

Legal Antinomy in Exercising Civil Rights of Persons with Disabilities in Notarial Activities: Lessons Learned from Indonesia

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Abstract

This paper addresses the legal antinomy present in the exercise of civil rights for persons with disabilities (PWD) in notarial activities in Indonesia. The conflict arises between the need for legal certainty, as required by national laws, and the obligation to provide equal justice and access for PWD, as mandated by the Convention on the Rights of Persons with Disabilities (CRPD). Key provisions of the Indonesian Notary Law, particularly the Notary Law Amendment of 2014, impose barriers that hinder PWD from fully exercising their civil rights. These issues highlight the lack of clear guidelines for notaries in accommodating PWD, resulting in legal uncertainty and potential discrimination. This paper proposes legal reforms and emphasizes the need for notaries to act as facilitators of justice, ensuring equal access to civil rights for PWD in line with international human rights standards. The study employs a doctrinal legal research method, conducting literature reviews of various primary, secondary, and tertiary legal materials, such as an international convention, notary laws, books, journals, dictionaries, and research papers published relevant to the topic. This article limits the analysis of human rights of PWD to their access of civil rights services provided by a notary. A notary needs to understand and carefully make legal judgment when providing advice and drawing up notarial acts under various circumstances involving disabilities. In the end, this paper acknowledges a significant finding that Article 16 paragraph (1) letter (c), Article 42 paragraph (2) and paragraph (3), and Article 43 paragraph (3) of the Notary Law Amendment of 2014 currently hinder the exercise of civil rights of PWD. This paper offers both theoretical and empirical contributions to the ongoing discussion and presents perspectives from the Indonesian Constitutional Court Judgement Number 93/PUU-XX/2022, which amends the provisions of Article 433 Indonesian Civil Code and argues for the importance of a specific understanding and guidelines on this issue.

Keywords: *Access to Justice, Disability Rights, Equality, Human Rights Model, Notary Acts*

I. INTRODUCTION

On December 13, 2006, Resolution Number A/61/106 on the Convention on the Rights of Persons with Disabilities (“CRPD”) was adopted by the United Nations General Assembly. This resolution entered into force on May 3, 2008, and Indonesia, one of the 160 ratifying countries enacted it through Law Number 19 of 2011. CRPD is important because it shifts the paradigm in the treatment and concept of persons with disabilities (“PWD”) at the level of human rights.¹ Article 8 of CRPD mandates that: States Parties must promptly and efficiently enhance the public awareness about PWD, ensure recognition of their rights and dignity; eradicate stereotypes, biases reflected in detrimental practices linked to PWD across various aspects of life, including issues tied to gender and age; and lastly, raise recognition of the capabilities and valuable contributions made by PWD.² This paper focus on Article 12 of CRPD, which states that PWD shall receive equal and full treatment before the law.

PWD are often ignored due to weak policies and law enforcement supporting the PWD community.³ This reality is so alarming that it requires raising critical awareness and intervention from key actors such as notaries, judges, prosecutors, advocates, policymakers, and other professionals. Realizing the rights of PWD is not only the duty of the government, but must also be supported and recognized by all levels of society as human rights. Bagenstons argues that achieving equality for PWD can only be achieved by maximizing efforts through social movements in the community.⁴ Efforts to provide justice for PWD can be made by supporting facilities and infrastructure for PWD that enable them to improve their quality of life in achieving social welfare.⁵

1 Article 1 of the CRPD provides the definition of PWD as individuals who have long-term physical, mental, intellectual, or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.

2 At the national level, there has been a wave of changes in policy and law. Some countries guarantee disability rights and equality in national constitutions. These include Austria, Brazil, Canada, Finland, Fiji, Gambia, Germany, Malawi, New Zealand, South Africa, Switzerland and Uganda. Other countries have anti-discrimination legislation which prohibits discrimination on the basis of disability. These include Australia, Canada, Chile, Costa Rica, Ethiopia, Germany, Ghana, Guatemala, Hong Kong, Hungary, India, Ireland, Israel, Korea, Madagascar, Mauritius, Namibia, Nigeria, Philippines, South Africa, Spain, Sri Lanka, Sweden, the United Kingdom, the United States, Zambia and Zimbabwe. In some cases, these laws are very broad and cover all aspects of life, in others they are specific to, for example, employment, education, housing, etc. Similarly, in some countries the anti-discrimination laws are general, while in others they are disability-specific. See National Human Right Commission, “Disability Manual”, (2005), online: <<https://nhrc.nic.in/sites/default/files/NHRC-Book-Disability.pdf>>.

3 Rahayu Repindowaty Harahap, “Perlindungan Hukum terhadap Penyandang Disabilitas menurut Convention on the Rights of Persons with Disabilities (CRPD)” in (Jurnal Inovatif, 2015) 19.

4 Samuel R Bagenstos, “Disability Rights and the Discourse of Justice” (2020) 73:1 SMU Law Review Forum 26–34.

5 Albain, “Penyandang Disabilitas Berhak Diakui sebagai Pribadi di Hadapan Hukum”, online: <<https://www.mkri.id/index.php?page=web.Berita&id=19028&menu=2>>.

Article 12 of CRPD is the basis for the exercising of rights by PWD. According to Roorda and Flynn, Article 12 should be understood as both calling for the respect of the legal capacity of adults with disabilities on an equal basis with other persons, and at the same time, placing an obligation on States Parties to provide access to the support needed for exercising this legal capacity.⁶ Legal capacity, understood as the capacity to act, is an absolute prerequisite for the enjoyment and exercise of all rights based on equal opportunity.⁷

Article 12 of CRPD reflects a modern concept of formal, substantive, and transformative equality.⁸ Formal equality focuses on combating direct discrimination, substantive equality addresses differences among individuals and power relations, and transformative equality aims to overcome structural, institutional, and direct and indirect discrimination by imposing positive duties to transform society. The human rights model is based on this latter concept of transformative equality, the medical model of disability aligns with formal equality, and the social model of disability corresponds to the concept of substantive equality.⁹ The CRPD encompasses all three concepts, and thus implicates duties of formal, substantive, and transformative equality for State Parties.¹⁰ The Convention aims to remove obstacles that could lead to inequality or discriminatory treatment for persons with disabilities.

Justice requires equality before the law, meaning equal treatment, which entails no special treatment for other legal subjects. If it is different, then the principle of equality before the law becomes violated and causes legal discrimination. In public life, there is

6 HN Stelma-Roorda, C Blankman & MV Antokolskaia, “A changing paradigm of protection of vulnerable adults and its implications for the Netherlands” (2018) *Fam Recht*, online: <<http://www.bjutijdschriften.nl/doi/10.5553/FenR/000037>>.

7 In Indonesia, the implementation and fulfillment of PWD rights on an equal basis has been regulated in Article 2 letter (g) PWD Law.

8 Samantha Backman, “The Right to Legal Capacity for Canadians with Disabilities: A Quest for Dignity, Equality, and Autonomy” (2020) 8:1 *International Human Rights Internship Program*.

9 Three prevalent definitions of disability have informed the legal and policy framework: medical, social, and human rights model. Medical definitions frame disability within a medical model, identifying PWD as ill, different from their non-disabled peers, and unable to take charge of their own lives. Social definitions emphasize social conditions that disable a group of individuals by ignoring their needs of accessing opportunities. Within these two overriding paradigms medical and social pathology, the four major identifiable formulations of disability are: the charity model, the bio-centric model, the functional model, and the human rights model. The first two of these, the charity model and the bio-centric model are chronologically prior and reflect the ways disability has been framed historically in many cultures around the world. Both of these models follow the individual pathology approach to disability. The latter two, the functional model of disability and the human rights model, which view disability as a social pathology, have emerged in recent decades through interventions by disability and human rights activists and theorists. While the appearance of the social pathology models is chronologically more recent, all four approaches are currently at play in contemporary law, policy and programs. See Alison Harris & Sue Enfield, *Disability, equality, and human rights: a training manual for development and humanitarian organisations* (Oxford: Oxfam, 2003).

10 Theresia Degener, “Disability in a Human Rights Context” (2016) 5:35 *Laws* 1–24.

often no equal treatment¹¹ as a result of individual rights to access justice being ignored. Equal opportunities for PWD can only be achieved through accessibility, which involves removing barriers that prevent PWD from obtaining their rights and fulfilling their obligations. Therefore, all stakeholders must take efforts to provide accessibility for PWD to inclusively participate in achieving development and the goals of social welfare. Equal opportunities for PWD are a shared responsibility of the government, community, and family, including parents and PWD themselves. All stakeholders need to play an active role in achieving these goals.¹²

The principle of equality before the law is also found in the Indonesian Constitution¹³ which has the highest rank in the legal order in Indonesia. PWD as Indonesian citizens also have equal rights, obligations, and roles within society.¹⁴ The Preamble to the 1945 Constitution, the fourth paragraph, and several articles¹⁵ expressly guarantee the fulfillment of rights for citizens, including PWD, the fulfillment and protection of PWD's constitutional rights in accordance with human dignity, and the prevention of acts of violence and discrimination.¹⁶

As a continuation to the ratification of CRPD, the Government of Indonesia issued the Law on *Persons with Disabilities*, Law No. 8 of 2016 (“**PWD Law**”), on April 15, 2016.¹⁷ The Government of Indonesia further sought to create a conducive environment

11 Frédéric Mégret, “The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?” (2008) 30 *Human Rights Quarterly* 1–28.

12 Magdalena Sepúlveda Carmona & Kate Donald, “Beyond legal empowerment: improving access to justice from the human rights perspective” (2015) 19:3 *The International Journal of Human Rights* 242–259.

13 Endah Rantau Itasari, “Perlindungan Hukum Terhadap Penyandang Disabilitas Di Kalimantan Barat” (2020) 32:2 *Journal Intergalistik* 79–80.

14 *Ibid.*

15 The fourth amendment, Chapter XA of the 1945 Constitution of the Republic of Indonesia, includes provisions on Human Rights (HAM). This chapter is designed to protect the constitutional rights of all citizens, including PWD. Chapter XA contains 10 articles, from Article 28A to Article 28J, with 26 provisions that broadly categorized into two groups: the protection of human rights for Indonesian citizens and the protection of the human rights for all people, including foreigners. PWD are covered under both categories.

16 Itasari, *supra* note 15.

17 Before the PWD Law came into effect, Indonesia has previously had regulations aimed at protecting the PWD, including: 1. Law Number 4 of 1979 concerning Child Welfare; 2. Law Number 4 of 1979 concerning Child Welfare; 3. Law Number 39 of 1999 concerning Human Rights; 4. Law Number 23 of 2002 concerning Child Protection; 5. *Law Number 28 of 2002 concerning Buildings*; 6. Law Number 13 of 2003 concerning Employment; 7. Law Number 20 of 2003 concerning the National Education System; 8. Law Number 3 of 2005 concerning the National Sports System; 9. *Law Number 23 of 2007 concerning Railways*; 10. Law Number 17 of 2008 concerning Shipping; 11. Law Number 1 of 2009 concerning Aviation; 12. Law Number 11 of 2009 concerning Social Welfare; 13. Law Number 22 of 2009 concerning Road Traffic and Transportation; 14. Law Number 25 of 2009 concerning Public Services; 15. Law Number 36 of 2009 concerning Health; and 16. Law Number 13 of 2011 concerning Handling of the Poor. Law Number 4 of 1997 concerning Disabled Persons was subsequently amended by Law Number 8 of 2016 concerning Persons with Disabilities, changed the terminology from “disabled persons” to “persons with disabilities”. The content of Law Number 4 of

for PWD by issuing implementation regulations for the PWD Law, namely Government Regulation Number 52 of 2019 concerning the Implementation of Social Welfare for Persons with Disabilities; Government Regulation Number 70 of 2019 concerning the Planning, Implementation, and Evaluation of the Respect, Protection, and Fulfillment of the Rights of Persons with Disabilities; and Government Regulation Number 13 of 2020 concerning Proper Accommodation for Students with Disabilities.¹⁸

Despite these efforts, Dumilah argues that the Indonesian government still faces challenges in managing PWD issues.¹⁹ For decades, PWD in Indonesia have been viewed from a medical perspective, separated in special schools, and seen as societal disease.²⁰ The social model concept of disability, which views disability as a result of social oppression, has significantly impacted the definition of "disabled persons" which in Indonesian means "differently able people".²¹ In daily activities, the term "disabled" is commonly used.

At first glance, the terms *cacat* (suffered, disabled), *difable* (differently able), and disability have the same meaning, but in a social environment, they are accepted differently by PWD on a psychological level, where the stigma attached creates discrimination and inequality.²² The use of the word *disability* is more appropriate, because there is a legal umbrella, while *difable* is only used in oral conversation.

1997 was more charity-based, and the fulfillment of the rights of PWD was still considered a social issue, with policies for fulfilling their rights being limited to social security, social rehabilitation, social assistance, and the improvement of social welfare. Following the ratification of the CRPD, the PWD Law is based on human rights perspective and the principle of equal rights, which is implemented through efforts to respect, protect, and fulfill the rights and empower PWD. There are many efforts, both physical and non-physical accessibility for PWD, mandated in the PWD Law, and it is the obligation of government to strive to realize them. Among them are adequate accommodation, health aids, counseling, habilitation and rehabilitation, special public services, and disability service units.

18 Although somewhat delayed, at the end of 2020, the Government of the Republic of Indonesia established the National Commission for Disabilities under Government Regulation Number 68 of 2020. This regulation serves as an implementation of Article 131 of the PWD Law, and the commission is responsible for monitoring, evaluating, fulfilling and safeguarding the rights of PWD.

19 Dumilah Ayuningtyas et al, "The Law On Persons With Disabilities: How Far Have We Gone? (Case Study In Indonesia)" (2022) 25:1 Journal of Legal, Ethical & Regulatory 1-19.

20 Paul Ochieng Juma, *Mental health, legal capacity, and human rights* (Cambridge University Press, 2021). African Disability Rights Yearbook 9 (2021), at 294 discusses the biomedical model as one of the three primary models of disability, alongside the Social Model and the Human Rights Model.

21 The term disabled person began since Indonesia's independence in 1945. PWD are considered a group of people who are helpless, incapable and have problems because they are reprehensible or disabled. Inspired by the social model, the Indonesian disability movement tried to change it into *difable*, which means differently-abled-people. Meanwhile, the word disability comes from the English, disability, which means loss of ability. Disability refers to the limitations that a person has and is influenced by the surrounding environment that is not yet friendly to disability.

22 Frichy Ndaumanu, "Hak Penyandang Disabilitas: Antara Tanggung Jawab dan Pelaksanaan oleh Pemerintah Daerah" (2020) 11:1 Jurnal HAM 131-150.

The PWD Law itself defines persons with disabilities (PWD) as individuals who experience long term physical, intellectual, mental, and/or sensory limitations.²³ These limitations cause obstacles and difficulties that hinder PWD's full, effective and on equal terms with others.

Most PWD in Indonesia live in fragile, underdeveloped, or poor conditions due to limitations, obstacles, difficulties, and the reduction or elimination of PWD rights.²⁴ Currently there is still a view held in society that PWD are individuals with physical or mental limitations, and the assumption that PWD are not able to do anything on their own, so they need special assistance, causing pity.²⁵ Such charity-based paradigm is certainly incorrect. What PWD need is access that facilitates equal opportunities to non-PWD, not pity.

Disability is different from inability.²⁶ Legal capacity is also different from acting capacity.²⁷ In European countries and the United States, acting capacity is fully recognized, leading the elimination of distinction between legal capacity and acting capacity for PWD.²⁸ However, in many other regions, including Islamic countries, China and Russia, this distinction remains. Despite these regional differences, notarial practices worldwide continue to distinguish between legal capacity and acting capacity.²⁹

Today, various types of notarial systems exist around the world.³⁰ Latin Notary is commonly known in Latin legal countries, such as Indonesia, the Netherlands, France, Italy, Spain, Germany, China, Japan, Korea, and others. These countries recognize the legal capacity of PWD but still require certain procedures to fulfill the capacity to act for

23 According to Article 4 paragraph (1) of the PWD Law, PWD are classified into 4 (four) types: physical, intellectual, mental and/or sensory disabilities. These types of disabilities can occur individually, in combination, or in various forms, and their duration is determined by medical personnel in accordance with statutory provisions.

24 *Hak-Hak bagi Para Penyandang Cacat (Disabilitas) dalam memperoleh Keadilan*, Research Report Faculty of Law, by Henry Arianto, Research Report Faculty of Law 2 (Universitas Esa Unggul, 2017).

25 *Ibid.*

26 Alex Gregory, "Disability as Inability" (2020) 18:1 Journal Ethics Social Philosophy 23-48, at 33 and 40. According to Gregory, the core aspect of the social model of disability is the distinction between impairment and disability. Impairments are defined in terms of bodily defects, while disabilities are the socially mediated effects of these impairments. For example, "an inability to walk is an impairment, whereas an inability to enter a building because the entrance is up a flight of steps is a disability. An inability to speak is an impairment, but an inability to communicate because appropriate technical aids are not made available is a disability. An inability to move one's body is an impairment, but an inability to get out of bed because appropriate physical help is not available is a disability."

27 Legal capacity is the ability to hold rights and obligations (legal standing), while acting capacity is the ability to carry out these rights and obligations (legal agency).

28 Human Rights Commission (HRC) & International Union of Notaries (UINL), "Notarial Guide of Good Practices for People with Disabilities: The Notary as an Institutional Support and Public Authority", online: <https://www.uinl.org/documents/20181/339555/ANM_CGK-10-6-CDH+Guia-ENG/9c07925b-cae2-48cc-9806-a6e611a41b4e>.

29 Legal systems often draw a distinction between having sufficient capacity to "hold" rights, but not insufficient capacity to "exercise" rights (like a baby).

30 Freddy Harris & Leny Helena, *Notaris di Indonesia* (Jakarta: PT Lintas Cetak Djaja, 2017).

PWD. The Common Law Notary is adopted by countries such as the United States, United Kingdom, Hong Kong, Singapore, Australia, Malaysia, and so forth, fully recognizes PWD's acting capacity without distinction. Indonesia, which adopts the Latin Notary,³¹ currently still mandates the fulfillment of PWD's acting capacity in making the notarial act.

Legal capacity needs careful attention. In many countries, PWD are placed under unnecessary and arbitrary custody, denying them the right to manage their affairs. Life under custody is equivalent to civil death.³² According to CRPD, PWD must have equal access to legal capacity, and States are required to provide support to PWD to exercise legal capacity (not to deprive them of their rights) and ensure that these systems contain safeguards.³³

Paolo Heritier argues that disability is a central issue for pondering justice. The way in which administrative agencies, businesses, judges, the State, and all citizens view and treat PWD raises fundamental questions of justice. Disability appears to be an issue of theoretical interest for the philosophy of justice;³⁴ therefore, institutional structures (including the notarial system and process) should have been modified to accommodate PWD.³⁵

This article explores the legal antinomy in exercising civil rights of PWD in notarial activities, drawing lessons learned from the Indonesian experience. It proceeds in three parts. Section 1 introduces the topic, Section 2 discusses the legal antinomy in the context of disability, PWD as legal subjects, their civil rights, challenges, and the need for accessibility in notarial activities, drawing lessons from Indonesian law applicable to notaries and policymakers in improving access to justice in transitional contexts. Section 3 presents concluding thoughts.

The study uses a doctrinal legal research method, through literature reviews of various primary, secondary, and tertiary legal materials, such as an international

31 Notary in Indonesia is different with the notary in countries that adopt the Common Law legal system, which plays a role limited to certifying agreements, such as the United States. In Indonesia, notaries function similarly to those in countries with a Civil Law Notary system. They have the authority to provide legal advice and verify whether an agreement complies with prevailing laws. Acts produced by notaries in Indonesia are highly regarded by the court, because they serve as authentic evidence. In contrast, deeds produced by Common Law notaries are not recognized as evidence by the court. See: Pengurus Pusat Ikatan Notaris Indonesia, *Jati Diri Notaris Indonesia, Dulu, Sekarang dan di Masa Datang*, 1st ed (Jakarta: PT Gramedia Pustaka, 2008).

32 Gerard Quinn & Abigail Rekas-Rosalbo, "Civil Death: Rethinking The Foundations of Legal Personhood for Persons With a Disability" (2016) 56 *Irish Jurist* 286-325.

33 Marit Rasmussen & Oliver Lewis, "Introductory Note to the United Nations Convention on the Rights of Persons with Disabilities" (2007) 46:3 *International Legal Materials* 443-466.

34 Paolo Heritier, "Person and Disability: Legal Fiction and Living Independently" (2022) 35:4 *International Journal for the Semiotics of Law* 1333-1350.

35 Penelope Weller, "Legal Capacity and Access to Justice: The Right to Participation in the CRPD" (2016) 5:1 *Laws* 13.

convention, notary laws, books, journals, dictionary and research papers published relevant to the topic.

II. LEGAL ANTINOMY AND CHALLENGES IN PWD'S NEED FOR ACCESS TO JUSTICE IN NOTARY ACTIVITIES

Legal antinomy occurs when a notary, who exists to meet the community's need for authentic evidence,³⁶ is required to provide legal certainty on one hand, while on the other hand, is obliged to provide justice for PWD in order to respect, protect, and fulfill civil rights of PWD as mandated by the CRPD, constitutional law, and national rules. Antinomy here inquiries the existence of conflicting paired legal norms, in order to find synchronization between them.³⁷ These legal norms must remain, because they are expected to create improvements or be amended over time.

1. Requirements in Various States Practices

The rules for notarizing for PWD vary significantly from one state to another. Law reforms on legal capacity have been initiated or concluded in 32 countries since the Convention's entry into force. Countries around the world have indicated a willingness to recognize the legal capacity of PWD in their national legislation.³⁸

The Austrian government has taken the recommendations of the UN Committee on revisions to legal capacity seriously. Now, every person, regardless of their individual capabilities, has legal capacity, including rights and duties. Legal capacity is limited by law, such as contracting capacity, decision-making capacity, and the capacity to set up the last will. For adults, all these capacities are presumed, some even before the age of 18. Mental capacity determines special decision-making abilities, and is distinct from legal capacity. Legal capacity requires a certain level of mental capacity, while mental capacity is the degree of understanding and memory that the law requires to uphold the validity of or hold someone responsible for a particular act or transaction. If a person lacks mental capacity, they are not bound to the decision. However, persons of full age do not require cognitive ability to conclude legal transactions as long as they are not improvident. The contractual capacity of a cognitively impaired person is limited by the transaction's legal binding status.³⁹

36 I Made Hendra Kusuma, *Problematisasi Notaris dalam Praktik* (Bandung: Alumni, 2019).

37 E. Fernando M. Manullang, *Menggapai Hukum Berkeadilan, Tinjauan Hukum Kodrat dan Antinomi Nilai* (Jakarta: Penerbit Buku Kompas, 2007).

38 Ida Ayu Ratna Kumala & I Ketut Sudantra, "Discourse on the Civil Rights of the Deaf People in Making a Notary Deed" (2023) 7:2 Udayana Journal of Law and Culture 141-158.

39 Michael Ganner & Caroline Othofer, "The Protection of People With Disabilities In Austria" 17 Actual Jurid Iberoam No 196-229.

The European Agency for Fundamental Rights outlines the Council of Europe standards for deprivation of liberty for persons with disabilities. Placement decisions must be made by an authority legally competent to place a person in a psychiatric hospital, based on a proven mental health problem. The decision must be justified by compelling reasons related to the person's health or others' rights.⁴⁰

Peruvian Legislative Decree No. 1384 in 2018 recognized legal capacity for PWD, abolished guardianship, and established a framework for appointing supported decision-makers. The UN Special Rapporteur on the Rights of Persons with Disabilities praised the Peruvian reform as an example for other states.⁴¹

In the United States, notaries are legally obliged to serve PWD, even if they cannot physically perform the act themselves, in accordance with the Americans with Disabilities Act (ADA). Notaries are appointed by their states or local governments and cannot lawfully avoid serving disabled individuals. There are two methods for notarizing PWD: signing by mark or directing another to sign. In Illinois, notaries are instructed to use a form of certificate for individuals who cannot write a signature and require two witnesses. Massachusetts notaries can use two methods: signing by mark or having the notary sign on their behalf. New Jersey laws do not provide instructions to notaries regarding individuals who cannot sign for themselves or must make a mark instead of a normal signature.⁴²

The Notary Regulations of 1977 in Israel require notaries to notarize actions by hospitalized or bedridden signers who cannot meet at their office. The medical certificate must be issued on the same day as the notarization and attached to the notary's copy of the notarized document. An issue often arises regarding wills signed before a notary public. In estate case 3982/93, Judge Esther Covo interpreted the term "bedridden" to include anyone with difficulty in moving around, such as an elderly person. In cases where a person is unable to move easily, the notary may require a medical certificate before authenticating their signature. If a signer is illiterate and unable to sign documents, they must add their fingerprint instead of a signature. In conclusion, a notary public's responsibility to authenticate signatures is significant.⁴³

From the above explanation, we may summarize that in all states, the rules for notarizing for PWD vary significantly, but the following conditions must be met: personal appearance, proper identification, communication with the notary, awareness of actions, and two witnesses. The presiding notary must review the document for completeness,

40 J Beqiraj, L McNamara and V Wicks, *Access to Justice for Persons With Disabilities: From International Principles to Practice*, International Bar Association, October 2017

41 Backman, *supra* note 10.

42 "Serving Notaries Nationwide", online: *American Association of Notaries* <<https://www.notarypublicstamps.com/members/news/956/>>.

43 Michael Decker, "Notarized Signature authentication for people with disabilities", online: *Decker Pex Levi* <<https://lawoffice.org.il/en/notarized-signature-authentication-for-people-with-disabilities/>>.

communicate with the client, complete it on a proper date and venue, and complete the correct form of notary certificate for a client signing by mark.

2. Legal Antinomy and Challenges in Notary Activities in Indonesia

In Indonesia, which follows the civil law notary system, notaries function as providers of preventive legal certainty, act as public officials, and serve as legal counsellors by providing legal advice to the public in civil law relations. Notaries document and produce the acts that govern these relationships, giving them authenticity and enforceable value. A notarial act made by or before a Latin notary is an authentic deed that holds the power of perfect evidence.⁴⁴ This is guarantees legal certainty regarding the date of the deed, the parties of the deed, the contents of the deed, the signing, and the compliance of all legal requirements. Therefore the party who denies the physical, formal, and material truth of the notarial act must prove otherwise in court.⁴⁵ The notarial act fulfills the provisions of an authentic deed based on Article 1868 of the Indonesian Civil Code (“ICC”).⁴⁶

In carrying out their offices, notaries sometimes encounter PWD as parties to a notarial deed. PWD as legal subjects, have the right to take legal action. Article 9 letter (b) of the PWD Law confirms that PWD are entitled to recognition as legal subjects, and therefore, their standing is equal to the other legal subjects’ standings.

In carrying out their activities, a notary must act honestly, thoroughly, independently, impartially, and in compliance with the law, code of ethics, and the oath of the notary office.⁴⁷ Notaries should not discriminate in providing legal services ensuring to everyone. There should be no discrimination on the basis of class, socio-economic status, or for any reason, including disability. Access to justice is a basic right for every human being, including PWD.⁴⁸ Access to justice for PWD requires equal treatment and equal access to all notary services.

However, a notary must also protect themselves from possible crimes from other parties.⁴⁹ The notary provides the strongest written evidence in law (authentic deed), so they must secure it themselves. A notary must take protective measures to prevent denial

44 Edmon Makarim, *Notaris dan Transaksi Elektronik, Kajian Hukum tentang Cybernotary atau Electronic Notary*, 4th ed (Depok: Rajawali Pers, 2020).

45 Civil Code [*Burgerlijke Wetboek*], translated by R. Soebekti and R. Tjitrosudibio,

46 Habib Adjie, *Hukum Notaris Indonesia, Tafsir Tematik Terhadap UU No. 30 Tahun 2004 Tentang Jabatan Notaris*, 3d ed (Bandung: PT Refika Aditama, 2011).

47 Article 16 paragraph (1) letter a Notary Law.

48 Attachment to the Decree of the Director General of the General Justice Agency Number 1692/DJU/SK/PS.00/ 12/2020 dated 22 December 2020 concerning Guidelines for Implementing Services for Persons with Disabilities in the High Court and District Court, Introduction Part, at 1.

49 Tan Thong Kie, *Studi Notariat, Serba-Serbi Praktek Notaris* (Jakarta: PT Ichtiar Baru Van Hoeve, 1944).

of the contents of the notarial act, both against third parties, as well as the claimants themselves, including denials by PWD and its counter parties.

A notary is obliged to comply with all legal provisions to avoid the creation of legally defective deeds. The notary must also safeguard the interests of PWD's interests to prevent injustice, fraud abuse, and so on, by requesting additional documents, including presenting the other party who assists PWD. On one hand, the notary faces the obstacle of unclear legal rules in providing a notarial act for PWD. On the other hand, PWD require a notary to apply the principle of equality before the law.

Legal relationship in social interaction requires certainty, allowing parties involved to calculate the outcomes, benefits, and/or consequences of the legal relationship.⁵⁰ For non PWD, legal protection ensures that they engage in valid and unenforceable legal relationships, however PWD, if allowed to make decisions or act independently, are always at risks of being manipulated or exploited because of their limited legal dealings with others. In this situation, the law no longer performs its primary role as a protector of right and guarantor of equality. In fact, the guarantee of equality in the civil law system, is not only for a legal purpose, but also a constitutional requirement as explained in Article 28D paragraph (1) of the 1945 Indonesian Constitution. This is where a notary can play a crucial role in strengthening equality between PWD and non-PWD in civil law relations, helping to avoid material losses and address the interests of all parties involved in notary activities.

Since the notarial authority is the quintessential authority before which any member of the public can exercise a wide range of rights, then it is crucial to investigate the role that notaries play in promoting and upholding the right of PWD to exercise their legal capacity. It is necessary to consider the best way for the notarial authority to carry out the Convention's requirements and the actions that follow from it. In this context, this article shall further discuss in more detail with regard to the different types of disabilities.

a. People with Handicapped Hand

In the Notary Law Amendment of 2014, Article 44 paragraphs (1) and (2) and Article 16 paragraph (1) point (c) mandates notaries to affix fingerprints to the minutes of deeds, including for PWD who make notarial acts. Problems arise when a notary encounters PWD who do not have fingers, but can still sign the deed; or when the signature and fingerprints cannot be provided due to the disability. Neither of those conditions is expressly addressed in the Notary Law,⁵¹ or in the Notary Law Amendment of 2014.

⁵⁰ Indonesia Constitutional Court, *Judgement No 93/PUU-XX/2022*, [2015] Indonesian Mental Health Association 471.

⁵¹ *Law concerning Notary Position, Law Number 30 of 2004*, (hereinafter shall be referred to as "Notary Law").

Another issue is Article 44 paragraph (1) of the Notary Law Amendment of 2014, which requires the act to be signed after the notary reads the contents of the deed.⁵² If it is impossible to obtain the client's signature, then at the closing part of the deed, the reason must be explicitly stated. The substance of this provision is unclear and multi-interpreted, such as on the procedure for affixing the fingerprints, all or part of the fingers, which fingerprints shall be used, the right or left hand, and whether the absence of fingerprints affects the authenticity of the notary deed.⁵³

According to Ida Ayu Putu Swandewi, et al., this legal obligation does not affect the validity or authenticity of the act and only serves to support the identity of the appearer and grant protection to the notary, if the appearer denies their own signature in the future.⁵⁴ A notarial act remains an authentic deed with perfect evidentiary power as long as, it complies with the law's provisions on the requirements for the format of a valid notarial act.

The detailed signing rules and procedures for PWD need to be included in the Notary Law Amendment of 2014, to ensure equal treatment by all notaries for PWD with physical limitations.

b. Person with Impaired Hearing or Deafness

Deaf individuals with hearing issues often struggle with speech, using verbal, body, and sign language to communicate, making abstract concepts difficult to understand, such as the contents of a notarial act.⁵⁵

Article 16 paragraph (1) point (m) and Article 44 the Notary Law Amendment of 2014 requires the notary to read the contents of the act to be signed. The term *read* carries consequences as an act of formality that needs to be done by a notary. Whether it is understood or not, falls under the responsibility of the appearer.⁵⁶ Supposedly to ensure the fulfillment of formal legality in making authentic evidence, notaries as sworn officials must obtain confidence that the deed really contains what the appearer wants. Therefore, in the authentication process, the term *read* in Article 16 and Article 44 of the Notary Law Amendment of 2014 should be changed to *explain*. This is to ensure

52 Notary in Indonesia do not recognize signing deeds using stamps or clichés, but recognize electronic signatures made in accordance with the *Law concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions*, Law Number 19 of 2016.

53 Fingerprints affixed to the original (*minuta*) of the deed are valid in lieu of signatures, as long as they are authorized by a notary or another official appointed by law, as stipulated in Article 1874 paragraph (2) of the ICC.

54 Ida Ayu Putu Swandewi, Made Subawa & Gde Made Swardhana, "Pengesahan Akta Notaris Bagi Penghadap Yang Mengalami Cacat Fisik" (2016) 1:1 Jurnal Hukum Kenotariatan 26-41.

55 Garin Dinda Azzela & Shafiyah Nur Azizah, "Kesulitan Penyandang Tunarungu Dalam Melakukan Pembuatan Akta Tanah Ditinjau Dalam Perspektif Hukum" (2022) 1:2 Jurnal Hukum Dan HAM Wara Sains 75-83.

56 GHS Lumban Tobing, *Peraturan Jabatan Notaris* (Jakarta: Erlangga, 1996).

that the appearer truly understands the contents of the notarial act they are signing, as well as to avoid misunderstanding, error, and fraud (including imposition, fraud, and undue influence), as referred to in Articles 1321, 1322, and 1328 of the ICC. The ICC does not provide detailed explanations whether or not a deaf person is placed under custody, or whether they can submit a request for custody.

Deaf people with hearing loss (PWD) must be accompanied to understand notarial acts, but they can make legal actions without prohibition. They must be accompanied by a sworn translator for signing notarial acts, unless they request custody in the district court. This is allowed in Article 43 paragraph (2) and paragraph (3) of the Notary Law Amendment of 2014. Article 43 also allows deaf individuals to use the language used in a notarial act, and if requested, the notary must translate into the parties' language, and can request assistance from a sign language interpreter. Therefore, deaf PWD still remain subjects of law in the making of notarial acts and acting on their own behalf.⁵⁷

c. Person with Impaired Vision or Total Blindness

In terms of fairness, PWD with visual impairments want to be independently involved in notary activities, but they are hampered by the form of notarial acts which do not use braille aids. This is not adequately regulated in applicable law.⁵⁸ In fact, legal protection for PWD is needed in the process of signing deeds to avoid bad faith from certain parties.

Article 43 paragraph (3) of the Notary Law Amendment of 2014 allows a notarial act to be made in a language other than Indonesian, if there is an interest from the parties. However, there is no regulation in the Notary Law Amendment of 2014 regarding which foreign languages can be used. This ambiguity raises issues, such as whether it includes only international languages, Indonesian languages, regional languages, or if braille is also included.

Here, legal antinomy is raised. On one hand, the notary is responsible for providing certainty through an authentic deed that guarantees the validity of the contents contained therein. However, on the other hand, the authentic deed can be easily denied by PWD, for the reason that the act is not the deed that they intended to sign, or that the signed notarial act does not contain their true wishes, due to limited vision.

The notary is sometimes also unable to explain the contents of the deed in a language understood by their clients, so the act needs to be translated or explained by a sworn translator so that there are no differences in the interpretation of the contents of the deed.

⁵⁷ *Ibid.*

⁵⁸ Dwi Mustika, Faizin Sulistyono & Fachrizal Afandi, "Perlindungan Hukum Bagi Penghadap Penyandang Disabilitas Tunanetra Dalam Proses Pembuatan Akta Otentik" (2022) 7:3 Jurnal Ilmiah Pendidikan Pancasila Dan Kewarganegaraan 701-708.

Article 43 of the Notary Law Amendment of 2014 does not provide legal certainty regarding foreign languages that a notary can use to translate the contents of deeds. Notarial acts in braille have not yet been implemented, making it impossible for blind PWD to sign the deed independently before the notary. As a result, a notary requires representatives for blind PWD to sign the deed,⁵⁹ making it seem like there is discrimination against blind PWD who require equal treatment. However, if the notary does not require representatives for blind PWD when signing the notarial act, it could create a loophole among the parties involved in making notarial deeds, potentially harming the notary themselves in case of a bad faith presence.⁶⁰

This problem can be overcome if the language used in notarial acts is adjusted to the needs of PWD, especially those who are blind PWD. Therefore, the use of braille, assistive and alternative technologies, and all other forms, modes, and formats of accessible communication should be facilitated by the Notary Law Amendment of 2014.⁶¹ Blind PWD need braille to understand the contents of a contract, will, or other legal acts contained in an authentic deed.

d. Person with Mental Disability

In many legal frameworks, the appointment of a guardian restricts the legal capacity of PWD based on their "mental capacity." This capacity, which pertains to "decision making ability", inherently varies among individuals, not only due to the presence of disability, but also due to many factors related to family matters, society, culture, or environment. However, the incapacitation approach in law relies on a person's status, i.e. the outcome/functional approach⁶² do not adequately support the exercise of rights; Instead, it strips PWD of the opportunity to exercise the rights.⁶³ In fact, it is important to note that people possess diverse cognitive abilities, and an individual's lack of intellectual capacity should never serve as the sole reason for denying their legal capacity. Indonesia is no exception; national laws must adopt CRPD provisions.⁶⁴

The definition of capabilities is not clearly defined in the ICC. There is no category of legally capable persons, there is only incompetence. Article 1330 of the ICC provides that incapacitation includes: (1) minors; (2) persons under custody; (3) a married woman in certain cases referred to by law, and (4) all persons prohibited by law from

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Human Rights Commission (HRC) & International Union of Notaries (UINL), *supra* note 30.

⁶² The Committee on the Rights of Persons with Disabilities reviewed three common legislative approaches to the denial of legal capacity in 2014. These approaches are characterized as "discriminatory denial[s] of legal capacity," as they use an individual's disability and decision-making skills as justification for denying legal capacity and diminishing their status as a person before the law. These approaches are also discriminatory, as they apply tests that measure cognitive functioning to persons with disabilities.

⁶³ *Ibid.*

⁶⁴ Pengurus Pusat Ikatan Notaris Indonesia, *supra* note 33.

making certain agreements.⁶⁵ Thus, it can be said that the ability to act is the ability to perform an approved legal act (agreement), by an adult who is not under custody.⁶⁶

People with mental disabilities are generally placed under the care of others, classifying them as incapable of civil legal action. Therefore, Abdul Hariss and Nur Fauziah argue that a person with mental disabilities is a legal subject who have civil rights, but do not have the ability to act legally.⁶⁷

From a different perspective, Article 9 of PWD Law states that PWD are subjects of law and have civil rights, like natural persons in general. The concept of acting capacity between PWD Law and the ICC raises legal antinomy. This is because, theoretically, people with mental disabilities have obstacles in exercising their civil rights independently, unlike those without mental disabilities. As a repercussion, a shelter institution is needed.

A custody is a form of guardianship for adults who are unable to act legally under certain conditions.⁶⁸ Therefore, if the judge determines that the person is incompetent, then by law, the person will have a representative, known as a curator.⁶⁹

Custody is stipulated in chapter XVII Article 433 of the ICC, which is further elaborated in Articles 434 to 461. The condition for a person to be placed under custody include being an adult who is ignorant, insane, or blind, although sometimes they may act with their intellect. Adults can also be set in custody due to wastefulness. This is in contrast with Article 12 of the CRPD, which states PWD are entitled to recognition as legal subjects.⁷⁰ It is considered that Article 433 of the ICC reflects discriminatory conditions for people with mental disabilities, as they are very vulnerable under custody because all legal acts are represented by the curator.⁷¹

65 Pursuant to the Supreme Court Circular Number 3 of 1963 concerning the Idea of Considering *Burgerlijk Wetboek* not as a Law and Article 31 of Law Number 1 of 1974 concerning Marriage, there is no difference between the capacity of wives and husbands in carrying out legal actions.

66 Abdul Hariss & Nur Fauzia, "Kecakapan Bertindak Penyandang Disabilitas Autisme Menurut Hukum Perdata" (2021) 21:3 Jurnal Ilmiah Universitas Batanghari Jambi 943-948.

67 *Ibid.*

68 The definition of the ability to act (*handelingsbekwaamheid*) is the authority to act in general. This is different from the specific authority to act (*handelingsbevoegdheid*), which pertains to a particular legal subject and legal act. Therefore, an incompetent person still possessed rights and obligations as a subject of law, but they cannot exercise these rights and obligations on their own and must carry out legal actions through others.

69 "Balai Harta Peninggalan (BHP) Jakarta", online: *Kementrian Hukum Dan HAM RI* <<http://bhbjakarta.kemenkumham.go.id/layananpublik/pengampuan>>.

70 Custody can lead to the loss of one's legal identity, resulting in decisions being made on behalf of another, potentially affecting basic rights like marriage, work, property ownership, and child care.

71 Utami Argawati, "Penyandang Disabilitas Berhak Diakui Sebagai Pribadi di Hadapan Hukum", (2023), online: *Mahkamah Konstitusi Repub Indones* <<https://www.mkri.id/index.php?page=web.Berita&id=19028&menu=2>>.

Based on Article 32 of the PWD Law, to obtain legal certainty concerning the incapacity of a person suspected of having a mental disorder, a court determination is first required. Therefore, a person with mental disabilities can still pursue legal action as long as they have not been declared by the local court to be incompetent. Conversely, if the district court has determined that people with mental disabilities is incapable, then the competent authority can declare the legal action committed by the person with mental disabilities invalid.⁷²

This is reinforced by the Indonesian Constitutional Court that has amended ICC Article 433. In this decision, the Constitutional Court rules that the terms "stupid, brain pain or dark eyes" and "must" are contrary to the Indonesian Constitution and have no legal effect if they are not interpreted as "mental or intellectual disabilities" and "can." This means that adults with such disabilities may be placed under guardianship or custody.⁷³

The Indonesian Constitutional Court Judgement Number 93/PUU-XX/2022 argued that Article 433 of the ICC need to be reinterpreted to align with the spirit of PWD Law, especially Article 32. The purpose of this reinterpretation is to ensure legal protection for people with mental or intellectual disabilities without abolishing custody institutions, citing an unconstitutional part of Article 433 of the ICC (against Article 28 I paragraph (1) of the 1945 Indonesian Constitution). The Constitutional Court also noted that the use of custody without clear guidelines can further burden people with mental or intellectual disabilities.⁷⁴ A person with mental or intellectual disabilities may not be constantly disabled⁷⁵ and sometimes legally capable, so therefore, they should still have the freedom to choose whether to use the custody system, the mentoring system, or other systems outside the civil law. The decision regarding a person with mental disabilities or their intention as the legal subject is determined with their personal interests

⁷² Azzela & Azizah, *supra* note 58.

⁷³ Indonesia Constitutional Court, *supra* note 50.

⁷⁴ *Ibid.*

⁷⁵ *The Law on the Criminal Code, Law No. 1 of 2023*, distinguishes between PWD (persons with mental disability and/or intellectual disability) who are less able to take responsibility and those who are unable to be responsible. PWD are considered less capable of recognizing the unlawful nature of their action or acting based on convictions that can be punished, such as individuals with down syndrome, physical disabilities, or those with below average intelligence levels (Article 38). Meanwhile, PWD who are unable to take responsibility are individuals with mental disabilities experiencing acute relapses accompanied by psychotic symptoms and/or those with moderate to severe intellectual disabilities. To medically explain the inability to be responsible, it is necessary to present experts, ensuring that perpetrators of criminal acts are judged as incapable of responsibility (explanation of Article 39). For PWD with mental and/or intellectual disabilities who commit criminal acts, they may receive reduced sentences and/or be subjected to actions (Article 38). For PWD who are unable to take responsibility, they cannot be criminalized, but can be subjected to actions (Article 39). Such actions may include rehabilitation, custody by a guardians, treatment in institutions, submission to government care and/or treatment in mental hospitals (Article 103 paragraph (2)). Article 39 of the new Criminal Code emphasizes the "when" a person commits a criminal offense than focusing on the perpetrator (PWD). This approach differs from Article 44 of the old Criminal Code, where PWD was considered a forgiving excuse for criminal abolition, while the new Criminal Code addresses PWD rules within the section on criminal liability.

concerned. Therefore, the District Court as the authority to determine custody must be careful and wise in making decisions on each application for custody. The determination must be based on legal facts obtained at the trial, especially on the results of competency expert examinations and considering testimony and/or evidence from doctors and psychiatrists as stipulated in Article 33 of the PWD Law and Articles 436–446 of the ICC. These points underscore the need to establish formal support of the judicial and extra-judicial systems as soon as possible, in line with the guidelines of Article 12 of the CRPD.

These also apply to individuals with impaired vision, who need a court determination to assess their capability or incompetence, supported by evidence or recommendations from doctors. This ensures that PWD are still considered capable of taking legal action independently, without the need for guardians, and that a notary must adequately support the needs of PWD.⁷⁶

The Constitutional Court Judgement shows that in Indonesia, there has been a paradigm shift in Indonesian law. Previously, when a person was placed under custody, they were no longer authorized to perform legal acts or deeds. Custody under the ICC did not consider the intention or preferences of PWD. PWD were considered unfit to make good and rational decisions about themselves and their property. This concept of guardianship is called the *status-based approach*, which compromises the autonomy⁷⁷ of decision-making for PWD deemed incompetent by granting such decisions to a legal guardian (*substitute decision-making*).⁷⁸

3. Notary as Institutional Support for PWD

Currently, since Article 12 of the CRPD took on an iconic status, a new model has developed, namely the *human rights-based model*.⁷⁹ This model does not negate the

76 The Constitutional Court acknowledges the concerns about potential misuse of pardon institutions for curators or other parties, but affirmed the need for strict examination by the judiciary. It mandated the involvement of experts in custody cases to ensure the PWD's mental or intellectual incompetence in law, mitigating the risk of abuse.

77 Although not defined in the CRPD, autonomy refers to the ability of PWD to do things on their own without the assistance of others and is linked to the right to be "free to make one's own choices." See Immanuel Kant, *Groundwork of the metaphysics of morals* (England: Cambridge University Press, 1998).

78 Eilionóir Flynn, "Making human rights meaningful for people with disabilities: advocacy, access to justice and equality before the law" (2013) 17:4 The International Journal Human Rights 491–510.

79 The medical and social models of disability in the English-speaking world are the most important. The medical model reduces the disabled individual to their impairment, while the social model dissects disability as a social construct and debunks exclusion and denial of rights based on impairment. The human rights model builds on the social model by stating that disability is a social construct and that human rights do not require a certain health or body status. It encompasses both sets of human rights, civil, political, economic, social, and cultural rights, and demands anti-discrimination rights for disabled persons. The human rights model also values impairment as a condition that might reduce the quality of life but belongs to humanity and must be valued as part of human variation. It also values different

acting competencies of a person who is hindered in making decisions.⁸⁰ Instead, it provides support for PWD to take a *supportive decision-making based approach*,⁸¹ replacing the previous approach.⁸²

In light of the paradigm shift brought about by CRPD,⁸³ it is crucial to find balance between legal certainty and justice. This balance requires empowering notaries to act as a supportive institution for the public. According to Manullang,⁸⁴ in legal antinomy, even when legal norms run in opposite directions, it does not necessarily mean that these legal norms will operate in a logically contradictory manner.⁸⁵ Ensuring access to justice for PWD at both the individual and systemic levels can be achieved by engaging notaries as a supportive, timely, and flexible mechanism. This approach is both necessary and theoretically sound. The social model of disability also fits this understanding as well.⁸⁶

As a public official, the notary must ensure that all necessary approvals are obtained for specific deeds. The notary shall therefore assess capacity, for example: (i) whether any approval from the relevant authorities is need to be obtained by the parties prior to drawing up a notarial act, especially when dealing with PWD; (ii) when a PWD has to use other supports, and this has already been established by a court decision, the notary will require the involvement of another person (or people) to offer this established support. In this instance, the notary also needs to make sure that the person providing support—such as a guardian or curator—understands the contents of the notarial act and its legal implications. This includes making sure that the relevant person has a good understanding of the nature of their actions supporting the PWD and the liabilities that come with them.

layers of identity and acknowledges intersectional discrimination. The human rights model clarifies that impairment prevention policy can be human rights sensitive.

The CRPD aims to challenge the medical model of disability, which views it as an impairment that needs treatment or rehabilitation. The social model, on the other hand, views disability as a social construct resulting from discrimination and oppression, focusing on society rather than the individual. The CRPD aims to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Human rights are fundamental rights acquired qua birth and universal, meaning they do not require a certain health status or functioning condition. The CRPD reflects this message in its preamble and articles, reaffirming the universality of all human rights for all disabled persons and recognizing the rights of all disabled persons, including those with more intensive support needs. It values impairment as part of human diversity and human dignity, recognizing impairment as part of human diversity.

80 Stelma-Roorda, Blankman & Antokolskaia, *supra* note 8.

81 Marcy Karin & Lara Bollinger, “Disability Rights: Past, Present, and Future: A Roadmap for Disability Rights” (2020) 23:1 University of the District Columbia David A Clarke School of Law Law Rev 17.

82 Quinn & Rekas-Rosalbo, *supra* note 34.

83 Nikita V Alexandrov & Natalie Schuck, “Coercive interventions under the new Dutch mental health law: Towards a CRPD-compliant law?” (2021) 76 International Journal Law and Psychiatry 1–13.

84 M. Manullang, *supra* note 39.

85 *Ibid.*

86 Flynn, *supra* note 79.

Support for legal capacity should empower PWD to exercise their legal right and ensure their decision are respected.⁸⁷ These wills consolidated between the PWD and the individual offering support, whether intentional or obligatory, become one party who are exercising their rights on an equivalent base. It is important to consider the specific circumstances involved, including: the level of assistance provided, the economic and legal significance of the act, the PWD's previous actions, and any obligations that may arise in the foreseeable future.

The presence of a court order or support is intended to protect PWD, not to undermine them.⁸⁸ The notary is impartial, but they cannot be neutral if there is injustice, fraud or arbitrariness, or in the absence of freedom of expression. The notary needs to keep the act authentic against the threat of cancellation or defect claims made by the counter party, which can potentially harm PWD. In this context, the notary's role is to help the PWD understand and exercise their civil rights, thereby enhancing their own autonomy.⁸⁹

Support for PWD during a transaction process is not meant to replace their role as a party in the notarial act, provided they are capable of acting independently.⁹⁰ Support is necessary in order to ensure that there is no bad faith from the parties in a transaction.⁹¹

The "judgment of capacity, discernment and understanding" is one of the important things in the process of making a notarial act, as it provides legal certainty for legal actions reflected in authentic evidence, and is also a form of control of a notary's legal obligations.⁹² The notary must confirm that the appearer has the capacity to perform legal action, and meets all legal requirements, as determined by the court. Since the notary believes that, in making a decision, the judge has considered the possibility that PWD can make the decision wisely, with the support of others. This perspective aligns with the custody rules under the ICC and the PWD Law. Consequently, establishing guardianship for PWD, as outlined in Article 32 of the PWD Law, should be considered a last resort when no other viable options exist for supporting and assisting PWD in making decisions for themselves.

87 Pengurus Pusat Ikatan Notaris Indonesia, *supra* note 33.

88 Indonesia Constitutional Court, *supra* note 50.

89 Flynn, *supra* note 79.

90 The right to support to exercise legal capacity is crucial for PWD to enjoy equal legal capacity with others. Article 12 CRPD states that adequate supports for decision-making are necessary for this right to be realized. Browning et al. link the right to legal capacity and equality by referencing the concept of reasonable accommodation, stating that supported decision-making is seen as a means to reasonably accommodate people with cognitive disabilities to exercise their legal capacity (like others, PWD who need a ramp to ensure that they can reasonably accommodate to access a building). See: Backman, *supra* note 10.

91 Kie, *supra* note 51.

92 Human Rights Commission (HRC) & International Union of Notaries (UINL), *supra* note 30.

Court decisions are imperative in certain cases, to ensure that PWD are included socially and have their human rights respected. This approach ensures that PWD's wishes to control their own lives and property are not merely treated as objects, but are respected under the law, as reflected in Article 12 of the CRPD.

This is about evaluating the PWD's competence *per se*. The notary's role is not to determine whether the PWD meets a specific level of competence for acting.⁹³ A notary is not authorized to make a medical judgment. Instead, the notary must ensure that the contents of the notarial act are clearly communicated, that the PWD is in a conscious state, and that their will to make the act is freely expressed. This aligns with Article 1320 of the ICC, which requires that legal action must be agreed upon and executed voluntarily to produce valid legal effects.

Given that PWD are not a homogeneous group, each situation calls for a different approach. To address possible scenario, support measures must be comprehensive and varied. Notaries must prevent the standardization of support measures.⁹⁴ Notaries need to carefully assess and make legal judgement when providing advice, and drawing up notarial acts for individuals with different types of disabilities, that is for example for those who cannot hear, the Notary Law Amendment of 2014 allows PWD to read and sign it after initialing each page of the original (*minuta*) of the notarial act themselves. For PWD who cannot read, a sworn translator can assist with reading and explanation. The notary must document this process at the end of the deed. For PWD who cannot read and sign, they can be assisted by a sworn or certified sign language interpreter. The notary can take fingerprints or perform surrogate procedures as substitute for signature (Articles 43 and 44 of the Notary Law Amendment of 2014). For those who cannot speak, the Notary Law Amendment of 2014 allows PWD to read and sign a deed independently after initialing on the minutes of the act. For PWD who cannot read, a notary can read and explain the deed, obtaining confirmation through body gestures or technological assistance. For PWD who are illiterate, a notary can read and explain the deed, taking their fingerprints instead of signature. For those with partial visual impairment, who wish to sign the notarial act by themselves, it can be done by presenting an ophthalmologist certificate explaining that their eye condition still allows viewing, reading, and signing the notarial act. The reading and signing of the deed are carried out the same as non-PWD (Article 16 paragraph (1) of the Notary Law Amendment of 2014), while the ophthalmologist certificate must be attached in the minutes of the deed. blind, mentally or intellectually disabled individuals require a curator appointed by the District Court for the notarial deeds. The notary explains the custodian's capacity, reading, and signing, while providing reasons and basis for appointment; blind or mentally disabled individuals but wish to sign the deed themselves without being assisted by a curator or guardian, the notary can proceed with the notarial act if permission is obtained from the District court. The notary will read and orally explain the notarial act and if necessary,

93 *Ibid.*

94 *Ibid.*

take the individual's fingerprints in place of a signature (*surrogate*), with explanation at the end of the minutes..

These proposed compromises aims to guide notarial activities and fill a lacuna in national law by providing access to justice for PWD and enhancing the notary's role as a preventive justice for the public. The most straightforward option is to simply wash one's hands of the issue, which is precisely why more efforts are required. Notary organizations should develop guidelines to accommodate PWD in notary activities, similar to the steps taken by the judiciary.⁹⁵ Awareness of this issue should be integrated early into notarial education. Notarial students need to understand that PWD also require notarial services to exercise their civil rights. They need to be taught on how to effectively serve the legal needs of PWD. Dorfman's research⁹⁶ indicates that education on PWD law should be directed not only at those who need to use the law, but also at the public as a whole. It is everyone's business.

III. CONCLUSIONS

The analysis of legal antinomy in the exercise of civil rights for persons with disabilities (PWD) within notarial activities underscores the complexity of balancing legal certainty with justice, especially in the Indonesian context.⁹⁷ Indonesia's commitment to the CRPD, which emphasizes equal treatment and recognition of legal capacity for PWD, has brought about significant changes in the legal framework, but certain provisions of Indonesia's national law, particularly the Notary Law Amendment of 2014, impose barriers to the full exercise of PWD's rights.

The research highlights the need for notaries to be empowered as facilitators of justice for PWD. By acknowledging the unique needs of PWD in notarial acts, notaries play a critical role in safeguarding the civil rights of this vulnerable group. This requires a comprehensive understanding of various disabilities and the appropriate accommodations, such as the use of braille, sign language interpreters, or guardians, which should be seen as measures of protection rather than limitations on legal capacity. Notaries must ensure that PWD understand and consent to the content of notarial acts, avoiding potential exploitation or fraud.

The study contributes to ongoing discussions about the role of notaries in providing access to justice for PWD and calls for a re-evaluation of Indonesia's legal framework in light of international human rights standards. Notary organizations, the judiciary, and

95 Decree of the Director General of the General Court Number 1692/DJU/SK/PS.00/12/2020 dated December 22, 2020 concerning Guidelines for the Implementation of Services for Persons with Disabilities in High Courts and District Courts.

96 Doron Dorfman, "Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse" (2019) 53:4 Law and Society Review 1-41.

97 ChatGPT, Response to "Please make a comprehensive conclusion with academic writing style for the attached article" (OpenAI, 17 October 2024). <https://chatgpt.com/c/67139fb8-2518-800b-b819-52455ea09931>

legal education institutions must work collaboratively to develop guidelines and training that equip notaries with the knowledge and tools to serve PWD effectively.

In conclusion, achieving a balance between legal certainty and justice for PWD in notarial activities requires legal reforms, institutional support, and a shift in the paradigm of how PWD are treated in the legal system. By amending problematic provisions in the Notary Law and strengthening the role of notaries as facilitators of justice, Indonesia can move towards a more inclusive legal system that respects the rights and dignity of all its citizens, particularly those with disabilities.

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