

Fairness in Disability Crimes Against the Law

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Article Info

Article history:

Accepted: 8 April 2025

Publish: 2 May 2025

Keywords:

Fairness theory;

Disability.

Abstract

The main idea of the Theory of Justice as fairness was developed by [1], a theory of justice that generalises and raises the traditional concept of social contract to a higher level of abstraction, Rawls' theory is similar to the classical contract because it also starts from a kind of natural state, justice as fairness states that the law must create an ideal society, namely a society that tries to increase happiness and minimise unhappiness (the greatest happiness of the greatest number of people). The purpose of this study is to offer the theory of justice as fairness to law enforcers in the legal process of disabilities who are in conflict with the law. This research uses normative research. The approach used in this research includes a conceptual approach. The results of this study can be concluded that the application of law enforcers regarding fairness Justice, namely the principle for the basic structure of society is recognised as the first principle, then the principle for individuals, then followed by the principle of national law. So finally the priority rules are used. to create a fairer and more balanced criminal case settlement agreement for disabilities dealing with the law.

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1. INTRODUCTION

The theory of justice as fairness, developed by [1] is a theory of justice that generalises and elevates the traditional concept of the social contract to a higher level of abstraction, the order of society is replaced by an initial situation involving certain procedural constraints on arguments designed to elicit initial agreement on principles of justice. [1] describes the theory of justice, each person finds himself in a certain position in a certain society, one form of justice as fairness is to view the various parties in the initial situation as rational and equally neutral, in composing the concept of justice as fairness, one of the main tasks is to determine which principle of justice will be chosen in the default position [1]. Meanwhile, [2] cites the opinion of [1] that justice is fairness which contains the principles that free and rational people who wish to develop their interests should obtain the same position at the time of starting and it is a fundamental requirement for those who enter the perhinpunan they want which says that justice is a political policy whose rules become the basis of state regulation and these rules are a measure of what is right. Based on [1] premise, [2] definition of justice above shows that realising something is fair is not as easy as imagined [2]. Fairness for certain groups is not necessarily fair for other groups. Based on the rationale of the theory of justice as fairness, the author sees the importance of justice as fairness applied by law enforcers in the legal process of disabilities dealing with the law.

That in the current legal regulations in Indonesia related to criminal offences by perpetrators with disabilities, there are no provisions governing the criminal liability of persons with disabilities. Thus, there is a disharmony of laws and regulations regarding this matter which results in the disparity of judges' decisions, even though it involves expert

testimony as a judge's consideration (Faiz Aqiel Maula Hidayat & Aji Lukman Ibrahim 2023: 326). The legal protection of persons with disabilities in the Unitary State of the Republic of Indonesia guarantees the survival of every citizen, including persons with disabilities who have the same legal status and human rights as Indonesian citizens and as an inseparable part of Indonesian citizens and society is a mandate and gift from God Almighty, to live and develop fairly and with dignity (Rahmahtillah, Arnita & Tri Widya Kurniasari 2025: 1). The author sees the importance of conducting this research so that the fairness of the application of justice as fairness by law enforcers in the legal process of disabilities dealing with the law is in accordance with the sense of justice in the community or can be accepted in the community with the basis of [1] thinking. In order to contribute to the improvement of the criminal justice system to be more inclusive, by increasing the understanding of legal officials, providing accessible facilities, and optimising legal protection for persons with disabilities to ensure better justice for them [3].

The purpose of this study is to determine whether the application of the theory of justice as fairness by law enforcement in the legal process of persons with disabilities who are in conflict with the law can be applied properly. Through analysis of various issues related to criminal offences by perpetrators with disabilities, the absence of provisions governing criminal liability of persons with disabilities, legal protection of persons with disabilities, and the uncertainty of the law of human rights of persons with disabilities, this research seeks to demonstrate the extent to which legal modifications applying the theory of justice as fairness can properly improve law enforcement. This research will examine best practices to improve integrity, and the application of justice as fairness, as well as the implementation and application of law enforcement by Judges in applying the theory of justice as fairness in criminal cases. The approach used is a normative approach. Thus, this research is expected to make a significant contribution to knowledge regarding the importance of the application of the theory of justice as fairness of law enforcers in the legal process of disabilities dealing with the law providing a certain conception of justice as the original equality relating to natural conditions in traditional theories in social contracts.

2. RESEARCH METHOD

The technique will be used in this research to describe the application of justice as fairness by law enforcement in the legal process of persons with disabilities who are in conflict with the law. Initially, a literature review will be conducted to conduct a study on justice as fairness. The researcher will be able to understand the application of fairness by law enforcement in this topic with the help of evaluation of scientific literature, which will also provide a theoretical foundation in the discussion.

By examining the Theory of Justice as fairness developed by [1] that has been applied in social society, this research will examine the application of justice as fairness by law enforcers in the legal process of disabilities dealing with the law. A deep understanding of the implementation by law enforcement officials, namely Judges, in applying the Theory of Justice as fairness can be obtained through scientific studies and various literature.

Finally, to gain practical insight into the problems encountered during the implementation of the research, researchers studied scientific articles, literature reviews, and opinions of legal experts on the Theory of Justice as fairness. Through the utilisation of scientific studies and literature review, this research will provide comprehensive knowledge on the need for the application of justice as fairness by law enforcers in the legal process of persons with disabilities who are in conflict with the law.

3. RESEARCH RESULTS AND DISCUSSION

Based on the results of the author's research, the Theory of Justice as fairness was developed by [1], a theory of justice that generalises and raises the traditional concept of social contract to a higher level of abstraction. So that the author looks for reputable books and journals as references that present a comprehensive and systematic discussion of the Theory of Justice as fairness can be applied by law enforcers in the legal process of disabilities dealing with the law, so as to solve problems in the discussion.

3.1. Application of fairness theory by law enforcers

The law enforcement system in Indonesia tends to adhere to the legal system of pure legal theory, pure legal theory is the science of law (jurisprudence), not legal politics, called pure legal theory because it only explains the law and seeks to clean the object of its explanation of everything that has nothing to do with the law (Hans Kelsen 2008: 1). Pure legal theory is a positive legal theory but not the positive law of a particular legal system but a general legal theory. As a theory, its main goal is knowledge of its subject to answer what the law ought to be or how it should be made (ought to be made) [4]. This pure legal theory thinking makes the basis of many law enforcers in Indonesia in carrying out their duties, so that decisions issued or actions taken are always related to the rule of law which tends to be far from a sense of justice, while the rule of law made by the government is very behind the times, many concrete circumstances that have not been made legal rules because the Government is slow to make regulatory rules. Meanwhile, legal positivism thinking is also widely embraced by law enforcers in Indonesia, currently the law in Indonesia is based on the philosophy of positivism which is an extension of the Cartesian-Newtonian teachings. Indeed, legal positivism is a school of thought that derives strong influence from the teachings of positivism (in general). That legal theory is a story of human order in its history, legal theory is nothing less than a human document that reflects traces of historical human struggles to organize themselves in each episode of the era with its own distinctive order of the spirit of the times, giving birth to a dialogue between generations of theory [5]. Therefore, the understanding of the teachings of legal positivism is a positive norm in the system of laws and regulations. In practice, the use of the positivism paradigm in modern law turns out to hinder the search for truth and justice in accordance with conscience. The impact of the development of positivism on Indonesia is the emergence of legal rigidity which is considered that the law in Indonesia is unable to create real justice. This indicates that the law is only a tool that is positioned as a horse pulling the load in accordance with the wishes of the employer, namely the ruler who has the authority and entrepreneurs as owners of capital. This kind of condition will bring bad consequences to the development of law in Indonesia today and in the future (Asep Bambang Hermanto: 7). Therefore, the author offers law enforcement in Indonesia to leave this pattern of thought, and think about how law enforcement is carried out with the approach of the theory of Justice as fairness in accordance with the thoughts of [1].

The need for law enforcers to apply theories related to the objectives of the profession or work carried out, because the purpose of the duties and work of law enforcers is none other than justice that can be felt by the community, not just one group but justice that can be felt from all groups. if law enforcers are influenced by pure legal theory thinking and legal positivism, it is rather difficult to provide a sense of justice to the community with various groups, but justice can only be felt only from certain groups such as the state or certain powers and oligarchs who can feel that justice. Based on this premise, the author feels the need for a legal theory that can be developed in the future to be applied in carrying out the duties of law enforcers in Indonesia, a theory that is in line with the objectives of the work of law enforcement officers, the author feels the importance of the theory of Justice as fairness in accordance with the thoughts of [1],

should be applied by law enforcers in Indonesia. The premise of the theory of Justice as fairness is to generalise and elevate the traditional concept of the social contract to a higher level of abstraction, the order of society is replaced by an initial situation involving certain procedural constraints on arguments designed to bring about an initial agreement on the principle of justice. Fairness theory views the parties in the initial situation as rational and equally neutral, this means that the parties are selfish, i.e. individuals with certain kinds of interests, say in wealth, merit, and dominance, but they are considered to be uninterested in their interests in each other. The concept of rationality should be interpreted as far as possible in the narrow sense of how to most effectively achieve goals, [1] modifies the concept to a certain extent, one must try to prevent ethically controversial elements from entering into it, the initial situation must be characterised by widely accepted needs, in composing the concept of justice as fairness one of the main tasks is to determine which principle of justice will be chosen in the default position, to do this we must describe this situation with a certain amount of detail and formulate a carefully expressed choice problem [1]. That justice is not negotiable and must be realised in society, without having to sacrifice the interests of other people, thus, justice is the goal of law [2]. Then according to [1] with a theory called Rawls theory or justice as fairness (justice as honesty) states that the law must create an ideal society, namely a society that tries to increase happiness and minimise unhappiness (the greatest happiness of the greatest number of people) [2].

According to [1], justice from law enforcement institutions is merely formal justice, the order of the main social institutions in the scheme of cooperation, regulating the granting of rights and obligations and determining the distribution of enjoyment according to the burden of social life. Institutions understand the system of public rules that determine positions and positions with rights and obligations, rules that classify permissible and prohibited forms of action. The actions of the Institution give rise to a public understanding with a system of rules that determines that the Institution is feared [1]. That what is questioned by [1] above is closely related to the current situation of law enforcement with Indonesian law enforcement institutions with an understanding of public law applied in the structure of society related to actions that are permitted and prohibited so as to create an understanding in the community that determines the institution is feared when dealing with law enforcement, based on these conditions, a mindset arises as most law enforcers who run the institution become opponents or enemies of society as a social structure. Such a situation by applying the mindset according to [1] must be abandoned by applying the theory of fairness justice by law enforcement. Rawls' theory is similar to the classical contract because it also starts from a kind of natural state, (called the original position) and from within a kind of contract the formulation of principles (a priori) based on which society must be organised, in order to realise justice [6]. Law enforcers in carrying out their duties and responsibilities in criminal law, if someone is detained by the authorities, then such must rely on an explicit statutory provision. And moreover it must be clear on what basis it is done. Finally, the person subject to detention has the right to a fair hearing before a judge within a reasonable period of time, a right that was established in the magna charta of 1215 and is currently enshrined in the positive law of the State [6]. If law enforcers carry out examination procedures and hand down decisions based on the positive law of the country then all positive laws provide higher punishment threats compared to the act is not comparable, but that is the rule of positive law, based on the premise that law enforcers in Indonesia experience the widest possible freedom, can be in accordance with taste, or feelings, and in accordance with the understanding of the law that may have been studied, However, all of that does not guarantee whether the decision

provides a sense of justice to the convicted perpetrator, victim or society in general, the anxiety is greatly influenced by the factor of applying what legal theory is adopted by law enforcers in seeing justice, it seems that there are no rules that bind law enforcers to apply which legal theory can be relevant so that justice can be felt by the community.

Retribution does not need to be done mechanically quantitatively as was the view in the past, but must be a qualitative harmony between the act and the punishment. Here a certain balance must be struck, which stems from the range (strekking) of punishable acts. Punishment as retribution is peculiar to humans, animals are not punished but only dressed, punishment presupposes freedom and responsibility and if one punishes someone, then one respects him as a free and responsible human being [6]. Laws and institutions can be equally present but unjust, treating similar cases in the same way is not a guarantee that encompasses substantive justice, it depends on the principles that fit the basic structural framework. Formal justice in terms of legal institutions is the aspect of the rule of law that supports and guarantees legitimate expectations, one type of injustice is the failure of judges and other authorities to comply with the appropriate rules or their interpretations in declaratory judgements, which is a theory of justice that emphasises the remedy for the harm caused by the criminal act committed.

3.2. Implementation of the Fairness Theory in the Application of Disability Legal Processes

In the Indonesian criminal law system, criminal liability is regulated in the Criminal Code (KUHP), a person can be held criminally liable if they commit an act that is contrary to the applicable legal provisions, to determine whether a person can be held criminally liable, there are several elements that must be fulfilled. First, the element of fault (*culpa*), where criminal liability can only be imposed if an act is committed intentionally (*dolus*) or as a result of culpable negligence. The Criminal Code distinguishes between criminal offences that are committed intentionally and those that occur due to negligence. In the old Criminal Code, there is no single article that specifically regulates criminal liability. However, there is a provision relating to excuse in Article 44 paragraph (1) of the Criminal Code, which explicitly states that a person whose soul is defective in growth and impaired due to illness may be exempted from criminal liability. This provision relates to the condition of persons with disabilities as perpetrators of criminal offences, although it does not specifically categorise the types of disabilities, especially physical disabilities. In previous regulations, the term used to describe disability was handicap, and individuals with such conditions were referred to as persons with disabilities. This can be seen in Article 1 paragraph (1) of Law No. 4/1997 on Persons with Disabilities, which defines persons with disabilities as individuals with physical and/or mental abnormalities that cause limitations or obstacles in carrying out daily activities (Sarah Diana Utami Dkk 2025:5).

In the beginning, disability was known as a handicap, and the person with the disability was a disabled person. As stated in Article 1 paragraph (1) of Law No. 4/1997 on Persons with Disabilities (hereinafter referred to as the Law on Persons with Disabilities). Persons with disabilities are people who experience abnormalities in their physical and/or mental health, due to which their daily activities are restricted and disrupted. Meanwhile, the definition according to Article 1 paragraph (1) of the Law on Persons with Disabilities is that a person with a disability is physically, intellectually, mentally, and/or sensorially limited for a long period of time, which hinders him/her from leading an effective social life based on equal rights. The results of the United Nations (UN) Convention on the Rights of Persons With Disabilities, on 13 December 2006, provide a view that persons with disabilities are people who experience

abnormalities in their physical, mental, intellectual or senses and this hinders the effectiveness of their activities, interactions and participation in society. Moreover, other positive laws, such as the Convention on the Rights of Persons with Disabilities, Law No. 11/2009 on Social Welfare, and Law No. 19/2011 on the Ratification of the Convention on the Rights of Persons with Disabilities. So that the regulation of criminal liability of persons with disabilities is only guided by the provisions of Article 44 of the Criminal Code, the discussion of which is still general in nature (Faiz Aqiel Maulana Hidayat et al 2023: 332). Legal protection that is being sought for persons with disabilities does not only come from the Law on disability, but also from government regulations in order to guarantee legal protection for disabilities such as, Presidential Regulation Number 67 of 2020 concerning Terms and Procedures for Granting Awards and Respect, Protection and Fulfilment of the Rights of Persons with Disabilities. Based on this, many things need to be improved so that law enforcement and protection become effective. Law No. 8/2016 on Persons with Disabilities states that the fulfilment of the rights of persons with disabilities is the responsibility of the government and not only in the form of compensation [7]. Law No. 8/2016 on Persons with Disabilities has provided a strong legal foundation to protect the rights of persons with disabilities. This law guarantees equal treatment without discrimination for persons with disabilities, as stated in Article 5, which affirms the right of persons with disabilities to receive equal treatment in all aspects of life. In terms of sexual violence, Article 21 provides special protection with the right of persons with disabilities to be protected from physical, psychological, and sexual violence. In addition, accessibility to legal services is also guaranteed in Article 9, which requires the state to provide disability-friendly facilities in public facilities, including legal services. Fair and equal law enforcement is guaranteed in Article 12, which ensures persons with disabilities receive adequate legal assistance. Therefore, to maximise the protection of persons with disabilities, further efforts are needed to strengthen the implementation of these provisions, both in terms of providing disability-friendly infrastructure, training for law enforcement officials on the rights of persons with disabilities, as well as legal assistance that suits their needs. [8]. Criminal liability arrangements for perpetrators with disabilities in Indonesia are regulated in the Criminal Code, which refers to Article 44 regarding a person's ability to be responsible because several other legal arrangements still do not specifically regulate the ability to be responsible for persons with disabilities. If a person with a disability has been proven as an intellectual dader in premeditated murder, then he is included in the category of people who are said to be able to be responsible for their actions. The legal basis for premeditated murder is regulated in Article 340 of the Criminal Code where later judges imposing punishment also need to pay attention to the provisions in Law No. 8 of 2016 to examine the condition of persons with disabilities and provide what is their right before the court[9]. The current positive law in Indonesia is not yet comprehensive in terms of normative, doctrinal, theological, and contextual substance that truly accommodates the needs of people with disabilities. Then, it is still common for law enforcement officials to use general rules when dealing with perpetrators or victims of people with disabilities (Dylan Aldianza Ramadhan et al 2021: 221).

Based on the approach put forward above, it is deemed necessary to implement the theory of fairness in the application of the disability legal process to provide thoughts of justice to law enforcers in determining decisions against persons with disabilities who are dealing with the legal process. the theory of Justice as fairness is to generalise and elevate the traditional concept of social contract to a higher level of abstraction, the order of society is replaced by an initial situation involving certain procedural

restrictions on arguments designed to bring about initial agreement on the principles of justice. Rawls' theory of justice as fairness views the parties in the initial situation as rational. Rawls' theory is similar to the classical contract in that it also starts from a kind of state of nature, justice as fairness states that the law should create an ideal society, namely a society that tries to increase happiness and minimise unhappiness (the greatest happiness of the greatest number of people). That the principles are applied to institutions or more precisely to the structure of society, because a complete theory of rights also includes principles for individuals. In the application of law enforcement regarding fairness, the principle for the basic structure of society is recognised as the first principle, then the principle for individuals, then followed by the principle of national law. So finally the rules of priority are used [1]v.

4. CONCLUSION

Justice as fairness theory if law enforcers apply it in the legal process of disabilities who are in conflict with the law. The main idea of the theory of justice as fairness was developed by [1], a theory of justice that generalises and raises the traditional concept of the social contract to a higher level of abstraction, Rawls' theory is similar to the classical contract because it also starts from a kind of natural state, justice as fairness states that the law must create an ideal society, namely a society that tries to increase happiness and minimise unhappiness (the greatest happiness of the greatest number of people). It is a theory of justice that emphasises the remedy for the harm caused by the criminal offence committed.

In the application of law enforcement regarding fairness, the principle for the basic structure of society is recognised as the first principle, then the principle for individuals, followed by the principle of national law. Finally, priority rules are used to create a fairer and more balanced criminal case settlement agreement for persons with disabilities in conflict with the law.

5. WORDS OF GRATITUDE

With all praise and thanks to God Almighty for His mercy so that the author can complete this research. on this occasion the author would like to express his gratitude and appreciation for the help and encouragement of various parties so that this research can be completed. The author requests that feedback be given on the author's shortcomings or omissions in this study.

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