

The Difables in conflict with the Law: Regulatory Analysis, Practices, and legal Aid



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The Difables in Conflict with the Law: Regulatory Analysis, Practice, and Legal Aid

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INTRODUCTION

Since the proclamation of the Indonesian independence 75 years ago, some groups in our society are still marginalized. They have not fully been able to enjoy the promises of independence and rights guaranteed in the constitution. One of the marginalized groups is the difables. They are still experiencing discrimination in various parts of life. The difables must face not only stigma and stereotype from the public, but also the state policies which have not been inclusive.

In the realm of law and justice, the obstacle faced by the difables in conflict with the law is fundamental. It can hinder their access to justice. The obstacles can be categorized into three aspects, namely regulations, law enforcers, and facilities.

The materials of this book are taken from several workshops for legal enforcers and PWD activists “*Penanganan Perkara Difabel Berhadapan dengan Hukum*” (The Handling of the Cases Implicating the Difables in Conflict with the Law) in Semarang, Mataram, and Makassar in 2019. They were parts of the program “Justice for Disability” held by Pusat Kajian Antikorupsi Fakultas Hukum Universitas Gadjah Mada (PUKAT Korupsi FH UGM/the Center for Anti-Corruption Studies) and Pusat Konsultasi dan Bantuan Hukum Fakultas Hukum Universitas Gadjah Mada (PKBH FH UGM/the Center for Legal Consultation and Aid). This program was supported by Voice, a donor organization giving support to rights holder groups in facing marginalization or discrimination to exert influence on the access to productivity, social service, and political participation.

Through the workshops, beside telling story and some best practices, legal enforcers can also acquire understanding and skills in handling cases implicating the difables. The materials in this book are related to general justice, especially criminal justice. This book is published in order that the general public can read it and this book can be used as an additional source of information on the difables in conflict with the law.

Even though the authors read law, we realize that we have not had sufficient understanding of the difables. Therefore, in writing this book, we tried to absorb input from experts and the difable activists through discussions and interviews as well as possible. We would like to express our thanks for the input. Nevertheless, this book is not perfect. The readers’ feedback is always welcome because the opportunity to improve this book is always open. May this book be worth reading.

Salam Inklusi.

Yogyakarta, 30 November 2020

Authors

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CHAPTER I THE CONCEPT OF THE DIFABLES AND THEIR RIGHTS

A. The Term “Difables”

The term “difables” stands for different ability. Some sources also use differently able people,¹ different abled people or different ability people² Generally, difables can mean people with different ability.

There are other terms to describe the difables in Indonesia, such as *penyandang cacat dan disabilitas*. *Penyandang cacat* was officially used by the referring to Law Number 4 of 1997 on the Persons with Disabilities. Subsequent the adoption of the Convention on the Rights of Persons with Disabilities in 2006, which used the term Persons with Disabilities, the Ministry of Social Affairs used the term istilah *Orang Dengan Kekacatan (ODK)*, translated from Persons with Disabilities.³

The use of the term *cacat* has begun to be left behind since the government ratified CRPD through Law Number 19 of 2011 on the Ratification of the Convention on the Rights of Person with Disabilities. The phrase “persons with disabilities” used in CRPD does not mean *penyandang cacat*, but *penyandang disabilitas* is a term from an English word, disability. Generally, it can the lack of ability. In more detail, *disabilitas* or disability means physical and/or mental and/or intellectual disability to do something as normal people do.⁴

Until today, the discourse on the term has only been concerning two *penyandang difabel/difabilitas* and *penyandang disabilitas*. Some people use the term *penyandang disabilitas*, referring to the existing laws and regulations. In addition, argue that those called *penyandang disabilitas* are really disabled or have disability according to International Classification of Function (ICF) from World Health Organization (WHO) in 2000, or those having difficulty, lack, abnormality, injury,

¹ Fajri Nursyamsi et al., 2015, *Kerangka Hukum Disabilitas di Indonesia : Menuju Indonesia Ramah Disabilitas*, Pusat Studi Hukum Dan Kebijakan Indonesia, Depok, p. 45

² Choky R. Ramadhan, Fransiscus Manurung, dan Adery Ardhan Saputro, 2016, *Difabel dalam Peradilan Pidana: Analisis Konsistensi Putusan-putusan Difabel*, Badan Penerbit Fakultas Hukum Universitas Indonesia, Depok, p. 11

³ Setia Adi Purwanta, “Penyandang Disabilitas”, <https://www.solider.id/sites/default/files/03.05.13-PENYANDANG%20DISABILITAS-dari%20buku%20vulnerable%20group.pdf> 18 July 2019

⁴ Moh Fuad Hasan in Choky R. Ramdhan et al., op.cit. 2016, *Difabel dalam Peradilan Pidana: Analisis Konsistensi Putusan-putusan Difabel*, Badan Penerbit Fakultas Hukum Universitas Indonesia, Depok, p. 10

loss of body organ functions and hindered by their physical and social environment.⁵ Therefore, disability is deemed as a reality.

On the other hand, some people use the term *difabel* because it is more humane and positive for them.⁶ They argue that the difables have ability despite their difficulty, damage, or loss of organs. They should be deemed people having potency or ability, but the potency or ability is different in forms and kinds. According to this group, the reality is process of disability through terms and discriminatory practices.⁷

According to Setia Adi Purwanta,⁸ the use of a term has behaviour on those using it to the other party described. For instance, the term *cacat* has a negative connotation, namely the lack resulting in bad or imperfect values or qualities, or the term *disable*, which the lack of ability.

Hence, this guidebook will consistently use the term “difables”. Nonetheless, there are exceptions to citing conventions, expert opinions, or laws and regulations. Most of them use the term *penyandang disabilitas*. The use of the term “difables” is an attempt to encourage a paradigmatic shift in our society who has not been friendly to the difables and state policies which have not sufficiently respected, fulfilled, and guaranteed the rights of the difables.

B. The Kinds of Difabilities

The kinds of difabilities have been changed since the ratification of Law Number 4 of 1997 on Disabled Persons and Law Number 8 of 2016 on Persons with Disabilities. The kinds of difabilities in Article 1 paragraph (1) UU Penyandang Cacat merely encompassed three categories, namely:

1. Physically disabled;
2. Mentally disabled;
3. Physically and mentally disabled.

The categories were changed by Law 8 /2016. According to the regulation, the kinds of difabilities are categorized into four, i.e.:

1. Physical difabilities;

⁵ Setia Adi Purwanta, *Op. cit*

⁶ Hari Kurniawan dkk, 2015, *Aksesibilitas Peradilan Bagi Penyandang Disabilitas*, Pusat Studi Hak Asasi Manusia Universitas Islam Indonesia, Yogyakarta, p. vi

⁷ Setia Adi Purwanta, *Op Cit*

⁸ *Ibid*

Physical difabilities refer to mobility function impairment, such as amputation, acute flaccid paralysis or paralyzed, paraplegia, cerebral palsy (CP), stroke-related paralysis, leprosy-related paralysis, and dwarfism.

2. Intellectual difabilities;

Intellectual difabilities refer to intellectual impairment due to below-average level of intelligence, for instance: learning difficulties, mental deficiency, and down syndrome.

3. Mental difabilities;

Mental difabilities are impairment in the mental, emotional, and behavioural functions, such as:

- a. Psychosocial difabilities, i.e. skizophrenia, bipolar, depression, anxiety, and personality disorder; and
- b. Developmental difabilities affecting social interaction capacity, i.e. autism and hyperactive.

4. Sensory difabilities

Sensory difabilities refer to impairment in one of the five senses, such as visual difability, hearing difability, and/or speech difability.

C. The Rights of the Difables in the Laws and Regulations

1. The Guarantee of the Rights of the Difables in the Constitution

Article 1 paragraph (3) of the Constitution 1945 stipulates that Indonesia a state based on law. It implies that in Indonesia, law is the supreme set of principles by which a state is governed. Therefore, as the supreme law of the the constitution regulates: (1) the guarantee of and respect for human rights and citizens; (2) the fundamental state structure; and (3) the division and limitation of fundamental constitutional duties.⁹

The guarantee of human rights is stipulated in Chapter XA of the Constitution 1945. Articles 28A-28J guarantee the rights of every citizen to be fulfilled by the state through its policy. It also protects every citizen to memenuhi

⁹ Sri Soemantri, 2006, Prosedur dan sistem perubahan konstitusi dalam batang-tubuh UUD : sebelum dan sesudah perubahan UUD 1945, Alumni, Bandung, p. 59-60

the goal of the Indonesian nation to protect the whole Indonesian nation and the entire native land of Indonesia.

Several points stipulated in Articles 28A-28J of the Constitution 1945 are dasar perlindungan of the rights of the difables, one of which is the right to receive ease and special treatment to achieve equality and justice in accordance with Article 28H paragraph (2). In addition, the right to live, the right not to be tortured, the right of freedom of thought and conscience, the right of religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be treated discriminatively in Articles 28I paragraphs (1) and (2). The bases for the protection for the rights of the difables in the Constitution 1945 can be seen in detail in the table below:

Table 1. The Bases for the Protection for the Rights of the Difables in the Constitution

Articles	Contents
Article 28H paragraph (2) of the Constitution 1945	Every person is entitled to receive ease and special treatment in order to obtain the same opportunity and benefit in order to achieve equality and justice.
Article 28I paragraph (1) of the Constitution 1945	The right to live, the right not to be tortured, the right of freedom of thought and conscience, the right of religion, the right not to be enslaved, the right to be recognizes as a person before the law, and the right not to be persecuted under a retroactive law are human rights that cannot be reduced under any circumstance whatsoever.
Article 28I paragraph (2) of the Constitution 1945	Every person is entitled to be free from discriminative treatment on whatsoever basis and is entitled to acquire protection against such discriminative treatment.
Article 28I paragraph (4) of the Constitution 1945	The protection, advancement, enforcement, and fulfillment of human rights shall be the responsibility of the state, particularly the government.
Article 28I paragraph (5) of the Constitution 1945	For the enforcement and protection of human rights in accordance with the principle of a democratic state based on law, the execution of human rights shall be guaranteed, regulated, and set out in statutory rules and regulations.
Articles 28J paragraph (1) of the Constitution 1945	Every person shall respect human rights of the others in the order of life of the society, nation, and state.
Article 28J paragraph (2) of the Constitution	In the exercise of his/her rights and freedom, every shall abide by the limitations to be stipulated by the laws with the purpose of solely guaranteeing the recognition as

1945	well as respect for the rights and freedoms of the others and in order to comply with just demands in accordance with considerations for morality, religious values, security, and public order in a democratic society.
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2. The Protection for the Rights of the Difables in Laws and Regulations

The protection of human rights, including those of the difables, grew stronger and kept developing subsequent to the reform in 1998. One of its bases was a fundamental change of state policy through the constitutional amendment from 1999 to 2002. The amendment produced the legal bases for the protection for human rights which are then used as the bases for fighting for the values of human rights.

A few years prior to the constitutional amendment, the Indonesian government issued Law 4/1997. This regulation had been in force for almost 20 years before being amended by Law 8/2016.

Despite regulating several rights of the difables, such as the right of in all aspects of life, the right of education, and the right of social rehabilitation, Law 4/1997 was criticized and deemed contrary to the the developing paradigm and the needs of the difables. One of the criticisms was the use of the word (disabled), which was considered contrary to the concept of equality. In the sociological point of view, people assume that disability means unhealthy.¹⁰ The term “*penyandang cacat*” (disabled persons) was also deemed discriminative and to categorize people into normal and abnormal based on physical condition.¹¹ The paradigm of the difables in Law 4/1997 mainly used the concept of welfare and not protect and advance the rights of the difables.¹² Hence, this law was using the *caritas* approach and contrary to the progress of the development of the protection for the rights of the difables.

In 2006, the Convention on the Rights of Persons with Disabilities was formulated. Indonesia signed the convention in 2007, in spite of ratifying it through Law Number 19 of 2011 on the Ratification of the Convention on the Rights of Persons with Disabilities. This ratification is a step forward in the

¹⁰ In the academic paper of Law 8/2016, it was explained that the clause “*sehat jasmani*” (physically healthy) was used to legitimize the obstruction, limitation, and even removal of the rights of the disabled in every process of recruitment and promotion with the assumption that disability means “unhealthy”.

¹¹ Fajri Nursyamsi, et. al., *Op.Cit.*, p. 44

¹² Nicola Colbran, “Akses Terhadap Keadilan Penyandang Disabilitas Indonesia”, <http://dfat.gov.au/about-us/publications/Documents/access-justice-2010-bahasa.pdf>, 23 June 2019

recognition of the rights of the difables. At least, the ratification of CRPD has important meanings. *First*, it recognizes the dignity and equality of the difables, recognizes that the discrimination against the difables violates the dignity and of every person. This affirmation strengthens the position of the difables as the legal subjects having human rights as every person. Thus, the discrimination against the difables is also the discrimination against human rights.

Second, this ratification is the starting point of the guarantee of the rights the difables in comprehensive laws and regulations. This convention regulates the rights of the difables jauh lebih luas than Law 4/1997. One of the examples is pertaining to the equality before the law. Law 4/1997 did not guarantee the of the difables before the law, wheareas CRPD does.¹³

Third, CRPD also obliges states to pay more attention to the rights of the difables. It can be done by obliging states to modify existing laws and regulations that constitute discrimination against the difables. Likewise, states are also mandated to appoint institutions to handle the problem of difability and be responsible for the implementation of this convention. States shall also evaluate and submit a report on the implementation of this convention. Two things can be said, i.e. a more assertive guarantee of the rights of the difables and the responsibility of states for protecting their rights as the bases for policy to regulate the difables after the adoption of this convention.

In general, the rights of the difables stipulated in this convention affirm that human rights also apply to the difables. In some opinions, it can mean that the adoption of the categorization of the difables in a broad sense, all disabled persons shall enjoy all human rights and fundamental freedom.¹⁴ In more detail, the importance of the stipulations of the protection for the rights of the difables CRPD can be seen in the table below:

Table 2. The Stipulations in CRPD and Protection for the Rights of the Difables

Importance	Articles
The recognition of the dignity and equal rights of persons with disabilities and the recognition of persons with disabilities as legal subjects	Article 5; Article 12
More comprehensive guarantees of the rights of persons with disabilities	Article 9 (accessibility); Article 12 (equal

¹³ See Article 5 of the Convention on the Rights of Persons with Disabilities

¹⁴ Solider, “Konvensi Internasional tentang Hak Difabel – CRPD”, <https://www.solider.id/baca/592-konvensi-internasional-tentang-hak-difabel-crpd>, 31 December 2018

	recognition before the law); Article 13 (access to justice); Article 15 (freedom from torture or cruel, inhuman, or degrading treatment or punishment); Article 21 (freedom of expression and opinion, and access to information); etc
The obligation of states to pay more attention to the rights of persons with disabilities through modifying the existing laws and regulations and designating institutions to handle the problems of persons with disabilities	Article 4; Article 33

With the ratification of the Convention on the Rights of Persons with Disabilities through Law Number 19 of 2011, the need to regulate the rights of difables became more urgent. Therefore, the lawmakers issued Law 8/2016 to replace Law 4/1997. Law 8/2016 was issued as the previous law was contrary to the paradigm of the needs of the difables, and to realize the same right and opportunity for the persons with disabilities toward prosperous, independent, and nondiscriminative life.¹⁵

In general, Law 8/2016 stipulates 22 rights of persons with disabilities, four rights of women with disabilities, and seven rights of children with disabilities. It is more comprehensive than Law 4/1997, which merely stipulated six rights of persons with disabilities. The rights of persons with disabilities in Law 8/2016 can be seen in detail in the table below:

Table 3. The Stipulations of the Rights of the Difables in Law 8/2016

	The Rights of Persons with Disabilities	Articles
1	The right to live	Article 6
2	The right to be free from stigma	Article 7
3	The right of privacy	Article 8
4	The rights of justice and legal protection	Article 9
5	The right of education	Article 10
6	The rights of occupation, entrepreneurship, and cooperatives	Article 11
7	The right of health	Article 12
8	The right of politics	Article 13

¹⁵ The consideration of Law Number 8 of 2016 on Persons with Disabilities.

9	The right of religion	Article 14
10	The right of sport	Article 15
11	The rights of culture and Pancasila	Article 16
12	The right of social welfare	Article 17
13	The right of accessibility	Article 18
14	The right of public service	Article 19
15	The right of disaster protection	Article 20
16	The rights of habilitation and rehabilitation	Article 21
17	The rights of concession	Articles 114 – 116
18	The right of data collection	Article 22
19	The rights to live independently and participate in the community	Article 23
20	The rights to express, communicate, and receive information	Article 24
21	The rights of mobility and citizenship	Article 25
22	The rights to be free from discrimination, neglect, torture, and exploitation	Article 26
	The Rights of Women with Disabilities	
1	The right of reproductive health	Article 5 paragraph (2) letter a
2	The right to receive or refuse contraception	Article 5 paragraph (2) letter b
3	The right of extra protection from multiple discrimination	Article 5 paragraph (2) letter c
4	The right of extra protection from violence and exploitation	Article 5 paragraph (2) letter d
	The Rights of Children with Disabilities	
1	The rights of special protection from discrimination, neglect, harassment, exploitation, and sexual violence and abuse	Article 5 paragraph (3) letter a
2	The rights to receive care and nurture from immediate or foster families for their optimum growth and development	Article 5 paragraph (3) letter b
3	The right to be protected in decision making	Article 5 paragraph (3) letter c
4	The right to be treated humanely according to their dignity and rights	Article 5 paragraph (3) letter d
5	The right of the fulfilment of special needs	Article 5 paragraph (3) letter e
6	The right to receive equal treatment as other children to achieve social integration and individual development	Article 5 paragraph (3) letter f

7	The right of social facilitation	Article 5 paragraph (3) letter g
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D. The Rights of the Difables in Conflict with the Law

1. The Constitutional Guarantee of the Rights of the Difables in Justice

Article 1 paragraph (3) of the Constitution 1945 stipulates that Indonesia is a state based on law. The affirmation means that the government should protect the rights of the community based on law. Article 27 of the Constitution 1945 reaffirms that all citizens shall be equal before the law and in government and shall uphold the law and government without exception.

The rights of the difables, even though they are not explicitly stated in the Constitution 1945, should be deemed as human rights in accordance with the universal principles of human rights, namely non-discrimination or equality. These principles are embraced by Article 28H paragraph (2) of the Constitution 1945, which states that every person is entitled to receive ease and special treatment in order to obtain the same opportunity and benefit in order to achieve equality and justice. The use of terminology *every person* can be interpreted in a broad sense that those who need justice and equality should have the guarantee of ease and be specially treated by the state. Nevertheless, the Constitutional Court interpreted the meaning of *every person* in the article through Verdict Number 10-17-23/PUU-VII/2009, Verdict Number 143/PUU-VII/2009, and Verdict Number 16/PUU-VIII/2010. In those three verdicts, the Court states that:

Article 28H paragraph (2) of the Constitution 1945 in a constitutional guarantee terhadap those who experience marginalization, underdevelopment, exclusion, limitation, distinction, participation gap in politics and public life stemming from continuous structural and socio-cultural inequality of the community (discrimination), both formal and informal, in public or private spheres or affirmative action.

The interpretation asserts that the difables are included in the *every person* in Article 28H paragraph (2) of the Constitution 1945. Furthermore, in the interpretation it is stated the meanings of *ease* dan *special treatment* are not to be interpreted as discriminative treatment, but fulfilment of the constitutional

rights.¹⁶ Besides, the constitution also guarantees in Article 28I that every person recognized as person before the law. Therefore, the rights and position of the difables should constitutionally be recognized as legal subjects.

2. The Guarantee of the Rights of the Difables in Justice Based on CRPD

CRPD stipulates it through the guarantee of the right of equality before before the law (Article 5) and the right of access to justice (Article 13). Article 5 of CRPD stipulates that:

- a. State parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
- b. State parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
- c. In order to promote equality and eliminate discrimination, state parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
- d. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present convention.

The important point of the right of equal recognition before the law is non-discrimination for the disables as legal subjects. They are recognized as legal subjects and should be treated equally. This affirms that difables have rights and obligations to act based on law.

In addition, Article 13 of CRPD stipulates the difables' rights of access to justice:

- a. State parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

¹⁶ Fajri Nursyamsi, *Ibid*, p. 23

- b. In order to help to ensure effective access to justice for persons with disabilities, state parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

This article guarantees the difables' right of access to justice. They shall be given regulatory guarantee of accommodations to achieve equality. This provision stipulates that discrimination due to the absence of facilities and regulations cannot hinder their direct participation in justice.

Referring to the article, the difables' rights of access to legal proceedings are not confined to particular roles, judiciary, or processes. They can act as witnesses, victims, or petitioners, in public or private justice systems and even in legal proceedings and othe preliminary stages. Thus, Aricle 13 of CRPD also obliges states to promote appropriate training for legal enfocers in handling and processing cases implicating the difables.

3. The Guarantee of the Rights of the Difables in Justice Based on the Law on Persons with Disabilities

Law Number 8 of 2016 on Persons with Disabilities stipulates the equality of the difables before the law in the righths of justice and legal protection. Contrary to CRPD, which stipulates the rights of equality before the law and access to justice in different articles, Law 8/2016 stipulates those two rights in one article, namely Article 9, which stipulates that the difables' rights of justice and legal protection encompass:

- a. equality before the law;
- b. recognition as legal subjects;
- c. to own and inherit movable or immovable property;
- d. to control their own financial matters or appoint another person to represent their interest in financial matters;
- e. to have access to banking and non-banking services;
- f. to have accessibility in seeking justice;
- g. protection from pressure, violence, assault, discrimination, and/or deprivation or takeover of their property;
- h. to select and appoint another person to represent their interest on civil matters in or out of court; and
- i. protection for their intellectual property rights

Seeing the points above, there are two main points of the difables' rights of justice and legal protection. First, they are recognized as legal subjects. Second, they have accessibility in the administration of justice. The two principles constitute the bases on which the difables fight for the other rights.

Related to the recognition of the difables as legal subjects, this provision means that basically the difables shall be recognized in conducting legal action, including legal rights and obligations. Even, in Article 28 of Law 8/2016, central and local governments are required to guarantee and protect the rights of the difables as legal subjects entitled to take legal action like others. This provision faces sufficiently major challenges, considering several laws and regulations which stipulate procedural law still do not accommodate their rights.

In terms of the difables's accessibility in the administration of justice, this law does not elucidate further, except Article 36, which obliges law enforcement agencies to provide reasonable accommodation for the difables in the justice process. If this provision is aimed to support the difables' access to justice, the accommodation is not sufficient if it is only infrastucure of legal enforcement agency building. The accommodation should include regulation guaranteeing the administration of justice in cases which implicate the difables¹⁷, especially regulation as the guidelines for law enforcers on handling cases implicating the difables.

The legal protection for the difables can be seen in more detail in the table below:

Table 5. The Stipulation of the Rights of the Difables in Justice

Laws and Regulations	Articles
Constitution 1945	Article 28H paragraph (2)
	Article 28I
Convention on the Rights of Persons with Disabilities	Article 5
	Article 13
Law Number 8 of 2016 on Persons with Disabilities	Article 9
	Article 28
	Article 29
	Article 30
	Article 31
	Article 32

¹⁷ Presented by Budi Suhariyanto in Focus Group Discussion "Implementasi Kebijakan Perlindungan Hukum dan Aksesibilitas Peradilan bagi Penyandang Disabilitas" 29 November 2018 in Jakarta

	Article 33
	Article 34
	Article 35
	Article 36
	Article 37
	Article 38
	Article 39

4. The Guarantee of the Rights of the Difables in Justice Based on the Master Plans for Persons with Disabilities

The government issued Government Regulation Number 70 of 2019 on the Planning, Implementation, and Evaluation of the Respect, Protection, and Fulfilment of the Rights of Persons with Disabilities, which contains the documents of the Master Plans for Persons with Disabilities. This regulation is the mandate of Article 27 of Law 8/2016 that central and local governments shall formulate the master plans for persons with disabilities.

Points in the documents of the master plans contain government’s strategies in the planning, implementation, respect, protection, and fulfilment of the rights of the difables. In the annex of GR 70/2019 it is stated that the master plans have at least three aims, i.e.: 1) to synchronize the perspectives of policy makers in making policy which are friendly to the difables; 2) to complete and elaborate the framework of the master plans; and 3) to be the bases for mainstreaming the issue of the difables at the national and local levels.

In terms of the issue of the difables in conflict with the law, there are several points inserted into the documents of the master plans. The points are included in the government’s strategic targets for the protection for political and justice rights and access of persons with disabilities, one of which contains the policy plans for the protection for persons with disabilities against violence, exploitation, and neglect in justice process and the execution of verdicts. There are three strategies for implementation related to the legal protection for the difables. First, it is the standards of examination encompassing the qualifications public prosecutors, investigators, judges, prison staff, facilitators for persons with disabilities, legal assistants, advocates, and interpreters; prosedures for examination; and reasonable facilities and services for the difables in conflict with

the law. Every legal enforcement institution is expected to be able to formulate standards of examination, reasonable accommodation, and access to legal aid for the difables in conflict with the law.

Second, there is a mandate to educate legal enforcers and legal aid providers on handling cases implicating the difables. It aims to conduct several research and compose modules on the inclusive services for the difables in conflict with the law. Moreover, it will train the jail and prison staff and legal enforcers to be responsive in handling cases implicating the difables.

Third, it is the strategy to develop standards and mechanisms for supervising the fulfilment of the rights of persons with disabilities in conflict with the law. It aims to provide the mechanisms for public complaints and their handling to fulfil the rights of the difables in conflict with the law.

5. The Guarantee of the Rights of the Difables in Justice Based on Government Regulation Number 39 of 2020 on Akomodasi yang Layak for Persons with Disabilities in Justice Process

The government has issued one of the implementing regulations of Law 8/2016 stipulate the rights of the difables in justice process further. It is Government Regulation Number 39 of 2020 on the Reasonable Accommodation Persons with Disabilities in Justice Process. It emphasizes the appropriate and necessary modification and adaptation to guarantee the rights of the difables in justice process.

There are several poin penting in GR 39/2020. **First**, the state obliges seluruh legal enforcement institutions to provide reasonable accommodation for the difables. They are the National Police, Attorney General's Office, Supreme Court and its subordinated judicial bodies, and Constitutional Court. Even Article 2 paragraph ayat (3) GR 39/2020 also obliges other institutions related justice process to provide reasonable accommodation for the difables.

Second, GR 39/2020 mandates legal enforcement institutions to request personal assessment process in handling cases implicating the difables. It is requested to doctors, other health workers, and serta psychologists atau psychiatrists.

Third, the reasonable accommodation in GR 39/2020 is not only related to facilities, but also services to the difables. If the difables experience trauma, they do not need to be confronted with the perpetrator during justice process, the judges examine using teleconferences, and the difables give evidence with various communication media. Investigators and public prosecutors shall also convey the rights of the difables in justice process and convey information concerning the progress of justice process to the difables as victims, their family or facilitators.

Fourth, GR 39/2020 mandates collaboration between legal enforcement institutions and other stakeholders to serve the needs of reasonable accommodation for the difables in justice process. Local governments and the Difable Organization may be the partners of legal enforcement institutions to provide facilitators/interpreters in cases implicating the difables. Bar associations are mandated to make and develop standards of providing legal aid to the difables. In addition, central and local governments are mandated to allocate legal aid funds from state finance.

CHAPTER II

THE OBSTACLES TO THE DIFABLES IN CONFLICT WITH THE LAW

The obstacles referred to in this chapter are factors which lead the fulfilment of the rights of the difables in justice to be unoptimal. The government shall protect and guarantee the fulfilment of the human rights of vulnerable groups, especially the difables. However, the difables in conflict with the law are still facing several obstacles in fulfilling their rights.

According to the Australian Human Rights Commission¹⁸, there are five general obstacles facing the difables:

- a. Community support, programs and assistance to prevent violence and disadvantage and address a range of health and social risk factors may not be available to some people with disabilities.
- b. People with disabilities do not receive the support, adjustments or aids they need to access protections, to begin or defend criminal matters, or to participate in criminal justice processes.
- c. Negative attitudes and assumptions about people with disabilities often result in people with disabilities being viewed as unreliable, not credible or not capable of giving evidence, making legal decisions or participating in legal proceedings.
- d. Specialist support, accommodation and programs may not be provided to people with disabilities when they are considered unable to understand or respond to criminal charges made against them („unfit to lead“).
- e. Support, adjustments and aids may not be provided to prisoners with disabilities so that they can meet basic human needs and participate in prison life.

In terms of legal procedure in Indonesia, the existing regulations still have not been able to accommodate the needs of the difables. Related to services, the legal enforcers have not understood how to handle the difables in conflict with the law well. The other obstacle is facilities which are yang not very friendly and unable to

¹⁸ Australian Human Rights Commission, 2014. *Equal Before The Law: Towards Disability Justice Strategies*. Australian Human Rights Commission. p. 8

serve the needs of the difables. They are constructed and designed without considering the accessibility bagi the difables.

Based on the existing regulations, relevant research outcomes, and practices in justice, three aspects of the obstacles are identified, namely: regulations on the examination of the difables, understanding and sensitivity to the difables, and facilities.

A. The Obstacles to the Difables in Conflict with the Law in the Examination by the Police

1. The Regulatory Obstacles to the Examination of the Difables
 - a. No Profile Assessment

According to GR 39/2020, profile assessment constitutes any attempt to assess the kinds, standards, obstacles, and needs of persons with disabilities both medically and mentally to determine the reasonable accommodation.¹⁹ It is needed to know the obstacles facing the difables in conflict with the law, and to know the proper models of examination and needs in handling cases.²⁰ The obstacles can be related to several abilities, i.e. mentality, speech, sensitivity of focus endurance, refraining, etc.²¹ From the obstacles, the law enforcers can understand the needs to prepare, such as interpreters, facilitators of the difables, experts, legal assistants, accessible facilities, and flexible examination process.²²

Based on the elaboration above, profile assessment is an important part in handling cases implicating the difables. It needs to be conducted in every process of case handling. Investigation is the preliminary stage of case handling, so that profile assessment is very necessary to know how to handle the difables in conflict with the law properly. Profile assessment is put aside probably due to no technical guidance about it, even though GR 39/2020 has obliged personal assessment in handling cases implicating persons with disabilities. However, considering that several law enforcers rely on positive law very much, the absence of the technical guidance will hamper them in doing their duties.

¹⁹ Article 1 number 3 of Government Regulation Number 39 of 2020 on the Reasonable Accommodation for Persons with Disabilities in Justice

²⁰ Jurnal Difabel Vol. 1, p. 31

²¹ Jurnal Difabel Vol 2, p. 27

²² *Ibid*

b. The Obstacles to the Financing of Profile Assessment

Profile assessment in the stages of initial investigation and investigation is important to determine the calendar age of the intellectual difables.²³ Although GR 39/2020 has obliged profile assessment of law enforcers, there is an obstacle to the financing of profile assessment. It can come from the police as the institution of the investigators and the difables, so that it hampers profile assessment. Presidential Regulation Number 82 of 2018 on Health Insurance adds another obstacle to it. Article 52 letter r states that the victims of mistreatment, sexual violence, terrorism, and human trafficking are not covered by the Healthcare and Social Security Agency (*Badan Penyelenggara Jaminan Sosial Kesehatan*). It can be covered by the Witness and Victim Protection Agency (*Lembaga Perlindungan Saksi dan Korban/LPSK*). Nevertheless, the medical assistance is not automatically given to the victims mentioned above. It is given through various stages subsequent to a request to LPSK²⁴ and approved by a decree of LPSK. The various stages through which the process goes take time, so that the medical costs are not automatically covered by LPSK.

2. The Obstacles to the Knowledge and Sensitivity in the Difables

Many police investigators do not understand the issues and needs of the difables. Unlike juvenile crimes, there is no specific requirement for the police investigators with particular abilities in cases implicating the difables. Article 26 paragraph (3) of Law Number 11 of 2012 on Juvenile Criminal Justice System stipulates several requirements for the police investigators in juvenile crimes, *inter alia*:

- a. Experiences as police investigators;
- b. Interest, attention, dedication, and understanding of child problems; dan
- c. Technical training on juvenile criminal justice.

The police investigators having knowledge and ability on the difables will ease the examination. At least, they can understand the obstacles facing the difables, so that proper treatment is needed in the examination. The obstacle to

²³ Jurnal Difabel Vol 1, p.31

²⁴ Regulation of the Witness and Victim Protection Agency Number 4 of 2009 on the Standard Operating Procedures for Psychosocial and Medical Assistance

the police investigators' understanding can be overcome by, among others, integrated law enforcement. It is nothing new in the Indonesian criminal justice system. For instance, Article 95 paragraph (1) of Law Number 32 of 2009 on the Protection and Management of the Environment stipulates that environmental crimes are investigated in an integrated manner by investigators from civil servant, the police, and prosecutor's offices under the minister. The police investigators can refer to it in handling cases implicating the difables despite no regulation mandating it. They can collaborate with difables' organizations, experts, social workers, and other elements to help them handle the cases.²⁵ Overall, law enforcement institutions can cooperate with local governments, institutions, or atau difables' organizations to have difables' facilitators and/or interpreters.²⁶

3. The Obstacles to Facilities

GR 39/2020 stipulates that facilities constitute reasonable accommodation. Article 20 of the GR determines minimum standard for such facilities based on the obstacles faced by the difables. They are as follows:

- a. Transportation is one of the obstacles to several difables. For instance, the difables using wheelchairs face obstacles to ride into public transportation due to no ramp to connect the stop/road to the public transportation.²⁷ It can also be experienced by the difables in conflict with the law to be examined in initial investigations and investigations in the police offices.²⁸ The public transportation accommodating the needs of the difables are rarely found.
- b. Various special facilities need to be provided to ease the difables in conflict with the law. They often cannot access facilities, such special parking areas for them. The areas are often located far away (like the back side of buildings, basement). The distance between the parking areas and the main entrance

²⁵ Hari Kurniawan, et al., *Op.Cit.*, p. 110

²⁶ Article 17 of Government Regulation Number 39 of 2020 on the Reasonable Accommodation for Persons with Disabilities in Justice Process

²⁷ Ro'fah, Teori Disabilitas: Sebuah Review Literatur, *Jurnal Difabel* Vol. 2, 2015, p. 11

²⁸ Hari Kurniawan, et al., *Op.Cit.*, p.82

will be hard to be accessed by the difables²⁹, especially those using wheelchairs. Pathways with inclined planes and wide doors are necessary, so that the wheelchairs can be used to reach the rooms. For the visual difables, there is no guiding block to the room to where they go. Additionally, the examination rooms are often difficult to be accessed by the difables in conflict with the law. For instance, they are located on the second floor. In addition, there is no lift in the building, but merely stairs as the only access. Therefore, it will be difficult for the the difables using wheelchairs or the visual difables.³⁰ Therefore, law enforcement institutions are expected to provide some facilities. *First*, the rooms should adhere to standards and be accessible for persons with disabilities. *Second*, public transportation should be accessible for the persons with disabilities to reach the examination rooms. *Third*, the accessible facilities in the building should comply with laws and regulations.³¹ The other facilities are wide doors for those using wheelchairs. They are needed in several rooms, such as examination rooms and toilets.

B. The Obstacles to the Difables in Conflict with the Law in Prosecution

The obstacles faced by the difables in prosecution can generally be categorized into three, namely hadling procedures, knowledge, and facilities. They will be explained further as follows:

1. The Regulatory Obstacles to the Examination of the Difables

One of the obstacles faced by public prosecutors in handling cases implicating the difables is the absence of the standard operating procedures for examination or SOP. They often use SOP based on general procedural law. Hence, they often cannot adapt.

The adaptation is very necessary for various difables in conflict with the law. For example, the mental difables really need facilitators or interpreters when undergoing the examination in prosecution. Likewise, speech, visual, and hearing difables need someone having particular skills to interact with the public prosecutors.

²⁹Ishak Salim, et al. 2018, Difabel dan Perlawanan Kecil Sehari-hari, Pergerakan Difabel Indonesia Untuk Kesetaraan (PerDIK) p.352

³⁰ Hari Kurniawan, et al, *Op.Cit.*, p.83

³¹ Article 21 of Government Regulation Number 39 of 2020 on the Reasonable Accommodation for Persons with Disabilities in Justice Process

Beside the regulatory problem owing to the absence of the standards of examination, the legal vacuum of the obligation to provide facilitators or interpreters often becomes the obstacle in prosecution. It results in the limited human resources and budget allocated by the public prosecutors to provide the interpreters of facilitators for the difables. In practice, the public prosecutors will use the interpreters previously provided by investigators. It is done by coordinating with the Departments of Social Affairs and the Center for the Integrated Service for Woman and Child Empowerment (*Pusat Pelayanan Terpadu Pemberdayaan Perempuan dan Anak/P2TP2A*), which then will recommend the interpreters for the needs of the public prosecutors. On the other hand, the recommendation is very limited due to the fact that it is not easy to provide the interpreters to the difables with various needs. The public prosecutors have not allocated budget on the interpreters, but it can be overcome by taking budget to provide witnesses.

2. The Obstacles to the Understanding and Sensitivity to the Difables

The difables in conflict with the law need adaptation to more specific service and handling. Therefore, public prosecutors need to pay attention to the way they interact and communicate. It is of importance to ease the process of gaining information the cases implicating them. It helps the public prosecutors in easing the prosecution and it is very important for the difables to prepare their defenses.³² There are several obstacles to the interaction and communications in the prosecution:³³

- a) The public prosecutors are not accustomed to facing the difables, so that it is hard for them to interact and understand how the difables communicate. The language used by the public prosecutors is still hard to comprehend for the difables, like asking with pressure and repeating words and sentences the difables do not understand;
- b) The public prosecutors who are not involved in the examination of victim witnesses since the beginning will face difficulties in adapting to and knowing the characteristics of the difables;
- c) In the examination, the difables sometimes have not got suitable facilitators. The facilitators are important as they can interact with and understand the difables

³² Hari Kurniawan, et al., *Op.Cit*, p. 38.

³³ *Ibid.* p 86.

best, so that the communication will be easy. For example, the facilitators provided by the public prosecutors are generally recommended by the department of social affairs and their characteristics may not be suitable for the difables. Therefore, the most ideal facilitators are those understanding the difables best, such their family or neighbours who often interact with them;

- d) There has been no thorough personal assessment of the difables. It is of vital importance to recommend the public prosecutors about how far examination can be conducted. For instance, based on the results of personal assessment, the difables cannot be examined in investigation rooms frequently used by the investigators, and they cannot be calm if the investigators wear uniforms;
- e) The Investigation Report (*Berita Acara Penyidikan*/BAP) made by the investigators is often rejected by the public prosecutors so that it should be improved. Consequently, the difables must be examined in investigation again with their limited mobility;
- f) In the process of examination, the public prosecutors tend to pay less attention to the mental and emotional states of the difables without asking/neglecting the recommendation from psychiatrists and psychologists, so that the results of the examination is not as expected. For example, in their recommendations, the doctors state that the difables can not focus for more than 30 minutes. However, as the public prosecutors are not satisfied with the information they obtain, the examination is continued for more than an hour.

3. The Obstacles of Facilities

The fundamental problem often experienced by the difables is facilities which do not accommodate their needs. The condition is still showing the low accessibility of the facilities for the difables. They are important for the difables due to the fact that their physical and mental conditions and social behavior require special needs. Also, the difables have difficulties if they must use public facilities which are only for those are not difables.³⁴ Several examples of the facilities which are not accessible for the difables are entrance stairs to buildings or examination rooms without inclined planes, and no special toilets for the difables, and no signs in *braille* and pictures or writing sufficiently visible and contrast colors³⁵. Furthermore, some buildings have

³⁴ Ezza Oktavia Utami, Santoso Tri Raharjo, Nurliana Cipta Apsari, 2018, *Aksesibilitas Penyandang Tunadaksa*, p.3, Jurnal Penelitian & PPM ISSN: 2442-4480 Vol5.

³⁵ *ibid*

special parking areas for the difables riding three-wheeled motorbikes and other special vehicles.³⁶ Nevertheless, the government issued Regulation of the Minister of Public Works Number 14 of 2017 on technical requirements for the facilities and accessibility in buildings.

C. The Obstacles Faced by the Difables in Conflict with the Law during Trial

The obstacles can be categorized into three, i.e. (1) law enforcers' understanding of the difables, (2) case handling, and (3) facilities. They will be explained as follows:

1. The Obstacles in the Regulation on the Examination of the Difables

The laws and regulations pertaining to the difables are only substantive law. There has been no special procedural law on the difables in conflict with the law. The existing one has not accommodated their needs. Instead of making special procedural law on them, the Law on Persons with Disabilities refers to the Criminal Procedural Law, which has not fully accommodated the difables' needs.³⁷

The special procedural law is necessary for the handling of the difables in conflict with the law because the examination during trial implicating the difables as witnesses, victim witnesses, and defendants needs special treatment based on the vulnerability of the difables. As argued by Tody Sasmita Jiwa Utama, the fulfilment of the rights of persons with disabilities should pay attention to their vulnerability due to various kinds of disability.³⁸ Several obstacles to the examination during trial are:

a. No special procedural law

The Law on Persons with Disability has not sufficiently stipulated the procedural law on the examination of the difables during trial. Article 35 of the law refers to the existing procedural law i.e. the Criminal Procedural Law. However, there some obstacles if this law is referred to.

b. Rigid procedural law

On the other hand, beside the obstacles in regulations, the procedural law is kaku. It becomes an obstacle to the examination during trial, such as the examination of witnesses. Article 1 number 26 of the Criminal Procedural Law

³⁶ Slamet Thohari, *Pandangan Disabilitas dan Aksesibilitas Fasilitas Publik Bagi kelompok difabel di Kota Malang*, Indonesian Journal of Disability Studies, Vol. 1 Issue 1, June 2014, p. 29-31

³⁷ Interview at the Ministry of Law and Human Rights on 20 December 2018

³⁸ Tody Sasmita Jiwa Utama in the Focus Group Discussion held by PUKAT Korupsi FH UGM and PKBH FH UGM on Friday, 13 November 2020

states that a witness is a person who can provide information in the interest of investigation, prosecution, and trial on criminal case which he himself has heard of, witnessed or experienced.³⁹ This provision can reduce the rights of the difables during trial. For example, a visual difable cannot meet the requirement of a witness owing to the fact that he or she cannot see. The rigidity can actually be minimized by referring to Constitutional Court Verdict Number 65/PUU-VIII/2010. The judges stated that a witness does not only refer to those hearing, witnessing, and experiencing themselves, but also those having direct knowledge of an event.⁴⁰ However, the limited evidence is one of obstacles to the handling of cases implicating the difables. Therefore, the testimony of the difables needs to be heard to obtain material truth. Nonetheless, the decision has not been implemented carefully because the legal enforcers has not had the similar concept of the definition of the witness in the Criminal Procedural Law and the Court's verdict, which expand the definition. For the sake of legal certainty, utility and justice for the difables, the definition in the Court's decision should be implemented in hearing the testimony of the witnesses.

c. Long waiting for the examination

In some cases, the examination during trial for defendants, witnesses, and victim witnesses must wait for the trial to start or the turn of examination which takes much time. It becomes an obstacles to the difables because they need to be calm in giving their testimony in the examination during trial. Article 30 paragraph (2) of the Law on Persons with Disabilities states that

“In the event that such consideration or advice as stipulated in paragraph (1) stated that it is not possible to proceed with the examination, a delay within a reasonable time will be decided”

Moreover, the elucidation to Article 30 paragraph (2) of the law states that “ a delay within a reasonable time” is the delay of examination to take statements in which the time is determined by law enforcers based on consideration from medical doctors or other medical personnel, psychologists or psychiatrists, and/or social workers. However, it causes time uncertainty for the persons with disabilities in conflict with the law.

³⁹ M. Syafi'ie, S.H.,M.H, *Sistem Hukum Di Indonesia Diskriminatif Kepada Difabel*, in the Focus Group Discussion held by PUKAT Korupsi FH UGM “Analisis Regulasi di Indonesia dalam Menjamin Hak Keadilan dan Perlindungan Hukum Bagi Penyandang Disabilitas” on 27 Desember 2018.

⁴⁰ Constitutional Verdict Number 65/PUU-VIII/2010, p. 90-91

d. No certain schedule of examination

As explained above, the examination is postponed due to particular reasons without certainty. It has impacts on the concentration of the difables if they give their testimony during trial for a long time. They need to take a rest for a while. However, there is no certain schedule of examination during trial.

e. Insensitive examination

Anyone who experiences physical or psychic trauma is likely to have difficulties. The trauma causes him or her to have difficulties in communicating. For instance, Bunga (pesudonym) is a deaf and mute difable having mental retardation due to the fact that she is a victim of rape and sexual harassment. She had trauma when she was confronted by the perpetrator during trial. It can be known from several indications, one of which is her being reluctant to meet the perpetrator. It is one of uneasy feeling shown by Bunga.⁴¹ All parties, especially law enforcers, should pay attention to it. It is better not to confront the victim with the perpetrator if the victim is a difable, for the sake of safety and convenience. As stipulated in Article 8 of Government Regulation Number 39 of 2020, to fulfil the feeling of safety and convenience, persons with disabilities, falling victim and experiencing trauma, can ask not be confronted with the perpetrator during trial.

f. Mental maturity of the difables

Law enforcers need to know the maturity of the difables due to the differences of calendar and mental ages (capacity). The differences can be seen in the difables with mental retardation.⁴² One of the examples is the story of Bunga above. When falling victim, she was 22 years old. Nevertheless, owing to her mental retardation, she was equal to a child at the age of 9 years and 2 months.⁴³ Hence, the enforcers are required to give special treatment in examining the testimony of the difables.

g. Limitation of communication

The ability of law enforcers to communicate with the difables is very necessary to obtain right information. Article 15 paragraph (4) of GR 39/2020 stipulates that the interpreter in paragraph (1) letter b have to meet several requirements, such as the ability to get along, interact, and communicate well and

⁴¹ Syafli'e, M., Purwanti, Mahrus Ali., 2016, Potret Difabel Berhadapan dengan Hukum Negara, Sasana Integrasi dan Advokasi Difabel, Sleman.p. 113.

⁴² G. Sri Nurhartanto, Jurnal Difabel Vol.1, No. 1, May , 2014, p. 15-16

⁴³ Sigab, *Op.cit*, p. 78-79

effectively with persons with disabilities and consent from the persons with disabilities or their family. Nonetheless, not all law enforcers know how to communicate with the difables, especially if the difables speak their “mother tongue”, they are usually more relaxed with the closest known people. Their parents or family can understand their communication. For instance, it is worth noting what Intan experienced when undergoing examination in investigation. The obstacle is pertaining to the language, despite the fact that the investigators were helped by an interpreter. They speak different language. As a consequence, the investigators called Oki, one of Intan’s friend in elementary school. Through Oki, the investigation started to run smoothly.⁴⁴

2. The Obstacles of the Understanding and Sensitivity in the Difables

In practice, a lot of law enforcers have not understood how to interact and accommodate the interest of the difables. They are often confused when facing visual, hearing, or mental intellectual difables.⁴⁵

According to Sasana Inklusi dan Gerakan Advokasi Difabel (SIGAB), in general, the law enforcers understanding and knowledge of disability are very low. It is illustrated in these following facts.⁴⁶ *First*, in another criminal case, a deaf and mute difable falling victim to rape was often cornered by the questions posed by the law enforcers, like ‘Why did you not shout when you were raped?’ They must have known and understood that the difable cannot shout and can give other expression.

Second, the law enforcers often do not proceed with the criminal case to which a visual difable falla victim as the victim cannot see the perpetrator. The law enforcers must have understood that the visual difable cannot see and has other senses to recognize the perpetrator.

Third, the law enforcers often underestimate the difables due to their difability, ability and legal capacity. They must have understood that the difables have different abilities and ways to explain and understand something.

⁴⁴ *Ibid*, p. 91-92

⁴⁵ <https://sigab.or.id/id/article/memperjuangkan-keadilan-untuk-difabel> 15 July 2019

⁴⁶ <https://www.sigab.or.id/id/blog/sistem-hukum-masih-diskriminatif-kepada-difabel> 15 July 2019

3. The Obstacles in Facilities

During trial, the difables have many obstacles in facilities which have not accommodated their needs in courts as stipulated by Article 20 GR 39/2020. One of them is that there is no special parking area and toilet for the difables. In addition, there is no ramp on the stairs for wheelchairs, trial documents without audio and braille. They reduce the fulfilment of the rights of the difables during trial. The accessible facilities in terms of legal service cannot be separated from the fulfilment of the rights of the difables in conflict with the law.

CHAPTER III

THE FULFILMENT OF THE RIGHTS OF THE DIFABLES IN CONFLICT WITH THE LAW

A. The Guidelines on the Examination of the Difables in Conflict with the Law in the Police

Concerning initial investigation and investigation, M. Yahya Harahap in his book *Pembahasan Permasalahan dan Penerapan KUHAP: Penyidikan dan Penuntutan* explains that the definition of the ‘initial investigation in KUHAP (the Indonesian Criminal Procedural Code) is the first measure of the “investigation”. However, the former cannot be separated from the function of the latter. It is an inseparable part of the investigation. Citing from the guidelines *Pedoman Pelaksanaan KUHAP*, the initial investigation constitutes a way or method or subfunction of the investigation prior to other measures, i.e. arrest, detention, search, seizure, examination of documents, summoning, examination, and delivery of dossiers to the public prosecutors.⁴⁷

“Initial investigation is a series of measures taken by initial investigators to seek and find an event presumed to be an offense to determine whether investigation is necessary as stipulated in this law.”

According to Article 1 number 2 of KUHAP, investigation is

“Investigation is series of acts by an investigator in matters and by means regulated in this law to seek and gather evidence with which to clarify whether an offense has occurred and to locate the suspect.”

Further, Yahya Harahap states that prior to the investigation, the initial investigation is conducted by initial investigators to obtain “preliminary evidence” or “sufficient evidence” to proceed with the investigation. Presumably, the initial investigation is conducted to seek and find testimony and evidence of an event presumed to be an offense.

Yahya Harahap also says that if carefully noticed, the motivation and aim of the initial investigation is the responsibility of the investigators to enforce law without humiliating human dignity.⁴⁸ Therefore, in the direct initial investigation and investigation of the difables as witnesses, victim witnesses, and suspects, special treatment by the investigators is necessary to be able to obtain testimony from the parties. Consequently, they must understand how to treat the difables as the witnesses, victim witnesses, and suspects.

Several treatment in the direct initial investigation and investigation of the difables is:

⁴⁷ Harahap, Yahya, *Pembahasan Permasalahan dan Penerapan KUHAP*, Sinar Grafika, Jakarta, p. 101

⁴⁸ *Ibid*, p. 102

1. Behavior of Interaction and Communication

During the initial investigation and investigation, the investigators are expected to have sufficient knowledge and experiences related to the issue of the difables as every difable has his or her characteristic. In the initial investigation of the difables, the investigators require facilitators or interpreters to help them obtain testimony. The facilitators are usually those psychologically close or having experiences of accompanying the difables, so that the difables can keep calm during the investigation.

At least, there are two most crucial things in the investigation, i.e. the ethics of behavior and communication. The investigators must pay attention to the ethics of behavior during the investigation. They include:

1. The investigation should be conducted by the investigators having knowledge of the difables. They must have good emotion and patience. The investigators must be able to serve the difables by honoring their equality and respect. They may not have prior assumption only due to the fact that the witnesses, victim witnesses, or suspects are the difables.
2. In examining the witnesses, victim witnesses, or suspects, the investigators must stare at the victim witnesses or suspects, not only the interpreters or facilitators, to respect the witnesses, victim witnesses, or suspects.
3. In asking questions, the investigators must use the languages the witnesses, victim witnesses, or suspects understand. They may not interrogate using pressure because it can disrupt the stability of the emotion of the witnesses, victim witnesses, or suspects, so that they cannot concentrate. The investigators are expected to communicate effectively with persons with disabilities. In so doing, the persons with disabilities can give their testimony by means of communications.⁴⁹
4. The examination is expected not to last too long. It must be adapted to the ability and focus of the witnesses, victim witnesses, and suspects.

In addition, during the examination the investigators are expected to be able to communicate with the difables because they are vulnerable groups, so that testimony can be obtained with no pressure.

⁴⁹ Article 9 paragraph (2) of GR 39 of 2020 on the Reasonable Accommodation for Persons with Disabilities in Justice

Related to the second crucial point, the ethics of communication during the examination are an important indicator of just investigation. They constitute an important element for the investigators to communicate with the difables. There are several things to do to communicate, among others:

Table 6. The Ethics of Interaction with the Difables

The Ethics of Interaction with the Difables	
Intellectual Difables	<ol style="list-style-type: none"> 1. The conversation should be friendly; 2. Talk directly to the difables, not through the facilitators; 3. Smile as much as possible.
Mental Difables	<ol style="list-style-type: none"> 1. Asking about what the investigators need to know before trying to obtain testimony; 2. Talking directly to the difables, not through the facilitators; 3. Using simple words; 4. Using signs that can help, like pictures generally recognized.
Deaf and Mute Sensory Difables	<ol style="list-style-type: none"> 1. How to greet: touch, salutation, greeting; 2. Talking with eye contact to and face to face with the difables, not the interpreters; 3. Clear lip movement; 4. Using mimic/gesture/expression/body language; 5. Providing stationery; 6. Avoiding using masks and other things which cover or hindering lips; 7. Provide interpreters if necessary.
Physical Difables	<ol style="list-style-type: none"> 1. All ways or forms of acts should be communicated with the difables or informed by the difables first. Taking measures without their instruction can be dangerous/harmful for them; 2. When talking to a wheelchair user, the

	<p>position of eyes should be equal to his or her eyes;</p> <ol style="list-style-type: none"> 3. Not separating the physical difables from their devices if they do not know; 4. Not putting items on the wheelchairs without the user's consent; 5. Helping if they permit.
Visual Sensory Difables	<ol style="list-style-type: none"> 1. Salutation, greeting, touching the outside part of your palm to them, while introducing yourself; 2. Always ask first about whether they need our help or accompaniment. Tell them if we want to leave them; 3. In guiding, let them hold the facilitators/investigators, not vice versa; 4. Not removing their property or what they are using if they do not know.

Source: Kemdikbud, 2018⁵⁰

During the investigation, the investigators are prohibited from showing attitude or statement degrading, blaming, and/or intimidating the difables or affirming an offense. In sexual harassment, the investigators are also banned from asking and/or considering the sexual experience or background of the victim to free the perpetrators or lighten their sentences.

2. The Procedures for Handling

a. Initial Investigation

During the initial investigation, the initial investigators are expected to conduct profile assessment of the difables as a potential suspect and victim first. In providing profile assessment, law enforcement agencies ask request for profile assessment to:

- a. doctors or other health workers; and/or
- b. psychologists or psychiatrists.⁵¹

⁵⁰ <https://www.kemdikbud.go.id/main/blog/2018/10/etika-berinteraksi-dengan-penyandang-disabilitas>, 20 July 2019

Profile assessment is necessary to identify and assess the background of the potential suspect and victim. Its result will show whether a difable need facilitators or not, whether he or she encounters difficulties in the examination, etc. The notes of the profile assessment will then be attached to the Initial Investigation Report (*Laporan Hasil Penyelidikan/LHP*) to provide information to the investigators on the needs of the difables during investigation.

b. Investigation

The procedures for handling are of vital importance for the difables in conflict with the law. The right procedures will surely influence the principle of justice they obtain during the investigation. It is expected to protect the aspects of their human rights:

First, arrest. In terms of the arrest of the difables, the police are expected to accommodate the rights of a difable as a suspect. If a deaf is arrested, he or she should be accompanied by an interpreter. An intellectual difable who is arrested should be given special treatment based on the result of profile assessment. The police can refer to the arrest of children which notices their rights:

- a) being accompanied by their parents or guardians;
- b) being accompanied by a special escort;
- c) the privacy rights not to be published, in terms of their identities;
- d) being placed in special service rooms;
- e) special protection.⁵²

In arrest, the enforcers must accommodate the needs of the difables as stipulated by GR 39/2002;

- 1) In terms of reasonable accommodation, the law enforcers provide:
 - a. Disability facilitators
 - b. Interpreters; and/or
 - c. Other relevant petugas.
- 2) Beside the reasonable accommodation, the law enforcers provide:

⁵¹ Article 3 of Government Regulation Number 39 of 2020 on the Reasonable Accommodation for Persons with Disabilities in Justice

⁵²Article 38 of Regulation of the Chief of the Indonesian National Police Number 14 of 2012 on the Management of Investigation

- a. doctors or other health workers to deal with health;
 - b. psychologists or psychiatrists to deal with mental state.
 - c. social workers to deal with psychosocial state.
- 3) An escort must:
- a. understand the needs and difficulties of the persons with disabilities to follow the justice process well;
 - b. obtain the consent from the persons with disabilities or their family;
 - c. be able to get along and interact well with the persons with disabilities.
- 4) An interpreter must be able to get, interact, and communicate well and effectively with the persons with disabilities and obtain the consent from them or their family.
- 5) Other relevant doctors or other tenaga kesehatan, psychologists or psychiatrists, and social workers have to meet the requirements in the laws and regulations.⁵³

The different treatment towards a difable must be based his or her basic needs. An intellectual difable is like a child because his or her calendar and mental ages are different. The treatment is given, so that the police can understand the basic needs of the difables.

Second, in the process of detention the suspect can be detained or not. The investigators must pay attention to the needs and impacts if a difable is ditahan. Insufficient facilities will complicate the difables in detention facilities. Therefore, adaptation is needed by the investigators in accommodating the needs of the difables related to the detention. The adaptation is detaining the difables referring to the treatment given to child prisoners. The treatment towards the difables, especially the mental difables, is expected to include:

- a. accompaniment by their parents or guardians;
- b. special facilitators;
- c. the rights not to be published (their identities);
- d. special detention facilities;
- e. being separated from the detention facilities for adult male and female prisoners;

⁵³ Article 15 of Government Regulation Number 39 of 2020 on the Reasonable Accommodation for Persons with Disabilities in Justice

- f. special procedures.⁵⁴

Third, expose. In this stage, at least the investigators must pay attention to the rights of the difables as victims and suspects. There may be no pressure and intimidation given by the investigators to the witnesses and suspects. There should be separated reconstruction for witnesses, victim witnesses, and suspects. Props are also necessary for the victims of sexual harassment or rape in the expose. It is expected not to last long and no to be too forced. The investigators must pay attention to the ethics of communication with the difables as suspects and victim witnesses.

3. Facilities

Facilities need to be improved not only to support the initial investigation and investigation. The police are expected to pay attention to the facilities during the examination. The minimum standards for the facilities to fulfil the rights of the persons with disabilities in conflict with the law are stipulated in Article 20 of GR 39/2020. The article stipulates the facilities in Article 19 of GR 39/2020 given to the visually disabled persons are at least:

No.	Kinds of Difficulties	Facilities
1.	Visual	<ul style="list-style-type: none"> a. Computers with screen reader applications; b. Readable pages for the persons with disabilities; c. Documents printed in braille; and/or d. Audio communication media;
2.	Hearing	<ul style="list-style-type: none"> a. Visual information boards; b. Communication media using letters and other visual forms; and/or c. Props;
3.	Speech	<ul style="list-style-type: none"> a. Visual information boards; b. Communication media using letters and other visual forms; and/or c. Props;

⁵⁴ Article 54 paragraph (4) of Regulation of the Chief of the Indonesian National Police Number 14 of 2012 on the Management of Investigation

4.	Communication	a. Visual information boards; b. Communication media using letters and other visual forms; and/or c. Props;
5.	Mobility	a. Wheelchairs; b. Wheeled beds; and/or c. Other mobility devices if necessary;
6.	Memory and Concentration	a. Pictures; b. Mock-ups; c. Dolls; d. Calendar; and/or e. Props if necessary;
7.	Intellectual	a. Drugs; b. Health facilities; and c. Other facilities if necessary;
8.	Behavior and Emotion	a. Drugs; b. Health facilities; c. Comfortable and quiet rooms; and/or d. Other facilities if necessary;
9.	Self care	a. Drugs; b. Accessible changing rooms; and/or c. Other needs if necessary; and

Moreover, in the arrest of a physical difable as a suspect, the police need to meet the standard of needs to support the access of the physical difable, for instance: providing wheelchairs in detention facilities, so that their mobility is not disrupted. The supporting facilities are expected to be provided gradually by the police to realize a just legal proceeding.

B. The Guidelines on the Examination of the Difables in Conflict with the Law in Prosecution

Based on the analysis of obstacles above, this is how the public prosecutors should handle the difables in the stage of prosecution.

1. The Behavior of Interaction and Communication

The adaptation of interaction and communication by the public prosecutors is very necessary in handling the difables in conflict with the law. One of them is

pertaining to the difables having the obstacles of behavior and emotion. The provisions of GR 39/2020 mandate several points to maintain the interaction and communication of the difables with the obstacles of behavior and emotion, i.e.: 1) drugs; 2) health facilities and; 3) comfortable and quiet rooms.

The pleasant atmosphere for the difables during examination can serve those having non-physical difficulties, for example the intellectual difables and psycho-social difables. The public prosecutors need some capacities:⁵⁵

- a. Involvement in the examination of victim witnesses or suspects in investigation.
- b. Knowledge and experiences of the issue of the difables and good emotion and patience.
- c. Upholding the equality and respect for the difables.
- d. No prior assumption only because the victim witnesses or suspects are difables.
- e. Profile assessment before examining the difables.

Basically, the adaptation of interaction and communication with the difables will be much easier if there is personal assessment. Its result can help the public prosecutors provide special needs and other important things to the examination and prosecution. Related to profile assessment, before examining, the public prosecutors need to ask consideration or advice from: ⁵⁶

- a. Doctors or other health workers about health condition;
- b. Psychologists or psychiatrists about mental state;

2. The Procedures for Handling

The procedures for handling refer to how the difables are examined. Prof. Endang Ekowarni⁵⁷ explains that there is a lot of different understanding of the difables, disability, etc. Therefore, during the examination in the stage of prosecution, there will be obstacles to the examination of physical and non-physical difables. For instance, in a mental difable, with obstacles to communication, this has an impact on the information he or she will receive. As a consequence, they need to be

⁵⁵ Hari Kurniawan, et al, *Op. Cit.*, p. 101-102

⁵⁶ See: Article 3 of Government Regulation Number 39 of 2020 on the Reasonable Accommodation for Persons with Disabilities in Justice

⁵⁷ Endang Ekowarni in Choky Risda Ramadhan, et al, 2016, "Difabel dalam Peradilan Pidana: Analisis Konsistensi Putusan-putusan Difabel", Badan Penerbit Fakultas Hukum Universitas Indonesia and Masyarakat Pemantau Peradilan Indonesia Fakultas Hukum Universitas Indonesia

accompanied, as a suspect, witness, and victim witness. The public prosecutors need to pay attention to:

- a. The difables should be accompanied by legal advisors who understand them in the making of the prosecution report.
- b. The difables need to be accompanied by difable facilitators and/or interpreters who can give understanding of the obstacles and communicate effectively with the difables, based on their specialties and needs.

The facilitators and/or interpreters must be groups or organizations trusted and/or having skills and knowledge to accompany the difables to make them feel safe and comfortable in giving their testimony during the justice process. If referring to GR 39/2020, interpreters shall have skills and knowledge to understand and use the languages of the difables. On the other hand, facilitators shall have knowledge about the kinds, levels, and hambatan disability pada anyone, and be able to accompany the difables.

The facilitators and/or interpreters help the public prosecutors ask questions/give information and reveal material truth during trial and to fulfil the rights of the difables as suspects, for instance deaf and/or mute difables. The rights to have interpreters are basic needs for the difables as defendants or victims during trial as the law enforcers need to know the testimony given by the defendants, witnesses, and victim witnesses. It is worth understanding that in some cases a difable speak “mother tongue” in daily communication.⁵⁸ Mother tongue or native language in English is the first language mastered or acquired by children. Wherever a child is born, then he or she acquires or masters the first language or “mother tongue”.⁵⁹

3. Facilities

The provision of Article 20 of GR 39/2020 stipulates in detail several facilities to be provided by law enforcement agencies in handling the difables in conflict with the law. There are 10 categories of the obstacles the difables should adapt to.

⁵⁸ Syaf'ie, M., Purwanti, Mahrus Ali., *Op.Cit.* p. 95-103.

⁵⁹ Soenjono Dardjowidjojo, 2003, *Psikolinguistik: Pengantar Pemahaman Bahasa Manusia.* Jakarta: Yayasan Obor Indonesia, p. 241.

In conjunction with prosecution, the agencies need to provide facilities to the visual difables by making summons, dossiers or other documents typed in braile or with audio communication. The public prosecutors also need to ensure that the prosecution is conducted in standard and accessible places for the difables, having accessible transportation and building.

C. The Guidelines on the Examination of the Difables in Conflict with the Law during Trial

Based on the obstacles above, this is how the rights of the difables should be fulfilled during trial.

1. The Behavior of Interaction and Communication

There are several things the law enforcers can do to understand the difables, i.e.:

a. Paying attention to daya focus

The Intellectual and Psychosocial Difables cannot keep focusing too long, so that effective trial is necessary. In addition, the questions need to be understandable and without pressure.

b. Flexibility

The examination of the flexibles is expected not to last too long. However, it should have more sense of kinship, so that they can express what they feel.

c. Using the Paradigm of Hukum Progresif

In handling a case, judges need to find law and not to be “la bouche de la loi” if their consciousnesses are contradict to statutory law. UU. According to Progressive Law, the judges must prioritize or have preference scales to justice and truth rather than legal certainty. The behaviour of the judges through their verdicts must promote social improvement and harmony.⁶⁰

For Progressive Law, behavior is more important as a significant factor in implementing law than other written regulations.⁶¹ Citing from Satjipto

⁶⁰ Ahmad Rifai, 2010, *Penemuan Hukum oleh Hakim dalam Perspektif Hukum Progresif*, Sinar Grafika, Jakarta, p. 138-162.

⁶¹ Satjipto Rahardjo, 2009 (I), *Hukum Progresif. Sebuah Sintesa Hukum Indonesia*, Genta Publishing, Yogyakarta, p. 10.

Rahardjo, the legal texts cannot fully be trusted as the representation of authentic life of law.⁶² The behavior is more authentic where a legal entity is. With human behavior, law becomes living.⁶³ It is only a text without the behavior.

2. The Procedures for Handling

With the lack of the guidelines for the judges in handling cases implicating the difables, some regulations can be the guidelines. They are KUHAP and the Law on Persons with Disabilities. These are several guidelines for the judges to examine the difables during trial:

a. Legal Facilitators

Every difable in conflict with the law should have an escort. The Law on Persons with Disabilities has mandated the central and local governments to provide legal aid to the difables in every stage of examination, including examination during trial.⁶⁴ In providing the Reasonable Accommodation, this regulation emphasizes personal assessment and Disability Facilitators and Interpreters.

Article 15 paragraph (3) of GR 39/2020 requires the facilitators to:

- a. understand the needs and obstacles of the Persons with Disabilities they accompany;
- b. facilitate the Persons with Disabilities to follow the justice process well;
- c. have consent from the Persons with Disabilities or their family; and
- d. be able to get along and interact well with the Persons with Disabilities they accompany.

In the examination during trial, the judges can also make sure there is a legal escort for the difables in conflict with justice. The legal escort aims to ensure the fulfilment of the rights of the difables during trial. Article 13 paragraph (1) of GR 39/2020 mandates the bar association to formulate and develop the standards of legal aid to the Persons with Disabilities.

⁶² Satjipto Rahardjo, 2009 (II), *Hukum dan Perilaku*, Penerbit Kompas, Jakarta, p. 20.

⁶³ *Ibid*, p. 21.

⁶⁴ See: Article 29 of the Law on Persons with Disabilities

b. Profile assessment

Profile Assessment is a stage of examination of the difables, in terms of physical and mental health and psychosocial condition. This stage is the key to the handling of cases implicating them. From the profile assessment, the needs of the law enforcers, including judges, in handling cases implicating the difables can be known. It can be conducted by asking consideration or advice from doctors or other health workers, psychologists, psychiatrists and social workers.⁶⁵

c. The Postponement of the Examination of the Difables

In the examination during trial, the judges can postpone the examination of the difables during a particular time based on consideration or advice from doctors, psychologists/psychiatrists, social workers in profile assessment.⁶⁶

d. The Testimony of the Difables

The minimum number of witnesses is an obstacle to the proof of cases implicating the difables.⁶⁷ The term “witness” in Article 1 number 26 KUHAP is considered to limit the role of the difables in the proof of a case. Nevertheless, CC Verdict Number 65/PUU-VIII/2010 interprets witnesses not only as persons have heard of, witnessed, or experienced, but also those having direct knowledge of an offense. Therefore, the testimony of the difables as witnesses, victim witnesses, and defendants is very necessary during trial. Besides, Article 171 KUHAP also stipulates those who can be examined without oath:

- a. a child whose age has not yet reached fifteen years and has never married;
- b. mental patients or neurotics, although sometimes they come to their senses.

Even though witnesses during trial shall be sworn, the testimony of the difables shall be heard. Although it is a legal evidence material, the testimony

⁶⁵ See: Article 30 paragraph (1) of the Law on Persons with Disabilities

⁶⁶ See: Article 30 paragraph (2) of the Law on Persons with Disabilities.

⁶⁷ Sigab, *Op.cit*, p. 30

corresponding to other legal evidence materials can confirm the judges' conviction.⁶⁸

e. Interpreters

Article 178 paragraph (1) of KUHAP stipulates that if a defendant or witness is dumb and/or deaf and is not able to write, the judge/chairman of the session shall appoint an interpreter who is versed in communicating with the defendant or witness as many difables speak their “mother tongue” or languages only known by their family or closest people.

Further, according to Article 15 paragraph (1) jo. (3), in providing Reasonable Accommodation, law enforcement agencies shall provide (a) Disability Facilitators, (b) Interpreters; and/or (c) othere relevant officials. The interpreters shall be versed in interacting and communicating well and effectively the Persons with Disabilities and have consent from them or their family. Hence, in examining the difables, the judges must be flexible in determining the interpreters to be able to obtain information or testimony from the difables.

3. Facilities

The environment of courts must be physically and non-physically accessible for the difables. The physical accessibility is related to the availability of facilities for the difables to come to, enter, reach the courts with no difficulty. Their rooms should have physical facilities, so that the difables can access them anyone's help.

The facilities are specifically stipulated in detail in Article 20 of GR 39/2020. Nevertheless, other facilities need to be provided to fulfil the rights of the difables in the courts:

- a. Special parking areas;
- b. Special toilets;
- c. Trial should be held on the first floor. If it is held on the upper floor, there should be lifts for the difables;
- d. Wide entrances to courtrooms with sliding doors;

⁶⁸ Sindura Debri Walanti and Bagas Pradikta Haryanto, “Tinjauan Kekuatan Pembuktian Keterangan Saksi Yang Tidak Disumpah Karena Keterbelakangan Mental Dalam Pemeriksaan Perkara Kekerasan Seksual”, Jurnal GEMA FH UNS, THN OOVII/50/February - July 2015, p. 2054

- e. Guiding block, hand rail, and ramp;
- f. Administration documents and files accessible via electronic files, audio, or typed in braille;
- g. Investigation report until the verdict is delivered typed in braille or in audio-book;
- h. A waiting room with accessible infrastructure and visual and audio information (written, running text, audio, braille, audio-book) for instance running text showing the exact schedule of trial with visual information for the deaf difables and audio information for the blind difables;
- i. Mobility devices, such as wheelchairs and other devices to help the mobility of the difables, especially the physical difables;
- j. Desk or disability assistance for the difables in conflict with the law;

CHAPTER IV LEGAL AID FOR THE DIFABLES

A. Legal Aid as Advocacy of the Difables

According to *Kamus Besar Bahasa Indonesia* (KBBI), advocacy is “*pembelaan*” (defense).⁶⁹ Asfinawati explains that the most important part of an advocacy process is its goal, i.e. promoting a social change. It is not only given in particular cases where the state and its people are unequal, but also in cases implicating marginalized discriminated people, in terms of disability, religious or faith minority, gender, etc.⁷⁰

Advocacy is indeed properly translated if each organization understands it based on their context, work, and experience. They will keep processing and experimenting by means of various approaches.⁷¹ Through a process of advocacy, civil society attempt to transform themselves socially into a more democratic one.⁷²

Actually, the legal aid is only a part of a much big process of advocacy. In terms of the difables, it involves legal aid organizations, difable representative organizations, other non-government organizations, and government agencies.

The first two organizations are of importance in cases implicating the difables as there has been no clear mechanism for the difables in conflict with the law.⁷³ They play a role in ensuring that the rights of the difables, including reasonable accommodation, are fulfilled. The scheme of the advocacy is not only legal assistance (litigation), but also out-of-court settlement (non-litigation) or even the combination of the both.⁷⁴ However, this research will only focus on the legal aid in the litigation in criminal cases.

⁶⁹ KBBI daring, <https://kbbi.kemdikbud.go.id/entri/advokasi>, 12 Juli 2019.

⁷⁰ Yayasan Lembaga Bantuan Hukum Indonesia, 2014, *Panduan Bantuan Hukum di Indonesia*, Yayasan Obor Indonesia, Jakarta, p.566.

⁷¹ Valerie Miller and Jane Covey, 2005, *Buku Pedoman Advokasi: Kerangka Kerja untuk Perencanaan, Bertindak dan Refleksi*, Yayasan Obor Indonesia, Jakarta, p.11-13

⁷² *Ibid.*

⁷³ M. Syafi'ie, in the Discussion “Pendampingan dan Bantuan Hukum Difabel Berhadapan dengan Hukum”, on Monday 29 July 2019 at the Faculty of Law Universitas Islam Indonesia

⁷⁴ Yayasan Lembaga Bantuan Hukum Indonesia, *Op.Cit*, p. 568

B. The Regulation on the Legal Aid for the Difables

Legal service and aid are the implementation of the fair trial principle.⁷⁵ They are given not only to the poor, but also to the vulnerable and marginalized.⁷⁶

At first, the legal aid was given independently by legal aid organizations and pengacara/advocates in line with the principle of *pro bono*. Since the enactment of Law Number 16 of 2011 on Legal Aid, the state has been responsible for the legal aid.⁷⁷ The law constitutes the state's attempt to guarantee the constitutional rights of every person to recognition, guarantee, protection, and legal certainty as well as equal treatment before the law.⁷⁸ Law 16/2011 stipulates the principles, requirements, procedures and mechanisms for distribution of the state's legal aid funds.⁷⁹

According to Law 16/2011, legal aid is legal service freely given by legal aid providers to the recipients.⁸⁰ The law mandates that the recipients of the legal aid are the poor.⁸¹ Nevertheless, the rights of the difables to the legal aid is stipulated in the Law on Persons with Disabilities. The law states that the legal aid for the difables shall be provided by the central and local governments.⁸²

The Law on Persons with Disabilities was made by the government to create equal rights and opportunities for the difables towards prosperous, independent, free-from-discrimination life.⁸³ In the realm of law, the difables are recognized as legal subjects and entitled to reasonable accommodation during legal proceedings.

As of 2015, at least there were 114 regulation containing articles on the issue of disability.⁸⁴ Several regions have had regulations on the fulfilment of the rights of the difables, including their rights to legal aid, such as Gubernatorial Regulation of Central Java Number 11 of 2017 on the Implementing Regulation of Regional Regulation of Central Java Number 11 of 2014 on the Fulfillment of the Rights of Persons with Disabilities and Gubernatorial Regulation of the Special Region of Yogyakarta Number 60/2014 on the Procedures for the Legal Aid for Persons with Disabilities.

⁷⁵ *Ibid*, p.468

⁷⁶ *Ibid*, p. 468-469

⁷⁷ *Ibid*, p. 477

⁷⁸ The Consideration of the Law on Legal Aid

⁷⁹ Yayasan Lembaga Bantuan Hukum Indonesia, *Op.Cit*, p. 470

⁸⁰ Article 1 number 1 of the Law on Legal Aid

⁸¹ Article 1 number 2 of the Law on Legal Aid

⁸² Article 29 of the Law on Persons with Disabilities

⁸³ The Consideration menimbang of Law Number 8 of 2016 on Persons with Disabilities.

⁸⁴ Fajri Nursyamsi, et al.*Op.Cit*.

According to two regulations on the difables above, the legal aid bagi the difables encompasses, inter alia:

- The legal aid given until the case is settled or finally settled;
- The legal aid in private, criminal, and administrative law;
- Litigation and non-litigation.⁸⁵

Three provinces compared, i.e. West Nusa Tenggara, Central Java and South Sulawesi, have regional regulations on the fulfilment of the rights of persons with disabilities.

C. The Problems of Legal Aid bagi the Difables

Even though the rights of the difables in conflict with the law are stipulated in the Law on Persons with Disabilities, GR 70/2019, GR 39/2020, and different regulations in regions, in practice there are still several problems:

1. The Problems in the Regulations

These problems are related to legal substances when the difables face legal proceedings and substansi in regional regulations, inter alia:

a. Legal Aid/Service

Article 13 paragraph (1) of GR 39/2020 mandates the bar association to make and develop the standards of the legal aid for Persons with Disabilities. In addition, to provide the legal aid, the association also makes and develops the standards of the legal service as stipulated in paragraph (1) of the article. Advocates shall provide the Legal Aid for the Persons with Disabilities in legal proceedings in accordance with laws and regulations. However, the mandate has not fully implemented as there has been no development or breakthrough in the legal assistance for the persons with disabilities.

b. The Poor as the Only Subject of the Legal Aid

At the level of the regional regulations, there is a shortcoming related to the subject entitled to the legal aid. According to the Law on Legal Aid,

⁸⁵ See: Gubernatorial Regulation of Central Java Number 11 of 2017 on the Implementing Regulation of Regional Regulation of Central Java Number 11 of 2014 on the Fulfillment of the Rights of Persons with Disabilities and Gubernatorial Regulation of the Special Region of Yogyakarta Number 60 of 2014 on the Procedures for the Legal Aid for Persons with Disabilities.

only the poor are entitled to the legal aid. On the other hand, the Law on Persons with Disabilities does not stipulate the economic status of the difables as a requirement for the legal aid.

Nonetheless, the rights of the difables to the legal aid are reduced by an administrative requirement in the Gubernatorial Regulation of DIY.⁸⁶ It requires an applicant of the legal aid to have a relief letter. This provision reduces the scope of the recipients of the legal aid in the Law on Persons with Disabilities.⁸⁷

So does the Gubernatorial Regulation of Central Java.⁸⁸ Although this regulation was made subsequent to the Law on Persons with Disabilities, it requires the letter as one of the requirements of the application for the legal aid.⁸⁹ Therefore, to guarantee the rights of the difables to the legal aid, the requirement should be revoked from the regulations above.

c. The Mechanism of Budgeting

The problem of the budgeting of the legal aid is frequently encountered by local governments. For instance, the Local Government of DIY has had difficulties in it due to the obstacles in the system and laws and regulations, inter alia:

First, the local government has no authority over judicial matters as it is an absolute authority of the central government as stipulated in Law Number 23 of 2014 on Local Governments.

Second, the budget of the legal aid cannot be predicted because the number of annual cases cannot be predicted either. *Third*, the mechanism of hibah cannot be chosen because it cannot continuously be given. *Fourth*, the scheme of social assistance cannot be used either as its definition is limited to sustaining social risks.⁹⁰

⁸⁶ Gubernatorial Regulation of the Special Region of Yogyakarta Number 60 of 2014 on the Procedures for the Legal Aid for Persons with Disabilities

⁸⁷ Totok Dwi Diantoro, Focus Group Discussion “*Kebijakan Bantuan Hukum Bagi Penyandang Disabilitas*”, 25 February 2019

⁸⁸ Gubernatorial Regulation of Central Java Tengah Number 11 of 2017 on the Implementing Regulation of Regional Regulation of Central Java Number 11 of 2014 on the Fulfilment of the Rights of Persons with Disabilities

⁸⁹ Article 59 paragraph (2) letter c of Gubernatorial Regulation of Central Java Tengah Number 11 of 2017 on the Implementing Regulation of Regional Regulation of Central Java Number 11 of 2014 on the Fulfilment of the Rights of Persons with Disabilities

⁹⁰ Dewa Isnu Broto Imam Santosa., S.H, the Legal Bureau of DIY, Focus Group Discussion “*Implementasi Kebijakan Perlindungan Hukum dan Aksesibilitas Peradilan bagi Penyandang Disabilitas*”, Yogyakarta, 7 February 2019

The problem of budgeting has also occurred in Makassar. One of the obligations and responsibilities of the Makassar City Government is to allocate the budget to fulfil the rights of the difables. Nevertheless, it was not allocated in the Regional Budget of Makassar in 2019.⁹¹

According to Article Pasal 19 paragraph (1) of Government Regulation Number 42 of 2013 on the Requirements and Procedures for the Legal Aid and the Distribution of Its Funds, the Local Government can allocate the budget in the Regional Budget.⁹² The allocation can be stipulated further in a regional regulation.⁹³ Therefore, the local government should be deeply committed to allocating the Legal Aid Budget in the Regional Budget.

2. The Practical Problems of the Difables in Conflict with the Law

a. The Perspective of Law Enforcers

The freedom of law enforcers is now constrained by the articles which do not respect the rights of the difables in conflict with the law. Although knowing the obstacles and needs of the difables quite well, they do not want to leave the legalistic approach.⁹⁴

For example, the difables cannot be tried due to their mental ages in accordance with the Law on Child Protection and Law on the Juvenile Justice System. Hence, even though the mental age of a difable is equal to that of a child, he or she has to undergo trial as an adult due to his or her calender age. Despite the result of psychological assessment, the law enforcers are not encouraged to implement the juvenile justice system because they argue that there is no normative guarantee in the law of the mental intellectual age.⁹⁵

Regarding the mental age of the difables, the research conducted by MAPPI FH UI found that court verdicts did not consider it.⁹⁶ As victims, they were considered adults so that the articles of the Law on

⁹¹ Interview by PUKAT Korupsi FH UGM with Fadli Lesmana, the Department of Social Affairs of Makassar on January 2019

⁹² According to Article 19 paragraph (2) of Government Regulation Number 42 of 2013 on the Requirements and Procedures for Legal Aid and the Distribution of Its Funds, the legal aid funded by APBD shall be reported to the Minister of Law and Human Rights and Minister of Home Affairs.

⁹³ Article 19 paragraph (3) of Government Regulation Number 42 of 2013 on the Requirements and Procedures for Legal Aid and the Distribution of Its Funds

⁹⁴ M. Syafi'ie, S.H.,M.H, *Op.Cit.*, p. 6

⁹⁵ *Ibid.*, p. 8

⁹⁶ Choky R. Ramadhan, Fransiscus Manurung, dan Adery Ardhan Saputro, *Op.Cit.*, hlm.93

Child Protection could not apply to the perpetrators.⁹⁷ Hence, the law enforcers must understand difability to act fairly and ethically when handling the difables in conflict with the law.⁹⁸

b. Legal Culture

Until now, a number of victims are reluctant to report the cases they experienced to the law enforcers. The hesitation is due to, inter alia: the assumption that it is disgrace for their family, shame or fear of reporting the closest family, fear of bad stigma from the community and the pressure/request from their own family.⁹⁹

The assumption can also be found in the cases experienced by the difables. Many of them and their family are not brave to report and proceed with legal proceedings.¹⁰⁰ It is also because the difables or their family think that the law enforcers frequently blame the difables in the legal proceedings.¹⁰¹

Hence, the difables' and their family legal awareness needs to be raised. It will promote more structural and cultural changes.¹⁰² The awareness can be raised by non-litigation advocacy, such as demonstration, press release, audiences, mediation, submission of draft legal improvement, critical awareness, etc.¹⁰³

c. Ineffective Implementation of Regional Regulations

Several regional regulations on the rights of the difables in the legal proceedings cannot effectively be implemented. The Central Java Government, for instance, has not founded the Disability Committee despite the mandate in the Regional Regulation.¹⁰⁴ In practice, the

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ Damar Juniarto, et al, 2009, *Perlindungan Terhadap Saksi dan Korban*, Komisi Nasional Anti Kekerasan terhadap Perempuan, Jakarta, p. 28-29

¹⁰⁰ M. Syaf'ie., *Op.Cit.*, p. 9

¹⁰¹ *Ibid.*, p. 10

¹⁰² *Ibid.*, p.11

¹⁰³ *Ibid.*

¹⁰⁴ Interview by PUKAT Korupsi FH UGM with Nur Hadi Amiyanto (the Head of the Department of Social Affairs of Central Java), Soesi Prawiro (Kabid of Rehabilitation), and Nanik Setyawati (the Head of the Disability Section), January 2019

handling of the cases implicating the difables has relied on the communication and coordination among institutions.¹⁰⁵

D. The Handling of the Cases of the Difables in Conflict with the Legal Proceedings

It is shown that the cases implicating the difables are often stopped due to the lack of evidence, their legal incapacity, the difficulty in obtaining testimony, or unconvincing testimony. Their legal capacity has been “dedisabilitized” by the legal procedures and logical framework. According to M. Joni Yulianto, law has failed to recognize them as an equal legal subject.¹⁰⁶

Their vulnerable position in conflict with the law can be helped by interpreters, facilitators, and legal facilitators. They have their own role in ensuring the rights of the difables in conflict with the law, i.e.:

Table 8. The Role of Facilitators, Legal Facilitators, and Interpreters

Needs		Explanations
Facilitators	Definition	Those who have knowledge on the kinds, levels, and difficulties of someone’s disability, and can memberikan assistance to Persons with Disabilities. ¹⁰⁷
	Provision	The Law on Persons with Disabilities only stipulates the facilitators or interpreters for children <i>“In examining children with disabilities, law enforcement officials are required to allow parents of family [member(s)] of the children and support officers/facilitators or interpreters to assist the children with disabilities.”</i> ¹⁰⁸

¹⁰⁵ Interview by PUKAT Korupsi FH UGM with AKP Pudji Hari Sugiarto and IPTU Yuni Utami, Unit PPA of the Central Java Police on January 2019.

¹⁰⁶Muhammad Joni Yulianto, Yayasan Lembaga Bantuan Hukum Indonesia, *Op.Cit.*, Hlm. 256

¹⁰⁷See: the Elucidation to Article 1 number (5) of Government Regulation Number 39 of 2020 on the Reasonable Accommodation for the Persons with Disabilities in Conflict with the Law

¹⁰⁸Article 31 of the Law on Persons with Disabilities

	Practice	The disability organizations and legal aid organizations handling the cases of the difables in conflict with the law only try to provide facilitators not only to juvenile crimes. ¹⁰⁹ They can come from the family, teachers, or disability organizations.
Legal facilitators		
	Provision	Legal Assistance is given by Advocates. According to Law Number 18 of 2003 on Advocates, an Advocate is: <i>someone who provides legal service, both in and out of court, who meets the requirements of this Law.</i>
	Practice	The Legal Assistance is often provided by the network of difability organizations and legal aid institutes. A legal facilitator performs several tasks, such as: <ul style="list-style-type: none"> • Paying close attention to the articles used by the law enforcers • Creating understanding on the difables among the law enforcers • Explaining the condition of the difables, and their trauma.¹¹⁰
Interpreters	Definition	Those who have skills and knowledge to understand and use the language of Persons with Disabilities. ¹¹¹
	Provision	Article 178 KUHAP stipulates interpreters as follows: (1) If a defendant of witness is dumb and/or deaf and is not able to write, the

¹⁰⁹ Sarli Zuhendra, Focus Group Discussion “Penyusunan Buku Panduan Penanganan Perkara yang Melibatkan Penyandang Disabilitas”, Yogyakarta, 3 July 2019

¹¹⁰ M. Syafi’ie, Purwanti and Mahrus Ali. *Op.Cit.*, p.110-111

¹¹¹ See: the Elucidation of Article 1 number (4) of Government Regulation Number 39 of 2020 on the Reasonable Accommodation for the Persons with Disabilities in Conflict with the Law

		judge/chairman of the session shall appoint an interpreter who is versed in communicating with the defendant or witness.
	Practice	The interpreters should not be certified. Article 178 of KUHAP merely requires them to be versed in communicating with the defendant or witness. In practice, certified interpreters cannot communicate with them. ¹¹²

The facilitators and legal facilitators play a key role in enabling the difables to be firm legal subjects.¹¹³ Their collaboration is necessary as the facilitators may not understand legal issues, and the legal facilitators may not understand the ethics of the interaction with the difables. In general, three things need to be considered when providing legal aid to the difables, i.e.:

1. The Ability of the Facilitators and Legal Facilitators

Article 15 paragraph (3) GR 39/2020 stipulates the requirements of the Disability Facilitators, inter alia:

- 1) Understanding the needs and difficulties of the Persons with Disabilities they facilitate;
- 2) Facilitating the Persons with Disabilities to follow the legal proceedings well;
- 3) Obtaining consent from the Persons with Disabilities or their family; and
- 4) Being versed in communicating and interacting with the Persons with Disabilities they facilitate.

Also, there are other references on the facilitators. These references surely complement the criteria of the facilitators in GR 39/2020, i.e.:

¹¹² Sarli Zulhendra, *op. cit*

¹¹³ Purwanti, Discussion "Pendampingan dan Bantuan Hukum Difabel Berhadapan dengan Hukum", Yogyakarta, Monday 29 July 2019.

a. The Ability to Read and Listen and Empathy

According to Yayasan Lembaga Bantuan Hukum Indonesia (YLBHI), the minimum requirements of the legal facilitators are the ability to read and listen and empathy.¹¹⁴ They are necessary in facilitating. For instance, the ability to listen is of importance in order that the difables are not asked repetitively. The repetition of questions can cause trauma, especially for the victims.

b. The Understanding and Perspective in Handling the Cases of the Difables

The understanding and perspective can be used to decide the steps of advocacy that will be taken. They can be started from knowing the kinds of the difables. There are four kinds of the difables according to the Law on Persons with Disabilities, i.e.: physical, intellectual, mental, and/or sensory. The kinds of the difables should be understood by the relevant legal aid institutes or disability organizations as they can have impacts on the ethics of interaction and fulfilment of the specific needs of the difables. They can be acquired through module, training, or collaboration with the network.

c. The Understanding of the Relevant Regulations on the Difables

There are several international and national regulations to be understood by the legal facilitators of the difables, inter alia: the Convention on the Rights of Persons with Disabilities, the Indonesian Criminal Code, the Indonesian Criminal Procedural Code, the Law on Persons with Disabilities, the Law on the Elimination of Domestic Violence, the Law on Child Protection, the Law on the Juvenile Justice System, the Regulation of the Supreme Court on the Guidelines on Handling the Cases of Women in Conflict with the Law, and other regulations related to particular cases.

2. The Process of Facilitation

Article 15 paragraph (1) jo. Paragraph (3) of GR 39/2020 stipulates the reasonable accommodation, such disability facilitators, interpreters, and other officials. These are the guidelines on facilitating the difables during the legal proceedings:

- a. When having a difable as a client, you should treat the difable well. If you do not understand what he or she expresses, you can communicate with him or her using writing or assistive devices, such as dolls, pictures, etc. If there is

¹¹⁴ Yayasan Lembaga Bantuan Hukum Indonesia, *Op.Cit*, p. 567

still a difficulty, say that you are going to find a facilitator to ease the communication.¹¹⁵

- b. Collaborating with those versed in communicating with the difables. Schools, disability organizations, family or those who can communicate with the difables can be alternatives.¹¹⁶
- c. Asking questions with simple languages. It can create a comfortable consultation, and every question flows like a conversation in telling.¹¹⁷ It can help the client remember and make him or her more comfortable.
- d. Paying attention to every detail of information given by the difables.
- e. Conducting thorough and detailed investigation, identifying witnesses and available evidence.¹¹⁸
- f. Giving understanding to the closest people, such family or schools, that the case needs support and cooperation.¹¹⁹
- g. Paying attention to the condition of the difables during examination. If the condition does not support, the examination can temporarily be postponed to restore the condition of the difables.
- h. The legal facilitators can ensure that the law enforcers have done their obligations before examining the difables. They are required to ask considerations or advice from:
 - 1) doctors or other health workers on the health condition;
 - 2) psychologists or psychiatrists on the mental condition; and/or
 - 3) social workers on the psychosocial condition.¹²⁰
- i. Actively monitoring the progress of the case. The facilitators can actively ask the law enforcers about it to ensure that the case is still processed and not dihentikan secretively.¹²¹
- j. The process of facilitation is exhausting and takes a long time, needs support and cooperation of various parties. Therefore, a strong network of various related stakeholders is necessary. The parties to be involved in the process of advocacy are:

¹¹⁵Purwanti, Discussion "Pendampingan dan Bantuan Hukum Difabel Berhadapan dengan Hukum", Yogyakarta, Monday 29 July 2019.

¹¹⁶ Yayasan Lembaga Bantuan Hukum Indonesia, *Op.Cit.*, p. 272

¹¹⁷ Purwanti, *Op.Cit.*

¹¹⁸ Yayasan Lembaga Bantuan Hukum Indonesia, *Loc..Cit.*, p. 272

¹¹⁹*Ibid*

¹²⁰ Article Pasal 30 paragraph (1) of the Law on Persons with Disabilities

¹²¹ Yayasan Lembaga Bantuan Hukum Indonesia, *Op.Cit.*

Table 9. The network of the facilitation of the cases of the difables in conflict with the law

Parties	Explanations
The Integrated Service Center for Woman and Child Protection (<i>Pusat Pelayanan Terpadu Perlindungan Perempuan dan Anak/P2TP2A</i>)	To facilitate and monitor the process of examination reports by the investigators and help provide psychiatrists and interpreters ¹²²
The Department of Social Affairs	The Department of Social Affairs will play more roles in the process of rehabilitation and reintegration of the difables after the handling of their cases. If the difables are adult men, there can be collaboration with the Department of Social Affairs to provide safe houses, interpreters, or social workers. ¹²³
Difable Organizations (<i>Organisasi Penyandang Difabel</i>) and Legal Aid Institutes (<i>Lembaga Bantuan Hukum</i>)	OPD and LBH have strong networks with their fellows and academicians or experts. ¹²⁴ The Roles of OPD and LBH are: <ul style="list-style-type: none"> • providing legal representatives who understand gender and difability, • providing interpreters who understand gender and difability, and are versed in communicating with the difables • suggesting and providing experts of medicine, psychology, and difability.¹²⁵

¹²² Interview by PUKAT Korupsi FH UGM with Andi M. Fajar Akbar, S.H., LBH Makasar, in January 2019.

¹²³ Andi M. Fajar Akbar, *Op. cit*

¹²⁴ Interview by PUKAT Korupsi FH UGM with Noviana Dibyantari, Komunitas Sahabat Difabel di Jawa Tengah in January 2019.

¹²⁵ M. Syafi'ie, Purwanti dan Mahrus Ali. *Op. cit.*, p. 100

Schools	Schools, especially Schools for Disabled Children, have teachers who can interpret sign languages.
National Commission and Ombudsman	Several institutions, inter alia: the National Commissions on Human Rights, National Commission on Violence against Women, or Ombudsman of the Republic of Indonesia, receive complaints.

- k. If there is violation in the ongoing process of legal proceedings, a letter can be sent to the leader of the institution. If the violation is in the process of investigation, the letter will be sent to the Chief of the Precinct Police (Kapolres) and attached to the Chief of the Regional Police (Kapolda).¹²⁶
- l. If the cases of the difables in conflict with the law are to be published in mass media, it is important to hide their identity, especially as victims.¹²⁷
- m. The difables as the victims of torture, sexual violence, and serious maltreatment can request medical, psychosocial rehabilitation, and psychological aid to the Witness and Victim Protection Agency.¹²⁸

3. Post-Facilitation

Even though the case is over, there are several things to take into account to ease the handling of the next cases. According to Asfinawati, there are three things to do subsequent to the handling of a case, i.e.:¹²⁹

- a. Evaluation. This is to know the success rate of advocacy, difficulties, challenges, and threats during the advocacy.
- b. Documentation. It can consist of files, photos, notes of the cases. The documentation is important to refer to in facing the subsequent cases.
- c. The plan for advanced advocacy. From the documentation above, it can be seen whether the case is a general phenomenon or not. The case can be a general phenomenon, so that the plan for the advanced advocacy will probably be policy advocacy

¹²⁶ Yayasan Lembaga Bantuan Hukum, *Op.cit.*, p. 274

¹²⁷ *Ibid.*

¹²⁸ Article 37 paragraph (1) and (2) of Government Regulation Number 7 of 2018 on the Compensation, Restitution, and Aid to Witnesses and Victims

¹²⁹ Yayasan Lembaga Bantuan Hukum, *Op. cit.*, p. 591

CHAPTER V

THE PROTECTION OF THE RIGHTS OF THE DIFABLES IN CONFLICT WITH THE LAW AS VICTIMS

The difables are often forgotten in the legal progress and participation in legal development.¹³⁰ The existing substantive and procedural law has not sufficiently accommodated their special needs and fair treatment. However, when they are in conflict with legal proceedings, the difables frequently have difficulties and vulnerability as victims. Therefore, the justice system which can accommodate their rights in conflict with the law is necessary due to these following reasons: *First*, Leigh Ann Davis, as cited in the study conducted by Institute for Criminal Justice Reform (ICJR), says that the intellectual, cognitive, or developmental difables are more often involved in legal cases, as victims and suspects/perpetrators, than other individuals without difability in the criminal justice system.¹³¹ The researchers argue that the difables have higher risks (4 – 10 times) if they are the victims.¹³² Furthermore, they are often negatively labeled, so that they are vulnerable to being the victims.

Second, the absence of reasonable access and support system for the difables as the victims to report the crimes they experienced causes the law enforcers not to be able to proceed with the alleged crimes until they are settled, so that there are no protection and fulfilment.¹³³ *Third*, the intellectual difables in a community vulnerable to being involved in legal cases, as the victims and suspects. The difables are often considered merely objects to take advantage, even it leads to crimes against victims. The misunderstanding

¹³⁰Supriadi Widodo Eddyono and Ajeng Gandini Kamilah , 2015, “Aspek Aspek *Criminal Justice* Penyandang Disabilitas”,*Hasil Penelitian*, Institute for Criminal Justice Reform, Jakarta, p. iii

¹³¹ *Ibid*, p. 8

¹³² *Ibid*, p. 9

¹³³ *Ibid*

of the law enforcers eventually makes the difables named suspects, instead of victims, and blamed. *Fourth*, in the context of regulations, the existing laws and regulations are half-hearted in protecting the difables. Moreover, the lower regulations contradict the higher regulations.¹³⁴ *Fifth*, the state apparatus have not understood the difables and difability, so that the policy made frequently eliminates or reduced their rights.¹³⁵ *Sixth*, the attitude of the family and community often injures the persons with disabilities with stigma and stereotype and considering the crime as a curse, sin, and punishment. It results in discrimination which can infringe the rights of the persons with disabilities.¹³⁶

A. The Double Vulnerability of the Difables as the Victims

The difables have had difficulties since the beginning. According to Goffman, the main problem encountered by the difables in their social life is other people's inability to interact with the difables or their inconvenience of the special needs of the difables.¹³⁷ In addition, the root of all problems of the difables is the stigma that the difables cannot do anything.¹³⁸ They are often discriminating in seeking a job. They frequently are not given chances to work in companies due their physical conditions¹³⁹ which do not meet the requirement of "physical and mental health".

In education, the chances of the difables in education has not fully been accommodated. They are still facing various discriminations in education, such as the requirement of "physical and mental health" in the student admissions in colleges.¹⁴⁰

The difable women may experience double burden in certain conditions and circumstances due to their gender and difability.¹⁴¹ In his study, Douglas A. Brownridge argues that the difable women are far more vulnerable to violence (33%) than non-difable ones are (22%).^{142 143}

To illustrate, if the difable women fall victim to sexual violence, they are vulnerable to discrimination, subordination, and marginalization in their community. They are

¹³⁴ The Academic Paper of the Law on Persons with Disabilities, p. 4.

¹³⁵ *Ibid*

¹³⁶ *Ibid.*, p. 5.

¹³⁷ Istifarroh and Widhi Cahyo Nugroho, "Perlindungan Hak Disabilitas Mendapatkan Pekerjaan di Perusahaan Swasta dan Perusahaan Milik Negara", *Mimbar Keadilan*, Volume 12 Number 1, February –July 2019, p. 22

¹³⁸ *Ibid*

¹³⁹ *Ibid.*, p. 3

¹⁴⁰ Jazim Hamidi, "Perlindungan Hukum terhadap Disabilitas dalam Memenuhi Hak dalam Pendidikan dan Pekerjaan", *Jurnal Hukum Ius Quia Iustum*, Fakultas Hukum Universitas Islam Indonesia, Volume 23, October 2016, p. 654

¹⁴¹ Sulistyari Ardiyantika, "Strategi Advokasi Perempuan Difabel Korban Kekerasan di SAPDA", *Jurnal Inklusi*, Volume 3, Nomor 2, Desember 2016, p. 196

¹⁴² *Ibid*

¹⁴³ *Ibid*

always excommunicated as they are not deemed virgins anymore. For the community, sexual violence is a taboo. They always blame the victims because they think that the sexual violence is caused by the women. Several stigma to the women are that: they wear sexy clothes so that men are attracted; they are too coquettish; they are considered hussy because they always go home late at night. They are often underestimated, so that they are discriminated by the community.

Moreover, the law enforcers frequently blame the victims. They view the victims as weak objects attracting desire or interrogate the victims by negating what really occurred and the reports of sexual violence. Especially for sensory difable women, the reports of sexual violence and sexual harassment are only untouched.¹⁴⁴ It is caused by several difficulties, such as the lack of physical evidence, the difficulty of the difable victims to tell their experiences, the absence of the interpreters of sign languages, etc.¹⁴⁵ For example, the law enforcers do not proceed with the rape to which the visual difables fall victim as the victims cannot see the perpetrators. However, in West Nusa Tenggara, the victims can identify the perpetrators from their smells and footsteps.¹⁴⁶ The prolonged and unclear process of law enforcement makes the victims and their family tired and bored, so that they choose out-of-court settlements.¹⁴⁷

Sexual violence has worrying psychic and emotional impacts on the victims. It makes the women have psychic and physical burdens. It will surely have profound impacts on the development of the difables as the victims of sexual violence.¹⁴⁸ The violence they experienced has impacts on psychic conditions, such as fear, shame, stigma, and withdrawing from their social environments.¹⁴⁹ The extreme accumulation of the psychological effects lead them to commit suicide.¹⁵⁰

¹⁴⁴ Rachel Farahiyah and Nurliana Cipta Apsari, "Peran Lembaga Himunan Wanita Disabilitas Indonesia (HSDWI) bagi Perempuan Disabilitas Sensorik Korban Pelecehan Seksual", *Jurnal Penelitian dan PPM*, Volume 5, Nomor 1, April, 2018, p. 75

¹⁴⁵ *Ibid*

¹⁴⁶ Joko Jumadi, in the Focus Group Discussion "Urgensi Pedoman Mengadili Perkara Difabel Berhadapan Dengan Hukum", Mataram, 8 September 2020

¹⁴⁷ Rachel Farahiyah and Nurliana Cipta Apsari, *Op. Cit*, p. 76

¹⁴⁸ Yulianti Ningsih Cahyani, Alfa Galih Verdiantoro, dan Febriyanti Uma, "Perlindungan Hukum bagi Korban Tindak Kekerasan Seksual Kaum Tunarungu dalam Perspektif Hukum Pidana", *Mimbar Keadilan* Volume 13 Nomor 2 Agustus 2020, hlm. 220

¹⁴⁹ Rachel Farahiyah dan Nurliana Cipta Apsari, *Loc. Cit*, p. 75

¹⁵⁰ *Ibid*

B. The Remedies for the Difables as the Victims

The psychic, physical, material impacts of crimes on the victims require remedies, so that they are restored (*restitutio in integrum*). Therefore, the processes of the remedies and fulfilment of the their rights constitute integral parts in protecting their rights as the victims. In Indonesian language, it is called “*pemulihan*”. According to Kamus Besar Bahasa Indonesia, the word is derived from “*pulih*”, which means a process, way, or act to restore.¹⁵¹ In addition, the word “*pemulihan*” means restoration, or return of rights, property, etc.¹⁵² It can be interpreted as an attempt or process to restore.¹⁵³ The remedies of the victims are attempts to heal or relieve their injury.¹⁵⁴ In the Indonesian positive law, especially regarding the victims of domestic violence, the remedies are “any attempts to strengthen the victims of domestic violence, so that they are more empowered physically and psychically”.¹⁵⁵

The remedies of the difables as the victims are mandated by the United Nations Convention on the Rights of Persons with Disabilities. Article 16 number 4 of the convention mandates States Parties to take all appropriate measures to promote the physical, cognitive, and psychological recovery, rehabilitaion, and social reintegration of persons with disabilities who become victims of any form of exploitation, violence, or abuse, including through the provision of protection services. There has been no universal provision on the remedies of the victims in laws and regulations, some of which are merely related to particular crimes. For example, Law Number 31 of 2014 on Witness and Victim Protection (UU LPSK) stipulates that psychological and psychosocial aid and rehabilitation are only provided to the victims of the particular crimes.¹⁵⁶

There are several difficulties in the legal protection and remedies for the difables as the victims as the laws and regulations are too general, so that they have not accommodated the persons with disabilities as legal subjects. Moreover, the Law on Persons with Disabilities does not stipulate how to protect and heal the difables as the

¹⁵¹ Kementerian Pendidikan dan Kebudayaan, KBBI Daring, <https://kbbi.kemdikbud.go.id/entri/pemulihan>, 23 December 2020

¹⁵² *Ibid*

¹⁵³ Tim Riset Fakultas Hukum Universitas Udayana ,2016, “Laporan Hasil Penelitian Pemulihan Tindak Pidana Terorisme”, *Hasil Penelitian*, LPSK RI dan Fakultas Hukum Univeristas Udayana, p. 45 - 48

¹⁵⁴ *Ibid*

¹⁵⁵ Article 1 number 1 of Government Regulation Number 4 of 2006 on the Implementation and Collaboration of the Remedies of the Victims of Domestic Violence

¹⁵⁶ Article Pasal 6 paragraph (1) of Law Number 31 of 2014 on the Amendment to Law Number 13 of 2006 on Witness and Victim Protection

victims comprehensively, so that it results in legal vacuum. Hence, the lawmakers must formulate a legal framework for the mechanisms. The implementing regulation is urgent to reach affirmative action, so that the difables falling victim to crimes have suitable and easy access to protection and fulfilment of their rights in the legal system. The articles should be complete, thorough, and clear in order to be easily understood and avoid misinterpretation and misunderstanding among various parties directly or indirectly involved which can injure the difables.

C. The Paradigms and Models of the Legal Protection of the Victims

The formulation of the implementing regulation above is expected to be in accordance with the models of legal protection, i.e.:

a. The model of procedural rights

In this model, according to Muladi, the victims are given chances to be actively involved in settling criminal cases,¹⁵⁷ such as the rights to be heard in every examination, to be consulted prior to conditional release, and to negotiate out-of-court settlements.¹⁵⁸ In France, this model is called “*partice civile model*” (civil action system). In short, this model emphasizes the active role of the victims in criminal justice to help public prosecutors, being actively involved in every examination, and be heard before the convict is conditionally released, etc.¹⁵⁹ Therefore, they can restore dignity and confidence.¹⁶⁰ However, their active role can set aside public interest and promote theirs.¹⁶¹

b. The model of the rights to service

In this model, the rigorous standards of the development of the victims are prioritized. The victims are specially served in the settlement of criminal cases.¹⁶² The compensation, restitution, and restoration of the victims due to trauma are

¹⁵⁷ Adil Lugiato, *Rekonstruksi Perlindungan Hak-Hak Korban Tindak Pidana*, Fakultas Hukum Universitas Diponegoro Semarang, MMH, Volume 43 Number 4, October 2014

¹⁵⁸ *Ibid*

¹⁵⁹ Ahmad Kamil, 2012, *Mediasi Penal Dalam Penanganan Tindak Pidana*, Mahkamah Agung RI, Jakarta, p. 4.

¹⁶⁰ Lilik Mulyadi, “Upaya Hukum Yang Dilakukan Korban Kejahatan Dikaji Dari Perspektif Sistem Peradilan Pidana Dalam Putusan Mahkamah Agung Republik Indonesia”, https://badilum.mahkamahagung.go.id/upload_file/img/article/doc/upaya_hukum_yang_dilakukan_korb_an_kejahatan_dikaji_dari_perspektif_normatif_dan_putusan_mahkamah_agung_republik_indonesia.pdf 23 December 2020

¹⁶¹ *Ibid*

¹⁶² Adil Lugiato, *Op. Cit*, p. 556

emphasized in this model.¹⁶³ Ruslan Saleh, as cited by Hasmiah Hamid, gives examples from countries embracing the Anglo Saxon legal system where damages are awarded to the victims.¹⁶⁴ For instance, in New Zealand, the laws and regulations stipulate the damages as one of kinds of punishment¹⁶⁵ as the perpetrators should pay damages over what is suffered by the victims.¹⁶⁶

The paradigm of the legal protection of the victims in the modern era cannot be separated from the concept of restorative justice. Eriyantouw Wahid gives examples from several countries in North America, Australia, and Europe in which this concept is implemented in all legal proceedings, from investigation, prosecution, adjudication, as well execution.¹⁶⁷

Eddy O.S. Hiariej, in *Prinsip-prinsip Hukum Pidana*, explains the goals of criminal law based on the absolute theory, relative theory, teori gabungan, and contemporary theory.¹⁶⁸ The latest theory defines the aims of criminal law: (1) deterrent effect, (2) education (to educate the society about what is good and bad), (3) rehabilitation (to rehabilitate the offenders, so that they can lead normal lives when they leave and will not reoffend), (4) social control (to isolate the offenders in order that they do not harm the community, or protect the community from their crimes), and (5) restorative justice (to restore conditions).¹⁶⁹ According to Bagir Manan, restorative justice is “the rearrangement for of the fairer sentencing system for the offenders, victims, and community”.¹⁷⁰

On the other hand, the United Nations Organization defines restorative justice as “an approach to problem solving that, in its various forms, involves the victim, the offender, their social networks, justice agencies and the community”.¹⁷¹ Therefore, if related to the concept of criminal law, restorative justice is an approach to criminal problem solving which involves the offenders, victims, and elements of community for the sake of justice.¹⁷²

¹⁶³ Lilik Mulyadi, *Op. cit*

¹⁶⁴ Hasmiah Hamid, “Perlindungan Hukum Terhadap Korban Penganiayaan Dalam Penanganan Tindak Pidana Di Indonesia”, <https://osf.io/q4hbr/download>, 23 December 2020

¹⁶⁵ *Ibid*

¹⁶⁶ *Ibid*

¹⁶⁷ <https://sinta.unud.ac.id/uploads/wisuda/1203005217-3-SKRIPSI%203.pdf>, 23 December 2020

¹⁶⁸ Eddy O.S. Hiariej, 2016, *Prinsip-Prinsip Hukum Pidana*, Cahaya Atma Pustaka, Yogyakarta, p. 37-44.

¹⁶⁹ Eddy O.S. Hiariej, *Loc.cit.*, p. 37- 44.

¹⁷⁰ Albert Aries, “Penyelesaian Perkara Pencurian Ringan dan Keadilan Restoratif”, *Majalah Varia Peradilan*, Tahun XX. No. 247, *Ikatan Hakim Indonesia*, Juni 2006, p. 3.

¹⁷¹ United Nations, 2006, *Handbook on Restorative Justice Programmes*, United Nations Publication, New York, 2006, p. 6.

¹⁷² M Taufik Makarao, et al., 2013, *Pengkajian Hukum tentang Penerapan Restorative Justice dalam Penyelesaian Tindak Pidana yang Dilakukan oleh Anak-anak*, Badan Pembinaan Hukum Nasional, Kementerian Hukum dan Hak Asasi Manusia, Jakarta, p. 7.

Umbreit focuses on restorative justice to repair the damage caused by crimes through the concept of restitution by attempting to repair the damage and injury suffered by the victims and facilitating out-of-court settlements.¹⁷³

D. Restitution as the Material Restoration for the Disabled as the Victims

Restitution is one of the remedies for the victims over various effects and damage they suffer from crimes. It often needs a huge amount of cost due to the complexity of the effect on the victims. If this cost has to be paid by the victims, they will suffer double impacts. Therefore, this damage should also be covered by the offenders in the form of restitution as the damages over what is suffered by the victims. Restitution is aimed to relieve suffering and enforce justice for the victims as a result of the crimes committed by the offenders. Because all victims can seek restitution, so can the persons with disabilities falling victim to crimes. Several kinds of restitution are:¹⁷⁴

- a. damages over the loss of property or income
- b. damages over the direct harm caused by the crimes;
- c. damages over the cost of medical and/or psychological care

Theoretically, the concept of restitution is closely related to the theory of restorative justice because the latter emphasizes the restoration of damage caused by the crimes and suffered by the victims. According to Dennis Sullivan and Larry Tift as cited by Eddy O.S. Hiariej, there are approaches to restorative justice, two of which are:¹⁷⁵

- a. Court based restitutive and reparative measures
Several early criminal justice reforms which orientating towards the victims involved the offenders prosecuted make restitution or other forms of it as a part of the reparation to the victims. This approach is a compromise of the aim of sentencing to rehabilitate the offenders. The justice reform is also aimed to overcome one of the main weaknesses of the conventional criminal justice system, i.e.: its failure to award reasonable damages to the victims.
- b. Victim offender programmes or mediation of/between victims-offenders
There are three goals of victim offender programmes. First, the approach promotes the process of restoration by confronting the victims and offenders to talk about how to settle the offense. Second, they encourage the offenders to be directly responsible by requiring them to hear the victims as a result of what they have committed and giving them chances to talk about how to deal with their offense. Third, the approach facilitates and promotes a process to empower both parties emotionally and satisfyingly. Fourth, they balance the public interest and

¹⁷³ Henny Saida Flora, "Pendekatan Restorative Justice Dalam Penyelesaian Perkara Pidana Dalam Sistem Peradilan Pidana Di Indonesia", *Jurnal Law Pro Justicia*, Vol II, June 2017, p. 51

¹⁷⁴ Article 7A paragraph (1) of Law Number 31 of 2014 on the Amendment to Law Number 13 of 2006 on Witness and Victim Protection

¹⁷⁵Eddy O.S. Hiariej., *Loc.cit*

that of those affected by the offense. Fifth, the approach enables the parties to agree on the solution to the offense.

In line with the two theories of restorative justice above, the restitution for the victims can be fulfilled in and out of court through mediation. Government Regulation Number 7 of 2018 on the Compensation, Restitution, and Aid to Witnesses and Victims accommodates the fulfilment of the restitution in the courts. If scrutinized, at least there are three interpretations of the model of the demand of the restitution based on KUHAP, i.e.:

- a. The mechanism for combining cases in Article 98 of KUHAP
- b. The mechanism for the ongoing trial
- c. The mechanism for the request to the court

From the three mechanisms, the only relatively good and recommended one is the second mechanism. In other words, the restitution is requested when the alleged offense is being proven. The first and third mechanisms pose several problems. *First*, the process of combining cases uses civil procedural law to examine the demand for the damages.¹⁷⁶ Article 101 of KUHAP explicitly states that “provisions of civil code regulations shall apply for compensation demands, so long as this law does not regulate otherwise”. If the concept of the civil proof in combining cases is analogous to the demand for the restitution, they are not related and contradict each other because the stages of the legal proceedings in civil action at least consist of plaintiffs’ statement of claim, defendants’ answer, reply, respond, civil proof, conclusion, and pronouncement of verdicts.¹⁷⁷ In the provision of PP Restitusi, the victims who demand restitution shall not bring legal action, but request to LPSK. Then, LPSK proposes restitution through the Decree of LPSK to the public prosecutors to be included in their closing address. It negates the provision on the deadline for the compensation demands in combining cases as stipulated in Article 98 paragraph (2) of KUHAP, which states that “The request as intended in paragraph (1) can only be made at the latest before the public prosecutor presents his criminal charge”.¹⁷⁸ The victims who will demand the restitution do not bring legal action to the court, but the demand will be included in the requisitor and read when the requisitor is read. In addition, the provision of restitution in the PP does not stipulate the exchange of pleadings in civil procedural law in its articles.

¹⁷⁶Andi Sofyan and Abdul Asis, *Loc. cit*

¹⁷⁷Andi Sofyan and Abdul Asis, *Op. cit.*p. 218

¹⁷⁸M. Yahya Harahap, *Op. cit.*, hlm. 82.

Second, Article 99 paragraph (1) of KUHAP states that “If the damaged party asks for the combination of its demand with the criminal case as intended in Article 98, the court of the first instance concerned shall consider its competence to judge the demand, the veracity of the basis of the demand, and the punishment for compensating the costs spent by the said damaged party”. Based on the phrase “..the court of the first instance concerned shall consider its competence to judge the demand”, the compensation demands are examined using civil procedural law based on the absolute competence and mainly the relative competence. The judges shall carefully examine the residence or domicile of the defendants because the relative competence in civil procedural law is based on it.¹⁷⁹ Therefore, in principle, the court of the district where the defendants live are competent to examine and decide the demands.¹⁸⁰ This provision is not in line with the relative competence relative in criminal procedural law as stipulated by Article 84, 85 and 86 of KUHAP. Article 84 paragraph (1) of KUHAP states that “A court of the first instance is authorized to judge all cases of criminal acts committed in its area of jurisdiction”. In other words, *locus delicti* (crime scene) determines the relative competence to judge a criminal case.¹⁸¹ This principle is the general rule in determining the relative competence of a court to examine a case brought by the public prosecutors.

If the demand for restitution on trial is interpreted as the combination of cases, the relative competence refers to the provision on the combination of cases as explained above. If implemented, it restricts the victims in demanding their rights to restitution as they can only seek damages if *locus delicti* is where the defendants live. When the *locus delicti* is not where the defendants live, the combination of cases cannot be examined or accepted by a district court by mentioning its “incompetence to examine” and it can only be examined by the district court of the residence or domicile of the defendants. From the discussion on the *locus delicti* using different theories, at least there are two approaches in determining the *locus delicti*, i.e.: (1) the approach determining a crime scene; and (2) the approach determining several crime scenes.¹⁸² Theories of the *locus delicti* are¹⁸³:

¹⁷⁹Andi Sofyan dan Abdul Asis, *Op. cit.* p. 215.

¹⁸⁰*Ibid*

¹⁸¹M. Yahya Harahap, *Loc.cit*

¹⁸²Eddy O.S. Hiariej, *Op. cit.* p. 298.

¹⁸³Eddy O.S. Hiariej, *Op. cit.* p. 298-300.

- a. The theory about where the crime is committed (*leer der lichamelijke daad*)

According to this theory, the *locus delicti* is where a crime is committed. It can more easily be applied to formal delicts especially which emphasizes the offense.

- b. The theory of instruments or *leer van instrument*

According to this theory, the *locus delicti* is determined by the instruments to commit crimes. It is vital sangat to sophisticated or trans-national crimes.

- c. The theory of consequences

This theory views the *locus delicti* as where crimes are committed.

Regarding the theories dalam *locus delicti*, Eddy O.S. Hiariej argues that *leer der lichamijke daad* is used in the formal delicts as it will be easier to determine the *locus delicti*, while the theory of consequences is used in material delicts because they emphasize the consequences. In terms of the sophisticated and trans-national crimes, the theory of instruments is used.¹⁸⁴ To avoid loopholes, based on the second view to determine the *locus delicti*, the location and consequence should explicitly be mentioned in the indictment.¹⁸⁵ The explanation above confirms that the theories of *locus delicti* as the main relative competence in criminal procedural law are not related to the relative competence in civil procedural law, which emphasizes the residents or domicile the defendants.

Third, if the demand for restitution in a trial is interpreted as the combination of cases for damages, the amount of the restitution demanded by the victims to the defendants or the third party is only material, while the immaterial damage cannot be (*niet onvankelyk*). This provision can be found in Article Pasal 99 paragraph (1) of KUHAP, which states that "...the court of the first instance concerned shall consider its competence to judge the demand, the veracity of the basis of the demand, and the punishment for compensating the costs spent by said damaged party". The context of 'the costs spent' refers to the costs which has really been nyata-nyata allocated or material costs. From the provision of the article above, the judges' verdict only accepts "compensation" for what has been spent by the damaged party, such as caring cost, treatment cost, transportation cost, etc. In victimology, the dimension of the damages over the victims' suffering is related to the rehabilitation of the loss suffered by the victims in terms of their body, moral, property, and rights.¹⁸⁶ The victims, for example, physically suffer the damage of their organs like torn hymens, faint, death, sexually

¹⁸⁴Eddy O.S. Hiariej, *Op. cit.* p. 298-301.

¹⁸⁵*Ibid*

¹⁸⁶Hendrojono, 2005, *Kriminologi: Pengaruh Perubahan Masyarakat dan Hukum*, Raja Grafindo, Jakarta, p. 173.

transmitted diseases, unintended pregnancy, and psychological suffering.¹⁸⁷ From the perspective of psychology, the victims of rape are likely to suffer severe trauma as the rape is shocking for them. The shock can be experienced during the rape and after it, such as: being depressed, crying, isolating themselves, regretting, feeling fear, etc.¹⁸⁸ This condition lasts in short and long time, so that the victims need to be restored. This pemulihan often needs a huge amount of cost continuously, so that the cost should be one of the aspects for the victims who should be awarded damages, even though it has not been able to be proven during the trial.

The limitation of the damages which can be demanded by the victims in the combination of cases in KUHAP oversimplifies the conditions and problems. Furthermore, it is only related to the material loss, limiting the rights of the victims to be awarded the damages over all material and immaterial losses.

Various problems are also worth noting in the demand for restitution in courts. *First*, the concept of the demand for restitution through request as stipulated in the Government Regulation on the Compensation, Restitution, and Aid to Witnesses and Victims contradicts the meaning of request. M Yahya Harahap explains the characteristics of request or voluntary legal action as follows¹⁸⁹:

- a. The matters are for the benefit of one party only. They are is to serve the interest of the applicant in a civil legal matter requiring legal certainty, for example a permit from the court to conduct a particular action, thus they are not related to the rights and interest of other parties.
- b. The matters are in principal without disputes or differences with another party. In other words, the voluntary legal action cannot requested tentang the dispute settlement of the rights or ownership and transfer as well as payment by the other or third party.
- c. The other or third party cannot be the opposing party, but it is *ex parte*. It is purely and absolutely one behalf of one party or only one party is involved in the legal matters.

The demand for restitution through the voluntary legal action fulfils the element 'to settle the interest of the applicant' as only the applicant's interest, i.e. restitution, will be dipenuhi. However, the matter in the request is not related to other parties' rights and

¹⁸⁷Koesnadi,1992, *Seksualitas Dan Alat kontrasepsi*, Usaha Nasional, Surabaya, p. 63.

¹⁸⁸ Hayati, 2000, *Kriminologi: Panduan Untuk Pendamping Korban Kekerasan Konseling Bernawasan Gender*, Raja Grafindo, Jakarta, p. 25.

¹⁸⁹M. Yahya Harahap., *Op.cit.*, p. 30.

interest, infringing the concept of restitution. Restitution is basically the demands paid the offenders to the victims or their family due to the crimes the offenders committed. Therefore, restitution is not related to other parties' interest and rights, i.e. the offenders. If the request is accepted, the offenders shall pay the restitution. The victims' rights to restitution is the obligation of the offenders, so that the request for restitution involves at least two parties and two interests. It has been argued that restitution cannot be requested for the settlement of the rights or ownership and transfer as well as payment by the other or third party. Dispute, according to Nurnaningsih Amriani, constitutes a situation when a damaged party shows his or her dissatisfaction to the second party. If they show their different views, dispute takes place.¹⁹⁰ In essence, the request for restitution is not entirely dispute, but if dispute is different views on damages, the request for restitution involves dispute. In this case, there are different views on the victims' rights to restitution to be paid by the offenders. Thus, in practice panels of judges always try to obtain the testimony of the defendants on their ability to pay restitution, so that their verdicts are agreed by the relevant parties. In this case, the request for restitution contradicts the legal concept of request as restitution involves dispute settlement over payment. The process of restitution involves at least two parties, i.e. the victims (who have rights to restitution) and the offenders (who shall pay it). It can be understood that the legal problem in restitution does not only involve one party, contradicting the legal concept of request.

Second, the legal product of the request for restitution is a court order in which finding imposes 'a sanction' on the offenders to pay restitution to the victims and it contradicts the legal concept of the court order, which contains legal reasoning and dictum on a request. M. Yahya Harahap explains that in the order, courts cannot impose any sanction.¹⁹¹ The *condemnatoir* decision contains finding to punish or order to pay, give, disassemble, share, etc.¹⁹²

This provision contradicts the court order in restitution. It is fulfilled by the offenders, so that the court order must not only be *declaratoir*, but also *condemnatoir*, ordering the offenders to pay damages. The *condemnatoir* decision is not a court order, but settling a *contentiosa* legal action, imposing 'a sanction', so that the judges shall be prudent in handing down the decision. Consequently, the process of evidence and exchange of

¹⁹⁰ Nurmaningsih Amriani, 2012, *Mediasi Alternatif Penyelesaian Sengketa Perdata di Pengadilan*, Sinar Grafika, Jakarta, p.13

¹⁹¹M. Yahya Harahap., *Op.cit.*, p. 30.

¹⁹²M Yahya Harahap,1995 *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata* , Gramedia, Jakarta, p.13

pleadings are necessary based on the procedure. In the examination of court orders, there are no the exchange of pleadings because the request only comes from a party, i.e. the applicant. Hence, restitution is not a part of a voluntary legal action. If the request for restitution contains demands for the sanction to pay to the defendants, it cannot be handed down in a court order, but it is requested in pure legal action.

Third, if the legal product of the request for restitution is a court order, it is likely to harm the victims requesting the restitution as the evidence in the court order only binds the applicant, not the other or third party.¹⁹³ Comparing the *contentiosa* evidence, it is really full and binding, so that it binds the parties concerned and their heirs and the other or third party having rights from them.¹⁹⁴ If referring to provision, all legal orders, including restitution, only binds LPSK as the applicant. Despite the fact that they are authentic deeds, their evidentiary power of the legal orders in restitution does not bind the offenders and victims, but merely LPSK as the applicant. It surely harms the victims because the offenders is highly likely to decline to pay restitution, denying the evidence in the legal orders. The offenders will have various reasons to avoid their obligations, stating that the amount of restitution is too high, etc. When this occurs, the victims cannot force the offenders to obey and pay the restitution. Even though the evidentiary power of the restitution does not bind them. The victims eventually win on paper and have rights to restitution, but restitution will never be paid.

From the explanation above, the only mechanism for the request for restitution is through the ongoing trial. The implementing regulation should be amended in order that the victims with disability can have easier access to restitution.

E. The Difable Victims' Rights to Rehabilitation, Medical Aid, and Compensation

In the context of the damages for the difable victims, beside restitution, they can also request rehabilitation, medical aid, and compensation. Article 6 paragraph (1) of the Law on LPSK stipulates how to provide medical and (psychological and psychosocial) rehabilitation aid to the victims. However, the provision restricts those having rigts to it to the victims of:

- a. Gross violations of human rights;
- b. Terrorism, human trafficking;

¹⁹³M. Yahya Harahap., *Op.cit.*, p. 43.

¹⁹⁴ Subekti,1977,*Hukum Acara Perdata*, Bina Cipta, Jakarta, p. 126.

- c. Torture;
- d. Sexual violence; and
- e. Serious maltreatment.

The aid is needed by the difables becoming the victims of sexual violence. In South Sulawesi in 2018, a difable woman suffered sexual violence. She was locked up by the perpetrator for one month to satisfy his sexual desire, and he forced her to consume *sabu-sabu* (crystal methamphetamine).¹⁹⁵ He also offered her to his friends to satisfy their sexual desire. Thus, she suffered sexual violence, torture/maltreatment, and human trafficking. The victim, especially the difables experiencing psychological and physical stress due to the crimes, needs medical and psychic rehabilitation badly.

In addition to medical and rehabilitation aid, compensation can be provided to the difables falling victim to crimes. Article 1 number 10 of the Law on LPSK defines it as “the damages paid by the state as the perpetrators cannot fulfil their obligations to pay to the victims or their families.”¹⁹⁶ It is undeniable that the rights to restitution cannot be obtained fully based on the court decisions due to a number of reasons, such as financial matters. Therefore, the victims should be able to request compensation. Nevertheless, the Law on LPSK also restricts it to the victims of gross violations of human rights and terrorism.

F. Recommendation for the Implementing Regulation

The formulation of the implemeting regulation on the procedures, guidelines and mechanisms for fulfilment, legal protection, and remedy for the difable victims is an alternative to take. The instrument is formulated to fill legal vacuum and guarantee the fulfilment of the difables’ rights. It can solve several cliché problems facing the difables in conflict with the law. As argued before, they face discrimination, marginalization, neglect, difficult access, *secondary victimization*, and indifference towards their rights in the legal system. In the context of procedural law, the legal instrument is needed to stipulate legal protection¹⁹⁷ for them, so that there will be a fair justice system. Hari Kurniawan, in his research “*Kebutuhan Difabel terhadap Aksesibilitas Peradilan yang Fair*” the rights of the difables as the victims have not accommodated especially in the criminal justice system.¹⁹⁸

¹⁹⁵ M Darwin Fatir, ‘Perdik Sulsel Kawal Difabel Korban Trafficking’, <https://makassar.antaraneews.com/berita/105990/perdik-sulsel-kawal-difabel-korban-trafficking>, 21 December 2020

¹⁹⁶ See Article Pasal 1 number 10 of Law Number 31 of 2014 on the Amendment to Law Number 13 of 2006 on Witness and Victim Protection

¹⁹⁷ A deliberate attempt to to protect and strengthen the rights of persons with disabilities

¹⁹⁸ Hari Kurniawan, *Op.cit.*, hlm., 22.

On the other hand, there is no sense of justice in the legal enforcement against the perpetrators where the difables are the victims.¹⁹⁹

It can be seen in a sexual violence case in Boyolali. The victim, a difable with mental retardation, was raped by her grandfather.²⁰⁰ During trial, she came closer to him because she lives with him. She has mental disorder, so that she cannot think as an adult. However, the judges thought there was no trauma based on the behavior. In the end, he was acquitted as there was no trauma experienced by the victim.

The argumentation above constitutes *ratio legis* that the legal instrument on the fulfilment, legal protection, and remedy for the difables is urgent. It must be subject to the principles and needs of the difables. Therefore, the regulation should elaborate the model of procedure and service rights.

For example, the model of procedure rights emphasizes the active role in settling criminal cases. It recognizes the difables as ‘individuals’ who should be involved in every legal proceedings, having rights to legal protection. This recognition asserts the equality before the law that they have the same opportunity, so that they have rights to psychic, physical, and material recovery. Thus, there should be clear regulation for the sake of legal certainty.

The regulation should also implement the model of service rights, where the standards of the fulfilment of the difables’ rights become reference for the parties concerned, especially the law enforcers. Moreover, the mechanisms should be friendly to the difables, containing adaptation, and be able to be the guidelines for anyone to fulfil the rights by paying attention to the variety of difability. The parties involved in the justice process for the difables should also be proactive, dedicated, interested, skilled, and experienced in promoting the fulfilment of the victims’ rights and their remedy. Thus, the difables, as the victims, do not feel alone in suffering the consequence of crimes and discriminated or stigmatized. This special provision is derived from the principle of special treatment and accesibility for persons with disabilities, so that justice is served.

¹⁹⁹ *Ibid.*

²⁰⁰ Anggun Malinda, Ekha Nurfitriana, dan M. Yasin Al Arif, “Bantuan Hukum terhadap Kaum Difabel Korban Tindak Pidana Upaya mewujudkan Acces to Justice”, *Jurnal Hukum ius quia iustum*, No. 3 Vol. 21 July 2014, p. 475

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- Government Regulation Number 7 of 2018 on the Compensation, Restitution, Aid for Witness and Victims
- Government Regulation Number 42 of 2013 on the Requirements and Procedures for Legal Aid and Distribution of Legal Aid Funds
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- Regulation of the Governor of Central Java Number 11 of 2017 on the Implementing Regulation of Central Java Province Regulation Number 11 of 2014 on the Rights of Persons with Disabilities
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Convention on the Rights of Persons with Disabilities

Academic Paper of the Law on Persons with Disabilities

LAMPIRAN

RANCANGAN PERATURAN MAHKAMAH AGUNG
REPUBLIK INDONESIA
NOMORTAHUN TENTANG
PEDOMAN MENGADILI PERKARA PENYANDANG DISABILITAS
BERHADAPAN DENGAN HUKUM
DENGAN RAHMAT TUHAN YANG MAHA ESA

Menimbang :

- a) bahwa setiap warga negara setara di hadapan hukum dan berhak atas proses peradilan yang adil, aksesibel, dan akomodatif;
- b) bahwa Indonesia telah meratifikasi Konvensi Hak-Hak Penyandang Disabilitas (*United Nation Convention on the Rights of Persons with Disabilities/UNCRPD*) dengan Undang- Undang Nomor 19 Tahun 2011 tentang Pengesahan *Convention on the Right of Persons with Disabilities* (Konvensi Mengenai Hak-Hak Penyandang Disabilitas) yang menjamin pemenuhan hak-hak penyandang disabilitas tanpa diskriminasi;
- b) bahwa penyandang disabilitas di Indonesia masih mengalami hambatan, kesulitan, dan pembatasan hak dalam berhadapan dengan hukum;
- c) bahwa untuk menjamin pemenuhan hak penyandang disabilitas dalam pelayanan di pengadilan perlu dilakukan penyesuaian yang tepat dan layak;
- d) bahwa berdasarkan pertimbangan sebagaimana dimaksud dalam huruf a, huruf b, dan huruf c, perlu menetapkan Peraturan Mahkamah Agung tentang Pedoman Mengadili Perkara Penyandang Disabilitas Berhadapan dengan Hukum.

Mengingat :

1. Undang-Undang Nomor 14 Tahun 1985 tentang Mahkamah Agung (Lembaran Negara Republik Indonesia Tahun 1985 Nomor 73, Tambahan Lembaran Negara Republik Indonesia Nomor 3316) sebagaimana telah beberapa kali diubah, terakhir dengan Undang-Undang Nomor 3 Tahun 2009 tentang Perubahan Kedua atas Undang-Undang Nomor 14

- Tahun 1985 tentang Mahkamah Agung (Lembaran Negara Republik Indonesia Tahun 2009 Nomor 3, Tambahan Lembaran Negara Republik Indonesia Nomor 4958);
2. Undang-Undang Nomor 13 Tahun 2006 tentang Perlindungan Saksi dan Korban (Lembaran Negara Republik Indonesia Tahun 2006 Nomor 64, Tambahan Lembaran Negara Republik Indonesia Nomor 4635) sebagaimana telah diubah dengan Undang-Undang Nomor 31 Tahun 2014 tentang Perubahan atas Undang-Undang Nomor 13 Tahun 2006 tentang Perlindungan Saksi dan Korban (Lembaran Negara Republik Indonesia Tahun 2014 Nomor 293, Tambahan Lembaran Negara Republik Indonesia Nomor 5602);
 3. Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman (Lembaran Negara Republik Indonesia Tahun 2009 Nomor 157, Tambahan Lembaran Negara Republik Indonesia Nomor 5076);
 4. Undang-Undang Nomor 8 Tahun 2016 tentang Penyandang Disabilitas (Lembaran Negara Republik Indonesia Tahun 2016 Nomor 69, Tambahan Lembaran Negara Republik Indonesia Nomor 5871);
 5. Peraturan Pemerintah Nomor 39 Tahun 2020 tentang Akomodasi yang Layak untuk Penyandang Disabilitas dalam Proses Peradilan (Lembaran Negara Republik Indonesia Tahun 2020 Nomor 174, Tambahan Lembaran Negara Republik Indonesia Nomor 6538).

MEMUTUSKAN:

Menetapkan : PERATURAN MAHKAMAH AGUNG TENTANG PEDOMAN MENGADILI PERKARA PENYANDANG DISABILITAS BERHADAPAN DENGAN HUKUM

BAB I
KETENTUAN UMUM

Pasal 1

Dalam Peraturan Mahkamah Agung ini yang dimaksud dengan:

1. Penyandang Disabilitas adalah setiap orang yang mengalami keterbatasan fisik, intelektual, mental, dan/atau sensorik dalam jangka waktu lama yang dalam berinteraksi dengan lingkungan dapat mengalami hambatan dan kesulitan untuk berpartisipasi secara penuh dan efektif dengan warga negara lainnya berdasarkan kesamaan hak;
2. Penyandang Disabilitas Berhadapan dengan Hukum adalah Penyandang Disabilitas sebagai terdakwa, korban, saksi, atau pihak;

3. Pihak adalah Penyandang Disabilitas yang bersengketa di lingkungan Peradilan Umum, Peradilan Agama, Peradilan Tata Usaha Negara dan peradilan uji materi di Mahkamah Agung.
4. Aksesibilitas adalah kemudahan yang disediakan untuk Penyandang Disabilitas guna mewujudkan kesamaan kesempatan.
5. Akomodasi yang Layak adalah modifikasi dan penyesuaian yang tepat dan diperlukan untuk menjamin penikmatan atau pelaksanaan semua hak asasi manusia dan kebebasan fundamental untuk Penyandang Disabilitas berdasarkan kesetaraan.
6. Penilaian Personal adalah upaya untuk menilai ragam, tingkat, hambatan dan kebutuhan Penyandang Disabilitas, baik secara medis, psikis, psikososial, untuk menentukan Aksesibilitas dan Akomodasi yang Layak.
7. Penerjemah adalah orang yang memiliki kemampuan dan pengetahuan untuk memahami dan menggunakan bahasa yang digunakan oleh Penyandang Disabilitas.
8. Pendamping Penyandang Disabilitas yang selanjutnya disebut Pendamping Disabilitas adalah orang yang memiliki pengetahuan tentang jenis, tingkat dan hambatan disabilitas pada seseorang, serta mampu memberikan pendampingan terhadap Penyandang Disabilitas.
9. Diskriminasi terhadap Penyandang Disabilitas adalah segala pembedaan, pengucilan atau pembatasan yang dibuat atas dasar keterbatasan kondisi fisik, intelektual, mental, dan/atau sensorik yang mempunyai dampak atau tujuan untuk mengurangi atau meniadakan pengakuan, penikmatan, atau penggunaan hak asasi manusia dan kebebasan-kebebasan pokok di bidang hukum, politik, ekonomi, sosial, budaya, sipil atau bidang lainnya oleh Penyandang Disabilitas atas dasar kesetaraan nilai kemanusiaan.
10. Hakim adalah hakim pada Mahkamah Agung dan hakim pada badan peradilan yang berada di bawah Mahkamah Agung dalam lingkungan peradilan umum, lingkungan peradilan agama, lingkungan peradilan militer, lingkungan peradilan tata usaha negara dan hakim pada pengadilan khusus yang berada dalam lingkungan peradilan tersebut termasuk hakim ad hoc, yang memeriksa, mengadili dan memutus perkara Difabel Berhadapan dengan Hukum.

BAB II ASAS DAN TUJUAN

Pasal 2

Hakim mengadili perkara penyandang disabilitas berhadapan dengan hukum berdasarkan asas:

- a. penghormatan terhadap martabat manusia;
- b. otonomi individu;
- c. non diskriminasi;
- d. inklusif;
- e. keragaman manusia;
- f. aksesibilitas;
- f. akomodatif;
- g. persamaan di depan hukum;
- h. keadilan;
- i. kemanfaatan; dan
- j. kepastian hukum

Pasal 3

Pedoman mengadili perkara Penyandang Disabilitas Berhadapan dengan Hukum bertujuan agar hakim:

- a. memahami dan menerapkan asas sebagaimana dimaksud dalam Pasal 2 pada proses pemeriksaan, pembuktian, dan pembuatan putusan di persidangan;
- b. memahami hambatan, kesulitan, dan keterbatasan pada saat proses pemeriksaan, pembuktian, dan pembuatan putusan di persidangan;
- c. menjamin pemenuhan hak Penyandang Disabilitas Berhadapan dengan Hukum pada proses pemeriksaan, pembuktian, dan pembuatan putusan di persidangan;
- d. memastikan Aksesibilitas dan pemenuhan Akomodasi yang Layak kepada Penyandang Disabilitas Berhadapan dengan Hukum pada proses pemeriksaan, pembuktian, dan pembuatan putusan di persidangan.

BAB III PEMERIKSAAN PERKARA

Bagian I Umum

Pasal 4

Hakim dalam pemeriksaan perkara Penyandang Disabilitas:

- a. menjunjung tinggi persamaan derajat dan menunjukkan sikap memperlakukan Penyandang Disabilitas Berhadapan dengan Hukum sebagai individu yang bermartabat;
- b. menyampaikan hak kepada Penyandang Disabilitas Berhadapan dengan Hukum dan pihak terkait selama proses persidangan;
- c. membangun komunikasi yang baik dan efektif dengan

Penyandang Disabilitas Berhadapan dengan Hukum.

Pasal 5

- (1) Dalam rangka membangun komunikasi yang baik dan efektif sebagaimana dimaksud dalam pasal 5 huruf c, maka Hakim berdasarkan Penilaian Personal perlu melakukan penyesuaian dalam berinteraksi dengan Difabel Berhadapan dengan Hukum
- (2) Komunikasi yang baik dan efektif sebagaimana dimaksud dalam ayat (1) dapat diwujudkan dengan, namun tidak terbatas pada:
 - a. berbicara, bertanya, menatap mata secara langsung kepada penyandang disabilitas berhadapan dengan hukum;
 - b. berbicara dengan gerak bibir, ekspresi, dan bahasa tubuh yang jelas;
 - c. menyediakan kesempatan bagi Penyandang Disabilitas Berhadapan dengan Hukum untuk memberikan keterangan dalam berbagai bentuk media komunikasi, seperti: video, peragaan, permainan, gambar, maupun bentuk komunikasi lain yang dipandang perlu berdasarkan Penilaian Personal.

Pasal 6

Selama jalannya pemeriksaan persidangan, Hakim agar mencegah dan/atau menegur para pihak, penasihat hukum, penuntut umum dan/atau kuasa hukum yang bersikap atau membuat pernyataan yang merendahkan, menyalahkan, mengintimidasi dan/atau menggunakan pengalaman atau latar belakang keterbatasan Penyandang Disabilitas.

Bagian II

Pemeriksaan, Pembuktian, Dan Pembacaan Putusan

Pasal 7

- (1) Pada pemeriksaan perkara, hakim memeriksa Dokumen Penilaian Personal penyandang disabilitas;
- (2) Dokumen Penilaian Personal diperlukan pada proses pemeriksaan, pembuktian, dan pembuatan putusan di persidangan;
- (3) Dalam hal Dokumen Penilaian Personal belum ada pada saat proses persidangan pidana dan hakim memerlukan hal tersebut, maka dapat memerintahkan Jaksa Penuntut Umum untuk melakukan Penilaian Personal;
- (4) Dalam hal Dokumen Penilaian Personal belum ada pada saat proses persidangan perdata, maka penyediaan Penilaian Personal dibiayai oleh Negara.

Pasal 8

- (1) Pengadilan dalam penanganan perkara Penyandang Disabilitas Berhadapan dengan Hukum untuk pemenuhan Akomodasi yang Layak dan Aksesibilitas perlu menyediakan:
 - a. Pelayanan berupa Pendamping Disabilitas, Penerjemah, dan/atau petugas lain yang terkait;
 - b. Sarana dan prasarana yang terkait dengan kebutuhan Penyandang Disabilitas Berhadapan dengan Hukum.
- (2) Pelayanan serta sarana dan prasarana sebagaimana dimaksud dalam ayat (1) huruf a dan b disesuaikan kebutuhannya berdasarkan Penilaian Personal.

Pasal 9

Hakim dalam mengadili perkara Penyandang Disabilitas Berhadapan dengan Hukum:

- a. melakukan penafsiran peraturan perundang-undangan dan/atau hukum tidak tertulis yang dapat menjamin pemenuhan hak bagi penyandang disabilitas;
- b. menggali nilai-nilai hukum, kearifan lokal, dan keadilan yang hidup di masyarakat guna menjamin pemenuhan hak bagi Penyandang Disabilitas;
- c. mempertimbangkan penerapan konvensi internasional tentang Penyandang Disabilitas yang telah diratifikasi.

Bagian III

Pendamping, Penerjemah, dan/atau Petugas lain

Pasal 10

- (1) Pendamping Disabilitas, Penerjemah, dan/atau petugas lain yang terkait adalah yang dapat memahami kondisi Penyandang Disabilitas Berhadapan dengan Hukum selama proses persidangan terutama yang terkait dengan aspek komunikasi, kesehatan fisik, mental, intelektual, dan sensorik di persidangan.
- (2) Pendamping Disabilitas, Penerjemah, dan/atau petugas lain yang terkait sebagaimana dimaksud dalam ayat (1) harus memenuhi persyaratan:
 - a. Pendamping Disabilitas
 - 1) Memahami kebutuhan dan hambatan Penyandang Disabilitas yang didampingi
 - 2) Memfasilitasi Penyandang Disabilitas untuk mengikuti proses peradilan dengan baik
 - 3) Mendapatkan persetujuan dari Penyandang Disabilitas atau keluarganya

- 4) Memiliki kemampuan bergaul dan berinteraksi secara baik dengan Penyandang Disabilitas yang didampingi
- b. Penerjemah harus pandai bergaul, berinteraksi, dan berkomunikasi secara baik dan efektif dengan Penyandang Disabilitas serta mendapatkan persetujuan dari Penyandang Disabilitas atau keluarganya
- c. Petugas lain yang terkait harus memenuhi persyaratan sesuai dengan ketentuan peraturan perundang-undangan.

Bagian IV

Durasi dan Bentuk Pemeriksaan, Pembuktian dan Pembacaan putusan

Pasal 11

- (1) Durasi pemeriksaan, pembuktian, dan pembacaan putusan hakim, memperhatikan kondisi fisik dan psikis Penyandang Disabilitas;
- (2) Hakim dapat menyesuaikan durasi pemeriksaan, pembuktian dan pembacaan putusan Penyandang Disabilitas berdasarkan Penilaian Personal;
- (3) Penyesuaian durasi pemeriksaan dan pembuktian diberikan dalam hal Penyandang Disabilitas tidak dapat melanjutkan keterangan dengan baik dan jelas;
- (4) Penyesuaian durasi pemeriksaan dan pembuktian dalam bentuk penghentian sementara proses pemeriksaan untuk waktu tertentu;
- (5) Hakim dengan memperhatikan kondisi fisik dan mental dapat menghentikan secara tetap proses pemeriksaan Penyandang Disabilitas.

Pasal 12

- (1) Hakim menentukan bentuk pemeriksaan, pembuktian, dan pembacaan putusan dengan memperhatikan kondisi fisik dan psikis Penyandang Disabilitas;
- (2) Hakim atas inisiatif sendiri dan/atau permohonan para pihak, penuntut umum, penasihat hukum dan/atau korban dapat memerintahkan Penyandang Disabilitas Berhadapan dengan Hukum untuk didengar keterangannya dalam bentuk komunikasi audio visual.

- (3) Hakim atas inisiatif sendiri dan/atau permohonan para pihak, penuntut umum, penasihat hukum dan/atau korban dapat mempertimbangkan untuk memisahkan pemberian keterangan oleh Penyandang Disabilitas di tempat yang berbeda dengan terdakwa dan para pihak.

Pasal 13

Prosedur pemeriksaan terpisah sebagaimana dimaksud dalam Pasal 12 dilakukan dengan mempertimbangkan:

- a. situasi konfrontasi antara Penyandang Disabilitas dengan pihak-pihak lain yang berinteraksi dalam proses pemeriksaan, pembuktian pada saat didengar keterangannya maupun dalam proses pembacaan putusan di persidangan;
- b. permohonan dari Penyandang Disabilitas atau Pendamping Disabilitas yang berdasarkan kepada Penilaian Personal yang dilakukan oleh dokter, psikolog dan/atau lembaga lain yang terkait sesuai dengan peraturan perundang-undangan; atau
- c. kendala mobilitas Penyandang Disabilitas yang tidak memungkinkan hadir di sidang pengadilan.

Pasal 14

Kebutuhan Pemulihan

- (1) Dalam hal pemulihan korban atau pihak yang dirugikan, hakim agar:
 - a. konsisten dengan prinsip dan standar hak asasi manusia;
 - b. bebas dari pandangan diskriminatif terhadap Penyandang Disabilitas; dan
 - c. mempertimbangkan situasi dan kepentingan korban dari kerugian yang tidak proporsional akibat ketidaksetaraan perlakuan terhadap Penyandang Disabilitas.
- (2) Hakim agar menanyakan kepada korban Penyandang Disabilitas atau Pendamping Disabilitas terkait kerugian, dampak kasus, dan kebutuhan untuk pemulihan.
- (3) Hakim agar memberitahukan kepada korban Penyandang Disabilitas atau Pendamping Disabilitas tentang haknya untuk melakukan penggabungan perkara sesuai dengan Pasal 98 dalam Kitab Undang-Undang Hukum Acara Pidana dan/atau gugatan biasa atau permohonan restitusi sebagaimana diatur di dalam ketentuan peraturan perundang-undangan.

BAB V

KETENTUAN PENUTUP

Pasal 16

Peraturan Mahkamah Agung ini mulai berlaku pada tanggal diundangkan.

Agar setiap orang mengetahuinya, memerintahkan pengundangan Peraturan Mahkamah Agung ini dengan penempatannya dalam Berita Negara Republik Indonesia.

Ditetapkan di Jakarta pada tanggal

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KETUA MAHKAMAH AGUNG
REPUBLIK INDONESIA,

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