

## PAPER NAME

**2021 Juridicial Review of Rights 4103-13  
876-1-PB.pdf**

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## WORD COUNT

**6957 Words**

## CHARACTER COUNT

**38815 Characters**

## PAGE COUNT

**12 Pages**

## FILE SIZE

**818.3KB**

## SUBMISSION DATE

**May 1, 2023 3:22 PM GMT+7**

## REPORT DATE

**May 1, 2023 3:23 PM GMT+7**

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## Juridical Review on the Rights of People with Mental Disabilities: The Procurement of Civil Servants

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How to cite : Risang Pujiyanto, Sonny Taufan. "Juridical Review on the Right of People with Mental Disabilities: The Procurement of Civil Servants " *Unifikasi:Jurnal Ilmu Hukum*. 8(2). 2021.218-229. DOI <https://doi.org/10.25134/unifikasi.v8i2.4103>  
Submitted : 10-05-2021 Revised : 08-10-2021 Accepted : 09-11-2021

**Abstract** : This study aims to examine and analyze the rights of people with mental disabilities in the procurement of Civil Servants. This normative law research employed a statute approach. The legal approach was conducted by examining the legal rules to the issues under study. In conclusion, different types of disabilities apply because Law Number 5 of 2014 is issued while Law Number 4 of 1997 concerning Persons with Disabilities is still applicable. This implies the rights of persons with mental disabilities to apply for Civil Servants have not been accommodated.

**Keywords:** Human Rights, Mental Disabilities, and Procurement of Civil Servants.

### Tinjauan Yuridis Hak Penyandang Disabilitas Mental dalam Pengadaan Pegawai Negeri Sipil

**Abstrak** : Penelitian ini bertujuan mengkaji dan menganalisis hak penyandang disabilitas mental dalam pengadaan Pegawai Negeri Sipil. Penelitian ini merupakan penelitian hukum normatif dengan menggunakan pendekatan undang-undang (*statute approach*). Metode Pendekatan undang-undang dilakukan dengan menelaah peraturan perundang-undangan yang bersangkutan paut dengan isu hukum yang diteliti. Hasil penelitian menemukan bahwa ragam disabilitas dalam Undang-Undang Nomor 5 Tahun 2014 tentang Aparatur Sipil Negara meliputi tuna daksa, tuna rungu dan tuna netra, yang berbeda dengan ragam disabilitas yang diatur dalam Undang-Undang Nomor 8 Tahun 2016. Simpulan bahwa perbedaan ragam disabilitas disebabkan Undang Undang Nomor 5 Tahun 2014 terbit pada saat Undang-Undang Nomor 4 Tahun 1997 Tentang Penyandang Cacat masih Berlaku, dan hal tersebut memberi implikasi hak penyandang disabilitas mental untuk melamar Pegawai Negeri Sipil belum terakomodir

**Kata Kunci:** Disabilitas Mental, Hak Asasi Manusia, dan Pengadaan PNS.

## INTRODUCTION

The Universal Declaration of Human Rights (UDHR) is a basic rule of Human Rights (HAM). It sets as a reference for every country to achieve progress in respecting human rights. Further elaboration of basic human rights provisions stated in the UDHR is regulated through several Covenants, such as the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic Social and Culture Rights (ICESCR). Indonesia as a member of the United Nations has ratified the ICCPR by Law no. 12 of 2005, and ICESCR by Law no. 11 of 2005. This is an affirmation that Indonesia highly respects human rights, even though the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) already has important provisions on human rights before the issuance of the UDHR. Article 1 of the UDHR states all human beings are born free and equal in dignity and rights. Thus, all human beings, including persons with disabilities, should have equality in dignity and rights. In fact, prior to the Declaration on Persons with Mental Disabilities and the Convention on the Rights of Persons with Disabilities (CRPD), persons with disabilities have not been considered as declaration subjects of Human Rights. In addition, disability

arrangements mentioned in the UDHR, ICCPR, and ICECS only relate to social security and health policies preventive.<sup>1</sup>

Indonesia has ratified the CRPD through Law no. 19 of 2011, to respect, protect, fulfill, and promote the rights of persons with disabilities. The formal implication of the ratification of the CRPD, ICCPR, and ICECSR is Indonesia must take various efforts to realize human rights provisions stated in the convention. It includes adjusting the content of laws and regulations. One example of adjustment done by Indonesia is issuing Law Number 8 of 2016 concerning Persons with Disabilities (Law on Persons with Disabilities). This is made after instrument ratification on international human rights.<sup>2</sup> An important provision of the Law on persons with disabilities related to their rights to work, stated in Article 53 paragraph 1 which requires the government, regional governments, state-owned enterprises, and regions to employ at least 2% of them out of the total number of employees. This is in line with the CRPD provisions stating that the government is obliged to employ persons with disabilities to protect and promote the right fulfillment to work.<sup>3</sup>

In 2017, the government opened formations to occupy vacant positions in 62 Ministries/Institutions. Of that number, 16 Ministries/Institutions did not open formations for persons with disabilities.<sup>4</sup> In 2018, 11 Ministries/Institutions did not open such formations. In 2019, five Ministries/Institutions did not open the formations as well.<sup>5</sup> The Ministries/Institutions that opened such formations in 2017, 2018, and 2019 stated different criteria. However, most of the criteria emphasized more physically disabled people. For instance, hand or foot disabilities, either monoplegia or paraplegia. Apart from that, several Ministries/Institutions also add some criteria such as sensory disability for someone to apply as a Civil Servant (PNS).<sup>6</sup> The Ministry of Environment and Forestry is explicitly providing opportunities for people with mental disabilities to apply for the 2018 civil servant. In 2019, it was limited to physically disabled applicants.<sup>7</sup> People with mental

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<sup>1</sup>Fajri Nursyamsi, dkk, *Kerangka Hukum Disabilitas di Indonesia :Menuju Indonesia Ramah Disabilitas*, Jakarta : Pusat Studi Hukum dan Kebijakan Indonesia, 2015, p.15.

<sup>2</sup>The general explanation on the Law of Persons with Disabilities is as follows "...Therefore, the Government must realize the rights in the convention by adjusting the laws and regulations. This includes ensuring the fulfillment of the rights of Persons with Disabilities in all aspects of life, such as education, health, employment, politics and government, culture and tourism, and the use of technology, information, and communication."

<sup>3</sup>Chapter 27 *Convention on the Rights of Persons with Disabilities*.

<sup>4</sup> Ministries/Agencies that did not provide disability formations in 2017 were: 1) Coordinating Ministry for Political, Legal, and Security Affairs, 2) Ministry of Environment and Forestry, 3) Ministry of Foreign Affairs, 4) Ministry of Tourism, 5) Ministry of Youth and Sports, 6 ) Ministry of Research, Technology, and Higher Education, 7) Supreme Court, 8) Attorney General's Office, 9) Judicial Commission, 10) Indonesian National Police, 11) Maritime Security Agency, 12) National Search and Rescue Agency, 13 ) Nuclear Energy Supervisory Agency, 14) National Nuclear Energy Agency, 15) National Crypto Agency, and 16) Financial Transaction Reports and Analyst Center.

<sup>5</sup> Ministries/Institutions that did not provide disability formations in 2018 were: 1) Coordinating Ministry for Political, Legal, and Security Affairs, 2) Ministry of Foreign Affairs, 3) Ministry of Youth and Sports, 4) Judicial Commission, 5) National Disaster Management Agency, 6 ) National Search and Rescue Agency), 7) State Intelligence Agency, 8) Nuclear Energy Supervisory Agency, 9) Secretariat General of the People's Consultative Assembly, 10) Center for Financial Transaction Reports and Analysts, and 11) National Resilience Council Ministries/Institutions that skipped disability formations in 2019: 1) Ministry of Youth and Sports, 2) Marine Security Agency, 3) National SAR Agency 4) State Intelligence Agency and 5) Secretariat General of the People's Consultative Assembly

<sup>6</sup>The Ministry of Communication and Informatics and the Geospatial Information Agency provided formations for the deaf in 2019, while the National Family Planning Population Board in 2018 opened formations for persons with sensory disabilities without specifying its type.

<sup>7</sup>Criteria for disability stated in the procurement announcement of civil servants of the Ministry of LHK No. G.1/Setjen/Ropeg/Peg.0/9/2018 is any person who has physical, mental, intellectual, or sensory limitations in the long term. They may encounter difficulties in interacting with the environment and community behavior to participate fully and effectively on equal rights. The criteria also include analyzing, typing, conveying ideas, and discussing.

disabilities have not been included as criteria for civil servant applicants. Some Ministries/Institutions even provide a limit. The applicants must not have a mental disability.<sup>8</sup>

Based on the Law, a person with a disability refers to a person who has physical, mental, intellectual, or sensory limitations in the long term. They may encounter difficulties in interacting with the environment and community behavior to participate fully and effectively on equal rights.<sup>9</sup> Persons with disabilities are not limited to those with physical and sensory disabilities but also include those with mental disabilities. People with mental disabilities should have equal rights to apply as civil servants. Therefore, it is important to further examine and analyze the issue. Referring to the aforementioned background, the researchers formulate the following research questions: (1) How to regulate the rights of persons with mental disabilities in the procurement of Civil Servants in line with Law Number 5 of 2014, the State Civil Apparatus? (2) What are their rights in the procurement of civil servants according to the human rights perspective?

## RESEARCH METHODS

This normative legal research also employed a statute approach. The legal approach is conducted by examining the legal rules related to the issues under study. This study involved primary legal materials such as the 1945 Constitution of the Republic of Indonesia, Law Number 4 of 1997 concerning Persons with Disabilities, Law Number 14 of 2005 concerning Teachers and Lecturers, Law Number 5 of 2014 concerning State Civil Apparatus, Law Number 8 of 2016 concerning Persons with Disabilities, and Government Regulation No. 11 of 2017 concerning Management of Civil Servants. In addition, this study also used secondary legal materials such as scholarly scientific works and any related or supported media. Finally, the data were analyzed prescriptively to make arguments for the issues under study.

## RESULTS AND DISCUSSION

### 1. Regulation of the Rights of Persons with Mental Disabilities in the Procurement of Civil Servants.

The PNS procurement is done to obtain quality employees to fill the needs of Administrative Positions, for Implementer Positions and/or Functional Positions in a Government Agency, Persons with disabilities must specifically comply with requirements needed. Prior to the enactment of Law Number 5 of 2014 on State Civil Apparatus (ASN Law), the regulation of civil servants cover in Law Number 8 of 1974 on Personnel Principles. This is as amended by Law Number 43 of 1999 on Amendments to Law Number 8 of 1974, Principal Personnel Law. Article 16 paragraph (2) of the Basic Employment Law stipulates that every citizen who meets the specified requirements has an equal opportunity to apply for a civil servant. This is in line with Article 61 of the ASN Law. It states every Indonesian citizen has the same opportunity to apply for a civil servant after fulfilling all requirements. After the issuance of the ASN Law in 2014, the procurement of civil servants has been carried out four times. It was in 2014, 2017, 2018, and 2019. The government temporarily suspended the procurement of civil servants in 2015 and 2016 to provide opportunities for government agencies. For example, calculating the needs of civil servants based on a job position and workload analysis.<sup>10</sup>

<sup>8</sup> The Secretariat General of the House of Representatives and the General Elections Supervisory Body in the procurement of civil servants in 2018, while in 2019, seven Ministries/Institutions did not accept people with mental disabilities explicitly, namely 1) Secretariat General of the House of Representatives, 2) State Civil Service Agency, 3) Election Supervisory Agency, 4) Geospatial Information Agency, 5) Ministry of Health, 6) Coordinating Ministry for Political, Legal and Security Affairs and 7) Ministry of Trade.

<sup>9</sup> Article 1 point 1 of the Law on Persons with Disabilities.

<sup>10</sup> Dewi Sendhikasari D, "Kebijakan Pengadaan CPNS Pasca-Moratorium", *Majalah Info Singkat Pemerintahan Dalam Negeri*, Vol. IX, No. 23, 2017, p 18.

Article 23<sup>25</sup> of Government Regulation Number 11 of 2017 concerning PNS Management (PP Management of PNS) regulates further requirements for PNS applicants. Previously, the requirements for civil servant applicants were regulated in Article 6 of Government Regulation Number 98 of 2000 concerning Procurement of Civil Servants. It was last amended by Government Regulation Number 78 of 2013. The Second Amendment was Government Regulation Number 98 of 2000 concerning Procurement of Civil Servants (PP Procurement of Civil Servants). PNS in 2014 used the PP on Procurement of Civil Servants as the basis for determining the general requirements for each applicant. Meanwhile, in 2017, 2018, and 2019, It uses PP on PNS Management. The general requirements for civil servant applicants based on Article 23 paragraph (1), the PP on PNS Management are as follows:

1. A minimum age of 18 (eighteen) years and a maximum of 35 (thirty five) years at the time of application;
2. Never be sentenced to imprisonment on a court decision (permanent legal force) for 2 (two) years or more imprisonment;
3. Never been dismissed with honor, not at his own request or dishonorably as a civil servant, soldier in the Indonesian National Armed Forces, a member of the Indonesian National Police, or dishonorably dismissed as a private employee;
4. Not a candidate for civil servants and are not civil servants, soldiers of the Indonesian National Armed Forces, or members of the Indonesian National Police;
5. Not a member or administrator of a political party or involved in political practice;
6. Meet the education qualification requirement
7. Physically and mentally healthy in line with the job application requirements
8. Willing to be placed in all areas of the Unitary State of the Republic of Indonesia or other countries determined by Government Agencies; and
9. Other requirements to the needs of the position determined by the PPK

An objective assessment requirement in the procurement of civil servants is a mandate for Basic Employment Law and the ASN Law. The requirements for being physically and mentally healthy in the PP on PNS Management are one of the general requirements for civil servant applicants. Then, this becomes a stumbling block for people with disabilities, especially mental disabilities. Accordingly, the regulatory requirement on physical health for them is adjusted to the job needs.<sup>11</sup> If they passed the selection process and are appointed as civil servants, their work will be adjusted to their disability. Unfortunately, spiritual health is not clearly stated in the ASN Law. This later complicates the required fulfillment objectively. The mental health requirement indicates if they are not mentally healthy according to the physician, they may be banned from job opportunities. Despite they might be able to do so with the relevant job requirements.<sup>12</sup> The absence of spiritual health criteria in the ASN Law, according to the author, cannot be separated from the various formulation of disabilities stated in Article 132<sup>34</sup> of the ASN Law and its explanations. Article 132 of the ASN Law states ASN Policies and Management are implemented by focusing on certain specificities of regions and citizens with special needs. The explanatory part of Article 132 of the ASN Law states citizens with special needs are individuals who have physical limitations (disabled), as follows:

1. Blind people are visually impaired individuals who are classified into total blind or low vision;
2. Deaf are individuals with permanent or non-permanent hearing impairments; and/or
3. Quadriplegics are individuals with movement disorders caused by congenital neuromuscular and bone structure disorders, illness or accidents, amputations, and polio.

<sup>11</sup>See Article 65 paragraph (1) of the ASN Law.

<sup>12</sup>Kathryn Ludlow, dkk, *Empowering People With Disabilities : A Comparative Study of Disability Legislation* , England : Thomson Reuters Foundation, 2015, p. 156.

The formulation in Article 132, the ASN Law is further elaborated on Merit System in ASN Law. The Merit System emphasizes qualifications, competencies, and performance suitabilities in a fair and reasonable manner without any distinction in political background, race, color, religion, origin, gender, marital status, age, or disability. The provisions of the Article and the so-called System are interrelated. This is because the law is considered as a unity. None of the provisions in the law is a stand-alone rule.<sup>13</sup> Historically, there are three important terms representing different points of view, such as a physical or mental illness, *difable*, and people with disabilities, each of which has the following differences<sup>14</sup>:

1. The term physical or mental illness is officially used in the Law, Persons with Disabilities. This term emphasizes 'disability' or 'less', or 'abnormal' from a physical or spiritual aspect. Thus, the approach used is also in the medical paradigm. This term views disability as caused by physical disorder or disease. The assessment is more focused on the types of disabilities and their appropriate treatment.
2. The term 'difable' is an acronym for differently-abled, which means that disability may result in not being able to do something 'normally'. However, A difable person with a disability can still do it in different ways. For example, using walking aids for people with leg or foot disabilities and hearing aids for people with hearing impairments. The term difable emphasizes the social model to fight discrimination against persons with disabilities. This is because the term "persons with disabilities" a various forms causing discrimination. This includes economic discrimination, stereotyping, and social access narrowing.
3. The term persons with disabilities refers to the Law on Persons with Disabilities. This was issued several years after Indonesia ratified the CRPD. There are several reasons why this term is used: subjects with disabilities can be described clearly, do not contain negative elements, foster an element of empowerment, and contain respect for human dignity.

The ASN Law uses the term disabled citizen as a special regulation in the implementation of ASN Policy and Management. The use of the term relates to the applicable Law Number 4 of 1997 concerning Persons with Disabilities (Law on Persons with Disabilities) at the time the ASN Law was issued in 2014. At the time the Law on Persons with Disabilities is still applicable, references to the rights' protection of persons with disabilities were still lacking. They were unable to provide protection and respect for them as citizens. The Law also views persons with disabilities as an object who have physical and mental deficiencies or abnormalities, not as subjects. Thus, the government's approach is more of a charity base. For example, rehabilitation, providing social assistance, and maintaining social welfare levels.<sup>15</sup>

The types of disabilities stated in the ASN Law only cover physical disabilities (blindness) and sensory disabilities (blind and deaf). It is dissimilar from various disabilities mentioned in the Law on Persons with Disabilities, as follows<sup>16</sup>:

1. Persons with physical disabilities or movement function impairment, including amputation, paralyzed or stiff, paraplegic, cerebral palsy (CP), due to stroke, due to leprosy, and dwarfs.
2. Persons with intellectual disabilities or cognitive impairment due to below-average intelligence levels. This covers slow learning, mental disabilities, and down syndrome.
3. People with mental disabilities or thought, emotion, and behavioral impairment including psychosocial, such as schizophrenia, bipolar, depression, anxiety, and personality disorders; and

<sup>13</sup>Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta : Prenadamedia Group, 2011, p. 151.

<sup>14</sup>Arief Maftuhin, "Mengikat Makna Diskriminasi: Penyandang Cacat, Difabel, dan Penyandang Disabilitas", *Inklusi : Journal of Disability Studies*, Vol. 3, No.2, Juli-Desember 2016, p 146-150.

<sup>15</sup>Academic Paper of the Law on Persons with Disabilities

<sup>16</sup>Article 4 paragraph (1) of the Law on Persons with Disabilities and its Explanation

- 8 developmental disabilities that affect social interaction skills, including autism and hyperactivity.
4. Persons with sensory disabilities or the impairment of the five senses, including visual impairment, hearing disability, and/or speech disability.

Such differences determine disability criteria for civil servant applicants. It is not only based on formation suitability to the level/type of disability that the applicant has, it also refers to the limitations of disabilities variety stated in the ASN Law. In conclusion, the ASN Law limits to only include physical disabilities (blindness) and sensory disabilities (blind and deaf) and have not opened up opportunities for persons with mental disabilities. In fact, they should have equal treatment before the law and government. For instance, in applying for civil servants.

## 2. <sup>3</sup> The rights of persons with mental disabilities in the procurement of Civil Servants according to the <sup>20</sup> Human Rights perspective.

The right protection of persons with disabilities <sup>33</sup> can be seen from the instrument perspective of international and national human rights. The former covers <sup>65</sup> the Universal Declaration of Human Rights, ICCPR, ICECSR, Declaration on Persons with Mental Disabilities, <sup>20</sup> Convention on the Rights of the Child (CRC), and CRPD.<sup>17</sup> One of the important provisions, <sup>27</sup> the international human rights instruments for persons with disabilities, that has been ratified by the Indonesian government, is the CRPD. There are important things related to CRPD such as:

- 1) Recognizing disability as an evolving concept.
- 2) Recognizing disability discrimination against any person <sup>13</sup> is a violation of the inherent dignity and value of every person;
- 3) Recognizing the <sup>13</sup> diversity of persons with disabilities.
- 4) Recognizing that <sup>13</sup> the full participation of persons with disabilities will result in significant advances in the human, social and economic development of communities and the elimination of poverty.

Disability is a concept that develops continually with the development of science and social conditions of society. The term people with disabilities are no longer appropriate. It needs to be changed, as the variety of people with disabilities also develops, as human beings who have dignity, <sup>5</sup> persons with disabilities also have the right to be free from discrimination. Through non-discriminatory policies and treatment, persons with disabilities can gain wider access, such as economic access. <sup>74</sup> The ratification of the CRPD provisions by the Indonesian government requires that the <sup>2</sup> rights of persons with disabilities must be realized immediately. <sup>27</sup> The economic, social, and cultural rights, however, can be realized gradually adjusting to the availability of national resources.

National Human Rights Instruments <sup>9</sup> for persons with disabilities can be seen through the provisions in the 1945 Constitution of the Republic of Indonesia. The <sup>14</sup> human rights regulation in the 1945 Constitution of the Republic of Indonesia, prior to the amendment, were briefly formulated and had limited content. In Indonesia, the regulation of human rights has developed significantly through <sup>6</sup> the second amendment to the 1945 Constitution of the Republic of Indonesia, which contains 37 provisions and is classified into four groups, as follows 1) a group of provisions relating to civil rights, 2) a group of political, economic, social, and legal rights, and culture, 3) special rights groups and the right to development and 4) groups that regulate state responsibilities and human obligations.<sup>18</sup> The aforementioned human right is applied to all people who live and are in the

<sup>17</sup> Aprilia <sup>67</sup> Prawesti, " Hak Penyandang Disabilitas Dalam Perspektif HAM Internasional dan HAM Nasional " <sup>39</sup> *Jurnal Era Hukum*, Vol. 2, No. 1, Juni 2017 , p. 171-176.

<sup>18</sup> Jimly <sup>39</sup> Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara Jilid II*, Jakarta : Sekretariat Jenderal dan Kepaniteraan MKRI, 2006, p. 105 – 108.

territory of Indonesia and some are applicable only to Indonesian citizens.<sup>19</sup> Human rights provisions that only apply to Indonesian citizens is Article 28 D paragraph (3) of the 1945 Constitution of the Republic of Indonesia. It states "Every citizen has equal opportunities in government". By regulation, Article 28 D paragraph (3) has a close relationship with Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Particularly, the equality aspect in the government. In other words, This indicates they are equal in sitting or participating in the government.<sup>20</sup>

People with mental disabilities are human beings who have had equal human rights since birth, the right to equal treatment before the law and government. Human rights which are included in the scope of civil and political rights are non-absolute. The state may reduce its fulfillment in certain circumstances (derogable rights). In addition, they are also absolute which cannot be reduced by the state under any circumstances (non-derogable rights). The 1945 Constitution of the Republic of Indonesia in Article 28 I paragraph (1) stipulates the existence of human rights that cannot be reduced, or known as non-derogable rights as follows: "The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on the basis of retroactive law are human rights that are non-derogable under any circumstances."

Apart from Article 28 I paragraph (1) of the 1945 Constitution of the Republic of Indonesia, Human rights are in the category of derogable rights. Thus, the state may limit its implementation. The application of human rights restrictions is in the state's inherent authority. However, the restrictions must be based on the following criteria: 1) In absolute terms, human rights restrictions cannot be enforced on any basis, 2) in a restrictive manner by granting certain qualifications to rights, opening the possibility of their exception efforts within the limits allowed by those qualifications, and 3) must meet the cumulative conditions of human rights restrictions.<sup>21</sup> In the 1945 Constitution of the Republic of Indonesia, the implementation limits of human rights are stipulated in Article 28 J paragraph (2) as follows: "In getting his rights and freedoms, everyone must comply with the restrictions established by law. This solely aims to guarantee the recognition and respect for the rights and freedoms of others. Furthermore, this also aims to fulfill fair demands echoes with morals, religious values, security and public orderliness in a democratic society."

Article 28 J paragraph (2) of the 1945 Constitution of the Republic of Indonesia contains 2 (two) aspects, first, a limitation must be stipulated by law. Second, the limitation is intended to guarantee the recognition and respect for the rights and freedoms of others, moral considerations, religious values, security, and public orderliness.<sup>22</sup> The provisions of Article 27 paragraph (1) and 28 D paragraph (3) of the 1945 Constitution of the Republic of Indonesia are the equality basis for persons with disabilities, such as persons with mental disabilities. This provision requires equal treatment for every citizen in the government, including persons with mental disabilities. This provision does not limit the participant in the government. For instance, in applying for civil servants. The most important thing is they must be an Indonesian citizen.<sup>23</sup> Human rights regulation in the 1945 Constitution of the Republic of Indonesia is not only to affirm human rights as fundamental rights, but also affirms human rights as the supreme constitutional right, the highest constitutional

<sup>19</sup> *Ibid.*, 109.

<sup>20</sup> Bagir Manan, *Hukum Kewarganegaraan Indonesia Dalam UU No. 18 Tahun 2016*, Yogyakarta : FH UII Press, 2019, p.43.

<sup>21</sup> Titon Slamet Kurnia, *Interpretasi Hak-Hak Asasi Manusia Oleh Mahkamah Konstitusi Republik Indonesia*, Bandung : Mandar Maju, 2015, p. 131-132.

<sup>22</sup> Bagir Manan, *opcit.*, p. 43-44.

<sup>23</sup> The phrase "citizen" is different from the phrase "everyone" in the regulation of chapter XA of the 1945 Constitution of the Republic of Indonesia. This shows human rights provisions apply to both citizens and foreigners, residents and non-residents.



right.<sup>24</sup> Thus, legal provisions that violate the constitutional rights of citizens, can be taken to the Constitutional Court as a matter of judicial review. The right to equal treatment before the law and the government is one of the human rights (civil rights) guaranteed by the 1945 NRI Constitution. In any case or however, should not be reduced by the state.<sup>25</sup>

Nevertheless, the Constitutional Court through its decision No. 15/PUU-V/2007 stated there is a right limitation to get equal opportunities in government, as follows: "... the right fulfillment to equal opportunities in government does not mean that the state cannot regulate and determine its conditions, as long as such conditions are objectively a necessity demanded by the position or activity of the government concerned and do not contain elements of discrimination. .. In this connection, the Court reaffirms that there are many kinds of government positions and activities. Thus, they have different needs and demands." Every citizen who meets the objective requirements, occupying a position in the government, must have equal rights and opportunities to occupy that position. This is the embodiment of the same position formulation in government as regulated in the 1945 Constitution of the Republic of Indonesia. Accordingly, in incasu case, it can be concluded that all citizens have the same rights and opportunities to apply for civil servants. However, they must meet the requirements determined objectively and the position needed. In addition, it must not have any elements of discrimination.

In applying for civil servant, one obliged requirement for persons with disabilities is they must be physically and mentally healthy which is proven by a medical certificate. From a human rights perspective, physical and mental health cannot become determining factors whether he can or can not be accepted in a position.<sup>26</sup> The assumption that disability is part of being "unhealthy often hinders, limits, and even eliminates their right to follow the recruitment and promotion process. It includes limiting access to employment in government agencies.<sup>27</sup> In general, society considers people with mental disabilities unfit to hold public positions including civil servants. This is because society thinks they are not capable of making policies affecting the community.<sup>28</sup> This is a negative attitude and prejudice against people with mental disabilities and becomes one of the obstacles to getting an equal right to work.<sup>29</sup> Disability Discrimination is an inherent violation of every person's dignity and value.<sup>30</sup> People with mental disabilities can still live normally and make the best decision. This is because mental disability is an episodic condition or is not permanent. Several world figures such as Winston Churchill, Isaac Newton, and Vincent van Gogh are examples of people with mental disabilities, bipolar who are successful in their professions. Their disability hinders their work.

Indeed, physical and mental health requirements are highly necessary. However, a person's health condition is not the only thing to interpret the phrase of physically and mentally healthy. The ability of persons with disabilities in a job must be seen through their work. They should not merely look at formal requirements. Implicitly, this can be seen by the Explanation of Article 8 and Article 45 of Law Number 14 of 2005, Teachers and Lecturers. Physical and mental health criteria refer to physical and mental health conditions that enable a person to carry out their duties properly. This is

<sup>24</sup> Bagir Manan dan Susi Dwi Harijanti, "Konstitusi dan Hak Asasi Manusia", *Jurnal Ilmu Hukum*, Vol. 3, No. 3, 2011, p. 465.

<sup>25</sup> Jimli Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia*, Jakarta : Konstitusi Press, 2005, p. 108.

<sup>26</sup> Fajri Nursyamsi, dkk, *Kerangka Hukum Disabilitas di Indonesia : Menuju Indonesia Ramah Disabilitas*, Jakarta : Pusat Studi Hukum dan Kebijakan Indonesia, 2015, p.48.

<sup>27</sup> Academic Paper of the Law on Persons with Disabilities

<sup>28</sup> Nadia Rifani Putri dan Tomy Michael, *Mengkaji Disabilitas Mental dalam Hukum Pemilu*, Jawa Timur : R.A.De.Rozarie, 2019, p.78.

<sup>29</sup> Meilanny Budiarti S dan Nurliana Cipta, "Pergeseran Paradigma Dalam Disabilitas", *Intermestic: Journal of International Studies*, Vol. I, No. 2, Mei 2017, p. 170.

<sup>30</sup> Number h of the CRPD as ratified through Law no. 19 of 2011.

not addressed to persons with disabilities.<sup>31</sup> The legislation of a country refers to a system that does not want or allow any conflict in it. Thus, if a general and specific conflict between laws and regulations appears, the specific regulation will annul general laws. This is known as *lex specialis derogat legi generali*. However, this condition applies only if they set the same materials.<sup>32</sup> To note, teachers and lecturers are one of the functional positions that can be occupied by civil servants. The ASN Law does not specifically regulate the requirements for spiritual health. Thus, such requirements for persons with mental disabilities should refer to the Law on Teachers and Lecturers. They can be declared spiritually eligible if they are able to do their work properly.

Respect, protection, and human rights fulfillment for persons with mental disabilities need to be supported by government policies. This is to implement basic norms as in the 1945 Constitution of the Republic of Indonesia.<sup>33</sup> One way that the government can take is to undergo legislative, administrative, judicial, and practical steps. These are necessary to fulfill the rights of persons with disabilities guaranteed by the constitution and laws and regulations.<sup>34</sup> In relation to the procurement of civil servants, the variety of persons with disabilities should refer to the Law on Persons with Disabilities. This should not be interpreted in a limited way based on the ASN Law. Philosophically, the Law on Persons with Disabilities is a mandate manifestation of the Pancasila and the Preamble to the 1945 Constitution, which clearly states that "Social Justice for All Indonesian People." Accordingly, every Indonesian citizen, including persons with disabilities, has the right to obtain the best social justice.<sup>35</sup> Justice is one of the most important goals of the law, apart from legal certainty, expediency, and orderliness. According to Pancasila, Social justice means human rights equality that allows individuals to live as whole human beings.<sup>36</sup> The existence of laws that protect vulnerable groups is one way to create social justice. Providing equal opportunities and rights for people with mental disabilities to apply for civil servants, the implementation of the ASN Law merit system, will be in accordance with the provisions of Article 27 paragraph (1) and Article 28 D paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Finally, this can realize social justice.

## CONCLUSION

In conclusion, the absence of spiritual healthy criteria in the ASN Law complicates people with mental disabilities in fulfilling the application requirement. This is inseparable from Article 132 provisions. It is stipulated that persons with disabilities are blind, deaf, and quadriplegic. The limitation variety of persons with disabilities to physical disabilities (blindness) and sensory disabilities (blind and deaf) is due to the issuance of ASN Law when the Law on Persons with Disabilities was still applicable. Such law places persons with disabilities as objects, not as subjects. The restriction is to limit their work opportunities in government agencies. From the instrument perspective of international human rights, the CRPD is an important provision that has been ratified by the Indonesian government for persons with disabilities. Meanwhile, according to the National Human Rights instrument, the equality basis for persons with disabilities is stated in Article 27

<sup>31</sup> Article 8 of Law No. 14 of 2015 states physically and mentally healthy refer to a physical and mental health condition that allows teachers to do their work properly. These physical and mental health conditions are not addressed to persons with disabilities. Similar arrangements are also stated in the Explanation of Article 45 of Law no. 14 of 2015. It states that physical and mental health is a condition that allows lecturers to do their work properly. These physical and mental health conditions are not intended for persons with disabilities.

<sup>32</sup> Sudilno, Mertokusumo, *Mengenal Hukum : Suatu Pengantar*, Yogyakarta : Liberty, 2007, p. 94.

<sup>33</sup> Andi Muhammad Asrun. "Hak Asasi Manusia Dalam Kerangka Cita Negara Hukum". *Jurnal Cita Hukum*, Vol. 4, No. 1, Juni 2016, p.137.

<sup>34</sup> Arie Purnomosidi, "Konsep Perlindungan Hak Konstitusional Penyandang Disabilitas Di Indonesia". *Jurnal Refleksi Hukum*, Vol. 1, No. 2, April 2017, p.171.

<sup>35</sup> Academic Paper of the Law on Persons with Disabilities

<sup>36</sup> Yunie Herawati, "Konsep Keadilan Sosial Dalam Bingkai Sila Kelima Pancasila", *Jurnal Paradigma*, Vol. 18, No. 1, January 2014, p. 26.

31 paragraph (1) and Article 28 D paragraph (3) of the 1945 Constitution of the Republic of Indonesia. This is in the form of equality aspects to sit or participate in government. Even though this is a derogable right (human rights in the civil rights group), 10 the Constitutional Court through its decision No. 15/PUU-V/2007 stated that there are limits to getting equal opportunities in government, the citizen must meet the conditions determined objectively. This constitutes a job requirement and does not contain elements of discrimination. In addition, 32 the mental health requirements for persons with 2 mental disabilities are not specifically regulated in the ASN Law. This is different from the 2 requirements for persons with physical disabilities, which are adapted to the work needs. Mental health requirements for persons with mental disabilities should refer to the Law on Teachers and Lecturers. They can be declared spiritually eligible if they are able to do their work properly.

## SUGGESTION

The authors suggest the adjustment of legislation, the Law on State Civil Apparatus and the Law on Persons with Disabilities, should be applied. This is because various types of disabilities limit the rights of persons with mental disabilities, particularly in applying for civil servants. From this perspective, adjustments are needed. Thus, the Law on State Civil Apparatus is in line with the 1945 Constitution of the Republic of Indonesia, international human rights instruments, and the Law on Persons with Disabilities. Thus, people with mental disabilities can get equal rights as general citizens. 6

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