

Sharia and International Law on Chemical Castration Sentence in Sexual Crime against Children: Conflict and Constraint

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Abstract: Sexual violence crimes against children in Indonesia have not seen a significant decline over time. Although criminal law has ruled a fitting punishment, pedophile crimes are still rampant in the society. The state then implemented a harsher punishment for sexual violence perpetrators by using chemical castration. This chemical castration punishment sparks an unending debate among the people in Indonesia. This study aimed to analyze the contradictions between the implementation of chemical castration punishment with international law and sharia law. This study used normative legal research that compares the normativity of Indonesian criminal law with the normativity of international law and Sharia law. This study found that international law on Human Rights and Sharia law did not demand physical law that brings damage to the body so that chemical castration imposed in Indonesia by the Government Regulation in Lieu of Law (Perppu Number 1 of 2016), which subsequently becomes the second change to the Law on Child Protection contradicts the international law and Sharia law. This study resulted in a challenge for the policy maker on criminal law to regulate crimes using humanitarian perspectives and religious values.

1 INTRODUCTION

The rights of children are part of fundamental human rights that have legal guarantees and protection, both in the international law and national law. Ironically, the rights of children are often violated and, even more, taken away. One of the deprivations of the rights of children is sexual violence crime. This sexual crime has become an extraordinary crime, which is considered as the most serious crime alongside of the crime of terrorism, corruption, and illegal drugs.

Children's rights must even be treated differently from adults, which are specifically regulated in special conventions. Children's rights are treated differently than adults because children since I was in the womb are born, grow, and grow up to be adults are still in a state dependent on their families and communities, yet self-contained and requires special treatment both in nutrition, health, education, science, religion, skills, jobs, security, free from fear, free from worries and welfare. The special treatment in the form of legal protection in obtaining civil rights, political rights and economic, social rights and cultural rights are better so that once the child becomes an adult, he will better

understand and understand the rights they have and will apply his rights in accordance with stipulated legal provisions. Thus, adult children will be the pillar and foundation of a very strong, good for the family, community, nation and state.

Acts of sexual violence such as rape that ended the current killings are common in the community. This action occurs not only the fault of the perpetrators of sexual violence, but the victim can also be a trigger for the actions of the perpetrators of this crime. Today there are many women who don't take good care of themselves. They easily provoke crime by using clothes that are sexy and inappropriate. With the existence of the castration law, it is hoped that the perpetrators of sexual violence will lose their desire to return to their actions. However, the discourse raises the pro and contradictions of the community. Many support this castration decision, but many also reject it. For this reason, arrangements for the protection and treatment of children have not been able to make the rights of children protected. This is evident from the fact that many children's rights have been violated and they are victims of various forms of violence, both physically and sexually, exploitation, discrimination and even inhumane acts. The more concern is that violations of human rights

(hereinafter referred to as HAM) for children are mostly carried out by parties who should provide protection and care for children such as parents, the community or other parties. Children are part of the community having more special human rights that must be respected and protected. The state and society are obliged to make efforts to protect and fulfill children's rights, because children are the successors to the existence of creatures with human species. This is the deposit of the Almighty God to the adult generation. Continuing human existence through the protection and fulfillment of children's rights includes including improving physical, mental, and spiritual qualities. Thus, the protection and fulfillment of children's rights is also a development and improvement of the quality of future human resources.

Sexual violence crime against children has become a serious problem in Indonesia. Sexual crimes against children in Indonesia even have a tendency to increase over time. In 2017, the Indonesian Child Protection Commission (ICPC) found 116 cases of sexual violence against children. This number increased sharply in the period of January-March 2018 where the ICPC found 223 cases of sexual violence against children. The increase in the number of sexual crimes indicates that the safety and security of children in Indonesia still poses a serious threat. Sexual crimes against children not only violate the rights of children, but also have a negative impact on children both physically and psychologically, which is feared to interfere with the child's development and life for a better future.

Most studies have investigated the effectiveness of "treatment" of sexual crime which argued that chemical castration reduces recidivism effectively. Nevertheless, this paper presents a conflict between chemical castration in criminal law in Indonesia with international law on Human Rights and Sharia law. This study uses a normative legal research method with comparative approach by tracing the norms of human rights in international law and national law as well as the norms of Sharia law which are then compared with the use of chemical castration as a punishment in Indonesian criminal law

2 PUNISHMENT FOR SEXUAL CRIME

Crime for perpetrators of crimes against sexual violence against children in the presence of a

castration law, which can be reviewed through the Child Protection Act. Number 23 of 2002, and also related to Law Number 39 of 1999 concerning Human Rights in the enactment of the castration law which aims to protect human rights from victims and provide deterrent effects to perpetrators of crimes. By using a normative juridical method, we can see the legal relevance of castration against perpetrators of sexual crimes in minors can we see a balance between human rights and basic obligations, especially for criminals (convicts).

Various cases of sexual crimes against children have become a polemic regarding the effectiveness of Indonesian criminal law. A number of institutions, such as the ICPC, the Ministry of Social Affairs, and the Ministry of Health have proposed to increase the severity of the punishment for pedophiles because these crimes are included in the category of extraordinary crime. They propose severe punishment as an addition in the form of death sentence and castration to cause a deterrent effect on pedophiles. The push from these various institutions resulted in the proposition of the Government Regulation in Lieu of Law Number 1 of 2016), which was later known as Castration Act. This act subsequently became the second amendment to the Law on Child Protection in Article 81 (7) concerning additional punishment in the form of chemical castration.

Castration is defined as any action, surgical, chemical, or otherwise, by which a male loses the functions of the testes or a female loses the functions of the ovaries. In the implementation, it can also be accompanied by cutting the penis together with the testicles. The purpose of this castration is to eliminate lust and make it sterile and barren at the same time. This castration can be done through a surgical process by cutting or binding the testes producing testosterone, or through an injection process. There are two types of injection method: First, injecting drugs that can suppress the production of testosterone, and; Second, injecting estrogen hormone, so that the person who is castrated will physically resemble a woman. Castration is not a new practice to human and animal life, except for a modern castration known as chemical castration that involves injecting chemicals into the body of the person that is to be castrated.

Castration as a punishment is not only done in Indonesia. Some European Union countries (Norway, Poland, and Russia) and Asian countries (India and Taiwan) also impose castration for sexual violence perpetrators against children, while some of

the states in the United States such as Louisiana and Iowa include castration sentence as a treatment.

Castration as a punishment in European, American and Asian countries is considered an effective way to reduce the number of sexual crimes against Children. With the existence of the Castration Act, castration becomes a new type of punishment in the criminal system and contributes to the renewal of criminal law in Indonesia by including castration as the type of criminal punishment. This punishment aims to protect the victims' human rights and give a deterrent effect to the perpetrators. In other words, chemical castration as punishment was intended as a balancing weight between human rights and obligations, especially for the criminals.

Castration as punishment is not without serious risks. Chemical castration can cause disruption of reproductive organs functions and other problems that are difficult to predict. Chemical castration also raises the effect of brutalization, which stimulates multiple acts of crime. The target is not only limited to children; everyone can potentially be a victim. These reasons make a number of people reject the implementation of chemical castration sentences.

3 **NORMATIVITY IN SHARIA LAW**

Sexual crime against children (Pedophilia) in Indonesia has been regulated in the Criminal Code and the Child Protection Act, both regarding criminal acts, as well as the provisions of punishment against the perpetrators. However, the provisions of this law have little effect on the prevention of sexual crimes against children. Child predators are constantly searching for their prey, without fear. From time to time sexual crimes against children are increasingly increasing in quantity and increasingly violent. Many cases of pedophilia that have killed victims have occurred in various regions in Indonesia. In 2010 for example, according to KPAI data from 171 cases of violence against children, 45.7% were cases of sexual violence. One of the cases that most caught the public's attention in 2010 was that carried out by Baiquni, known as Babeh, who had sodomized dozens of street singers in Jakarta. The number of cases recorded in that year was 2335 cases, which was far increased from the previous year which was only 1998. In 2017 the KPAI found 116 cases of sexual violence against children. In the January to March 2018 Period, the KPAI indicated that there

had been 223 cases of sexual violence against children. Previously, there were also many similar cases which had claimed many casualties. According to data from the KPAI reported by wikipedia, from 2010 to 2014 there were 21,869,797 cases of violations of the rights of children, 42-58% of which were sexual crimes against children. Various cases of sexual crimes against children have caused fear to parents and children and made people angry and angry, so that various parties proposed to aggravate punishment for pedophile perpetrators.

The emergency condition of sexual violence against children which is called an extraordinary crime then prompted relevant agencies, such as the Child Protection Commission, Ministry of Social Affairs and the Ministry of Health, to offer severe penalties as additional punishments in the form of capital punishment and castration to cause deterrent effects on Pedophile perpetrators. The pressure from various parties is the reason for the birth of the Law Substitution Government Regulation (Perppu No 1 of 2016), which became known as the Kebiri Perppu which subsequently became the second change to the Child Protection Law, which in article 81 paragraph (7) concerning additional criminal acts in the form of chemical castration, which became known as the Kebiri Law.

Castration (al-ikhsha', castration) is the cutting of the testis or two dzakar (al-khushsyatain). In its implementation it could be possible to cut the testis along with cutting the penis (dzakar). The purpose of this castration is to eliminate lust and at the same time make it barren. The implementation of this castration can be done through a surgical process by cutting or binding the testicles that produce testosterone, and can also be through the injection process. There are two kinds of this injection method; First inject drugs that can suppress testosterone production. The second injection is to enter the hormone estrogen, so that the physical person who is castrated will resemble a woman.

The problem of castration is not a new problem in human and animal life, except for castration in a modern way, known as chemical castration, which is to enter chemicals into the body of a person who will be castrated through injection. In the early days of Islam the problem of this castration had been questioned and questioned by the Prophet (peace be upon him). Therefore, because the majority of Indonesians were Muslims, the issue of punishment for chemical castration needed to be studied in the perspective of Islamic law, whether or not Islam permitted this castration.

In Islam, castration is not justified, either by surgical process, drug injections or by other means, because castration will cut off offspring and reduce the number of descendants. This contradicts the teaching of Islam that encourages the proliferation of offspring, and producing descendants is one of the goals of marriage. Islamic Sharia Law forbids castration done to human. This opinion was agreed by Islamic law scholars (*fuqaha*) without any differences of opinion between them. This agreement (*ijmak*) is based on several *Hadits* that explain the prohibition said by Muhammad SAW to his companions to do *tabattul* (leaving worldly pleasures for worship) and prohibits castration.

Historically, Muhammad SAW rejected the wishes of Utsman ibn Mazh'un to do *tabattul*, which was deciding not to marry because he wanted to focus on worshipping Allah SWT. The Companions of the Prophet (*Sahaba*) commented on the Prophet's rejection by saying: If the Prophet permitted Utsman to do *tabattul*, we would have castrated ourselves to be able to withstand our biological desires so that we could focus on the worship. If castration was prohibited by the Prophet even for the reason of wanting to focus on worship alone, it is certainly not justified as well for any other reason. The Prophet also forbade castration and gave dispensation to do *mut'ah* marriage to the troops who went to war in exchange for the castration they asked to overcome their biological desires. For this reason, the Prophet strongly stated that anyone who commits castration does not belong to his people. This all confirms that castration is strictly prohibited in Islam. In this position, Ibn Hajar asserted, without any differences of opinion, that the prohibition on castration shows the illegitimacy (*Haram*) of doing castration to human. If this provision is associated with the 2016 Castration Act that stipulates additional criminal punishment for pedophiles in the form of chemical castration, then the problem is not only limited to the illegitimacy of doing castration to human, but also related to the prohibition to impose penalties that are not in accordance with the provisions stipulated by Sharia Law. Therefore, there is no room for any person to set another provision aside of those decreed by Allah and the Prophet.

In Islamic criminal law it is explained that sexual crimes against children can be divided into three forms, adultery (sexual intercourse without marriage), *liwath* (anal sexual intercourse), and *sihaq* (homosexual/lesbian), each of whom has a clear sentence in Sharia Law. If the crime was categorized as adultery, then the punishment is *jilid* (whipping) for those who are not married and

stoning if they have been married. If it was categorized as *liwath* and *sihaq*, then the punishment is in accordance with the differences of opinion of the *ulama*, namely stoning, or even death sentence. If the act is in the category of sexual abuse, then the punishment is *ta'zir*.

Moreover, the implementation of chemical castration is carried out with two stages of Inspection. The first injection is done to reduce and even eliminate testosterone, which causes a person to become impotent. Then in the second stage the injection is carried out to enter the estrogen hormone which causes castrated men to have physical characteristics resemble those of women. However, Islam forbids men to resemble women or vice versa. Allah and the Prophet would not curse the perpetrator of an act unless it is something that is forbidden and categorized as major sin, which is threatened with punishment in the world or in the hereafter. Even besides cursing, the Prophet ordered to expel them.

4 HUMAN RIGHTS FRAMEWORK

The doctrine of human rights (HAM) has now been accepted as moral, political and legal guidelines in building a peaceful world free from oppression. In regard to the state of law, the guarantee to protect human rights is an absolute feature that must exist in every country referred to as *rechtsstaat*. The Universal Declaration of Human Rights and a number of Covenants/Conventions have become international law on Human Rights in which countries are subjected to the provisions of the protection of human rights. In fact, norms regarding human rights have been included within the constitution in modern countries.

Chemical castration in Indonesian criminal law is a provision that has the potential to violate human rights, especially the right not to be tortured as stipulated in Article 28G (2) which reads: "Everyone has the right to be free from torture or acts that reduce human dignity and are entitled to political asylum from the state." In this provision, the punishment of chemical castration seen from a medical perspective will adversely affect the biological survival of individuals in the form of damaged and impaired organ functions, such as muscle shrinking, bone loss, reduced blood cells, and impaired cognitive function that will bring difficulties to the life of someone affected by

chemical castration. In addition, chemical castration is also seen as a cruel, inhuman and degrading method of punishment that clearly violates human rights. Chemical castration is also a punishment that attacks human nature to produce offspring as stated in Article 28B of the 1945 Constitution of the Republic of Indonesia.

Indonesia as a country that has ratified the International Covenant on Civil and Political Rights (ICCPR) is subject to the concept of the non-derogable rights of this covenant. In Article 28I, the ICCPR states on rights that must not be reduced at all cost because they are fundamentals, including the right to be free from torture. Indonesia has also ratified the Convention against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment. This provision was further strengthened by the European Convention on Human Rights and the American Convention on Human Rights which affirmed the right to be free from torture and inhuman or degrading treatment or other punishment as one of the core of rights of non-derogables rights.

Chemical castration should not be assumed as a penalty but be part of the sexual offender treatment so that consent of the person is required. It means that the application of chemical castration without their consent violate the international human rights law. It constitutes cruel, inhumane and degrading punishment. This opinion is justified by the Art. 7 of the International Convention on Civil and Political Rights: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Moreover, chemical castration without consent is incompatible with the International Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. Art. 1: "Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as punishing him for an act he or a third person has committed or is suspected of having committed, 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." It also violate the Art. 5 of the Universal Declaration of Human Rights which states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." In addition, UNESCO'S Universal Declaration on Bioethics and Human Rights and the WMA Declaration of Helsinki protect the right to informed consent of chemical castration.

This means that punishment that is considered as torture and vile contradicts the international law and

national law. Thus, chemical castration without consent as punishment in Indonesia contradicts the law on human rights both in international and national law. For this reason, sentences imposed on sexual violence perpetrators must consider a recovery-oriented approach through comprehensive medical, psychological and social rehabilitation. Providing severe punishment for sexual crimes perpetrators is certainly intended to protect victims and society at large, but this form of punishment will certainly have the potential to violate the rights of the perpetrators as human. Ideally, the protection of individual rights and community rights should complement each other and not be contradicted.

5 CONCLUSION

Indonesia is a country with a majority of Muslims, so that Sharia law is considered as a principle teaching in social life. Likewise, Indonesia is a part of the world community which is incorporated in the United Nations which is bound by international law on Human Rights. Therefore, the chemical castration as a form of punishment cannot be separated from the provisions of Sharia law and international law on Human Rights.

In the perspective of Shari'a law, chemical castration sentence contradicts the punishment already established by the Sharia law, namely adultery (sexual intercourse without marriage), liwath (anal sexual intercourse), and sihaq (homosexual/lesbian). This means that the punishment for sexual violence needs to be adjusted according to the actions whether they fulfill the category of adultery, liwath, or sihaq. Not only contradicts the Sharia law, chemical castration also contradicts international law on human rights because it contains elements of torture that undermine human dignity. In this context, the use of chemical castration as punishment for sexual violence perpetrators against children contradicts the Sharia law and international law. Thus, the punishment for the perpetrators of sexual violence against children is expected to be based on providing mental and psychological recovery so that the perpetrator will not repeat his crimes over time.

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