



The person with schizophrenia in conflict according to the criminal law in Indonesia



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ABSTRACT

Indonesia recognizes the grounds of pardon in criminal law as stipulated in Article 44 of the Criminal Code (KUHP). One of the conditions that may be subjected to grounds of pardon is when the perpetrator of a criminal act is a person with a mental disorder, including schizophrenia. The consequence of this situation is that the perpetrator of a criminal act must be declared irresponsible for his actions and released from all criminal charges. However, in practice, the panel of judges would find the defendant with schizophrenia remain guilty since the judge would disregard the medical records or statements from psychiatric experts as evidence at trial. This article analyzes 2 Supreme Court Decisions, namely Supreme Court Decision No. 46 PK/Pid.Sus/2010 and Decision No. 94-K/PM.II-09/AD/V/2016. This research uses a normative juridical method. This research discusses the implementation of criminal sentences for persons with schizophrenia by confronting between field practices that remain sentencing persons with schizophrenia. Legal protections that able to be carried out by the state include terminating the prosecution, utilizing psychiatrists' statements as the basis for decisions, and deciding on defendants with acquittal decisions which in practice are not often found. This research concludes that legal protection for people with schizophrenia in Indonesia stays incongruent with the principles of criminal law and violates the principle of protecting the rights of the defendant. Law enforcement officials are remaining disregarding Article 44 of the Criminal Code by continuing to sentence, even executing people with schizophrenia who commit criminal acts even though there is a statement from a psychiatrist as valid evidence.

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Introduction

In Indonesia, people with mental disorders (hereinafter referred to as ODGJ) have the grounds of relief namely grounds of justification and grounds of pardon (Sulaihah et al., 2020). The grounds of pardon are the causes that eliminate the guilt of the perpetrator of a criminal act (Irmansyah et al., 2009). His actions are still against the law but the perpetrator cannot be convicted since there is no guilt against him. The grounds of pardon are the application of Article 44 of the Criminal Code. ODGJ also has special legal protection that supports Article 44 of the Criminal Code, namely Law Number 18 of 2014 concerning Mental Health. Article 71 Paragraph (1) of the Mental Health Law stipulates that for the sake of law enforcement, a person suspected of ODGJ committing a crime must obtain a mental health examination to determine whether he is able to account for his criminal act and whether he is legally capable to undergo the judicial process (Yunita et al., 2020).

By law, persons with disabilities in Indonesia are defined as people who experience physical, intellectual, mental, and/or sensory limitations for a long-term period who in interacting with the environment may experience obstacles and difficulties to fully and effectively participate with other citizens according to equal rights (Grant, 2004). This includes people with schizophrenia. A person

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with schizophrenia cannot be held accountable for his actions. Schizophrenia is a serious mental disorder in which a person interprets reality abnormally and may cause several combinations of hallucinations, delusions, and very disorganized thinking and behavior that interfere with daily functioning, and maybe disabling (Endriyani et al., 2019; Marthoenis et al., 2015). People with Schizophrenia have a serious mental illness that affects the way they think, feel, and behave, making it difficult to distinguish between reality, therefore when they act, it will be very difficult for them to understand their own doing. People with Schizophrenia are included in the category of people with mental disabilities based on Law Number 39 of 1999 concerning Human Rights and Law Number 8 of 2016 concerning Persons with Disabilities. Schizophrenia sufferers cannot be punished because they have a different understanding of reality, hence incapable to distinguish between right and wrong when they were about to commit an act which ultimately need to be protected and restored.

In Indonesia, the problem is that in practice punishments for people with schizophrenia are exist. This punishment is exercised due to the proportional consideration of the mental condition of the perpetrator and overrides Article 44 of the Criminal Code. An example is what happened to Rodrigo Gualarte, a death row inmate from Brazil who is a person with schizophrenia and bipolar affective disorder. Rodrigo Gualarte was caught in a narcotics crime case and was executed in 2015. The law enforcers, in this case, are considered not to have paid attention to Rodrigo Gualarte's mental condition because during the trial process, Rodrigo Gualarte was never examined by a psychiatrist and his medical records from mental health experts in Brazil were ignored. The Attorney General's Office of the Republic of Indonesia merely had the opportunity to examine Rodrigo's mental health and the results were only applied as a second opinion. Even the Attorney General has repeatedly stated that Rodrigo was not suffering from a mental disorder, despite the person capable to assess his mental condition being a psychiatrist/psychiatrist (Winahyu et al., 2015).

A similar case has also occurred with Khotibul Umam, a TNI soldier who has been declared a person with chronic paranoid schizophrenia by a psychiatrist, who was indicted for an assault that resulted in death in 2016. Khotibul is unable to distinguish between fantasy and reality and is unable to assess between good and bad. Both expert testimony and Khotibul himself stated that at the time of the persecution, Khotibul was affected by a mental disorder beyond his control. However, the judge still found Khotibul Umam guilty on the grounds of lack of faith and piety (Windarwati et al., 2021).

In this paper, the method used is a normative juridical research method. The normative juridical method is carried out by means of a literature study that traces data, especially secondary data in the form of laws and regulations, court decisions, agreements, contracts, or other legal documents (Nova et al., 2021).

The data sources used for this research are primary data sources, namely the Criminal Code, Law Number 39 of 1999 concerning Human Rights, Law Number 36 of 2009 concerning Health, Law Number 18 of 2014 concerning Health. Soul, Law Number 8 of 2016 concerning Persons with Disabilities, Convention on the Rights of Persons with Disabilities. And also, the author uses secondary data sources consisting of Supreme Court Decision No. 46 PK/Pid.Sus/2010 (Rodrigo Gualarte case) and Decision No. 94-K/PM.II-09/AD/V/2016 (Khotibul Umam case) which I took as an example case for discussion in this research, Decision No. 290/Pid.Sus/2019/PN Tng (the case of Wendra Purnama) which I will use as an example to compare the two cases above, and other sources such as books, articles, and electronic news. The human rights of convicted persons with schizophrenia as persons with disabilities are also being disregarded by the state. Such as when Rodrigo Gualarte was accused of faking madness to avoid execution and during the case of Khotibul Umam when the judge in his decision stated that Khotibul's faith and piety were weak. The negative labeling carried out by law enforcers obscures their consideration of the mental condition of the convicts which is a condition for being responsible for criminal acts (Munkner et al., 2003). This is an example of a violation of the rights of persons with schizophrenia as persons with mental disabilities need to be released from stigma in the form of negative labeling of their disability as regulated in Article 7 of Law Number 8 of 2016 concerning persons with disabilities.

Based on this problem, the main purpose of this study is to analyze and describe what and how the regulations regarding the punishment of Persons with Schizophrenia should be based on the perspective of criminal law. This analysis also needs to be supported by other relevant legal arrangements and legal protection for Persons with Schizophrenia in relation to the ability to be criminally responsible in accordance with Article 44 of the Criminal Code.

Literature Review

Based on Indonesian Criminal Code article 44, People with mental disabilities have the grounds of relief namely grounds of justification and grounds of pardon (Sulaihah et al., 2020). The grounds of pardon are the causes that eliminate the guilt of the perpetrator of a criminal act (Irmansyah et al., 2009). Article 71 (1) The Law Number 18 of 2014 concerning Mental Health confirms that People with mental disabilities who commit a crime must obtain a mental health examination to determine whether she/he can account for his criminal act and whether he is legally capable of undergoing the judicial process (Yunita et al., 2020). This law also protects people with Schizophrenia. Endriyani (2019) and Marthoenis (2015) define Schizophrenia as a severe mental disorder in which a person interprets reality abnormally and may cause several combinations of hallucinations, delusions, and very disorganized thinking and behavior that interfere with daily functioning and may be disabling. People with Schizophrenia are included in the category of people with mental disabilities based on Law Number 39 of 1999 concerning Human Rights and Law Number 8 of 2016 concerning Persons with Disabilities.

The Indonesia Criminal Code and Mental Health Law divert the criminal responsibility for people with Schizophrenia from punishment into treatment; however, several cases that elaborate in this research show the different legal practices. Cassese, in 2007, delivered the concept of responsibility in criminal law, known as malice or mens rea in Latin, which is based on the thought that an act does not always make a person guilty unless the person's thoughts are evil. Edward Coke defines that "an act does not make a person guilty unless the mind is legally blameworthy." However, when the article elaborates Rodrigo Gualarte's case in the Supreme Court Decision No. 46 PK/Pid.Sus/2010 that has been executed in 2016 and Decision No. 94-K/PM.II-09/AD/V/2016 (Khotibul Umam case).

This article shows that a person with mental disability and mental disorders due to an illness is determined in medical terms and from a legal perspective. In Indonesia, Judge has the power to determine the perpetrator's mental state and the act committed and assess whether the person can be held accountable for the actions. Tengström et al., in 2004, explain that the power of Judges applies the law in concreto, which indeed does not possess adequate knowledge in the medical field; therefore, there is an urgent need to require assistance or opinion from an expert on mental issues. In addition to that, at the practice level, Anwear (2011) states that many court decisions state that legal actions taken by psychotic perpetrators with general symptoms of Schizophrenia cannot be punished because of their insanity. Those opinions are not applied when it comes to narcotics cases. Based on the Rodrigo Gualarte cases, the euphoria of the war against drugs has led to eliminating the right to get a pardon and the limitation of criminal responsibility due to mental health issues.

Responsibility and Accountability in Criminal Law

Accountability is one of the basic principles in criminal law which is also known through the principle of "no crime without guilt". However, there is no explanation of what is meant by the principle of "no crime without guilt" in the Criminal Code (Braithwaite, 2006). Even so, this principle is considered an unwritten law that applies in Indonesia. So, regarding criminal liability, two things must be considered, namely as follows:

- i. Criminal act (daad strafrecht)
- ii. The perpetrator of criminal act (dader strafrecht)

Criminal act and perpetrator of a criminal act are two things that must be truly observed, considering in criminal law there are principles where albeit an act has fulfilled all the elements of a criminal act, the perpetrator may not always be held accountable for his actions (Baranyanan, 2021). Thus, criminal liability may only be given to the perpetrator of a criminal act if he is guilty or able to be held accountable for having committed a crime. The element of error in the perpetrator of this crime will be the basis of consideration for judges or as a general condition for imposing a sentence. In Indonesia, the measure of this responsible capacity is regulated through Article 44 of the Criminal Code, especially in Paragraph (1) which reads:

"Whoever commits an act that cannot be accounted for due to his mental disability since birth or is impaired due to illness, will not be penalized."

The concept of responsibility in criminal law is a central concept which is also known as malice aforethought (Cassese, 2007). This malice aforethought is known as mens rea in Latin. The doctrine of mens rea is based on the thought that an act does not always make a person guilty unless the person's thoughts are evil. The doctrine of mens rea was also formulated by Edward Coke "an act does not make a person guilty unless the mind is legally blameworthy". The two conditions are required to be fulfilled for a person to be convicted, namely the existence of a prohibited outward act/criminal act (actus reus), and an evil inner attitude (mens rea).

Criminal responsibility also called toekenbaarheid, leads to the punishment of perpetrators which aims to determine whether a perpetrator of a crime can be held accountable for the occurring criminal act. According to the existing doctrine, a perpetrator is incapable to be responsible if:

- i. The perpetrator does not have the freedom to choose between doing and not doing what is prohibited or regulated by law;
- ii. The perpetrator is in a situation that makes him unable to realize that his actions are against the law and cannot realize the consequences of his actions.

According to SR Sianturi, a person can be responsible if:

- i. Mental state:
 - a. Not disturbed by permanent or temporary disease.
 - b. No growth defects (stupid, idiot, imbecile).
 - c. Not disturbed by shock, hypnotism, anger overflowing, influenced by the subconscious, sleep, delirious because of fever, cravings.

In other words, the perpetrator is in a conscious state.

- ii. Mental abilities:

- a. Able to understand the nature of their actions.
- b. Able to determine his willingness to act, whether it should be done or not.
- c. Able to know whether the action is right or wrong.

Based on the occurrence of a prohibited act, a person will be held responsible for his actions if the action he takes is against the law and there is no reason to justify or negate the unlawful nature of his actions. Meanwhile, based on the ability to be responsible, only someone who is declared capable of being responsible/capable may be held accountable for his actions.

According to Lacey (2001), the ability to be responsible is a state of psychological normality and maturity, which consists of three types of abilities:

- i. The ability to understand the real world from one's actions.
- ii. The ability to realize that his actions are not allowed/accepted by society.
- iii. The ability to determine the will of his actions.

Regarding the ability to be responsible, Article 44 of the Criminal Code stipulates as follows:

- i. No person is allowed to be punished, whoever does an act for which he cannot be accounted for, because of imperfect or change of state of mind due to illness.
- ii. If it is evident that the act cannot be accounted for due to his imperfect or change of state of mind due to illness, the judge may order him to be admitted to a mental hospital for a maximum of one year for examination.”

The application of Article 44 paragraph (1) of the Criminal Code must consider these 2 conditions, namely:

- i. Psychiatric requirements

There must be an imperfect state of mind in the perpetrator or change of state of mind due to illness, such as a state of madness (idiot), which may have been present since he was born or because of mental illness, and this condition continues.

- ii. Psychological conditions

The perpetrator experienced a mental disorder at the time of committing the crime. If a mental disorder arises after a criminal act has occurred, it cannot be the reason the perpetrator cannot be sentenced.

The provisions of this article do not elaborate the definition of "unable to be responsible", yet only contains reasons attached to the perpetrators who conduct the act which cannot be held accountable, namely reasons about personal biological condition biological in nature, which is an imperfect state of mind or experiences an illness that causes a change of mind. In this situation, the perpetrator does not possess the freedom of will and is unable to determine his will for his actions hence incapable to take responsibility for the act. Hence to be responsible, one must have a perfect state of mind and not experience mental disorders therefore has freedom of will and is able to determine his will in carrying out an action. There are three methods to determine whether the perpetrator of a criminal act can be held accountable for the crime he has committed or not, namely:

- a. Biological method. In this method, the psychiatrist will state whether or not the perpetrator is mentally ill. If the psychiatrist states there is, then the perpetrator will be punished because he is declared to have the ability to be responsible for the crime he has committed.
- b. Psychological methods. This method shows the importance of the relationship between abnormal mental states and actions. The consequences of mental disorders on the actions of the perpetrators determine whether the perpetrator can take responsibility and the punishment imposed can be justified theoretically.
- c. Mixed methods between biological-psychological. This method does not only pay attention to the mental state but the mental state is assessed as a unit with his actions to state whether or not the perpetrator is responsible.

Schizophrenia as a Ground of Reliefs of Criminal Sentences

The grounds of reliefs of criminal sentences are divided into three, namely grounds of reliefs of general crimes according to the Criminal Code, grounds of reliefs of special crimes in the Criminal Code, and grounds of reliefs of putative crimes (Yang et al., 2009). The grounds of reliefs of the crime that is closely related to the discussion of this article is the grounds of reliefs of a criminal offense due to a mental disorder as stated in Article 44 of the Criminal Code which stipulates that:

(1) Whoever commits an act that cannot be accounted against him due to his mentally disabled or is disturbed due to illness, will not be punished.

(2) *If it turns out that the act cannot be accounted against the perpetrator due to being mentally disabled or is disturbed due to illness, the judge may order that the person be admitted to a mental hospital for a maximum of one year as a probationary period.*"

The reason a convict cannot be punished because his actions cannot be held accountable is that:

- i. Has imperfect reasoning. "Reason" here means the power of thinking, thinking power, and thinking intelligence. This includes less than perfect intellect, namely idiots, imbeciles, deafblind and mute from birth. People with these deficiencies are not suffering from illness, but have a disability from birth, therefore they have the ability to think that similar to children. Idiot, experienced by someone who has an IQ (Intelligence Quotient) less than 25. The level of intelligence (intelligence) is unable to develop, does not have the ability to comprehend, and is unable to receive any kind of learning. They lack fundamental instinct (fundamental), and the ability to defend and protect themselves. Imbecile, experienced by someone who has an IQ between 25-49. Their behavior is similar to children aged 3-7 years.

They have slow and unstable movements. Their facial expressions were blank. In general, they do not have the ability to control and take care of themselves. But they can be taught to respond when a dangerous situation occurs and to protect themselves against physical harm.

- ii. Mentally disturbed due to illness. For example, insanity, hysterical (a type of neurological disease), epilepsy, and various other mental illnesses.

The word "reason" in Article 44 of the Criminal Code is defined as the psyche of the perpetrator. " Imperfect intellect" could be interpreted as a lack of mental skill development, such as mental illness Oligophrenia (confusion), Schizophrenia, and several other types of mental disorders that may have been present since birth. Mentally disturbed due to illness, namely some mental illness that afflicts for a while, in contrast to the sane thinking people. This may appear temporarily, for example when the person has a fever or the person commits acts of violence.

In the Criminal Code, there are provisions where if the perpetrator of a crime turns out to have an imperfect/disturbed mental condition, then he cannot be held responsible for his actions. According to the Criminal Code, such an act cannot be held accountable to him. Therefore, according to the provisions of the Criminal Code, a criminal act conducted by a person with a Mental Disorder cannot be punished.

Criminal Sentences Against Persons with Schizophrenia

Based on Law Number 18 of 2014 concerning mental health, People with Mental Disorders (ODGJ) are people whose thoughts, behavior, and feelings are disturbed and manifest in the form of symptoms and/or changes in behavior, and may cause suffering and obstacles in carrying out their duties and function as a human. One of the mental disorders causing a person to be unable to account for his actions is Schizophrenia which is included in the classification of severe mental disorders based on the 2013 basic health research (Wallace et al., 2004).

Schizophrenia is a serious mental disorder in which people interpret reality abnormally and may cause several combinations of hallucinations, delusions, and very disorganized thinking and behavior that interfere with daily functioning, and maybe disabling (Mullen et al., 2000). People with Schizophrenia own a serious mental illness affecting the way they think, feel and behave, making it difficult to distinguish between realities, consequently, when they conduct an action, it will be difficult for them to understand their own doing. People with schizophrenia are included in the category of people with mental disabilities and should be protected in accordance with Law Number 39 of 1999 concerning Human Rights and Law Number 8 of 2016 concerning Persons with Disabilities. In the Convention on the Rights of Persons with Disabilities which has been ratified by Law no. 19 of 2011, mental disorders are one type of disability that must receive special protection. Article 1 of this Convention states that:

"The objective of this Convention is 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 innate dignity."

In Indonesia, the prevalence of severe mental disorders, including schizophrenia, reaches around 400,000 people or 1.7% per 1000 population. However, many of these people with Schizophrenia should face the law even though Article 44 of the Criminal Code has regulated the grounds of pardon eliminating their crime, which is the absence of the ability to be responsible for such crime. Studies prove that persons with schizophrenia experience a cognitive deficit state. Some studies say that persons with Schizophrenia experience cognitive deficits that affect various skills, including general intelligence, attention, working memory, verbal fluency, and other cognitive functions while a cognitive function is a key element of the mental state that determines the ability to take responsibility. Therefore, People with Schizophrenia never actually intentionally commit a crime, so it is inappropriate to hold them accountable for their actions.

Cases of Criminal Sentences for People with Schizophrenia

Legal Protection in Cases Related to Persons with Intellectual Disabilities as Perpetrators

There is one case where the judge applied the principles of criminal law more precisely, namely in the case of Wendra Purnama. Wendra is a person with an intellectual disability (Decision Number 290/Pid.Sus/2019/PN Tng). Wendra Purnama was charged with

possession of class I narcotics and the judge granted a guilty verdict as the second alternative charge, namely Article 112 paragraph (1) jo. Article 132 paragraph (1) of the Law of the Republic of Indonesia No. 35 of 2009 concerning Narcotics from the Public Prosecutor, however, the judge applied the grounds of pardon in Article 44 Paragraph (1) of the Criminal Code by stating that Wendra Purnama's actions could not be accounted for against him.

In Wendra's case, the Panel of Judges considered the results of mental and psychological examination of the Defendant which was presented by an expert witness from a psychiatric specialist who was presented by the Public Prosecutor, namely Dr. Jap Mustopo Baktiar, Sp.Kj, and expert witnesses who were presented by the Defendant's Legal Counsel, namely Mulyanto, M.Si (Psychologist), and Prof. Dr. Irwanto, all of whom stated that the Defendant had mild mental retardation, an imperfect state of mind, in the sense of less than perfect strength, power, the intelligence of mind, that the Defendant's mind was impaired in growth. The judge also gave a voluntary verdict on Wendra Purnama.

Criminal Cases of Persons with Schizophrenia

Not all persons with schizophrenia are terminated by the legal process despite psychiatrists having declared a mental disorder. As an example, we will discuss the sentence of Persons with Schizophrenia which occurred in the Supreme Court Decision No. 46 PK/Pid.Sus/2010 (Rodrigo Gularte case) and Decision No. 94-K/PM.II-09/AD/V/2016 (Khotibul Umam case) which occurred due to the judge ruling out their mental conditions.

The first case is Rodrigo Gularte, who at the age of 10 was sentenced to suffer from cerebral dysrhythmia causing him to lack self-control and was unable to make decisions. He was caught in a narcotic smuggling case in Indonesia but his mental condition was never revealed during the trial process, therefore there was no legal remedy that could be taken. Law enforcement in the Rodrigo Gularte case from the outset disregarded Rodrigo Gularte's mental condition. From the initial to the final proceeding, there was no consideration of his mental condition. Rodrigo Gularte's mental condition was explained by his lawyer at the first trial through a plea, yet the court did not examine and consider his mental condition.

During the trial process, Rodrigo Gularte was never examined by a psychiatrist, his medical record from Brazil was being disregarded, and a psychiatric expert witness was never brought in during the trial process. This translates to not only disregarding Article 44 of the Criminal Code, but also the provisions of Article 71 of Law Number 18 of 2014 concerning Mental Health jo. Article 30 Paragraph (1) of Law Number 8 of 2016 concerning Persons with Disabilities requires a psychiatric examination for the sake of law enforcement. Investigators should be careful in considering or examining allegations of mental disorders to their suspects since based on Article 7 Paragraph (1) letter h of the Criminal Procedure Code, investigators should have the authority to invite experts, in this matter a psychiatrist, to determine whether there is a mental disorder or not, since a person with schizophrenia, like Rodrigo Gularte are unable to understand the consequences of their actions and have difficulty processing information to make decisions, thus the confession being made might occur because he was prompted by his mental condition. Even at the final court stage, Rodrigo Gularte's medical records should be taken note of and considered. On 3 November 2014 a mental examination was conducted on Rodrigo Gularte at the Kusumowardhani Psychological Consultant & Center of Behavioral Studies and on 11 February 2015 at the Cilacap Regional General Hospital where the results indicated that Rodrigo Gularte was suffering from Paranoid Schizophrenia. Through the second judicial review, Rodrigo Gularte's attorney also submitted 22 novums proving that Rodrigo Gularte did have a mental disorder. The Attorney General's Office examined Rodrigo's mental health before executing him, however, the results of his examination were only used as a second opinion and have not been published by the Attorney General's Office until today.

An Attorney General even repeatedly stated that Rodrigo did not suffer from a mental disorder. On 22 April 2015, Rodrigo Gularte's team of lawyers applied to the Cilacap District Court to seek a court decision on the application of Rodrigo Gularte's cousin for guardianship on the grounds of Rodrigo Gularte's mental condition where if the court accepts a civil application, the application can be applied as an argument for Rodrigo was not sentenced to death and had to be treated in a mental hospital. However, Rodrigo Gularte was already executed on April 29, 2015. The neglect by law enforcement on Rodrigo Gularte's mental condition is contrary to the provisions of Article 71 of Law Number 18 of 2014 concerning Mental Health which requires a mental health examination of perpetrators of crimes committed suspected of having a mental disorder to determine the ability to take responsibility.

The second case is on behalf of Khotibul Umam who was convicted of torture resulting in death. In the case of Khotibul Umam, his mental condition was checked with the presence of a psychiatrist/psychiatrist by his legal advisor, namely dr. Teddy Hidayat, Sp.Kj (K) who examined him and gave a statement in court based on the Visum et Repertum of Hasan Sadikin Hospital Bandung Number B26/146/I/2016 dated January 6, 2016, that Khotibul Umam did suffer from chronic paranoid schizophrenia which caused Khotibul Umam unable to distinguish between reality and fantasy and unable to judge between good and bad. In conclusion, psychiatrists are of the opinion that at the time he committed his actions, Khotibul Umam was influenced by his schizophrenic condition. However, even though the judge included the Visum et Repertum from a psychiatrist in his consideration, the judge still granted a guilty verdict and sentenced Khotibul Umam to 8 months and 20 days in prison with the consideration that the psychiatrist's statement stating that Khotibul Umam did not aware of what he was doing needs to be ruled out and that Khotibul Umam committed his actions since he was unable to control his anger as well as lack of faith and piety, meaning the judge had his own opinion which contradicted the statement of the psychiatrist, that there was no causal relationship between Khotibul Umam's actions and his schizophrenia disorder.

In the two cases above, the law enforcers ruled out the mental condition of the defendant, which translated that they set aside the provisions of Article 44 of the Criminal Code and gave their own opinion regarding the mental condition of the defendants even though there was already the information from a psychiatrist. This exceeds the capacity of a law enforcer because based on Article 150 of Law No. 36 of 2009 concerning Health jo. Article 73 of Law Number 18 of 2014 concerning Mental Health, which can examine mental conditions for the sake of law enforcement is a specialist in mental medicine and/or clinical psychologists so that only the psychiatric experts mentioned in the two regulations are allowed to assess mental conditions. Law enforcers should have paid attention to the provisions stipulated in Article 44 of the Criminal Code and related provisions, namely by taking into account the mental condition of convicts with mental disorders through medical records as well as results of examinations and statements from psychiatric experts. The ability and skill of the convicts in being responsible for criminal acts must be seriously considered considering Article 44 paragraph (1) of the Criminal Code and Article 71 of the Mental Health Law which emphasizes the importance of the ability to be responsible and legally capable to carry out the judicial process.

The human rights of convicted persons with schizophrenia as persons with disabilities are also being disregarded by the state. Such as when Rodrigo Gualarte was accused of faking madness to avoid execution and during the case of Khotibul Umam when the judge in his decision stated that Khotibul's faith and piety were weak. The negative labeling carried out by law enforcers obscures their consideration of the mental condition of the convicts which is a condition for being responsible for criminal acts (Munkner et al., 2003). This is an example of a violation of the rights of persons with schizophrenia as persons with mental disabilities need to be released from stigma in the form of negative labeling of their disability as regulated in Article 7 of Law Number 8 of 2016 concerning persons with disabilities.

The judge's decision that sentenced persons with schizophrenia as occurred in the cases of Rodrigo Gualarte and Khotibul Umam was incorrect due to the existence of evidence that they had schizophrenic mental disorders where both Rodrigo Gualarte had a medical record that he suffered from mental disorders, one of which was paranoid schizophrenia and Khotibul Umam has gone through a psychiatric examination during the trial process where it was declared by a psychiatrist that he had chronic paranoid schizophrenia which should not be ruled out. In these two cases, the judge did not protect the convicts with schizophrenia since they disregard the excuse for forgiveness in Article 44 of the Criminal Code.

Legal protection as happened in the case of Wendra Purnama did not occur in the cases of Rodrigo Gualarte and Khotibul Umam. Rodrigo Gualarte has never received proper legal assistance. He was never examined by a psychiatrist, was not given an interpreter, nor was he able to file an appeal since he did not have the funds to hire a lawyer and was not provided with information regarding the Indonesian legal systems. What happened to Rodrigo was a violation of the defendant's rights, even a violation of human rights. In the case of Khotibul Umam, although it had been examined by a psychiatrist and the *visum et repertum* of the examination was included in the judge's consideration, apparently, those would not change the judge's belief and instead, the judge decided to override the testimony of the psychiatrist and imposes a prison sentence, where even though the sentence is commuted, this judge's decision is still contrary to Article 44 of the Criminal Code which regulates that persons with mental disorders cannot be convicted. Different from what happened in the Wendra Purnama case which showed that the presence of expert witnesses could result in a distinctive judge's decision where the psychiatric experts who were presented at his trial were then able to convince the judge to release Wendra Purnama from criminal responsibility as stated in Article 44 of the Criminal Code.

Schizophrenia suffered by Rodrigo Gualarte and Khotibul Umam causes a mental disorder resulting in a person's inability to understand reality and difficulty processing information to make decisions. If a person has an understanding of reality and the ability to make poor decisions, then he or she has a severe mental disorder according to Article 44 of the Criminal Code. This is supported by the 2013 Basic Health Research which classifies Schizophrenia as a severe mental disorder. Accordingly, based on Indonesian criminal law, if a criminal suffers from Schizophrenia, a severe mental disorder, then they are unable to take account for their actions and the only sanction that may be imposed on them is behavioral sanction as referred to in Article 44 Paragraph (2) of the Criminal Code.

Legal Protection for Persons with Schizophrenia

Substantially, criminals suffering from mental disorders such as persons with schizophrenia are remain recognized as legal subjects. However, when someone with a mental disorder commits a crime, they must have the ability to take responsibility to be held accountable. Criminal sanctions should not be imposed on perpetrators who are unable to take responsibility. Lamintang is of the opinion that the provisions of Article 44 of the Criminal Code may be defined as in the event that a person commits an act that violates the law and should be held accountable, yet due to the disease or disorder in his psyche as well as a disturbance in the ability to healthy reasoning, then such person cannot be held criminally accountable (Soyka et al., 2007).

In relation to the ability to be responsible, the Indonesian Criminal Law regulates the grounds of reliefs in terms of sentencing ODGJ with criminal law, criminal matters, or conditions that may result in not imposing a crime on someone who has committed an act that is expressly prohibited and is threatened with sanctions. Criminal sentences by law include grounds of justification and grounds of pardon. The grounds of pardon are the application of Article 44 of the Criminal Code, which constitutes as a ground that eliminates the guilt of the perpetrator of a criminal act. The act itself would remain against the law, however, the perpetrator is not allowed to be punished due to no wrongdoing against him. On the basis of grounds of reliefs, 2 elements can be reliefs, namely:

i. Element of Guilt

The element of guilt is an element that originates or is attached to a person's personality. This is subjective, if this element of guilt is removed, it will become the basis for criminal pardon. Therefore, if someone with these grounds of pardon, the element of guilt may be forgiven but without any elimination of the element against the law. His actions will remain against the law.

ii. Elements Against the Law

If this element is removed, it will become the ground of justification. Meaning if someone has this ground of justification, an act that should be categorized as a criminal act, would be considered as an act.

Based on Article 44 Paragraph (1) of the Criminal Code, for the insane/mentally/ill person, the perpetrator of a criminal act who is insane, mentally ill, or idiotic cannot be held criminally responsible. Article 44 Paragraph (1) of the Criminal Code distinguishes between defects in growth and disorders of mental illness. The definition of interference is a disorder since birth or since adolescence grows normally, but later on, a mental disorder appears. The disorder in question is a condition that is psychotic (characterized by a disconnection from reality or delusions). Article 44 Paragraph (1) of the Criminal Code itself does not further define the meaning of being unable to be responsible, but only states the various mental states of people who cannot be responsible for the actions committed, thus the conclusion is drawn that people who are capable of being responsible. The responsibility for his actions is if there is no state of mental disorder or impaired ability to think healthy. Several doctrines hold the view that inability to take responsibility as regulated in Article 44 of the Criminal Code includes, among others, the following actions:

- i. Forced act, or lack of freedom in carrying out actions that are prohibited by the law.
- ii. The condition of a person who does not underlie his actions is prohibited by law and the person does not understand the consequences of his actions, such as mental disorders.

Thus, the mental state of a person with an ingrowth disability and mental disorders due to an illness is not only being determined in medical terms, but also from a legal perspective, where the mental state of the perpetrator and the act committed will be related so that the judge can assess whether the perpetrator can be held accountable for his actions. Judges are law enforcers to apply the law in concreto which indeed does not possess adequate knowledge in the medical field, hence the judge requires assistance or opinion from an expert mastering the field, which in this case, a psychiatrist (Tengström et al., 2004).

The principle of guilt as the principle that there is no criminal act without an inappropriate act which objectively shall become the burden of the perpetrator, is a fundamental principle. In the application of material criminal law in formal crimes, where the observation and investigation process here play a role in proving the existence of alleged criminal acts to be examined and investigated further.

An investigation is a process to determine whether a report or event may continue to be investigated. During the examination, the investigator should be able to observe the symptoms of a mental disorder in the suspect. Therefore, the result of the process is to illustrate that an event that was initially suspected was a criminal act. In this process, a psychiatrist may play a role in helping to analyze the intellectuality, mental competence as well as the existing risks and dangers of the alleged perpetrator of a criminal act.

In the Criminal Procedure Code (KUHAP), there is Article 109 Paragraph (2) which stipulates that:

"In the event that the investigator halts the investigation due to insufficient evidence or the incident does not constitute a criminal act or the investigation is terminated by law, the investigator shall notify the public prosecutor, the suspect, or his family."

However, the grounds of reliefs as referred to in Article 44 of the Criminal Code excludes the requirements contained in Article 109 Paragraph (2) of the Criminal Procedure Code to terminate the investigation hence if the investigation of a suspect with an inability to take responsibility is halted, the investigator unable to use Article 109 Paragraph (2) KUHAP as the basis for its termination. Article 44 of the Criminal Code also excludes the grounds of the abolition of prosecution hence suspects with Schizophrenia sufferers may still be prosecuted in court proceedings. Article 44 of the Criminal Code, is regulated regarding mental disorders or illnesses experienced by perpetrators of crimes that may result in the perpetrator being unable to account for the actions he has committed. However, there is no formulation of the notion of accountability in the Criminal Code, so that understanding must be sought through legal science or expert doctrine.

Referring to Article 7 paragraph (1) letters d and j of the Criminal Procedure Code, Articles 20 and 21 of the Criminal Procedure Code, SEMA No. 1 of 1989 dated March 15, 1989, concerning the Cancellation of the Detention Period and a relevant doctor certificate is evidence that the suspect is proven to suffer from mental illness or disorder, the family or through a legal representative may apply for a suspension of detention of the suspect. Hence a cancellation letter may be issued as a letter made for a suspect who suffers illness while in detention, thus the suspect is firstly sent to undergo the treatment process until he is able to return to undergo the criminal proceeding. During this period of detention, the suspect's detention period will not be calculated until the suspect recovers. The implementation of this cancellation policy lacks completely clear legal regulations since according to Article 8 KUHAP every case which has been registered and processed by the investigator cannot be terminated unless complied with the

conditions as stipulated in Article 109 Paragraph (2) KUHAP concerning termination of the investigation. While the grounds of reliefs stated in Article 44 of the Criminal Code is not included as grounds of termination of investigation as regulated in Article 109 Paragraph (2) of the Criminal Procedure Code, therefore in the event the investigation of a suspect suffering from a mental disorder is stopped, the investigator can not use Article 109 Paragraph (2) of the Criminal Procedure Code as the basis for terminating it. The process of investigation of Persons with Schizophrenia, in particular regarding the termination of investigations and the act of entering convicts with Schizophrenia into a mental hospital by investigators, does not yet have a clear legal basis hence it requires a separate policy in dealing with perpetrators of Persons with Schizophrenia because Article 44 of the Criminal Code gives authority only on the judge to decide whether or not there is a mental disorder based on evidence through examination in court.

In order to try, judges can be assisted by an expert to explore further a criminal act so that it becomes clear and clear. Against Persons with Schizophrenia, the criminal liability is included in the category of Article 44 of the Criminal Code, so according to the provisions of the criminal law a person cannot be punished even though the act is an act that is contrary to the law but the perpetrator is given a ground of pardon by law so that the guilt is eliminated. In addition, criminal law has the nature of an *ultimum remedium* which requires that punishment should not be used as a means if it is not necessary.

The provisions of Article 44 of the Criminal Code are supported by various other laws and regulations, namely Article 71 of Law Number 18 of 2014 concerning Mental Health which regulates mental health examinations to determine the ability to be responsible for someone who commits a crime. and Article 30 Paragraph (1) of Law Number 8 of 2016 concerning Persons with Disabilities which stipulates that law enforcers before conducting an examination are required to request consideration from a psychologist or psychiatrist regarding mental conditions. However, although there is an explanation from a psychiatrist that the perpetrator has Schizophrenia disorder due to a disease in his brain, the focus of the law is on the thoughts of the perpetrator when he committed his act. If it is associated with the doctrine of *mens rea* where a person's actions are declared wrong if there are evil thoughts at the time of committing the act, then based on Indonesian criminal law, people with schizophrenia can not be held responsible for their actions because there are distortions in their thoughts, perceptions, emotions, language, feelings of themselves and their behavior, and delusions, namely false beliefs, which makes them unable to judge between the good or bad of their actions.

Schizophrenia has several types, yet it is difficult to separate the types of Schizophrenia that should receive legal protection and those that do not. In the discussion of psychiatry, all patients who have psychotic disorders must get help including legal protection. The law is difficult to determine which areas of mental illness are excluded from the legal process. The law may regulate requirements based on fundamental principles of justice and human rights. However, by far, the most frequently requested psychological evaluation is regarding the competence to be tried in order to determine whether the legal process can proceed. So the protection provided both legally and mentally is very necessary to ensure that perpetrators with psychosis are not legally processed in the same way as perpetrators who are mentally healthy. In practice, many court decisions state that legal actions taken by psychotic perpetrators with general symptoms of Schizophrenia cannot be punished by reason of their insanity (Anwar et al., 2011).

Indonesia is one of the countries that has signed and ratified the Convention on the Rights of Persons with Disabilities through Law No. 19 of 2011. Article 12 of this convention requires states parties to take appropriate steps to provide access for persons with disabilities who may need in exercising their legal capacity. People with schizophrenia are people with mental disabilities. Indonesian criminal law has Article 44 Paragraph (2) of the Criminal Code which stipulates that:

"If it turns out that the act cannot be insured against the perpetrator because his mental growth is impaired or is impaired due to illness, then the judge may order that the person be admitted to a mental hospital for a maximum of one year as a probationary period."

Article 44 Paragraph (2) of the Criminal Code regulates behavioral sanctions in the form of treatment in a Mental Hospital for 1 year. According to R. Soesilo, if the perpetrator is incapable to be responsible for his actions, then he should not be sentenced, instead, as a measure to prevent harm to the perpetrator who suffers from mental disorders and public safety, the judge may order treatment in a mental hospital for a maximum probationary period of 1 year, to be protected and inspected. Therefore, the judge as an authority based on Article 44 of the Criminal Code to decide whether or not there is a mental disorder which may apply to the grounds of pardon through Article 44 Paragraph (2) of the Criminal Code as legal protection for convicted People with Schizophrenia.

Conclusions

Based on the discussions that have been described, it can be seen that the implementation of criminal law protection for Persons with Schizophrenia in Indonesia is still far from the statutory provisions, criminal law principles, and international law provisions that have been ratified by the Indonesian Government.

Law enforcement officials, especially judges, are still not unanimous in deciding criminal cases even though there are provisions for providing legal protection which is materially contained in Article 44 of the Criminal Code. This condition is exacerbated by the fact that law enforcement officers in Indonesia are still not sensitive to the mental condition of an offender with Schizophrenia because they often give negative stigma and even label suspects, defendants, and convicts with Schizophrenia as individuals who lack faith and are far from God or pretend to be crazy to act. avoid punishment. This personal stigma is carried over to the handling of cases. In the case of Rodrigo Gularte and Khotibul Umam, the investigator and judge ignored the psychiatrist's certificate and gave their

own opinion by saying that there was no causal relationship between Schizophrenia disorder and the actions he had committed. This exceeds the capacity of a law enforcer because based on the provisions of the legislation those who can examine mental conditions for the sake of law enforcement are psychiatric specialists and/or clinical psychologists thus only the psychiatric experts mentioned in the two regulations are allowed to assess mental conditions.

Legal protection of people with schizophrenia is the government's commitment to the protection of the human rights of people with mental disabilities. This paradigm and mission dissimilarity illustrate that the spirit of punishment is greater than the spirit of protecting people with schizophrenia as citizens who should be protected because law enforcement officers often prioritize punishment and forget the nature of criminal law, namely the *ultimum remedium*. The Indonesian government is negligent in protecting individuals with mental disorders in its jurisdiction when they conflict with the law. The aspects of protection and recovery that are important pillars of criminal law reform have been violated.

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