

Proving The Insanity Defense in The Enforcement of Criminal Law in Indonesia

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Abstract

Criminal liability is a manifestation of the perpetrator for his or her crime. Article 44 (1) of the Indonesian Criminal Code (KUHP) explains that the insanity defense may release a perpetrator from conviction. For this research, the utilized research method was normative legal research, by which legal regulations are examined and the results neither reject nor accept a hypothesis, but give prescriptions for what should be proposed. The results of this research showed that first, insanity defense can release a criminal offender from conviction. This is because the perpetrator is unable to consciously understand that his or her actions are against the law, and that person cannot be held with criminal liability. Second, the construction of a verdict to declare whether or not a person qualifies for the insanity defense must be made in advance of his or her psychological condition, to decide if it is appropriate for the perpetrator to be convicted.

Keywords: Proving; insanity defense; enforcement of criminal law.

Abstrak

Pertanggungjawaban pidana merupakan bentuk manifes dari pelaku tindak pidana atas kesalahan yang dilakukannya. Berdasarkan Pasal 44 ayat (1) KUHP dijelaskan bahwa adanya insanity defense menyebabkan seseorang tidak dapat dipidana. Metode penelitian yang digunakan ialah penelitian hukum normatif (legal research), yang mana mengkaji kaidah hukum dalam tataran hukum positif dengan hasil yang dicapai bukan menolak atau menerima hipotesis, melainkan memberikan preskripsi mengenai apa yang seyogyanya atas itu yang diajukan. Penelitian ini untuk memperoleh hasil, pertama, insanity defense dapat melepaskan pelaku tindak pidana dari hukuman. Hal ini disebabkan karena orang tersebut tidak mampu menyadari bahwa perbuatannya bertentangan dengan hukum serta tindakan yang dilakukan diluar dari kesadarannya, maka orang tersebut tidak dapat dimintai pertanggungjawab secara hukum. Kedua, Sebuah konstruksi putusan untuk menyatakan seseorang memiliki insanity defense atau tidak, harus dibuktikan terlebih dahulu keadaan psikologinya sehingga dapat ketahui pantas atau tidak untuk dikenai hukuman.

Kata Kunci : Pembuktian; insanity defense; penegakan hukum pidana.

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Introduction

Perpetrators of criminal offenses cannot automatically be held accountable, as long as there is a juridical reason that justifies the perpetrators to be convicted or acquitted. It has been established that the primitive law of looking at the relationship between actions and their effects has no psychological qualification. There is no relevant relationship between an individual action and the mental state of perpetrator. Thus, it is not necessary to consider the perpetrator's mental attitude in relation to the consequences of the action. In contrast, Glanville William stated in his Criminal Law that “the act constituting a crime may in some circumstances be objectively innocent” (A.P. Simester, 2011). In reality,

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conviction must begin with an examination of the possibility of the perpetrator's innocence.

Not all crimes are committed by people with healthy mental states. In Indonesia, there have been several criminal cases committed by people with mental disorders. According to data from the World Health Organization (WHO), there were approximately 60 million people affected by bipolar disorder, 47.5 million affected by dementia, 35 million people affected by depression, and 21 million affected by schizophrenia in 2016. In Indonesia, cases of mental disorders continue to increase with various predisposing factors, including biological, psychological, and social factors. This has the impacts of increasing the burden on the government and decreasing the quality of human resources in the long run. In Indonesia, the prevalence of mental emotional disorders with symptoms of depression and anxiety for those aged 15 years and older reaches approximately 6.1% of the total population of Indonesia.

An accused who pleads a valid excuse cannot be held blameworthy and therefore culpable for having brought about the external elements of a criminal offence (Mousourakis, 1998). The existence of external factors acts a defense for a perpetrator to not be deemed criminally liable. In addition, there must first be a causal link between the mental state and the implementation of actions. Based on this, it is necessary to review if insanity defense applies in order to hold someone criminally liable.

Insanity defense is described in criminal law as a condition of mental disorder that excuses the defendant from criminal liability for the committed criminal offense. Thus, determining if the defendant is guilty in criminal law requires proving the defendant to be in a certain mental state when carrying out the accused act. "The affirmative defense of legal insanity applies to this fundamental principle by excusing those mentally disordered offenders whose disorder deprived them of rational understanding of their conduct at the time of the crime" (Suresh Bada, 2015).

Initially, implementing the insanity defense was not easy. Many countries refused to allow the usage of this excuse. Insanity defense was first recorded in the treatise of British law in 1581. Meanwhile, in the United States of America, the application of insanity defense began in early 1994, when the U.S. amended several laws to include reasons for waiving criminal liability on the basis of the perpetrator's mental disability or mental disorder (abnormal mind).

The term "insanity defense" is more well-known in the common law system. However, the law regarding insanity defense also exists in Indonesian law. According to Moeljatno's translation of the Indonesian Criminal Code (KUHP), Article 44 (1) states that: "Whoever commits an act that cannot be held accountable to him, because his mental state is defective in growth or disturbed by illness, shall not be punished." Based on the provisions in Article 44 (1) of the KUHP, it is understood that a person whose mental state is defective or whose mind is not sound cannot be convicted because the person is incapable of being responsible; in other words, the insanity defense applies to that person. Even though there are legal regulations regarding the insanity defense, the criminal

liability process for someone for whom the insanity defense applies does not end here. A judicial process is needed to declare that the defendant with such a mental state cannot be punishable by law.

Regulations regarding the insanity defense in criminal liability should exist in every modern legal system. This is because a legal system that recognizes the insanity defense will have effects on the concept and implementation of certain circumstances that may excuse the defendant from criminal liability. When the defendant is mentally disturbed, the defendant cannot be held responsible. It becomes unfair to punish someone in such a mentally disturbed state.

Research Problems

The research for this article was carried out to solve and analyze certain problems. *First*, is the insanity defense able to excuse a person from criminal liability? *Second*, what is the process of proving whether the insanity defense applies to a person?

Research Method

The utilized research method for this article was normative legal research. This research method involves a theoretical framework and consists of several steps: (1) problem formulation; (2) preparation of a theoretical framework for formulating the hypothesis; (3) hypothesis formulation; (4) hypothesis testing; and (5) drawing conclusions (Titik, 2013). In addition, the research involved three approaches, which are the statute approach, conceptual approach, and case approach. The statute approach was for understanding the philosophical basis and *ratio legis* of the basic principles of the insanity defense. The conceptual approach was for looking further into the views and doctrines that develop in relation to the insanity defense. Finally, the case approach was for examining cases related to the issues at hand, in the form of legally binding court verdicts.

Discussion

Criminal Liability with the Insanity Defense

Criminal offense and the liability for said offense are intertwined and inseparable. A criminal offense is an act in which the perpetrator can be held accountable for his or her misconduct. The basis for criminal accountability is "*geen straf zonder sculd, actus non facit reum nisi mens sis rea*" (Aminullah, 2018), which means the judgment of a criminal act is based upon the moral position of its perpetrator relative to his or her criminal act.

A defendant can be held responsible for a crime that they committed based on the defendant's ability to be held responsible. It is necessary to establish prior motive as the basis for a criminal offense to occur. The responsibility system ascribes judgmental responsibility to a person not just in case the person is scientifically free, but if he or she (1) has a minimal ability to form true beliefs about the world, other people's mental states,

and the likely consequences of what they do; and (2) the ability to make decisions that fit 'the agent's normative personality: his desires, preferences, convictions, attachments, loyalties and self image (Allen, 2010). Before holding a defendant as criminally liable, one must first look at the mental state of the perpetrator during the time the crime was committed. Next, one must relate the mental state to possible convictions.

Criminal liability exists unless there are reasons for the defendant to be acquitted. In other words, criminal liability exists as long as the perpetrator does not have a defense for the crime(s) they committed. The laws seeks to exclude from criminal liability those who are not 'appropriate' subject for a given sanction or indeed for any sanction (Goldstein, 1963). Therefore, every element of crime charged to the perpetrator has been established beyond any doubt.

The other side of criminal liability is that in regarding criminal offenses, one must also consider the state of mind, mentality, or psychology of the perpetrator. Moeljatno stated that, only for people who are in a normal mental state, can we expect to regulate his or her behavior in accordance with what is considered good in society (Mamangkey, 2020). "The proper boundaries of criminal liability with respect to those with questionable mental capacity are currently under review (Peay, 2015). It can be said that only people who are in a normal state of mind have fulfilled the conditions of criminal liability. Perpetrators of criminal offenses who do not have a normal or a healthy state of mind are deemed incapable of being responsible for his or her actions.

In addition, Pompe explained that criminal liability is within the limits of the elements of the ability to think that is possessed by the perpetrator that allows to control the mind and determine his or her will, meaning that the perpetrator can determine his or her will according to personal opinion (about the meaning and consequences of behaviors) (Muhaling, 2019). Therefore, if the perpetrator is held accountable for a prior committed criminal offense, his or her mental state must be corrected, and if they can be blamed, then they must be held accountable for the committed criminal offense (Indah, 2019).

Jan Remmelink revealed that in order to punish a person while at the same time meeting the demands of justice and humanity, there must be an act that is against the law and can be blamed on the perpetrator. In addition to these conditions, the perpetrator in question must be held accountable (*toerekeningsvatbaar*) or *schuldahig* (Suhariyono, 2019). Based on this, for deciding whether or not a person can be held responsible for a crime, the following conditions must be fulfilled:

1. Acts against the Law

A person is held liable in criminal law when he or she has committed a criminal offense. Since every criminal offense is against the law, criminal liability is directed at the act against the law. Actions against the law are actions that violate the provisions stipulated in the law. Acts against the law can be committed with intent or negligence. The nature of acts against the law is that there has been a crime committed, without regarding whether the act was done with intent or was negligent.

A person is considered to commit an act against the law if the committed act has fulfilled the elements of crime in the provisions charged against him or her. This is an indispensable condition and is needed to manifest his or her criminal liability. Sudarto stated that it is not enough to convict someone if that person has committed an act that is against the law or an act that is unlawful in nature. Even though the act fulfills the elements of the crime and is not justified, it has yet to fulfill the requirements for conviction. There is yet another requirement, in that the defendant must be guilty for the crime that he or she is charged with for the defendant to be convicted. The person must be held liable for his or her actions, or considering his or her actions, the actions must be liable to that person (Saputra, 2015)

2. Ability to Be Held Criminally Liable

The ability to be held liable is one of the elements of criminal liability. The ability to be held liable is generally a fact about the perpetrator's mental state that is directly related to criminal liability. Van Hamel argues that there are three types of ability to be held liable (Hidayat, 2017):

- a. Ability to understand the true meaning of his or her actions.
- b. Ability to realize that his or her actions can or cannot be justified by society.
- c. Ability to determine the will for his or her intended actions.

To examine the ability to be held liable, one must first consider the factor of the mind, as whether the perpetrator can distinguish between what is allowed and what is not. One then must also consider the factor of feelings or the will of the perpetrator, as whether they can adjust his or her behavior with the awareness of what is allowed and what is not. Therefore, if a person commits a criminal offense and is unable to determine his will according to the awareness of whether the act is good or bad, the perpetrator cannot be held liable for his crime.

3. Grounds for Acquittal

Grounds for acquittal is defined as a special condition that allows a person who commits an act that fulfills the elements of a crime to not be convicted. The perpetrator or defendant may have actually fulfilled all the elements of a crime as stipulated in criminal law regulations, but there may be several reasons that can cause the perpetrator to not be convicted or to be excluded from the conviction. The reason for acquittal is called the defense for the perpetrator of a criminal offense.

Criminal law theory explains that the reasons for acquittal can be divided into (Narindri, 2019):

- a. Legal justification, which are reasons that eliminate the unlawful nature of an act; what the defendant did is then considered proper and correct by these reasons.
- b. Legal excuse, which are reasons that eliminate the defendant's guilt. While the offense committed by the defendant is still against the law and therefore a criminal offense, he or she is not convicted because a wrongful act was not committed.
- c. Grounds to Abolish Prosecution, which involve neither legal justification nor legal excuse and does not regard the nature of the act or the nature of the person who

committed the act, but the government considers that, on the basis of utility or benefit to society, the defendant should not be prosecuted.

The description above explicitly states that a person with insanity cannot be convicted. This is because the person does not possess the ability to be held liable, even though it is clear that the committed act is an act that is against the law. In actuality, the perpetrator or defendant may have fulfilled all the elements of a crime as stipulated in criminal law regulations, but the insanity defense becomes applied as a reason to disregard the crime, or to exempt him or her from conviction.

Regarding the insanity defense, there are several cases of criminal offenses that occur in which the perpetrators suffer from mental disorder. With the power of the law to determine the perpetrator's liability in light of the insanity defense in Indonesian law, one must regard the provisions of Article 44 (1) of the KUHP, which according to Moeljatno's translation, states that: "Whoever commits an act that cannot be held accountable to him, because his mental state is defective in growth or disturbed by illness, shall not be punished." From the provisions in Article 44 (1) of the KUHP regarding the inability to be held liable, this may also be determined through reverse interpretation (*argumentum a contrario* or *redeenering a contrario*). If the person who cannot be held liable is a person whose mental state is defective in growth or disturbed by illness, then a person who can be held liable is a person who does not have the conditions as specified (Irawati, 2009).

As stated in KUHP Article 44 (1), to determine whether the insanity defense may be considered to apply to a perpetrator of a criminal offense, one of the following two things must be found to apply to him or her (Oratmangun, 2016):

1. The perpetrator's mind is defective from the time of his or her growth, resulting in the perpetrator's inability to distinguish between good and bad. An example is a person who committed a criminal offense, but has an intellectual disability.
2. The perpetrator's mind suffers from a mental disorder, resulting in the mind to not be able to function normally or less optimally to distinguish between good and bad. An example is a person who committed a criminal offense, but has mental illness or epilepsy.

In connection with mental illness or insanity, Indonesia has attempted to unify the diagnosis of psychiatric diseases with the creation of the Classification Guidelines for the Diagnosis of Mental Disorders (PPDGJ) in 1993. To date, PPDGJ has three versions, which are PPDGJ I, II, and III. They are based on the Diagnostic and Statistical Manual of Mental Disorders (DSM) published by the American Psychiatric Association (APA) as well as the International Classification of Diseases (ICD) published by the World Health Organization (WHO), and the latest version is the Third Classification Guidelines for the Diagnosis of Mental Disorders (PPDGJ III). PPDGJ III states that mental disorders are clinical behavioral or psychological patterns that are typically associated with symptoms, distress, and impairments in psychosocial functions. The PPDGJ III mentions the term of "mental disorder" to refer to persons with mental disabilities. PPDGJ III does not recognize the term of "mental illness" or "mental disease" (Ginting, 2020). According to WHO, mental

disorders consist of a variety of problems with a variety of symptoms generally characterized by some abnormal combination of thoughts, emotions, behavior, and relationships with others. Some examples of mental disorders are schizophrenia, depression, intellectual disabilities and disorders due to drug abuse, bipolar affective disorder, dementia, intellectual disabilities, and developmental disorders that include autism (Ayuningtyas, 2018)

However, a problem then emerges. While a classification of mental disorders exists, KUHP Article 44 (1) states neither the term of “mental illness” nor the mental conditions that are categorized as a mental illness. Thus, confusion occurs in determining what mental conditions for which criminal liability does not apply. In addition, a person who has problems with his or her thoughts and behavior could be confused as a person who is insane.

According to Moeljatno, the formulation of mental or psychological conditions that can disregard a crime may be conducted in one of three ways (Putrawan, 2018):

1. Determining the causes of acquittal.

With this method, if a psychiatrist has declared the perpetrator to be insane or to have no mental sense, the judge may not impose a punishment.

2. Mentioning only the consequences and not determining the disease itself.

This method is based on the ability of the perpetrator to realize the meaning of his or her actions or to realize that the committed act is an act against the law. Therefore, this system is referred to as (normative) assessment. The judge becomes the assessor.

3. Combination of methods 1 and 2 (descriptive normative).

To determine whether or not the perpetrator has the capacity to be responsible, a psychiatrist and the judge cooperate to do so. The psychiatrist determines the presence of a disease while the judge assesses the effect of a mental illness that excludes accountability.

The basis for holding a perpetrator liable for a committed criminal offense is the state of his or her mind. “A formula defining responsibility or irresponsibility in human behavior cannot do justice to individuals of unequal endowment in intellect, emotional stability, or probable intervention of various mental illnesses” (Tillim, 1951). The perpetrator must be in a healthy mental state or be free from any form of mental disturbances. Up to this point, it is sufficient to illustrate that a person can be acquitted from criminal liability by the insanity defense. Regarding the application of the law related to the insanity defense, there have been several different verdicts made in the courts:

Table 1. Different verdicts related to the insanity defense

No.	Case Verdict	Type of Mental Disorder(s)	Findings	Expert Statement
1.	Surabaya District Court Verdict Number 1736/Pid.B/2013/PN.Sby Defendant EKO BUDI SANTOSO Bin BUDI SETIONO	Mild Mental Retardation	1. Defendant was found guilty as charged 2. Defendant was acquitted from all charges	Accepted as a legal excuse

2.	Surabaya District Court Verdict Number 2607/Pid.B/2017/PN.Sby Defendant AGUSTINUS DWIJO WIDODO Bin JC. MANISO	Mild Mental Retardation	1. Defendant was declared to be legally and convincingly proven guilty of a criminal offense 2. Defendant was convicted	Ruled out as a legal excuse
3.	Malang District Court Verdict Number 190/Pid.B/2013/PN.Mlg Defendant JOHANES MARTEN LUTHER SIMANJUNTAK, BBA	Mental Illness (Under Pressure)	1. Defendant was declared to be legally and convincingly proven guilty of a criminal offense 2. Defendant was convicted	Accepted as a reason for sentence reduction
4.	Bulukumba District Court Verdict Number 16/Pid.B/2011/PN.Blk or Supreme Court Verdict Number 2554K/Pid.Sus/2011 Defendant Samad Bin Raba	Accumulation of Effects, Auditory Hallucinations, Depression, and Suspicion of Others	1. Defendant was found guilty of committing a criminal offense as charged 2. Defendant was acquitted from all charges	Accepted as a legal excuse

Source : Directory Website of Republic of Indonesia Supreme Court

Based on the court verdicts above, there is no clear pattern in determining the application of insanity defense to defendants. This is a reflection of the lack of insight or information obtained by the Panel of Judges regarding the issue of the insanity defense. In fact, the consideration of whether or not someone deserves to be held accountable criminally requires further knowledge on the insanity defense. Article 71 of Law No. 18 of 2014 on Mental Health stipulated that a person with mental and/or intellectual disabilities who are suspected of committing a criminal offense must receive a mental health examination before being brought to trial. The aim of the examination is to determine a person's ability to be held liable for a criminal offense that has been committed, as well as a person's mental ability to undergo the criminal justice process. The results of the mental examination are compiled by a psychiatrist or psychiatric specialist, which will be set forth in the form of a *Visum et Repertum Psychiatricum* (VeRP) as evidence in court.

The provisions in Article 44 (1) of the KUHP stipulate that to determine whether a perpetrator's mental state is defective in growth or disturbed by illness, two things must be addressed (Widnyana, 2010):

1. The process of determining the mental state of the perpetrator of a criminal offense is within the authority of the psychiatrist. This is because determining the presence of intellectual or mental disorders is related to medicine and not law.
2. The process of determining clauses between mental state and committed offense(s) is within the authority of the judges for the case. The authority is given to the judge to determine whether or not the defendant can be held liable for his or her crime(s), as it is a juridical (legal) definition.

Even though a psychologist or a psychiatrist is present, the judge is still the final decision maker for every act that the perpetrator has committed. This is because under-

standing the issue of the insanity defense is not solely the responsibility of the psychiatrist, and the Panel of Judges for the case must also understand the issue. From this description, a legal problem arises when a judge does not know the characteristics of a person for whom the insanity defense applies, but is able to decide that the act committed by the defendant has nothing to do with his or her mental state. In trial, judges are required to have the knowledge about and ability to recognize disabilities. Judges are also not allowed to base everything on assumptions, and they must recognize the characteristics of each person who possesses a disability.

There are disparities in judges' decisions regarding the ideal role in determining criminal liability. Based on the court decisions above, at the level of academic discourse, there are three methods by which judges can determine the inability of being responsible: (1) the psychological method; (2) the biological method; and (3) the biological-psychological method (Hiariej, 2014). In the psychological method, the Panel of Judges possess the authority to determine the criminal liability. When it comes to cases that require the assessment of defendant mental conditions, a major question then arises. How can a panel of judges determine the existence or problem of mental disorders without any medical justification by a psychiatrist? A panel of judges does not have the role of medical doctors, but is considered to have the competence to assess medical aspects.

In the biological method, the psychiatrist has the responsibility to determine if the defendant has a mental disorder, in order to be held with a criminal liability. This method requires the Panel of Judges to obtain medical justification from a psychiatrist to determine criminal liability. The judges are required to ask for help from a psychiatrist to account for the verdict. Here, the psychiatrists have a strong role to determine the criminal liability of perpetrators with mental disabilities, which will cause problems if the psychiatrists provide information that is incompetent or does not meet the qualifications. This will be very dangerous, because the verdict by the Panel of Judges is based on psychiatric information.

The biological-psychological method are combines the biological and psychological methods, and thus involves consideration of two aspects: the mental or intellectual state of the perpetrator and the causal relationship between the mental state experienced by the perpetrator and the actions he or she committed. Through this method, the Panel of Judges must always base the process to determine criminal liability for perpetrators of mental disabilities on the medical justification provided by psychiatrists. Then, the Panel of Judges determines the causal relationship between the mental state and the criminal act. Currently, this method is considered to be the most appropriate method for determining criminal liability.

Furthermore, based on the methods mentioned above, three of the verdicts that have been detailed above can be analyzed:

1. Psychiatric information as the only basis for determining the capacity for criminal liability

According to the information from Court Verdict Number 1736/Pid.B/2013/PN.Sby, the psychiatrist was the one who determined criminal liability. The verdict was made with the biological method because it referred to the medical considerations given by the psychiatrist. When the psychiatrist declared that the perpetrator has a mental disorder, the judge immediately decided without consideration regarding the observation of whether or not there is a causal relationship between the defendant's condition and the committed criminal act.

The reliance upon psychiatric information as a determinant for assessing a criminal liability will threaten judicial independence if for a case, the psychiatrist who is presented by the legal advisor to provide information has arranged the answer to benefit the defendant. Many judges do not possess the knowledge of concepts related to persons with mental disabilities. When the panel of judges conducts an examination of causality, there will be difficulties, and therefore the panel of judges must first master the concepts related to persons with mental disabilities and the law.

2. Psychiatric information overruled by the observation of the judges

Court Verdict Number 2607/Pid.B/2017/PN.Sby involved the psychological method, wherein the judges disagreed and ruled out the presented psychiatric statement. Based on the consideration of the verdict, it was explained that the psychiatric statement was ignored by the panel of judges. The consideration of the verdict states that considering the condition of the Defendant's personality and his mentality when he gave testimony in court, the defendant could clearly state his identity and actions as described in the indictment, and this shows that the Defendant is responsible for his actions.

If a verdict in court is based solely on the observation of the judges, then a problem arises. A judge is not a psychologist who is able to determine a person's mental state. Furthermore, this is related to the principle of a fair trial. Therefore, judges must receive at least some training related to aspects of mental disabilities. This will allow a panel of judges to be able to assess the characteristics of a person with a mental disability and can draw a conclusion that the act the person has committed has nothing to do with the mental disorder suffered by the perpetrator.

3. Synergy between the statement by the expert and the observation of the judges as a complete consideration

Court Verdict Number 2554K/Pid.Sus/2011 or Number 16/Pid.B/2011/PN.BLK, as well as Court Verdict Number 190/PID.B/2013/PN.MLG involved the biological-psychological method. The verdicts took into account both the psychiatrists' statements presented at the trials and the judges' observations in determining the causal relationship between mental state and committed actions.

Ideally, to determine criminal liability, medical and juridical justification must be combined. Both of these will contribute to an ideal verdict, considering the issue of the insanity defense. It is not easy to determine whether the insanity defense applies, even though it is known that someone who is insane cannot be held accountable for a crime

because of his or her mental state. On the other hand, it has been stated that a person deserves to be held accountable, supposing that the individual has the ability to control his or her actions. Perpetrators of crimes who are in normal mental states but are unable to control their actions can be deemed incapable of taking responsibility for their actions. “In the criminal justice system, an offender who lacks the capacity to understand the wrongfulness of his actions as the result of severe mental disorder does not deserve full blame and punishment and must be excused in a sufficiently extreme case” (Morse, 2013).

There is a principle or doctrine that states, “*actus maxim non facit reum nisi mens sit rea*”, which means, “an act does not make a person guilty, unless the mind is legally blameworthy” (Hanafi, 1999). According to the doctrine, the thoughts of the perpetrators influence the existence of criminal liability. Thus, a person who is actually insane cannot be convicted.

The insanity defense is the single most controversial legal doctrine because it produces a verdict that acquits the perpetrator. “If the plea of not guilty by reason of insanity is satisfactorily made out it would finally acquit the defendant of the charge preferred against him and entitle him to go without a day of detention absolutely freed and discharged of the offense for which he was indicted” (Albert, 1962).

It is necessary to bear in mind that the law cannot convict a person who commits a crime if he or she could not tell if their action was wrong or right. Mothersole and Ridley stated, “he did not know the nature and quality of the act he was doing, or if he did know that, he did not know that what he was doing was wrong” (Mothersole, 2000). Thus, the insanity defense can acquit a person because he or she could tell wrong from right.

The inability to be held criminally liable for a person means that the person cannot be convicted. Thus, when a person is found to be unable to be held criminally liable, his or her liability ends there. Presently, holding someone criminally liable not only entails legal conviction, but also leads to the full belief that it is appropriate to hold the person accountable for the crime committed.

Proof of the Insanity Defense

An abnormal mental condition or insanity is a state of human mind that is different from that of ordinary people. “The term insanity as used in the special plea in a criminal case, means such abnormal mental condition, from any cause, as to render the accused at the time of committing the alleged criminal act, incapable of distinguishing between right and wrong and so unconscious at the time of the nature of the act which he is committing, and that the commission of it will subject him to punishment.” (Suemnick, 1963). It can be said that someone who has insanity cannot be held liable when committing a crime.

Michael J. Allen identified five psychological conditions that affect the perpetrator’s criminal liability. “First, he may perform a prohibited act in a state of impaired consciousness due to some mental condition... his act is involuntary and he is referred to as an automaton. Secondly, he may be conscious and perform willed bodily movements which constitute the *actus reus* of an offence... [by] what he is doing. Thirdly, he may be

conscious and able to comprehend what he is doing but due to his mental condition be unaware that it is wrong. Fourthly, he may know what he is doing and that it is wrong but due to his mental condition he may not be able to control what he is doing. Fifthly, he may know what he is doing and that it is wrong but due to a delusional state he may believe that his act is appropriate” (Allen, 1997).

The *first* condition is the fulfillment of the elements of crime without the intent, or without the perpetrator being aware of it. This doctrine in common law is known as automatism. Automatism is any situation where the perpetrator is not aware of his or her actions, or when some of his or her actions do not come from his or her mind. Therefore, it can be seen that in essence, the wrongful act was performed deliberately, but when the mind of the perpetrator cannot function properly, he or she cannot be held liable.

The *second* condition relates to an abnormal mental state, by which the perpetrator does not realize and understand that the action is wrong. This occurs in a situation where the perpetrator is unable to be held liable for his or her criminal offense as expected by society, and because of his or her condition, he or she does not have the ability to realize his or her actions. Therefore, as the elements are not fulfilled, it is not appropriate for the perpetrator to be punished in accordance with the provisions of the law. The *third* condition is considered as a failure in understanding the law. This can happen if the perpetrator has been wrong in giving judgment about what he or she commits. Common law doctrine generally does not view this as a defense against a criminal offense. Therefore, this should not be regarded as an abnormal mental state, but as wrong mental functions.

The fourth condition is the existence of coercion against the perpetrator. It can be seen that a criminal offense was committed because it was forced, and this has nothing to do with the inner abnormality of the actor. The criminal offense was committed beyond the will of the actor. The reproachable nature of the maker is lost by accident. The fifth condition is a condition that is known in common law as a failure in understanding that the committed act is a criminal offense. The perpetrator can distinguish between what is prohibited and what is permissible, but the mistake of the assessment for the committed action is that it is not a crime. It is also not a state of mind but the perpetrator’s act.

Richard Card has stated that a person who has a mental disorder as a suspect of a crime can be identified in three ways (Richard Card, 1984):

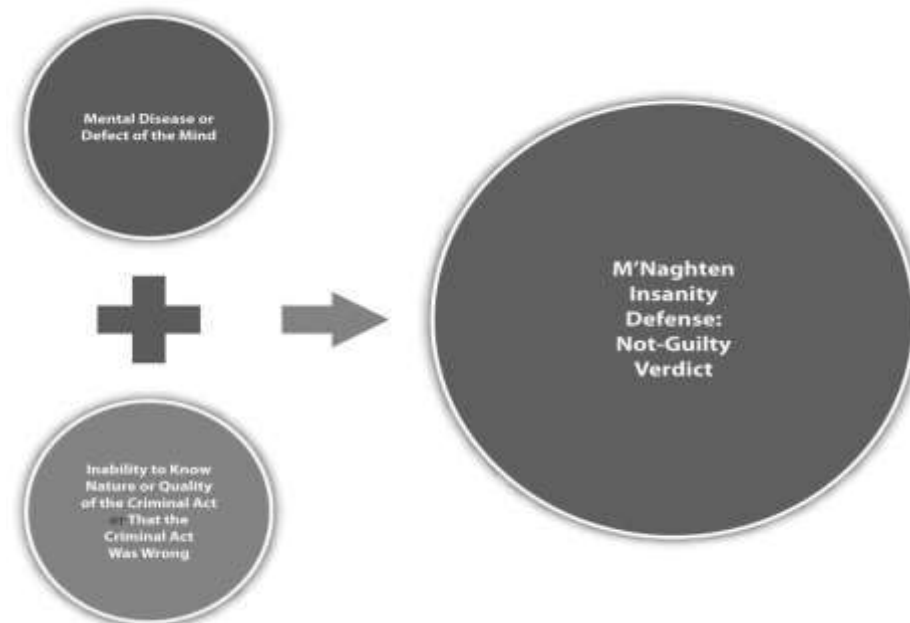
1. Mental disability at the time when the accused is committed or brought for trial may render him unfit to be tried.
2. Mental disability at the time of alleged offence by him may give rise to the defense of insanity of (in the case or murder) diminished responsibility.
3. Mental disability at the time of conviction may result in a hospital order or some other similar order being made, instead of one of the normal types of sentence being imposed.

At present, in all parts of the world, in order to determine legally if a criminal has a mental disorder or insanity, the following four rules or tests can be carried out (Lumen-candela, 2020):

1. M'Naghten Rule;
2. The Durham Rule;
3. The Irresistible Impulse Test; and
4. The Substantial Capacity Test;

The M'Naghten Rule, also known as the “right-wrong test”, is the test for insanity that is most commonly utilized, especially in the United States, although it was first utilized in England in 1843. The M'Naghten Rule is an exemption from criminal liability that focuses on the awareness of the perpetrator, not on the ability to control behaviors. “The M'Naghten human defense is cognitive and focuses on the defendant's awareness, rather than the ability to control conduct. The defense requires two elements. First, the defendant must [suffer] from a mental defect at the time he or she commits the criminal act. The mental defect can be called a ‘defect of reason’ or a ‘disease of the mind,’ depending on the jurisdiction. Second, the trier of fact must find that because of the mental defect, the defendant did not know either the nature and quality of the criminal act or that the act was *wrong*.”

Figure 1. Explanation of M'Naghten Rule or “right-wrong test”

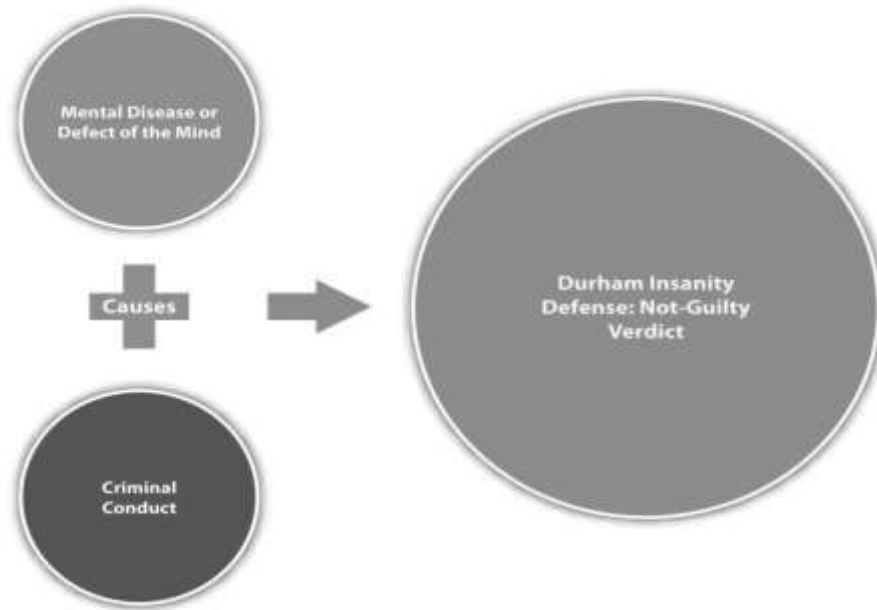


Thus, the perpetrator who is classified as insane cannot be convicted, not because of his or her mental condition, but because the perpetrator is seen as unable to know the nature and quality of the criminal offense or that the committed action is wrong. This incapacitating mental state can be defined as cognitive impairment to the extent of not knowing the nature and quality of the crime, or that it is wrong.

The Durham Rule relies on clear principles that the perpetrator of the crime is insane. “In general, the Durham insanity defense relies on ordinary principles of proximate causation. The defense has two elements. First, the defendant must have a mental disease

or defect. Although these terms are not specifically defined in the Durham case, the language of the judicial opinion indicates an attempt to rely more on objective, psychological standards, rather than focusing on the defendant's subjective cognition. The second element has to do with causation. If the criminal conduct is 'caused' by the mental disease or defect, then the conduct should be excused under the circumstances."

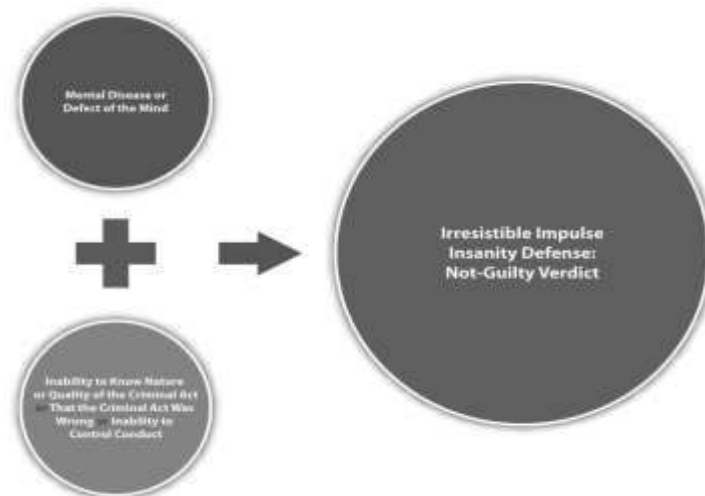
Figure 2. Explanation of M'Naghten Rule or "right-wrong test"



Judicially, the Durham Rule relies more on psychological standards to establish that crimes committed by persons with mental disabilities must be disregarded. The Irresistible Impulse Test focuses on the awareness and will (ability to control behavior) of the perpetrator because of insanity.

It can be said that a crime occurs as a result of mental illness, and therefore the perpetrator cannot control his or her actions, or they are taken against the will of the perpetrator. "In jurisdictions that recognize the irresistible impulse insanity defense, the first element is the same as M'Naghten; the defendant must suffer from a mental defect or disease of the mind. However, the second element adds the concept of volition, or free choice. If the defendant cannot control his or her conduct because of the mental defect or disease, the defendant's conduct is excused even if the defendant understands that the conduct is wrong."

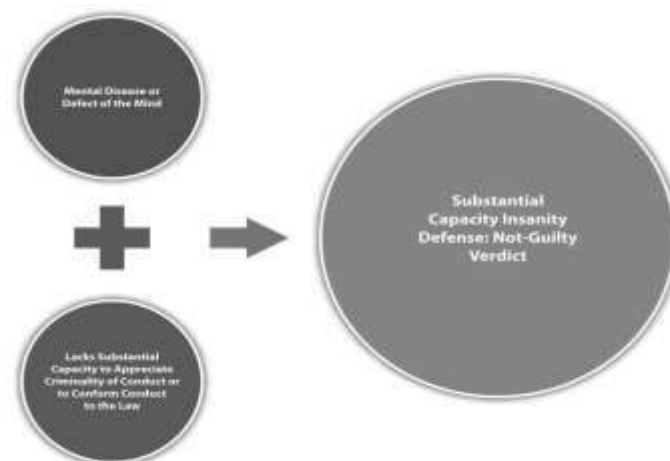
Figure 3. Explanation of M'Naghten Rule or “right-wrong test”



Thus, it is necessary for a judge to understand and pay close attention to the characteristics of a person who is insane, in order for the judge to not only rely on psychiatrists in determining the mental state of the perpetrator.

The Substantial Capacity Test is based on the principle that a person cannot be held liable if the crime is the result of mental illness or disability, being that he or she does not have a substantial capacity (the capability) either to understand the error or to adapt behaviors to what the law requires. “[T]he substantial capacity test relaxes the requirement for complete inability to understand or know the difference between right and wrong. Instead, the defendant must lack substantial, not total, capacity. The ‘wrong’ in the substantial capacity test is ‘criminality,’ which is a legal rather than moral wrong. In addition, unlike the irresistible impulse insanity defense, the defendant must lack substantial, not total, ability to conform conduct to the requirements of the law.”

Figure 4. Explanation of M'Naghten Rule or “right-wrong test”



As previously stated, this method of assessment is performed by incorporating emotional qualities, which means that evidence of the character or personality of the offender is relevant and likely to be accepted to support the application of the insanity defense.

Based on several ways to determine the insanity defense, the assumption that the perpetrator is innocent with the claim for insanity must be proven as the dominant evidence. This means that the release of criminal liability with the insanity defense being applicable is centered on the perpetrator's mind or mental state. This determining element is given through a mental examination prepared by a specialist in psychiatry or a psychiatrist, which is outlined in the form of *Visum et Repertum Psychiatricum* (VeRP). However, in its implementation, a statement from a psychiatrist or psychiatric specialist does not bind the judge in making a verdict for the case.

Referring to the opinion of Hamel and Simons quoted by Lamintang, it is stated that (Raspati, 2013):

“Regarding the existence of a defective growth of common sense ability in a person, or whether or not there is an illness or a disorder in one's common sense ability, it is a media problem. Meanwhile, the problem of *toerekeningvatbarrheid* or the problem of whether a person can be held accountable for his actions is a juridical definition, thus it is the judge's duty to determine.”

Meanwhile Simons has stated that:

“A psychiatrist must provide information whether or not there is a defect in growth or disease or disorder in a person's mind. However, the judge has the freedom to follow or not to follow the advice he or she receives from such an expert.”

This is the challenge in assessing whether a person who is insane can be held accountable for his or her behavior, because there are differences in basic concepts between psychiatry and law. Many say that psychiatry and psychology belong to medicine, even though “disease of the mind”, “insanity”, and “mental disability” are legal terminology, not medical terminology. The terminology refers to the state of mind of criminal behavior at the time a crime is committed (Sinaga, 2016). The problem is when a psychiatrist in court explains medical language into legal language. People who clearly experience mental disorders according to psychiatry do not necessarily qualify as insane according to law. The law works on the mind and not on the brain (Allen, 1991). “Insanity as it is used in the insanity defense is a legal term, and it does not have a direct medical or psychiatric translation” (NAMI, 2020).

Psychiatry and law have different approaches regarding human behavior. The judge considers behavior from data and circumstances on the basis that such behavior can determine criminal liability. Meanwhile, in psychiatry, behavior is controlled by two kinds of factors, which are conscious factors and unconscious factors. Unconscious factors are very influential on human behavior. Therefore, psychiatry considers that behavior that violates the law may not only be based on conscious factors but may also be a manifestation of psychological disorders (Ramadhanita, 2018). A psychiatrist explains that mental disorders are due to disturbances in the brain. However, the law focuses more on the crime committed.

In addition, an expert (psychiatrist) testimony in the Indonesian Criminal Procedure Code (KUHAP) raises a critical question, because it is stated that judges have the freedom to judge (decide) and there is no obligation for judges to accept expert testimonies. Even so, it is difficult for judges to determine whether a person has a defective growth of the mind or suffers from a mental disorder that affects the ability to be held accountable. This makes it impossible for a judge to understand everything, especially matters of psychology, which are necessary to determine criminal liability in relation to the insanity defense. The reason is that in order to decide a case for persons with mental disabilities, a psychiatrist or expert in psychiatry is needed.

The KUHAP states that the burden of proof of expert testimonies does not have inherent power and is independent. It is precarious when a judge has a different view from the testimony of an expert who has academic qualifications in psychology. Judges can make wrong decisions that are not based on the truth. Without an understanding regarding the burden of proof of expert testimonies, there will never be a uniform standard of determining criminal liability for a person who is insane. Thus, judges continuously give different verdicts for different cases with respect to the insanity defense. This results in the uncertainty of positive law against people who are insane.

An in-depth investigation must be performed to find out information about the crime as well as about the perpetrator(s). In order to know whether the perpetrator of a criminal offense can be held criminally liable, a series of examinations of mental normality is required. The role of psychiatrists is very much necessary to conduct diagnosis and treatment to determine the mental normality of the perpetrator(s). Psychiatry has played a role in law since over 100 years ago when Mustenberg conducted several psychological tests to detect if someone is guilty, or to detect the credibility of the testimony of witnesses as well as psychological factors that can affect the results of a trial (Schultz, 2014).

In principle, a statement from a psychiatrist stating that the perpetrator of the crime is mentally abnormal does not bind the judge. The psychiatrist's statement is only to describe the mental state of the perpetrator at the time of committing the crime. This means that juridically, the judge in charge determines whether the psychology of the perpetrator at the time of committing a crime is normal or abnormal, in order to determine whether the perpetrator has the capacity to be held liable. Here, only the judge has the power to determine whether the perpetrator of the crime has the capacity to be held liable. If the judges decide that the perpetrator of a criminal offense cannot be held liable because this or her mind is defective in growth or disturbed by illness or disorder, the perpetrator cannot be convicted and has to be acquitted from any criminal charges. As a result, proving that the insanity defense applies also means an effort to convince the judges.

It would be wise if a judge could use the results of psychiatric diagnosis as a reference for the criminal liability of persons with mental disabilities. In addition, a judge must also have knowledge about persons with mental disabilities. This is to preserve the independence of the judge in assessing the information from a psychiatrist (expert) if the psychiatrist does not have the competence nor meet the qualifications, since not all expert statements can be said to be juridical because they contain medical justifications.

Therefore, the judge must link the clause of the circumstances and the actions taken to make an ideal verdict.

Furthermore, there is another problem regarding the insanity defense if there is no examination of the psychology of the perpetrator, who may be an insane person. Some insane people can appear to be normal and may be held criminally liable because of the judge's ignorance. A person who is insane sometimes tends to be closed off. If there is no testimony from experts regarding the perpetrator's mental state, it could be fatal in the process of conviction, as there may be cases where no expert testimony is involved.

Therefore, judges at court hearings need to confirm the mental state of the defendants. Although judges do not have the obligation to involve experts in every case they examine, court verdicts should reflect the formal and material aspects of a trial. Moreover, in the present, court verdicts are easily accessible to the public and are widely used as references in research or learning activities by academics and researchers. Therefore, it would be better if court verdicts contain expert testimonies.

The burden in determining the application of the insanity defense to criminal liability does not only belong to the judges. All law enforcement personnel also possess the same obligation, because more attention should be directed to efforts of legal protection for people who are insane. In general, people with mental disabilities have difficulty in interacting with others. Therefore, all law enforcement personnel must be aware of this and provide access to justice without discrimination.

A prosecutor is in a good position to promote practices that can help insane persons avoid undue conviction. The *dominus litis* principle as it applies to the justice system in Indonesia puts prosecutors in a controlling role. Prosecutors have the authority to control criminal cases, examine the results of investigators' examinations, or filter case files regarding the completeness of requirements and eligibility standards to be delegated to the courts.

Prosecution is an act of the public prosecutor to bring matters of criminal action before a competent district court to be heard and decided upon by the judges at trial, by means of a plea and as regulated in law (Article 1 (7) of the KUHAP). However, there is a process called Pre-Prosecution. Based on the Explanation of Article 30 (1) (a) of Law of the Republic of Indonesia Number 16 of 2004, Pre-Prosecution is the act of the prosecutor to monitor the progress of an investigation, after receiving notification of the commencement of an investigation from an investigator and providing instructions to be completed by the investigator, in order to be able to determine whether the case can proceed to the prosecution stage.

Pre-Prosecution is an important process in researching the results of investigation, including the case of a person for whom the insanity defense might apply. The fact that the insanity defense might apply to a person might not be rare. In the Pre-Prosecution process, a prosecutor must be observant of each case based on their facts and their strengths, and must assess the nature, extent, and influence of the conditions of the individuals, together with the specific circumstances of the offenses.

In the case that it is known that the perpetrator is someone who is insane, in the process, a psychiatric expert or psychiatrist can be asked to assess the criminal liability of

the perpetrator. “A prosecutor should begin with an objective assessment of the evidence concerning the act or omission of the offence alleged. The suspect[’s] mental health condition or disorder may be a live consideration but as with all suspects, the prosecutor must be satisfied of the evidence concerning the act or omission alleged” (The Crown Prosecution Service, 2019).

It is possible for the public prosecutor to not proceed with prosecution on the condition that a mentally ill perpetrator undergoes voluntary treatment. It is futile to force legal proceedings on a person who is unable to be held liable, for which in the end the insanity defense applies. If the mentally ill person fails to follow up with voluntary treatment, the prosecutor’s office can request that the person be arrested again with the same charges. In addition to proving that a perpetrator is guilty of a crime, the public prosecutor must also prove the appropriateness of the mental condition of the perpetrator to be held liable for the alleged crime that was committed. It is not possible for a public prosecutor to demand acquittal for a person being proven in court for whom the insanity defense applies. It is a failure when there is relevant evidence that shows that the case of a perpetrator for whom the insanity defense applies is accepted in court, as in the Pre-Prosecution process, the public prosecutor is required to be observant in examining cases.

Conclusion

Criminal liability is considered to exist, unless there are reasons for an acquittal. In other words, criminal liability can be held against a perpetrator as long as he or she has no defense when committing a criminal offense. A person who is insane cannot be held liable for the crime he or she has committed, because he or she does not have the capacity to be liable. However, it must be proven beforehand that the perpetrator has a defense for committing the crime. The element to prove the insanity defense is realized through a mental examination prepared by a psychiatry specialist or a psychiatrist as an expert. Meanwhile, the final decision on a criminal case is still left up to the judges. Therefore, the judges can peruse the results of the psychiatrist’s diagnosis as a reference for whether the insanity defense applies. In addition, a judge is also required to have insight into the concept of mental state categorized as insane in deciding cases.

Suggestions

There needs to be a renewal of understanding the latest legal techniques before convicting people with mental disabilities. The current criminal system in Indonesia is heavily oriented toward the incarceration of criminals. There have been cases of crimes committed by people who are insane, and some of them were convicted. It would be more appropriate if judges included an element of therapy in their sentences. People with mental disabilities need psychiatric treatment and not punishment, as punishment will not deter people with mental disabilities from their actions.

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