

Protection of Persons with Disabilities in a Comparative Legal Context

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ABSTRACT: Legal protection for persons with disabilities in the criminal justice system is a fundamental aspect of human rights-based legal development. This study aims to conduct a comparative analysis of the forms of legal protection for persons with disabilities in Indonesia, Canada, and Germany. Through a normative legal approach and literature review, this study found that although Indonesia has ratified the *Convention on the Rights of Persons with Disabilities (CRPD)* and issued national regulations such as Law No. 8 of 2016, its implementation still faces various structural and cultural obstacles. Meanwhile, Canada has established a special court system (mental health courts) based on the principle of restorative justice, and Germany applies an individual justice approach that emphasizes a comprehensive assessment of the legal capacity of defendants. The results of the study show that the success of legal protection for persons with disabilities depends heavily on three key elements: a progressive legal framework, inclusive institutional support, and the capacity of law enforcement officials. Indonesia needs to immediately undertake technical and structural reforms to ensure substantive justice for persons with disabilities in all stages of the criminal justice process.

KEYWORDS: Disability; criminal law; comparative law

I. INTRODUCTION

Protection for persons with disabilities in the criminal justice system is a crucial aspect of efforts to develop a legal system based on human rights principles. Since the adoption of the Convention on the Rights of Persons with Disabilities (CRPD) by the United Nations in 2006, various countries have begun to implement a more inclusive legal approach that is responsive to the needs of this vulnerable group. The Convention emphasizes that persons with disabilities have the right to be recognized as subjects of law on an equal footing, including the right to fair and equal treatment under the law at all stages of the criminal justice process.

Everyone, without exception, has the right to live a life of dignity, feel safe, and be free from all forms of violence or degrading treatment. These rights are universal, including for individuals with physical or mental limitations, but also fully for persons with disabilities. In other words, the existence of a disability should not be a reason for limiting the right to equal protection of the law. It is precisely because of the vulnerability that accompanies disability that persons with disabilities require special attention and treatment from the state and society to ensure that justice is accessible in practice.

However, in practice, the implementation of the principles contained in the CRPD still faces various obstacles at the national level. Many persons with disabilities still encounter procedural and substantive barriers, ranging from difficulties in understanding legal processes due to limited access to information, lack of sign language interpreters, absence of legal assistants who are competent in disability issues, to discriminatory treatment by law enforcement officials. Not infrequently, they become victims of revictimization or even criminalization, especially for persons with intellectual or psychosocial disabilities who are not fully understood by the legal system.

The CRPD itself is an international instrument that is not only declarative but also binding on the states that are parties to the convention, obliging them to take concrete measures to ensure respect, protection, and fulfillment of the rights of persons with disabilities. This convention places persons with disabilities as equal subjects of law, not as parties who are merely recipients of charity. One of the fundamental principles of the CRPD is respect for the inherent dignity of every individual and recognition of personal autonomy, including the freedom to determine one's own life choices.

Indonesia, as a country that has ratified the CRPD, has enacted it through Law No. 19 of 2011. This commitment was further strengthened by the enactment of Law No. 8 of 2016 on Persons with Disabilities, which replaced Law No. 4 of 1997. This regulatory shift reflects a significant paradigm shift from a medical and pity-based approach to one based on human rights principles. However, despite these normative advances, implementation challenges remain significant. Persons with disabilities in Indonesia still face real barriers in the criminal justice system, from arrest to sentencing. In the context of criminal law, persons with disabilities as perpetrators or defendants require individual and proportional protection and treatment. Failure to take into account the medical or

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psychosocial condition of persons with disabilities risks violating the principle of substantive justice. For example, when persons with psychosocial disabilities are sentenced to criminal penalties without adequate psychological assessment or when persons with sensory disabilities attend court without being provided with adequate communication access, this reflects the failure of the system to provide equal justice (Barda Namawi Arief, 2010).

A paradigm shift in modern law has led to increased attention to vulnerable groups, including persons with disabilities, both in national and international legal systems. Legal guarantees for persons with disabilities are no longer considered a marginal issue, but have become a key element in efforts to achieve inclusive substantive justice. This view is in line with the spirit of the 1948 Universal Declaration of Human Rights (UDHR), which affirms the equal rights of all people without discrimination. In the context of criminal law, this issue becomes more complicated when persons with disabilities are involved in legal proceedings, whether as victims, witnesses, or perpetrators of criminal acts, because they often face structural and cultural barriers that limit their access to justice. (Satjipto Rahardjo, 1996)

A global phenomenon shows that persons with disabilities often experience double discrimination: first, as part of a vulnerable group; and second, as individuals entangled in the criminal justice system. Limited accessibility, a lack of understanding of disability among law enforcement officials, and the absence of supportive regulations make them vulnerable to criminalization or unfair treatment. This issue is increasingly relevant as various countries, including Indonesia, are striving to align their legal systems with the human rights values enshrined in the Convention on the Rights of Persons with Disabilities (CRPD).

Protection for persons with disabilities in the criminal justice system is a crucial issue in the context of human rights-based law development. Since the Convention on the Rights of Persons with Disabilities (CRPD) was adopted by the United Nations in 2006, various countries have begun to implement a more inclusive and responsive legal approach to the needs of this vulnerable group. The Convention emphasizes that persons with disabilities have equal legal standing, including the right to fair and non-discriminatory protection throughout the entire legal process, particularly in the context of criminal law.

Everyone, without exception, has the right to live a life of dignity, feel safe, and be free from all forms of violence and inhumane treatment. These rights also apply fully to persons with disabilities. In other words, the existence of a disability should not be a reason for limiting the right to equal protection of the law.⁶ Due to their inherent vulnerability, persons with disabilities require special attention and treatment from the state and society to ensure their effective access to justice (R. Nurizzah, 2019).

However, in practice, the implementation of the principles of the CRPD often faces obstacles at the national level. Various procedural and substantive obstacles remain evident: difficulties in understanding legal processes due to lack of access to information, absence of sign language interpreters, scarcity of competent legal advisors on disability issues, and discrimination by law enforcement officials. Not infrequently, persons with disabilities become victims of revictimization or criminalization, particularly those with intellectual or psychosocial disabilities.

The CRPD is an international legal instrument that is binding on signatory countries, with an obligation to take concrete measures to ensure respect, protection, and fulfillment of the rights of persons with disabilities. The convention recognizes persons with disabilities as equal subjects of law, no longer as objects of pity. One of the fundamental principles of the CRPD is respect for the inherent dignity of every individual and recognition of their independence, including freedom to make personal decisions. Indonesia has ratified the CRPD through Law No. 19 of 2011, which was further strengthened by the enactment of Law No. 8 of 2016 on Persons with Disabilities. The paradigm shift from a medical and charitable approach to a human rights-based approach marks an important normative advancement. However, implementation challenges remain significant, as persons with disabilities continue to face real barriers within the criminal justice system, from arrest to sentencing. In the context of criminal law, persons with disabilities as perpetrators or defendants require individual and proportional protection. Adequate medical or psychosocial assessments and communication access for persons with sensory disabilities are crucial. The absence of these elements has the potential to violate the principle of substantive justice.

As part of the global community, Indonesia needs to adopt best practices from countries such as Canada and Germany, which have implemented inclusive criminal justice systems through restorative justice, diversion, and specialized courts for persons with disabilities. These practices demonstrate that criminal law reform that is disability-friendly is not impossible, but requires political commitment and cross-sectoral policy integration.

Through a comparative law approach, this study aims to critically analyze how the protection of persons with disabilities in criminal law is implemented in Indonesia (civil law system), Canada (common law), and Germany (mixed system). The focus will include procedural protection, alternative sentencing, and institutional support. Thus, this study is expected to provide relevant strategic recommendations for policymakers, law enforcement officials, and academics to build a criminal justice system that is more just, inclusive, and respectful of human dignity.

As part of the global community, Indonesia needs to strengthen its position by adopting good practices from other countries that have already implemented inclusive criminal justice systems. Countries such as Canada and Germany, for example, have established policies that support the active involvement of persons with disabilities in the legal process, through restorative justice approaches, diversion mechanisms, and special courts that take into account the conditions of offenders with special needs. These

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efforts demonstrate that criminal law reform that is disability-friendly is not impossible, but rather something that can be adopted through political commitment and cross-sectoral policy integration.

Therefore, through a comparative legal approach, this study aims to critically analyze how the protection of persons with disabilities in the context of criminal law is implemented in various jurisdictions with different legal system characteristics. This study will focus on three countries: Indonesia (civil law system), Canada (common law system), and Germany (mixed system), to evaluate the effectiveness of procedural protection, alternative sentencing, and institutional support for persons with disabilities in contact with the law.

By highlighting existing practices and challenges faced in these countries, this paper aims to provide relevant strategic recommendations for policymakers, law enforcement officials, and the academic community in their efforts to build a criminal justice system that is more fair, inclusive, and oriented toward respect for human dignity.

II. RESEARCH METHODS

The normative legal research method applies a normative legal approach, which is an approach based on written legal provisions or applicable laws and regulations (Bambang Sunggono, 2003). In this method, data is collected through literature study, using secondary data as the main source. The collection process is carried out by tracing various legal regulations and literature relevant to the issue being studied, so this method is also known as library-based legal research (library research).

According to Soerjono Soekanto, research is an activity that aims to analyze and build understanding in a methodological manner, meaning that research is conducted using specific methods and procedures. Research is also systematic, carried out through structured stages and conducted consistently in accordance with applicable scientific principles (Soerjono Soekanto, 2011)

III. RESULT AND DISCUSSION

A. Protection of Persons with Disabilities in Indonesian Criminal Law

The development of criminal law in Indonesia in ensuring protection for persons with disabilities as a vulnerable group is still in a phase that requires much improvement. From a normative perspective, the enactment of Law No. 8 of 2016 is a significant step forward as it reflects a paradigm shift, namely the recognition of persons with disabilities as legal subjects with rights and responsibilities equal to those of other citizens. However, in judicial practice, the implementation of this law still faces significant structural and cultural obstacles.

These obstacles are not only related to the lack of supporting facilities, such as sign language interpreters or disability-friendly courtrooms, but also rooted in the mentality of law enforcement officials who do not fully understand the rights of persons with disabilities. This situation often results in persons with disabilities facing unfair legal procedures, and in some cases, being treated in a manner that degrades their dignity. This is in stark contrast to the principle of inherent dignity enshrined in Article 3 of the CRPD, which requires state parties to ensure respect for the inherent dignity of every individual.

This shows that limited access to legal information is one of the main factors that hinder persons with disabilities in obtaining justice. Persons with disabilities often do not understand their rights as defendants or victims due to the absence of information dissemination mechanisms tailored to their needs. This situation violates the principle of due process of law and increases the risk of criminalization of persons with disabilities in the criminal justice system.

Additionally, the phenomenon of revictimization is commonly experienced by persons with psychosocial and intellectual disabilities, as many individuals in these groups become victims of revictimization due to their inability to provide consistent statements before law enforcement authorities. As a result, they are prosecuted without considering their psychological limitations, which should be taken into account at every stage of the criminal justice process.

From a modern criminal law perspective, the concept of restorative justice has proven effective as an alternative approach to resolving cases involving vulnerable groups, including persons with disabilities. This approach focuses on restoring relationships between perpetrators, victims, and the community, as well as paying attention to the special needs of persons with disabilities so that they can fully participate in the resolution of cases. Canada and Germany, for example, have implemented special court systems that enable persons with disabilities to receive fair treatment and freedom from discrimination throughout the legal process.

In Indonesia itself, the concept of restorative justice has been introduced in the Criminal Justice System for Children (Law No. 11 of 2012). However, to date, this mechanism has not been explicitly applied to persons with disabilities involved in criminal cases. As a vulnerable group, persons with disabilities have the same need for more inclusive and fair legal protection.

Barda Nawawi Arief emphasizes the importance of the principle of proportionality in imposing criminal sanctions, especially against vulnerable groups such as persons with disabilities. Judges must ensure that every decision taken takes into account a comprehensive assessment of the medical and psychosocial conditions of persons with disabilities, as well as their ability to participate in the judicial process.

If this assessment is ignored, the judicial process can be deemed invalid because it does not meet the principle of a fair trial. In line with this, J. Schmidt suggested that developing countries such as Indonesia immediately formulate progressive policies through technical regulations that provide for special treatment for persons with disabilities in the criminal justice process.

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These regulations should include provisions on the provision of legal assistants who are knowledgeable about disability issues, training for law enforcement officials, and the provision of facilities and infrastructure that support accessibility in judicial institutions (J. Schmidt, 2020).

However, the various challenges to implementation require strong political commitment and cross-sectoral support. Synergy between the government, judicial institutions, civil society organizations, and the disability community is essential to formulate inclusive policies that are responsive to the needs of this vulnerable group. In addition, the establishment of an independent monitoring mechanism to evaluate judicial practices towards persons with disabilities is a strategic step in realizing the accountability of the criminal justice system.

As part of the international community, Indonesia has a legal and moral obligation to ensure that persons with disabilities are not only recognized as having rights in theory, but also experience substantive justice. The success of the state in providing legal protection to persons with disabilities will be an important indicator of the achievement of social justice and human dignity in the development of the legal system.

B. Comparison of Protection for Persons with Disabilities in Criminal Law Between Indonesia and Canada

Legal guarantees for persons with disabilities in the criminal justice system are a key element in a country's efforts to create substantive justice. From a human rights perspective, persons with disabilities are a vulnerable group that often faces various obstacles, both structural and cultural, when involved in legal proceedings.

Indonesia and Canada, despite having different legal systems, have demonstrated their commitment to this issue, albeit with contrasting approaches. Through a comparative legal approach, this analysis aims to identify effective practices and explore weaknesses that still need to be addressed.

Indonesia, as a country with a civil law system, has taken important normative steps by ratifying the Convention on the Rights of Persons with Disabilities (CRPD) through Law No. 19 of 2011. This ratification was reinforced by the enactment of Law No. 8 of 2016 on Persons with Disabilities, which marked a paradigm shift in protection from a medical approach to a human rights-based approach. Through this legal framework, persons with disabilities are explicitly recognized as legal subjects with equal rights and obligations, and their right to access inclusive justice is guaranteed.

However, the implementation of these regulations on the ground still faces various serious obstacles. These obstacles are not only technical in nature, such as limited accessibility facilities in judicial institutions and the lack of sign language interpreters, but also cultural, such as the low awareness of law enforcement officials about the rights of persons with disabilities. A study by Alice Marlin and J. Sihombing (2018) shows that persons with disabilities involved in criminal cases are often interrogated without assistance or without adequate procedural modifications to accommodate their limitations.

This situation ultimately increases the risk of revictimization, where persons with disabilities not only fail to receive protection but also become new victims of the legal process itself (Alice Marlin and J. Sihombing, 2018). One of the fundamental problems faced by Indonesia is the absence of systematic psychosocial and medical assessment mechanisms for persons with disabilities who come into direct contact with the law.

In many cases, persons with psychosocial disabilities are processed through conventional criminal justice mechanisms without considering their capacity to understand the legal process or defend themselves effectively. This clearly contradicts the principle of fair trial as stipulated in Article 13 of the CRPD, which requires states to ensure that persons with disabilities can participate fully and equally in the judicial process.

Unlike Indonesia, Canada has implemented a more innovative and responsive approach through the establishment of mental health courts. These courts are part of a criminal justice system reform that recognizes the fact that persons with disabilities, particularly those with psychosocial disabilities, require a different approach than defendants in general. The main principle underlying mental health courts is that traditional criminal punishment is not always the appropriate solution for individuals with special needs, and that recovery and rehabilitation should be a priority (J. Schmidt, 2020)

Mental health courts in Canada operate with the support of a multidisciplinary team consisting of judges, prosecutors, lawyers, psychiatrists, psychologists, social workers, and nurses. This team works together to ensure that each defendant receives a comprehensive psychological and social assessment before a legal decision is made. If the assessment results indicate that the defendant's condition is closely related to the crime committed, the conventional court process can be diverted to a rehabilitation program or mental health services.

This approach is in line with the principles of restorative justice, which emphasizes the restoration of individuals and social relationships rather than mere retribution. A comparative study found that mental health courts in Canada have significantly reduced recidivism rates among defendants with disabilities by up to 25%. In addition, this practice also has a positive impact on the psychosocial well-being of defendants and strengthens public trust in the justice system. A comparison between Indonesia and Canada reveals fundamental gaps in both the philosophy and implementation of legal protection for persons with disabilities. Indonesia is still stuck in a retributive justice paradigm that emphasizes punishment as the main goal of the criminal justice system. Meanwhile, Canada has successfully integrated restorative justice principles into its practices through mental health courts.

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This analysis also reveals that Canada's success is not only supported by progressive regulations but also by institutional innovation and consistent capacity building of law enforcement officials. The lesson that Indonesia can learn is the need to build a more disability-friendly justice system through the establishment of special courts or at least the adoption of principles applied in mental health courts.

In addition, criminal law reform in Indonesia must include the drafting of detailed technical regulations as derivatives of Law No. 8 of 2016. These regulations must specifically regulate examination procedures, psychosocial assessment mechanisms, the provision of accessibility facilities, and intensive training for law enforcement officials on the rights of persons with disabilities. This approach is in line with the application of the progressive law concept proposed by Satjipto Rahardjo, which emphasizes that law must be human-centered and prioritize vulnerable groups as a form of substantive justice.

By adopting best practices from Canada, Indonesia can accelerate the transformation of its legal system to become more inclusive, humane, and oriented towards the fulfillment of human dignity. This step will also strengthen Indonesia's position as a state party to the CRPD that is responsible for fulfilling the constitutional rights of persons with disabilities.

C. Reform of the Indonesian Criminal Justice System Based on International Legal Comparisons

The overhaul of the criminal justice system in Indonesia has become urgent amid the global trend of human rights principles emphasizing the importance of substantive equality and respect for the dignity of every individual, including persons with disabilities. However, Indonesia's criminal justice system remains dominated by a retributive approach focused on punishment and has not fully addressed the needs of persons with disabilities as subjects of the law, whether as perpetrators, victims, or witnesses. In fact, since 2011, Indonesia has ratified the Convention on the Rights of Persons with Disabilities (CRPD) through Law No. 19 of 2011. However, its implementation still faces various obstacles, including regulatory, institutional, and human resource capacity issues.

In comparison, Canada has developed a more responsive and inclusive criminal justice system through specialized courts known as mental health courts. These courts not only aim to punish but also to rehabilitate and restore offenders with psychosocial disorders or intellectual disabilities. Before the legal process begins, a multidisciplinary assessment is conducted by psychiatrists, social workers, and legal advisors.

If it is proven that the disability has influenced the criminal act, the defendant can be transferred to a rehabilitation program outside the correctional system (Schneider, R. D, 2010). Meanwhile, Germany takes an individual justice-based approach, which assesses the legal capacity of the defendant before initiating criminal proceedings. If the defendant is deemed incapable of understanding the legal consequences of their actions due to psychological or mental disorders, the criminal proceedings may be terminated and transferred to non-criminal mechanisms such as civil protection. This approach emphasizes that justice is not the same treatment for everyone, but rather treatment that is appropriate to the conditions and needs of each individual.

Based on the practices of these two countries, it can be concluded that the fulfillment of the rights of persons with disabilities in criminal law requires three main components a progressive legal framework, a supportive institutional structure, and law enforcement officials who are knowledgeable and trained in a human rights-based approach. Unfortunately, Indonesia has not yet fulfilled all three of these requirements. To date, there are no technical regulations detailing the implementation of Law No. 8 of 2016 in the criminal justice system, no integrated psychosocial assessment system, and no special courts or support units within law enforcement agencies.

Furthermore, Indonesia's criminal justice system has not yet integrated mandatory legal capacity assessment mechanisms into the investigation or trial process, so that persons with disabilities who have cognitive impairments are often processed in the general system without consideration of their ability to understand their legal rights and obligations. However, Article 13 of the CRPD requires state parties to ensure access to justice for persons with disabilities by providing reasonable accommodation throughout the legal process.

Therefore, Indonesia needs to reform its criminal law structure and norms by learning from countries such as Canada and Germany. An initial step that can be taken is to establish a cross-sectoral assessment unit at the early stage of handling cases involving persons with disabilities. This assessment team should consist of psychologists, psychiatrists, social workers, and criminal law experts who can jointly provide recommendations before the legal process continues. In addition, training for law enforcement officials is a matter that cannot be delayed. Without understanding and sensitivity to disability issues, officials will tend to use general procedural standards that risk discriminatory treatment of vulnerable groups. The training provided must include knowledge of law, psychology, alternative communication, and non-discrimination values as enshrined in international conventions.

In order to support structural reform, Indonesia also needs to establish an independent oversight body to monitor and evaluate the judicial process involving persons with disabilities. This body could collaborate with Komnas HAM and the National Commission on Disabilities to ensure that the principle of substantive justice is truly applied and realized. It is important to recognize that the reform of the criminal justice system must be directed towards the realization of a more humane justice. In the progressive legal perspective put forward by Satjipto Rahardjo, law should not be understood merely as a set of rigid norms, but must function as a means to create social justice and protect vulnerable groups. In this context, persons with disabilities should no longer be

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positioned as passive objects of the law but must be recognized as active subjects of the law, with equal rights at every stage of the judicial process.

CONCLUSIONS

Legal protection for persons with disabilities in the criminal justice system is an integral part of efforts to achieve substantive justice that upholds human rights. This study shows that although Indonesia has ratified the CRPD and enacted Law No. 8 of 2016 as the national legal framework, the normative implementation of these provisions has not been fully effective in ensuring equal access to justice for persons with disabilities. Structural, cultural, and procedural barriers remain serious challenges, ranging from the absence of psychosocial assessments, limited accessibility facilities, to the lack of understanding of legal officials regarding disability conditions. Through a comparative legal approach with Canada and Germany, it appears that a more inclusive criminal justice system reform can be achieved through the integration of practices such as *mental health courts*, diversion mechanisms, and legal capacity assessments from the early stages of the judicial process. Both countries demonstrate that protecting persons with disabilities requires not only regulatory changes but also institutional commitment and training for law enforcement officials. Therefore, Indonesia needs to immediately formulate technical policies governing special treatment for persons with disabilities in the legal process, establish multidisciplinary assessment units, and involve independent monitoring institutions to ensure the accountability of the judicial system. A fair criminal justice system is not sufficient if it merely provides equal treatment; it must also be able to provide equal and appropriate treatment tailored to individual needs, as mandated by the CRPD and progressive legal principles.

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