

LBH Masyarakat Policy Paper



**DETERMINING MENTAL CAPACITY  
IN CRIMINAL AND CIVIL LAW**

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## INTRODUCTION

*This paper<sup>1</sup> sets out a study of mental capacity in Indonesian criminal law, capital punishment and civil law. Indonesian Law Number 18 Year 2014 Regarding Mental Health (UUKJ) provides a new legislative framework for mental health issues within Indonesia that seeks to protect and rehabilitate mentally ill people.*

*Articles 71-73 of UUKJ are of particular importance because they attempt to clarify the legal framework for mental capacity evaluation in criminal and civil law. Mental capacity is the ability to ‘comprehend both the nature and consequences of ones [decisions and] actions’.<sup>i</sup> Capacity concerns the ‘assessment of a person’s ability to make a decision, not the decision they make’. Mental capacity assessment is imperative to determining their legal standing in criminal law, capital punishment cases and civil law.<sup>ii</sup>*

*However, UUKJ is still in its infancy and its effectiveness cannot yet be ascertained, thus it is prudent to comparatively assess mental health laws throughout the Asian region to determine the best method of implementation in the future.*

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## I. CAPACITY IN CRIMINAL LAW

Penalties must be imposed on people who commit criminal acts that violate predetermined laws unless it would be unjust to enforce the penalties, due to an individual's lack of mental capacity. Due to that condition, stringent psychological assessment must be utilised to ascertain the mental capacity of an individual in criminal law.

In Indonesia, a team, led by a psychiatrist<sup>iii</sup>, assess each case (civil and criminal) on its own merits to determine the mental capacity or incapacity of an individual.<sup>iv</sup> As per Article 71(1) of the *UUKJ*, capacity assessment is restricted to severely ill individuals that are found to have a *mental disorder*. The *UUKJ* distinguishes '*mental disorder*' from a less severe '*mental problem*'. *Mental disorder* is defined as 'psychological, behavioural, and emotional disorder manifested in a series of symptoms and/or significant changes in behaviour, which can potentially cause suffering and detriment to a person's performance of his/her function as a human being'.<sup>v</sup> While, *mental problem* is defined as 'physical, mental, social, growth and development disorders, and/or living quality problem, [which carries] the risk of suffering [from a] mental disorder'.<sup>vi</sup> Although the classification of mental disorder is held to be more severe than mental problems it appears that these categories are not mutually exclusive, often mental problems, that become more severe, transcend into the classification of mental disorder.

Determinations of incapacity in criminal law are predicated on a high standard, found in instance of severe mental illness, and many individuals do not satisfy this threshold. Mentally ill Indonesians who do not meet the threshold of mental incapacity do not receive a lighter sentence in the Indonesian penal system, as diminished capacity is not a defence in Indonesian. Certain jurisdictions of Australia uphold the diminished capacity defence.<sup>vii</sup> This defence is only applicable in murder cases, and if established can reduce murder to manslaughter.<sup>viii</sup> Comparatively, determinations of mental incapacity in Indonesia provides an exemption to stand trial or punitive punishment, and this will apply only in exceptional circumstances.

### 1.1. Capacity to Stand Trial

Article 14(1) of the *International Covenant on Civil and Political Rights (ICCPR)* requires states to uphold a fair trial.<sup>ix</sup> It is fundamentally unfair and inhumane to subject an incapacitated person to a trial without proper accommodation, as they cannot sufficiently defend their alleged actions.<sup>x</sup>

The *UUKJ* tries to accommodate this point. As per Article 71(2)(b) of the *UUKJ*, psychiatric examinations must also determine an individual's capacity to undergo trial. This psychiatric assessment, of an alleged offender, can render them unfit for trial due to mental incapacity.<sup>xi</sup> However, this regulation does not specify a retrial process at a time when an individual regains capacity.<sup>xii</sup>

A more effective framework for establishing fitness for trial, and periods of recommencement, has been established under Malaysian law. Malaysia law specifies that an individual may be subjected to medical examination, for a period of one month, to determine if the individual is/isn't fit for trial.<sup>xiii</sup> If, at the end of the initial examination period, the accused is deemed fit then legal proceedings will recommence.<sup>xiv</sup> If, however, the accused is determined to still be unfit for trial, the trial will be postponed while the individual continues mental health rehabilitation until such time that they are competent to stand trial.<sup>xv</sup> It is imperative that the proposed guidelines for psychiatric assessment under the *UUKJ* provide a comprehensive framework for postponement and recommencement of trials in instances of mental incapacity.<sup>xvi</sup>

## 1.2. Capacity and Culpability

In Indonesia, Article 71(2)(a) of the *UUKJ* provides that a person suspected of having a *mental disorder*, who commits an offence, must undergo a psychiatric examination to determine their capacity to be culpable for the charged offences. Mental disorders which lead to incapacitation of a certain criminal act is regulated under Article 44(1) *Kitab Undang-Undang Hukum Pidana (KUHP)*. Article 44(1) of the *KUHP* dictates that “a judge cannot convict an individual for an act committed by reason of the defective development or sickly disorder”. There are no predetermined illnesses that will automatically render an individual incapacitated and proposed safeguards under the *UTKJ*, for determination of mental capacity have not yet been mandated by law.<sup>xvii</sup>

Consequently, at present, a Judge has the discretion to decide, on the basis of a psychiatric report<sup>xviii</sup> whether a person is accountable for their actions or not based on their mental capacity.<sup>xix</sup> This was exemplified in Makassar when a man killed multiple cows and was found not guilty on the grounds of a psychiatric report, which specified that the offender was mentally insane.<sup>xx</sup>

Similarly, Singapore applies a strict approach to mentally ill offenders by establishing that nothing is an offence that is done by a person of unsound mind if they were incapable of knowing the nature of the act that constitutes the crime.<sup>xxi</sup> This can be contrasted to Malaysia, which will acquit a person on similar grounds as Indonesia and Singapore, but the court's findings shall state specifically whether the acquitted individual did or did not commit the act.<sup>xxii</sup>

India and Australia apply a more expansive approach to mentally ill offenders. In India, nothing is an offence of a person with an unsound mind<sup>xxiii</sup> or a person acting while in a state of unintentional intoxication.<sup>xxiv</sup> Legislation from both Australia and India specifies that criminal liability cannot be imposed for actions undertaken by a person incapable of judgement due to intoxication caused against their will.<sup>xxv</sup> Further, Australian courts will exculpate an accused from criminal responsibility if they can establish a defence of insanity or automatism. Australian law delineates that

automatism occurs when the accused has total, rather than partial, absence of control and direction of their will.<sup>xxvi</sup> Automatism may be caused by concussion,<sup>xxvii</sup> sleepwalking,<sup>xxviii</sup> hypoglycaemia<sup>xxix</sup> or dissociation arising from extraordinary external stress<sup>xxx</sup>. This paper suggests that Indonesian criminal law adopts a more expansive approach when determining mental capacity related to the criminal law. Psychiatric assessment of an individual suspected of lacking capacity should take into consideration instances of automatism and involuntary intoxication.

Individuals found to lack mental capacity must be diverted away from the punitive measures of the criminal law system, as appropriate and effective rehabilitation would be better attained in a psychiatric hospital rather than a prison.<sup>xxxi</sup> Imprisoning an incapacitated individual is an ineffective method of rehabilitation for three reasons. First, imprisoning a severely mentally ill person is manifestly wrong because it will expose an individual to conditions that will likely lead to further mental degradation, self-harm and possible suicide. Second, the deterrence and retribution rationale of criminal law is not justified when considering cases of mentally incapacitated individuals, as they are of unsound mind and cannot comprehend the acts they have committed or why they were contrary to the law.<sup>xxxii</sup> Consequently, deterrence through criminal punishment would unlikely prevent mentally incapacitated individuals from undertaking similar acts in the future.<sup>xxxiii</sup> Third, the Indonesian Government or Regional Government is obliged to deliver rehabilitative services to people who harm themselves or the wider community.<sup>xxxiv</sup> Therefore, rehabilitation of mentally ill Indonesians, who come into contact with the law, must be at the forefront of mental health policy.

## II. REHABILITATION AND PREVENTION

It is crucial that mentally ill individuals, who come into contact with the law, have access to services that rehabilitate and improve their mental state. Currently, in Indonesian, mentally incapacitated offenders, who are found not to be accountable for their actions but are not a danger to themselves or the community, will not be sentenced to a term of hospitalisation for rehabilitation.<sup>xxxv</sup> Conversely, if an offender is held to be a danger to themselves, or the community, the Judge may order that the individual be placed in a psychiatric hospital for a maximum period of one year.<sup>xxxvi</sup> Upon expiration of this mandatory period of hospitalisation the Criminal Code does not provide subsequent means of rehabilitation.

The Malaysian legal system provides a comparative framework for rehabilitation of mentally incapacitated offenders. The *Malaysian Criminal Procedure Code* provides that an incapacitated individual, who was acquitted from a crime, should be kept in safe custody that is determined by the court.<sup>xxxvii</sup> In deciding this matter, the court's primary concern is the individual's danger to themselves or the community.<sup>xxxviii</sup> If the individual is found to be dangerous they can be confined in a psychiatric hospital for

a period determined by the Ruler of the Yang di-Pertua Negeri of the State.<sup>xxxix</sup> The individual may be discharged from the psychiatric hospital at a point in time when a Medical Director, and accompanying Board, determines that the individual is no danger to themselves or the community.<sup>xl</sup> Upon release, the individual will be delivered to a guardian that must take care of them. The guardian is required to prevent the dependant from inflicting self-harm, and must present the individual to healthcare profession for examination upon request.<sup>xli</sup> However, similarly to Indonesia, there is still a lacuna in rehabilitative mental health polices of mentally ill offenders who are not a danger to themself or the community, as these people may simply be cautioned and discharged by a Malaysian Magistrate without receiving appropriate rehabilitative services.<sup>xlii</sup>

It is suggested that a comprehensive rehabilitative framework, established in accordance with *UUKJ*, be implemented for mentally ill individual's that are acquitted from legal liability due to findings of incapacity. In accordance with Article 30(2) of the *UUKJ*, the Minister of Social Affairs should be held responsible for ensuring the effective implementation of the proposed rehabilitative framework. The substantive process of rehabilitation should initially focus on reducing suffering, managing the individual's mental illness and recovery.<sup>xliii</sup> Once the individual's mental state improves, rehabilitation should advance to restoring social functions and preparing the individual to be self-reliant within the community.<sup>xliv</sup>

The procedure of this framework would consist of two stages. First, after one year of hospitalisation, if an individual is still a danger to themselves or the community, psychiatric rehabilitation must continue.<sup>xlv</sup> The patient must be immediately referred to the appropriate mental health facility, being a psychiatric hospital,<sup>xlvi</sup> or hospital wards which specifically focus on rehabilitating mentally ill people acquitted from crime due to mental incapacity.<sup>xlvii</sup> Second, if the individual is no danger, rehabilitation shall be undertaken in a family setting or community environment. Thus, providing the individual psychiatric care at an appropriate local hospital, while allowing them to live in a comfortable and familiar environment. Establishing a rehabilitative framework that is specifically focused on mentally ill individuals that come into contact with the law would provide a more effective process of rehabilitation than is presently available.<sup>xlviii</sup>

### III. MENTALLY ILL VICTIMS OF THE LAW

Indonesia's ratification of the *United Nations Convention of the Rights of Persons with Disabilities (UNCRPD)* delineates that the State must prevent victimisation of mentally ill people by implementing proactive and reactive measures of protection. Proactively promoting rights of mentally ill people, and reactively imposing harsh punishments for violence or abuse towards mentally ill individuals.

The stigmatization of mental health in Indonesia provokes acts of violence against mentally ill individuals. For example, in Indonesia, it is a common practice for psychiatrists to prescribe medicine without explaining the nature or extent of the mental illness to the patient or their family.<sup>xlix</sup> This is inevitable in some cases, as many families are still afraid of the concept of “mental illness” and are reluctant to accept that their family member is “mentally ill”.<sup>l</sup>

To reduce this stigmatisation and promote the rights of mentally ill individuals the Indonesian Government must implement educational programmes focused ‘on how to avoid, recognise and report instances of exploitation, violence and abuse’ of mentally ill individuals.<sup>li</sup> Ultimately, these programs should seek to raise awareness of mental illness in society to prevent inhumane and degrading treatment of vulnerable people.<sup>lii</sup>

According to Mr. Utomo, mental illness stigmatisation also gives rise to inhumane treatment of mentally ill individuals, which frequently occurs in regional areas, by means of restricting a mentally ill person from moving by shackling them to an immovable object. Shackling mentally ill individuals is further complicated by article 491(1) of the *KUHP* which requires that a legal guardian, of someone who is mentally disabled, should not let the individual roam free if they are a danger to themselves or society. For example, in South Sumatera, it was found that a family shackled two mentally ill men in a toilet for 30 years, which the family justified by stating that they feared the men would endanger the safety of others.<sup>liii</sup>

Prohibition must be imposed in such instances of harsh and degrading treatment of people with disabilities and mental health issues.<sup>liv</sup> To mitigate future human rights abuses of mentally ill individuals the *UUKJ* has prohibited ‘intentional shackling, neglect, acts of violence against a person with a mental disorder, or, any other action that violates the human rights of mentally ill people’.<sup>lv</sup>

People participating in the prohibited acts can be subject to criminal punishment in accordance with applicable laws and regulations of Indonesia.<sup>lvi</sup> This was exemplified when a man fondled his mentally ill son’s genitals, which was contrary to article 290(1) *KUHP*.<sup>lvii</sup> Pursuant to article 290(1) *KUHP*, obscene acts against people considered to be helpless are prohibited, and in this instance the mentally ill son was found to be helpless, thus the father was convicted.<sup>lviii</sup> The implementation of the *UUKJ* is a positive step in proactively and reactively protecting mentally ill victims of the law, yet it is too soon to ascertain its effectiveness.

#### IV. MENTALLY ILL OFFENDERS ON DEATH ROW

Indonesian law provides insufficient regulations for people who develop a mental illness after they have been sentenced to death. There are no regulations pertaining to the prohibition, or postponement,<sup>lix</sup> of execution when an individual becomes

‘severely mentally ill after the death sentence is imposed’.<sup>lx</sup> This was exemplified by the execution of Rodrigo Gularte in 2015. Gularte suffered from a long history of mental illness, but just prior to execution, he was diagnosed with paranoid schizophrenia. After 11 years on death row, Gularte’s severe mental illness rendered him incompetent to comprehend or understand that he was going to be executed.<sup>lxi</sup> Nevertheless, Gularte was executed. This is a violation of article 6 and 7 of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>lxii</sup> Article 6 protects the right to life and arbitrary deprivation of life.<sup>lxiii</sup> Article 7 bans cruel, inhumane or degrading treatment or punishment.<sup>lxiv</sup>

Article 6 should be interpreted as an expansive provision that prohibits the execution of a mentally incapacitated individual in all circumstances. Death penalty safeguards and subsequent resolutions, implemented by the Economic and Social Council, urge states not to execute ‘people who have become insane’,<sup>lxv</sup> ‘whether at the stage of sentencing or execution’.<sup>lxvi</sup> As Professor Babcock noted, ‘the Safeguards were adopted by resolution and lack the binding force of a treaty, [but] they may nonetheless embody norms of customary law’.<sup>lxvii</sup> Consequently, states imposing capital punishment have been ‘called upon to bring their domestic legislation into conformity with [these] international standards’.<sup>lxviii</sup>

The execution of a prisoner who is suffering from severe mental illness clearly amounts to cruel, inhumane and degrading treatment, which is contrary to article 7 of the ICCPR.<sup>lxix</sup> The UN Human Rights Committee found that Trinidad and Tobago and Jamaica violated article 7 when executing, or issuing execution writs, for prisons whose mental health had seriously deteriorated during their time awaiting execution.<sup>lxx</sup> Indonesia can no longer blatantly disregard international law and norms; it must implement safeguards to protect individuals who become mentally ill while on death row.

Currently, Indonesia only imposes three safeguards for prevention or postponement of execution: minors, pregnant women,<sup>lxxi</sup> or an individual who has appealed execution.<sup>lxxii</sup> It is recommended that the Indonesian Government expand the protected categories of execution to include ‘inmates who develop a serious mental illness after they have been sentenced to death’.<sup>lxxiii</sup> Thailand, Japan and Jordan ‘have laws that explicitly protect death row prisoners in such cases’.<sup>lxxiv</sup>

Thailand law ‘commutes the death sentence to life in prison if the prisoner is insane for over one year’.<sup>lxxv</sup> In Japan, execution will be suspended if the prisoner is in a state of insanity.<sup>lxxvi</sup> In Jordan, the execution will be postponed if the prisoner becomes incapacitated, but shall be reinstated after a medical report determines the prisoner has again attained sanity.<sup>lxxvii</sup> Other countries that implement similar safeguards include Kuwait, Morocco, Bahrain, Mongolia and Trinidad and Tobago.<sup>lxxviii</sup>

Implementing the said safeguards for mentally ill prisoners may be more difficult than protecting clearly defined categories of minors or pregnant woman,<sup>lxxix</sup> as ‘there is an

enormous degree of subjectivity involved when assessing any form of mental disorder'.<sup>lxxx</sup> Nevertheless, there is no place in the modern world for the archaic and barbaric punitive punishment of the death penalty,<sup>lxxxi</sup> especially for mentally incapacitated individual that cannot comprehend or understand the grave nature of their sentence. Executing mentally incapacitated individuals is a miscarriage of justice. Expanding the execution safeguards to incorporate mentally incapacitated individuals must occur to prevent future cruel and inhumane treatment of mentally ill prisoners.

## V. CAPACITY IN CIVIL LAW

Mental capacity in civil law is primarily concerned with the capability of a person to manage his or her own affairs.<sup>lxxxii</sup> The *UNCPRD* delineates the need for disabled people, including mentally ill individuals, to have 'individual autonomy [which includes] the freedom to make one's own choices'.<sup>lxxxiii</sup> The *UUKJ* enables the government to declare that a person with mental illness is incompetent<sup>lxxxiv</sup>, regardless of the type of activity that person seeks to undertake.

A determination of mental incapacity will prohibit the said individual from making a will,<sup>lxxxv</sup> entering into contracts<sup>lxxxvi</sup> and being a witness in court<sup>lxxxvii</sup>. India applies similar capacity provisions in civil law when determining private rights and remedies. Indian succession law prohibits the creation of a will by a person who at the time of making the will does not know what they are doing due to intoxication or lack of mental capacity.<sup>lxxxviii</sup> The Indian Muslim Marriage Act enables a wife to divorce their husband if it is established that he has been insane for a period of two years.<sup>lxxxix</sup> In instances of prolonged mental illness an incapacitated individual may be placed under guardianship.

As per Indonesian Law, people who lack mental capacity must be placed under guardianship<sup>xc</sup> of a family member,<sup>xcii</sup> and the guardian is liable for damages caused by the dependent.<sup>xciii</sup> Guardianship in Indonesia should not arbitrarily deprive individuals of their freedom and must only be utilised to protect the most severely mentally ill individuals who cannot independently conduct their daily lives or pose a risk, physically or financially, to themselves or the wider community. Therefore, Indonesian guardianship laws must attempt to balance the autonomy of an individual with the legal necessity of protecting people who are severely mentally ill.

By way of example, in Australia, guardianship is utilised to control a dependents decision-making, but does not cover financial affairs.<sup>xciii</sup> Decision-making disabilities that generally give rise to guardianship orders include: intellectual disabilities, psychiatric disabilities (e.g. schizophrenia and depression), neurological disabilities (e.g. dementia and Alzheimer's), developmental disabilities (e.g. autism and Asperger's), brain injury and physical disabilities that render the dependent unable to communicate their intentions and wishes.<sup>xciv</sup> Australian Courts and Tribunals have

the discretion to limit guardianship orders temporarily or functionally, as guardianship orders are not always applicable for all aspects of a person's life.<sup>xcv</sup>

Guardianship orders can be divided into four overlapping theoretical categories, which vary in the extent of control and the period of control. First, orders can limit the guardian's custody rights over the dependent and the functions that the guardian can exercise.<sup>xcvi</sup> Second, orders can be plenary providing the guardian with full custody and functional rights over the dependent's life.<sup>xcvii</sup> Third, continuing orders can be made to establish guardianship for a substantive period of time (e.g. 5 years). Fourth, orders of temporary guardianship, lasting 21-30 days, can be made prior to the Court making a final determination of a continuing guardianship order.<sup>xcviii</sup> In such circumstance, a temporary guardian will be allocated to the dependent until the final continuing guardianship order is made. The mentioned theoretical categories of guardianship orders are not mutually exclusive and demonstrate the various aspects Australian Courts and Tribunals consider when appointing a guardian.

## CONCLUSION

From my normative law research in Indonesia and its comparison with other countries' laws, I have discerned the following conclusions:

1. Although the *UUKJ* provides that psychiatric examinations to assess their capacity to stand trial, there is no defined procedure following a verdict that an accused individual is unfit for trial. It is imperative that a comprehensive framework is implemented to regulate the rehabilitation and postponement of trials for individuals that are determined unfit to stand trial.
2. Currently, there are no procedural regulations regarding how to assess mental capacity of an offender or predetermined illness that will automatically render an individual incapacitated. Therefore, a judge on the basis of a psychiatric report, which pertains to the accused's mental capacity/ incapacity, solely determines the accused's criminal culpability.
3. There is no proscribed criminal defence of diminished mental capacity, automatism or involuntary intoxication under the *UUKJ* or any other Indonesian Law.
4. Sanctions for rehabilitating a mentally incapacitated offender is reserved for people which are determined to be a danger to themselves or the community. A judge can only order that an incapacitated offender is rehabilitated in a psychiatric hospital for a maximum period of one-year. Once the one-year period of hospitalisation expires there is no legal framework or comprehensive procedure for further rehabilitation.

5. The *UUKJ*, under article 86, has attempted to mitigate human rights abuses against mentally ill individuals by prohibiting intentional shackling, neglect, and other acts of violence against a person with a mental disorder. This provision seeks to protect mentally ill individuals, yet it is too soon to ascertain its effectiveness.
6. There is an absence of legislative regulation pertaining to the prohibition, or postponement, of execution when an individual becomes severely mentally ill after they have been sentenced to death. Present safeguards for death row prisoners only apply to minors, pregnant women or an individual that has appealed a sentence of execution.
7. Guardianship can be granted under Indonesian Civil Law but such laws do not clearly define the extent of the control the guardian has over their dependent. It is necessary that Indonesian guardianship law seeks to adequately balance the autonomy of the dependent with the guardian's obligation to control the dependent to maintain their physical and financial safety.

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## ENDNOTES

<sup>i</sup> *Legal Dictionary*, The Free Dictionary <<http://legal-dictionary.thefreedictionary.com/capacity>> <<http://legal-dictionary.thefreedictionary.com/capacity>>.

<sup>ii</sup> Ben Fogarty, (2012), 'Guardianship and Administration Law Across Australia', *Intellectual Disability Rights Service*, 16.

<sup>iii</sup> Indonesia, *Undang-Undang Republik Indonesia Nomor 18 Tahun 2014 Tentang Kesehatan Jiwa*, Article 37.

<sup>iv</sup> Delphine Lourtau and Professor Sandra Babcock, (2015), 'Overview of International Law and Practice: The Execution of Individuals with Mental Illness or Intellectual Disability' *Death Penalty Worldwide*, 5.

<sup>v</sup> Indonesia, *Undang-Undang Republik Indonesia Nomor 18 Tahun 2014 Tentang Kesehatan Jiwa*, Article 1 Number 3.

<sup>vi</sup> *Ibid*, Article 1 Number 2.

<sup>vii</sup> Australian Capital Territory, Northern Territory, New South Wales and Queensland.

<sup>viii</sup> *Crimes Act 1900 (ACT)* s 14; *Criminal Code Act 1983 (NT)* s 159; *Crimes Act 1900 (NSW)* s 23A; *Criminal Code (QLD)* s 304A, (Australia).

<sup>ix</sup> United Nation, *Deklarasi Universal Hak Asasi Manusia*, Article 11 Number (1).

<sup>x</sup> The Australian Law Reform Commission, (2014), "Equality, Capacity and Disability in Commonwealth Laws", Discussion Paper 81 part 7, access at <[https://www.alrc.gov.au/publications/7-access-justice/unfitness-stand-trial#\\_ftn6](https://www.alrc.gov.au/publications/7-access-justice/unfitness-stand-trial#_ftn6)>.

<sup>xi</sup> Indonesia, *Undang-Undang Republik Indonesia Nomor 18 Tahun 2014 Tentang Kesehatan Jiwa*, Article 71 Number 2b.

<sup>xii</sup> Proposed guidelines for psychiatric examination for legal purpose under Article 73(3) *UUKJ* have not yet been implement, and the penal code is silent on this issue.

<sup>xiii</sup> Malaysia, *Act 593 Criminal Procedure Code 2012*, ss 342(3).

<sup>xiv</sup> *Ibid.*, s 343(1).

<sup>xv</sup> *Ibid.*, s 343(2).

- <sup>xvi</sup> In Australia, mental capacity is also a consideration during police questioning. For example, in Victoria, during police questioning after arrest, Victoria Police must ensure that an independent third person is present at the interview of any intellectually or mentally impaired person to guarantee that the arrested individual understands his rights and questions being asked of him/her. Failing to provide an independent third person during question may lead to exclusions of confessions made by the intellectually or mentally impaired individual on the basis of unfairness.
- <sup>xvii</sup> Indonesia, *Undang-Undang Republik Indonesia Nomor 18 Tahun 2014 Tentang Kesehatan Jiwa*, Article 73 Number 3.
- <sup>xviii</sup> *Ibid.*
- <sup>xix</sup> Indonesia, *Kitab Undang-Undang Hukum Pidana*, Article 44 Number 1.
- <sup>xx</sup> Indonesia Supreme Court Decision Number 215 K/Pid/2005.
- <sup>xxi</sup> Singapore, 2008, *Penal Code*, Article 84.
- <sup>xxii</sup> Malaysia, *Act 593 Criminal Procedure Code*, Article 347.
- <sup>xxiii</sup> India, *Indian Penal Code* 1860, cl 84.
- <sup>xxiv</sup> *Ibid.*
- <sup>xxv</sup> Australia, *Criminal Code Act 1995*, Article 8.5; India, *Indian Penal Code* 1860, cl 85.
- <sup>xxvi</sup> *Milloy v R* [1993] 1 Qd R 298; (1991) 54 A Crim R 340; (QLD) *Criminal Code* s 23; (TAS) *Criminal Code* s 13; (WA) *Criminal Code* s 23.
- <sup>xxvii</sup> *R v Minor* (1955) 112 CCC 29, CA(Saskatchewan); *R v Stripp* (1978) 69 Cr App R 318 at 323 per Ormrod LJ; *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279.
- <sup>xxviii</sup> *R v Cogdon* [1951] Res Jud 29; *R v Holmes* [1960] WAR 122 at 125; *Jiminez v R* (1992) 173 CLR 572; 106 ALR 162; 66 ALJR 292; 59 A Crim R 308.
- <sup>xxix</sup> *R v O'Connor* (1980) 146 CLR 64.
- <sup>xxx</sup> *R v Tsigos* [1964-65] NSW 1607, CCA(NSW).
- <sup>xxxi</sup> Peter Bal and Frans Koenraadt, (2000), 'Criminal Law and Mentally Ill Offenders in Comparative Perspective', *Psychology, Crime & Law* 6(4): 219-250.
- <sup>xxxii</sup> Aimee D Borromeo, (2002), 'Mental Retardation and The Death Penalty', *Loyola Journal of Public Interest Law* 3: 175.
- <sup>xxxiii</sup> Peter Bal and Frans Koenraadt, (2000), 'Criminal Law and Mentally Ill Offenders in Comparative Perspective', *Psychology, Crime & Law* 6(4): 219-250.
- <sup>xxxiv</sup> Indonesia, *Undang-Undang Republik Indonesia Nomor 18 Tahun 2014 Tentang Kesehatan Jiwa*.
- <sup>xxxv</sup> R Soesilo, *Kitab Undang-Undang Hukum Pidana: Serta komentar-homentarnya lengkap pasal demi pasal*, (Politeia-Bogor, 1996) pg. 60,61.
- <sup>xxxvi</sup> Indonesia, *Kitab Undang-Undang Hukum Pidana*, Article 44 Number 2; see also Article 44 Number 3.
- <sup>xxxvii</sup> Malaysia, *Act 593 Criminal Procedure Code*, s348(1).
- <sup>xxxviii</sup> *Ibid.*
- <sup>xxxix</sup> *Ibid.*, s348(2).
- <sup>xl</sup> Malaysia, *Act 593 Criminal Procedure Code*, s 350.
- <sup>xli</sup> *Ibid.*, s 351.
- <sup>xlii</sup> *Ibid.*, 348(1).
- <sup>xliii</sup> Indonesia, *Undang-Undang Republik Indonesia Nomor 18 Tahun 2014 Tentang Kesehatan Jiwa*, Article 26.

<sup>xliv</sup> *Ibid.*, Article 25.

<sup>xlv</sup> This is in accordance with rehabilitative measures specified in article 26 of UUKJ..

<sup>xlvi</sup> Indonesia, *Undang-Undang Republik Indonesia Nomor 18 Tahun 2014 Tentang Kesehatan Jiwa*, Article 20 Number 2.

<sup>xlvii</sup> Peter Bal and Frans Koenraadt, (2000), "Criminal law and mentally ill offenders in comparative perspective", *Psychology, Crime & Law*, 6:4, 219-250, 236.

<sup>xlviii</sup> Bagus Utomo, leader of Komunitas Peduli Skizofrenia Indonesia, express grave concern about current rehabilitation for mentally ill people. Mr. Utomo said that current treatment centres do not focus on one particular mental illness or age group of people. At present, one mental hospital may house children and elderly people, people with down syndrome to violent schizophrenics.

<sup>xlix</sup> Conversation had with Mr Utomo on the 10th March 2016 at Komunitas Peduli Skizofrenia Indonesia.

<sup>l</sup> *Ibid.*

<sup>li</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, Article 16 Number 2.

<sup>lii</sup> *Ibid.*

<sup>liii</sup> Ilham, 'Dua Orang Gila Hampir 30 tahun Dipasung', *Republika*, 28 January 2016, accessed at <<http://www.republika.co.id/berita/nasional/umum/16/01/28/o1ng7s361-dua-orang-gila-hampir-30-tahun-dipasung>>.

<sup>liv</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, Article 15.

<sup>lv</sup> Indonesia, *Undang-Undang Republik Indonesia Nomor 18 Tahun 2014 Tentang Kesehatan Jiwa*, Article 86.

<sup>lvi</sup> *Ibid.*

<sup>lvii</sup> Oelamasi District Court Decision Number 190/ Pid.b/2012/PN.

<sup>lviii</sup> *Ibid.*

<sup>lix</sup> "Adakah Aturan yang Melarang Orang Sakit Jiwa Dihukum Mati?" *Hukum Online*, 12 October 2015, accessed at <<http://www.hukumonline.com/klinik/detail/lt55069c38d2bbc/adakah-aturan-yang-melarang-orang-sakit-jiwa-dihukum-mati>>.

<sup>lx</sup> Delphine Lourtau and Sandra Babcock, (2015), 'Overview of International Law and Practice: The Execution of Individuals with Mental Illness or Intellectual Disability' *Death Penalty Worldwide*, 5.

<sup>lxi</sup> <http://www.theguardian.com/world/2015/apr/30/brazilian-executed-by-indonesia-was-hearing-voices-all-the-time>; <http://www.bbc.com/news/world-asia-32527977>

<sup>lxii</sup> Delphine Lourtau and Sandra Babcock, (2015), 'Overview of International Law and Practice: The Execution of Individuals with Mental Illness or Intellectual Disability' *Death Penalty Worldwide*, 5.

<sup>lxiii</sup> United Nations, *International Covenant on Civil and Political Rights*.

<sup>lxiv</sup> *Ibid.*

<sup>lxv</sup> ECOSOC 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty' Res. 1984/50 (25 May 1984) in Lourtau and Babcock.

<sup>lxvi</sup> ECOSOC 'Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty' Res. 1989/64 (24 May 1989) in Lourtau and Babcock.

<sup>lxvii</sup> William Schabas, (1993), 'International Norms on Execution of the Insane and the Mentally Retarded', 4 (1) *Criminal Law Forum* 95, 101.

<sup>lxviii</sup> Report by the Special Rapporteur on Extrajudicial, summary or arbitrary executions, para. 117, U.N. Doc. E/CN.4/1998/68, Dec. 23, 1997; Lourtau and Babcock, above n 54, 2.

- <sup>lxix</sup> Delphine Lourtau and Sandra Babcock, (2015), 'Overview of International Law and Practice: The Execution of Individuals with Mental Illness or Intellectual Disability' *Death Penalty Worldwide*, 5.
- <sup>lxx</sup> Delphine Lourtau and Sandra Babcock, (2015), 'Overview of International Law and Practice: The Execution of Individuals with Mental Illness or Intellectual Disability' *Death Penalty Worldwide*, 5, see case *Sahadath v. Trinidad and Tobago*, Communication No. 684/1996, U.N. Doc. CCPR/C/74/D/684/1996, UN Human Rights Committee, Apr. 15, 2002. *Francis v. Jamaica*, Communication No. 606/1994, U.N. Doc. CCPR/C/54/D/606/1994, Aug. 3, 1995.
- <sup>lxxi</sup> Indonesia, *Penetapan Presiden Republik Indonesia No 2 Tahun 1964 Tentang Tata Cara Pelaksanaan Pidana Mati yang Dijatuhkan oleh Pengadilan di Lingkungan Peradilan Umum dan Militer*, Article 7.
- <sup>lxxii</sup> "Adakah Aturan yang Melarang Orang Sakit Jiwa Dihukum Mati?", Hukum Online, 12 October 2015, accessed at <<http://www.hukumonline.com/klinik/detail/lt55069c38d2bbc/adakah-aturan-yang-melarang-orang-sakit-jiwa-dihukum-mati>>; "Alasan-Alasan Penundaan Eksekusi Hukuman Mati", Hukum Online, 12 August 2014, <<http://www.hukumonline.com/klinik/detail/lt53df2c50e4980/alasan-alasan-penundaan-eksekusi-hukuman-mati>>.
- <sup>lxxiii</sup> Delphine Lourtau and Sandra Babcock, (2015), 'Overview of International Law and Practice: The Execution of Individuals with Mental Illness or Intellectual Disability' *Death Penalty Worldwide*, 6.
- <sup>lxxiv</sup> *Ibid.*
- <sup>lxxv</sup> *Ibid.*, pg., 7; Thailand, *Code of Criminal Procedure*, s 248.
- <sup>lxxvi</sup> Delphine Lourtau and Sandra Babcock, (2015), 'Overview of International Law and Practice: The Execution of Individuals with Mental Illness or Intellectual Disability' *Death Penalty Worldwide*, pg. 6.
- <sup>lxxvii</sup> *Ibid.*, pg. 6-7.
- <sup>lxxviii</sup> *Ibid.*
- <sup>lxxix</sup> *Ibid.*
- <sup>lxxx</sup> *Ibid*, pg. 4.
- <sup>lxxxi</sup> "A world without the death penalty: Australian Advocacy for the Abolition of the Death Penalty", (2016), *Joint Standing Communiee on Forign Affairs Defence and Trade ( May 2016, Canberra)*, pg. 7.
- <sup>lxxxii</sup> Ben Fogarty, (2009), "Intellectual Disability Rights Services: guardianship and administration laws across Australia," accessed at <[http://www.idrs.org.au/pdf/Guardianship\\_and\\_administration\\_laws\\_across\\_Australia\\_by\\_Ben\\_Fogarty.pdf](http://www.idrs.org.au/pdf/Guardianship_and_administration_laws_across_Australia_by_Ben_Fogarty.pdf)>.
- <sup>lxxxiii</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, Article 3(a).
- <sup>lxxxiv</sup> Indonesia, *Undang-Undang Republik Indonesia Nomor 18 Tahun 2014 Tentang Kesehatan Jiwa*, Article 72.
- <sup>lxxxv</sup> Indonesia, *Kitab Undang-Undang Hukum Perdata*, Article 895 and 896.
- <sup>lxxxvi</sup> *Ibid.*, Article 1330 Number 2; lihat juga Article 1320 Number 2, Article 1329, Article 1331.
- <sup>lxxxvii</sup> *Ibid.*, Article 1912.
- <sup>lxxxviii</sup> India, *Indian Succession Act 1925*, s 59.
- <sup>lxxxix</sup> India, *Indian Muslim Marriage Act 1939*; Choudhary Laxmi Narayan and Deep Shikha, (2013), "Indian legal system and mental health", *Indian J Psychiatry* 55.

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<sup>xc</sup> Indonesia, *Kitab Undang-Undang Hukum Perdata*, Article 433; “Orang Gila Mengamuk, Bisakah Keluarganya Dimintakan Ganti Rugi?” Hukum Online, 6 June 2014, diakses di <<http://www.hukumonline.com/klinik/detail/lt538eb7f8677de/orang-gila-mengamuk,-bisakah-keluarganya-dimintakan-ganti-rugi?>>.

<sup>xc</sup> *Ibid.*

<sup>xcii</sup> *Ibid.*

<sup>xciii</sup> Ben Fogarty, (2009), “Intellectual Disability Rights Services: guardianship and administration laws across Australia,” accessed at <[http://www.idrs.org.au/pdf/Guardianship\\_and\\_administration\\_laws\\_across\\_Australia\\_by\\_Ben\\_Fogarty.pdf](http://www.idrs.org.au/pdf/Guardianship_and_administration_laws_across_Australia_by_Ben_Fogarty.pdf)>.

<sup>xciv</sup> *Ibid.*

<sup>xcv</sup> *Ibid.*

<sup>xcvi</sup> *Ibid.*, referring to s 25 Vic Act and s 16(1)(c) in NSW Act.

<sup>xcvii</sup> *Ibid.*, referring to s 24 Vic Act and s 16(1)(c) in NSW Act.

<sup>xcviii</sup> *Ibid.*

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## ABOUT LBH MASYARAKAT

LBH Masyarakat is a human rights organization which fight for the rights of people with mental illness in Indonesia, through case working, research, and public campaign.

LBH Masyarakat brings justice to those left behind. When injustice takes place, humanity is lost. Together let's fight injustice, protect dignity, and restore hope. Because every human matters.

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