

*State Responsibility toward the Embodiment of Education Rights Protection of
Disabled Community*

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Introduction

International law has placed a distinguished position for state in its position as one of the member of the international law subject. The rights given has a strongest nature among other international law subject. This issue is supported by the existence of legal personality as owned by state itself.¹The Montevideo Convention 1933 has named special characteristic that must owned by state, so that it will obtain its authority to the fullest, which are : defined territory, government, permanent population and capacity to enter into relation with other state,²yet this four category has resulted on the distinction of sovereignty that state has, instead of the other subject.

Sovereignty in its nature has allow state to have sovereign right to the fullest in its territory over person, object, and activities that happen in its territory, yet when it is cross another border of another state, it is become limited since it has been regard as a respect toward the equality and independency of other state.³Related with the sovereign right of a state itself, and since it has its authority over its territory, the right of state is to conduct well living of its people rights fulfill through the role of the government as one of the media. What means by right is related to the guarantee of rights that obtain from every person since he/she born into the world⁴.

Human rights are moral principles or norms that describe certain standards of human behavior, and are regularly protected as legal rights in municipal and international law.⁵ They are commonly understood as inalienable fundamental rights "to which a person is inherently entitled simply because she or he is a human being,⁶ and which are "inherent in all human beings" regardless of their nation, location, language, religion, ethnic origin or any other status.⁷They are applicable everywhere and at every time in the sense of being universal,[1] and they are egalitarian in the sense of being the same for everyone.[3] They require empathy and the rule of law⁸ and impose an obligation on persons to respect the human rights of others. They should not be taken away except as a result of due process based on specific circumstances, and require freedom from unlawful imprisonment, torture, and execution.

The doctrine of human rights has been highly influential within international law, global and regional institutions.[3] Actions by states and non-governmental organizations form a basis of public policy worldwide. The idea of human rights[8] suggests that "if the public discourse of peacetime global society can be said to have a

¹ Slomanson, William (2011). *Fundamental Perspectives on International Law*. Boston, USA: Wadsworth. pp. 4–5.

² Montevideo Convention 1933

³ Bruno Simma and Andreas L.Paulus "Symposium on method in International Law: The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View" 93 *American Journal of International Law* 302 (April, 1999)

⁴ Janis, M. and Noyes, J. *International Law*": Cases and Commentary (3rd ed.), Prosecutor v. Furundžija, Page 148 (2006)

⁵ ames Nickel, with assistance from Thomas Pogge, M.B.E. Smith, and Leif Wenar, Dec 13, 2013, *Stanford Encyclopedia of Philosophy*, Human Rights, Retrieved Aug. 14, 2014

⁶ The United Nations, Office of the High Commissioner of Human Rights, What are human rights?, Retrieved Aug. 14, 2014

⁷ urns H. Weston, March 20, 2014, *Encyclopedia Britannica*, human rights, Retrieved Aug. 14, 2014

⁸ Merriam-Webster dictionary, [3], Retrieved Aug. 14, 2014, "rights (as freedom from unlawful imprisonment, torture, and execution) regarded as belonging fundamentally to all persons

common moral language, it is that of human rights." The strong claims made by the doctrine of human rights continue to provoke considerable skepticism and debates about the content, nature and justifications of human rights to this day. The precise meaning of the term right is controversial and is the subject of continued philosophical debate⁹ while there is consensus that human rights encompasses a wide variety of rights such as the right to a fair trial, protection against enslavement, prohibition of genocide, free speech, or a right to education, there is disagreement about which of these particular rights should be included within the general framework of human rights; some thinkers suggest that human rights should be a minimum requirement to avoid the worst-case abuses, while others see it as a higher standard.

One of the right that is important for the well being of every person is the right to obtain well education, and what means by every person is every person comes to any ages that has put their goal to obtain education, yet it also included the right of difable person to obtain such education right. The right to education is a universal entitlement to education. This is recognized in the International Covenant on Economic, Social and Cultural Rights as a human right that includes the right to free, compulsory primary education for all, an obligation to develop secondary education accessible to all, in particular by the progressive introduction of free secondary education, as well as an obligation to develop equitable access to higher education, ideally by the progressive introduction of free higher education.

The right to education also includes a responsibility to provide basic education for individuals who have not completed primary education. In addition to these access to education provisions, the right to education encompasses the obligation to rule out discrimination at all levels of the educational system, to set minimum standards and to improve the quality of education.

The right to education is reflected in international law in Article 26 of the Universal Declaration of Human Rights and Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights. The right to education has been reaffirmed in the 1960 UNESCO Convention against Discrimination in Education, the 1981 Convention on the Elimination of All Forms of Discrimination Against Women, and the 2006 Convention on the Rights of Persons with Disabilities

In Europe, Article 2 of the first Protocol of 20 March 1952 to the European Convention on Human Rights states that the right to education is recognized as a human right and is understood to establish an entitlement to education. According to the International Covenant on Economic, Social and Cultural Rights, the right to education includes the right to free, compulsory primary education for all, an obligation to develop secondary education accessible to all in particular by the progressive introduction of free secondary education, as well as an obligation to develop equitable access to higher education in particular by the progressive introduction of free higher education.¹⁰ The right to education also includes a

⁹ Macmillan Dictionary, [human rights - definition](#), Retrieved Aug. 14, 2014, "the rights that everyone should have in a society, including the right to express opinions about the government or to have protection from harm

¹⁰ Beiter, Klaus Dieter (2005). *The Protection of the Right to Education by International Law*. Martinus Nijhoff Publishers. pp. 226–227.

responsibility to provide basic education for individuals who have not completed primary education. In addition to these access to education provisions, the right to education encompasses also the obligation to eliminate discrimination at all levels of the educational system, to set minimum standards and to improve quality. The European Court of Human Rights in Strasbourg has applied this norm for example in the Belgian linguistic case. Article 10 of the European Social Charter guarantees the right to vocational education.

The term difable means different abilities and often mistaken with the condition that limit someone to conduct one action, yet the condition that difable person faced is bring to such bitter some reality that usually also occurs with the right to obtain fair education.¹¹ International regulation has established the UN Convention on the Rights of Persons with Disabilities to provide legal shelter for guarantee the rights of persons with disabilities. Indonesia as a part of the international community also provides regulation of Law number 4 of 1997 concerning disabled people. Though within the existence of these regulation, various problems related with their right fulfillment in the equity of education, it still trails behind. The legal standing of disabled right s protection has been regulated in UN Convention on the Rights of Persons with Disabilities especially as regulated in article 24 on Education, yet this Convention also provides comprehensive shelter for the disabled community interests. Meanwhile in Law number 4 year 1997 also provides such regulations that apply in Indonesia, yet it has not given some specific regulation as the UN Convention on the Rights of Persons with Disabilities did.¹² Regarding the action for the model to provide the equality of education rights for disabled community. Therefore based on this explanation, this paper attempt to analyze and to find the concept of justice related with state responsibility for equal education right of difable person and the model of inclusive education as a model to fulfill equality of difable person education right.

Explanation

The Concept of Justice in the State Responsibility for Equal Education Right of Difable Person

Justice in its broadest context includes both the attainment of that which is just and the philosophical discussion of that which is just. The concept of justice is based on numerous fields, and many differing viewpoints and perspectives including the concepts of moral correctness based on law, equity, ethics, rationality, religion, and fairness. Often, the general discussion of justice is divided into the realm of societal justice as found in philosophy, theology and religion, and, procedural justice as found in the study and application of the law.¹³

The liberal concept of justice is an interpersonal one resolution of conflicts between individuals. Individuals can suffer or perpetrate wrong. Individuals can be punished,

¹¹ Moyn, Samuel (2010). *The last utopia: human rights in history*. Cambridge, Mass.: Belknap Press of Harvard University Press.

¹² Ishay, Micheline R. (2008). *The history of human rights : from ancient times to the globalization era*. Berkeley, Calif.: University of California Press.

¹³ Durham, H. (2004). "'We the People: The Position of NGOs in Gathering Evidence and Giving Witness in International Criminal Trials". In Thakur, R, Malcontent, P. *From Sovereign Impunity to International Accountability*. New York: United Nations University Press.

protected and granted restitution. Justice is an interpersonal thing. It consists in upholding that which is right and due as between persons. Social justice, which involves society and groups, is a concept, which is directly antagonistic to the liberal idea. It is a concept, which is nebulous and non-achievable. Its proponents increase state power to affect it, with counterproductive results.¹⁴

Disability, of course, can be understood very differently across different communities and cultures. In order to pursue a coherent approach to addressing inclusive education for children with disabilities, a definition of disability is required. Article 1 of the CRPD describes persons with disabilities as those who have longterm 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'.¹⁵ This approach is consistent with the WHO's International Classification of Functioning, Disability and Health, known more commonly as ICF, which conceptualizes a person's level of functioning as a dynamic interaction between her or his health conditions, environmental factors, and personal factors. It defines functioning and disability as multidimensional concepts relating to:¹⁶

- The body functions and structures of people
- The activities people do and the life areas in which they participate; and
- The factors in their environment that affect these experiences.

Both approaches allow for a broad approach to disability which acknowledges the importance of the context and environment in enabling or disabling individuals from participating effectively within society best interests of the child, the optimum development of the child and the right of the child to be heard and taken seriously in accordance with age and maturity.

These principles need to underpin all actions to promote the right of children with disabilities to education. In addition, it is necessary to take account of all other relevant rights. For example, many children with disabilities will continue to experience barriers in realising their right to education, unless measures are taken to provide early assessment and access to early years provision, to tackle prejudice and discrimination, to provide protection from bullying and violence, and to develop appropriate support and services for families.¹⁷

A rights based approach to education is informed by seven basic principles of human rights. These principles need to be applied in the development of legislation, policy and practice relating to the right to inclusive education.¹⁸

¹⁴ "Corporations and Human Rights". Human Rights Watch. Archived from [the original](#) on December 15, 2007. Retrieved January 3, 2008.

¹⁵ The United Nations, Office of the High Commissioner of Human Rights, [What are human rights?](#), Retrieved Aug. 14, 2014

¹⁶ Burns H. Weston, March 20, 2014, Encyclopedia Britannica, [human rights](#), Retrieved Aug. 14, 2014

¹⁷ Danny Danziger & John Gillingham, "1215: The Year of Magna Carta"(2004 paperback edition) p278

¹⁸ Hannum, Hurst (2006). "The concept of human rights". *International Human Rights: Problems of Law, Policy, And Practice*. Aspen Publishers. pp. 31–33.

- Universality and inalienability:

Human rights are universal and inalienable, the entitlement of all people everywhere in the world. An individual cannot voluntarily give them up. Nor can others take them away

- Indivisibility:

Human rights are indivisible. Whether civil, cultural, economic, political or social, they are all inherent to the dignity of every person

- Interdependence and interrelatedness:

The realization of one right often depends, wholly or in part, on the realization of others.

- Equality and non-discrimination:

All individuals are equal as human beings, and by virtue of the inherent dignity of each person, are entitled to their rights without discrimination of any kind.

- Participation and inclusion:

Every person and all people are entitled to active, free and meaningful participation in, contribution to and enjoyment of civil, economic, social, cultural and political development.

- Empowerment:

Empowerment is the process by which people's capabilities to demand and use their human rights grow. The goal is to give people the power and capabilities to claim their rights, in order to change their own lives and improve their communities.

- Accountability and respect for the rule of law:

A rights based approach seeks to raise levels of accountability in the development process by identifying 'rights holders' and corresponding 'duty bearers' and to enhance the capacities of those duty bearers to meet their obligations.

When governments across the region ratified the CRC and signed or ratified the CRPD, they undertook to take all necessary measures to ensure that the rights they contain are realised. This involves action:¹⁹

- To fulfil the right to education

-for example, by ensuring that quality education is available for all children, promoting inclusive education, and introducing positive measures to enable children to benefit from it, for example, making physical adaptations to buildings, providing

¹⁹ John Rawls, *A Theory of Justice* (revised edition, Oxford: Oxford University Press, 1999), p. 266

accessible transport, adapting the curricula to the needs of all children, and providing necessary equipment and resources.²⁰

- To respect the right to education

–for example, by avoiding any action that would serve to prevent children accessing education, for example, legislation that categorizes certain groups of children with disabilities as uneducable, school entry testing systems that serve to categorise children with disabilities as not ready for school.

- To protect the right to education

-for example, by taking the necessary measures to remove the barriers to education posed by individuals or communities, for example, resistance by teachers to accepting children with disabilities, or violence, abuse or bullying in the school environment²¹

Inclusive Education As a Model of Equal Education Practice

Education for All (EFA), which represents an international commitment to ensure that every child and adult receives basic education of good quality, is based both on a human rights perspective, and on the generally held belief that education is central to individual well being and national development.²²

UNESCO defines inclusive education as ‘a process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities, and reducing exclusion within and from education. It involves changes and modifications in content, approaches, structures and strategies, with a common vision which covers all children of the appropriate age range and a conviction that it is the responsibility of the state to educate all children.’²³

Inclusive education is not a marginal issue, but is central to the achievement of high quality education for all learners and the development of more inclusive societies.

Equivalent and systematic learning opportunities in a wide range of school and additional educational settings, despite the differences that might exist. Inclusive education provides a fundamentally different pedagogical approach to one rooted in deviance or difference. In other words, it stresses²⁴:

²⁰ John Stuart Mill, *Utilitarianism* in *On Liberty and Other Essays* ed. John Gray (Oxford: Oxford University Press, 1991), Chapter 5.

²¹ ed Honderich, *Punishment: The supposed justifications* (London: Hutchinson & Co., 1969), Chapter 1.

²² Michael Braswell, and John Fuller, *Corrections, Peacemaking and Restorative Justice: Transforming Individuals and Institutions* (Routledge, 2014).

²³ Beiter, Klaus Dieter (2005). *The Protection of the Right to Education by International Law*. The Hague: Martinus Nijhoff. p. 19. ISBN 90-04-14704-7.

²⁴ Beiter, Klaus Dieter (2005). *The Protection of the Right to Education by International Law*. Martinus Nijhoff Publishers. pp. 21–22.

- a. the open learning potential of each student rather than a hierarchy of cognitive skills;
- b. reform of the curriculum and a cross cutting pedagogy rather than a need to focus on student deficiencies;
- c. active participation of students in the learning process rather than an emphasis on specialized discipline knowledge as key to teachers expertise;
- d. a common curriculum for all, based upon differentiated and/or individualized instruction, rather than an alternative curriculum being developed for low achievers;²⁵
- e. teachers who include rather than exclude. Radical changes are required in education systems, and in the values and principles of the people involved in delivering education, if the world's most vulnerable and disadvantaged children are to realise their right to gain access to their local school
- f. Central to an inclusive approach are a commitment to Putting inclusive values into action valuing every life equally.
- g. Helping everyone feel a sense of belonging
- h. Promoting children's participation in learning and teaching
- i. Reducing exclusion, discrimination and barriers to learning and participation
- j. Developing cultures, policies and practices to promote diversity and respect for everyone equally²⁶
- k. Learning from inclusive practice to share the lessons widely
- l. Viewing differences between children and between adults as a resource for learning
- m. Acknowledging the right of children to locally based high quality education
- n. Improving schools for staff and parents as well as children.
- o. Emphasising the value of building positive school communities as well as achievements

²⁵ John Rawls, *A Theory of Justice* (revised edition, Oxford: Oxford University Press, 1999), p. 266.

²⁶ James Nickel, with assistance from Thomas Pogge, M.B.E. Smith, and Leif Wenar, Dec 13, 2013, Stanford Encyclopedia of Philosophy, [Human Rights](#), Retrieved Aug. 14, 2014

Conclusion

The road for providing sufficient education for difable person nowadays is not a long winding road for every state to fulfill, since state has the right of authority to do such action. Yet for the fulfillment of justice in this issue need only not such thing, but also the existence of certainty and benefit for all education bearer. Therefore, regarding the action for the model to provide the equality of education rights for disabled community, it will needs three aspects, which are : substance, meaning that Indonesia will need a subsidiary regulation to apply the protection of disabled community specifically, structure means there is needed a model of inclusive schooling that provides equality for all the disabled community.