

THE CONSTITUTIONALITY OF CASTRATION SANCTION

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Abstract The research was conducted to assess Article 81 and Article 81A of Government Regulation In Lieu of Law No. 1 of 2016 on the Second Amendment of Law No. 23 of 2002 on Children Protection which includes imposition of castration sanction in its substance materials. Such policy is based on many rapes and murders case of minors that happen cruelly nowadays. Based on three points of view, chemical castration is the effort of reducing sexual arousal addressed to the perpetrator in order not to reiterate the same action and to reduce crimes such as rape and other sexual offenses. Although this regulation has good aim in terms of the deterrent effect, but there is a human rights character code which is a non-derogable human rights stipulated in Article 28 paragraph (1) The 1945 Constitution of the Republic of Indonesia, one of which is so called right not to be tortured. The conclusion of this research is that the sanction of chemical castration violates human rights therefore constitutes an unconstitutional policy or in contrary to the 1945 Constitution of the Republic of Indonesia. The results of this study is also expected to provide a view on constitutional law in doing the judicial review before the Constitutional Court.

Keywords: *castration sanction, human rights*

I. INTRODUCTION

In 2016 people were surprised by the tragic news related to sexual abuse of children accompanied by murder. For instance, is the case of Yuyun in Bengkulu who was raped and killed by 14 perpetrators namely Dedi Indra Muda (19), Tomi Wijaya (19), DA (17), Suket (19), Bobi (20), Faisal Edo (19) Zainal (23), Febriansyah Syahputra (18), Sulaiman (18), AI (18), EK (16) and SU (16). Later on, the Eno case in Tangerang shows minors as the victims of rape and murder by many people. In addition to that we can also see another example of children sexual abuse based on data collected by the Indonesian Child Protection Commission (*KPAI*).

The incidence of children sexual abuse raises deep hatred of the public against the perpetrators of the cruel rape and murder on minors. Therefore, the legal discourse on castration sentence is raised. Immediately after such issues, the Government Regulation in Lieu of Law No. 1 of 2016 on the Second Amendment of Law No. 23 of 2002 on Children Protection (*Perppu No.1 of 2016*) enacted. This regulation includes the castration sanction in its substance materials.

Article 81 of *Perppu No.1 of 2016* stipulates that:

- a. In addition to the perpetrator as referred to in paragraph (3), additional punishment of 1/3 (one-third) of criminal sanction will also be applied to the perpetrator who previously have been convicted of criminal offence as referred to in Article 76D.
- b. In the event where criminal offence referred to in Article 76D causing casualties more that one person, resulting major injuries, mental disorders, infectious diseases, or loss of impairment of reproductive function, and/or the death of the victim, the perpetrator shall be sentenced to death, lifetime or at minimum 10 years of imprisonment and maximum 20 years of imprisonment.
- c. In addition to criminal sanction referred to in paragraph (1), (3), (4), and (5), the perpetrator can also be subject to additional punishment in form of public announcement of the perpetrator identity.
- d. To the perpetrator referred to in **paragraph (4) and (5) can also be subject to punishment of chemical castration** and installment of an electronic detection device.
- e. The punishment referred to in paragraph (7) decided together with the core criminal sanction with information on the period of the punishment.

- f. The additional punishment and measures are excluded for perpetrators who are still a child.

Such castration sanction is directed against the perpetrator who has ever been convicted the same offense (recidivists), causing more than 1 (one) victim, resulting in serious injuries, mental disorders, infectious diseases, impaired or loss of reproductive function, and/or the death of the victim. Furthermore, Article 81A of *Perppu No.1 of 2016* regulates as follow:

- a. Measures referred to in Article 81 paragraph (7) shall be imposed for a maximum period of 2 (two) years and implemented after the convict undergo the core criminal sanction.
- b. The implementation of the measures referred to in paragraph (1) is under the periodically supervision of the Ministry which held government affairs in the field of legal, social, and health.
- c. The implementation of chemical castration accompanied by rehabilitation.
- d. Further provisions on the procedures for the execution of measures and rehabilitation are regulated by Government Regulation.

Thus, the castration sanction is executed after a convict undergo the core criminal sanction. In other words, if the perpetrator subject to imprisonment of 10 years, then when he is free, he supposed to be sanctioned with the chemical castration for maximum period of 2 years and the installation of electronic detection devices, based on the previous verdict.

Based on the above explanation, there are two questions raised in this research, namely:

- a. Whether the policy determination on chemical castration sanction in *Perppu No.1 of 2016* violates the human rights which constitutionally guaranteed?
- b. How is the constitutionality of *Perppu No.1 of 2016*?

II. RESEARCH METHODOLOGY

This study is using normative legal research which employs several approaches as follow:

- a. Statute Approach
- b. Conceptual Approach
- c. Historical approach.

The sources of legal research can be divided into primary and secondary legal materials.

- a. Primary legal materials: some laws are used in this research.
- b. Secondary legal materials: books literature, the results of dissertation and scientific speech, legal dictionaries and language dictionaries, as well as the materials from the

internet. These materials are listed on the reading list.

III. RESULTS AND DISCUSSION

a. Chemical Castration Concept

Historically the concept of castration has been known long time ago in the state of civilization. In the writing of Zachary Edmonds Oswald, he explained that a state can implement castration in two ways, namely surgical castration and chemical castration. Both have different goals in the physical and psychological. There are several definitions of "chemical castration", including:

- 1) Mukesh Yadav stated that: Chemical castration is the administration of medication designed to reduce libido and sexual activity, usually in the hope of Preventing rapists, child molesters and other sex offenders from repeating Reviews their crimes, unlike surgical castration, where the testes or ovaries are removed through an incision in the body.
- 2) Ika Puspita Sari said that castration is an attempt to lower the sex drive which is usually done to perpetrators of sexual abuse by decreasing the levels of androgen hormones, namely testosterone (T) in men. Testosterone is the primary hormone that is necessary for libido/sexual desire and sexual function (sexual behavior).
- 3) Samantha Vaillancourt said that: Chemical castration is a colloquial term used to refer to the treatment of certain sex offenders with anti-androgenic drugs in order to reduce recidivism. The use of this treatment began in the United States in 1966, at which time the nation favored a rehabilitative approach to criminal justice. In its first thirty years of use, chemical castration proved effective at reducing recidivism rates among one subset of offenders by about fifty percent.

Based on the above point of views, it is understood that chemical castration constitutes effort to reduce the sexual arousal aimed at the perpetrators in order not to repeat the same action and reduce crimes such as acts of rape and other sexual offenses.

b. Castration Policy in the States around the World

The existence of chemical castration sanction is not only known in Indonesia, but other several states in the world are also familiar with this kind of punishment. Several states as mentioned above include: Poland, Russia, Estonia, and even up to several states in the United States. In 2011, South Korea became the first Asian country to apply chemical castration sentence. Not only that, the

castration sentence is still implemented in various states, such as the Czech Republic, Germany, Moldova, Estonia, Argentina, Australia, Israel, New Zealand.

In the 20th century, several European states have passed Laws allowing surgical castration to be used as a treatment for sex offenders. These countries are: Denmark (1929, 1935 and 1967), Germany (1933, 1935 and 1969), Norway (1934 and 1977), Finland (1935 and 1950), Estonia (1937), Iceland (1938), Latvia (1938), Sweden (1944), and the Czech Republic (1966). In the Czech Republic, castration sanction is stipulated in the Act on Human Health Care No. 20/1966 Coll., as amended (hereinafter "Act No. 20/1966 Coll."). Furthermore, Stojanovski argued that the imposition of castration sanction in Czech Republic is based on voluntary demand of the perpetrators. It is also well enforced in the United Kingdom, France, Belgium, Germany, Denmark, Sweden, Hungary and Italy. In addition to that, in America there are a few states that impose laws relating to castration sanction. Around 1996 to 2005, there were 9 states that enforce such matter on their Laws, among others were California, Florida, Georgia, Iowa, Louisiana, Montana, Oregon, Texas, and Wisconsin. Such Laws addressed the conditions that allowed or required sex offenders to undergo castration. However, since 2005, two decrees have been revoked. Georgia revoked the Castration Law in 2006 through legislative session (Georgia General Assembly, 2006). Meanwhile, Oregon did the same thing in 2011 (Oregon Legislative Assembly, 2011).

Conditions of the reduced number of states that eliminate the policy on castration sanction show their thinking on the humanity nuances.

c. The Idea of Regulating Castration Sanction in Perppu No. 1 of 2016

The provisions set out in Perppu No.1 of 2016 are based on philosophical, sociological and juridical reasons, including:

- 1) State guarantees the right of children to live, grow, and develop as well as the right to protection from abuse and discrimination as stipulated in the 1945 Constitution of the Republic of Indonesia. This is in line with Article 28B paragraph (2) of the 1945 Constitution of the Republic of Indonesia.
- 2) Children sexual abuse has increased significantly which threaten and endanger the lives of children, damaging private life and child development as well as disrupt the sense of comfort, tranquility, security and public order.
- 3) The imposed criminal sanctions for the perpetrators of children sexual abuse have not been

able to provide a deterrent effect and comprehensively prevent sexual abuse against children.

Based on the consideration part of Perppu No. 1 of 2016, the idea of such castration sanction is aimed at:

- 1) the deterrent effect
- 2) a comprehensive prevention-related sexual abuse against children, as well as
- 3) Emphasis on the retaliation paradigm.

d. Effectiveness of the Castration Sanction

There are some negative impacts in relation to the existence of castration sanction. Those are as follow:

- 1) Castration sanction is only applied to the perpetrators for only two years which still open possibility of the perpetrators to commit the same abuse. Whereas the legal politics of this castration sanction is to provide deterrent effect.
- 2) The injection of chemical castration to a free man whose has been sentenced to imprisonment constitutes a violation of human rights since such way is inhumane. This proves that coaching in prison does not have significant mental change for the perpetrators.
- 3) The additional penalty in the form of castration sanction given to the perpetrators after they completed imprisonment will lead to the rebel actions of such perpetrators. That is even more dangerous as it will invite more frontal action against the other potential victims.
- 4) According to Perppu No. 1 of 2016, the one who performs castrate the patient is a doctor. From the view of medical ethics such action is contradictive. Therefore the rules of this medical ethics will obstruct the implementation of this sanction by considering affection and respect for human dignity and to obtain patient consent.

e. The Castration Sanction From the Perspective of Human Rights

When someone is released form the prison then his right specifically the right to bear children as part of Human Rights is needed to be taken into account since it is protected by the State under Article 28B of the 1945 Constitution of the Republic of Indonesia. The problem arises when someone cannot bear children after being imprisoned due to the implementation of chemical castration for two years after he was free. The implementation of chemical castration sanction potentially leads to a more tragic action of the perpetrators since this type of sanction may influence the condition of the perpetrators for example for the next ten years when they undergo the correction

institution. Given the concept that correction institution is a shift concept of imprisonment that emphasizes the element of revenge and deterrence into a sense of security, equality of treatment and services; education; guardianship; respect for human dignity; loss of independence is the only suffering; and ensuring the right to stay in touch with family and certain people.

The aegis principle that provides treatment of inmates in the correction institution in terms of public protection from the possibility of repeated criminal acts committed by such inmates actually also provides life investment therefore their existence is useful in the society. Thus, the development pattern in the correction institution has no positive impacts if such chemical castration sanction is given its inmates.

With such an arrangement, castration sanction could potentially abuse human rights which protected under Article 28B paragraph (2) of the 1945 Constitution of The Republic of Indonesia, since such sanction is implemented in a way that is inhumane. There are two character of human rights regulated under the 1945 Constitution of The Republic of Indonesia namely the non derogable human rights (the rights which cannot be reduced under any circumstances) and the derogable human rights (rights which can be limited).

The non derogable human rights are regulated under Article 28I paragraph (1) of the 1945 Constitution of the Republic of Indonesia which one of them is the right not to be tortured. The exercise of chemical castration sanction constitutes a form of psychological and physical torture, when a person is already experienced human rights implementation through imprisonment. Thus, the policy of castration sanction is in contrary to the absolute human rights guaranteed by the Constitution. Likewise with Article 7 of Law No. 12 of 2005 on Ratification of the International Covenant on Civil and Political Rights. While the derogable human rights can be found in Article 28B paragraph (1) of the 1945 Constitution of the Republic of Indonesia, Article 5 of the Universal Declaration of Human Rights and Article 10 paragraph (1) of Law No. 39 of 1999 on Human Rights where everyone has the right to marry legally, to found a family and to bear children.

f. Impacts of the Chemical Castration

There are some thoughts on the impacts of chemical castration from the medical and legal

perspectives. Negative impacts on the medical side are:

- 1) Chemical castration is not permanent. That means if the injection of anti-androgen is stopped then the effect will stop therefore the rapists will get back their sexual function both sexual desire and erectile ability.
- 2) The male secondary hormone will be lost. The perpetrator will perform like a female usually accompanied with the appeared natures of female for instance enlargement of the breast and the bone is easily porous. Thus such things will indirectly weaken the male immune. It is the same as slowly killing the perpetrators.
- 3) Chemical castration actually hurts someone because it will create the perpetrator's hormonal condition become unbalanced. The perpetrator will potentially be more aggressive. Such castration is also triggering depression. The impacts of hormonal changes are the senses of nervous, heat, pain, nausea, and dizziness.
- 4) The chemical castration will bring up anger, revenge, hatred. Therefore it is worried that the sexual perpetrators will use more brutal ways to paralyze their victims.

g. The Constitutionality of Perppu No. 1 of 2016

Based on the hierarchy, Government Regulation in Lieu of Law shall be sourced from the 1945 Constitution of the Republic of Indonesia which consists of preamble and Articles. The preamble shows the existence of the ideal of law "rechtsidee".

Rechtsidee as mentioned above in the context of the state of Indonesia is Pancasila (Five basic principles of the Republic of Indonesia). Therefore, from the perspective of Pancasila, the existence of Perppu No. 1 of 2016 which regulates castration sanction is violating the second principle of Pancasila that is just and civilized humanity considering the lack of civilized treatment. In addition to that such sanction violates Article 28I paragraph (1) of the 1945 Constitution of the Republic of Indonesia, Article 28B paragraph (1) of the 1945 Constitution of the Republic of Indonesia, Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia and Article 28I paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

It is not appropriate to establish Government Regulation in Lieu of Law (Perppu) which allow a person to be tortured. One of the principles of the substance materials of Article 6 of Law No. 12 of 2011 on the Establishment of Laws and Regulations is humanity principle as the manifestation of Pancasila's second principle. On that basis, Perppu No. 1 of 2016

does not reflect this principle. Thus, Perppu No. 1 of 2016 is unconstitutionality.

IV. CONCLUSION

Based on the above explanations, it can be concluded that the castration sanction violates human rights (HAM) hence constitutes an unconstitutional policy or contrary to the 1945 Constitution of the Republic of Indonesia.

Based on such conclusion, it is suggested that the parties who feel their constitutional right is aggrieved then they can look for judicial review before the Constitutional Court to examine *Perppu No. 1 of 2016*.

We would like to express our gratitude to University of Udayana specifically LPPM of University of Udayana for the funding of this research. For those who have helped us to complete this research on time, we would also like to say thank you.

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