

ACHIEVING JUSTICE TO PEOPLE RIGHTS WITH DISABILITIES

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ABSTRACT

Human Rights have a logic of their own. This stems from the fact that they have originated in domestic constitutional documents before becoming part of the corpus of international law, that they regulate the relationship between the State and individuals under their Jurisdiction, rather than simply relationship between State. The question of who should be protected, who is human and how they should be protected has broadened over the centuries. Despite the UN Convention on the Rights of Persons with Disabilities is committed to promoting the human rights of disability rights, in contrast achieving justice for children and women with disabilities remains uncertain and has long been a major cause for concern. Achieving justice to disabled people can only prevent gender-based discrimination against them. This paper seeks to expand and strengthen the link between justice and disabled rights by focusing on barriers in preventing gender women and girls with disabilities into the analysis on what constitute that guide the legal response provide board principles arrangement for discrimination against them. The conceptual approach is used to study the views and doctrines to understand law and the disabled rights under theorized, rule of law principles and to determine how they work in practice we look beyond the law in the books to the law in action.

Keyword: Human Rights, People, With Disabilities, Achieving Justice

1. INTRODUCTION

Achieving justice as fairness has been noted in Rawls a Theory of Justice, the main ideas of the theory of justice I then present the main idea of justice as fairness, a theory of justice that generalizes and carries to a higher level of abstraction and traditional conception of the social contract. Justice is the first virtue of social institutions, as truth is of system of thought.¹ Socrates said *justice, if only we knew what it was*. General principles, such as ‘justice’ or ‘equality’, are often passionately invoked in the course of arguing about the issues of the day, but such terms usually go undefined and unexamined.²

This paper is the product of ideas by the lives of people with disabilities who have been locked away for decades to access justice as fairness. I was motivated by our political commitment to feminism and to disability rights. This paper focused and dedicated to ending torture, abuse, and discrimination of people, specifically for women with disabilities throughout the world to achieve justice. By introducing gender into the analysis of disability, makes an important contribution to understanding on barriers in preventing gender women and girls with disabilities and discrimination against them. We can begin to understand what makes law work and how it governs interactions between states and societies, as well as between disabled citizens themselves. Method of this paper based on normative juridical research, as McLeod wrote “overview of the legal basis of the constitution as the foundation of any real understanding”.³ This paper, therefore consider the legal frame work of International and National law. According to Soerjono Soekanto and Sri Mamudji, “The Object of Normative Law Research Study includes: (i) research on legal principles, (ii) research on systematic law, (iii) research on vertical and horizontal synchronization levels, (iv), and (v) legal history, the approaches taken are statute approach, conceptual approach, and case approach”.⁴ The structure of this paper reflects the fact that there are no simple solutions to the achievement of justice for disabled.⁵

Today, the world population is over 7 billion people. More than one billion people, or approximately 15 per cent of the world's population, live with some form of disability. 80 per cent live in developing countries as reported by the United Nations Organization in International day of persons with disabilities 3rd December. People with disabilities are at much higher risk of violence: the selective non treatment of disabled women, young children.⁶ Women with disabilities face significantly more

¹ Rawls John (2005), *A Theory of Justice: Original Edition*, Harvard University Press, University Press Cambridge, Massachusetts London, England

² Sowell Thomas (1991), *The Quest For Cosmic Justice*, New York: The Free Press

³ McLeod, Ian (1999), *Legal Method*, UK: Macmillan Press LTD, p 57

⁴ Soerjono Soekanto, Sri Mamuji. (2014), *Normative Law Research A Brief Review*, cited by Salim HS, Erlies Septiana Nurbani, *Application of Legal Theories in Theses and Dissertation Researches* (Jakarta: Raja Grafindo Persada), p 14

⁵ McLeod, Ian (1999), Op.Cit. p 57-58

⁶ Women and girls with disabilities, United nations, March 2017, accessed 14 May 2018 <http://www.un.org/development>

difficulties – in both public and private spheres – in attaining access to adequate housing, health, education, vocational training and employment, and are more likely to be institutionalized (Kothari, 2005).⁷ They also experience inequality in hiring, promotion rates and pay for equal work, access to training and retraining, credit and other productive resources, and rarely participate in economic decision making according to O'Reilly Employment barriers for women with disabilities, The Right to Decent Work of Persons with Disabilities, International Labour Organization.⁸

Respecting the rights of persons with disabilities, good intentions do not always make for good policy. That is particularly true for people with disabilities, who are often stripped of the most fundamental of human rights, the right to make choices about their own lives under the guise of 'protecting' them from the challenges of decision making and living dependently. "It happens to all persons with disabilities", in Croatia, for example, Human Rights Watch found that more than 70 percent of persons with intellectual or mental disabilities living in nine institutions without their consent or the opportunity to challenge the decision keep them there. Living out grim and regimented days, they cannot even take a shower in private and are deprived of the ability to make even basic decisions, including what to eat and what time to sleep. Many residents have been there for most of their lives.⁹ As one young woman in Uganda, Marija said, "Once you enter, you never leave".¹⁰ Finally, this subject to go beyond the general acknowledgment that the rights of people with disabilities face barriers in achieving justice. The objective is to provide analysis of how these barriers operate in different parts of our justice system, particularly barriers in preventing gender women and girls with disabilities based on discrimination. In essence, this paper as a conversation starter to expose some key ways in which our justice system has failed the rights of people with disabilities in the past, and to prompt further research into the ways in which right of disabled people's might be better accommodated in achieving justice

2. UNDERSTANDING DISABILITY MEANS

Despite the prevalence of disability in this society, disabled persons tend to be invisible. Reliable estimates indicate that most people's lives will be touched by disability, but the community avoids the topic in much the same way as it avoids encounters with individuals who have disabling conditions. Indeed, public reluctance to deal with disability as a potential for one's own life or those of loved ones is reflected in the lack of information about it. Human dignity, writes Nussbaum Martha, "is equal in all who are agents".¹¹ Everyone is said to deserve equal respect from societal laws and institutions. The conception of dignity at play here espouses a principle of human beings as an end, and not merely a means to another's. Macklin said, dignity plays an integral role in the establishment and justification of the capabilities approach.¹² Unequal rights, discrimination due to the capability of disabilities suffered social isolation. The lack of affordable support services provided by the government discovered discrimination is a fact of life for many people with disabilities. Although the government never really gave much thought to discrimination growing up. It was not until a person became disabled finally understood what discrimination meant. It meant not only being misunderstood, but being rudely mistreated. No one truly understands what discrimination is until they're on the receiving end of things.

Disability discrimination occurs when a person is treated less favourably, or not given the same opportunities, as others in a similar situation because of their disability. A disability is a condition or function judged to be significantly impaired relative to the usual standard of an individual of their group. The term is often used to refer to individual functioning, including physical impairment, sensory impairment, cognitive impairment, intellectual impairment, mental illness, and various types of chronic disease. This usage has been described by some disabled people as being associated with a medical model of disability as shown in the UN International day of persons with disabilities 3 December.¹³

The *Disability Discrimination* makes it unlawful to discriminate against a person, in many areas of public life, including: employment, education, getting or using services, renting or buying a house or unit, and accessing public places, because of their disability.¹⁴ There are two types of discrimination, *first* Direct disability discrimination happens when a person with a disability is treated less favourably than a person without disability in the same or similar circumstances. For example, as reported by Human Right Watch World Report 2017, people with disabilities are overrepresented in prisons and are more likely to be investigated, charged, remanded to custody, or serve longer prison terms than people without disabilities. In some cases, people with disabilities have been languishing in prison for years without having been convicted of a crime, simply because the government has not provided alternatives to incarceration.¹⁵

Second, Indirect disability discrimination can be less obvious. It can happen when employers or service providers put in place conditions, requirements or practices that appear to treat everyone the same but which actually disadvantage some people because of their disability. It will be discriminatory if a requirement or condition: applies to everyone, but because of their disability the person is not able to comply or, although able to comply, would suffer serious disadvantage by doing so, and the

⁷ Kothari, Miloon 2005, *Women and adequate housing, Study by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, E/CN.4/2005/53, para. 64, *ibid*

⁸ O'Reilly, Arthur (2003), *Employment barriers for women with disabilities, The Right to Decent Work of Persons with Disabilities*, Skills Working Paper No. 14, Geneva, International Labour Organization. <http://www.un.org/en/events/disabilitiesday/>

⁹ Human Rights Watch, *World Report 2012*, New York: Seven Stories Press, 2011, p.51

¹⁰ Human Rights Watch (2017), *World Report events of 2016*, USA: Human Right Watch, p 51

¹¹ Nussbaum Martha (2011), *Creating Capabilities: the Human Development Approach*, Cambridge: The Belknap Press Of Harvard university press, p 31 in Bickenbach Jerome E. et.al, *Disability and The Good Human Life*, New York: Cambridge University Press, p 271

¹² *Ibid*.

¹³ International Day of Persons With Disabilities, The United Nations, accessed 15 May 2018, <http://www.un.org/en/events/disabilitiesday/>

¹⁴ Australian Human Rights Commission, *Disability discrimination*, : www.humanrights.gov.au/employers

¹⁵ Human Rights Watch (2017) *Op.Cit.*, p 97

requirement or condition disadvantages a person because of their disability, and it is unreasonable in all of the circumstances.¹⁶ In other cases, if a person who is the best person for the job is not employed because of their disability it is called indirect discrimination. For both males and females, a work disability was associated with lower earnings and unemployment. Having a work disability had a stronger negative impact on women's labour force participation than it did on men's. Work disabled women in the labour force are much more likely to face unemployment than are other women. The unemployment rates for work disabled women between the ages of 25 and 34 is 23.5 percent, compared with a rate of 8.4 percent for other women in that age range.¹⁷

Both examples what is being said could be direct or indirect discrimination. In some circumstances treating someone differently because of their disability isn't against the law, This is known as an exception or exemption. However, it may be unlawful for airlines not to refer a passenger with a disability for he or she is entitled to get the right as others in a similar situation. As Nussbaum Martha said *about human dignity*, "everyone is said to deserve equal respect from societal laws and institutions". She argues for the centrality of notions of dignity and respect in articulating a conception of social justice. The conception of dignity at play here espouses a principle of human beings as an end, and not merely a means to another's end.¹⁸

By contrast, Kant's political philosophy says his interest in the limit of freedom; Justice is consequently more than a condition in which external freedom is guaranteed to all through a system of coercive laws; it is a condition of maximum liberty for all". Kant's view of the limits of freedom as one assuring as much freedom for each individual as can coexist under universal laws with a like liberty for all others and Article IV of the French Declaration of the Rights of Man of 1789; "Liberty consists in the power to do anything that does not injure others, thus the natural rights of every man have only such limits as assure the other member of society the enjoyment on the same rights. These limits can only be determined by law" (Quoted in Hobhouse 1964, 35).¹⁹ Human rights exist to protect discrimination disabled people from government or society abuse and neglect. Rights limit what a state or society can do and impose obligations for how a state must act. There are important roles for many to play. Civil society organizations, particularly groups that fight to uphold rights, need to protect civic space where it is threatened, build alliances across communities to show the common interest in human rights for people with disabilities.

3. Women and Girls With Disabilities

Among the social actors most mobilized in the context of global opportunity structure are women's movements worldwide. We emphasize that women's global mobilization is neither something wholly new and unprecedented nor unconnected to the variety of local and regional conflicts that are part of the process of reshaping the world system. Gender is very much a part of the structure of the social order globally. Gender is therefore also part of what is being remade in the current reconfiguration of power relations. Organizing women explicitly as women to make social change is what makes a 'women movement'. It is defined as such because of the constituency being organized. The movement, as an organization strategy, addresses its constituents as women, mothers, sisters, daughters. By using the language of gender, it constructs women as a distinctive interest group (Ferre, et.al, 2006).²⁰

In December 1986 the New York Times reported that one in eight adults between the ages of 16 and 64 indicated having a disabling condition that effected life activities (New York Times 1986). Of the 51% of the nation that is female, we can estimate that perhaps one-sixth have disabilities. How do being female and having a disability interact? How do women with disabilities view their experience and how do race, social class, social circumstances, and sexual orientation influence the lives of women with disabilities? Women found themselves significantly more disadvantaged than either non-disabled women or disabled men. These are a few of the questions that spawned this volume. Although the meaning of gender for either disabled women or men has been neglected by most rehabilitation and medical professionals, social scientists, and disability rights activist, the attentions of such groups has not focused equally on the two sexes. For many years the thrust of rehabilitation and government study and policy was on the war wounded or work injured disabled person, one who was, invariably, a male. Women with disabilities traditionally have been ignored not only by those concerned about disability but also by those examining women's experiences.²¹

Rawls said, since justice as fairness starts with the special case of the basic structure, its principles regulate this structure and do not apply directly to or regulate internally institutions and associations within society. Firms and labour unions, churches, universities, and the family are bound by constraints arising from the principle of justice, but these constraints arise indirectly from just background institutions within which associations and groups exist, and by which the conduct of their members is restricted. For example, Universities cannot discriminate in certain ways; (this constraint to help to establish fair equality of opportunity women equally with men) are equal citizens and have equal basic rights including the rights or property; they must respect the rights of their children (which the latter have as prospective citizens) and cannot, for instance deprive them of essential medical care. Moreover, to establish equality between men and women in sharing the work of society, in preserving its culture and in reproducing itself overtime. Rawls affirmed that Justice as fairness is a political, not a general, conception justice: it applies first to the basic structure and sees these other questions of local justice and also questions of global justice (what I call the law of peoples) as calling for separate consideration and their merits.²²

¹⁶ Australian Human Rights Commission, Op.Cit.

¹⁷ Fine Michelle, et.al. (1988), *Women with Disabilities, Essays In psychology, Culture, and Politics*, Philadelphia: Temple University Press, p 234

¹⁸ Bickenbach Jerome E. et.al, Op.Cit., p 271

¹⁹ Rosen Allen D, *Kant's Theory Of Justice*, New York: Cornell University Press, p 11

²⁰ Ferree Myra Marx, et.al. (2006), *Global Feminist, Transnational Women's Activism, Organizing and Human Rights*, New York University Press, New York and London.

²¹ Fine Michelle, et.al. (1988), *Women with Disabilities, Essays In psychology, Culture, and Politics*, Philadelphia: Temple University Press, p 1-11

²² Rawls John in Kelly Erin (Eds), (2001). *Justice As Fairness A Restatement*, Massachusetts: The Belknap Press of Harvard University Press, p 10-11

The public paradigm of disability is often attributable to medical disability and make disabled persons are regarded as ill people that are in need of help and do not fit for education. Conservative group even believe that disability is God's wish so men must accept it. Children with disabilities in Nepal face diverse and imposing barriers to obtain a basic education. Schools are physically inaccessible, teachers are inadequately trained, and some children are denied admission to neighborhood schools. Disabled women, girls are at the bottom of the ladder. They are generally low levels of education (five times as likely as non-disabled women to have fewer than 8 years of schooling) cannot be ascribe to disability factors, whether inherent in biology or in institutional discrimination. In fact, it is like that the women's pre-disability work and living arrangement contribute to disability. Unskilled manual labour, substandard living conditions, poor nutrition, and inadequate medical care all take a toll.²³

The relationship between disability, unemployment or under employment, and poverty for disabled women is far from clear, however. We know that regardless of age or education attainment, women with disabilities are employed far less than are either non-disabled women or disabled men (Bowe 1984; U.S. Census Bureau 1983). Bowe reports that even for disabled women between 16 and 34, only one-third have jobs, and only slightly more than one-third of disabled women with college educations work. Disabled women are also slightly less likely than disabled men to have college educations. College-educated men with disabilities and women without are considerably more successful than disabled women in obtaining employment. Gender and disability discrimination must interact somehow to exclude these women.²⁴

As reported by disability compendium organisation from the University of New Hampshire, see figure 1 and figure 2 shows in 2016 the media earnings of people with disabilities ages 16 over in the US was \$22,047, about two-thirds of the median earnings of people without disabilities, \$32,479. This disparity of over \$10,000 in median earnings between those with and without disabilities continues a trend, which has existed since at least 2008 has increased in magnitude since 2013.²⁵

²³ Ibid.

²⁴ Bowe F (1984), *Disabled women in America*, Washington DC: President's Committee on Employment of the Handicapped in Op.Cit. Fine 1988, p 11

²⁵ Disability Statistics Annual Report (2017) Institute of Disability/UCED, University of New Hampshire,
https://disabilitycompendium.org/sites/default/files/user-uploads/AnnualReport_2017

Figure 1. Median Earnings, People with and Without Disabilities Ages 16 and Over, 2008-2016

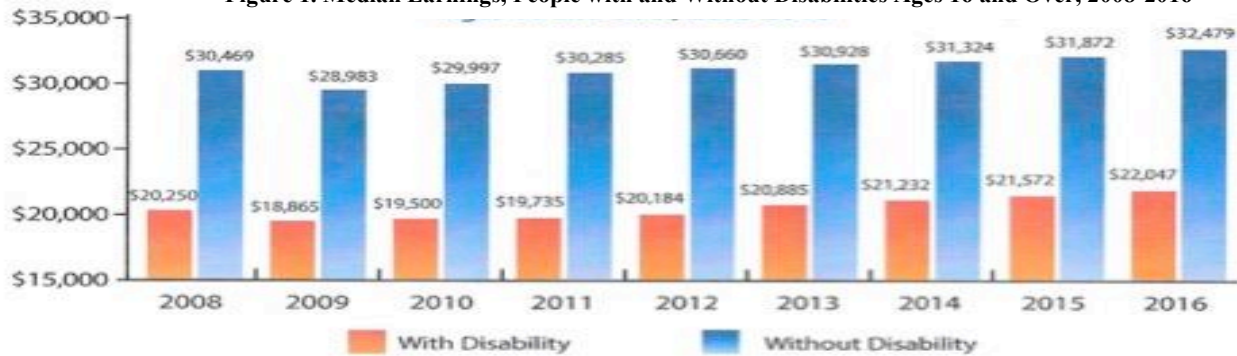
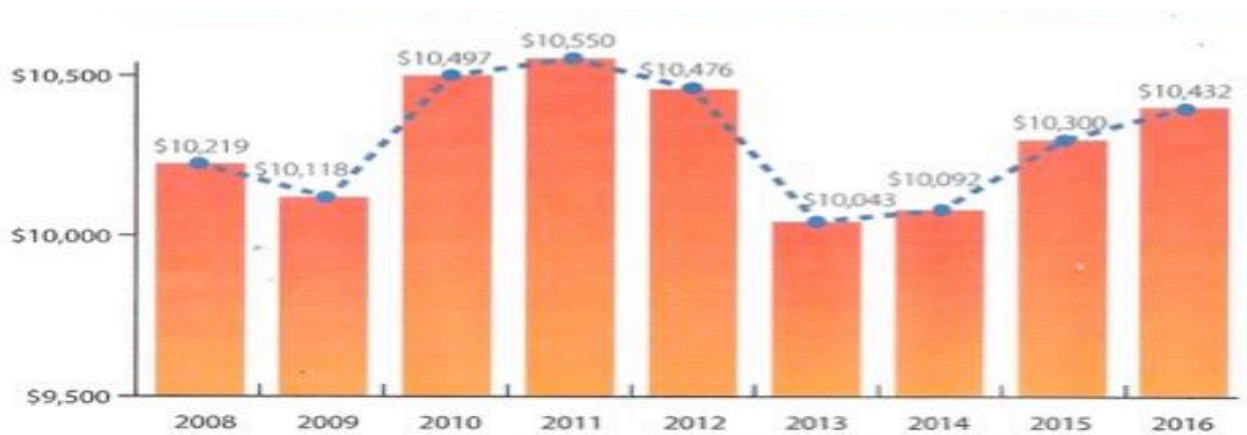


Figure 2. Median Earnings Gap Among People with and Without Disabilities 2008-2016



Source: Institute on Disability/UCED, University of New Hampshire, 2017 Disability Statistic Annual Report

In Australia, women and girls with disabilities are particularly at risk of sexual violence. Studies have shown that women with disabilities face much higher rates of sexual abuse than the general population of women. Some face coerced sterilization and force psychiatric intervention. Australia raises human rights concerns in other country, but does so very selectively. IT seldom raises human rights concerns publicly about countries it works closely with interdicting asylum seekers and refugees or with which it has significant trade relations.²⁶ Meanwhile in Uganda, women with disabilities, who are often stripped of the most fundamental of human rights-the right to make choices about their own lives, according to Rawls (2001) in his theory of justice philosophy, *he says that justice as fairness constraint to help to establish fair equality of opportunity women equally with men are equal citizens and have equal basic rights including the rights or property.* In Uganda, under the guise of “protecting” them from the challenges of decision making and living independently, it happens to all persons with disabilities, Jennifer, a women with a physical disability in northern Uganda, told Human Rights Watch, “it is as if we were not human”. In Croatia, more than 70 percent of persons with intellectual or mental disabilities living in nine institutions without their consent or the opportunity to challenge the decision to keep them there. Living out grim and regimented days, they cannot even take a shower in private and are deprived of the ability to make even basic decisions, including what to eat and what time to sleep. Losing one’s legal capacity can be devastating, Milica, a woman with disability in Croatia, was stripped of her legal capacity by a court decision and forced to live in an institution for approximately 20 years.²⁷ She even had to ask her sister for permission before marrying her husband.²⁸ As one young women Marija said, “Once you enter, you never leave”.

Many women and girls with disabilities lack of informed consent in related to their health treatment. Free and informed consent is one of the pillars of the right o heath and to legal capacity.²⁹ Legal and medical institutions utilize decision making procedures that define autonomy by reference to action or in action and perceptions by third parties about a person’s ability to act. These models do not always respond adequately to issues that concern internal of emotional quality of life, because they rely heavily on an exclusive view of autonomy that is limited by the constraints of the decision maker. In both legal and medical spheres, traditional rules about how and when people make decisions and choices about themselves, their bodies and their immediate social environment are in a state of flux. The ways in which issues such as informed consent, the right to refuse, demand, or withhold treatment, the right to die, and ‘least restrictive’ treatment or rehabilitation have been addressed in both settings in recent years illustrate that the rules of the game have changed.³⁰

²⁶ Human Rights Watch 2017, *World Report events 2016, Australia, USA*: Human Rights Watch, p 97

²⁷ Human Rights Watch 2010 “*Once You Enter, You Never Leave*”: *deinstitutionalization of Persons with Intellectual or Mental Disabilities in Croatia*, in Op.Cit., Human Rights (2012), p 53

²⁸ Ibid.

²⁹ Ibid.

³⁰ See Roth et.al. (1977) and Gaylin et.al. (1982), Hastings Center Report (1986) in Op.Cit. Fine 1988, p 270

In Argentina Human Right Watch found that women and girls with disabilities are infantilized in the reproductive health system, and stripped of their capacity to make decisions about available service. One woman told Human Rights Watch that some doctors thought her incapable of remembering to take her daily contraceptive pill because she is blind. The coerced sterilization of women and girls with disabilities is another issues of serious concern. In Nepal, women and girls with intellectual disabilities were sterilized without their free and informed consent.³¹ In these cases, the decision to perform the sterilization was made by the parents in consultation with a doctor. Dr. Lalitha Joshi gynaecologist and president of Down's Syndrome Association, Kathmandu, Nepal, said: "if parents and society really care for children with disabilities, there's no need to sterilize them. We can train them to look after themselves."³²

Good intentions to respect the rights of persons with disabilities do not always make for good policy. As these example show, restrictions on legal capacity are based on law, policy, accepted state practices, or arbitrary decision making by state officials. Government laws and policies restricting or removing legal capacity of persons with disabilities reflect and understanding of disability as a medical issue. Deprivation of legal capacity profoundly impacts people with disabilities, for example, when it comes to the right to health, political participation, access to justice, and freedom from arbitrary detention. Indeed in many countries, national laws recognize persons with disabilities as unequal citizens, sometimes allowing them fewer rights than children.³³ It is no coincidence that the CRPD calls on governments and communities not only to guarantee the rights of people with disabilities, but also to guarantee their human dignity.

4. Disability Rights under International and domestic law

The expansion of human rights and humanitarian norms has placed new demands on the United Nations and international actors to curb abuses in the face of publicity by media and global networks. (Karns, 2015).³⁴ On December 13, 2006, the United Nations General Assembly adopted the Convention on the Rights of persons with Disabilities (CRPD) and its Optional Protocol. The CRPD is the first international human rights treaty drafted specifically to protect the rights of people with disabilities under international law. Within three months of its adoption, 81 countries and the European Union signed the CRPD and 44 signed countries signed its Optional Protocol. On May 3, 2008, after more than 100 countries had ratified it, the CRPD entered into force and became the first human rights treaty of the 21st century.³⁵ CRPD establishes the paradigm of human rights of persons with disabilities, which provides a multifocal look at the conception on the right holder: the addition between the impairment a person can experience, including physical, sensory, intellectual and/or psychosocial levels; the interaction with various barriers; and the impact it produces as to restrictions on full and effective participation in society.³⁶

Barriers are a key factor in respect of which society as a whole must work intensively and permanently both in removing obstacles as creating necessary conditions for equal opportunities and even material equality or of results. In addition, the Convention expresses various changes in the approach to human rights in the twenty first century, which include the interdisciplinary nature in the drafting of the Treaty, determining a significant impact on its implementation, and monitoring at national and international levels.³⁷ From invisible Citizens to Agents of Change, a short history of the struggle for the recognition of the Rights of Person with Disabilities at the United Nations. The adoption of CRPD was a major achievement, but it took decades before disability was recognised as a human right issue at the United Nations. In retrospect, four phases can be distinguished. The first phase, dating from 1945 to 1970, marks a time when disabled persons were invisible in United Nations policy. This changed in the second phase, from 1970-1980, when disabled persons became recognised as subjects of rehabilitation. The third phases comprised the two decades from 1980 to 2000, and during this time persons with disabilities became objects of human rights. Only in the new millennium, during the Fourth phase, disabled persons became subjects of human rights.³⁸

Following CRPD established in 2008, many countries adopted the CRPD to its domestic law, such as Columbia ratifies the CRPD in May 2011. To comply with the standards established in the convention, it will need to adjust domestic legislation and policies to ensure that people with disabilities are not stripped of their legal capacity, resulting in restrictions on the right to vote, property rights, and the right to free and informed consent.³⁹ Although China ratifies the CRPD in 2008, persons with disabilities continue to face barriers and discrimination in areas including education and employment. The government also continues to detain activist in psychiatric facilities. Regulations drafted in 2013 on access to education for people with disabilities have still not been adopted. Official guidelines continue to allow universities to deny enrolment in certain subjects if the applicants have certain disabilities. In July, a Henan student, Song Yichen, made headline when he was rejected by Tianjin University of Traditional Chinese Medicine for his visual impairment. The Chinese government is inadequately protecting the rights of people with disabilities, despite its ratification of the CRPD, and its forthcoming review by the treaty's monitoring body. Although

³¹ Human Rights Watch, *Futures Stolen: Barriers to Education for Children with Disabilities in Nepal*, August 2011, <http://www.hrw.org/reports/2011/08/24/futures-stolen> Accessed 15 May 2018

³² Op.Cit., Human Rights Watch (2012), p 57

³³ Ibid.

³⁴ Karns P Margaret, et.al, (2015), *3rd edition International Organizations, The Politics and Processes of Global Governance*, Lynne Rienner Publishers, Boulder, London., p. 291

³⁵ Kanter, S. Arlene 2015, *The Development of Disability Rights Under International Law, From Charity to Human Rights*, Routledge, New York. P.4

³⁶ Fina Valentina Della, et.al. (2017), *The United Nations Convention on The Rights of Persons with Disabilities, A Commentary*, Switzerland:Springer International Publishing

³⁷ Ibid.

³⁸ Ibid

³⁹ Fina, Valentna Della, et.al.(2017), Op.Cit.

people with HIV/AIDS continued to face discrimination, in September an HIV positive female burn victim was denied treatment at treatment at three hospitals in Guangdong province due to stigma about her status.⁴⁰

In order to fulfill the State's obligation to disabled citizens, the Government of Republic of Indonesia established various statutory provisions for protection of disabled persons the *first phase* started on 1997 by Law Number 4/1997 for people with disabilities.⁴¹ One of the Government of Republic of Indonesia's commitments to protecting, respecting and fulfilling the rights of disabled persons is the ratification of Convention on the Rights of Persons with Disabilities on March 30, 2007 in New York. *Second phase* the convention was ratified by Law No. 19 of 2011, on ratification of Convention on the Rights of Persons with Disabilities. Under the convention, a person with disabilities is defined as person having physical, mental, intellectual or sensory unfitness for prolonged period causing him or her to experience troubles in his or her effort to fully and effectively participate in interaction with the environment and the community on the basis of equality. The Adoption of CRPD was a major achievement for Indonesia in recognition that discrimination on the basis of disability is a violation of every man's dignity and value, the state should empower disabled persons, improve the environment including infrastructure and mechanism, and promote the public's care and sensitivity in order to eliminate negative stigma towards equality of dignity.⁴² Following the first and second phase, the *third phase* Indonesia reaffirmation the regulation for people with disabilities by Law No. 8/2016.⁴³

Despite Indonesia reaffirmation regulation for disabled people, however the government urgently needs to amend the Mental Health Act and Rights of Persons with disabilities bill to ensure that they are in full compliance with the CRPD. Across Indonesia, there is a widespread belief that mental health conditions are the result of possession by evil spirits or the devil, having sinned, displayed immoral behavior, or lacking faith. As a result, families typically first *Pasung* the disabled persons, in practice the families believe that the relative with the psychosocial disability is possessed by evil spirits, or are worried that the person might hurt themselves or others, or might run away. It is also used in traditional or religious healing centers in Indonesia as a form of restraint, punishment, or "treatment". Furthermore, families consult faith or traditional healers in Indonesia who are versed in magic or dealing with spirits are usually referred to as *paranormal or dukun*. They and often only seek medical advice as a last resort.⁴⁴

The Indonesian Ministry of Health has recognized *pasung* as an "inhuman" and "discriminatory" treatment of persons with mental health conditions. The government has launched many programs and initiatives to promote mental health and put an end to *pasung*, including a program called "Indonesia Free from *Pasung* 2014." However, due to the lack of understanding and awareness around mental health and the dearth of community-based voluntary services, the practice of *Pasung* continues. Indonesian government's commitment to ensuring that people with a disability have the same rights to access, equality and participation in the community as other Indonesians, therefore despite Indonesia reaffirms Health Law Number 36 of 2014,⁴⁵ Indonesia also promulgated a new mental health law No. 18 of 2014 in an effort to bring its laws in line with the CRPD. Although some parties says the bill remains problematic as it fails to guarantee full legal capacity for persons with disabilities on an equal basis with others and this provision fails to meet the standard set by the CRPD. However, the new mental health Act, consists a number or basic social justice principles, directed to services provided by the government for people with disabilities to provide services to people in a way that best meets their needs, respects and rights.⁴⁶

5. Achieving justice for People with Disabilities Under Indonesian Law

Discrimination against women, her name is Dwi Aryani Indonesian citizen, she fight for justice after being forced off flight by Etihad. A case of discrimination case against a disabled woman began when Dwi Ariyani (37) intended to fly on Etihad Airways. She was scheduled to depart from Jakarta, Indonesia to Geneva in April 2016 to attend a United Nations forum. She was denied a seat in the flight. Dwi Aryani felt that Etihad Airways' reasons for forcing her off the flight were unreasonable. On that that, April 4, 2016, Dwi was about to depart from Soekarno-Hatta International Airport, Jakarta for Geneva to attend a training for disabled persons organized by the United Nations. To qualify for an entry in the United Nations international forum, she went through a selection process until she was selected to participate in trainer of trainer training program for disabled persons.⁴⁷

Upon arrival at the airport, Dwi passed some departure gates from baggage check, check-in, immigration door, until boarding on the plane. Minutes prior to the plane took off, a plane crew approached her and asked her to disembark the plane immediately due to aviation safety reasons. According to Dwi, its unacceptable the way Etihad treated her. Dwi argued, although she is a disabled woman, her presence in the aircraft would not jeopardize the aviation safety. Etihad's crew also argued that Dwi as a disabled women would not be able to evacuate herself in case of emergency during the flight. On the other hand, in accordance to aviation procedure the airline is require to prepare a crew member to accompany and assist disabilities passenger.

In regard to Dwi Aryani's incident, she argued there are no statutory provisions that forbid a disabled person to board an aircraft. She had experiences with other airlines such as Qatar and Emirate and she did not faced such problem. The incident happened on her second experiences travelled with Emirates. Her first trip with Emirates was last year when she travelled together with her husband and infant. During her first trip with Etihad, the airline welcomed Dwi and her family without any hesitating. She

⁴⁰ Ibid

⁴¹ Indonesia, Act Number 4/1997, *the Rights of Persons with Disabilities*, signed 28 February 1997, LNRI 1997.

⁴² Indonesia, Act Number 19/2011, *Ratification of Convention on the Rights of Persons with Disabilities*, signed 10 November, 2011, LNRI number 107, 2011.

⁴³ Indonesia, Act Number 8/2016, *the Rights of Persons with Disabilities*, signed 15 April 2016, LNRI number 69, 2016.

⁴⁴ Human Rights Watch (2016), *Living In Hell*, <http://www.hrw.org/reports/2016/03/> Accessed 15 may 2018

⁴⁵ Indonesia, Act Number 36/2014. *Health*, signed 17 October 2014, LNRI Number 5607

⁴⁶ Indonesia, Act Number 18/2014. *Menthal Health*, signed 17 August 2014, LNRI Number 5571

⁴⁷ Verdict case Number 846/Pdt.G/2016/PN JKT SEL, *Dwi Aryani vs. Etihad Airways*, South Jakarta District Court

admitted that currently the airline has apologized to her. However apologized was not the end result of the discrimination pressured. According to Dwi the knowledge that she would obtain in Geneva is irreplaceable. The Ministry of Transportation of Republic of Indonesia rebuked Etihad Airways and tried to mediate the parties but both parties have not reached an amicable settlement. Dwi applied the case to court at the end of 2016 by filing a suit with registration Number 846/Pdt.G/2016/PN JKT SEL. She filed a complaint against Etihad Airways as well as PT Jasa Angkasa Semesta and Directorate General of Air Transportation, Ministry of Transportation.

Dwi demanded that Etihad apologize publicly on five national media and pay material and immaterial compensations to her. Dwi felt that her being unable to go to Geneva was a great harm to her. In the hearings, Dwi called some expert witnesses from various agencies such as Indonesian Ombudsman, National Commission for Women, National Commission of Human Rights and psychologist. Dwi's intention by filing a lawsuit is to prevent the Airline from treating passengers with disabilities without torture and discrimination. In her civil suit filed with South Jakarta District Court and registered under Number 846/Pdt.G/2016/PN JKT SEL, Dwi as the Plaintiff accused Etihad Airways, PT Jasa Angkasa Semesta Tbk., and Directorate General of Air Transportation, Ministry of Transportation of a tort that harmed the Plaintiff. The Defendants were demanded to apologize to the Plaintiff and disabled persons in Indonesia by publishing the apology on five printed media and three electronic media.⁴⁸

The Defendant were also demanded to pay material and immaterial damages in total amount of Rp.687 million, said Dwi's attorney to Media Indonesia after a hearing on Monday, October 9, 2017. Service for disabled passengers is clearly regulated in Article 134 of Law No. 1 of 2009 on Flight. The first paragraph of article 34 provides that disabled persons, old persons, and minors below 12 years of age and/or ill persons shall be entitled to special treatment and facilities from commercial airliners. Paragraph 2 regulates minimal facilities to be provided by airliners to disabled persons, old persons, and children below 12 years of age and/or ill persons during the flight. The emphasis of the legal suit is to demand that airliners are not allow to discriminate people with disabilities in the future. The claim for compensation is secondary demand. Etihad Airways on its website states that it will conduct investigation. The head office of the airliner would send its representative to Indonesia to offer apology. However, Dwi did not see Etihad's goodwill as published on its website. Ombudsman already held meetings with Etihad and Ministry of Transportation for the purpose of clarification and found procedural irregularities. Dwi highly expected that the judges would render fair decision that will respect the rights of disabled persons. "If I win the suit, this will give lesson not only to foreign airliners but also domestic airliners to respect the rights of disabled persons".

South Jakarta District Court's Panel of Judges granted the lawsuit filed by Dwi Aryani, a disabled person, against Etihad Airways. Dwi filed the lawsuit since she was forced to disembark the flight bound to Geneva on account of her disability. The Presiding Judge Justice Ferry Agustina Budi Utama read the following verdict in the case Number 846/Pdt.G/2016/PN JKT SEL, on a hearing at South Jakarta District Court on December 4, 2017.⁴⁹

1. Granted Dwi Aryani's suit against Etihad Airways, which is found to have committed a tort. "The Defendant is found to have committed a tort".
2. The Defendants Etihad Airways, PT Jasa Angkasa Semesta dan Directorate General of Air Transportation, Ministry of Transportation are ordered to publish their apologies to Dwi Aryani on five printed media and three electronic media. "The Defendants are ordered to apologize to the plaintiff (Dwi Aryani).
3. The Defendants are ordered to pay material and immaterial compensations to Dwi Aryani in the amount of Rp.37 million and Rp 500 million, respectively. The Defendants are found to have violated Article 134 of Law Number 1 of 2009 on flight with regard to the service for disabled persons.

Achieving justice for Dwi as a disabled women through judiciary process, represented the success of the State to fulfill its obligations to its citizens, such obligations: to respect, to protect, to fulfill.⁵⁰

6. Conclusion

- 6.1. As noted above, this paper seeks to expand and strengthen the link between justice and disabled rights by focusing on barriers in preventing gender women and girls with disabilities into the analysis on what constitute that guide the legal response provide board principles arrangement for discrimination against them. Indeed, disability rights movement share common goals for their members; equality of opportunity, no discrimination and full participation in all aspects of society. However equal opportunity and full participation can exist only in a society that values the individual as part of the social collective. It is about human dignity that everyone deserves to have it. In practise, women movement for disabled rights such as Dwi Aryani's case is a legal reform in Indonesia judiciary process in achieving justice for disabled women. Considering the history of Human Rights in Indonesia are provided since 1945 in Articles 28A-28J of the 1945 Constitution of the Republic of Indonesia. Although the constitution does not explicitly refer to persons with disabilities, it lays the foundation of full citizen rights and provides the legal basis against discrimination for disabled people as *the Ultimate Citizens*. With the existence of constitutional right, all citizens are guaranteed by the constitution to have and enjoy their rights under the 1945 Constitution. If a citizen being treated *unfair equality of opportunity*, they may file a suit against the state to enforce their rights.⁵¹
- 6.2. For many years women and girls with disabilities traditionally have been ignored, the attentions of state and non-state institution has not focused equally on the two sexes due to the contradiction between the desire to maintain cultural

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Oliver De Schutter (2014), *International Human Rights Law, 2nd Edition*, United Kingdom: Cambridge, p. 281.

⁵¹ Indonesia, 1945 Constitution

diversity and the effort to promote equality and rights universally as the basic fundamental. This two sets of goals are in conflict; applying a universal framework obscures local particularities. Rather than understanding how the practise of those countries meshes with a complex set of kinship interventions, the human rights actors criticized the practice itself. Ironically, this feeds into a resistant ethnic nationalism that attributes its problems to human rights. That is one of the reasons *Pasung* remain continues in Indonesia. Despite the best efforts of the United Nations and advance in human rights law, however discrimination against disabled persons particularly women and girls across the globe is still perpetuated in the gap between legal principle and local practises. The tensions between global law and local justice create a fundamental dilemma for human rights practice and legislation.

- 6.3. This analyses suggests that human rights must become part of legal consciousness to fulfill their emancipatory potential. Moreover, human rights activist to be culturally legitimate, they must localizing transnational knowledge, fit into existing normative structures and ways of thinking for instance activist in Islamic countries are most effective when they use Islamic models and approaches. Presenting human rights ideas through culturally familiar images and sources in Islamic societies. Finally, State systemic and legislation change must occur in the criminal justice system as well civil, and this must framed in local terms and must be done in consultation with people with disabilities to be accepted and effective. "Law should focus on the Ultimate Consumer".

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