

**Research Article**

# Criticisms on Amnesty for People with Mental Disabilities in Indonesia: Transformative Effort from Substitutive to Supportive Decision Making

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## Abstract.

The community of persons with disabilities currently disputes the regulation on amnesty. Amnesty is considered discriminatory and violates the rights of persons with disabilities, especially those with mental disabilities. The amplification rule, which means that persons with disabilities do not have legal capacity, is considered inconsistent with the Convention on the Rights of Persons With Disabilities (CRPD), which substantively stipulates that persons with disabilities do have the legal capacity and that the government is obliged to take measures to provide access to the necessary support that is needed, known as the supportive decision-making system.

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

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## 1. Introduction

Towards the commemoration of Mental Health Day in October 2021, the World Health Organization (WHO) revealed shocking data that nearly 1 billion people, or 1 in 7 people in the world, have mental disorders. There are many factors that lead people having mental disorders, including the circumstances evolved due to the Covid-19 pandemic which causes a great number of people to experience excessive anxiety, coupled with unclear economic conditions, ranging from layoffs, business collapses, and concerns on health due to the overpoweringly negative news on Covid-19.[1]

Law No. 8 of 2016 on Persons with Disabilities defines people with mental disabilities as people whose thoughts, emotions, and behaviour are disturbed. The disturbance may include *first*, psychosocial such as schizophrenia, bipolar, depression, anxiety, and

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personality disorders; *second*, developmental disabilities that affect social interaction skills such as autism and hyperactivity.

In the context of the rule of law, the community of persons with disabilities criticized several regulations which were deemed to have neglected in safeguarding their rights. One of the rules that was criticized was on amnesty. Article 433 of the Civil Code reads: *"Every adult who is always in a state of stupidity, brain disease or dark eyes must be placed under guardianship, even if he is sometimes able to use his mind"*. This article was criticized for directly eliminating the legal capacity of persons with disabilities.[2]

In several studies it has been stated that to determine a person's skills, there are generally two elements: *first*, the age parameter, whether the person has met the legal age limit according to the legislation or not; *second*, physical and mental health parameters. People who are mentally disturbed are classified as incompetent, including people who are drunk. Some lawyers even agree that people who experience physical disabilities also need to be included in a condition of being incapable of carrying out legal actions, although it is to say that a District Court decision is needed(3)

Empirically, groups of persons with disabilities are in fact generally rejected as parties to contract agreements, insurance and several other forms of civil contracts. The party who is always given responsibility is generally the person who is considered or declared to be in charge, or their next of kin . One of which happened to Ali who was about to enter into an insurance contract. The insurance company refused Ali to sign. The insurance company asked his wife to sign in his stead to take the legal action, whereas Ali has an actual profession while his wife is a housewife.

Another example is a deaf person who has difficulty of hearing and communication. According to the confession of several lawyers, when they are about to carry out certain legal actions, a deaf person by the decision of the District Court can be included in the category of incompetent to carry out legal actions. The consideration of including a deaf person into a group that is not capable of carrying out legal actions does not mean that there is a desire from law enforcers to discriminate against deaf people, but merely to protect the interests of the deaf group so as not to be used by other irresponsible people.[3]

Another case happened to Ripin, a person with a psychosocial mental disability. Ripin filed a lawsuit against his brother-in-law who had taken care of him and had taken his property. The case occurred in 2018 in the Sungai Penuh region, Jambi City, Jambi Province. The lawsuit was filed because the pardon for him was carried out unilaterally,

the absence of the victim at the trial during the determination of the pardon, and there was a practice of expropriation of property rights by the incumbent.

While being under detention, on April 20, 2016, Ripin was forcibly admitted to a mental hospital and experienced various violence and deprivation of basic rights such as handcuffs, not being given food and no opportunity to defecate while on the trip, forced to drink medication, and was not given clear information about why he had to be hospitalized. The victim stated that their right to freedom had been violated in the incident. Worse yet, not long after leaving the hospital and checking his savings, all the money in his savings ran out and according to information from bank employees, Ripin's savings had moved to his custodian's account.[4]

In practice, there are many cases of irony that befell people with disabilities who are categorized as schizophrenic whose inheritance is completely under the control of the guardian, and people with mental disabilities are considered to have no ability to control their own property. In fact, according to experts, people with mental disabilities of schizophrenia are episodic (relapse), which in this case is a condition of distortion of thinking, perception, emotion, language, sense of self and behaviour whose symptoms include hallucinations and delusions that do not last forever and have a continuous tempo. but it is episodic, recurrent, and can be cured with treatment and therapy.[5]

Based on the above thoughts, the author is interested in researching: *first*, how is the review of human rights on the *legal capacity* of people with mental disabilities? *Second*, what are the criticisms and ideals of providing *legal capacity* for people with mental disabilities? This study of the formulation of the problem is important to put forward, especially in the context of a rereading of the politics of the law of amnesty which some experts define as a basic policy that determines the direction, form, and content of the law that will be formed in the future.[6]

## 2. Methods

The typology of this research is empirical juridical study, namely by examining the amnesty as regulated in Article 433 of the Civil Code and by reviewing the human rights and the empirical events that underlie it. The approach used is conceptual. The primary data source is Article 433 of the Civil Code, Law no. 19 of 2011 on Ratification of the Convention on The Rights of Persons with Disabilities (CRPD), and Law no. 8 of 2016 on Persons with Disabilities. Secondary data refer to literature, journals, and

papers related to the object of discussion. Data collection techniques were carried out by means of interviews and literature studies. Qualitative data analysis includes data classification activities, editing, presenting data results in narrative form and then making conclusions.

### 3. Results and Discussion

#### 3.1. Human Rights Overview on the Legal Capacity of Persons with Mental Disabilities

Everyone in the eyes of the law is a legal subject. From the human rights perspective, the recognition that everyone is a legal subject is a non-derogable right.[7] In this context, it can be said that the status of being a legal subject is inseparable from a person, as long as they are regarded as human being.[8] However, in the legal world, especially civil law, provisions are still regulated on legal capacity wherein a person, due to certain circumstances is not recognized for their legal skills or capacity.

In Law no. 19 of 2011 on the Ratification of the Convention on The Rights of Persons with Disabilities (CRPD) is stated that it is important to mainstream the disability issues as an integral and relevant strategy for sustainable development, and discrimination against any person based on disability is a violation of dignity and values. inherent in everyone. The purpose of the convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms for all persons with disabilities, and to promote respect for the inherent dignity of persons with disabilities.[9]

One of the important principles of human rights is state responsibility. The Convention on the Rights of Persons with Disabilities states that the state must be responsible in all sectors of rights, one of which is in the legal sector. Article 5 paragraph (1) states that the State is obliged to recognize that all human beings are equal before the law and are entitled to equal protection and benefit from the law without any discrimination.

States should prohibit all discrimination on the basis of disability and ensure equal and effective legal protection for persons with disabilities from discrimination on any basis. In order to promote equality and eliminate discrimination, States should take appropriate steps to ensure adequate accommodation is available. In this case, persons with disabilities in the legal sector must be placed as individuals who should not be discriminated against. Any distinction, exclusion, or limitation on the basis of disability

that aims to or has an impact on the destruction or elimination of the recognition, enjoyment or exercise of all human rights and fundamental freedoms must be eliminated, including legal norms and law enforcement must not have a discriminatory impact.[10]

In the context of the *'legal capacity'* of persons with disabilities, the CRPD has given its own mandate. Article 12 paragraph (1) states that the State affirms that persons with disabilities have the right to recognition before the law. Paragraph (2) states that the State must recognize that persons with disabilities have the right to enjoy legal capacity on the basis of equality among others in various aspects of life. Therefore, Article 12 paragraph (3) again states that the State must take appropriate steps to provide access to the needed support by persons with disabilities in exercising their legal capacity.[11]

States should ensure that all measures related to the exercise of the legal capacity of persons with disabilities provide adequate and effective guarantees. States should also take measures to ensure the equal right of persons with disabilities to own or inherit property, control their financial matters and have equal access to banks, credit loans, other forms of financial credit, and along this line, states must guarantee that persons with disabilities are not deprived of their property arbitrarily.

Referring to the convention, it is very clear that persons with disabilities are individuals whose legal capacity. This provision of international human rights law explicitly opposes the implementation of Article 433 of the Civil Code which editorially eliminates the legal capacity of persons with disabilities, especially for persons with mental disabilities, which in empirical practice shows the effects of discrimination, where persons with mental disabilities cannot be parties in civil relations such as insurance, credit loans, agreements, and in many cases have lost control of their own possessions, and have generally passed to the custodians.[12]

### **3.2. Criticisms and Ideality on Legal Capacity Persons with Disabilities**

Committee which was actually formed under the CRPD expressed its criticisms of discriminatory practices that afflict people with disabilities. The criticism is read in General Comment No. 6 of 2018 on Equality and Non-Discrimination which expresses concern that the laws and policies of the State parties —one of which is Indonesia which has ratified the Convention— are still perceiving disability through charity and medical

condition.[13] The fact that this paradigm is still exist shows that persons with disabilities are still not seen as subjects of rights holders.

The Committee on Disabilities stated that equality and non-discrimination is at the heart of the Convention and is present consistently throughout the basic articles by repeating the wording “*on an equal basis with others,*” linking all the basic rights in the Convention to the principle non-discrimination. A person’s dignity, integrity, and equality have often been overlooked for those with the disorder. Discrimination continues, including in heinous forms such as unlicensed and/or forced sterilization, medical or hormonal interventions such as lobotomy or Ashley’s treatment, drug-feeding and forced electroshock treatment, confinement, systematic murder labeled euthanasia, forced abortion and abortion under threat.

One of the general obligations of the State as stated in the Convention relates to non-discrimination and equality, where the state is obliged to respect, protect, and fulfil the rights of all persons with disabilities to non-discrimination and equality. In this regard, the State party shall not take any act of a discriminatory nature against persons with disabilities. In particular, States parties should amend or abolish laws, regulations, customs and practices that contain elements of discrimination. The Committee has set an example for this, such as the law on guardianship, pardon, and other regulations that violate the right to legal capacity; mental health laws that legitimize forced care in nursing homes/hospitals or forced treatment, which constitute discrimination and should be abolished; sterilization of women and girls with disabilities without permission; care policies at home or in inaccessible institutions; segregated education laws and policies; and electoral laws that exclude persons with disabilities.

Departing from the General Comments of the Disability Committee, Article 433 of the Civil Code on amnesty which substantially has the effect of discrimination, eliminating the legal capacity of persons with mental disabilities, and still using a disability approach can be said to be inconsistent with the rights of persons with disabilities and must be abolished. Risna Utami, member of the UN Committee for the International Convention on the Rights of Persons with Disabilities for the period of 2019-2022, asserts that the substance of Article 433 of the Civil Code has become a legal barrier and has even become a discriminatory law in Indonesia.

The use of the term in Article 433 of the Civil Code is also not in accordance with the current context. The term used is still a disability approach and has an effect on stigmatization and discrimination against groups of people with disabilities. This is also

not realized by the judicial system in Indonesia, so that the judicial apparatus and all forms of policies that are produced can be categorized as discriminatory and have no sensitivity to the rights of persons with disabilities.[14]

Referring to the view above, it is proper that the amnesty system regulated in the Civil Code 433 should be substituted by the concept and system of “*supported decision making*” or a “*supportive system in decision making*” which is substantively mandated in the Convention on the Rights of Persons with Disabilities.[15] The amnesty model is categorized as a “*substitutive decision making*” or a “*substitution system in decision making*”.[16] This concept is problematic because in general, it poses a negative impact, namely eliminating the legal capacity of persons with disabilities, mentally eliminating the self-confidence of persons with mental disabilities, and eliminating the ability to become independent individuals.[17]

The concept of amnesty is different from the concept of “*supportive decision making*” in which persons with disabilities are recognized as having legal capacity, remain as the main determinant in making decisions regarding themselves, even though to reach these decisions they have the support of others. The legal capacity of persons with disabilities is not replaced by others. This concept is considered as part of giving respect to the dignity of persons with disabilities, and in practice encouraging persons with mental disabilities to live more independently in their daily lives.(9) In addition, this concept also helps restore a person’s mental condition because he can automatically ward off the negative stigma of mental disability that he has experienced so far.[18]

## 4. Conclusions

Discourse on the legal capacity of persons with mental disabilities is currently strengthening among organisations of persons with disabilities. In general, the pressure that arises is the urge to abolish the amnesty regulated in Article 433 of the Civil Code, and request that it be replaced with a legal policy with the concept of “*supportive decision making*” which has been normatively mandated in the CRPD which has been ratified by law. No. 19 of 2011.

The amnesty system is substantially contradictory to human rights values. In human rights perspective, the acknowledgment that everyone is a legal subject is a non-derogable right. The regulation and practice of amnesty is considered to be a legal barrier and even a discriminatory law. The diction and terminology used are considered

insensitive to the rights of persons with disability. Under the CRPD, the Indonesian government has an obligation to provide access to support the implementation of the legal capacity of persons with disabilities. Access to this support is a system known as “*supportive decision making for persons with disabilities*”.

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