

Conceptual Article

Reconceptualization of The Competence to be held Responsible in National Criminal Code

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ABSTRACT

Construction of norm in determining competence to be responsible stated in Criminal Code (KUHP) needs to be reconceptualized because the construction does not make any qualification on the incompetence to be responsible (*verminderde teorekeningsvatbaarheid*) in criminal science law. . Criminal Code stipulates that a person is deemed incompetence to be responsible for the crime he/she commits for 2 (two) reasons. First is if the person is considered mentally incapable (*gebrekkige ontwikkeling*), and the second is if a person is considered incapable because of an illness (*ziekelijke storing*). This article aims to reconceptualize the competence to be responsible stated in National Criminal Code through qualitative literature study on some texts. The finding of the study is that first, the concept of norm competence to be responsible stated in Criminal Code is no longer relevant with current development of psychiatry and law which have been specialized and interdisciplinary. The second is that the categorization of a person's mental condition considered light and severe mental retard and has given chance for the concept of incompetence to be responsible (*verminderde teorekeningsvatbaarheid*), which so far is only recognized in criminal study, to be normatively present in light mental retard category and to give a chance to *negatief wettelijk* evolution in the study of criminal procedure to move to *positief wettelijk* on the *superego* of judge's decision based on *visum et repertum* psychiatry of a psychiatrist.

Keywords: Norm Reconceptualization; The Competence to be Held Responsible; Psychiatry.

A. INTRODUCTION

The conception of criminal act (*strafbaar feit*) in Indonesia which separates between the definition of criminal act and criminal responsibility, which is the definition of criminal act not covering criminal responsibilities according to Moeljatno (Alfarisi, 2020). This view is called dualism view, which means separating criminal act and the mental element or conscience of the person commits the crime regarding the crime. This is a bifurcation of monistic view, which does not separate the act of crime and its criminal liability.

The extension of dualistic is the principle of *geen straf zonder schuld*, which means no crime without mistake, or in other words, although a person's conduct has fulfill the requirement to be an offence based on the law, There is another requirement that must be fulfilled as well. The law must also consider whether the person who commits the crime makes mistake or not. In other words, the person must be held accountable for what he did. In a more general meaning, a mistake contains the following elements:

- a. There is an ability or competence to be responsible coming from the inner self of the person who commits the crime (*schuld-fähigkeit / zurechnungs-fähigkeit*),

meaning that the mental condition of the perpetrator must be normal; b. There is mental relation between the perpetrator and his/her conduct, which is an intention (*dolus*) or negligence (*culpa*). These are types of mistakes. ; c. There is no reason which omits the mistake (Suleman, 2012).

The element of mistake in point (a) which requires the presence of competence to be responsible is the focus of this study, which also relates to point (c) which is a sanction that can be charged by the judge when deciding a case associated with the competence to be responsible.

The conception of norm about the incompetence to be responsible in National Criminal Code (KUHP) is based on Article 44 section (1) stating that:

“Any person who conducts an action which he/she cannot be held accountable due to a mental disorder (*gebrekkige ontwikkeling*) or a disease (*ziekelijke storing*) is free from the charge”.

If it is proven that the perpetrator cannot be held accountable for his crime, the judge can give him/her sanction in reference to the provision in Article 44 section (2), which stipulates that the judge sends the perpetrator to a mental health facility to be observed, maximum for a year as a probation (Ohoiwutun et al., 2019).

According to this norm conception, it is crucial for a judge to be very careful in deciding whether a perpetrator of a crime fulfills the qualification as a person who is incompetence to be responsible because this concerns whether the treatment given by the judge to a perpetrator is suitable or not. The relevance between norm construct in terms of

incompetence to be responsible and the sanction given is vis-à-vis the norm construct and sanction charged to a narcotic user and a narcotic dealer. When the judge decided that the perpetrator is the user, he will receive an order to be rehabilitated. Meanwhile, for dealer, a sentence punishment will be charged.

Despite the aim of criminal law for the sake of social defend from a perpetrator of a crime in a long term, the accuracy in determining the punishment for a perpetrator is also related to the interest of the perpetrator to be able to be a better person and can return and be accepted to his/ her social environment when returning to the society instead of becoming a criminogenic factor in the society.

The next issue is the outdated concept of criminal liability and psychiatry in national criminal law regulations. In the advance of criminology and psychiatry study, there is a discourse on mental capacity concept which is based on UN Convention on Disabilities Rights (CRPD) 2008. Discourse on the norm of criminal liability is continuously elaborated in various scientific forums particularly the ones concerning mental capacity and rights to vote or make decision regarding medical treatment for a perpetrator with personality disorder (Craigie et al., 2019)

Recently, a stabbing of a preacher, Syekh Ali Jaber, by a perpetrator with mental illness has sparked a debate on this norm and the authority to stop law process. Lately, Mahfud M.D. has made a statement concerning this case. He agreed that the case proceeded to the court (Mahfud MD, 2020). Previously, similar cases also happened, a murderer

of a child by his mother in Cakung, the stabbing in TransJakarta Bus Stop, and the Assault of an Imam in Garut. All those cases only proceeded until the investigation stage.

The construction norm of incompetence to be responsible in National Criminal Code needs to be reconstructed because it does not implicitly accommodate the incompetence to be held accountable due to mental disorder, which is recognized in the field of psychiatry and is an empirical fact. So far, the conception of incompetence to be held accountable is recognized in the study of criminal law with the term "verminderde teorekeningsvatbaarheid", or the inability to be partially responsible in field of psychiatry (gedeeltelijke ontoerekeningsvatbaarheid) (Sudarto, 2013).

Some previous studies on reconceptualization of competence to be responsible in National Criminal Code are; a journal article entitled Competence to be responsible in Article 44 Criminal Code (Punuh, 2015) focusing on normative descriptive research related to norm in Article 44 currently. A journal article entitled Reconstruction of Article 44 Criminal Code and VeRP in Criminal Trial System (Irawati, 2009) focuses on normative descriptive norm of competence to be responsible with the urgency to improve the quality of the use of Visum et Repertum Psikiatrik (VeRP) in criminal procedure. Another article concerning Functionalization of Article 44 Criminal Code in the Investigation of Murder Crime (A Re-Oriented and Re-Evaluation Leading to Reformulation) (Ohoiwutun et al., 2019) focuses on functionalization of Article 44 for investigators and reformulation of

Criminal Code Procedure with a case study. A journal article entitled Fluctuating Capacity and Advance Decision-Making in Bipolar Affective Disorder – Self-Binding Directives and Self Determination (Gergel, & Owen, 2015) focuses on research on exploration of mental capacity problems and decision making for personality disorder as well as providing initial broad outline for a model which may be suitable to be integrated to clinical and legal context. Another article entitled Choice, Deliberation, Violence: Mental Capacity and Criminal Responsibility in Personality Disorder (Pickard, 2015) focuses on the exploration of tension between a person's mental capacity and personality disorder with liability for the crime he or she commits.

This study is different from those previous studies. This study criticizes and reconceptualizes the same norm as that of in previous studies, which is Article 44 Criminal Code and reconstructs it into a new norm which is more adaptive. This study also suggest to separate between its implementation by law enforcers and by considering its operation by law enforcers and let the psychiatrists in charge of any aspects related to psychiatry by following the development in the field of psychiatry.

B. DISCUSSION

1. Criticism for Norm of Competence to be responsible in National Criminal Code (Ius Constitutum)

The development of Legal State in Indonesia particularly in Criminal Law is part of meta-narration of Legal State of enlightenment era project which is

based on Criminal Law legacy of Dutch East Indies called *Wetboek van Strafrecht (WvS)*. Dutch formulized and ratified the enactment of *WvS* for the first time replacing French Criminal Code in 1881 and was amended in 1994. Meanwhile, Indonesian Criminal Law still uses 1881 *WvS* Dutch East Indies which was transplanted through politics/ principle of concordance during the independence of Indonesia and came into effect through Laws No. 1 Year 1946 on Criminal Law Regulation (State Gazette of the Republic of Indonesia II Number 9).

The competence to be responsible in National Criminal Code is currently accommodated in Article 44 section (1) Criminal Code which stipulates that the qualification of reasons for a person's incompetence to be responsible and for a person's to be made free from charges is due to a condition where a person grows up with mental disorder (*gebrekkige ontwikkeling*) or condition where a person has got a disease (*ziekelijke storing*).

Definition of competence to be held accountable or responsible is not found in Criminal Code. Criminal Code only states the qualification of reason for a person's to be deemed incompetence to be held accountable from a crime he/she commits. The definitions of competence to be held accountable can be found in the study of criminal law. One of them is by Simons. Simons defined competence to be held accountable as a psychological condition which affirms the charge of a punishment from either public perspective or the perpetrator's perspective (Hakim, 2019).

Simons also gave reasons for a person's to be called competent to be responsible. According to Simons, the reasons are if : a. he/she is able to acknowledge or feel conscious that his/ her conduct is against the law; b. he/she can determine his/her willingness based on his/her consciousness (Puspitasari, & Rofikah, 2019).

Van Hamel also suggested that normality for a person to be competent to be held accountable are : a. being able to understand the values of consequences of his/ her conduct; b. being able to realize that his/her conduct is prohibited by the society; c. being able to determine his/her willingness over his/her conducts (Sudarto, 2013).

In addition, *Memorie van Toelichting/M.v.T.*(memory of explanation) negatively mentions that the competence to be held accountable is the absence of competence to be responsible in the doer self: a. in this case he/she has no freedom to choose between doing and not doing what is not allowed or ordered by the law; b. in this case, he/she is in a certain circumstance so that he/she is not able to realize that his/her conduct is against the law and cannot identify the consequence of his/her conduct (Sudarto, 2013).

In conclusion, if we look at Article 44 section (1) Criminal Code in more detail, there will be 2 points: a. determinant of how is mental condition of the doer; b. the presence of determinant of casual relation between mental of condition of the doer and the conduct (Sudarto, 2013).

According to the definitions and explicit intention of Article 44 section (1) Criminal Code based on the study of criminal law, it can be said that Article

44 section (1) Criminal Code is not a norm/content of an offence. It is instead a requirement or qualification of reason to cause a person to be considered incompetent to be held accountable and to be not convicted, or is the main reason of the elimination of punishment used negatively. These are what is meant with requirements to be negatively considered competent to be held accountable, in that the judge draws conclusion and can make different decision despite the description made by psychiatry experts regarding a person's mens rea condition/situation and its causal relation with actus reus. The relation between psychiatrist and judge according to the study of criminal law is called descriptive-normative relation.

According to the literature of psychiatry, there are 2 reasons for being incompetent to be held accountable, first due to a mental disorder a person grows up with (*gebrekkige ontwikkeling*) or due to health reason causing by disease (*ziekelijke storing*).

The first reason, which is because a person is mentally impaired as he grows up (*gebrekkige ontwikkeling*), is based on an examination conducted by Binet and Simon using Intelligence Quotient (I.Q.) to measure intelligence on children aged 3-11 years old by multiplying mental age/calendar age by 100 (Saenin, 1983). American Psychiatric Association (APA) considers mental disorder during a person's growing up retardation. The term retardation is a generic term and contains the degree of mental damage caused by stagnant growth or imperfect growth, and therefore, the people who suffers this disorder cannot compete with his/her normal peers

with the same qualifications or managing him/herself with moderate intelligence rate (Saenin, 1983).

It is indicated that according to the legislators who made this regulation according to the development of the study of psychiatry at that time, the qualification for a person to be considered growing up having mental disorder is a person who has suffered severe mental disorder since they were a kid, and this disorder is innate. This is categorized as Idiot and Imbecile with low I.Q, or known also as a severe form of mental sub normality. In this category, kids with damaged brain tissue are always found. This category has I.Q. below 50. Then, one level above the previous category is the category of *debilitas metis* or mild sub normality, including Moron. They have I.Q. ranging between 50 to 70 and can continue their study to grade 4 Elementary School (Saenin, 1983). In this context, the child is known as kids with intellectual disability

The second reason is because a person has got a disease (*ziekelijke storing*). This means that a person suffers mental disorder due to a disease so that he/ she cannot think normally. Severe mental disorder or psychosis (mental disorder which is severe category with personality disorganization) is divided into several types as follows:

- a. Functional psychosis, or psychogenic, psychogenetic contains all elements of psychotic disorder, covering:
 - 1) Schizophrenia is one of severe mental disorder and is a type of mental illness, or split personality.

- 2) Affective psychosis is a tendency of constantly changing of mood, suddenly normal or healed by itself, as for example, suddenly a person feels excited and cheerful, but a few moments later spontaneously he/she becomes gloomy or depressed and cries..
 - 3) Paranoia is a feeling of constantly suspicious. It is personality disorganization with symptoms such as feeling being chased by something that may hurt him/herself, feeling like somebody mocking him/her, and so forth.
 - 4) Another psychosis includes organic psychosis, which is a mental disorder caused by or occurring with the damage of brain tissue function. It can be in the form of senile psychosis, which is psychosis caused by blood circulation disorder, psychosis caused by trauma (brain injury), psychosis caused by or occurring with infection, psychosis caused by intoxication (toxin gets into brain tissue), and so forth.
 - 5) Uncategorized psychosis.
- b. Organogenic psychosis, which is psychosis related to organic syndrome (Saarin, 1983).

In this context, a person who initially grows normally, but because of psycho-social pressure or because of infection/brain neuron damage he becomes abnormal. This condition is categorized as psychosis not neurosis. It means that this is a severe mental disorder.

In conclusion, in current National Criminal Code, qualifications of a person who is not competent to be held accountable in Article 44 section (1) are

limited to the cause of the disorder, which is first by genetic factor since born. This means that a person was born with abnormal condition in their brain so that he/she cannot think the way normal people do. The second is by disease as he/she grows up. This means that a person is initially normal, but then he suffers a disease at some point in his/her life that causes him/her to be abnormal (pathology). This categorization is no longer relevant to the development of psychiatry and law, which is currently moving towards specialization and interdisciplinary.

The shift of criminal liability norm, which has implication on the treatment to criminal perpetrator with mental disorder, to next stage of criminology and psychiatry development is a good choice amidst the norms which are outdated written in Criminal Code. According to Alan Norrie in *A Critique of Criminal Causation*, it is possible to question even a normal individual responsibility through objective cause concept and cause and effect doctrine among the big others as a separated self which is outside oneself, and reduction of policy as well as judge's language rhetoric as decision maker to cover causal attribution mistake of laws individual agent (Norrie, 1991).

2. Reconceptualization of Competence to be Held Accountable in National Criminal Code (Ius Constituendum)

Reconceptualization of competence to be held accountable needs an understanding of psychiatry, which is different from psychology. A psychologist is a person who learns all human behaviors either the normal or the abnormal ones. Meanwhile, a psychiatrist is a doctor who takes specialization in the

field of abnormal behavior or mental disorder (Benson, & Grove, 2002).

A psychiatrist has a medical degree along with additional requirement in psychiatry field and registered in medical association (it is only they who are allowed to prescribe medicine). However, psychologists can also have specialization to help people suffering from mental disorder by providing additional training. They are usually called clinical psychologist. There are some requirements that must be fulfilled in order to achieve the degree. Some of the requirements are good score, relevant work experience such as experience as a nurse, and also having a clinical degree which admitted and equal to diploma degree (Benson, & Grove, 2000). Psychiatrist profession is a specialist doctor which is in charge of handling problems of mental disorders. Different from a psychologist, a psychiatrist must first complete his/her education in medical study undergraduate level. The academic degree for a psychiatrist here in Indonesia is Sp.KJ (Specialist in mental health).

Historically, the study of mentality was born and began in 1879. However, during that time, the scope was generally on behavior. It was when Wilhem Wundt (1832-1920) was interested in this field and opened his first laboratory to learn more about human behavior in Leipzig, Germany (Benson, & Grove, 2000). Wundt contributed significantly in this field because he was the founder of psychology as a science which studies human mentality and behavior. Wundt refused the idea in the past which is not scientific and found a new scientific approach.

Since then, psychology has developed in some big countries and Wundt's students continued to develop this field. After Wundt, there was another researcher from United States named John B. Watson (1878-1958) with his Behaviorism Theory. He found this theory as he observed animals. As psychology in United States thrived with its structural theory, in Germany, there was gestaltisme, which is a bifurcation of theory of Behaviorism. This theory was pioneered by Wertheimer, Koffka, and Kohler. Through this theory Wertheimer, Koffka, and Kohler agreed that thought is active and constantly looks for meaning (Benson, & Grove, 2000).

The science of psychology continues to develop and has become wider in terms of its field of research. However, the actual big figure behind the study of forensic psychiatry is Ramaer (Saainin, 1983). Not only did he give much insight about criminal field, what is more important is his contribution in determining liability for Dutch W.v.S, which was enacted in 1886. He believed that mental disorder occurs in the brain cells and neuron fibers, and this such association which is then called the mythology of the brain (Saainin, 1983).

Ramaer's belief called materialistic then was referred by Dutch government in Article 37 Dutch Criminal Code stipulating that: "A person who commits an offence he cannot be held responsible for cannot be punished because his thought was not functioned normally, or because he suffered mental disease as he grows up " (Saainin, 1983). This belief was then also adopted by Indonesia National Criminal Code, which is a legacy from Dutch East Indies W.v.S. In

1928 then, the government of Indonesia made minor revision of Article 37 Dutch Criminal Code.

In addition, in Germany, the development of psychiatry has thrived marked by the appearances of figures such as Kraepelin, Freud, and Bleuler. Also an idea that crime is manifestation of one of mental disease emerged. It is Lombroso who first stated the idea along with the facts and his interpretation of researches he conducted. Through Lombroso contribution in determining physical characteristics and the tendency of crime a person commits, psychiatry has found its relation with criminal field. This field is then called forensic psychiatry.

According to the concept of psychiatry, mental defect or mental disease can be in the form of mental retardation which is defined as degradation of intellectual function directly leading to social adaptation disorder (Sularyo, & Kadim, 2016). This means that in order for a person to be considered having mental retardation, he/ she must fulfill cognitive and social adaptation aspect which he/she experiences as he/she grows up. The Classifications of mental retardation according to The ICD-10 Classification of Mental and Behavioral Disorders, WHO, Geneva 1994 are:

- a) Mild Retardation (minor mental retardation) IQ 50-69. Minor mental retardation is categorized as educable mental retardation. Including in this category are children who suffer speaking disorder yet still able to speak in daily context and in a clinical interview. Generally, they are also able to take care of themselves independently (eating, doing the laundry, wearing clothes, control their digestive track and bladder). The main difficulty is commonly seen in academic context. A lot of them have trouble in reading and writing. In social cultural context, where academic is the least needed, they have no problem. However, whenever emotional and social problem arise, it will seem like they are in trouble, for example their inability to cope with conflict in a marriage, inability to raise children, or inability to adapt with culture tradition.
- b) Moderate Retardation IQ 35-49. Moderate mental retardation is categorized trainable mental retardation. In this category, children experience delay in understanding skill, language use, and limited accomplishment. The ability to take care of themselves and their motoric skill are also delayed, and even some of them needs lifetime supervision. They experience limited academic progress. Some of them are still able to learn basic reading, writing, and counting.
- c) Severe Retardation IQ 20-34. This category is almost similar to moderate retardation in terms of clinical pictures, organic causes, and certain condition. The main difference is that a person with severe retardation usually experiences significant motoric damage, or there is neurologic deficit.
- d) Profound Retardation (heavily severe mental retardation) IQ <20. Profound Retardation means children who have very limited ability to understand and fulfill a request or obey an instruction. In general, these children are very limited in mobility and are only able to communicate nonverbally

using with very basic language proficiency (Sularyo, & Kadim, 2016).

In a study by Sri Idaiani, in general there are 4 diseases in psychiatry field that must get complete examination in primary facility in Indonesia (Idaiani, 2016). Those 4 diseases have the following criteria: high prevalence (high volume), high risk, and high impact. In the field of psychiatry, the diseases are; the first, Insomnia, a sleeping disorder or poor sleep quality. The second is Dementia, a condition with severe cognitive impairment in memory, judgment, orientation, and cognition (learning ability). The third is Mixed Anxiety Disorder and Depression, a disorder which is marked with the presence of anxiety symptoms and depression occurring at the same time, and each symptom does not show series of symptoms of quite severe mental retardation to be considered a separated diagnosis. The fourth is Psychosis, a disorder which is marked with the inability or severe impairment in judging the reality, in the form of syndrome, such as hallucination and delusion.

Psychiatry narration in mental retardation can be classified into 4 categories in ICD-10, and this categorization can still be reduced into 2 categories only, which are severe and mild. This categorization is also related with its sanction, which is imprisonment with reduction sentence period for mild cases or admission to Psychiatric Hospital as probation for a year for severe category.

The conception of norm in Article 44 Criminal Code currently still categorizes mental disease in terms of etiology, which is disability when growing up (gebrekkige ontwikkeling) or disorder caused by a

disease (ziekelijke storing). This can be re-conceptualized into the categories of severe mental retardation and mild mental retardation, which means impairment occurs when growing up or inability caused by a disease based on psychiatric visum et repertum by an psychiatrist inherent in severe and mild category. The concept of incompetence to be held responsible or accountable which has existed in the study of criminal law can be re-conceptualized into 2 categories, which are severe and mild. These 2 categories can be categorized as mild mental retardation.

An objective investigation by a psychiatrist regarding a person's mental normality condition in the study of criminal code is currently *negatief wettelijk*. This means that the descriptive pictures of a person's mental condition by a psychiatrist, in evidence stage in a trial, are classified as expert testimony, and is not automatically and normatively obligated for the judge to follow it up because the judge can decide without considering the result of mental health examination conducted by a psychiatrist by referring to Article 184 Criminal Code Procedure. Norm reconceptualization in Article 44 Criminal Code will also affect *negatief wettelijk* into *positief wettelijk* because it no longer determines the etiology, instead, making decision based on the result of the examination according to the degree of mental retardation suffered.

Norm in criminal liability concerning personality or mental disorder must be reconstructed. At least, there is guarantee that this norm will not be misused and also guarantee human rights of the defendant in law during the trial process and the right of mental

health by improving the system of national health so that a defendant with mental disorder will no longer be considered an imperfect human being. Norrie in his criticism on the philosophy of Hegel punishment stated that "In my study of Hegel's philosophy of punishment, I argued that his speculative rationalism failed this test. It was used to reconcile social contradictions in the modern institution of punishment, but in fact it only did so by placing them outside of, and thereby excluding them from the philosophical understanding of the institution" (Norrie, 2000).

Duff in Norrie explained that in the trial there is a different interpretation through the comparison of Faulkner and Miller and Donovan cases, which are both stealing cases leading to fire accidents. However, for the Faulkner case, the decision was revised into only fulfilling stealing categories. Nevertheless, in Miller and Donovan's case, there was no revision (Norrie, 1992). Law enforcement for the norm of incompetence to be held responsible must also be completed in the court (adjudication), so that there will be no more case dismissing which becomes a dark number for criminal cases by mental disorder in the pre-adjudication stage.

Goodrich stated that "realism promises to criminology the capture of the criminal process in its totality (investigation, arrest and trial, judgment)" (Goodrich, 1997). Goodrich stresses on the need for contemporary criminology to embrace the whole criminal process along with its reality. A research by Agusriyadi in Lambaro Correctional Facility in Aceh Besar supports Goodrich's statement that the rehabilitation of a defendant with personality or mental disorder has not been regulated, particularly in terms

of its medical treatment. The law only regulates treatment for a defendant with physical health condition (Agusriyadi, 2017).

National Criminal Code or National Criminal Code Procedure needs to regulate medical treatment and supervision for a defendant with mental disorder following the development of psychiatry which leads to 'digital psychiatry' as claimed by the World Psychiatric Association in an article written by Gooding "A 40-author report for the World Psychiatric Association's Commission on the Future of Psychiatry, for example, claimed that the digital psychiatry revolution has arrived" (Gooding, 2019). Digital psychiatry enables mental health professionals to employ communication technology such as online counseling, application for treatment and medical supervision as well as connecting a person's mental health information to influence criminal proceedings (regarding association to the mistake, reducing punishment, and so forth) (Gooding, 2019).

C. CONCLUSION

According to the discussion in this article, it can be concluded that; first, the conception of competence to be held accountable as a norm contained in Article 44 section (1) Criminal Code is no longer relevant with the current development in the field of psychiatry and law which has been specialized and interdisciplinary. Being specialized means that currently, with the advance in the medical field, expertise is necessary. Technological advance can give a precise picture to a person's mental condition up to the stage where it can be categorized as minor or severe mental retardation.

Being interdisciplinary means that the study of law is interdisciplinary that it needs another study or knowledge particularly in the field of psychiatry and criminology in order to help explain a certain criminal phenomenon committed by a person with mental disorder. The second, the categorization of a person's mental condition into minor and severe retardation has given room to the concept of lacking competence to be held accountable (verminderde teorekeningsvatbaarheid). So far, in criminal law, it is normatively present in the minor and severe mental retardation category, and this has opened chance of evolution of negatief wettelijk in the study of criminal law into positief wettelijk on superego of the judge's decision based on psychiatric visum et repertum made by a psychiatrist.

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