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Is There Any Regulation to Protect People with Mental Disorders in Indonesia? (Case Study of *Pasung*)¹

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The Indonesian Constitution expressly states that Indonesia is a country that is based on the rule of law. The law guarantees the rights and the obligations of every citizen. The law of Indonesia recognizes the principle of equality before the law. This principle prohibits any form of discrimination. Eliminating discrimination could support the upholding of human rights. One of the State's duties is to promulgate proper regulation in order to protect people with mental illness from wrong treatment. "Pasung" cases³ in Indonesia are an example of the phenomenon of providing inhuman treatments to people with a mental illness. However, only a few such cases are published by the media. Some advocacy activities are starting to be conducted in order to build societal awareness that pasung is a form of mental mistreatment that is prohibited by law and there are sanctions for offenders. Furthermore, the aim of the advocacy activities is also to build a much better understanding among law enforcers for further legal discussions and cooperation in order to handle the pasung cases with comprehensive and proper method(s).

Keywords: Indonesian Regulation, Mental Disorders, Pasung.

I. Introduction

Indonesians commonly interpret health as mere physical health. They will consider themselves healthy when all organs function well and, on the contrary; they consider themselves unhealthy when one of their organs is not functioning well. For instance, when someone suffers headaches or stomach aches, he or she considers himself or herself unhealthy; however,

¹ This paper was prepared for presentation at the 6th Asian Law Institute (ASLI) Annual Conference held at the Faculty of Law, Hong Kong University on 29 and 30 May 2009.

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³ [Reviewer's note: this term should probably be explained— i.e. the practice of putting people in prisoner's stocks].

he or she does not consider himself or herself unhealthy when he or she feels depressed or under stress. This is a misleading mindset since the definition of health also includes physical and psychological condition (often referred to as mental health or psychological health). Incomplete comprehension regarding the definition of health causes marginalized health situations in Indonesia.

As reported by Time Magazine, Indonesia is classified as one the countries with the lowest standard of mental health care in Asia.⁴ This study is a strong indication of fairly low mental health in Indonesia. Moreover, according to a UNDP report, in 2005, among 177 States, Indonesia ranked 107th on the Human Development Index.⁵ The Human development Index constitutes a dilemma for developing countries. Mental disorder contributes significantly to the global burden of disease, as much as 13% (year 2002). This figure is much bigger than heart disease (10%), respiratory infection or disease (6%) and fatalities (5%).⁶

The inclusion of mental health as part of the definition of health was adopted internationally by the WHO, as indicated in the preamble to the WHO Constitution of 1948. The preamble to the WHO Constitution of 1948 states that "Health is not merely an absence of illness but a state of physical mental and social well-being". This definition clearly explains that mental health is an integral part of health and constitutes a primary element of an intact quality of life.

Indonesia, as a member of the United Nations and an active actor in the international community, has adopted intact a "health definition" into Law

⁴ Time Magazine, edition: 10 November 2003.

⁵ UNDP's Human Development Report 2007/2008. According to UNDP's Human Development Report 2006, [is this a quote? If so, put quotation marks] each year since 1990 this report has published a human development index (HDI) that looks beyond GDP to a broader definition of wellbeing. The HDI provides a composite measure of three dimensions of human development: living a long and healthy life (measured by life expectancy), being educated (measured by adult literacy and enrolment at the primary, secondary and tertiary level) and having a decent standard of living (measured by purchasing power parity, PPP, income). The index is not in any sense a comprehensive measure of human development. It does not, for example, include important indicators such as respect for human rights, democracy and inequality. What it does provide is a broadened prism for viewing human progress and the complex relationship between income and well-being. The rank of Indonesia in 2005 is better than its rank in 2003 and in 2004. According to UNDP's Human Development Report 2005, in 2003, among 177 countries, Indonesia ranked 110th. UNDP's Human Rights Development Report 2006 indicated that, in 2004, among 177 countries, Indonesia ranked 108th.

⁶ As indicated by the WHO Mental Health Atlas 2005.

No.23 of 1992 concerning Health. This law provides that health is a prosperous condition of body, soul and social life which enables everyone to live productively socially and economically.⁷ Prosperity cannot be measured only by economic or social ranking, but also by personal feelings or self-esteem.

By the adoption of a "health" definition, the Indonesian government is obliged to undertake various concrete actions to better its community's mental health. In reality, the community's access to mental health care is far cry from the initial plan. This causes a fairly low quality of mental health care and a high prevalence of mental disorder cases, in which scenario most mental health patients do not receive sufficient mental health care.

Mental health is not merely determined by the absence of mental disorder, as expressed by April Rusello "*Good mental health is not merely an absence of illness or disorder but includes a positive sense of well being; individual resources including self esteem, optimism, a sense of mastery and coherence; the ability to initiate, develop and sustain mutually satisfying personal relationship and the ability to cope with adversities*". This opinion is in line with the Indonesian Minister of Health's statement during the Commemoration of World Mental health day at the national level in Sindang Barang, Bogor. He stated that mental health is an integral part of health. Mental health is not merely determined by the absence of mental disorder, but also healthy feeling, happiness, and the ability to cope with life's challenges. Mentally healthy people can accept other people as they are, possess a positive attitude toward themselves and other people, trust other people and feel happy to be a part of a group or community.

To ensure the right of citizens to healthcare, the Government of Indonesia has devised various laws as mandated by the UUD 45 (Indonesia's constitution). These laws are expected to provide guidelines for government in determining policy and undertaking actions which are useful for all citizens, particularly to be aware of their rights. In improving and ensuring citizens' health, the government has enacted several laws which directly or indirectly underline its health care policy, though those laws have not been able to ensure intact health care for all citizens.

⁷ Article 1 (1) Law No.23 of 1992 concerning Health provides that "Kesehatan adalah keadaan sejahtera dari badan, jiwa, dan sosial yang memungkinkan setiap orang hidup produktif secara sosial dan ekonomis".

II. Pasung: A Problem of Mental Health in Indonesia

In general, mental health problems in Indonesia can be described as follows. Firstly, the low ratio of psychiatrists to Indonesian citizens, with a ratio of 1:500,000 and psychologists infrastructure ratio of 1:30,000. Rare number of psychiatrists and psychologists' infrastructure are exacerbated by huge coastal geographical conditions in Indonesia. Indonesia's geographical conditions cause difficulties in providing mental healthcare for Indonesian citizens.⁸

Secondly, scarce mental health workers and financial constraints (1% of the total health care budget) is another problem. Psychiatrists are not the only actors with the role of improving citizens' health care since there are other mental health workers. However, the ratio between mental health workers and Indonesian citizens is still extremely low.⁹

Thirdly, low numbers of psychiatrists and other mental health workers (psychologists and general practitioners who have additional expertise, also known as GP++) and difficulties in accessing mental health care caused by Indonesia's geographical situation causes high mental health care costs, especially for rural citizens who live in secluded or remote areas. Moreover, no insurance company categorizes mental health as a health risk; hence, mental health risks cannot be insured.¹⁰

Fourthly, most Indonesians have a negative opinion about mental disorder patients. Many rural folks (especially those living in remote village areas) consider mental health disorders as a curse or mystical phenomenon. In addition, mental health is considered by most Indonesians as an incurable disease. Mental health disorder patients are also automatically considered as incapable of sustaining legal rights and undertaking any legal actions. They are treated as liabilities that should be helped and have their legal rights taken care of for them. Individuals with mental health problems suffer from stigma, discrimination and marginalization from most parts of their communities.¹¹

Stigma concerning mental health disorder patients is that they are dangerous, capable of causing public disorder and therefore must be secluded.

⁸ Asia-Pacific Community Mental Health Development Project

⁹ *Ibid*

¹⁰ *Ibid*

¹¹ *Ibid*

This stigma hinders their chance to access required therapy. This situation can even exacerbate existing conditions. Marginalization and discrimination cause people with mental disorder to receive low quality and unsuitable mental health care. This increases the risk of violating their economic, social and educational rights as citizen.

All the above-mentioned problems stem from terrible mental health care and improper community, family and governmental attitudes against mental disorder patients. One improper treatment which is given to people with mental disorders is *Pasung*.¹² "In Indonesia, *pasung* is commonly known as a kind of wooden block or stocks in which the legs of the person who is being subjected to *pasung* are secured."¹³

The forms of *pasung* are different in North Sumatra, Indonesia. The subject is tied to wooden stocks, tied with rope, chained, shackled or locked in a small room. According to a study carried out by Minas and Diatri in North Sumatra, Indonesia, the application of *pasung* whose duration ranged from two to 21 years results in physical disabilities, such as the person subjected to *pasung* no longer being able to walk. Furthermore, the parties who are responsible for putting *pasung* on people with mental disorders are the families of the mentally ill people, because the families should be providing primary care. However, the families have several obstacles, such as limited financial resources, inadequate knowledge and skills regarding mental illness and a lack of knowledge about how to provide proper mental health treatment, and difficulties in getting proper mental health care services.¹⁴

Socio-economic conditions are, commonly, the reason family members conducting *pasung*. They have no capability to provide proper mental health medication and claim that preventing people with mental disorders

¹² *Pasung* is an Indonesian word. According to the Indonesian Language Dictionary issued by Pusat Bahasa Departemen Pendidikan Nasional (The Language Centre of the Ministry of National Education"), 2002, the meaning of *pasung* is punishing a person by taking a form of stocks with hole(s) for securing leg(s), hand(s), and/or the neck of a person. The application of *pasung* causes the movements of a person to be restrained. To apply *pasung* results in punishing someone into confinement.

¹³ Tri Hayuning Tyas, "Pasung family experience of dealing with "the deviant" in Bireun, Nanggroe Aceh Darussalam Indonesia", August 2008, p.2.

¹⁴ H. Minas and H. Diatri, "Pasung: Physical Restraint and Confinement of the Mentally Ill in the Community", *International Journal of Mental Health System* 2 (8), p. 1-8.¹⁵ Tri Hayuning Tyas, above n.10, p.53.

from harming other people is the purpose of conducting *pasung*¹⁵. *Pasung* is conducted because of limited choices family members have. Some of these family members stated that they would pursue other alternatives if they were available¹⁶. Sixty percent of Indonesian people are still living in remote or rural areas. This situation gives strong reasons for many family members not to provide proper mental health care due to difficulties in accessing mental health care centres.

There are some cases of the practice of *pasung* that have been published in the media:

- a. Yasin Heronimus, who is 34 years old, resident in West Kalimantan. He has been assumed to have a mental disorder. He has been subjected to *pasung* for 15 years. The reason why his family conducted the practice of *pasung* is their limited financial resources¹⁷
- b. Ai Widiani, who is 27 years old, resident in Ciomas Bogor, West Java, Indonesia. She was bound to a tree in a funeral place near her village for approximately a month. Ai was bound because she has a mental disorder. Her family has no funds to bring her to a mental hospital. Night and day, Ai becomes "a free show" for people.¹⁸

III. Is There any Regulation Concerning People with Mental Disorders?

The Indonesian Constitution, UUD 1945, expressly states that Indonesia is a country which is based on the rule of law. Every citizen has rights and obligations that are guaranteed by law that limits and at the same time guarantees citizens' independence. Ideally, law ascertains positive manifestations of human aspects and on the other hand addresses negative aspects of humanity. Law that is implemented will create order and improve life quality. Law recognizes equality before the law and therefore it is not acceptable to discriminate.

In writer's opinion, discrimination is also caused by the absence of le-

¹⁶ Ibid. p.56.

¹⁷<http://arsip.pontianakpost.com/berita/index.asp?Berita=Kota&id=143933>, accessed at 17 March 2009

¹⁸ www.Swaberita.com, "Pemasungan Masih ada di Indonesia" (The Application of Pasung Still Exist in Indonesia), accessed: August 21, 2008 .11.50pm.

gal protection for citizens who deserve protection from the State by enacting proper laws, especially for citizens with disabilities. Discrimination is a form of injustice and hence eradicating discrimination can uphold human rights, as rights everyone is entitled to at birth. Protection of human rights is a requirement to achieve order and a harmonious life in a society.

The accomplishment of the protection of human basic rights guarantees freedom from hunger, rights to embrace certain religions, rights to security and rights to healthy life. People with mental disorders also have basic rights; one of many is the right to receive proper medication. In reality, however, mistreatment often takes place, as evidenced by Ai Widiani's case above, where it is expressed that violations of mental health rights are violations of human rights¹⁹. Most people with a mental disorder cannot refuse improper treatment(s) because they are unable to protect their rights due to their condition. This, however, cannot be used as an excuse to justify improper treatments.

3. 1. International Law²⁰

Indonesia, as a member of the United Nations, automatically has an obligation to implement The Universal Declaration of Human rights²¹ and United Nations Resolution No.A/RES/46/119 dated 17 December 1991 concerning "The Protection of Persons with Mental Illness and the Improvement of Mental Health Care" ("UN Resolution 46/119").

Article 5 of The Universal Declaration of Human Rights provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". The term of "no one" has no limitation with respect to "people with mental disorders". Therefore, people with mental disorders should be protected from torture or cruel, inhuman or degrading treatment or punishment. Nevertheless, The Universal Declaration of Human Rights does not provide the definition of "torture", the meaning of "cruel, inhuman or degrading treatment" and the meaning of "cruel, inhuman or degrading punishment".

¹⁹ Michael L. Perlin, *International Human Rights and Comparative Mental Disability Law: The Role of Institutional Psychiatry in the Suppression of Political Dissent*, *ISR. L. REV.* Vol. 39 No 3, 2006, p.73.

²⁰ Protecting, promoting and fulfilling human rights are the states' obligation under International Law. See Nicola M.C.P. Jagers, *Corporate Human Rights Obligations: in Search of Accountability*, *INTERSENTIA*, p. 75-92.

According to Principle 1 point 3 of UN Resolution 46/119²², mentally ill people have basic rights, including the right to protection from physical abuse and degrading treatment. *Pasung* could be classified not only as degrading treatment²³, but as physical abuse as well, for several reasons. Firstly, *pasung* eliminates the freedom of movement of any person subjected to *pasung*; the person is prevented from self-actualization, social interaction, and becomes the subject of a horrific visual impression.²⁴ Secondly, according to Mardjono Reksodiputro, *pasung* is similar to an illegal detention or imprisonment conducted by police.²⁵ Thirdly, it is clear that any individual to whom *pasung* is applied could not exercise his or her civil, political, economic, social and cultural rights²⁶. Therefore, it could be concluded that *pasung* violate the human rights of people subjected to *pasung*.

Moreover, Indonesia has ratified several international agreements with regard to the protection of people with mental disorders. They are:

²¹ The General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights on 10 December 1948.

²² Principle 1 point 3 of UN Resolution 46/119 states that "All persons with a mental illness, or who are being treated as such persons, have the right to protection from economic, sexual and other forms of exploitation, physical or other abuse and degrading treatment".

²³ The proper treatment for people with mental disorder is regulated in more detail in Principle 9 point 1 of the Resolution 46/119. Principle 9 of the Resolution 46/119 provides that "(1) Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others. (2). The treatment and care of every patient shall be based on an individually prescribed plan, discussed with the patient, reviewed regularly, revised as necessary and provided by qualified professional staff. (3). Mental health care shall always be provided in accordance with applicable standards of ethics for mental health practitioners, including internationally accepted standards such as the Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment, adopted by the United Nations General Assembly. Mental health knowledge and skills shall never be abused. (4). The treatment of every patient shall be directed towards preserving and enhancing personal autonomy".

²⁴ Tri Hayuning Tyas, above n.10, p.2.

²⁵ Prof Mardjono Reksodiputro, S.H., M.A. is a professor of criminal law of the Faculty of Law of Universitas Indonesia. The statement was stated in an interview at 21st March 2009 at the Faculty of Law of Universitas Indonesia.

²⁶ Principle 1 point 5 Resolution 46/119 provides that "Every person with a mental illness shall have the right to exercise all civil, political, economic, social and cultural rights as recognized in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and in other relevant instruments, such as the Declaration on the Rights of Disabled Persons and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment."

a. **The International Covenant on Civil and Political Rights²⁷**

Indonesia has ratified this covenant by Law No.12 of 2005. Article 7 of this covenant provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” The term of “no one” in Article 7 of this Covenant, without any limitation with respect to “people with mental disorders”, means that people with mental disorders are protected. It is clear that that people with mental disorders should not be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Nevertheless, The International Covenant on Civil and Political Rights does not define the meaning of “torture”, the meaning of “cruel, inhuman or degrading treatment” and the meaning of “cruel, inhuman or degrading punishment”.

b. **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.**

Indonesia has ratified this convention by Law No.5 of 1998 concerning Ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment²⁸. The main purpose of this Convention is to “make more effective the struggle against torture and other cruel, inhuman or degrading treatment²⁹ or punishment throughout the world”.³⁰ Therefore, this Convention reaffirms that torture³¹ is unacceptable in any circumstances in the international community.

²⁷ The International Covenant on Civil and Political Rights was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. The entry into force was 23 March 1976.

²⁸ Human Rights Council, Rice Model United Nations Conference, October 13th-15th, 2006, Houston, Texas. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. The entry into force was 26 June 1987.

²⁹ In relation to “Other Cruel, Inhuman or Degrading Treatment or Punishment”, according to Article 3 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the treatment is referred to any treatment given for any person who is in proceedings “in connection with any of the offences referred to in Article 4”. Article 10 jo. Article 16 of Convention, the treatment is referred to any treatment in the scope of law enforcement or conducted by public official(s). Meanwhile, Article 13 of this Convention provides that “any complainant and witnesses is protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given”.

³⁰ See the Preamble of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It was also stated in the Preamble of this Convention that this convention is having regarded to Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights”.

It is not easy to determine whether *pasung* is a kind of torture. It is clear that *pasung* causes the severe pain or suffering of an individual subjected to *pasung*. *Pasung* is a torture provided the *pasung* is intentionally inflicted on the individual subjected to *pasung* for the purposes of obtaining information or a confession, punishing, or intimidating or coercing that person or a third party. When *pasung* is applied to a person with a mental disorder, it is carried out because of the poverty of the family and, also, for the benefit of the person with mental illness and for the safety of the society, therefore the application of *pasung* could not be classified as torture because the *pasung* is not applied to punish and/or intimidate the mentally ill person. However, if (one of) the reason(s) for the application of *pasung* is to punish the mentally ill person because the family believes that mental illness could not be cured and is related to a bad spirit having taken control of the body and mind of the person with a mental disorder, then the family will have committed torture. Therefore, intention is a very significant element to determine whether *pasung* is a kind of torture.

According to Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³², Indonesia as a state party has an obligation to regulate that any act of torture is offence under its criminal law. According to Mardjono Reksodiputro, torture has not yet been regulated in the Indonesian Criminal Code. What is now regulated in Indonesian Criminal Code is "misconduct" (*penganiayaan*).³³

³¹ Article 1 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

³² Article 4 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that "(1) Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. (2). Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

³³ See above n.15. The topic concerning "misconduct" will be explained below.

³⁴ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. The entry into force was 3 January 1976.

c. **The International Covenant on Economic, Social and Cultural Rights³⁴**

Indonesia ratified this Covenant by Law No.11 of 2005. As explained above, it could be concluded that putting *pasung* on people with mental disorders was an inhumane mental health treatment. Therefore, the application of *pasung* to people with mental illnesses does not comply with Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights³⁵ that recognizes the right of everyone, including people with mental disorders, “to the enjoyment of the highest attainable standard of... mental health”.

It is clear that any person subjected to *pasung* could not enjoy ‘the highest attainable standard of mental health’ due to the fact that every daily activity³⁶ of that person is carried out in the same place where the *pasung* is applied. That person depends on other person(s) totally. Moreover, ‘they are completely isolated from interaction with people other than those who give them food or clean their space’.³⁷ Consequently, the Government of Indonesia should prohibit the application of any form of *pasung*.

3.2. **Indonesian Legal System/National Law**

The WHO opined that the existence of mental health regulation in each country³⁸ is important in ensuring proper mental health services, which could protect the basic rights of people with mental disorders.

Several Indonesian regulations relating to people with mental disorders:

a. **Law No.23 of 1992 concerning Health**

Indonesia is one of countries that has mental health regulations. Indonesia had had a mental health act, which was Law No.3 of 1966 concerning Mental Health (“**Mental Health Act 1966**”). The Mental Health Act

³⁵ Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights provides that, “the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.

³⁶ Including eating and urinating.

³⁷ Tri Hayuning Tyas, above n.10, p.16

³⁸ The global development of mental health regulation had begun before 1960 and has been developed very rapidly in the past few decades. As of 2005, 78% countries in the world had promulgated their own mental health regulations.

1966, having 14 articles, covered a fairly comprehensive range of issues regarding mental health. However, the Mental Health Act was annulled. It was then replaced by four articles on mental health provided in Law No.23 of 1992 concerning Health (“Health Act 1992”).

Article 25 of the Health Act 1992³⁹ provides that the Government of the Indonesian people shall provide adequate treatment for people with mental disorders. It means that the Government of Indonesia should be responsible for providing proper mental health treatment for mentally-ill people, including poor mentally-ill people. Indeed, the Government of Indonesia should provide free mental health treatment for people with mental disorders who are poor.

Therefore, in relation to *pasung*, the Government of Indonesia should not allow such improper or inhumane treatment to happen in any area in Indonesia. Appropriate mental health treatments should be provided for people with mental disorders subjected to *pasung*. Nevertheless, the Government of Indonesia could not satisfy such an obligation considering the lack of mental health services that may be found in many areas in Indonesia⁴⁰ and most mental hospitals in Indonesia have a low quality of care and poor conditions.⁴¹ Furthermore, many Indonesian people could not afford the high access fees (transport fee) to mental health care because of the conditions of Indonesian geography and transportation limitations.⁴²

b. Law No.39 of 1999 concerning Human Rights.

Law No.39 of 1999 concerning Human Rights (“Human Rights Act”) is much clearer than the Health Act 1992 regarding the obligation of the

³⁹ Article 25 of the Health Act 1992 provides that “

Pemerintah melakukan pengobatan dan perawatan, pemulihan, dan penyaluran bekas penderita gangguan jiwa yang telah selesai menjalani pengobatan dan atau perawatan ke dalam masyarakat”.

⁴⁰ According to the Asia-Pacific Community Mental Health Development Project, in Indonesia, state mental hospitals are available in 24 out of 32 provinces, private mental hospitals account for about 8% of all beds, and fifty beds are allocated for a drug abuse treatment centre. There are 51 mental health hospitals and 27 general hospitals with specialist psychiatric services. Indonesia has relatively few mental health professionals: currently there are 500 psychiatrists for a population of more than 222 million people.

⁴¹ According to the Asia-Pacific Community Mental Health Development Project, Indonesia spends 1-2% of the total health budget on mental health, with 97% allocated for mental hospitals, leaving a very limited budget for community mental health.

⁴² According to the Asia-Pacific Community Mental Health Development Project, 60% of Indonesian people are still rurally based.

Government of Indonesia in providing mental health treatment, including for those who are confronted with limitations in their financial resources. Article 42 of the Human Rights Act⁴³ provides that any citizen with a mental illness has the right to access mental health services at the expense of the state. It is clear that Indonesia has full responsibility for granting mental health treatments for Indonesian people with a mental illness. Indeed, there is no limitation that such right is granted only for poor people.

Thus, in relation to *pasung*, the Government of Indonesia not only has the obligation to protect people with mental disorders from any mistreatment, including *pasung* but, as well, to provide proper mental health treatments at the expense of the state.

c. Law No.4 of 1997 concerning Persons with Disabilities

Article 1.1 of Law No.4 of 1997 concerning Persons with Disabilities (“Disabled People Act”) defines disabled people as “people with physical and/or mental deficiencies which mean that they can’t ordinarily carry out their social functions”. Therefore, people with mental disorders are covered by such definition.

According to Article 16 in conjunction with Article 18 of the Disabled People Act⁴⁴, the Government of Indonesia shall conduct medical rehabilitation efforts for people with mental disorders. Furthermore, Article 17 of

⁴³ Article 42 of Law No.39 of 1999 concerning Human Rights regulates that “Setiap warga negara yang berusia lanjut, cacat fisik dan atau cacat mental berhak memperoleh perawatan, pendidikan, pelatihan, dan bantuan khusus atas biaya negara, untuk menjamin kehidupan yang layak sesuai dengan martabat kemanusiaannya, meningkatkan rasa percaya diri, dan kemampuan berpartisipasi dalam kehidupan bennasyarakat[?], berbangsa, dan bemegara [?].“ (In the event of old age, physical and/or mental disability, every citizen has the right to special care, education, training and assistance at the expense of the state, ensuring an existence worthy of human dignity, and building his self confidence and capacity to participate in the life of nation, state, and society).

⁴⁴ Article 16 of the Disabled People Act provides that “Government and/or society shall conduct: (1) Rehabilitation efforts, (2) Social assistance efforts, and (3) Social welfare standard maintenance efforts.” Article 17 The aim of rehabilitation activities is directed to refunctionalization and to develop the physical, mental and social abilities of disabled people in order to conduct their social function normally according to their talents, abilities, education and experience.

1. The rehabilitation activities shall be conducted in all State and/or private facilities.
2. As meant at clause (1) the rehabilitation activities include medical rehabilitation, educational, vocational and social training.
3. As meant at clause (1) and clause (2), the provisions concerning the implementation of rehabilitation activities shall be regulated further by Government Regulation.

the Disabled People Act⁴⁵

Thus, in relation to *pasung*, the Government of Indonesia forbids any kind of *pasung* because, mostly, *pasung* worsen the mental health of people with mental disorders subjected to *pasung*. According to Try Hayuning, socio-behavioral problems could generally be generated because of the application of *pasung* for an indefinite period of time.

Under Indonesian legislative mechanisms, to implement the articles in a law requires a government regulation. This becomes an obstacle because drafting government regulations is a separate process from drafting the law and requires a long time period, moreover it has often happened that a law has been annulled, even though the government regulations under the law had not been made yet.

d. Penal Code of Indonesia

Article 1 (1) of the Indonesian Penal Code states that no act shall be punished unless by virtue of a prior statutory penal provision. Moreover, Article 2 of Indonesian Penal Code regulates that everyone who is in Indonesia shall have criminal responsibility imposed upon them for any unlawful act. In Indonesian criminal law, an unlawful act is known as a *delict*.

In relation to *Pasung*, there is a question whether *pasung* could be categorized as a *delict*, based on the Indonesian Criminal Code? This is not an easy question to answer. Indeed, it a complicated question. As mentioned above, Indonesian families who conduct *pasung* have reason(s) to do so; such as it is for the benefit of people with mental illnesses and for the benefit of the society. However, could it be concluded that the above-mentioned automatically imply that *pasung* is not a punishable act?

Article 351 of Indonesia Penal Code regulates that maltreatment (*penganiayaan*) is a punishable act. However, the definition or the element(s) of maltreatment is not provided in the Indonesian Penal Code. According

⁴⁵ Article 18 of the Disabled People Act provides that explains the aim of the medical rehabilitation, which is to enable mentally ill people to carry out normal social functions by developing their mental abilities. There is no limitation in relation to the application of Article 16, Article 17, and Article 18 of The Disabled People Act.

⁴⁶ R. Sugandhi, *KUHP dan penjelasannya (Indonesian Penal Code and Its Elucidation)*, Usaha Nasional, Surabaya, 1980. P. 366.

to Indonesian jurisprudence, the definition of mistreatment is a deed that intentionally generates pain, hurt and uncomfortable situations.⁴⁶ Article 351 of Indonesian Criminal Code could be employed for one who conducts *pasung*. It is clear that *pasung* results in pain and an uncomfortable situation for people with mental disorders subjected to *pasung*.

According to Mardjono Reksodiputro, poverty and inadequate human resources could not be employed as reasons to nullify the element of the unlawful act of maltreatment. Nevertheless, law enforcers, especially judges, should consider the reasons for the application of *pasung*. Poverty and inadequate human resources could be employed as the reason for exclusion or mitigation of punishment.⁴⁷

e. Indonesian Criminal Procedure Code

Mardjono Reksodiputro said that *pasung* is similar to an illegal detention or imprisonment conducted by police.⁴⁸ Consequently, it could be concluded that *pasung*, which restricts the freedom of any individual subjected to *pasung* to conduct any activity, is against Article 18 and/or Article 21⁴⁹ of the Indonesian Criminal Procedure Code.

Pasung could be classified as a criminal deed, which fulfils the elements of Article 351 of Indonesian Criminal Code and is against Article 18 and/or Article 21 of the Indonesian Criminal Procedure Code. Nevertheless, until now, there is no perpetrator of *pasung* who has been punished. There is no decision that stipulates that *pasung* is a punishable act.

The above-mentioned phenomenon could be as a result of some of the following reasons:

- a. There is no adequate understanding among law enforcers that *pasung* is maltreatment.

⁴⁷ Mardjono Reksodiputro, see above n.22.

⁴⁸ *Ibid.*

⁴⁹ Article 18 of Indonesian Criminal Procedure Code regulates that "Pelaksanaan tugas penangkapan ... memperlihatkan surat tugas serta memberikan kepada tersangka surat perintah penangkapan yang mencantumkan identitas tersangka dan menyebutkan alasan penangkapan serta uraian singkat perkara kejahatan yang dipersangkakan serta tempat ia diperiksa". Article 21 of Indonesian Criminal Procedure Code regulates that "Penahanan atau penahanan lanjutan dilakukan... dengan memberikan surat perintah penahanan atau penetapan hakim yang mencantumkan identitas tersangka atau terdakwa dan menyebutkan alasan penahanan serta uraian singkat perkara kejahatan yang dipersangkakan atau didakwakan serta tempat ia ditahan."

- b. The existence of a “consensus” in society that *pasung* is the best way to protect people with mental disorders, their families and society from any trouble or harm that could result from people with mental illnesses;
- c. There is no regulation that expressly prohibits *pasung* by clearly stating the word “*pasung*”. Although there are some existing regulations which are related to people with mental disorders, none of them expressly define and give details of the elements of the forms of wrong treatment and the legal consequences of the wrong treatments for offenders.

To implement the protection of people with mental disorders, especially to avoid the practice of *pasung*, strong efforts are very essential and needed. It could be started with carrying out a campaign that *pasung* is a form of punishable act and, therefore, there are sanctions for offenders. Furthermore, Indonesian Government should take responsibility for this problem, especially when the families of people with mental disorders are poor. The Government should provide proper mental health treatments for people with mental disorders. Besides that, to create understanding among law enforcers, further legal discussions and legal cooperation are also significant and compulsory in order to handle *pasung* cases in a comprehensive way. It is largely the duty of the judges in order to have a more deliberate and meticulous consideration in handling *pasung* cases, so there might be more just and predictable jurisprudence.

IV. Conclusion

The main conclusions that we can draw from this article is the:

1. Inclusion of mental health as part of health definitions has been adopted internationally by the WHO and was adopted intact as the “health definition” into Law No.23 of 1992 concerning Health.
2. Indonesia, as a member of United Nations, automatically has an obligation to implement The Universal Declaration of Human rights and UN Resolution 46/119. According to Article 5 of The Universal Declaration of Human Rights, people with mental disorders should be protected from torture or cruel, inhuman or degrading treatment or punishment. Nevertheless, The Universal Declaration of Human Rights does not provide the definition of “torture”, the meaning of “cruel, inhuman or degrading treatment” and the meaning of “cruel, inhuman or degrading punishment”. According to Principle 1 point 3 of UN

Resolution 46/119, *pasung* could be classified not only as a degrading treatment, but as well as a form of physical abuse, for several reasons.

3. Indonesia has ratified several international agreements with regard to the protection of people with mental disorders. They are: The International Covenant on Civil and Political Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and The International Covenant on Economic, Social and Cultural Rights.
4. According to Article 7 of The International Covenant on Civil and Political Rights, people with mental disorders should not be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
5. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment reaffirms that torture is unacceptable in any circumstances in the international community. Nevertheless, it is not easy to determine whether *pasung* is a kind of torture. It is clear that *pasung* causes severe pain or suffering of an individual subjected to *pasung*. *Pasung* is torture provided the *pasung* is intentionally inflicted on the individual subjected to *pasung* for the purposes of obtaining information or a confession, punishing, or intimidating or coercing that person or a third party. The intention is a very significant element to determine whether *pasung* is a kind of torture.
6. *Pasung* put on people with mental disorders could be concluded to be inhumane mental health treatment. Therefore, the application of *pasung* to people with mental illnesses does not comply with Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights.
7. According to Article 25 of the Health Act 1992, the Government of Indonesia should be responsible for providing proper mental health treatment for mentally-ill people, including poor mentally-ill people and should not allow such improper or inhumane treatment to happen in any area in Indonesia.
8. Article 42 of the Human Rights Act provides that any citizen with a mental illness has the right to access mental health services at the expense of the state. It is clear that the Government of Indonesia not only has the obligation to protect people with mental disorders from any mistreatment, including *pasung*, but as well as to provide proper mental health treatments at the expense of the state.

9. Article 1.1 of the Disabled People Act includes people with mental disorders in the definition of disabled people. According to Article 16 in conjunction with Article 18 of the Disabled People Act, the Government of Indonesia is to conduct medical rehabilitation efforts for people with mental disorders. Furthermore, the Government of Indonesia forbids any kind of *pasung* because, mostly, *pasung* worsen Article 351 of the Indonesian Penal Code regulates that maltreatment (*penganiayaan*) is a punishable act. The definition or the element(s) of maltreatment is not provided in the Indonesian Penal Code. According to Indonesian jurisprudence, the definition of mistreatment is a deed that intentionally generates pain, hurt and uncomfortable situations. Article 351 of Indonesian Criminal Code could be employed for one who conducts *pasung*. It is clear that *Pasung* results in pain and an uncomfortable situation for people with mental disorders subjected to *pasung*.
11. *Pasung* is similar to an illegal detention or imprisonment conducted by police. Consequently, it could be concluded that *pasung*, which restricts the freedom of any individual subjected to *pasung* to conduct any activity, is against Article 18 and/or Article 21 of the Indonesian Criminal Procedure Code.
12. *Pasung* could be classified as a criminal deed, which fulfils the elements of Article 351 of the Indonesian Criminal Code and against Article 18 and/or Article 21 of the Indonesian Criminal Procedure Code. Nevertheless, until now, there is no perpetrator of *pasung* who has been punished. There is no decision that stipulates that *pasung* is a punishable act. The above-mentioned phenomenon could be as a result of some of the following reasons:
 - a. There is no adequate understanding among law enforcers that *pasung* is maltreatment.
 - b. The existence of a “consensus” among society that *pasung* is the best way to protect people with mental disorders, their families and society from any trouble or harm that could result from people with mental illnesses;
 - c. There is no regulation that expressly prohibits *pasung* by clearly stating the word “*pasung*”. Although there are some existing regulations which are related to people with mental disorders, none

of them expressly defines and details the elements of the forms of mistreatment and the legal consequences of mistreatment for offenders.

13. To protect people with mental disorders, especially to avoid the practice of *pasung*, strong efforts are very essential and needed.