second*, the Court provides limitations on the rights of persons with mental disabilities by taking into account the characteristics of each mental and/or memory disorder referring to the Health Law and the Mental Health Law. *Third*, the Court is aware that there are no specific parameters provided by the law that can be used to measure the level of legal competence for persons with mental and/or memory disabilities, so the Court is of the opinion that the most competent person to declare this is a professional in their field. Hence it can be concluded that the current condition

is that people with mental disabilities are facilitated to vote but are excluded for people with permanent mental disabilities.

Article 433 of the Civil Code arises from the old stigma given to persons with mental disabilities who are considered unable to carry out certain actions including legal actions for themselves. The concept of amnesty was born from the paradigm of *charity* based on compassion which aims to represent a person with physical or mental limitations in making decisions or legal actions. Amnesty, commonly known as *substitutive decision making*, has the potential to eliminate a person's legal capacity.

Although empowerment is intended to help people with disabilities in carrying out daily activities, on the other hand, people with disabilities lose access to exercise their rights autonomously and freely. Whereas people with mental disabilities should be able to enjoy their rights without any discrimination and on an equal basis with others.[3] Even though the results of a medical diagnosis indicate a mental disorder or cognitive impairment, a person's ability to make decisions (*decision making capacity*) depends on specific conditions.[4]

The role of the state in protecting and guaranteeing the rights of persons with disabilities is already so strong. Moreover, Indonesia has ratified *the Convention on the Rights of Persons with Disabilities (CRPD)*, one of which is to ensure that their rights are guaranteed and protected. Article 12 of the CRPD requires States parties to recognize that all persons with disabilities have legal capacity and are equal before the law. In addition, a number of other obligations were born in order to seek recognition and equality before the law.

Based on the above thinking, it is necessary to study the opportunity for *substitutive decision making* with a concept that further ensures that the human rights of persons with mental disabilities are guaranteed. However, as a concept offer, it is also necessary to study risk mitigation efforts if the *substitutive decision making* is about to be replaced.

2. Methods

This is a normative research which is defined as a doctrinal law research. The object of the study is the opportunity to adopt a substitute for the amnesty system. The approaches used are normative and conceptual approaches. The data used is in the form of secondary data which includes primary legal materials in the form of relevant laws and regulations, secondary legal materials in the form of references related to the

topic of study, and tertiary legal materials in the form of dictionaries. The research data were analyzed descriptively and qualitatively.

3. Results and Discussion

It has become a reality that persons with mental disabilities face various limitations in exercising their rights and participating in daily activities. One of them is limited legal capacity on the basis of medical conditions (status approach), making poor decisions (outcome approach), or having poor decision-making skills (functional approach). Limitation of legal capacity for persons with mental disabilities in one or more areas of life will have implications for placing persons with mental disabilities under a guardianship regime such as guardianship.[5]

For centuries, people with mental disabilities were considered incompetent in making life choices. In most countries in the world, the results of the diagnosis of a person's mental disorder condition become the basis for the legal authority by the state to appoint a guardian through the ability to make decisions for the person with mental disability, even without consulting the person with mental disability and without paying attention to the person's preferences.[6] The label of disability condition is also the basis for legal justification for unwanted intervention, unneeded care, confinement and forced treatment resulting in inability to participate in social life.[6]

As part of the Indonesian legal system, substitution (substitutive decision making) places persons with mental disabilities as people who are incapable of carrying out legal actions. In addition to being adopted by the provisions of Article 433 of the Civil Code, this incompetency is also present in several other laws and regulations, as follow:

Some of the laws and regulations above place a person with mental disability as a person who does not have the ability and skills so that he must be placed under guardianship. Unfortunately, the application for amnesty by prospective guardians/custodians is relatively easy and does not involve the person with mental disabilities to determine whether he or she wants to be supported or not.

As a special person, people with mental disabilities must be guaranteed by the legal system, especially for States parties that have ratified the CRPD are linked to *General Comment* Rights of Persons with Disabilities above, there are at least two important obligations that must be fulfilled by States parties, namely:[5]

TABLE 1: Recognition of Persons with Mental Disabilities as Incompetence in Several Legislations.

Law No. 18/2014 on Mental Health	Article 72 and 73 states that a person suspected of having lost the ability to take legal action must obtain a mental health examination, which is carried out by a team consisting of a psychiatrist, another specialist/general practitioner and/or clinical psychologist.
Law No. 8/2016 on Persons with Disabilities	Article 33 and Article 34 basically stipulates that a person with a disability can be declared incompetent based on a district court decision. Unfortunately, this law does not provide indicators about persons with disabilities who deserve to be declared incompetent through the determination of amnesty. This law only requires that pardons are granted with clear reasons and must present and attach evidence from doctors, psychologists and/or psychiatrists and legal actions by guardians that result in an increase, decrease or loss of property rights of the empowered person on an object must be preceded by a stipulation from District Court.
Minister of Health Regulation No. 77/2015 on Guidelines for Mental Health Examinations for the Purpose of Law Enforcement of the Civil Code	Starting from the section on health service facilities (Art. 4 and 5), the examination team (Art. 6), procedures (Art. 7 to Article 20) Article 433 as the basis amnesty Article 466 as a basis if a person under guardianship commits a legal act, then it is considered null and void.

1. The law for persons with mental disabilities requires a change in the paradigm of empowerment towards supported decision making.
2. Elimination of the *substitutive decision making* as a system that allows forced treatment.

Based on the obligations of the State party above, the remuneration system that places persons with mental disabilities as powerless before the law must be abolished. The Covenant mandates that people with mental disabilities be given the freedom to make important decisions for themselves.

For this reason, it is important to change the mentoring system in the form of *substitutive decision making* into independent decision making with support or known as *supported decision making*. People with mental disabilities should be given the freedom to make decisions regarding themselves autonomously.

Autonomous decision making by persons with mental disabilities is classified into at least three categories, namely: *everyday preferences*, *life choices*, and *difficult decisions*. [6] The three categories of decision making are the space for supporters in the *supported* to provide support for people with mental disabilities in making decisions.

In terms of *life choices*, it becomes quite complex because it involves important choices such as choices of education, work to choice of place to live. The key to support in determining educational levels and employment options for persons with mental disabilities is based on their specific preferences and interests.[7] Meanwhile, in determining the choice of residence, it is often constrained by the difficulty of finding a place to live with good facilities in a short period of time and the impact of the "bedroom tax" in the context of the UK.[6] In terms of *difficult decisions*, the role of professional assistants is becoming increasingly important because it is related to supporting more complex decisions such as financial and investment management decisions, medical decisions, to legal decisions.[7]

The capacity to make a rational decision consists of four components, namely *comprehension* (the ability to understand an explanation given), *appreciation* (the ability to understand the relationship between information and the situation at hand), *reasoning* (the ability to understand the reasons, risks and benefits of an action), and *choice* (the ability to communicate clearly the choices made).[8] These four components are commonly used as a basis for looking at the capacity of people with mental disabilities to make decisions.

The choice of a supportive decision making model as a substitute for a pardoning system is not without its challenges. Joseph Dute stated that the abolition of the amnesty system was an extension of obligations under the CRPD that had exceeded its powers.[9] This argument has therefore been heavily criticized. The abolition of *substitutive decision making* is considered a step too far and unrealistic.[9] The emphasis on the personal autonomy of a person with mental disability at other times also contradicts other principles such as the need to protect people in need of care, especially for persons with mental disabilities with permanent conditions. The choice of implementing *substitutive decision making* also has other consequences in the form of vulnerability of persons with mental disabilities from the consequences of irresponsible decisions and the possibility of abuse by others, so that personal autonomy must be balanced with the need for protection.[9]

Meanwhile, Katrine Del Villar stated that the interpretation in General Comment No. 1 is considered too extreme.[10] Specifically, it relates to the conceptualization of the relational understanding of the autonomy of persons with mental disabilities in determining a decision. Decision-making without the consent of persons with mental disabilities in medical treatment, especially for severe or permanent conditions, in

fact constitutes discrimination on the basis of lack of legal capacity (*legal agency*) which can be justified on the basis that the treatment given is actually aimed at restoring individual autonomy or capacity. Therefore, involuntary treatment, although a short-term disruption of one's freedom, is actually based on respect for autonomy and the goal is the restoration of the capacity to make one's own choices.[10] So that the absolute elimination of *substitutive decision making* and replacing it with *supportive decision making* as an exclusive model actually complicates a number of factors such as facilitating support networks for people with mental disabilities, the lack of available social services to burden the family or people closest to people with mental disabilities.[10]

Apart from the pros and cons of eliminating *substitutive decision making* in the legal regime of amnesty, the main goal of the CRPD is to fight discrimination against people with mental disorders. The paradigm on *substitutive decision making* is in dire need of reform because it has the potential to discriminate against PDM.[11] Therefore, Matthe Scholten *et al* formulated in eliminating discrimination against persons with mental disabilities in the decision-making process, not in absolute elimination of arrangements oriented to *substitutive decision making* alone.[11] Rather, it is a radical reform of the legal system of forgiveness, increased education of mental health professionals on supported decision-making methods and non-discriminatory criteria as a basis for assessing the competence of a person with mental disability.[11]

For this reason, in order to implement *supportive decision making*, two important facilitations are needed, namely; 1) support for good communication skills and attitudes among health and social service providers, and 2) introduce formal support through legal mechanisms that accommodate the *supportive decision making*. [12] The legal mechanism must be oriented towards the framework of personal recovery of the inherent human rights as an impetus for the implementation of *supportive decision making* in mental health care and treatment.

4. Conclusions

Based on the discussion above, the guarantee of the constitutional rights of persons with mental disabilities will be fully implemented if the state is able to formulate arrangements regarding legal capacity for them in a balanced and adequate portion. The concept of amnesty in the Indonesian legal system is considered inappropriate and outdated

because all advances in treatment technology for people with mental disabilities have been discovered.

To replace empowerment, the concept of supportive decisionmaking which places people with mental disabilities still having the autonomy to make decisions but with assistance/support. In order for this concept to be implemented properly and remain within the corridor of protecting the rights of persons with mental disabilities, it is necessary to support communication skills and good attitudes among health and social service providers.

Acknowledgments

At the end, the author thanked for the space given to provide some important and actual input. The author again emphasizes, that, the development of the times has always been a reinforcing reason to make changes or additions to the law, so the idea of implementing undue influence needs attention.

References

- [1] W. N. of U. and S. of Psychiatry. Implementation Manual for the UN Convention on the Rights of Persons with Disabilities. 2008.
- [2] Ramadhan DA. The limitation of voting rights for people with permanent mental disabilities in Indonesia: a debate between reasonable and unreasonable rights. Volume 7. Cogent Soc. Sci; 2021.
- [3] Szmukler G. The UN Convention on the Rights of Persons with Disabilities: 'Rights, will and preferences' in relation to mental health disabilities. Int. J. Law Psychiatry. <https://doi.org/10.1016/j.ijlp.2017.06.003>.
- [4] and M. P. S. Meares. S. McSwigan, "Decision-making Capacity Evaluation in Adult Guardianship: a Systemic Review. Volume 28. Int. Psychogeriatr. Assoc; 2015.
- [5] Craigie J. Legal Capacity, Mental Capacity and Supported Decision Making: Report from a Panel Event. <https://doi.org/10.1016/j.ijlp.2018.09.006>.
- [6] T. E. Harding R. Supported Decision Making From Theory to Practice: Implementing the Right to Enjoy Legal Cakacity. Societas. 2018.
- [7] R. H. and E. Tascioglu. Everyday Decesion Project Report: Supporting Legal Capacity through Care, Support and Empowerment. United Kingdom: Brimingham Law School;

2017.

- [8] Jeste DV. Supported Decision Making in Serious Mental Illness. Volume 8. *Psychiatry*; 2018.
- [9] Dute J. Should Substituted Decision Making be Abolished? Volume 22. *Eur. J. Heal. Law*; 2015.
- [10] Del Villar K. Should Supported Decision-Making Replace Substituted Decision Making? The Convention on the Rights of Persons with Disabilities and Coercive Treatment under Queensland's Mental Health Act 2000. Volume 4. *Laws*; 2015.
- [11] MS, Vollman JGJ. Equality in the Informed Consent Process: Competence to Consent, Substitute Decision Making, and Discrimination of Persons with Mental Disorders. *J. Med. Philos.* 2021;46.
- [12] AC, McSherry B. Making Defensible Decisions in the Era of Recovery and Rights. *Aust. Psychiatry*. 2015.