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The Right of Workers with Disabilities: Legal Instrument and Challenges in Indonesia

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Abstract: Nowadays, people with disabilities still experience various acts of discrimination. For example, mainly constrained by the requirements of "no physically disabled" which has always been one common absolute requirement for every person when registering for certain jobs. Therefore, states should expressly provide legal protection to people with disabilities and provide opportunities for people with disabilities to be able to work like normal people in general and not consider their limitations as something that could hamper their work. Two important and interesting points will be discussed in this paper. First, people with disabilities are discriminated Often against while facing job recruitment, especially for Indonesian Attorney Civil Servants. Second, it is important to know the responsibility of the state in protecting people with disabilities. The type of research used in the present research is doctrinal-comparative legal research. This present research conducts library research to obtain secondary sources of law (authorities). This paper found that various legal instruments on disability rights that there is no correlation with each other, so it does not create an integrated system to protect the rights of disabilities in obtaining jobs. Although there has been affirmative action in the recruitment process prosecutor (civil servant), it is not enough to give the disabilities an equal opportunity to participate in the recruitment process.

Keyword: Workers, Disabilities, Humanright

INTRODUCTION

Disability is an issue that rarely gets public attention, whereas every person has the potential to have a disability (Syahbuddin, 1999). A person can become a disability not only because of abnormalities in the womb, but disability can also occur in children, adolescents, adults, to the elderly. Everyone can have an accident on the highway, workplace accidents, and victims of natural disasters. It can cause normal people to people with disabilities. People with disabilities are those who have physical, mental, intellectual, or sensory impairments

which in the long-term interaction with various barriers may make it difficult for the full and effective participation in society based on equality with others (Syahbuddin, 1999).

The existence of the disability, which is overlooked and often marginalized in society, is one of the obstacles. The rights of disabilities are often overlooked because most people consider the disabilities to have limitations that interfere with their activities, especially in the working context. A disability is often described as the inability of a person medically, so a disability is regarded as a sick person who always needs help and cannot get an education, or work like a normal person (Hamidi, 2016).

In Indonesia, the human rights guarantee contained in Article 28A-28J of the Constitution of the Republic of Indonesia, 1945. Clause 27 (2) provides that: "Every citizen has the right to work and a decent living for humanity". Then clarified in Article 28 D which provides that: "Everyone has the right to work and to receive remuneration and fair and proper treatment in the employment relation." The right to work for every citizen is already regulated. Indonesian Constitution 1945 did not restrict someone who has physical limitations and/or intellectual from getting the right to work so that everyone without exception can enjoy their rights following what is set in the Regulation.

The inclusion of human rights in the Indonesian Constitution 1945, officially has made it a constitutional right of every citizen or constitutional right (Ridwan, 2013). Articles stipulate clearly that concerning human rights, then the state must fulfil, protect, and promote human rights. In addition, another meaning of such an arrangement is that if citizens are not getting their rights to education and work, citizens can demand their rights to the state.

In addition, it is set in the constitution, that the fulfilment of the rights of the disability to decent work is also regulated in the Convention on the Rights of Persons with Disabilities (CRPD). In general, Article 27 CRPD mandates that "state Parties Recognize the right of persons with disabilities to work on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall provide safeguard and promote the realization of the right to work, including providing reviews of those who acquire a disability and taking appropriate legislation.

Nowadays, people with disabilities still experience various acts of discrimination. For example, mainly constrained by the requirements of "no physically disabled" which has always been one common absolute requirement for every person when registering for certain jobs. For example, the recruitment of an Indonesian Attorney Civil Servant will always appear as one of the special requirements that must be owned by the applicant. In addition, the physical-related requirements are also complicated by the existence minimum height requirement, which is for men at least 160 centimeters and women 155 centimeters. With the physical requirements oriented, it will create limited access and opportunities for persons with disabilities to participate in the registration process. Even though the recruitment regulations state that special formation is provided for people with disabilities, its implementation cannot yet be assessed or assessed to what extent it is implemented fairly and transparently.

The more discrimination against people with disabilities, states should expressly provide legal protection to people with disabilities and provide opportunities for people with disabilities to be able to work like normal people in general and not consider their limitations as something that could hamper their work, legal protection of basic rights of workers are attached to and protected by the constitution so that violations of fundamental rights are human rights violations. Protection of workers aims to guarantee the basic rights of workers and ensure equality and treatment without discrimination on any basis to realize the welfare of workers by paying attention to the development of business progress and the interests of employers.

From the background above, two important and interesting points will be discussed in this paper. First, people with disabilities are discriminated Often against while facing job recruitment, especially for Indonesian Attorney Civil Servants. Hence, it is important to know the international instruments regarding job access for people with disabilities. Second, considering that the case occurred in Indonesia, it is important to know the responsibility of the state in protecting people with disabilities, especially if the state has already ratified the international convention related to persons with disabilities while facing job recruitment.

METHODS

The type of research used in the present research is doctrinal-comparative legal research. Doctrinal legal research as conceived in the legal research domain, is research ‘about what the prevailing state of legal doctrine, legal rule, or legal principle is. It is a research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments. Hence, this research takes one or more legal propositions, principles, rules or doctrines as a starting point and focus of his study. Comparative methodology can provide an extra dimension to research outcomes. This methodology is used in a variety of disciplines – education, political science and, of course, law. The comparison may not be the focus of the research but it forms part of the international legal context. However, it is important to approach the comparison to achieve more than a mere description, or a simple chronicling of sameness and difference. (Walliman, 2021).

This present research conducts library research to obtain secondary sources of law (authorities). Secondary authorities are raw materials which are used to explain, interpret, develop, locate, or update the primary authorities. Secondary data is also defined as the data which have been interpreted and recorded (Walliman, 2021). Within doctrinal legal research, primary sources of law are the materials used as bases to make up the legal rules that govern our society. This research uses a qualitative method of data analysis. This research uses the qualitative method of data analysis because the information gathered is non-numerical data, therefore, it shall be analysed by using the interpretative method.

RESULTS AND DISCUSSION

International and Indonesian Law-Instrument in Protecting the Job Access For People with Disabilities

1 International Law Instruments

In international instrument there are some conventions that provide regulation concerning protection of access for people with disabilities to get a job. All of which mandates that people with disabilities get a decent work opportunity for livelihood. Here is the details:

a. International Covenant on Economic, Social and Cultural Rights (ICESR)

The Government has ratified ICESR which was marked by the issuance of Law No. 11 of 2005 concerning the Ratification of the International Covenant on the Rights of Economic, Social, and Cultural Rights. Specifically, Article 6 ICESR urge the States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and will take appropriate steps to safeguard this right. Furthermore, at that point ICESR regulated: the right to work, the right to training, the right to comfort and good working conditions, the right to form unions, the right to enjoy social security, the right to enjoy protection during and after childbirth as well as the right to participate as well as in the cultural life to enjoy the benefits of scientific progress and its applications.

However, article 2 (2) ICESR did not specifically regulate and provide special protection to people with disability in finding jobs. It can be seen from the arrangement which states that "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or another opinion, national or social origin, property, birth or another status ". It can be concluded that the focus of ICESR is to eliminate discrimination in economic, social, and culture in general.

b. Convention on the Rights of Persons with Disabilities (CRPD)

CRPD was born after decades work of UN to change attitudes and approaches to people with disabilities. CRPD is a form of peak paradigm shift movement disabilities of the old perspective that see persons with disabilities as "objects" of charity and social protection to the new perspectives that see persons with disabilities as "subjects" with rights, who can claim their rights and are able to make decisions for their lives based on awareness of their independence and become active members of society (Nursyamsi, 2015).

Indonesia has ratified the CRPD into Law No. 19/2011 (Act No. 19 of 2011) concerning the Ratification of the CRPD. The formal implications of the ratification are Indonesia should make all efforts to realize optimally all forms of values listed in Article 27 (1) CRPD. Indonesia should be aware that people with disabilities also have the same right to work and improve their living standards. Indonesia shall prohibit discrimination based on disability concerning all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions.

However, various legal instruments about disability rights that exist in the CRPD only mention the right to get a job in general but do not explain further how these rights can be obtained later for people with disabilities. This makes the CRPD impressed merely to give recognition to persons with disabilities, but lack a mechanism to ensure that these rights can be met by the state or not.

Concerning cases of discrimination against people with disabilities in civil servant recruitment in the Attorney General, the CRPD has not specifically protected persons with disabilities when undergoing recruitment in the public sector. CRPD simply set the state's obligation to "employ persons with disabilities in the public sector", without giving any further regulation such as what form of protection should be given by the state. It is inversely proportional to the CRPD arrangements in the private sector, these are: Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programs, incentives, and other measures. Based on the differences in regulation between the public and private sectors in the CRPD, it would be possible in the admissions process employees who were in the public sector will not get affirmative action programs, incentives, and other measures. This is a major drawback of CRPD in protecting against discrimination experienced by disabled when registering employees Prosecutor.

The rights that are regulated in the Convention Rights of the Persons with Disabilities are the basis for people with disabilities to maintain their life and fight for their rights, but the rights of people with disabilities are not optimally guaranteed and protected, especially the right to work and get a job. The right to work in the Convention on the Rights of Disability is a right which cannot be separated because every human being and everyone is entitled to participate, contribute, and enjoy economic development, social, cultural and political, which all human rights and freedoms that fundamental can be fully realized.

2 Indonesian Law Instruments

The legal instruments in Indonesia itself have been set regarding the rights to work in general, and in particular regarding the protection of the disabilities in obtaining employment. At the constitutional level, Indonesian Constitution 1945, Article 27 (2) provides that; "Every citizen has the right to work and a decent livelihood for humanity ", later clarified in Article 28 D which provides that; "Everyone has the right to work and earn rewards and treatment fair and appropriate in the employment relationship. "Further, Article 28 (2) Indonesian Constitution of 1945 states that" everyone has the right freely over discriminatory treatment on any grounds and the right to protection against that discriminatory treatment". Under the Indonesian Constitution of 1945, the right to work for every citizen is already guaranteed. Indonesian Constitution 1945 also does not limit someone with limited physical and/or intellectual getting the right operation, so that everyone without exception can enjoy their rights in accordance with the regulation.

In the lower regulation, at the level of Act (undang-undang), Act No. 39 of 1999 on Human Rights (Human Rights Act) and the Law of the Republic of Indonesia Number 40 of 2008 regarding the Elimination of Racial and Ethnic Discrimination has also reinforced the prohibition of discrimination. From both regulations, it can be seen that "everyone has the right regarding recognition, security, protection and fair legal treatment and obtain legal certainty and equal treatment before the law". Therefore, every citizen, according to their talent, skills, and abilities, is entitled to decent work. Both articles made clear that the state must ensure that in obtaining a job, every citizen is entitled to get a decent job. Setting states "according to their talents, skills, and abilities," emphasized that persons with disabilities should be able to enjoy the same rights as other citizens.

Although the Human Rights Act does not specifically mention or regulate the protection of people with disabilities access to employment, that regulation uses another terminology, which is disabled (orang cacat). Articles 41 and 42 provide that any persons with disabilities, the elderly, pregnant women, and children, are entitled to ease and special treatment. In other words, the Human Rights Act has provided protection Although the Human Rights Act does not specifically mention or regulate the protection of the disabled access to employment, the law using other terminology, is disabled. Chapters 41 and 42 provide that any persons with disabilities, the elderly, pregnant women, and children, are entitled to ease and special treatment. In other words, the Human Rights Act has provided protection, although the Human Rights Act does not specifically mention or regulate the protection of people with disabilities access to employment. Chapters 41 and 42 provide that any persons with disabilities, the elderly, pregnant women, and children, are entitled to ease and special treatment. In other words, the Human Rights Act has provided protection for the possibility of the disability to get affirmative action or positive discrimination on convenience and special treatment in the context of the fulfilment of the right to work.

The government, in the Procurement Selection of Indonesian Attorney Civil Servant, deemed to have committed discrimination against persons with disabilities the government. The announcement letter from the Indonesian General Attorney number: PENG- 12/C/Cp.2/09/2023 on the Implementation of Procurement Selection of Civil Servant Candidates for The Indonesian Attorney Civil Servant 2023 has special requirements that applicants must be "not colour blind either partial or total, not disabled physically, not mentally impaired, and has ideal body posture to the standard body Mass Index (BMI) between 18-25 with a formula of weight in kilograms divided by height in meters squared height for males at least 160 (one hundred and sixty) centimetres and women 155 (one hundred and fifty-five) centimetres". More considered discrimination is when a prosecutor who has an accident resulting in physical disabilities can be honourably discharged from his post. Things that could lead to a prosecutor can be honourably

discharged from his post: a. own request; b. physical or mental illness continuously; c. has reached the age of 62 (sixty-two) years; d. die; e. incompetent in performing their duties.

The requirements in the Indonesian Attorney Civil Servant recruitment process are certainly contrary to the existing regulations, both at the level of the Constitution and in the Act as described previously. In addition, it is also contrary to some technical rules related to the recruitment of civil servants. Law of the Republic of Indonesia Number 5 of 2014 On the State Civil Apparatus states that in the recruitment of civil servants was more use of the merit system. The merit system is the policy and management of ASNs based on qualifications, competence, and performance in a fair and reasonable to the background regardless of politics, race, colour, religion, origin, gender, marital status, age, or condition of disability. Thereby employees at the Prosecutor's admission supposed more concerned with competence. Although the explanation of Article 65 (2) explains that healthy physical requirements for persons with disabilities are tailored to the need's execution of the work, then it is relevant. It is given that the Prosecutor is not a position that is required to have a proper physical specimen of police, army, pilot, or any other job.

Moreover, in the Minister of Administrative Reform and Bureaucratic Reform of the Republic of Indonesia Number 36 Year 2018 on Criteria Determination of Need for Civil Servants and Implementation Selection of Civil Servants 2018, the Attorney General as government agencies should determine specific requirements "shall allocate a determination of need (formation) positions, requirements, quantity and placement of units that can be proposed by the participants with disabilities under the organization's needs and the needs of position". So, the attorney still has to provide an opportunity for persons with disabilities to participate in the recruitment process. The special considerations or specific considerations why should be required not physically disabled, should be explained and based on the existing rules. This thing needs to be done in order to create transparency and the public can judge the policies that are considered discriminatory.

The latter is related to the issue of the prosecutor who had an accident which resulted in physical disabilities can be honorably discharged from his post. It is also already protected by the Law of the Republic of Indonesia Number 8 Year 2016 On Disability. In article 11 explains that the right to work, entrepreneurship, and cooperatives for Persons with Disabilities includes the right to get a job held by the Government, local government, or private without discrimination, not dismissed for reasons of disability, and get the program back to work. Such arrangements are also considered irrelevant, considering everyone has the potential to have a disability. A person can become a disability not only because of abnormalities in the womb, but disability can also occur in children, adolescents, adults, to the elderly. Everyone can have an accident on the highway, workplace accidents, and victims of natural disasters. Thus, it can be said that the rules in the attorney that a person who has a physical disability can be honourably discharged from the position is contradictory and it is considered discrimination.

The Analysis of The Government Policy in Protecting Job Access for People with Disabilities

Debate and holding physical and spiritual terms in an office has been debated for a long time. Some consider it important that a person who occupies a position is not hampered in their duties. The argument was criticized for physical and spiritual terms sometimes do not focus on seeing the potential barriers, but just look at the person's physical condition, which does not necessarily hamper a person in running duties. Physical limitations did not reduce the intelligence and capacity of the individual to be treated equally before the law. Those requirements are too often classified as a factor that is considered unhealthy and not feasible physically or spiritually.

According to Hart, that is fair and unfair is a form of criticism of morals that are more specific than good and bad or right and wrong, it is clear from the facts that logically claim a law is good because the law was fair, or that the law is bad because it is not fair, Hart, explained the general concept of justice which is always related to fairness, so that a decision judged based on "natural" or "unnatural". Social practices become important for the realization of the law. When the law refers to the apparent irrelevance such as height, physical, weight or beauty, then the law would be unfair at once ludicrous.

The government as a representative of the state should be obliged to make the anti-discrimination policy, both through regulation and in its implementation. The government as a representative of the state, should not create policies that lead to discriminatory actions (Pakpahan, 2013). If because of the policy that made, a group of citizens feel discriminated, then the regulations should be revisited, especially if the rules refer to one's physical limitations.

A review of the policy should be accompanied by a comprehensive solution that can remove the discrimination against people with disability. One of the policies that need to be reviewed is affirmative action. The policy is one solution to solve the problem of discrimination by the state against the disability. Unfortunately, in the case of the prosecutor (civil servant) affirmative action policies are perceived as unfavourable to those with disabilities who want to register as a prosecutor. Affirmative action has been granted in the form set minimum quota for central agencies of at least 2 per cent under the Regulation of the Minister of Administrative Reform and Bureaucratic Reform of the Republic of Indonesia Number 27 Year 2021 on Criteria Determination of Need for Civil Servants and Implementation Selection of Civil Servants. However, the quota provision applies only to a computer expert in the Attorney RI agencies and not for as a prosecutor. Thus, people with disability still do not have access to participate and sign up to become a prosecutor. However, the quota provision applies only to a computer expert in the Attorney RI agencies and not for as a prosecutor. Thus, people with disability still do not have access to participate and sign up to become a prosecutor. However, the quota provision applies only to a computer expert in the Attorney RI agencies and not for as a prosecutor. Thus, people with disability still do not have access to participate and sign up to become a prosecutor.

In this policy, the government is quite justified. It is given that giving opportunities to the disability can be tailored to the needs of the agency concerned. Nevertheless, the government should also be transparent stating the reasons why certain positions with disabilities are not able to work. There should be a clear justification so that people understand why there is discrimination against people with disability. Working as a Prosecutor is fundamentally different from a job as soldiers, policeman, pilot, etc. which require excellent physical condition in carrying out their duties. Thus, according to the author, work as an attorney should still be performed by persons with disabilities under certain conditions.

A provision stating that if the prosecutor experiences an event which makes it a flaw, then can lead to a prosecutor being honourably discharged from his post is a pretty discriminatory provision. Affirmative action should be taken against the incident, considering the victim will be classified as a disability. In Article 48 of Law No. 8 of 2016 concerning persons with disabilities, the government should aid in the implementation of the work by paying attention to the special needs of people with disabilities. The hope is to be guaranteed to be able to work again. To be able to work again, actually doesn't need the same position, but rolling positions could be the alternative, for example, an employee at the administrative level and not just dismiss them. It is also equally applied to employment in police and army institutions.

Giving affirmative action through a quota system was also not a wise policy. In practice, the minimum limit is used as a mere formality. That is, the agency will only receive

the minimum threshold amount so that it can be possible to close the opportunity for applicants with other disabilities that might be feasible but the quota has been met. Form of affirmative action through the provision of quotas should be supplemented by providing a specific provision for disability applicants, where the terms of certain deductions can facilitate the disabilities to register.

CONCLUSION

Both international instruments and regulations exist in Indonesia, of which mandates that persons with disabilities get decent work opportunities for livelihood. All these settings only refer to the right to get a job in general but do not explain further how these rights can be obtained later for persons with disabilities. Requirements in the Indonesian Prosecutor employee's recruitment process would have been contrary to some existing regulations both at the level of the constitution as well as at the level of an act (undang-undang) as has been discussed previously. Thus, it can be concluded that the various legal instruments on disability rights that there is no correlation with each other, so it does not create an integrated system to protect the rights of disabilities in obtaining jobs.

Although there has been affirmative action in the recruitment process prosecutor (civil servant), it is not enough to give the disabilities an equal opportunity to participate in the recruitment process. The first reason is, that granting quotas also well-tended by compassion (charity-based) means a condition of persons with disabilities forced to adapt to the environmental conditions compensate for disabilities acquired. Second, the 2 per cent quota for the disabled in the attorney is confined to office computer experts, which incidentally is not regarded as a lady prosecutor. Lastly, the policy of affirmative action will be more beneficial if followed by furnished by giving specific provisions for disability applicants, where in these conditions certain reductions can make it easier for disability to register.

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