

**THE EFFECTIVENESS POLICY OF ADDITIONAL CRIMINAL  
PUNISHMENT OF CHEMICAL CASTRATION AGAINST  
PERPERATORS OF SEXUAL VIOLENCE AGAINST CHILDREN**

**THESIS**



**ARRANGED BY:**

**AKHIRUDDIN SYAHPUTRA LUBIS**

**18410572**

**INTERNATIONAL PROGRAM**

**UNDERGRADUATE STUDY PROGRAM IN LAW**

**FACULTY OF LAW**

**UNIVERSITAS ISLAM INDONESIA**

**YOGYAKARTA**

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Telah diperiksa dan disetujui Dosen Pembimbing Tugas Akhir untuk diajukan  
ke depan TIM Penguji dalam Ujian Tugas Akhir / Pendaran  
pada tanggal 12 Maret 2021



Yogyakarta, 18 Maret 2023  
Dosen Pembimbing Tugas Akhir,

  
Hanafi Amrani, S.H., M.H., LL.M., Ph.D.



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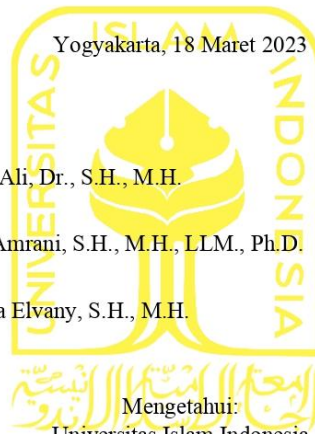
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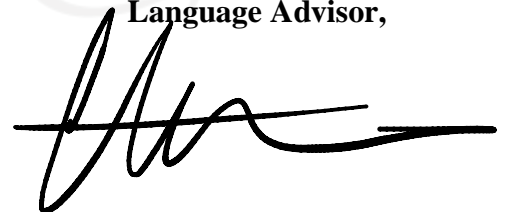
**THE EFFECTIVENESS POLICY OF ADDITIONAL CRIMINAL  
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PERPERATORS OF SEXUAL VIOLENCE AGAINST CHILDREN**

This bachelor degree thesis has been approved by Thesis Language Advisor to be  
examined by the Board of Examiners at the Thesis Examination on 12 March

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Yogyakarta, January 12<sup>nd</sup> 2023

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**SURAT PERNYATAAN**  
**ORISINALITAS KARYA TULIS ILMIAH BERUPA TUGAS AKHIR MAHASISWA**  
**FAKULTAS HUKUM UNIVERSITAS ISLAM INDONESIA**

*Bismillahirrahmanirrahim*

Yang bertanda tangan di bawah ini, Saya:

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Adalah benar-benar Mahasiswa Fakultas Hukum Universitas Islam Indonesia yang telah melakukan penulisan Karya Tulis Ilmiah (Tugas Akhir) berupa skripsi dengan judul: **THE EFFECTIVENESS POLICY OF ADDITIONAL CRIMINAL PUNISHMENT OF CHEMICAL CASTRATION AGAINST PERPERATORS OF SEXUAL VIOLENCE AGAINST CHILDREN**. Karya Ilmiah ini saya ajukan kepada Tim Penguji dalam Ujian Pendadaran yang diselenggarakan oleh Fakultas Hukum Universitas Islam Indonesia. Sehubungan dengan hal tersebut dengan ini saya menyatakan:

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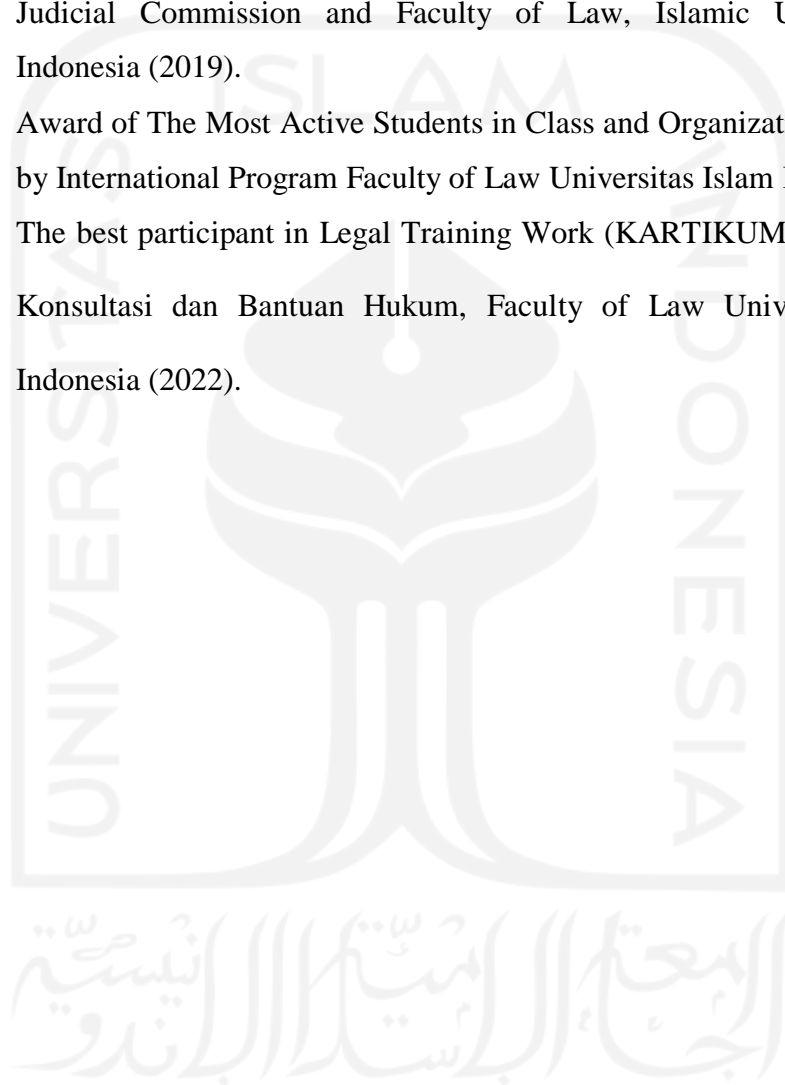




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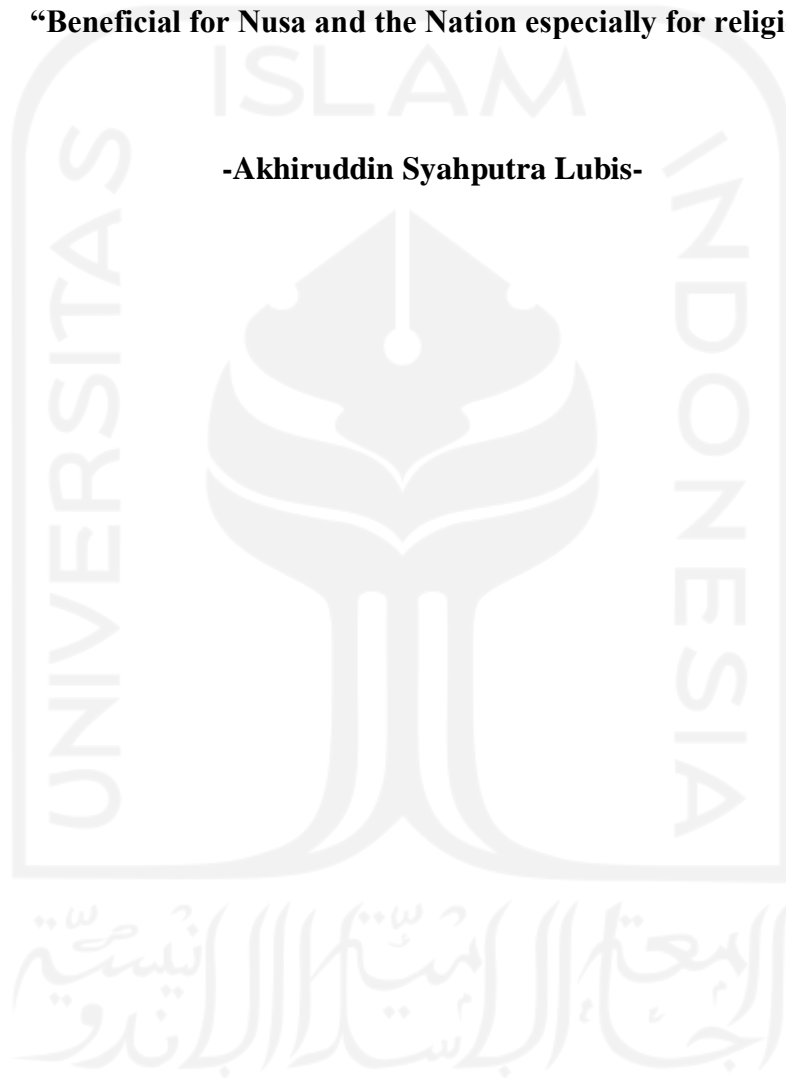
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## MOTTO

**“Beneficial for Nusa and the Nation especially for religion”**

**-Akhiruddin Syahputra Lubis-**



## DEDICATION

This thesis is wholeheartedly dedicated to:

**Allah *Subhanallahu wa ta'ala*,**

Thanks to Allah SWT who always gives me strength, health, and broad knowledge which made it possible to complete my legal case study;

**My Beloved Parents, My Brothers, My Sister, and All of my Family,**  
who always provided me with love, continuous support, and affection;

**My Alma Mater,**  
Universitas Islam Indonesia

**All of my lectures at the Faculty of Law, Universitas Islam Indonesia,**  
who have taught and guided me to complete my study;

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who always help during my study

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who always be on my side in easy and hard times.

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Finally, the author realized that there are still a lot of things that need to be improved, hence any kind of suggestion will be gladly accepted and considered for better future knowledge. Hopefully, this legal case study can be useful for anyone who reads this.

Yogyakarta, 12 March 2023

author

Akhiruddin Syahputra Lubis

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## **ABSTRACT**

*On May 25, 2016 the Government of Indonesia issued a policy, namely carrying out legal reforms by signing Government Regulation in Lieu of Law (PERPPU) Number 1 of 2016 concerning Castration Punishment as an additional punishment. On November 9, 2016 the PERPPU was passed into Law, namely Number 17 of 2016 concerning Child Protection. This regulation is considered ineffective because chemical castration is not a good solution to address crimes of sexual violence against children. The problem in this study is what factors influence effectiveness and what are the obstacles to the implementation of additional chemical castration sentences for perpetrators of sexual violence against children. The research method is normative legal research in the form of a literature study which is carried out by tracing primary and secondary legal materials. The results of the research from the first problem are that of the 5 (five) factors that influence the effectiveness of a regulation none of the factors is fulfilled that the additional punishment of chemical castration is effective. While the results of the research on the second problem are that obstacles to the application of chemical castration occur because it is contrary to human rights, the attorney general cannot carry out the judge's decision because chemical castration is under the authority of a health organization and chemical castration is rejected by IDI because it is against the Hippocratic Oath or doctor's oath and the Indonesian Code of Medical Ethics.*

**Key Word:** *Effectiveness, Obstacle, Chemical Castration, Regulation*

## CHAPTER I

### PRELIMINARY

#### A. Background

Based on the total population in Indonesia, the Central Statistics Agency (BPS) noted, the number of children aged 0-19 in Indonesia will reach 88.4 million people in 2021. This figure is equivalent to 32.3% of Indonesia's total population of 272.7 million. Based on its composition, early childhood in the 0 until 4-year age group reached 22 million people. As many as 22 million early childhood children in the range of 5-9 years. Then, children aged 10-19 reached 44.3 million people.<sup>1</sup>

Based on the Child Protection Law Number 35 of 2014 Article 1 number 1, a child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb. Children are the next generation of the nation and have an important role in national development in the future. Children are given a very big responsibility to be able to carry out these responsibilities, so they are entitled to the widest opportunity to grow and develop optimally, both physically and spiritually.

Indonesia regulates the protection of children as regulated in various laws and regulations, one of which is the Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights chapter 3, tenth part of article 52 paragraph (1) which states that every child has the right to protection of parents, family,

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<sup>1</sup> Badan Pusat Statistik, *Jumlah Penduduk Menurut Kelompok Umur dan Jenis Kelamin, 2021*,. In [https://www.bps.go.id/indikator/indikator/view\\_data\\_pub/0000/api\\_pub/YW40a21pdTU1cnJxOGt6dm43ZEdoZz09/da\\_03/1](https://www.bps.go.id/indikator/indikator/view_data_pub/0000/api_pub/YW40a21pdTU1cnJxOGt6dm43ZEdoZz09/da_03/1), accessed in 29 July 2022 at 10.00 PM.

community and state; and paragraph (2) which states that children's rights are human rights and in the interests of children's rights they are recognized and protected by law even from the time they are conceived.

In fact, children are not able to protect themselves from various kinds of threats such as mental, physical and social. The rapid flow of globalization and the negative impact of developments in the field of information and communication technology have increased the number of sexual violence against children.

The sexual violence against children is the involvement of a child in all forms of sexual activity that occurs before the child reaches a certain age limit set by state law where adults or other children who are older or who are considered to have more knowledge than children use it for sexual pleasure or sexual activity.<sup>2</sup>

Child sexual abuse is a form of violence against children in which older adults and adolescents use children for sexual stimulation. Forms of child sexual abuse include asking or forcing a child to perform sexual activity (regardless of the outcome), sexual intercourse, and physical contact with the child's genitals.<sup>3</sup>

Viewing a child's genitals without physical contact (except in non-sexual situations such as a medical examination) or using the child in the production of child pornography. The effects of these actions can cause children stress, trauma,

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<sup>2</sup> Maslihah, S., *Play Therapy dalam Identifikasi Kasus Kekerasan Seksual terhadap Anak*, Jurnal Penelitian Psikologi Fakultas Psikologi Universitas Pendidikan Indonesia (UPI), Vol. 1 No. 1, 2013, p.21.

<sup>3</sup> Arini Fauziah Al haq, dkk., *Kekerasan Seksual Pada Anak di Indonesia*, Jurnal FISIP UNPAD, Vol. 2 No. 1, 2015, p. 16.

anxiety, a tendency to continue being bullied into adulthood, and physical damage to children.<sup>4</sup>

The factors that make children often become targets of sexual violence are children who are always in a weaker and helpless position, community ethics, especially perpetrators of sexual violence are weak, and parental control and awareness to predict crime. low kids. Given the large number of cases of sexual violence against children, of course, the protection of children and victims of sexual violence against children needs to be considered firmly, this step is planned so that children do not feel alone.

Handling perpetrators of sexual harassment crimes requires multi-dimensional handling, including an effective criminal sanction system to address the crime situation of child sexual abuse. The Indonesian government must take policies to ensure that victims of violence against children do not recur, including enacting government regulations in lieu of the child protection law. Indonesia is a legal state as stipulated in the Constitution of the Unitary State of the Republic of Indonesia.

Therefore, it is necessary to rely on law to regulate society, the state and the state based on legal norms. That is, the law is used as a means of solving problems involving individuals or groups. The rule of law is not just a norm that governs people.

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<sup>4</sup> *Ibid.*

The law must still contain ideal values and must be respected by all people. The function of law is to prevent social disintegration and to create peace and order, one of which is the existence of the state as a ruler to protect the rights of all citizens by carrying out a fair law enforcement process.<sup>5</sup>

On May 25, 2016 the Indonesian government issued a policy of carrying out legal reforms by signing the Government Regulation in Lieu of Law (PERPPU) Number 1 of 2016 concerning Castration as an additional crime. The Government of Indonesia has expressly ratified and enforced a Government Regulation in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection, this change is the second amendment after the first amendment, namely Law Number 35 of 2014 concerning Child protection.

Then, on November 9, 2016 the Law concerning the Stipulation of Government Regulation in Lieu of Law Number 1 Year 2016 was passed concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection into Law, namely Law Number 17 of 2016. In December 2020, the Government issued Government Regulation of the Republic of Indonesia Number 70 of 2020 concerning Procedures for Implementing Chemical Castration Action, Installation of Electronic Detection Devices, Rehabilitation, and Announcement of the Identity of Perpetrators of Sexual Violence Against Children.

The ratification and enforcement of these regulations was motivated by the significant increase in the number of sexual violence against children and it was

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<sup>5</sup> Peter Muhammad Marzuki, *Pengantar Ilmu Hukum*, Kencana, Jakarta, 2015, p. 76.

feared that it would endanger the lives and development of children, besides that it also disrupted public security and order and the criminal sanctions imposed on perpetrators of sexual violence against children in the previous regulations were deemed not to have an effect. Deterrent and prevent sexual violence against children.

The new Government Regulation in Lieu of Law Number 1 of 2016 contains additional punishment in the form of chemical castration for perpetrators of criminal acts of child molestation as set forth in Article 81 Number (7) which reads "Against the perpetrators as referred to in paragraph (4) and paragraph (5) may be subject to action in the form of chemical castration and installation of electronic displays".

The Castration (also called castration or castration) is surgery and/or the use of chemicals to remove the testicles. Function in males or ovarian function in females Castration can be performed on animals or on humans. There are two forms of castration applied in many countries, namely physical castration and chemical castration. Physical castration is carried out by amputating the testicles of the perpetrators of paedophiles so that the perpetrators lack the hormone testosterone which affects their sex drive.<sup>6</sup>

Therefore, the ratification and enactment of Government Regulation in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection certainly has pros and cons.

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<sup>6</sup> Muhammad Andi Dirgantara, Syafruddin Kallo, *et al.*, *Analisis Yuridis Kebijakan Pemidanaan Dengan Hukuman Kebiri Terhadap Pelaku Pedofilia*, USU Law Journal, Vol. 5 No. 1, 2017, p. 24.

Proponents argue that castration is necessary because cases of sexual violence are at an urgent stage. Additional criminal penalties are deemed necessary to be imposed on perpetrators of sexual violence against children because the previous regulations were not very effective in reducing immoral acts against children. Obviously, the average punishment for perpetrators is still relatively light. So, it cannot provide a deterrent effect for the perpetrators. Finally, similar cases, which are more terrible, are rampant in this country.<sup>7</sup> Another consideration is that sexual crimes against minors are extra-ordinary crimes or extraordinary crimes, let alone causing the victim to die.<sup>8</sup>

Sexuality crimes against minors are also seen as crimes against humanity, this is because minors should enjoy their absolute rights as a child as has been formulated in Article 4 of Law Number 35 of 2014 concerning the First Amendment of Law Number 23 2002 concerning Child Protection which states that "Every child has the right to be able to live, grow, develop, and participate fairly, in accordance with human dignity and protection, and to receive protection from violence and discrimination".

Meanwhile, opponents have rejected castration, questioned its effectiveness, and its implementation as a violation of human rights as enshrined in the 1945 Constitution, international conventions ICCPR and CAT approved by Indonesia,

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<sup>7</sup> Arliman, Laurensius S, *Undang-Undang Nomor 17 Tahun 2016 tentang Penetapan Perppu 1 Tahun 2016 Sebagai Wujud Perlindungan Anak Ditinjau Dari Perspektif Hukum Tata Negara*, Jurnal Hukum POSITUM, Vol. 1 No. 2, 2017, p. 19.

<sup>8</sup> Paat, Alfando, *Relevansi Hukum Kebiri Terhadap Pelaku Kejahatan Seksual Pada Anak Dibawah Umur Ditinjau Dari Undang-Undang No. 39 Tahun 1999 Tentang Hak Asasi Manusia*, Jurnal Lex Crimen, Vol. 5 No. 5, 2017, p. 48.



and Law no. 39/1999 concerning Human Rights, as well as IDI parties who are not willing to be the executor of the implementation of chemical castration.

In addition, Indonesia has ratified the United Nations Convention Against Torture or Other Cruel, Inhuman and Degrading Punishments. Amnesty International Indonesia has stated that the application of chemical castration is nothing more than adding one act of cruelty to another.<sup>9</sup>

Based on the description above, in the author's opinion, it is necessary to conduct research on the effectiveness of the imposition of additional criminal penalties of castration and the obstacles to the implementation of additional criminal penalties of chemical castration against perpetrators of criminal acts of sexual violence against children in Indonesia.

## **B. Problem Formulation**

Based on the description put forward in the background above, there are two problems formulation can be formulated as follows:

1. What are the factors that influence the effectiveness of the policy towards the imposition of additional punishment of chemical castration for perpetrators of sexual violence against children?
2. What are the obstacles to the implementation of additional punishment of chemical castration against perpetrators of sexual violence against children?

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<sup>9</sup> Hafrida, *Pro Kontra Sanksi Kebiri Kimia: Sanksi Yang Progresif Atau Primitif?*, Indonesia Criminal Law Review, Vol. 1 No. 1, 2021. p. 12.

### **C. Research Objective**

The purpose of research in doing this thesis, to answer the main problems as formulated in the formulation of the problem above, namely:

1. To analyse factors that influence the effectiveness of the policy towards the imposition of additional criminal punishment of castration on perpetrators of sexual violence against children.
2. To analyse the obstacles to the implementation of additional criminal punishment of castration against perpetrators of sexual violence against children.

### **D. Research Originality**

To confirm this study's authenticity and prevent replication or reproduction of themes with the same emphasis on the study. So, to assess the originality of the research, a search was first carried out on previous studies, both those written by Indonesian authors and writers from other countries. Several studies that are relevant to the writing of this research have been compiled as a comparison with previous studies.

The first study was conducted by Dhimas Puguh Priyambodo who examined the Juridical Analysis of the Castration Punishment for Perpetrators of the Crime of Rape of Children (*Pedophilia*) in a Human Rights Perspective (Study of Decision No. 69 / Pid.Sus / 2019 / Pn Mjk). The study discusses the rule of castration law in Indonesia in the crime of rape against children and the application of the law of castration for perpetrators of child rape (*pedophilia*) in

the perspective of Human Rights (Study of Decision No. 69/Pid.Sus/2019/PN MJK).

The second study, conducted by Adam Yuriswanto and Ahmad Mahyani, entitled castration punishment as an additional crime in sexual crimes. The researchers in this study discuss the punishment of castration as an additional punishment in the criminal system in Indonesia and the implementation of castration as an additional crime in sexual crimes.

The third research, conducted by Annisa Fianni Sisma and Widodo Tresno Novianto, entitled Application of Chemical Castration for Sexual Violence Perpetrators. The researchers discussed how to apply chemical castration punishment to perpetrators of sexual violence crimes after the issuance of Law 17/2016.

To further understand the differences between the author's research and several previous studies, the author provides a table.

NO	SOURCES	DISCUSSION
1	Dhimas Puguh Priyambodo, "Analisa Yuridis Hukuman Kebiri Bagi Pelaku Tindak Pidana Pemerkosaan Anak (Pedofilia) Dalam Perspektif Hak Asasi Manusia (Studi	<p><b>Problem Formulation</b></p> <ol style="list-style-type: none"> <li>1. What is the legal regulation of castration in Indonesia in the crime of child rape?</li> <li>2. How is the application of the law of castration to perpetrators of the</li> </ol>

<p>Putusan No 69 / Pid.Sus / 2019 / Pn Mjk)", Fakultas Hukum Universitas Bhayangkara Surabaya, 2021.<sup>10</sup></p>	<p>crime of child rape (pedophilia) in the perspective of Human Rights (Study of Decision No. 69/Pid.Sus/2019/PN MJK)?</p> <p><b>Conclusion</b></p> <ol style="list-style-type: none"> <li>1. Indonesia applies the castration punishment intended to provide a deterrent effect on perpetrators of child rape. The regulation of castration punishment in Indonesia is included in the qualification of additional penalties aimed at perpetrators of sexual crimes against children (<i>pedophiles</i>) whose victims are more than one, especially for recidivist perpetrators. Castration is given after the convict completes his main sentence (imprisonment).</li> <li>2. Castration in the perspective of human rights is considered very contradictory because it is considered a form of</li> </ol>
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<sup>10</sup> Dhimas Puguh Priyambodo, *Analisa Yuridis Hukuman Kebiri Bagi Pelaku Tindak Pidana Pemerkosaan Anak (Pedofilia) Dalam Perspektif Hak Asasi Manusia (Studi Putusan No 69 / Pid.Sus / 2019 / Pn Mjk)*, Thesis in Faculty of Law Universitas Bhayangkara Surabaya, 2021.

		<p>torture. Castration is considered to violate the provisions of both international and national law. The negative side effects of these chemicals can be excruciating.</p>
2	<p>Adam Yuriswanto, Ahmad Mahyani “Hukuman Kebiri Sebagai Pidana Tambahan Dalam Tindak Pidana Kejahatan Seksual”, DiH Jurnal Ilmu Hukum, 2018.<sup>11</sup></p>	<p><b>Problem Formulation</b></p> <ol style="list-style-type: none"> <li>1. How is castration as an additional punishment in the Indonesian criminal system?</li> <li>2. How is the Implementation of Castration as an Additional Criminal in Sexual Crimes?</li> </ol> <p><b>Conclusion</b></p> <ol style="list-style-type: none"> <li>1. The punishment of castration as an additional crime in the criminal system in Indonesia is the last criminal alternative to deal with perpetrators of sexual crimes. This additional punishment is in accordance with the criminal system in Indonesia which adheres to a</li> </ol>

<sup>11</sup> Adam Yuriswanto, Ahmad Mahyani, *Hukuman Kebiri Sebagai Pidana Tambahan Dalam Tindak Pidana Kejahatan Seksual*, DiH Jurnal Ilmu Hukum, Vol. 14 No. 27, 2018.

		<p>combined theory of absolute theory which can cause a deterrent effect and a relative theory that provides benefits from the punishment through the rehabilitation process.</p> <p>2. The implementation of castration as an additional crime in sexual crimes does not yet have a technical implementing regulation.</p>
3	<p>Annisa Fianni Sisma, Widodo Tresno Novianto, "Penerapan Hukuman Kebiri Kimia Bagi Pelaku Kekerasan Seksual", Pusat P4TIK Mahkamah Konstitusi RI, 2017.<sup>12</sup></p>	<p><b>Problem Formulation</b></p> <p>How is the application of chemical castration punishment for perpetrators of sexual violence crimes after the issuance of Law 17/2016?</p> <p><b>Conclusion</b></p> <p>Sexual violence crimes in Indonesia have increased every year. Criminal penalties for perpetrators of sexual violence as stated in the Criminal Code and the Law on Child Protection are considered ineffective, so the</p>

<sup>12</sup> Annisa Fianni Sisma, Widodo Tresno Novianto, *Penerapan Hukuman Kebiri Kimia Bagi Pelaku Kekerasan Seksual*, Pusat P4TIK Mahkamah Konstitusi RI, 2017.

		<p>Government ratified PERPU No. 1/2016 into Law 17/2016 which imposes heavier penalties for perpetrators of sexual violence crimes, including by imposing chemical castration.</p>
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## E. Literature Review

### 1. Criminal and Sentencing

#### a. Criminal Concept

The definition of the term criminal law comes from the Netherlands *strafbaarfeit* which consists of three elements, namely *straf*, *baar*, and *feit*. *Straf* means punishment (criminal), *baar* means can (permissible), and *feit* means event (action). A criminal act is an act for which the perpetrator may be subject to a criminal penalty.<sup>13</sup>

According to Pompe, criminal law is all the legal rules that determine what actions should be punished and what kind of crime it is.<sup>14</sup>

According to Moeljatno said that, Criminal Law is part of the overall law that applies in a country, which provides the basics and rules for:<sup>15</sup>

- 1) Determine which actions should not be carried out, which are prohibited, accompanied by threats or sanctions in the form of certain crimes for anyone violating the prohibition;
- 2) Determine when and in what cases those who have violated the prohibitions can be imposed or sentenced to the punishment that has been threatened;

<sup>13</sup> Bambang Poernomo, *Azas-Azas Hukum pidana*, Galia Indonesia, Jakarta, 1994, p. 90.

<sup>14</sup> Takdir, *Mengenal Hukum Pidana*, Penerbit Laskar Perubahan, Palopo, 2013, p. 2.

<sup>15</sup> Moeljatno, *Asas-asas Hukum Pidana*, Rineka Cipta, Jakarta, 2008, p. 1.

- 3) Determine how the imposition of the punishment can be carried out if there are people who are suspected of having violated the prohibition.

Criminal law is inseparable from the term criminal act, a criminal act is an act that is prohibited by criminal law and is threatened with sanctions for someone who violates the prohibition. These criminal acts according to their form or nature are contrary to the order or order required by law, they are acts against (violating) the law.<sup>16</sup>

Besides that, in criminal law it is also known as criminal liability, liability in law, relating to the basis for being able to give sanctions to perpetrators of law violations. Sanctions themselves are generally a coercive tool so that someone obeys the applicable norms.

In terms of criminal liability, the legal responsibility that must be imposed on the perpetrators of violations of criminal law relates to the basis for imposing criminal sanctions. A person can be held criminally responsible can be divided into 3 criteria, namely:<sup>17</sup>

- 1) When committing an offense. The perpetrator is a person who has the ability to be responsible (common sense/perfect in the sense of being able to distinguish good or bad actions);
- 2) A criminal act with an intentional mental attitude/culpa;
- 3) When doing, the perpetrator does not do things that are forgiving reasons.

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<sup>16</sup> *Op. Cit.*, Moeljatno, *Asas-asas Hukum Pidana*, p. 6.

<sup>17</sup> M.Abdul Kholiq, *Buku Pedoman Mata Kuliah Hukum Pidana*, FH UII Press, Sleman, 2016, p. 1.



## **b. Purpose of Sentencing**

Sentencing is important in criminal law because punishment is the culmination of the entire process of accountability for someone who has committed a crime. According to Sudarto, punishment is synonymous with the word punishment. Sudarto further said:<sup>18</sup>

*“Punishment comes from the basic word "law", so it can be interpreted as determining the law or deciding the weight of the law. Determining/deciding the law for an event does not only concern the specific field of criminal law, but also other fields of law (civil law, administrative law, etc.). so as to establish law in criminal law, the term must be narrowed down in meaning. The notion of punishment in criminal cases is often synonymous with "punishment" or "granting/imposing a criminal" by the judge. Punishment in this case also has the same meaning as "sentence" or "veroordeling", for example in the sense of "sentence conditionally" or "voorwaardelijk veroordeeld" which has the same meaning as "convicted on condition" or "convicted on condition".*

Things are different with W.A. Bonger who argues that punishment is:<sup>19</sup>

*“To punish is to put on suffering. Punishing is tantamount to "declaration of decency" that arises from the crime, which is also suffering. Punishment is essentially an act committed by the community (in this case the state) consciously. Punishment does not come from one or several people, but must be a group, collectively that acts consciously and according to the calculation of reason. The new "element" of punishment is "the conscious opposition expressed collectively.”*

On the basis of these objectives, the punishment must contain elements that are:<sup>20</sup>

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<sup>18</sup> Sudarto, *Hukum Pidana 1 A -1B*, Fakultas Hukum Universitas Jenderal Soedirman, Purwokerto, Tahun akademik 1990/1991, 1990, p. 3.

<sup>19</sup> W.A. Bonger, *Pengantar Tentang Kriminologi. Terjemahan Oleh R.A. Koesnoen*. PT. Pembangunan, Jakarta, 2001, p. 24-25.

- 1) humanity, in the sense that the punishment upholds the dignity of a person;
- 2) educative, in the sense that the punishment is able to make people fully aware of the actions committed and cause them to have a positive and constructive mental attitude for crime prevention efforts;
- 3) justice, in the sense that the punishment is perceived as fair, both by the convict and by the victim or by the community.

Punishment in the view (perspective) of Pancasila adopted by Indonesian law, must be in accordance with the culture adopted in society. In the history of the development of criminal law, there are 3 kinds of theories that put forward the purpose of punishment, namely absolute theory (*vergelding theory*), relative theory (*doel theory*), and combined theory (*vernengings theory*). The three theories examine the reasons for the imposition of a criminal.

a) Absolut Theory (*vergelding theorien/retributif*)

The imposition of a criminal on this absolute theory is as a form of retribution that is commensurate to the criminal for what he did, therefore this theory is also called the theory of retaliation. Anyone who commits a crime must be punished regardless of the consequences that arise after the imposition of a crime, both to the

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<sup>20</sup> Barda Nawawi Arif, *Kebijakan Legislatif Dalam Penanggulangan Kejahatan Dengan Pidana Penjara*, Genta Publishing, Yogyakarta, 2010, p. 83.

convict and the community. The purpose of punishment is to make the criminal suffer by imposing a sentence in retaliation.

b) Relative Theory (*doel theorien/deterrence/utilitarian*)

Criminal imposition in this relative theory should at least be oriented towards preventing the convict (special prevention) from the possibility of repeating the crime again in the future, as well as preventing the wider community in general (general prevention) from the possibility of committing good crimes such as crimes that have been committed by the convict and others.<sup>21</sup>

c) Combined Theory (*vernengings theorien*)

Combined theory in this case combines the thoughts contained in absolute theory and relative theory. Combined theory is a response to existing criticisms of both absolute and relative theory.

According to this theory, in the conception of punishment, there needs to be a separation between different stages of punishment, for example on criminal threats in the law, the prosecution process, the judicial process, and the implementation of the crime. At each stage there needs to be certain principles that are prioritized, for example the prosecutor in submitting a criminal charge (*requisitoir*) with a severe category may prioritize the elements of retaliation and general prevention.

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<sup>21</sup> Mahrus Ali, *Dasar-Dasar Hukum Pidana*, Sinar Grafika, Jakarta, 2011, p. 190.

At the stage of criminal implementation, it is also necessary to pay attention to special prevention, namely the aspect of resocialization of the convict. For crimes categorized as minor, the purpose of the crime is more focused on the person of the perpetrator, and providing opportunities for the perpetrator to be resocialized.<sup>22</sup>

## 2. Legal Effectiveness

Effectiveness means the effectiveness of the effect of success or efficacy or efficacy. Talking about the effectiveness of the law certainly cannot be separated from analysing the characteristics of two related variables, namely the characteristics or dimensions of the target object used.<sup>23</sup>

The theory of legal effectiveness according to Soerjono Soekanto is that effective whether or not a law is determined by 5 (five) factors, namely:

- a. *The legal factor itself (law).*
- b. *The law enforcement factors, namely the parties that form and apply the law.*
- c. *The factors of facilities or facilities that support law enforcement.*
- d. *The community factors, namely the environment in which the law applies or is applied.*
- e. *The cultural factors, namely as a result of work, creativity and taste based on human initiative in social life.*

When talking about the effectiveness of the law, we must first be able to measure the extent to which the rule of law is understood or not understood and obeyed or not obeyed. If a rule of law is understood and obeyed by most

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<sup>22</sup> Widodo, *Sistem Pemidanaan Dalam Cyber Crime*, Laksbang Mediatama, Yogyakarta, 2009, p. 76.

<sup>23</sup> Barda Nawawi Arief, *Kapita Selekta Hukum Pidana*, Citra Aditya, Bandung, 2013, p. 67.

of the targets who are the target of its obedience, it will be said that the law in question is effective.<sup>24</sup>

Legal awareness and legal compliance are two things that will determine the effectiveness of the implementation of legislation or the rule of law in society. Legal awareness, legal compliance, and the effectiveness of legislation are three interrelated elements. People often confuse legal awareness and legal obedience, even though the two are closely related, but they are not exactly the same. These two elements really determine the effectiveness or not of the implementation of legislation in society.<sup>25</sup>

### 3. Policy

The term policy is taken from the English language, namely "policy" or which in Dutch is "*politiek*". In Black's Law Dictionary, policies are defined as general principles that function to direct the government (in a broad sense including law enforcement officers) in managing, regulating, or resolving public affairs, community problems or fields of preparation. laws and regulations and the application of laws or regulations, with a (general) goal that leads to efforts to realize the welfare or prosperity of the community (citizens).<sup>26</sup>

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<sup>24</sup> Damang, Legal Effectiveness, in link: <http://www.negara Hukum.com/ Hukum/ Effectiveness- Hukum-2> accessed on August 24, 2022 at 08.00 PM.

<sup>25</sup> *Ibid.*

<sup>26</sup> Syamsul Hidayat, *Pidana Mati Di Indonesia*, Genta Press, Yogyakarta, 2010, p. 64.

Raksasatya concluded that public policy basically has 3 (three) elements, namely:<sup>27</sup>

- a. identification and objectives to be achieved;
- b. tactics or strategies and various steps to achieve the desired goal;
- c. providing various inputs to enable the actual implementation of the tactics and strategies mentioned above.

The three elements of public policy, basically public policy is an action-oriented attitude and command, meaning that public policy is a concrete work and the existence of a government organization. The intended government organization is an institution formed to carry out public duties, namely tasks that concern the lives of many people in a community called the state.

These public duties are more concrete in the form of a series of action programs to be realized in a tangible form. The series of processes for realizing the objectives of the public program are what is meant by public policy.<sup>28</sup> From this understanding, basically public policy has implications that:

- a. The initial form of public policy is the determination of government actions;
- b. public policy is not enough to be stated in the form of formal texts, but must also be implemented or implemented in real terms;

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.* p. 24.

- c. The public policy in essence must have objectives and impacts, both long-term and short-term that have been carefully thought out in advance;
- d. In the end, all the processes above are intended to fulfil the interests of the community.

The fact that a public policy as a means of meeting the needs or interests of the community, it means that the measure of success or failure of a public policy depends on how the community assesses it. If the public feels that their needs and interests have been fulfilled by public policy, then the public policy will automatically be considered to have carried out its function successfully. However, if the public feels that their needs and interests are not being met, or even harmed, then the existing public policy is neither a success nor a failure.<sup>29</sup>

#### **4. Sexual Violence Against Children**

The term sexual violence comes from English sexual hardness, in English the word hardness has the meaning of violence, unpleasant, and not free.<sup>30</sup> While the word sexual has the meaning of something related to sexuality.

So, the term sexual hardness means sexual acts that are not desired by the recipient, where there is threat, pressure, unpleasant and not free. The Criminal Code has regulated violence, namely Article 89 which defines

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<sup>29</sup> *Ibid.* p 25.

<sup>30</sup> John M. Echols and Hassan Shadily, *Kamus Inggris Indonesia*, Gramedia Pustaka Utama, Jakarta, 1997, p. 517.

violence as using legal force or physical strength, for example kicking, hitting with the hands or with all kinds of weapons.<sup>31</sup>

According to Law No. 23 of 2002 Article one paragraph (1) what is meant by a child is someone who is not yet 18 (eighteen years old), including those who are still in the womb. Meanwhile, according to the Civil Code, children are those who have not reached the age of twenty-one (21) and have not been married before.

Children are a mandate and gift from God Almighty who have dignity, dignity and rights as human beings that must be respected. Children are potential buds, as well as the next generation of the nation's ideals. Children who are potential and human resources for national development need guidance and protection.<sup>32</sup>

The definition of violence against children in terms is closely related to the word abuse, which is a word that is usually translated into violence, mistreatment, torture, or mistreatment. This word is defined as "improper behaviour intended to cause physical, psychological, or financial harm to an individual or group". Meanwhile, child abuse is a term commonly used to refer to violence against children.<sup>33</sup>

According to Law Number 35 of 2014 violence is any act against a child that results in physical, psychological, sexual misery or suffering, and/or

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<sup>31</sup> R. Soesilo, *Kitab Undang-undang Hukum Pidana (KUHP) serta Komentar-komentar Lengkap Pasal demi Pasal*, Politeia, Bogor, 1996, p. 98.

<sup>32</sup> Zahirin Harahap, *Bentuk Negara Hukum*, Alumni. Bandung. 2008. p. 24.

<sup>33</sup> Barker dalam Abu Hurairah, *Kekerasan terhadap Anak: Fenomena Masalah Sosial Krisis di Indonesia*, Nuansa (Anggota IKAPI), Bandung, 2006, p. 74.



neglect, including threats to commit acts, coercion, or unlawful deprivation of liberty.

## 5. Castration Punishment

The definition of castration according to the Big Indonesian Dictionary is the removal of the testicular glands which are sterile so as not to produce semen / sperm.<sup>34</sup> Meanwhile, according to the Health Dictionary, castration or what can be referred to as Castration is the surgical removal of the testes as a reproductive organ, to reduce or eliminate a person's sexual urge.<sup>35</sup>

Castration is an act with the aim of spaying living beings, both male and female. Conceptually, castration is a surgical procedure or the use of chemicals with the intention of eliminating the function of the male testes and female ovaries.<sup>36</sup>

Castration is usually carried out with a physical surgical procedure, namely by cutting the genitals. This can cause living things, both humans and animals, to be permanently sterile. As knowledge increases, castration is carried out by inserting antiandrogen chemicals by injecting them into a person's body.

These chemicals' function will reduce the hormone testosterone in men which causes a loss of one's sexual appetite. Castration as a form of

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<sup>34</sup> *Kamus Besar Bahasa Indonesia Online*. Accessed in 29 July 2022 at 07.45 PM.

<sup>35</sup> Kementerian Kesehatan Republik Indonesia, in link: <https://www.kemkes.go.id/folder/view/full-content/structure-kamus.html> accessed in 29 July 2022 at 09.00 PM.

<sup>36</sup> Saharuddin Daming, *Mengkaji Pidana Kebiri Kimia Dalam Perspektif Medis, Hukum Dan Ham (Assesing Chemical Castrated Penal in Medical, Legal and Human Rights Perspectives)*, Jurnal Kajian Ilmu Hukum, Vol. 9 No. 2, UIN Yogyakarta, 2020 Jurnal Kajian Ilmu Hukum, Vol. 9 No. 1, 2020, p. 30.

punishment or action has always been a symptom in various countries such as the United States, Poland, Moldova, Estonia, Israel, Argentina, Australia, South Korea, Russia.<sup>37</sup>

Castration punishment is a system of legal rules in the form of heavy punishment for perpetrators of sexual crimes, especially against children as victims. With consideration and various reasons, the application of castration as an additional crime is considered to be able to reduce the sexuality of perpetrators of crimes against children through genetic cutting or by injecting drugs in the form of chemical substances.<sup>38</sup>

## **F. Operation Term**

### **1. Policy**

Policy is a program of achieving goals, values and practices that are directed. The policy in question is the policy of applying additional criminal penalties of castration in criminal acts of sexual violence.

### **2. Additional Criminal Punishment**

Additional criminal punishment are punishments for perpetrators of criminal acts of sexual violence against children in Indonesia.

### **3. Castration**

The castration is the surgical removal of the testes as a reproductive organ, to reduce or eliminate a person's sexual drive.

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<sup>37</sup> Taufik Nur Hidayat, *Penerapan Hukum Kebiri Bagi Pelaku Kejahatan Seksual Di Indonesia (Tinjauan Hukum Pelaksanaan Undang-Undang Nomor 17 Tahun 2016)*, Jurnal Sosial Dan Politik, Vol. 14 No. 1, 2019, p. 83.

<sup>38</sup> Philipus M. Hadjon, *Argumentasi Hukum*, Gadjah Mada University Pers, Yogyakarta, 2005, p. 19. Dikutip dari Martin P Golding, *Legal Reasoning*, Alfreda A Knoff Inc., New york, 1984, p. 1.

#### **4. The perpetrator of the crime of sexual violence**

The perpetrator of the crime of sexual violence is a person or more who commits a crime of sexual violence against children.

#### **5. Children**

A child is someone who is not yet 18 (eighteen) years old, including a child who is still in the womb.

### **G. Research Method**

#### **1. Research Type**

This research method is normative legal research or doctrinal legal research library research, also referred to as library research or document study.<sup>39</sup> Normative legal research is legal research that uses library materials as a research source (secondary data).<sup>40</sup>

#### **2. Research Approach**

The approach method used in this research is a normative juridical approach where in finding the data used by adhering to the juridical aspect which relies on secondary data. The normative approach taken is based on the consideration that this study aims to discuss and examine various regulations relating to the idea of implementing social work crime as a criminal offense for certain serious crimes. Formulating a policy based on a certain background, values, culture, conceptions, or theories.

#### **3. Research Data Sources**

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<sup>39</sup> Bambang Waluyo, *Penelitian Hukum Dalam Praktek*, Sinar Grafika, Jakarta, 1996, p. 13.

<sup>40</sup> Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat* Raja Grafindo, Jakarta, 1995, p. 15.

The data used is secondary data, in the form of primary legal materials, secondary legal materials. Primary legal materials include the 1945 Constitution of the Republic of Indonesia, Legislation. Meanwhile, secondary legal materials include library materials such as books, theories, scientific journals, research results and papers in seminars and expert opinions in the field of law.

In addition, the author also uses tertiary legal materials or supporting legal materials, which basically include materials that provide instructions on primary legal materials and secondary legal materials, which are better known as reference materials in the field of law or reference materials in the field of law such as legal dictionaries, dictionaries language, and legal encyclopaedias, news.<sup>41</sup>

#### **4. Research Data Collection Techniques**

The technique of collecting legal materials or secondary data in this research was carried out by means of literature study on legal materials, both primary legal materials, secondary legal materials, and tertiary legal materials. The collection of legal materials, both primary legal materials, secondary legal materials and tertiary legal materials, is carried out by studying and studying the necessary legal materials.

#### **5. Research Nature**

This research is descriptive in nature, that is, research that is expository in nature, and aims to obtain a complete description (description) of the legal

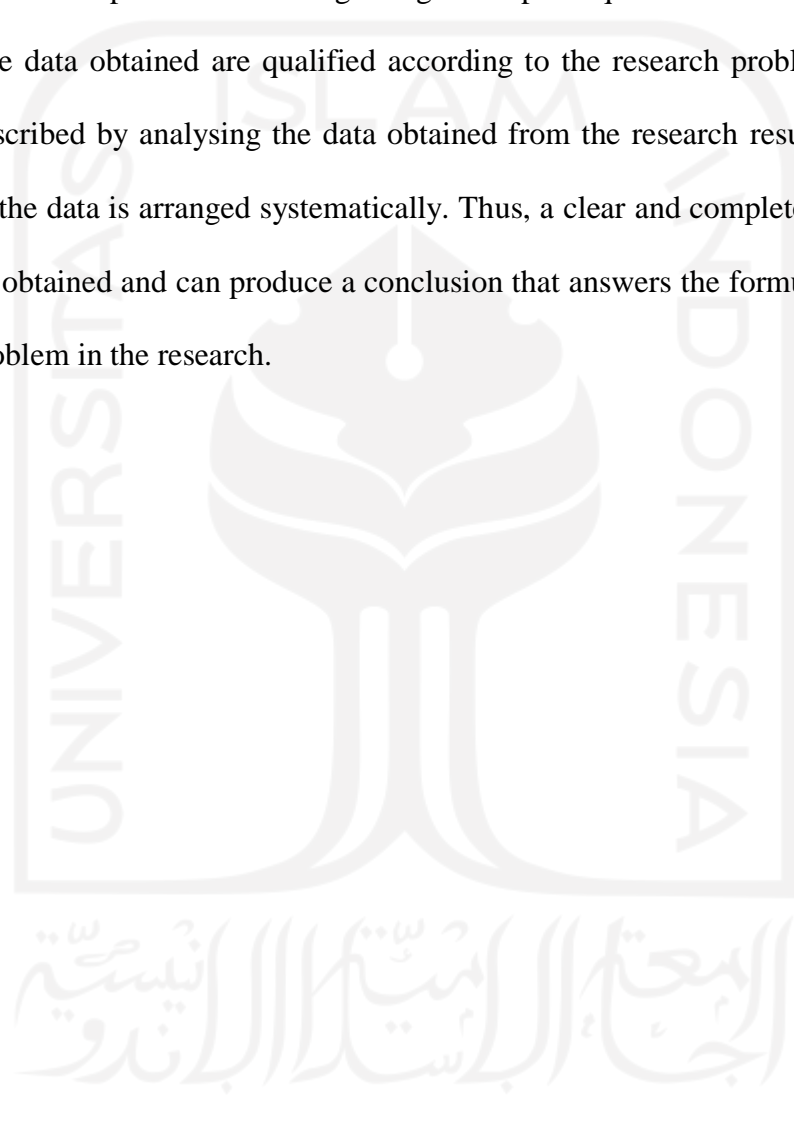
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<sup>41</sup> *Op. cit.*, p. 33.

conditions that apply in a certain place, or regarding existing juridical phenomena, or a certain legal event that occurs in society.<sup>42</sup>

## **6. Data Analysis**

In the process of writing using descriptive-qualitative analysis method. The data obtained are qualified according to the research problem and then described by analysing the data obtained from the research results. Analysis of the data is arranged systematically. Thus, a clear and complete picture will be obtained and can produce a conclusion that answers the formulation of the problem in the research.



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<sup>42</sup> Abdulkadir Muhammad, *Hukum dan Penelitian Hukum*, Citra Aditya Bakti, Bandung, 2004, p. 48.

## CHAPTER II

### GENERAL OVERVIEW OF CRIMINAL AND CRIMINATION IN SEXUAL VIOLENCE AGAINST CHILDREN

#### A. Criminal Concept In Indonesia

##### 1. The Understanding of Criminal

The word "Criminal", appears in our perception as something cruel, scary and even threatening that makes most people afraid when dealing with the law. Because Criminal is a punishment for people who commit crimes or where people have violated the rules. Linguistically the meaning or meaning of the word criminal comes from the word *straf* (Dutch), criminal means sorrow or suffering, meaning that the person charged with the crime is a person who suffers. Sad and shackled both body and soul. But the sadness is not caused by the actions of others, but by the actions of one's own doing.<sup>43</sup>

According to Mulyatno translating *starf* with "criminal", because it is more appropriate than "punishment". Because punishment is the result or result of the application of law which has a broader meaning than criminal, because it includes judges' decisions in the field of civil law and administrative law (State).<sup>44</sup>

While another criminal law figure, namely Simons as quoted by P. A. F. Lamintang, criminal or *starf* is a suffering which by the criminal law has been

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<sup>43</sup> Ismu Gunadi w. and Jonaedi Efendi, *Cepat dan Mudah Memahami Hukum Pidana*, PT. Prestasi Pustakaraya, Jakarta, 2011, p. 8.

<sup>44</sup> H. R. S. Effendy, S. H, *Pengantar Hukum Indonesia*, Hand Out Kuliah, Universitas Surabaya, 2014, p. 5.

associated with a violation of a norm, which with a judge's decision has been handed down for someone who is guilty.<sup>45</sup>

Based on the various opinions above, that crime contains the following elements:<sup>46</sup>

- a. The punishment is essentially an imposition of suffering or misery or other unpleasant consequences;
- b. The punishment is given intentionally by a person or body who has power (authorized person or institution);
- c. The punishment is imposed on a person who is responsible for a criminal act according to the law.

## 2. Criminal Act

The notion of criminal acts used in Indonesia comes from the Dutch language, namely *strabaarfeit*, but until now there has been no concept that explains the term *strafbaarfeit* as a whole. Because until now there has been no agreement between scholars about the definition of a crime (*strafbaarfeit*). The word "*feit*" itself means part of a reality or "*een gedeelte van de werkelijkheid*", while "*strafbaar*" means punishable, so literally the word *strafbaarfeit* can be translated as part of a reality that can be punished, which is actually punishable. is human as a person .<sup>47</sup>

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<sup>45</sup> P. A. F. Lamintang, *Dasar – Dasar Hukum Pidana Indonesia*, Sinar Baru, Bandung, 1984, p. 48.

<sup>46</sup> Muladi dan Barda Nawawi Arief, *Teori – Teori dan Kebijakan Pidana*, Alumni, Bandung 2005, p. 4.

<sup>47</sup> *Op. Ctt.*, P.A.F. Lamintang, *Dasar-Dasar Hukum Pidana*, p. 181.

Sometimes also a criminal act is often called a delict which comes from the Latin delictum. Andi Hamzah stated that a criminal act is a human behaviour that is formulated in the law as an act that is against the law, which deserves to be punished and committed with error. A person who commits a criminal act will be held accountable for his actions with a criminal if he has a mistake, someone has an error if at the time of committing the act, viewed from the perspective of society, it shows a normative view of the error committed.<sup>48</sup>

The following is an understanding of criminal acts according to experts, including:

- a. Moeljatno said that a criminal act is an act that is prohibited by a rule of law, a prohibition accompanied by threats (sanctions) in the form of certain crimes, for those who violate these rules there are three things that need to be considered.
  - 1) A criminal act is an act by a law that is prohibited and is punishable by a criminal offense;
  - 2) Prohibition is aimed at an act, which is a condition or event caused by a person's behaviour, while a criminal threat is directed at someone who caused the incident;
  - 3) There is a close relationship between prohibition and criminal threat, because between an incident and a behaviour there is a close

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<sup>48</sup> Andi Hamzah, *Sistem Pidana dan Pemidanaan Indonesia*, Pradnya Paramita, Jakarta, 1993, p. 22.



relationship, then an event cannot be prohibited if it is not a person, and a person cannot be threatened with a criminal if it is not because of the incident caused by it. From this, according to Moeljatno, criminal acts must have elements of actions committed by humans, which meet the formulation in the law and are against the law.

- b. D. Simons, a criminal act is an act of violating criminal law that has been committed intentionally or unintentionally by someone who can be accounted for his actions and by criminal law it has been declared an act that can be punished.<sup>49</sup>
- c. W.P.J Pompe, *strafbaarfeit* is actually an act other than an action which according to a law formulation has been declared as a punishable act. That *strafbaarfeit* can theoretically be formulated as a violation of norms that has been intentionally or unintentionally committed by an actor, where the imposition of punishment on the perpetrator is necessary for the maintenance of legal order and the guarantee of the public interest.<sup>50</sup>

### 3. Criminal Liability

Criminal liability contains the principle of error (culpability principle), which is based on a *monodualistic* balance that the principle of error based on the value of justice must be aligned in pairs with the principle of legality based on the value of certainty. The concept is based on the principle that criminal

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<sup>49</sup> P.A.F. Lamintang, *Op Cit*, p. 182.

<sup>50</sup> *Ibid.*

liability is based on error, but in some cases, it does not rule out the possibility of vicarious liability and strict liability. The problem of error, both error regarding the situation (*error facti*) and error regarding the law, is in accordance with the concept of forgiving reason. So, that the perpetrator is not punished unless the error is to blame.<sup>51</sup>

The criminal responsibility is applied to punishment, which aims to prevent the commission of criminal acts by enforcing legal norms for the sake of protecting the community, resolving conflicts caused by criminal acts, restoring balance, bringing a sense of peace in society, socializing the convicts by conducting coaching so that they become good people and freeing the guilt of the convict.

The criminal responsibility is a mechanism to determine whether a defendant or suspect is responsible for a criminal act that occurred so that the perpetrator can be punished, it is required that the criminal act he commits fulfils the elements specified in the law. Viewed from the point of view of the occurrence of prohibited actions, a person will be held accountable for these actions, if the action is against the law and there is no reason to justify or negate the unlawful nature of the crime he has committed. From the point of view of the ability to be responsible, only someone who is able to take responsibility can be held accountable for his actions.

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<sup>51</sup> Nawawi Arief, *Masalah Penegakan Hukum dan Kebijakan Penanggulangan Kejahatan*, PT. Citra Aditya Bakti, Bandung, 2001, p. 23.

A criminal act if there is no mistake is the principle of criminal responsibility, therefore in the case of a person who commits an act as has been threatened, it depends on whether in committing this act he has an error.<sup>52</sup>

Based on the description above, it can be stated that criminal liability implies that anyone who commits a criminal act or violates the law, as formulated in the law, then that person should be held accountable for his actions in accordance with his mistakes. In other words, a person who commits a criminal act will be held accountable for the act with a criminal if he has a mistake, a person has an error if at the time of committing the act viewed from the perspective of society shows a normative view of the mistakes that have been made by that person.

## **B. The Concept Of Sentencing In Indonesia**

### **1. The Understanding of Sentencing**

Sentencing can be interpreted as the stage of determining sanctions and also the stage of imposing sanctions in criminal law. The word "criminal" is generally defined as law, while "criminal" is defined as punishment. The doctrine distinguishes material criminal law and formal criminal law. J.M. Van Bemmelen explains these two things as follows:<sup>53</sup>

*"Material criminal law consists of the criminal acts referred to in a row, general rules that can be applied to the act, and the sentencing threatened for the act. Formal criminal law regulates the way in which a criminal procedure should be carried out and determines the order that must be observed on occasion that"*

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<sup>52</sup> Moeljatno, *Perbuatan Pidana dan Pertanggung jawaban Dalam Hukum Pidana*, Bina Aksara, Jakarta, 1993, p. 49.

<sup>53</sup> Leden Marpaung, *Asas-Teori-Praktik Hukum Pidana*, Sinar Grafika, Jakarta, 2005, p. 2.

While Prof. Soedarto said that:<sup>54</sup>

*“The word sentencing is synonymous with the term sentencing. sentencing itself comes from the word law, so it can often be interpreted as setting the law or deciding on the sentencing (berechten). Establishing this law is very broad in meaning, not only in the field of criminal law but also in other fields of law. Therefore, the term must be narrowed to its meaning, namely sentencing in criminal cases which is often synonymous with sentencing or giving or imposing a crime by a judge”*

Sentencing can be interpreted as the stage of determining sanctions and also the stage of imposing sanctions in criminal law. The word criminal in general can be said as law and the word sentencing is defined as sentencing. Criminal law is a suffering that is imposed for violations of the law, what is meant by suffering in this case has been stated in Article 10 of the Criminal Code (KUHP).

## **2. Types of Sentencing in Indonesian Positive Law**

In Indonesian positive law, The Criminal Code (KUHP) has formulated the types of crimes regulated in Article 10, as follows:

### **a. Basic Criminal**

The basic crimes that have been regulated in the Criminal Code can be outlined as follows:

#### **1) Death penalty**

The death penalty is the heaviest of the types of criminal threats listed in the Criminal Code chapter 2 article 10 because the death penalty is carried out in the form of deprivation of the right to human

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<sup>54</sup> Marlina, *Peradilan Pidana Anak di Indonesia*, PT Grafika, Bandung, 2009, p. 33.

life, so in determining the death penalty there are many pro and contra opinions among legal experts and the public.

Some people argue that the death penalty is justified in certain cases, namely if the perpetrator has shown by his actions that he is a person who is very dangerous to the public interest.

Therefore, to stop the crime, a firm law is needed, namely the death penalty. From this opinion it is clear that indirectly the purpose of the crime is to destroy. Another opinion says that the death penalty is actually not necessary because it has a weakness, namely if the death penalty has been carried out, it cannot give hope for improvement, both for the crime and for repairing itself. the perpetrator does not repeat the crime.<sup>55</sup>

The implementation of the death penalty is regulated in Law No. 2/PNPS/1964 concerning Procedures for Implementing the Death Penalty Imposed by Courts in General and Military Courts.

## 2) Imprisonment

Imprisonment is a form of crime in the form of loss of independence. Imprisonment in the form of temporary imprisonment of at least 1 day to life imprisonment. Life imprisonment is only listed where there is a death penalty or life imprisonment or a sentence of twenty years imprisonment.

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<sup>55</sup> *Ibid.*

So, in general, the maximum prison sentence is 15 years. This is regulated in Article 12 of the Criminal Code which reads:

- a) The prison sentence is for life or for a certain period of time.
- b) Imprisonment for a certain period of time is the shortest one day and a maximum of fifteen consecutive years.
- c) Imprisonment for a certain period of time may be imposed for twenty consecutive years in terms of which the judge may choose between the death penalty, life imprisonment and imprisonment for a certain period of time or between imprisonment for a certain period of time; Likewise in the case of the fifteen-year limit can exceeded because of concursus, repetition (recidivist) or because of what has been determined in article 52.
- d) Imprisonment for a certain period of time may not exceed twenty years.

The exception outside the Criminal Code, namely in the Anti-Corruption Law, the maximum is life imprisonment without a death penalty.

### 3) Criminal Confinement

Both imprisonment and confinement are forms of punishment by withholding a person's freedom for committing a criminal act as described in Article 22 of the Criminal Code. Confinement can be imposed by a judge as a principal crime, but it can also be a substitute

for a fine that is not paid by a convict. For imprisonment in lieu of a fine, the length of time is at least one day and for a maximum of six months. However, the length of imprisonment in lieu of the fine can be increased up to a maximum of eight months, i.e., if the crime committed by the convict is related to the criminal act as referred to in Article 52 of the Criminal Code.

Imprisonment as a substitute for a fine is not automatically carried out if the convict does not pay the fine, namely if the judge in his decision only imposes a fine without mentioning that the convict must carry out imprisonment as a substitute for the fine imposed, in the event that the convict does not pay the money. the relevant fine.<sup>56</sup>

#### 4) Fines

Fines are the oldest form of punishment, even older than imprisonment, perhaps as old as the death penalty. A fine is the obligation of a person who has been sentenced to a fine by a judge/court to pay a certain amount of money because he has committed an act that can be punished.

Fines are imposed for minor offenses, in the form of violations or minor crimes. Therefore, a fine is the only crime that can be borne by someone other than the convict. Although a fine is imposed on a private convict, there is no prohibition if the fine is voluntarily paid by another person on behalf of the convict.

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<sup>56</sup> Lamintang, *Hukum Penitensier Indonesia*, Sinar Grafika, Jakarta, 2010, p. 76.

## b. Additional Penalty

### 1) Revocation of Certain Rights

One of the additional penalties regulated in Article 10 letter b is the revocation of certain rights. Certain rights of the convict that can be revoked by the judge with a court decision are stipulated in article 35 of the Criminal Code.

Dismissal as guardians, supervisors, guardians and supervisors of other people from children, as well as from the power of fathers, guardians and guardians of children, since 1927 has been regulated in the BW, as long as it concerns the population groups that are subject to the criminal law.<sup>57</sup>

### 2) Deprivation of Certain Items

The crime of confiscation of certain goods is a type of property crime, as is the case with a fine. Provisions regarding the seizure of certain goods are contained in Article 39 of the Criminal Code.<sup>58</sup>

The confiscation of goods that were not previously confiscated is replaced with imprisonment if the goods are not delivered or the price according to the estimate in the judge's decision is not paid. Substitute imprisonment for a minimum of one day and a maximum of six months. This substitute confinement is also removed if the confiscated items are handed over.

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<sup>57</sup> A. Fuad Usfa, Tongat, *Pengantar Hukum Pidana*, UMM Press, Malang, 2004, p. 138-141.

<sup>58</sup> Collection of Codes of Civil Code..



### 3) Announcement of Judge's Decision

The announcement of the judge's decision is regulated in Article 43 of the Criminal Code which stipulates that:<sup>59</sup>

*"If a judge orders that a decision be announced based on this law book or other general rules, it must also be determined how to carry out the order at the expense of the convict. The additional penalty for announcing this decision can only be imposed in cases that have been determined by law."*

The additional penalty for the announcement of the judge's decision is intended primarily for prevention so that the public is protected from the rotten shrewdness or recklessness of a perpetrator. This additional penalty can only be imposed if it is expressly determined that it applies to certain criminal offenses.

### C. Sentencing Theory

There are three main groups of theories to justify the imposition of a criminal, namely, Absolute Theory or Absolute Theory, Relative Theory or also known as the Relative Theory and the Combined Theory:<sup>60</sup>

#### 1. Absolut Theory (*vergelding theorien/retributif*)

The imposition of a criminal on this absolute theory is as a form of retribution that is commensurate to the criminal for what he did, therefore this theory is also called the theory of retaliation. Anyone who commits a crime must be punished regardless of the consequences that arise after the imposition of a crime, both to the convict and the community. The purpose of

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<sup>59</sup> Collection of Codes of Civil Code.

<sup>60</sup> Wirjono Prodjodikoro, *Asas Asas Hukum Pidana di Indonesia*, Refika Aditama, Jakarta, 2003, p. 23

punishment is to make the criminal suffer by imposing a sentence in retaliation.

## 2. Relative Theory (*doel theorien/deterrence/utilitarian*)

According to this theory, a crime does not absolutely have to be followed by a crime. For this, it is not enough to have a crime, but it must be questioned about the need and benefits of a crime for society or for the criminal himself. Thus, there must be a goal that goes beyond just imposing a sentence. This goal must first be directed to efforts so that in the future the crimes that have been committed will not be repeated (prevention).

There are two kinds of prevention, namely special or special prevention and general or general prevention. Both are based on the idea that starting with the threat of being punished and then with the imposition of a sentence people will be afraid to commit a crime.

In special prevention, this fear is directed at the criminal, while in general prevention, it is suggested that all elements are afraid of committing a crime. This relative theory sees that the effort to impose a criminal corrects the criminal so that he becomes a good person who will no longer commit a crime.

## 3. Combined Theory (*Verenigings Theorien*)

In addition to the absolute theory and relative theory of criminal law, a third theory appears which on the one hand recognizes the element of "retaliation", but on the other hand, also recognizes the element of prevention and the element of improving criminals inherent in each criminal.

The combined theory can be divided into two, namely, first, that the combined theory prioritizes retaliation, but it must not exceed the limits of what is necessary and sufficient for the maintenance of social order, secondly, that the combined theory also prioritizes the protection of public order, but suffering from the punishment of a criminal must not be heavier than the actions of the convict.

#### **D. Criminal Policy**

The problem of overcoming crime in society, of course, cannot be separated from the context of the discussion on penal policies. Penal policy can be interpreted as a rational effort to tackle crime by using the means of criminal law.<sup>61</sup> The term penal policy has the same meaning as the terms criminal law policy and criminal law politics (*strafrechtspolitik*). Therefore, the use of these three terms in the field of thought has the same meaning.<sup>62</sup>

A rational effort to control or overcome crime (criminal politics) is of course not only using "penal" means (criminal law), but can also use "non-penal" means.<sup>63</sup> Penal crime prevention efforts are carried out through the formulation of criminal law norms, which contain substantive, structural and cultural elements of the community where the legal system is enforced. Crime prevention efforts through the penal facility are operationally carried out through a criminal justice system in which it moves harmoniously from its supporting subsystems, namely

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<sup>61</sup> Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana*, Citra Aditya Bhakti, Bandung, 1996, p. 29.

<sup>62</sup> Salman Luthan, *Kebijakan Kriminalisasi di Bidang Keuangan*, FH UII Press, Yogyakarta, 2014, p. 14.

<sup>63</sup> *Op. Cit.*, Muladi and Barda Nawawi, p. 158.

the Police, Prosecutors, Commission of Corruption Eradication, Courts, Correctional Institutions and Advocates.

The criminalization policy is a policy in determining an act that was originally not a crime (not punished) to become a criminal act (a criminal act). So essentially the criminalization policy is part of the criminal policy (criminal policy) by using the means of criminal law (penal) so that it is part of the criminal law policy (penal policy).<sup>64</sup>

In essence, penal policy is not merely a legal technical work that can be carried out in a normative and systematic-dogmatic juridical manner, but also requires a factual juridical approach which can be in the form of a sociological, historical and comparative approach. In addition, penal policy also requires a comprehensive approach from various other social disciplines and an integral approach that is in line with social policies or national development policies.<sup>65</sup>

## **E. Criminal Acts of Sexual Violence Against Children**

### **1. The Understanding of Children**

Based on the Big Indonesian Dictionary, children are descendants, children are also interpreted as humans who are still small. In addition, essentially a child is a person who is at a certain developmental period and has the potential to become an adult.<sup>66</sup>

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<sup>64</sup> Barda Nawawi Arief, *Tindak Pidana Mayantara Perkembangan Kajian Cyber Crime di Indonesia*, RajaGrafindo Persada, Jakarta, 2006, p. 20.

<sup>65</sup> Muladi, *Proyeksi Hukum Pidana Materiil Indonesia Pada Masa Depan*, Pidato Pengukuhan Guru Besar, Universitas Diponegoro, Semarang, 1991, p. 6.

<sup>66</sup> Anton M. Moeliono, *Kamus Besar Bahasa Indonesia*, Balai Pustaka, Jakarta, 1988, p. 30.

Based on the Child Protection Law Number 35 of 2014 Article 1 number 1, a child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb. Children are a mandate and gift from God Almighty who have dignity, dignity and rights as human beings that must be respected. Children are potential buds, as well as the next generation of the nation's ideals. Children who are potential and human resources for national development need guidance and protection.<sup>67</sup>

Children are grouped as weak and vulnerable. The group is very at risk because it is dependent on adults, because the level of age, physical, mental, moral and spiritual development is immature. Not yet able to think like an adult, not yet able to make decisions which are good and which are bad. Therefore, it is necessary to get protection and direction from adults. Therefore, children who have not reached the age of eighteen (18) or have never married are under the control of their parents as long as they are not deprived of their power.

Children have different characteristics and traits from adults. Children are buds, the next generation of the nation's ideals, have a strategic role in maintaining the existence of the State and nation in the future. Children are also one of the vulnerable groups whose rights are still neglected. Therefore, children's rights must be prioritized.<sup>68</sup>

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<sup>67</sup> Kartini Kartono, *Psikologi Apnormal*, Pradnya Pramitha, Jakarta, 2004. p. 35.

<sup>68</sup> Regulation of the Minister of Women's Empowerment and Child Protection of the Republic of Indonesia Number 15 of 2010 concerning General Guidelines for Handling Children in Conflict with the Law.

## 2. The Understanding of Sexual Violence Against Children

The term violence, in the Big Indonesian Dictionary (KBBI) has the meaning of something that has a hard nature or the existence of coercion in an act of a person or group of people that causes physical damage or an item.<sup>69</sup> Whereas literally, violence is a form of action that is more physical in nature, which can cause injury, disability, illness, or suffering to others, where there is an element of coercion or unwillingness or the absence of approval from others.<sup>70</sup>

According to Law Number 35 of 2014 violence is any act against a child that results in physical, psychological, sexual misery or suffering, and/or neglect, including threats to commit acts, coercion, or unlawful deprivation of liberty.

Violence can be in the form of physical violence and sexual violence. Sexual violence can be interpreted as an act or act that intimidates someone related to intimacy or sexuality committed by an offender by coercion. Because of this action, the victim suffers both physically and psychologically. Sexual violence is a sexual crime which in general is an act that violates decency that damages decency and the act is not against the will of the victim through threats of violence.<sup>71</sup>

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<sup>69</sup> Pusat Bahasa Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia*, Pusat Bahasa, Jakarta, 2008, p. 698.

<sup>70</sup> Abdul Wahid and Muhammad Irfan, *Perlindungan Terhadap Korban Kekerasan Seksual: Advokasi Atas Hak Asasi Perempuan*, Refika Aditama, Bandung, 2001, p. 54.

<sup>71</sup> Leden Marpaung. *Kejahatan Terhadap Kesusilaan Dan Masalah Prevensinya*, Sinar Grafika, Jakarta, 2004, p. 7.

The context of sexual violence against children is a form of sexual violence where children are objects of violence or can be interpreted as victims of sexual violence. Sexual violence against children with the term child sexual abuse is defined as an act of coercion to have sexual relations or other sexual activities, carried out by adults against children, with violence or not, which can occur in various places regardless of culture, race, and public literature. The victims can be boys or girls, but girls are more often the targets of sexual violence than boys.<sup>72</sup>

Sexual violence tends to have a traumatic impact on victims, both children and adults. However, often cases of sexual violence go unrevealed due to the denial of the incidents of sexual violence that occurred. Denial of incidents of sexual violence is more common in children. This is because children who are victims of sexual violence do not understand that they are victims. Victims of sexual violence tend to distrust other people so they keep the incidents of sexual violence they experience a secret. In addition, victims are afraid to report the perpetrators because they feel threatened that they will experience worse things if they report them, and feel ashamed because the events they experienced could damage the family name.<sup>73</sup>

### **3. Criminal Sanctions for Perpetrators Sexual Violence Against Children**

In Indonesia Regulation for protecting of Children found in Child Protection Regulations regulated in Law No. 17 of 2016 year. In Article 1:

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<sup>72</sup> *Ibid.*, p. 7-8.

<sup>73</sup> Ivo Noviana, *Kekerasan Seksual Terhadap Anak: Dampak dan Penanganannya*, Jurnal Sosio Informa, Vol. 01 No. 1, 2015, p. 18.

Several provisions in Law Number 23 of 2002 concerning Child Protection (State Gazette of the Republic of Indonesia of 2002 Number 109, Supplement to the State Gazette of the Republic of Indonesia Number 4235) as amended by Law Number 35 of 2014 concerning Amendments to Law Number 23 2002 concerning Child Protection (State Gazette of the Republic of Indonesia of 2014 Number 297, Supplement to the State Gazette of the Republic of Indonesia Number 5606) amended as follows:

a. The provisions of Article 81 are amended to read as follows:

*(1) Anyone who violates the provisions as referred to in Article 76D shall be sentenced to a minimum imprisonment of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiah).*

*(2) The criminal provisions as referred to in paragraph (1) shall also apply to any person who intentionally commits a trick, a series of lies, or persuades a child to have intercourse with him or with another person.*

*(3) In the event that the criminal act as referred to in paragraph (1) is committed by parents, guardians, people who have family relationships, child caretakers, educators, educational staff, officers who handle child protection, or it is committed by more than one person collectively, the penalty shall be increased by 1/3 (one third) of the criminal penalty as referred to in paragraph (1).*

*(4) In addition to the perpetrators as referred to in paragraph (3), the addition of 1/3 (one third) of the criminal threat is also imposed on the perpetrators who have been convicted of committing a crime as referred to in Article 76D.*

*(5) In the case of a criminal act as referred to in Article 76D causing more than 1 (one) victim, causing serious injury, mental disorder, infectious disease, disruption or loss of reproductive function, and/or the victim dies, the perpetrator is sentenced to death, life imprisonment, or a minimum imprisonment of 10 (ten) years and maximum of 20 (twenty) years.*

*(6) In addition to being subject to the punishment as referred to in paragraph (1), paragraph (3), paragraph (4), and paragraph (5), the*



*perpetrator may be subject to additional punishment in the form of announcing the identity of the perpetrator.*

*(7) The perpetrators as referred to in paragraphs (4) and (5) may be subject to action in the form of chemical castration and installation of electronic detection devices.*

*(8) The action as referred to in paragraph (7) shall be decided together with the main punishment by specifying the period of execution of the action.*

*(9) Additional penalties and actions are excluded for child perpetrators."*

b. Between Article 81 and Article 82, 1 (one) article is inserted, namely Article 81A which reads as follows:

*(1) The action as referred to in Article 81 paragraph (7) is imposed for a maximum period of 2 (two) years and is carried out after the convict has served the principal sentence.*

*(2) The implementation of the actions as referred to in paragraph (1) is under regular supervision by the ministry that administers government affairs in the fields of law, social and health.*

*(3) The implementation of chemical castration is accompanied by rehabilitation.*

*(4) Further provisions regarding the procedure for implementing the action and rehabilitation shall be regulated by a Government Regulation.*

c. The provisions of Article 82 are amended to read as follows:

*(1) Anyone who violates the provisions as referred to in Article 76E shall be punished with imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiah).*

*(2) In the event that the criminal act as referred to in paragraph (1) is committed by parents, guardians, people who have family relations, child caretakers, educators, educational staff, officers who handle child protection, or it is committed by more than one person collectively, the penalty shall be increased by 1/3 (one third) of the criminal penalty as referred to in paragraph (1).*

*(3) In addition to the perpetrators as referred to in paragraph (2), the addition of 1/3 (one third) of the criminal threat is also imposed on the perpetrators who have been convicted of committing a crime as referred to in Article 76E.*

*(4) In the event that the criminal act as referred to in Article 76E causes more than 1 (one) person to die, causes serious injury, mental disorder, infectious disease, reproductive function is disturbed or lost, and/or the victim dies, the penalty is increased by 1/3 (one third) of the criminal penalty as referred to in paragraph (1).*

*(5) In addition to being subject to the punishment as referred to in paragraph (1) to paragraph (4), the perpetrator may be subject to additional punishment in the form of announcing the identity of the perpetrator.*

*(6) The perpetrators as referred to in paragraphs (2) to (4) may be subject to action in the form of rehabilitation and installation of electronic detection devices.*

*(7) The action as referred to in paragraph (6) shall be decided together with the main punishment by specifying the period of execution of the action.*

*(8) Additional penalties are excluded for child perpetrators.*

d. Between Article 82 and Article 83, 1 (one) article is inserted, namely Article 82A which reads as follows:

*(1) The action as referred to in Article 82 paragraph (6) shall be carried out during and/or after the convict has served the principal sentence.*

*(2) The implementation of the actions as referred to in paragraph (1) is under regular supervision by the ministry that administers government affairs in the fields of law, social and health.*

*(3) Further provisions regarding the procedure for implementing the action shall be regulated by a Government Regulation.*

## **F. Chemical Castration**

The term castration or castration has been known for a long time in human civilization, quoted from the book "A Brief History of Castration" Second Edition by Victor T Cheney published in 2006, this action is the most ancient, effective, fast, and inexpensive treatment to prevent crime, disease, violence, and unwanted births. There are various reasons for the practice of castration, ranging from religious reasons, criminal penalties, to vocal interests in music to maintain the high notes of children even though they are growing up.<sup>74</sup>

In the medical world, surgical castration by taking testicles is usually done to treat cancer. Taking these testicles is expected to reduce the production of the

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<sup>74</sup> Danu Damarjati, *Meniliki Sejarah Kebiri dari Masa ke Masa*, detikNews, 2015, in link: <https://news.detik.com/berita/d-3052566/menilik-sejarah-kebiri-dari-masa-ke-masa> accessed in 27 August 2022 at 08.00 PM.

hormone testosterone (male hormone) in the body. Cases such as prostate cancer, testicular cancer, and male breast cancer that are largely affected by testosterone development may require a process called orchiectomy or glaciation. In the process, surgery is performed by making an incision in the centre of the scrotum and pulling it out until the testicles are correct -out. After the membrane connecting the testicle and the sperm bag or the vas deferens is cut, the new testicle is removed and the vas deferens is returned to the scrotum. The incision is closed, then proceeds to the other testicle.<sup>75</sup>

Although the use of the term castration is the same, the action taken as a sanction for perpetrators of sexual violence goes through a different process in its application, namely the use of chemicals. Under the supervision of a doctor, antiandrogen drugs such as cyproterone are injected several times a few weeks. hormones such as testosterone that function to maintain masculine characteristics. With decreased testosterone levels, most men will also experience a decrease in libido or sex drive and thoughts related to sexuality. But when the chemical is no longer present, testosterone and sperm production will resume.<sup>76</sup>

#### **G. Legal Effectiveness**

The effectiveness means the effectiveness of the effect of success or efficacy or efficacy. Talking about the effectiveness of the law certainly cannot be

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<sup>75</sup> Gabriel Abdi Susanto, *Di Dunia Medis, Kebiri Diterapkan untuk Atasi Kanker*, Liputan6.com, 2016, in link: <https://www.liputan6.com/health/read/2516432/di-dunia-medis-kebiri-diterapkan-untuk-atasi-kanker> accessed in 27Augusts at 09.00 PM.

<sup>76</sup> *Ibid.*

separated from analysing the characteristics of two related variables, namely the characteristics or dimensions of the target object used.<sup>77</sup>

The theory of legal effectiveness according to Soerjono Soekanto is that effective whether or not a law is determined by 5 (five) factors, namely:

1. *The legal factor itself (law).*
2. *The law enforcement factors, namely the parties that form and apply the law.*
3. *The factors of facilities or facilities that support law enforcement.*
4. *The community factors, namely the environment in which the law applies or is applied.*
5. *The cultural factors, namely as a result of work, creativity and taste based on human initiative in social life.*

When talking about the effectiveness of the law, we must first be able to measure the extent to which the rule of law is understood or not understood and obeyed or not obeyed. If a rule of law is understood and obeyed by most of the targets who are the target of its obedience, it will be said that the law in question is effective.<sup>78</sup>

Legal awareness and legal compliance are two things that will determine the effectiveness of the implementation of legislation or the rule of law in society. Legal awareness, legal compliance, and the effectiveness of legislation are three interrelated elements. People often confuse legal awareness and legal obedience, even though the two are closely related, but they are not exactly the same. These two elements really determine the effectiveness or not of the implementation of legislation in society.<sup>79</sup>

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<sup>77</sup> *Op. Cit.*, Barda, *Kapita Selektta*, p. 67.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

Based on the theory of legal effectiveness according to Soerjono Soekanto above which states that the effectiveness of a law is determined by 5 (five) factors, namely the legal factor itself (the law), law enforcement factors (the parties that form or apply the law), the facilities or facilities that support law enforcement, community factors (the environment in which the law applies or is applied), cultural factors (as a result of work, creativity and taste based on human initiative in social life).

According to Soerjono Soekanto, the measure of effectiveness in the first factor regarding the law or the legislation is:<sup>80</sup>

1. *The existing regulations regarding certain areas of life are quite systematic.*
2. *The existing regulations regarding certain areas of life are quite synchronous, hierarchically and horizontally there are no conflicts.*
3. *Qualitatively and quantitatively the regulations governing certain areas of life are sufficient.*
4. *The issuance of certain regulations is in accordance with the existing juridical requirements.*

The second factor that determines whether or not the performance of written law is effective is law enforcement officials. In this connection, it is necessary to have a reliable apparatus so that the apparatus can carry out their duties properly. Reliability in relation here is covering professional skills and having a good mentality.

According to Soerjono Soekanto, problems that affect the effectiveness of the written law in terms of the apparatus will depend on the following:<sup>81</sup>

1. *To what extent are officers bound by the regulations there is.*
2. *The extent to which officers are allowed to give discretion.*
3. *What kind of example should the officer give to the community.*

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<sup>80</sup> Soerjono Soekanto, *Faktor-Faktor yang Mempengaruhi Penegakan Hukum*, PT. Raja Grafindo Persada, Jakarta, 2008, p. 80.

<sup>81</sup> *Ibid.* p. 86.

4. *To what extent is the degree of synchronization of assignments given to officers so as to provide firm limits on their authority.*

In the third factor, the availability of facilities in the form of facilities and infrastructure for implementing officers in carrying out their duties. The facilities and infrastructure in question are infrastructure or facilities used as a tool to achieve legal effectiveness. This infrastructure is clearly a part that contributes to the smooth running of the duties of the apparatus at the place or location of work. The elements are the presence or absence of infrastructure, sufficient or lack of infrastructure, good or bad existing infrastructure.

In the fourth factor, there are several elements of measuring effectiveness that depend on community conditions, namely:

1. The understand and understand the existing rules.
2. The cause of people not complying with existing rules.
3. The causes people to obey the existing rules.

As for the fifth factor, namely regarding culture as a habit that is carried out by the community regarding the treatment of the existence of a rule. This can be seen whether or not there is a treatment against the rules that are made a habit by the community, either good habits or those that are contrary to the rules.

#### **H. Sexual Crimes Against Children In Islam**

*Jarimah*, linguistically, is a form of *masdar* (origin) which means an act of sin, wrongdoing, or crime. According to the terms of the *fuqoha'*, what is called *jarimah* is the prohibition of the prohibition of *Syara'* (doing prohibited things

and/or leaving things that are obligatory) which is threatened with Had or *Ta'zir* punishment.<sup>82</sup>

Broadly speaking, Islamic criminal law determines three types of jarimah, namely *jarimah hudud*, *jarimah qishash / diyat*, and *jarimah ta'zir*. *Jarimah hudud* includes adultery, *qadzaf* (accusing adultery), drinking *khamr* (drinking liquor), theft, robbery, rebellion, and apostates. The provisions for the type of *qishash/diyat* crime include: intentional murder and murder by mistake. While *Jarimah ta'zir* is divided into three parts:<sup>83</sup>

1. *Jarimah hudud* or *qishash/diyat* that are *subhat* or do not meet the requirements, but are already immoral. For example, the act of attempted theft, attempted murder, theft among families.
2. Fingers are determined by the Qur'an and al-Hadith, but the sanctions are not specified. For example, insults, false sanctions, not carrying out the mandate, and insulting religion.
3. fingers determined by *Ulul Amri* for the public good. In this case, the value of Islamic teachings is taken into consideration in determining the general benefit. For example, traffic violations.

From the opinions of these experts, it can be concluded that there are characteristics of adultery, namely:<sup>84</sup>

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<sup>82</sup> Marsum, *Jinayat (Hukum-Pidana Islam)*, Fakultas Hukum Universitas Islam Indonesia, Yogyakarta, 1984, p. 2.

<sup>83</sup> A. Djazuli, *Fiqh Jinayah (Upaya menanggulangi kejahatan dalam Islam)*, Raja Grafindo Persada, Jakarta, 1996, p. 13-14.

<sup>84</sup> Faris Akmal, *Hukuman Pelaku Pelecehan Seksual Terhadap Anak di Bawah Umur Dalam Perspektif Hukum Islam*, Thesis in Faculty of Law, Universitas Muhammadiyah, Surakarta, 2016, p. 6-9.

1. There is sexual intercourse in the form of intercourse.
2. The intercourse is marked by the entry of the male genitalia into the female genitalia or it can also enter the anus and mouth.
3. The intercourse in question is carried out outside the legal marriage bond.
4. The intercourse was carried out on the basis of consensual consent, not on the basis of coercion by one of the parties. The four elements above are the stepping stones in distinguishing between adultery and sexual crimes, where the difference is in the fourth element. So, in this case, the perpetrator can be positioned as an adulterer, while the victim's legal status is someone who is forced to have sex or do something against his will or in other words the victim is made an object by the perpetrator to fulfil his sexual desires.

*Takzir* punishment can be used as an alternative to implementing Islamic law in modern times in accordance with the legal provisions in each region or country by placing judges and authorities to consider making decisions. is an attempt by Islamic law to reduce acts of sexual harassment can be carried out.<sup>85</sup>

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<sup>85</sup> Faris Akmal, *Op.Cit*, p. 76.



## CHAPTER III

### RESEARCH RESULTS AND DISCUSSION

#### A. Factors that influencing the effectiveness of the policy towards the imposition of additional criminal penalties of chemical castration against perpetrators of sexual violence against children

In Indonesia, the additional application of chemical castration to criminal acts of sexual violence against children in Indonesia is listed in Law Number 17 of 2016 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection which was passed into Law on November 9, 2016 ago.<sup>86</sup>

In this discussion, researchers will contrast the theory discussed in the previous chapter, namely the theory of legal effectiveness according to Soerjono Soekanto. Soerjono stated that a regulation is said to be effective if it fulfils the 5 factors, Seorjono mentioned in his book entitled “Factors Influencing Law Enforcement”. These factors are:

##### 1. Legal or Act Factors

In his book Soerjono Soekanto, says that a regulation is said to be effective if it follows the principles that apply to a law.<sup>87</sup> In this case the researcher will discuss the implementation of chemical castration punishment in the perspective of criminal law.

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<sup>86</sup> Dhita Mutiara Putri, et. al., *Penerapan Hukuman Kebiri Kimia Menurut Peraturan Pemerintah Nomor 70 Tahun 2020*, Jurnal Hukum Adil, Vol. 12 No. 2, 2021, p.161.

<sup>87</sup> Nur Fitryani Siregar, *Efektivitas Hukum*, Jurnal Hukum Al-Razi, Vol. 18 No. 2, 2018, p. 3.

Meanwhile, if viewed from the perspective of the Draft Criminal Code Indonesia (RKUHP),<sup>88</sup> the application of the provisions for chemical castration also creates many problems. Where the formulation of the RKUHP was based on, among other things, the United Nations (UN) Resolution on "The Prevention of the Crime and the Treatment of Offenders", the discourse on criminal law underwent a significant reshuffle. One of its developments is the orientation of punishment which is more "humanizing" to perpetrators of criminal acts (offenders) in the form of coaching (treatment).<sup>89</sup>

The above is also in line with Ross' view which states:<sup>90</sup>

*“Prevention, or more generally the influencing of behavior, is only adequate answer when the question is posed as one of aim of penal legislation. Retribution, i.e., requirement of guilt as a precondition and measure of punishment, is only adequate answer when the question is posed as one of what restrictive moral consideration limit the state’s right to use as means of influencing behaviour”.*

In addition, chemical castration sanctions are also seen as contrary to the 'Purpose of Punishment' which is expressly stated in Article 55 paragraphs (1) and (2) of the RKUHP. If chemical castration sanctions are associated with criminal purposes in the RKUHP, it can be said that chemical castration sanctions appear only as an act of retaliation from the state without any attempt to improve the personal aspects of the perpetrators of paedophilia crimes. Even though the purpose of this punishment, as one of which is

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<sup>88</sup> Drafting team. "The Draft Criminal Code as a Result of Discussion by the Working Committee of the RKUHP-DPR RI", 24 September 2018, Jakarta: BPHN & Menkumham, 2018, (hereinafter referred to as "RKUHP")

<sup>89</sup> Herbert L. Packer, *The Limits of The Criminal Sanction*, Stanford California Press, Stanford California University, 1968, p. 37-58.

<sup>90</sup> Alf Ross, *On Guilt, Responsibility and Punishment*, Stevens and Sons, London, 1975, p. 60-61.

contained in the RKUHP, apart from having to make the perpetrators deterred, they also had to provide education and protection for the convicted person and also the public. At the theoretical level of criminal law, according to Packer, the theory of retribution (retributivism) has been abandoned and has shifted towards the theory of expediency (utilitarianism). Based on the above, the policy of applying chemical castration sanctions from the perspective of criminal law can be said to deviate from the good punishment system as contained in the current Criminal Code, even contained in the Draft Criminal Code which will soon take effect.

Husak emphasized that in addition to external constraints, legislators must also pay attention to constraints regarding the basis of criminal justification.<sup>91</sup> Thus, if Husak's opinion regarding the issuance of a criminal policy is related to regulation regarding chemical castration policy, then this requires further elaboration. However, in short Indonesia has issued Law Number 5 of 1998 concerning Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Law Number 12 of 2005 concerning Ratification of the International Covenant on Civil and Political Rights, in which the two laws This law is essentially a ratification of international conventions regarding the prohibition of torture or other cruel, inhuman or degrading treatment or punishment of perpetrators of crimes.

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<sup>91</sup> Douglas Husak. *Overcriminalization: The Limits of The Criminal Law*, Oxford University Press, Oxford, 2009, p. 55-102.

If, the definition of criminalization above is related to paedophilia cases using the regime of this Law on Child Protection as it contains provisions regarding chemical castration, then it is illustrated that the resolution of these cases is directed at imposing criminal sanctions in the form of "punishments" which are also contradictory. with the legal system of criminal sanctions contained in the currently valid Criminal Code, in particular Article 10 of the Criminal Code. Meanwhile, if the notion of criminalization is also directed at giving "actions" which are also contrary to the legal system of criminal sanctions contained in the RKUHP which will soon be promulgated, specifically Article 55 paragraph (1) of the RKUHP regarding the Purpose of Punishment.<sup>92</sup>

In addition, if you look at the chronology of the issuance of the Amendment to the Child Protection Act which regulates provisions regarding chemical castration, the President issued a Government Regulation in Lieu of Law (PERPU), namely PERPPU Number 1 of 2016. In the constitutional system in Indonesia, PERPPU is a provision that can be issued by the president based on an "emergency state".<sup>93</sup>

Furthermore, regarding what is meant by "emergency state", it is regulated in PERPU Number 23 of 1959 concerning Dangerous Conditions.

Another thing is that if one looks at the "emergency state" aspect of the

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<sup>92</sup> *Ibid.*

<sup>93</sup> Article 22 Paragraph 1 of the 1945 Constitution states that "In the event of a pressing emergency, the president has the right to issue government regulations in lieu of laws". See also Article 1 Paragraph 4 Number 11 of 2011 Concerning the Formation of Legislation, reads "Government Regulations in Lieu of Laws are statutory regulations stipulated by the President in matters of compelling urgency."

PERPPU which underlies the issuance of the Amendment to the Child Protection Act which regulates provisions regarding chemical castration, in principle it has not been fulfilled. This is due to the weak supporting data in the application of chemical castration, the ineffectiveness of the application of chemical castration in reducing paedophilia crime in several countries that have implemented chemical castration in their criminal sanctions, the problem of the influence of chemical castration sanctions on paedophiles from a medical perspective, even the problem of applying chemical castration sanctions in the criminal justice system. punishment, all of them have answered the question that the application of chemical castration to paedophiles is excessive (over-criminalization) in the politics of criminal law in Indonesia.<sup>94</sup>

It should be noted that the enactment of Law Number 17 of 2016 which began with the issuance of Government Regulation in Lieu of Law Number 1 of 2016 was motivated by a significant increase in the number of sexual violence against children and fears that it would endanger the lives and development of children, besides that it would also disrupt security and order. Public. Criminal sanctions imposed on perpetrators of sexual violence against children have not provided a deterrent effect and prevented sexual violence against children from occurring.

The chemical castration sanctions or punishments formulated in Law Number 17 of 2016 have shown that the criminal law politics adopted by the

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<sup>94</sup> Douglas Husak, *Opp. Cit.*, p. 159

government is not based on rational studies and reasons. However, based on emotional reasons, namely due to several underlying reasons, namely *first*, in considering the Government Regulation in Lieu of Law, the government stated that criminal sanctions imposed on perpetrators of sexual violence against children had not provided a deterrent effect and have not been able to comprehensively prevent the occurrence of sexual violence against children, so it is necessary to immediately change the Child Protection Act. This consideration is more or less the same reason as Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection.<sup>95</sup>

*Second*, these regulations are on the same spectrum, namely focusing on criminal sanctions, deterrent effects and comprehensive prevention. *Third*, the criminal charge in this Government Regulation in Lieu of Law is very emotional, but without the formulation of a rational law and in accordance with existing laws and regulations. The special minimum sentence is still maintained, this time it can reach a minimum of 5 to 10 years in prison. While the maximum sentence reaches 15 to 20 years with several conditions. In addition, the government also aggravates 1/3 of the punishment in several conditions such as repetition of criminal acts and crimes committed by people who are trusted and should protect children. It is not clear whether the sentence can be imposed twice or only once.

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<sup>95</sup> Kristina Sitanggang, *Hukuman Kebiri Kimia (Chemical Castration) Untuk Pelaku Kekerasan Seksual Pada Anak Ditinjau Dari Kebijakan Hukum Pidana (Punishment of Chemical Castration for Performers of Sexual Violence in Child Review from Criminal Law Policy)*, Jurnal Juristic, Vol. 1 No. 1, 2021, p. 4.

This weighting is understandable, but the problem is that the drafters of the Government Regulation in Lieu of Law did not pay attention to the provisions of the Criminal Code, namely in Article 12 Paragraph (4) of the Criminal Code it is stated that the maximum prison sentence is 20 years in prison. That is, in the event that a crime is punishable by up to 20 years in prison, an increase in imprisonment of up to 1/3 can no longer be given. A minimum sentence of 10 years is also irrational, the reason is that this sentence will lock up the court to impose a sentence, there will be no consideration of the severity of the perpetrator's actions and the impact of the sentence imposed by the court will no longer be carried out proportionally.<sup>96</sup>

## **2. Law Enforcement Factors**

Based on Government Regulation Number 70 of 2020 concerning Procedures for the Implementation of Chemical Castration, Installation of Electronic Detection Devices, Rehabilitation, and Announcement of the Identity of Perpetrators of Sexual Violence against Children, chemical castration is imposed on perpetrators of intercourse based on court decisions that have permanent legal force.

Then, the implementation of chemical castration will be carried out in three stages. First, clinical assessment, which is carried out by officers who have competence in the medical and psychiatric fields who come from the coordination of the ministry of health with the prosecutor's office. Clinical assessment includes clinical and psychiatric interviews, physical examination

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<sup>96</sup> Ibid., p. 36.

and investigations. Second, conclusions containing the results of clinical assessments that ensure that perpetrators of sexual intercourse with children are eligible or unfit to be subjected to chemical castration. Third, the implementation of chemical castration. In the event that the conclusion of the clinical assessment states that the perpetrator of sexual intercourse with a child is not eligible to be subjected to chemical castration, then the implementation of the chemical castration procedure is postponed for a maximum of six months.<sup>97</sup>

During this delay period, a clinical assessment and re-conclusion will be carried out to determine whether it is appropriate or not to be subject to chemical castration. If the clinical reassessment and re-conclusion still state that the perpetrators of sexual intercourse with children are unfit to be subject to chemical castration, the prosecutor will notify the court of first instance which decided the case in writing by attaching the results of the re-clinical assessment and re-conclusion.

Meanwhile, if the conclusion of the clinical assessment states that the perpetrator of child intercourse deserves to be subjected to chemical castration, then within a maximum period of seven working days after the conclusion of the clinical assessment is received, the prosecutor will order the doctor to carry out the chemical castration action. Chemical castration will be carried out at a government-owned hospital or designated regional hospital

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<sup>97</sup> Andreas Adithya Ginting dan Maharani Nurdin, *Penerapan Peraturan Kebiri Kimia Bagi Pelaku Kekerasan Seksual Terhadap Anak*, Jurnal Kertha Semaya, Vol. 9 No. 4, 2021, p. 650-651.



attended by prosecutors, representatives from the Ministry of Law and Human Rights, the Ministry of Social Affairs, and the Ministry of Health.<sup>98</sup>

In carrying out their duties in carrying out court decisions that have permanent legal force, prosecutors cannot necessarily carry them out independently, because chemical castration is under the authority of the health agency.<sup>99</sup> In this case, the Indonesian Doctors Association (IDI) is the institution chosen to be a cooperation partner by the prosecutor's office to carry out the execution but, IDI cast a refusal because chemical castration violated the Hippocratic Oath or we know it as the doctor's oath which is an oath read by a doctor when someone starts the profession as a doctor<sup>100</sup> and also conflicts with the Indonesian medical code of ethics where the duty of a doctor is to provide medical services in accordance with professional standards and standard operating procedures as well as the patient's medical needs while chemical castration is not a medical service.<sup>101</sup>

### **3. Facility or Facilities that Support Law Enforcement Factors**

A very important factor in carrying out a regulation is the means or facilities that support law enforcement, without certain facilities or facilities, it is impossible for law enforcement to run smoothly. These facilities or

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<sup>98</sup> Nathalina Naibaho dan Tunggal S, *Polemik Kebiri Kimia bagi Pelaku Kekerasan Seksual*, in link: <https://law.ui.ac.id/polemik-kebiri-kimia-bagi-pelaku-kekerasan-seksual-oleh-nathalina-naibaho-dan-tunggal-s/> accessed in 8 November 2022 at 10.30 AM.

<sup>99</sup> Article 6 of Government Regulation Number 70 of 2020 concerning Procedures for Carrying out Chemical Castration, Installation of Electronic Detection Devices, Rehabilitation and Announcement of the Identity of Perpetrators of Sexual Violence against Children states that chemical castration must be carried out by officers who have competence.

<sup>100</sup> *Op. Cit.*, Ratna Wahyu, p. 140.

<sup>101</sup> CNN Indonesia, *IDI Tolak Jadi Eksekutor: Kebiri Kimia Bukan Layanan Medis*, in link <https://www.cnnindonesia.com/nasional/20190827174203-12-425112/idi-tolak-jadi-eksekutor-kebiri-kimia-bukan-layanan-medis> accessed in 8 November 2022 at 08.00 AM.

facilities include, among others, educated and skilled human resources, good organization, adequate equipment, adequate finances and so on.<sup>102</sup>

The idea of castration was initiated, it has been proven in practice in other countries that setting up and building an appropriate chemical castration treatment system is resource intensive and expensive. Until now, the government and related ministries have never provided an explanation regarding the description of the funding that must be provided to implement this expensive system. Moreover, this system is not in accordance with the health approach. From the projections that can be carried out, the budget spent will not be small, because in addition to the implementation of chemical castration, there will be a budget for psychiatric rehabilitation, social rehabilitation and medical rehabilitation for chemical castration convicts.<sup>103</sup>

Komnas Perempuan commissioner, Siti Amninah,<sup>104</sup> said that the estimated cost of castration is IDR 65 million a year, meaning IDR 130 million for two years, not including the rehabilitation process. While victims have to spend money for post mortem, recovery, treatment. In addition, it will not cause a deterrent effect; castration also violates the anti-torture convention.

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<sup>102</sup> *Op. Cit.*, Soerjono, *Faktor-Faktor*, p. 5 dan 27.

<sup>103</sup> Institute for Criminal Justice Reform, *Kebiri Kimia: Prioritas yang Bukan untuk Korban*, 2021. in link <https://icjr.or.id/kebiri-kimia-prioritas-yang-bukan-untuk-korban/> accessed in 9 November 2022 at 07.30 AM.

<sup>104</sup> BBC Indonesia, *Kebiri kimia: Hanya untuk tekan 'libido' dengan biaya tinggi, sementara korban dikesampingkan*, 2021. In link: <https://www.bbc.com/indonesia/indonesia-55534394> accessed in 09 November at 10.00 AM.

According to Dr. Arry Rodjani, SpU,<sup>105</sup> a urologist, the fee for providing a chemical castration injection is Rp. 700,000.00 – Rp. 1,000,000.00 for one use, and the effects of the injection can last from 1 – 3 months. According to him, the cost is expensive and ineffective.

Meanwhile, Andrology Specialist Doctor, dr. Heru H. Oentoeng<sup>106</sup> said that castration drugs were expensive because castration drugs had to be given continuously like other drugs which could not be given once and then immediately healed. Castration medication will be given according to its type, some are given once a day, once a month, at most once every three months.

This fact is also exacerbated by the minimal budget provided by the state for the protection and recovery of victims of criminal acts. Based on the budget data of the Witness and Victim Protection Agency (LPSK), it was found that from 2015 to 2019 the number of services needed by victims and provided by the LPSK continued to increase, in 2015 there were only 148 services, 2019 to 9,308 services, but the budget given to LPSK since 2015 until 2020 it continues to decline, even quite significantly, the LPSK budget in 2015 amounted to IDR 148 billion, while in 2020 the LPSK service budget was only provided IDR 54.5 billion, even though the needs of victims

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<sup>105</sup> Forum Keadilan, *alasan hukuman kebiri tidak efektif bagi pelaku kejahatan seksual*, forum keadilan, 2020, in link: <http://forumkeadilan.co/hukum/10-alasan-hukuman-kebiri-tidak-efektif-bagi-pelaku-kejahatan-seks/> accessed in 15 October 2022 at 11.00 AM.

<sup>106</sup> Fitri Syarifah, *Biaya Obat Kebiri Mahal, Pemerintah Pakai yang Mana?* Liputan6.com. in link: <https://www.liputan6.com/health/read/2516548/biaya-obat-kebiri-mahal-pemerintah-pakai-yang-mana> accessed in 09 November 2022 at 12.00 AM.

increased. For the record, in 2019, the budget related to services for victims was only IDR 25 billion.<sup>107</sup>

With the implementation of chemical castration, the state must prepare a new budget burden that is used to punish the perpetrators. Even so, victims still scream that they have to bear the costs of their own protection and recovery. The government's budgetary policy, which always cuts the budgetary needs of the recovery and protection of victims, such as the LPSK, shows that the protection and recovery of victims is not yet a priority for the state.

#### **4. Community Factor**

Community factors, namely the environment where the law applies or is applied, to compile codification or bookkeeping of legal norms in certain fields must take into account neutral and spiritual aspects of life, and the purpose of law is legal certainty, legal uniformity, and legal simplicity. Then, the effort to codify is positive. However, if the effort is only aimed at achieving legal certainty and trying to record legal norms governing the field of spiritual life, then it is negative in nature.<sup>108</sup>

The effectiveness of a statutory regulation is greatly influenced by the compliance and awareness of the community itself, Law Number 17 of 2016 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of

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<sup>107</sup> Budiarti Utami Putri dan Amirullah, *Hukuman Kebiri Dianggap Berbiaya Mahal*, 2021. In link: <https://nasional.tempo.co/read/1419974/hukuman-kebiri-kimia-dianggap-berbiaya-mahal> accessed in 9 November 2022 at 09.00 AM.

<sup>108</sup> *Op. Cit.*, Soerjono, *Faktor-Faktor*, p. 5 and 43.

2002 concerning Child Protection become the legal basis for the implementation of additional chemical castration crimes against perpetrators of crimes of sexual violence against children. Apart from that, this regulation aims to make people aware and not commit these crimes, so that the number of cases of sexual violence against children in Indonesia will decrease or not even happen again. One way to assess whether public compliance and awareness of these regulations is by looking at data on the number of cases from year to year.

Based on data obtained by researchers from sexual crime cases in Indonesia, the National Commission for Child Protection (Komnas PA) said that complaints of violations of children's rights continued to increase. This is based on data compiled by the National Commission for Child Protection data and Information Centre (Pusdatin), in the period 2010-2015. The data shows that the number of complaints in 2010 was 2,046, of which 42 percent were sexual crimes. In 2011 there were 2,467 cases, of which 52 percent were sexual crimes. Meanwhile in 2012, there were 2,637 complaints, 62 percent of which were sexual violence. It increased again in 2013 to 2,676 cases, of which 54 percent were dominated by sexual crimes. Then in 2014 there were 2,737 cases with 52 percent sexual violence. Looking at 2015, there was a

very sharp increase in complaints, there were 2,898 cases in which 59.30 percent were sexual violence and the rest was other violence.<sup>109</sup>

In Indonesia, based on data from the Ministry of Women's Empowerment and Child Protection (KemenPPPA), the number of children who are victims of sexual violence has increased from 2019 to 2021. In 2019, the number of child victims of sexual violence reached 6,454, then increased to 6,980 in 2020. Furthermore, from 2020 to 2021 there was an increase of 25.07 percent to 8,730. Then KemenPPPA reported that there were 797 children who were victims of sexual violence throughout January 2022.<sup>110</sup>

Based on the data above, cases of sexual violence against children in Indonesia have continued to increase from year to year, even before and after the regulation was implemented, the number of sexual violence against children continued to increase. This shows that the ratification of PERPPU No. 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection by the current government has become Law Number 17 of 2016 concerning Stipulation of Government Regulation in Lieu of Law Number 1 of 2016 concerning The Second Amendment to Law Number 23 of 2002 concerning Child Protection Becomes an ineffective law in preventing sexual crimes against children in society. From the above data it

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<sup>109</sup> Putu Merta Surya Putra, Komnas PA: 2015, *Kekerasan Anak Tertinggi Selama 5 Tahun Terakhir*, Liputan6.com. in link: <https://www.liputan6.com/news/read/2396014/komnas-pa-2015-kekerasan-anak-tertinggi-selama-5-tahun-terakhir> accessed 15 October 2022 at 09.20 PM.

<sup>110</sup> Mutia Fauzia, *KemenPPPA: 797 Anak Jadi Korban Kekerasan Seksual Sepanjang Januari* 2022. Nasional Kompas, in link: <https://nasional.kompas.com/read/2022/03/04/17062911/kemenpppa-797-anak-jadi-korban-kekerasan-seksual-sepanjang-januari-2022> accessed in 15 October 2022 at 10.00 PM.

can be concluded that the level of public awareness and compliance is very low.

The cases of sexual violence in society will not go down if only by applying chemical castration which functions to reduce hormone levels, because according to Doctor Nugroho<sup>111</sup> that the emergence of sexual arousal is not solely caused by the hormone testosterone but, there are sexual experiences that men experience, it will arouse passion. and male health factors also have an effect. This was approved by Wimpie Pangkahila,<sup>112</sup> Deputy Chairperson of the Indonesian Association of Andrology Specialists. According to him, even though sexual arousal can be suppressed, the memory of sexual experiences cannot be erased and there has never been a report showing that chemical castration actually has a more deterrent effect on perpetrators of sexual crimes than other punishments that are quite severe because previous sexual experiences have already been recorded in the brain, so the desire would still exist, regardless of whether he was capable of it or not.

Besides that, Antitestosterone substances that are given routinely to men whose testosterone levels are normal are assumed to cause a decrease in the man's sexual desire. However, the impact goes beyond that. The reason is, the

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<sup>111</sup> Jerome Wirawan, *Apa yang dimaksud dengan kebiri kimia?*, melakukan wawancara dengan Dokter Nugroho, BBC News Indonesia, in link [https://www.bbc.com/indonesia/majalah/2016/10/161012\\_majalah\\_kesehatan\\_kebiri\\_kimia\\_explainer](https://www.bbc.com/indonesia/majalah/2016/10/161012_majalah_kesehatan_kebiri_kimia_explainer) , accessed in 13 February 2023 at 22.30 WIB.

<sup>112</sup> Jerome Wirawan, *What is chemical castration?*, conducted an interview with Wimpie Pangkahila, Deputy Chairman of the Association of Indonesian Andrology Specialists, in link [https://www.bbc.com/indonesia/majalah/2016/10/161012\\_majalah\\_kesehatan\\_kebiri\\_kimia\\_explainer](https://www.bbc.com/indonesia/majalah/2016/10/161012_majalah_kesehatan_kebiri_kimia_explainer) , accessed in 13 February 2023 at 22.30 WIB.

hormone testosterone plays a role in various bodily functions, not only sexual function. The decrease in the testosterone hormone will affect the brain so that the mood is uncomfortable, you will become angry after that, it will affect your skin so that your skin becomes dry and your muscles shrink, your bones become porous and the perpetrator will also be very weak and sluggish.<sup>113</sup>

## 5. Cultural Factor

The legal culture (system) basically includes the values that underlie the applicable law, values which are abstract conceptions of what is considered good (so it is embraced) and what is considered bad (so it is avoided). Measuring the effectiveness of interventions by administering the chemical injections of medroxyprogesterone acetate (MPA) (United States of America) or Cyproterone acetate (CPA) (Europe, for example Androcur) against sex offenders cannot necessarily be generalized from one condition to another. Factors related to the methodology of a particular research need to be considered in such a strict way before concluding that a particular action is effective in reducing the recidivist rate of perpetrators of sexual crimes.<sup>114</sup>

Castration can indeed reduce sex drive in sex offenders, however, if castration is performed by removing the testicles, it will permanently remove the organs. In addition, even though the sex drive will drop drastically, it can still return if the chemical treatment injections are stopped, because there are still psychological factors that can cause a return to sex drive.

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<sup>113</sup> *Ibid.*

<sup>114</sup> *Op. Cit.*, Saharuddin Daming, p. 31.



Castration can also increase the possibility of the perpetrator becoming more aggressive due to psychological and social factors, negative feelings, such as hurt, anger, and revenge, have been formed since the perpetrator felt victimized. Although medically it has the effect of reducing sex drive, it must be studied in depth, the social and psychological impact on castrated perpetrators so that psychological and social assistance is needed for the perpetrators during and after serving their sentence.<sup>115</sup>

The difficulty in finding trigger factors and appropriate treatment of perpetrators of sexual crimes is a methodological difficulty that must be applied to experimental designs. The sample is only limited to perpetrators who are currently serving sentences. In order to impose an aggravating sentence for perpetrators of sexual crimes and at the same time provide protection for society, it must not only be based on emotional considerations, common sense, imagery, serving public demands which are more of an emotional consideration. For scientists, health worker practitioners, and law enforcement officials, every consideration or recommendation must be based on scientific considerations which are marked by the conformity between ideas and facts and at the same time constitute the implementation of the constitutional mandate, namely to protect and educate the nation's life.<sup>116</sup>

Regarding the application of chemical castration in Law Number 17 of 2016, opinions were expressed by medical personnel. According to Wimpie

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<sup>115</sup> Kompas.Com, *Ini Efek Hukuman Kebiri Bagi Tubuh*, health.kompas.com, 2016, in link: <http://health.kompas.com/read/2016/05/25/200500123/ini.efek.hukuman.kebiri.kimiawi.pad.t> accessed in 15 October 2022 at 11.10 PM.

<sup>116</sup> *Ibid.*

Pangkahila,<sup>117</sup> Head of the Andrology and Sexology Section of the Faculty of Medicine, Udayana University, Denpasar, in the modern era, castration is no longer done by removing the testicles, but chemically. The process can be through giving pills or injections of anti-androgen hormones. Chemical castration can damage and even undermine organ function, namely reduced muscle function, osteoporosis, reduce the number of red blood cells, and interfere with the function of other cognitive organs. According to him, so far there is no data to support that the application of chemical castration can provide a more deterrent effect than the existing punishment.

Retno Listyarti, Commissioner of the Child Protection Commission for Education, argues that chemical castration is not effective if the motive of the perpetrators of the crime is due to psychological factors, not libido or hormones in the body. First, it must be known whether the perpetrator of the crime committed his crime due to psychological factors or hormonal factors in his body. Psychological reasons because some of the perpetrators were victims in their childhood who did not receive rehabilitation as a child.<sup>118</sup>

Based on this, chemical castration is not an appropriate sanction because the perpetrator commits a sexual crime or does not commit a sexual crime not based on sanctions but because the perpetrator's psychology is not in a normal

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<sup>117</sup> Harry Siswoyo, *Ahli: Tidak Ada Data Kalau Kebiri Beri Efek Jera Pemerkosa*, Vivo.co.id., 2016, in link: <http://m.news.viva.co.id/news/read/783180-ahli-tidak-ada-data-kalau-kebiri-beri-efek-jera-pemerkosa> accessed in 15 October 2022 at 11.30 PM.

<sup>118</sup> Antara, *Kebiri tidak efektif kalau kejahatan karena faktor psikologis*, in link <https://translate.google.com/?sl=en&tl=id&text=Antara%20Kebiri%20tidak%20efektif%20karena%20kejahatan%20karena%20faktor%20psikologis%20pada%20link%20&op> accessed in 14 October 2022 at 09.30 PM.

state. According to world rape statistics or world statistics on rape in various parts of the world, it proves that the death penalty or castration is not effective in creating a deterrent effect or preventing the occurrence of sexual crimes.<sup>119</sup> World statistics on sexual crimes that are published every two years show that countries that apply the death penalty and castration actually show the top ten positions as countries that have the highest cases of sexual crimes in the world.<sup>120</sup>

Countries that apply castration for sexual crimes are 9 European countries and 9 American states, one Latin American country and one country in Asia. The nine European countries are England, Poland, Russia, Germany, Czech Republic, Denmark, Sweden and Spain. While the nine American states are California, Florida, Georgia, Iowa, Louisiana, Montana, Oregon, Texas and Wisconsin. One Latin American country that enforces castration is Argentina and one country in Asia is South Korea.<sup>121</sup> Countries that apply castration punishment reveal that the decrease in the number of reported cases of sexual crimes does not reflect the actual cases because many cases go unreported, especially if the perpetrators are part of the family.<sup>122</sup>

In addition, the Indonesian Ulama Council (MUI) rejects chemical castration for perpetrators of sexual crimes against children (paedophilia), as stated in Government Regulation (PP) Number 70 of 2020 concerning

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<sup>119</sup> ICJR, Hukum Kebiri Indonesia Latah atau Tanpa Solusi, 2018. In link <http://icjr.or.id/hukum-kebiri-indonesialatah-atau-tanpa-solusi/>, accessed in 31 November 2022 at 10.00 AM.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

Procedures for Carrying Out Chemical Castration, Installation of Electronic Detection Devices, Rehabilitation, and Announcement of the Identity of the Perpetrators of Sexual Violence against Children.

In the perspective of Islamic law, castration of humans is prohibited because the majority of scholars agree that it is included in the category of changing God's creation. Supposedly, the punishment for pedophilia can be subject to articles related to adultery or the MUI fatwa on Lesbian, Gay, Bisexual, and Transgender (LGBT), not castration. According to Muhyiddin, the vice chairman of the MUI stated that in the perspective of Islamic law, castration of humans is prohibited because the majority of scholars agree that it is included in the category of changing God's creation. This reason is based on the fact that most paedophiles usually experience psychiatric disorders that require special therapy. In his opinion, castration for paedophiles will not solve the problem of sexual violence against children because the perpetrators still have the opportunity to commit immoral behaviour. Not a few experts worry about the negative impact of castration in the long term.<sup>123</sup>

In addition, the Nahdlatul Ulama Regional Board (PWNNU) of East Java also reviewed the application of castration law for perpetrators of sexual crimes among children. From the study presented by various groups, it was stated that chemical castration for perpetrators of sexual immorality or child predators is unlawful.

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<sup>123</sup> IDN Times, *Tolak Hukuman Kebiri Kimia, MUI: Itu Mengubah Ciptaan Allah SWT, MUI menilai hukuman kebiri tak selesaikan masalah*, IDN News, in link <https://www.idntimes.com/news/indonesia/fitang-adhithia/tolak-hukuman-kebiri-kimia-mui-itu-mengubah-ciptaan-allah-swt?page=all>, accessed in 12 January 2023 at 23. 00 WIB.

Based on *bahtsul masail*, it was attended by 11 fiqh experts, as well as members of the East Java Indonesian Doctors Association (IDI), namely doctor Edi Suyanto. Even in the study, there were about 22 participants who attended. They are representatives of several institutions such as legal aid agencies, Muslimat NU, Fatayat NU and East Java NU Health Institute. Kiai Asyhar stated that the majority of scholars required that *takzir* not have a negative impact, while from a health point of view, chemical castration not only damages the reproductive organs but can damage other organs.

In terms of health, chemical *takzir* actually has a more severe impact than surgical castration. Because it's not only the reproductive organs that are damaged, but other organs. In addition to being against Islamic law, chemical castration also has its downsides. The law must protect human rights. In this case there are five, including the right to have offspring. If a person is castrated, then the right to have children will be lost. Likewise, in Islamic law, castration is not recognized. Therefore, the application of chemical castration in legal products in Indonesia is contrary to Islamic law. Not in accordance with the code of ethics and professional doctor's oath, and not in accordance with the Criminal Code. Furthermore, another reason is that it is against the code of ethics of the Indonesian Doctors Association (IDI). If it is carried out, of course, by a doctor, but according to the code of ethics and

oaths, castration cannot be carried out. While in the positive legal aspect. It is not in accordance with the Criminal Code in force in Indonesia.<sup>124</sup>

## **B. The Obstacles to the Implementation of Additional Chemical Castration Penalties for Perpetrators of Sexual Violence Against Children in Indonesia**

### **1. Analysis of Obstacles to the Application of Additional Chemical Castration in the Perspective of Human Rights**

Human rights are a material that is very attached to the nature and life of humans, regarding human rights, the history of human rights can be traced back to the beginning of the story of humans in their social life in this world, namely when they began to become aware of their position as legal subjects. However, according to science, the history of human rights only grew and developed when human rights began to be defended and fought for against attacks or dangers arising from the power possessed by a social formation called the State. So, in essence the issue of human rights revolves around the relationship between humans (individuals) and society.<sup>125</sup>

The state guarantees that every child has the right to survival, growth and development and is entitled to protection from violence and discrimination. Currently there are many cases of sexual violence against minors. The government understands that the problem of sexual crimes against children has reached an extraordinary point and also understands that it is necessary to take extraordinary steps to overcome this problem, therefore the government

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<sup>124</sup> Ibnu Nawawi, *NU Jatim Haramkan Kebiri Kimia Bagi Pelaku Pencabulan*, NU Online, 2019, in link <https://nu.or.id/nasional/nu-jatim-haramkan-hukuman-kebiri-kimia-bagi-pelaku-pencabulan-TJcvn> accessed 12 February 2023 at 23.30 WIB.

<sup>125</sup> Susanto, S. & Sukinta, *Hukum dan HAM*, Semarang, 2006, p. 18.

issued new regulations which are expected to provide a deterrent effect on perpetrators. In 2016, the Government issued government regulation in lieu of law Number 1 of 2016 concerning the second amendment to Law No. 23 of 2002 concerning child protection, this government regulation in lieu of law is burdensome for perpetrators of sexual crimes in which the regulation provides for legal sanctions of chemical castration for perpetrators. The article states explicitly that threats of punishment for violators of the provisions in Article 81 paragraph 7 "Against the perpetrators as referred to in paragraphs (4) and (5) can be subjected to chemical castration and installation of electronic detection devices".

Chemical castration is an act of injecting anti-testosterone substances into a man's body to lower testosterone levels. Testosterone is a hormone that plays a role in various functions, one of which is sexual function. That is, the hormone testosterone affects a man's sexual arousal. Head of the Andrology and Sexology Section of the Faculty of Medicine, Udayana University, Denpasar, Wimpie Pangkahila revealed that castration in the medical world is known as castration. Castration is no longer done by removing the testicles but can be done chemically. The process can be through giving pills or injections of anti-androgen. The anti-androgen hormone is an anti-male hormone, the administration of the anti-androgen drug will make men

deficient in the testosterone hormone so that they no longer have a sex drive. Antiandrogen drugs will have the same effect as physical castration.<sup>126</sup>

The 2012 world rape statistics report shows that castration for perpetrators of rape in various countries in the world is not effective in creating a deterrent effect. There is no evidence that guarantees that the use of chemical castration has reduced the amount of violence against women and children.<sup>127</sup>

Chemical castration seems to have violated human rights. According to the Head of the Clinical Psychology Section of the Faculty of Psychology, Atma Jaya Catholic University of Indonesia, Jakarta, Dinastuti, the (psychological) effects of physical or chemical castration are not the same for everyone. This condition makes castration sanctions raise pros and cons, including in developed countries. The debate is not only about human rights not to torture in imposing sanctions, but also on the disconnect between the causes of a person committing a sexual crime and the form of punishment. Therefore, it is natural that castration injections are not proven to be able to suppress cases of sexual crimes.<sup>128</sup>

In terms of the world of health, the implementation of the castration law actually has many negative effects. As quoted from National Geographic Indonesia, it was explained that: "The anti-androgen hormone is an anti-male

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<sup>126</sup> Dian Maharani, *Yang Terjadi Jika Seseorang Dihukum Kebiri*. Kompas.com. in link: <https://lifestyle.kompas.com/read/2015/10/22/120535623/Yang.Terjadi.jika.Seseorang.Dihukum.Kebiri> accessed in 11 October 2022 at 10.00 PM.

<sup>127</sup> *Ibid.*

<sup>128</sup> Lidya, S. W. *Pengebirian Sebagai Upaya Perlindungan Anak Dari Kekerasan Seksual*, Info Singkat Hukum, 2020, p. 7.



hormone. Administration of anti-androgen drugs will not have an effect on a man to become feminine," said Wimpie. However, chemical castration has a negative effect in the form of premature aging of the body. Anti-androgenic fluids are known to reduce bone density so that the risk of brittle bones or osteoporosis increases. Anti-androgens also reduce muscle mass, which increases the body's chances of storing fat and thereby increasing the risk of heart and blood vessel disease.<sup>129</sup> The process of chemical castration can paralyze the organs so that it can be called torture.

The castration sentence imposed on the perpetrators of child rape, when it is related to human rights, the castration sentence violates two principles that are the mandate of reform, namely the principles of human rights and democracy. In substance, castration punishment will have an impact on the loss of a person's right to continue offspring and fulfil his basic needs guaranteed in the 1945 Constitution. This is of course contrary to human rights as contained in the Constitution and the Human Rights Law.

In addition, to date there have been no studies showing that castration sanctions are able to effectively suppress acts of sexual violence. Sexual violence is a complex thing that cannot be easily removed by castrating the perpetrator. Castration of perpetrators is not a fair solution for victims and there is also no significant relationship between castration and reduced child sexual crimes, there is no scientific effect, victims will recover by giving additional castration sentences to perpetrators.

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<sup>129</sup> Bestari Kumala Dewi, *Ini efek hukuman kebiri kimiawi pada tubuh*. National Geographic Indonesia, 2021, in link: <http://nationalgeographic.grid.id/read/13305384/iniefek-hukuman-kebiri-kimiawi-pada-tubuh> accessed in 12 October 2022 at 09.30 PM.

Human rights organizations' rejection of castration basically rests on several reasons, namely; *First*, castration punishment is not justified in the national criminal law system or the purposes of punishment adopted by the Indonesian legal system. *Second*, castration punishment violates human rights as stipulated in various international conventions that have been ratified in national law. And *third*, all forms of violence against children, including sexual violence, are basically a manifestation or operationalization of the desire to dominate, control and dominate children, thus castration laws do not target the root causes of violence against children. Because of this, these human rights organizations request that the government focus on the interests of children in a comprehensive manner, in this case as victims, the state must ensure that victims receive protection and access to physical and mental recovery, as well as other actions that focus on the interests of child victims.<sup>130</sup>

The views of Komnas HAM regarding the application of chemical castration for perpetrators of sexual violence, namely:<sup>131</sup>

- a. Punishment through castration can be qualified as cruel and inhumane punishment which is thus inconsistent with the constitution and Indonesia's commitment to human rights. The provisions of article 28G paragraph (2) of the Indonesian constitution state that "everyone has the right to be free from torture and treatment that degrades human

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<sup>130</sup> *Op. Cit.*, Saharuddin Daming, p. 34.

<sup>131</sup> *Op. Cit.*, Kristina Sitanggang, p. 23.

- dignity". Thus, these rights are constitutional and promotion, protection and fulfilment become constitutional commitments as well.
- b. The provision of additional punishment by castration (both chemical and medical operations), can also be qualified as a violation of rights, namely a violation of the right to consent to medical action and the right to protect one's physical and mental integrity.
  - c. Input from doctors, legal experts and criminologists stated that the causes of sexual violence are not only medical, but also psychological and social. Acts of sexual violence are not just penetration of the genitals. In this case, in addition to punishment based on existing laws, what must be given is recovery efforts through comprehensive rehabilitation both medical, psychological and social while still guided by human rights.
  - d. Handling sexual crimes against children, in this case women also ask for a comprehensive and consistent action and not only centred on punishment but also rehabilitation and prevention measures such as developing a social protection system for children (for example child-friendly communities as well as women, disclosure of information about the perpetrators) or through education and increased understanding of reproduction. This can be done by implementing Presidential Instruction Number 5 of 2014 concerning the National Movement Against Sexual Crime against Children, other existing

instruments or strengthening them. Hopefully this can be the main concern.

The castration sentence must be carried out in accordance with the applicable procedures and procedures by taking into account the human rights of the perpetrator and the punishment must bring benefits as the main goal of the results of the rehabilitation carried out.

In line with the provisions in Law Number 5 of 1998, Article 7 of Law Number 12 of 2005 Concerning Ratification of the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights) states:

*“No one shall be subject to torture or other cruel, inhuman or degrading treatment or punishment. In particular, no one may be subjected to medical or scientific experimentation without freely given consent.”*

Indonesia as a country that has ratified the ICCPR and CAT (Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment ), has the obligation to respect, protect and comply with provisions prohibiting acts of torture, inhuman treatment, and all forms of treatment and sanctions that degrade human dignity. If Indonesia applies chemical castration sanctions and without the consent given freely by the perpetrators of sexual violence crimes, then this is considered to have violated the obligations stated in the ICCPR and CAT documents.

On the official page of the Indonesian human rights commission, Beka Ulung Hapsara, Commissioner for Education and Counseling at the Indonesian National Commission on Human Rights said that Komnas HAM

is against chemical castration, because chemical castration is a form of torture. Chemical castration is a form of torture, this is against human rights. Article 28 G paragraph (2) of the 1945 Constitution of the Republic of Indonesia: Everyone has the right to be free from torture or treatment that degrades human dignity and has the right to obtain political asylum from another country. The purpose of Article 28 G paragraph (2) of the 1945 Constitution of the Republic of Indonesia is not to justify Indonesian citizens being subjected to torture, and/or inhumane and degrading acts of human dignity or citizenship. In addition, in Article 33 paragraph (1) of Law Number 39 of 1999 concerning Human Rights, it states that everyone has the right to be free from torture.<sup>132</sup>

Even though the imposition of a castration sentence is above the authority of the judge, before passing a decision there is nothing wrong if the judge consults a psychologist and health doctor first, because not all perpetrators' body conditions are suitable for castration injections. If later the castration sentence is carried out, the state through law enforcement officials is obliged to respect the rights of the perpetrator as a dignified human being by paying attention to the development of the perpetrator's health, providing counselling in the form of an understanding of treatment that must be known

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<sup>132</sup> Kabar Latuharhary, Reviewing Government Regulations (PP) Chemical Castration in a Human Rights Perspective, KOMNAS HAM of the Republic of Indonesia, 2021, in link <https://www.komnasham.go.id/index.php/news/2021/2/1/1660/mengupas-peraturan-pemerintah-pp-kebiri-kimia-dalam-perspektif-ham.html#:~:text=%E2%80%9CKomnas%20HAM%20menentang%20kebiri%20kimia,menjadi%20narasumber%20dalam%20Kajian%20terbuka.>, accessed on 13 February 2023 at 22.45 WIB.

and understood by the perpetrator to anticipate the adverse effects caused after the castration process.<sup>133</sup>

After castration, in order to achieve the benefits of success in rehabilitation, the state must also help the perpetrator to change his mind set through psychological therapy and sex education, mental assistance is also needed as support for rehabilitation, this is intended to change the perspective of the perpetrator to normal again and not make society uneasy.

## **2. Analysis of Obstacles to the Application of Additional Chemical Castration in the Perspective of the Attorney General of the Republic of Indonesia**

The Prosecutor's Office as the executor of decisions has the burden of responsibility to carry out judge decisions that have obtained permanent legal force. The criminal justice system as part of government administration is essentially also bound by the provisions of constitutional law, namely the implementation of the judicial process by the components of the criminal justice system must be based on the authority possessed by each component. For example, the police have the authority to investigate and investigate, the prosecutor's office has the authority to prosecute, and the court has the authority to examine cases and so on.

The authority of each component in driving the management of criminal justice administration must receive serious attention, not only the issue of the legitimacy of the actions of law enforcement officials, but what is more

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<sup>133</sup> *Ibid.*

substantial, because any action by the apparatus without a basis for authority will result in violations of human rights.<sup>134</sup>

In carrying out their duties in carrying out court decisions that have permanent legal force, prosecutors cannot necessarily carry them out independently, because chemical castration is under the authority of the health agency. In this case, the Indonesian Doctors Association (IDI) is the institution chosen as a partner by the prosecutor's office to carry out the execution but IDI has refused for various reasons. Because of this refusal, the prosecutor's office has tried to find another agency that is willing to carry out this execution, but to no avail, so this sentence cannot yet be carried out.

Regardless of the efforts made by the Attorney General's Office, there is the authority of the supervisory judge to supervise and observe the punishments carried out against perpetrators of crimes. This supervision is administrative in nature, namely the prosecutor and the head of the correctional institution send regular reports to the supervisory judge which are useful for the benefit of the judge in imposing further sentences against other defendants.<sup>135</sup>

In line with this, the Attorney General's Office (Kejagung) of the Republic of Indonesia revealed the obstacles to the implementation of castration punishment against perpetrators of child sexual violence. One of them is the doctors who refuse to carry out chemical castration because it is

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<sup>134</sup> Bambang waluyo, *Penegakan Hukum di Indonesia*, Sinar Grafika, Jakarta, 2016. p. 210.

<sup>135</sup> Anang Priyanto, *Hukum Acara Pidana Indonesia*, Penerbit Ombak, Yogyakarta, 2012, p. 107.

against the Medical Code of Ethics. According to the Deputy Attorney General for General Crimes Fadli Zumhana<sup>136</sup> that doctors who are not affiliated with the IDI are also bound by this ethics as well as police and military doctors, Fadli explained that the method of carrying out chemical castration itself is contained in Government Regulation (PP) Number 70 of 2020 concerning Procedures for Castration, Installation of Electronic Detection Devices, Rehabilitation, and Announcement of the Identity of Perpetrators of Sexual Violence against Children.

The PP states that the execution of chemical castration also involves officers who are competent in the medical and psychiatric fields. Article 9 letter D, the prosecutor orders the doctor to perform chemical castration on the perpetrators of intercourse. Of course this becomes a problem in itself when the prosecutor as the executor of the judge's decision asks the doctor to carry out chemical castration, while this task is contrary to the code of ethics of the medical profession. At the same time, the implementation of the judge's decision is also an obligation of the law.

Furthermore, Fadli said that there were also parties who felt that the issuance of regulations regarding castration punishment was still unclear. For example, starting from the process of implementation, supervision, to funding. Moreover, there is a possibility that the convict with a judicial

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<sup>136</sup> Adhiyasta Dirgantara, *Kejagung Ungkap Kendala Hukuman Kebiri Predator Seks Anak*, Detik News saat melakukan wawancara dengan Jaksa Agung Muda Tindak Pidana Umum Fadli Zumhana dalam diskusi virtual, 2021, in link <https://news.detik.com/berita/d-5873425/kejagung-ungkap-kendala-hukuman-kebiri-predator-seks-anak>, accessed in 13 February 2023 at 23.00 WIB.



review decision will be declared not guilty of committing a crime. Is there a mechanism for rehabilitation and/or compensation for convicts who have already been executed?.<sup>137</sup>

In accordance with Chapter XX of the Criminal Procedure Code concerning Supervision and Observation of the Implementation of Court Decisions in article 277 paragraph (2), that supervision is carried out by the supervisory judge for a maximum of two years, as an evaluation of decisions that have been handed down previously. If indeed the chemical castration decision cannot be implemented, then in subsequent decisions this additional punishment can be set aside

This is in accordance with the principle of criminal individualist ideas. Prof. Sudarso stated that the individualization of punishment is the determination of the type of crime, the level of punishment, and the method of execution of punishment.<sup>138</sup> In this way, the implementation of chemical castration must still be pursued, with the supervision and observation of the supervisory judge in order to obtain an evaluation of the implementation of chemical castration, which was the first to be imposed in Indonesia.

### **3. Analysis of Obstacles to the Application of Additional Criminal Chemical Castration in the Perspective of the Indonesian Doctors Association (IDI)**

#### **a. Indonesian Doctors Association's Rejection of Chemical Castration Punishment**

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<sup>137</sup> *Ibid.*

<sup>138</sup> DPM Sitompul, *Hukum dan Pembangunan*, Jurnal Fakultas Hukum Universitas Indonesia, Depok, 1988. p. 591.

In the process of executing additional chemical castration crimes for perpetrators of sexual violence against children, the prosecutor's office cannot carry out chemical castration itself, because chemical castration is an area of competence in medicine, the prosecutor's office in carrying out its duties and authorities, the prosecutor's office maintains a cooperative relationship with law enforcement agencies and justice as well as state agencies or other agencies in accordance with Article 33 Law Number 16 of 2004 concerning the Attorney General of the Republic of Indonesia.

In this case the Attorney General's Office maintains relationships and cooperates with the Indonesian doctors' association who are competent in the health sector, with regard to chemical castration the Indonesian doctors' association clearly issues a statement refusing to become the executor. According to the Indonesian Doctors Association, chemical castration violates several rules and medical oaths, among others:

1) Hippocratic Oath

The Hippocratic Oath or we know it as the doctor's oath is an oath read by a doctor when someone starts their profession as a doctor. The doctor's oath pronouncement is based on the National Working Meeting of the Honorary Council of Medical Ethics or MKEK and the Advisory and Defence Council of Members or MP2A.<sup>139</sup>

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<sup>139</sup> Ratna Wahyu Iestari, *Wajib Simpan Rahasia Kedokteran versus kewajiban hukum sebagai Saksi Ahli*, Jurnal Perspektif, Vol. 18 No. 3, Surabaya, 2013, p. 140.

Hippocrates was a Greek physician who was credited with promoting medicine as a science that stood alone, apart from the influence of shamanism, namely the assumption that disease originates from evil spirits, divine curses, violations of taboos, and other mystical influences.<sup>140</sup> Then that Hippocrates is considered the father of world medicine. The original Hippocratic oath was an oath that worshiped the Greek gods, only then in 1948 was an amendment to the oath in the Geneva declaration. Then the countries use it as a reference and create a code of ethics in their respective countries by adhering to:<sup>141</sup>

- a) The Hippocratic Oath (460-377 BC);
- b) Declaration of Geneva (1948);
- c) International Code of Medicine Ethics (1949);
- d) Declaration of Helsinki (1964) on clinical research;
- e) The Sidney Declaration (1968) on death;
- f) Declaration of Oslo (1970) regarding abortion for medical indications;
- g) Tokyo Declaration (1975) on torture.

The Indonesian Doctor's Oath was first drafted in 1969 which adheres to the reference to the International Code of Medical Ethics which was perfected in 1968 at the 22nd Conference of the World

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<sup>140</sup> Irwana, *Tanggungjawab Dokter Terhadap Kewajiban Menyimpan Rahasia Kedokteran*, Thesis, Faculty of Law, Universitas Hasanudin Makassar, 2013, p. 34.

<sup>141</sup> *Ibid.*

Medical Association. As with the International Code of Medical Ethics which underwent improvements, the National Code of Medical Ethics also underwent improvements in 1983. This doctor's oath was declared valid for all doctors throughout Indonesia through Decree No. 434/MENKES/SK/X/1983 dated 28 October 1983. Currently, the Indonesian medical code of ethics is contained in SK Menkes No. 434/MENKES/Sk/x/1983 and SK PB IDI No. 221/PB/A/4/042002 and most recently listed in the 2012 KODEKI then the regulations for Indonesian medical practice are regulated in Law number 29 of 2004 concerning Medical Practice.

The Indonesian doctor's oath based on article 1 of the 2012 KODEKI which reads that every doctor must uphold, live up to and practice the doctor's oath or promise, is as follows:

By Allah I swear, that:

- a) *I will devote my life to the cause of humanity.*
- b) *I will carry out my duties in an honourable and ethical manner, befitting the dignity of my work.*
- c) *I will maintain with all my might the dignity and noble traditions of the medical office.*
- d) *I will keep everything I know confidential because of my work and knowledge as a doctor.*
- e) *I will always put the patient's health first.*
- f) *I will make every effort so that I am not influenced by considerations of religion, nationality, ethnicity, party politics, or social status, in fulfilling my obligations to sufferers.*
- g) *I will give my teachers the respect and thanks they deserve.*
- h) *I will treat my colleagues as siblings.*
- i) *I will respect every human life from the moment of conception.*
- j) *I will not use my medical knowledge for something that is contrary to humanitarian law, even if I am threatened.*
- k) *I pledge this oath seriously and by risking my own honour.*

In the case of chemical castration, at least it is contrary to the doctor's oath in letters e, i and j. Chemical castration is considered as a punishment that hurts the patient's body because it is in contact with the patient's vital organs and makes him temporarily paralyzed.

This action is also considered disrespectful to human life, because humans have the right to have offspring by not castrating their vital organs.

## 2) Indonesian Code of Medical Ethics

The Indonesian Medical Code of Ethics (KODEKI) is a collection of professional ethical rules that are used as a guide for ideal behaviour and to resist the temptation to deviate from the professional profession of doctors in Indonesia as a professional group in the implementation of health services in society. The Indonesian Doctors Association (IDI) is a professional organization and the highest hierarchy in decision making in establishing KODEKI. KODEKI plays a role in maintaining honour and dignity as a profession that differentiates it from ordinary professions.<sup>142</sup>

The implementation of the Indonesian Medical Code of Ethics was renewed in the Decree of the Indonesian Doctors Association General Manager No. 111/PB/A.4/02/2013 concerning the Implementation of the Indonesian Medical Code of Ethics.

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<sup>142</sup> Afandi, *Kondisi keberlakuan bioetika dalam mekanisme revisi kode etik kedokteran Indonesia*, disertasi, FK Universitas Indonesia, Jakarta, 2010, p. 45.

In KODEKI there are four principles that are upheld, namely beneficence, non-maleficence, autonomy, and justice.<sup>143</sup> The medical code of ethics must contain the norms that exist in society, the presence of a doctor can be a helper for safety and the common good.

In the case of refusal to carry out a chemical castration sentence, the Indonesian Doctors Association stated that conventional and chemical castration is a violation of the medical code of ethics. There are several articles that conflict with the implementation of chemical castration, namely:

- a) Article 3 which reads "In carrying out his medical work, a doctor may not be influenced by something that results in the loss of freedom and independence of the profession".
- b) Article 5 which reads "Every doctor's action or advice, which may weaken psychological and physical endurance, must obtain the consent of the patient or his family and is only given for the benefit and good of the patient".
- c) Article 6 which reads "Every doctor must always be careful in announcing or implementing any new technical discoveries or treatments that have not been tested for truth and on matters that cause public anxiety".

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<sup>143</sup> Fakultas Kedokteran USU: Kode Etik Kedokteran, Sumatera Utara, 2006.

- d) Article 10 which reads "a doctor is obliged to respect the rights of patients, colleagues, and other health workers, and is obliged to maintain the patient's trust".
- e) Article 11 which reads "every doctor must always remember the obligation to protect the right to life of human beings."
- f) Article 12 which reads "In carrying out his work a doctor must pay attention to all aspects of health services (promotive, preventive, curative and rehabilitative) both physically and psycho-social-cultural of his patients and try to become a true educator and servant of the community”.

The Medical Code of Ethics is a code of ethics upheld by a doctor. Chemical castration is carried out by paralyzing the vital organs of perpetrators of sexual violence against children or paedophiles. Even though in article 11 a doctor is obliged to respect the right to life of a human being, the Indonesian Doctors Association argues that castration is not respecting a person's right to life to always reproduce. Because the effects of chemical castration will also have an effect in the long term, even though in theory chemical castration will disappear within 6 months after the activity of giving chemical drugs is stopped.

Then it is strengthened by the statement that a doctor must always be careful in applying new techniques or discoveries in medicine that have not been tested for truth which will later cause public unrest. In

Article 6 it is clearly stated, treatment or drug administration that has not been tested for its truth must be very careful and careful so that practice errors or malpractice do not occur. As is the case with chemical castration which does not yet have legal certainty, when a doctor practices without a license in the form of a SIP (Practice Permit), it will be reviewed by the Indonesian Medical Discipline Honorary Council (MKDKI) which was formed to uphold the discipline of doctors in carrying out their practice.<sup>144</sup> It is this caution that is used by the Indonesian Doctors Association not to accept cooperation from the Attorney General's Office to carry out chemical castration sentences. In addition to not having legal certainty as a result of not having issued a derivative decision by the Ministry of Health or an amendment to Law Number 17 of 2016 regarding the elaboration which contains technical instructions for castration.

The Indonesian Doctors Association rejects the execution of chemical castration sentences because the punishment is against the Indonesian Medical Code of Ethics (KODEKI). In Article 44 of Law Number 29 of 2004 concerning Medical Practice, that doctors have health service standards, then in Article 51 it states that the obligation of a doctor is to provide medical services in accordance with

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<sup>144</sup> Wila Chandrawila, *Hukum Kedokteran*, Mandar Maju, Bandung, 2001, p. 98.



professional standards and standard operating procedures as well as patient medical needs.<sup>145</sup>

The strong reason for the Indonesian Doctors Association is the denial of the Hippocratic oath which is held in high esteem by doctors all over the world. The Indonesian doctor's oath is contained in the 2012 KODEKI or in Government Regulation Number 26 of 1960 concerning Pronunciation of Doctor's Oaths.

If a doctor violates the oath, it means that the doctor has committed an ethical and oath violation in accordance with the assembly's policy. Such violations can bring a doctor into the criminal realm and abort him as a doctor, meaning that after a doctor violates it, he will no longer be able to carry out his profession as a doctor. Because specifically, the medical code of ethics is formulated to maintain the nobility of the profession, reduce ethical conflicts, secondary deterrence of unethical behaviour and maintain the relationship between doctors and other parties as a relationship of trust.<sup>146</sup>

Although castration can be carried out in two ways, namely surgery and chemistry, the Indonesian Doctors Association is of the opinion that abuse of authority can lead to violations of human rights. In line with the imperfect State Gazette Number 5882 in regulating chemical castration. In the absence of SOPs or technical guidelines, and the

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<sup>145</sup> *Op. Cit.*, Anang Priyanto, p. 141.

<sup>146</sup> Anna Rozaliyani, *et al.*, *Prinsip penetapan Sanksi bagi Pelanggaran Kode Etik Kedokteran*, Jurnal Kedokteran Indonesia (JEKI), Vol. 2 No. 1, 2018, p. 7.

absence of legal regulations from the minister of health, doctors can also be said to have violated the Doctor's Oath and violated the Medical Practice Act which can lead to criminal acts and disqualify the medical profession.<sup>147</sup>



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<sup>147</sup> *Ibid.*

## CHAPTER IV

### CLOSING

#### A. CONCLUSION

Based on the previous discussion it can be concluded that.

1. Application of additional criminal penalties of chemical castration against perpetrators of sexual violence against children which in Law Number 17 of 2016 concerning Child Protection is ineffective. This can be seen from the author's analysis which contrasts the additional punishment of chemical castration with the theory of legal effectiveness according to Soerjono Soekanto, which states that there are 5 (five) factors that influence the effectiveness of a regulation, namely, legal factors or laws, law enforcement factors, factor facilities or facilities that support law enforcement, community factors, and cultural factors. These five factors, none of the factors is fulfilled that the additional punishment of chemical castration is effective.
2. The implementation of additional criminal penalties of chemical castration against perpetrators of crimes of sexual violence in Indonesia cannot be easily implemented because the implementation of chemical castration in Indonesia reaps pros and cons which results in the emergence of several obstacles. These obstacles, namely, *firstly*, from a human rights perspective, chemical castration is considered to have violated human rights because chemical castration is an act of torture, inhumane treatment and degrading human dignity. *Secondly*, the obstacles experienced by the attorney general who is responsible for executing court decisions, the

execution of chemical castration sentences cannot necessarily be carried out by the attorney general because chemical castration has the authority as executor is a health organization, namely the Indonesian Doctors Association (IDI), in this case, IDI has filed a refusal to become executor of chemical castration. *Thirdly*, the obstacle to the application of chemical castration came from the Indonesian Doctors' Association, as a Health organization IDI has the authority to be the executor of chemical castration, but IDI refuses chemical castration because it contradicts the Hippocratic Oath or doctor's oath and violates the Indonesian Medical Code of Ethics.

## **B. SUGGESTION**

1. The government in terms of passing a law and regulation, in this case PERPPU number 1 of 2016 which was passed into Law Number 17 2016 concerning child protection, must study it in depth before passing it. These regulations are still deemed ineffective because they have not fulfilled the factors that influence the effectiveness of a law or law enforcement and examine more deeply whether these regulations are in accordance with human rights and related regulations.
2. To deal with sexual crimes against Indonesia, chemical castration is not the best solution, as evidenced by the fact that several countries apply chemical castration to perpetrators of sexual violence against children. In addition, there are still many obstacles to carrying out chemical castration. Therefore, the government must find a way out so that sexual violence

against children does not recur in a more humane way, such as educating the public, assisting victims and perpetrators so that they do not commit these crimes again.



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Article 6 of Government Regulation Number 70 of 2020 concerning Procedures for Carrying out Chemical Castration, Installation of Electronic Detection Devices, Rehabilitation and Announcement of the Identity of Perpetrators of Sexual Violence against Children states that chemical castration must be carried out by officers who have competence.

Article 22 Paragraph 1 of the 1945 Constitution states that "In the event of a pressing emergency, the president has the right to issue government regulations in lieu of laws". See also Article 1 Paragraph 4 Number 11 of 2011 Concerning the Formation of Legislation, reads "Government Regulations in Lieu of Laws are statutory regulations stipulated by the President in matters of compelling urgency."

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## Attachment 1



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### SURAT KETERANGAN BEBAS PLAGIASI

No. : 030/Perpus-S1/20/H/I/2023

*Bismillaahirrahmaanirrahaim*

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AGAINST CHILDREN

Karya ilmiah yang bersangkutan di atas telah melalui proses uji deteksi plagiasi dengan hasil 15.%

Demikian surat keterangan ini dibuat agar dapat dipergunakan sebagaimana mestinya.

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