

Implementation of the Criminal Justice System for Persons with Disabilities

Taufik Hidayat¹, Mahrus Ali², Arief Hidayatullah Khamainy³, Nyoman Serikat Putra Jaya¹, Pujiyono¹

¹Lecture at Faculty of Law Diponegoro University, Semarang, Indonesia, ²Lecture at Faculty of Law Indonesian Islamic University, Indonesia, ³Lecture at Faculty of Law Wiraraja University, Indonesia

Abstract

The criminal justice system is built on the ideology of normality, a perspective that all people are physically and intellectually normal. Consequently, the process of investigation, prosecution and examination in court proceedings is only aimed at and designed for those who are normal. The existence of persons with disabilities has become marginalized and even forgotten. The rights of persons with disabilities are often violated both when they are perpetrators and witnesses/victims of criminal acts. In order for the criminal justice system to be pro for them, the medical approach should be abandoned and replaced with a social approach. Here what is needed is what the law enforcers need to fulfill at each stage of the criminal justice so that persons with disabilities have the right to a fair criminal trial. A profile assessment is necessary to determine the character, barriers and needs of persons with disabilities in the early stages of the criminal justice process.

Keywords: Criminal justice system, Normal ideology, Persons with disabilities, Social approach

Introduction

The criminal justice system from the beginning was not designed for those categorized as persons with disabilities^{1,2}. Persons with disabilities who are witnesses or victims of a crime are considered the same as witnesses or victims in general. They are required to testify according to what they have seen, heard or experienced. In fact, not all of them have the ability to hear or see a crime because they are deaf or blind, or they have intellectual and psychological barriers such as those experienced by slow learners or mentally retarded so that difficulties when giving testimony will arise both during the investigation and examination stages in court proceedings.

If examined, the design of the Criminal Procedure Code is basically influenced by a viewpoint or a normal ideology. Legal rules (statutory norms) are made and intended for normal people only, and forget the existence

of persons with disabilities. The treatment and perspective of law enforcement officials towards perpetrators, witnesses or victims of persons with disabilities refers to this ideology of normality. In fact, with the character, obstacles, and needs of people with disabilities that some people label as abnormal, this ideology is not only flawed from birth, but also discriminatory. On the pretext of the principle of equality before the law, the police, prosecutors and judges require witnesses to be persons who have seen, heard or experienced a criminal act without exception being persons with disabilities. In addition, law enforcement officials doubted that the testimony given by the mentality of retardation was only because the answers given to a question were unclear³.

In addition, persons with disabilities are vulnerable to becoming victims of criminal acts such as rape, assault or sexual abuse so that legal protection should be given to them, one of which is through the design of a pro criminal justice system for persons with disabilities⁴. The aim is to fulfill their rights to a fair trial⁵. In addition, if the main objective of implementing the criminal justice system is to seek material truth, this goal will not be achieved if the design of the criminal justice system

Corresponding author:

Mahrus Ali

mahrusali.iii@gmail.com

is still based on the ideology of normality⁶.

This paper specifically proposes a criminal justice system for persons with disabilities, a vulnerable group whose existence is increasingly marginalized and forgotten in Indonesia. The first part of this paper describes the need for a change in theoretical perspective in understanding disabilities. So far, the medical approach/model have dominated the reading of the concept or issue of disability. The implication is that persons with disabilities are considered as sick people and therefore need to be treated. Of course this approach is inadequate and tends to be discriminatory. Therefore, discussing disabilities must be seen from how to remove barriers and education that eliminates prejudice with the ultimate goal of inclusion.

The second part of this paper analyzes the ideological basis of the Indonesian Criminal Code which is built on the basis of the ideology of normality. KUHAP is absolutely not designed for persons with disabilities. As a result, they often experience secondary victimization. The last part of the article discusses the need for a criminal justice system that is pro-disabled. What is needed is not the rights of persons with disabilities who are suspects, defendants, witnesses or victims of criminal acts which investigators, public prosecutors, and judges need to pay attention to and fulfill, but rather what obstacles to interaction are faced by persons with disabilities that prevent them from enjoying their right to trial fair.

Understanding Persons with Disabilities from Medical Model to Social Model

Understanding the concept of people with disabilities will be more appropriate if examining it from developing models. The model that first emerged regarding the existence of persons with disabilities was the medical model. According to this model, a person with a disability is seen as a person who is sick and thus needs care, rehabilitation, medication and compassion. This model places disability as a problem that lies with persons with disabilities, and not in society. He also places the responsibility on persons with disabilities to change them to be rehabilitated or treated so that they can adapt to society⁷. The term used by adherents

to the medical model for someone who has a physical abnormality is a person with a record or a disability.

In its development, along with the claims from experts and persons with disabilities themselves against the medical model, the Minority Group Model of Disability emerged. According to this model, persons with disabilities are placed as a marginalized minority group. According to this model, which was first coined by the British Disability Studies expert, people with disabilities are victims of humiliation, discrimination and exclusion from the community as well as marginalized groups on the basis of race, gender or sexual orientation. Because persons with disabilities are considered as abnormal people whose number is not as many as normal people, they will forever be marginalized.

The minority group of disability model is not satisfactory for many groups, especially people with disabilities. For them, physical abnormalities are a gift from God and do not need to be considered a problem so that normal or not a person is no longer attached to one's physicality, but rather to their role and function in society. This thought has led to a social model in looking at disability issues (social model of disability). According to this model, disability is seen as a social construction and part of the human experience. Disability is a relationship problem between persons with disabilities and the views of society that are still discriminatory. Therefore the strategy used is to remove barriers and education that removes prejudice with the ultimate goal of insulation. With this in mind, disability is defined as a condition in which a person faces barriers to interact with the surrounding environment. This obstacle actually arises from the surrounding environment so that it hinders interactions between persons with disabilities and others.

The barrier-based approach in understanding disability, which is the substance of the social model, is accommodated in Law Number 19 of 2011 concerning the Ratification of the Convention on the Rights of Persons with Disabilities. It is stated in the preamble letter e that "disability is a developing concept and that disability is the result of the interaction between physically and mentally imperfect people with environmental barriers that prevent their full and effective participation in

society on an equal basis with other people". This preamble shows that disability is a concept that refers to the problems faced by humans because experiencing physical, mental, intellectual or sensory suffering for a long period of time hinders interaction and makes full and effective participation in society based on equality with humans in general difficult.

A person is considered as a person with a disability based on the obstacles that exist for him to interact with other people or their environment. For example, a deaf person is not considered a person with a disability if he does not communicate with other people. A person is only called a person with a disability if they communicate with someone who does not understand the sign language used. However, if the other person uses sign language that is understood by the deaf person, then the disability will no longer exist. Another example is a blind man. He is not called a person with a disability if he does not interact with his environment, such as when reading writing in non-braille forms. A blind person is only called a person with a disability if he reads an article in a newspaper, book or internet intended for people who are not blind. However, if written in braille was provided for him, disabilities would no longer exist.

Ideology Normality in KUHAP

The criminal justice system (SPP) must be able to proportionally accommodate at least two kinds of interests, namely the public interest, the interests of citizens who are victims of crime, either directly or indirectly, represented by state law enforcement agencies, and the interests of criminals. These two interests that must be considered proportionally must be one of the main philosophical bases in the formation of the SPP. However, if we examine the formulations of legal norms in Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP), it will appear that the main issue behind the formation of the Criminal Procedure Code is the need for protection of human rights for criminals who often violated by criminal law enforcement officers. The low condition of human rights protection for suspects and defendants who are faced with criminal law enforcers, who are equipped with various kinds of authority (full power) in the "Het Herziene Inlandsch Reglement" or H.I.R. (Staatsblad Number 44

of 1941), is the reason the Criminal Procedure Code was formed.

Because the emphasis is on the protection of criminals, it is not surprising that victims in the Criminal Procedure Code are forgotten people in the criminal justice system (victim as forgotten people in the system)⁸. The victim is seen as nothing more than a witness who is morally and legally obliged to explain what he saw and experienced. If the information has been given both at the stage of investigation and examination in court, its existence is forgotten. With this configuration of thought, it is only natural that the issue of persons with disabilities at that time has not yet emerged. It is unthinkable that with the number of persons with disabilities experiencing an increase in quantity from year to year, coupled with their vulnerability to become victims of crime, the Criminal Procedure Code should also be prosecuted to accommodate their rights when dealing with the criminal justice system.

KUHAP was also formed based on the ideology of normality, and this ideology is practiced today. The policeman must not be deaf, his body must be complete, intact, and not in the least bit. A person with a lame, midget body, one eye, one hand and one leg is not allowed to become a public prosecutor. The requirements to become a judge must be physically and mentally healthy. With this condition, it is impossible for a lifetime to be a judge of a person with one hand, one long leg, who sees only the right or left eye, or a midget. Because the police, public prosecutors, and judges come from people who have physical perfection, even if their morals and integrity are corrupt, for example, persons with disabilities who are victims of criminal acts must be treated as normal people (not persons with disabilities) are victims of criminal acts.

A person who is a suspect or defendant is a person who is physically normal. The rights of suspects and defendants in the Criminal Procedure Code are also based on this idea of respect, and in no way take sides with the legal interests of persons with disabilities, whether they are suspects, defendants, witnesses or victims of a crime. First, the right of a suspect or defendant to be clearly informed in a language he understands about what he is suspected or accused of, is limited to the meaning of

Indonesian, and is not related to sign language. Second, although a suspect or defendant has the right to get the assistance of an interpreter at any time, this provision only applies to suspects, defendants, witnesses or victims who do not understand Indonesian. Third, the Criminal Procedure Code regulates interpreters for defendants or witnesses who are deaf or mute, but it is not clear what criteria are used as the basis for the translator to truly understand the language, character and habits of persons with disabilities.

In relation to the process of investigation and prosecution, the basic principle is that although there is a relationship between investigation and prosecution there is a relationship between one another, their existence is still separate. There is a moral obligation for the investigator to inform the public prosecutor in the event that an investigation begins, it cannot be interpreted that the two cannot be separated. This is because the public prosecutor can state that the Investigation Report (BAP) submitted by the investigator is not complete (P19) so it needs to be completed (P21). In this process, it is likely that the BAP will go back and forth from the investigator to the public prosecutor. This situation is clearly detrimental to persons with disabilities, especially those with communication and intellectual barriers such as autism, slow learner, and mental retardation. In addition, the process of processing the Crime Scene (TKP) which can take place repeatedly psychologically affects the active participation of witnesses or victims with disabilities in it⁹.

In the process of examination in court proceedings, judges appointed to hear cases apply in general to persons with disabilities. In other words, there is no specification for judges handling cases of persons with disabilities. Judges are also prohibited from showing attitudes or issuing statements that discredit witnesses or victims. However, it is well known that for crimes of rape, revocation or sexual violence, the questions raised by the judge often turn the victim into a second victim. Victims of criminal acts become victims again (*revictimization*) due to the treatment of law enforcement officials who are insensitive to their rights and interests.

Witnesses or victims who will testify at court proceedings are required to take an oath or promise.

Usually, oaths or promises are still based on the perspective that the witness or victim is physically and intellectually normal people, so they have not touched persons with disabilities. Judges can also hear witness/victim statements regarding certain matters without the presence of the defendant, but this is optional. In practice, the judge usually orders the defendant to leave the court session if the facts of the trial show that the witness was traumatized or was not free when he testified in the presence of the defendant. This means that the order to issue the defendant when the witness/victim gives testimony will only be carried out after it is clear that the witness/victim has experienced trauma. Obviously, this situation does not protect the rights of persons with disabilities, especially intellectual disabilities who generally experience trauma for a relatively long time.

The description above shows that the criminal justice system manifested in the Criminal Procedure Code is not yet pro-interests of persons with disabilities and is still based on the ideology of normality. In fact, the rights and needs of suspects, defendants, witnesses or victims with disabilities who are faced with the criminal justice system are not the same as the rights and needs of suspects, defendants, witnesses or victims without disabilities. The criminal justice system that equates the two basically does not protect and does not support persons with disabilities. Therefore, it is necessary to initiate a criminal justice system for persons with disabilities so that on the one hand their rights are fulfilled, and on the other hand, the material truth that is to be sought and discovered can be realized.

Pro Criminal Justice System for Persons with Disabilities

In order for the criminal justice system to be pro for persons with disabilities, the approach used is the barrier approach in accordance with the substance of the social model. Here, what is needed is not the rights of persons with disabilities who are suspects, defendants, witnesses or victims of criminal acts that need to be considered and fulfilled by investigators, public prosecutors, and judges, but rather what obstacles to interaction are faced by persons with disabilities that prevent them from enjoying the right to fair trial. By knowing and analyzing these obstacles, it will be known about the rights of

persons with disabilities that must be fulfilled by law enforcement officials. Because the social model views disability as a matter of interaction between persons with disabilities and the person or their environment, the task of law enforcement officers is to identify these obstacles. Once these barriers have been identified, the rights and needs of persons with disabilities can be identified.

Identification of the obstacles and needs of persons with disabilities who are faced with the criminal justice system must be carried out at the investigation stage, because the results will be used as guidelines for handling cases at the prosecution and examination stages at court proceedings. Therefore, investigators, public prosecutors, and judges handling cases of persons with disabilities are required to have knowledge of disability an issue, the concrete form of which is competency certification and has relatively high patience^{10,4}. The implication is that investigations, prosecutions, examinations in court proceedings become null and void if cases of persons with disabilities are handled by investigators, public prosecutors and judges who do not have competency certificates. In addition, persons with disabilities can become investigators, public prosecutors and judges with certain conditions. Why is that? The answer is that they are able to identify the barriers and needs of persons with disabilities. In addition, it is necessary to develop a sense of four in investigators, public prosecutors and judges when dealing with persons with disabilities, so that it is easier for them to fulfill the rights of persons with disabilities.

An easy way to identify the barriers and needs of persons with disabilities is to conduct a profile assessment, by presenting disability psychologists, psychiatrists, translators and teachers, friends of deans of persons with disabilities, or their parents, as well as organizations of persons with disabilities. This assessment must be carried out at the investigative stage, and the results will be influential and used to fulfill the rights of persons with disabilities at a later stage. After the profile assessment is carried out, it will be known the type of disability a person with a disability has, whether he or she must be provided with a companion from the investigation stage to the examination stage at the court hearing, whether or not it is necessary to

meet the defendant when giving information, how to communicate and ask law enforcement officials, psychological resilience of persons disabilities during the examination process, what kind of interpreter is needed, the factors that make it prolonged trauma, the condition of the investigation room and courtroom, who should be in the room, and the necessary infrastructure.

For example, if the victim of a crime is mentally retarded who is deaf and mute, and then the profile assessment must present a disability psychologist, psychiatrist, sign interpreter, and teacher, playmate or victim's family. In general, the obstacles faced by persons with disabilities are legal barriers and communication barriers. Psychologists with disabilities are presented to find out the psychological barriers of victims such as how to communicate and ask questions with victims with law enforcement officials, length of time for examinations, examination methods, design of examination rooms, and assistance from the investigation stage to the examination stage at court proceedings. All costs are borne by the state¹¹. If the victim is traumatized when the examination is carried out in the police room, the examination process is carried out in places that the victim likes, such as in the park, at the victim's house or even where the victim used to play with his friends. If the victim will be traumatized when he sees the judge's oversized shirt, the judge is obliged to remove the shirt during the examination in court. If the victim was traumatized when he saw the defendant, then during the victim's examination, the defendant was immediately issued by order of the judge. If the victim can only focus on answering questions from investigators and judges for a maximum of 30 minutes, then the question and answer process must be interspersed with intervals. If the victim absolutely needs a psychologist's companion, then from the investigation to the examination in court the psychologist must be present¹².

Psychiatrists who are presented must be psychologists who understand disability issues. Its existence is needed both in the process of investigation and examination in court in addition to avoiding undesirable things, also to measure the mental level of the victim so that medical records can be made related to his psychiatric. While certain drugs are needed to calm the victim's mental

condition, such as anti-depressants. Sign language interpreters are brought in to remove communication barriers¹³. People who can be used as translators should be deaf themselves, people close and trusted by the deaf, or others who are not deaf but understand and have long communicated and interacted with the deaf. It is better if the translator that must be provided by investigators, public prosecutors and judges is not only one, but three. The first is a deaf interpreter who translates directly what the deaf perpetrator or victim says. The second is the non-deaf translator whose job is to deliver the deaf translator's translation to investigators, public prosecutors and judges. The third is another person who understands deaf sign language to ensure the validity of the deaf translation.

Teachers, playmates, or victims' parents are presented to provide initial information about the chronology of the crime, the victim's daily habits, items that the victim always carries, such as calendars or dolls. It is often found that in several cases of rape that has suffered mental retardation, it is the teacher or playmate that is used as a place to confide in the victim. It is easier for victims to tell what happened to them, rather than to their parents. But in other cases, victims were more open to their parents than playmates or school teachers. Therefore, their presence is very important to know the obstacles and needs of victims.

In addition to the obligation for investigators, public prosecutors and judges to have certification of competence in handling cases of persons with disabilities and conducting a profile assessment, case handlers for persons with disabilities must be carried out in an integrated manner as in the handling of cases of environmental protection and management and election criminal cases. The aim is not only so that the procedures and processes for handling cases of persons with disabilities are not complicated, but also so that the right to a fair trial for persons with disabilities is fulfilled. Meanwhile, organizations of persons with disabilities are needed considering that in several cases where persons with disabilities have become victims of criminal acts, the role of this organization is the key to the successful handling of these cases. In addition, his presence is very helpful for investigators, public prosecutors and judges

when they face difficulties related to the barriers and needs of persons with disabilities¹⁴. In other words, organizations of persons with disabilities have important information so that the profile assessment carried out by the investigation can run well, such as presenting a disability psychologist, the host, and even the victim himself.

Conclusion

Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP) which is used as a normative reference for the administration of the criminal justice system (SPP) is believed to be compiled based on the ideology of normality, a perspective that all people are normal physically and intellectually. Consequently, the process of investigation, prosecution and examination in court proceedings is only aimed at and designed for those who are normal. Only a person, who can see firsthand the occurrence of a crime can be used as a witness, while a blind person, even though he has the power of the sense of smell and "sees" the crime, cannot be a witness. This condition clearly negates the existence of persons with disabilities such as deaf, blind, and mentally disabled when dealing with SPP.

Because they are considered as abnormal people, and because the Criminal Procedure Code is only aimed at normal people, the rights of persons with disabilities are often violated, both when they are perpetrators and witnesses/victims of criminal acts. In order for the rights of persons with disabilities to be fulfilled and so that the criminal justice system is no longer based on normal ideologies but rather applies proportionately to normal people and persons with disabilities in accordance with their respective characteristics and needs, criminal cases where the perpetrator or victim is disabled must be handled and examined by investigators, public prosecutors and judges who understand disability issues.

A profile assessment to find out the character, barriers and needs of persons with disabilities by presenting a disability psychologist, psychiatrist and special companion at the investigation stage is mandatory because the results will be used as guidelines for handling cases at the prosecution and examination stages at court proceedings. To find out whether the

perpetrator or witness/victim is deaf, mute, blind, mentally disabled, slow learner, autism, and others, how to communicate and how to ask them, the conditions of the investigation room, the examination room in the court, whoever who must be in that room, and what facilities and infrastructure must be in place to fulfill their rights, can only be known after a profile assessment is carried out.

Conflict of Interest: There is no conflict of interest.

Source of Funding: This research was funded by the Diponegoro University Faculty of Law Research Grant Fund for the 2020 Fiscal Year.

Ethical Clearance: Ethical clearance from the institutional ethical committee obtained for the study.

References

- [1] Reksodiputro M. Criminology and the Criminal Justice System [Indonesian]. Pusat Pelayanan Keadilan dan Pengabdian Hukum Universitas Indonesia. 1994.
- [2] Benedet J, Grant I. Hearing the sexual assault complaints of women with mental disabilities: Evidentiary and procedural issues. *McGill LJ*. 2007;52:515.
- [3] Syafi'ie M. Potret Aksesibilitas Penyandang Disabilitas di Yogyakarta, Solider Jul. 28, 2013. Retrieved from <https://www.solider.id/2013/07/28/potret-aksesibilitas-penyandang-disabilitas-di-yogyakarta>. Accessed on Sept. 24, 2020.
- [4] Ortoleva S. Inaccessible justice: Human rights, persons with disabilities and the legal system. *ILSA J. Int'l & Comp. L.*. 2010;17:281.
- [5] Nowak M. U.N. Covenant on Civil and Political Rights – CCPR Commentary, 2. erw. Aufl., Kehl/ Straßburg/Arlington. 2005.
- [6] Bakhri S. The law of proof in criminal justice practice [Indonesian]. Pusat Pengkajian & Pengembangan Ilmu Hukum, Fakultas Hukum, Universitas Muhammadiyah Jakarta; 2009.
- [7] Kanter AS. The law: What's disability studies got to do with it or an introduction to disability legal studies. *Colum. Hum. Rts. L. Rev.*. 2010;42:403.
- [8] Mudzakkir, *Posisi Hukum Korban Kejahatan Dalam Sistem Peradilan Pidana*, Dissertation, Postgraduate Program, Faculty of Law, University of Indonesia, Jakarta; 2001.
- [9] Syafi'ie M. Purwanti P, Ali M. Potret Difabel berhadapan dengan Hukum Negara, Yogyakarta: SIGAB 2014.
- [10] Blume JH, Johnson SL, Millor SE. Convicting Lennie: Mental Retardation, Wrongful Convictions, and the Right to a Fair Trial. *NYL Sch. L. Rev.* 2011;56:943.
- [11] Guo Z. Approaching visible justice: procedural safeguards for mental examinations in China's capital cases. *Hastings Int'l & Comp. L. Rev.*. 2010;33:21.
- [12] Australian Human Rights Commission. Access to Justice in the Criminal Justice System for People With Disability: Issues Paper. Australian Human Rights Commission. 2013.
- [13] Brodoff L, McClellan S, Anderson E. The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon. *Seattle J. Soc. Just.* 2003;2:609.
- [14] Grant C. The Texas Intellectual Disability Standard in Capital Murder Cases: A Proposed Statute for a Broken Method. *S. Tex. L. Rev.* 2012;54:151.