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Reconstruction of Castration Sanction Formulation in The Perspective of Indonesian Criminal Law Renewal

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Abstract

The development of crimes should be balanced by the development of criminal law-oriented policies protecting society. The castration sanction policy as a government reaction on the rise of sexual violence against children has a negative side in its establishment. The research method used in this research was normative juridical research that examined the rules or norms in positive law to find the truth based on the legal scholarly logic of the normative side. The results of research obtained were, firstly, the existence of the castration sanction based on *ius constitutum* did not reflect the essence of punishment so that the offenders repented, and it only aimed to arrest the offender and focused on the dehumanization potential of the offenders. Since the reality of sex crime in Indonesia was seen as an alarming phenomenon, the existence of this castration sanction was not immediately abolished from the criminal law of Indonesia in the future. Secondly, the existence of the castration sanction is still needed as long as it is positioned as a specific action and alternative to aggravated sex offenders.

Keywords: castration; punishment; criminal law renewal; criminal law.

Abstrak

*Perkembangan kejahatan harus diimbangi dengan perkembangan kebijakan hukum pidana yang berorientasi melindungi masyarakat. Kebijakan sanksi kebiri sebagai reaksi pemerintah akan maraknya kekerasan seksual terhadap anak memiliki sisi negatif dalam perumusannya. Metode penelitian yang digunakan dalam penelitian ini yaitu penelitian yuridis normative yakni mengkaji kaidah-kaidah atau norma-norma dalam hukum positif untuk menemukan kebenaran berdasarkan logika keilmuan hukum dari sisi normatifnya. Penelitian ini memperoleh hasil, pertama, keberadaan Sanksi kebiri dalam tataran *ius constitutum* merupakan sanksi tindakan akan tetapi tidak mencerminkan esensi dari sanksi tindakan yaitu perbaikan pelaku, namun bertujuan untuk menjerakan pelaku dan berpotensi terjadinya dehumanisasi terhadap pelaku. Akan tetapi melihat realita kejahatan seksual di Indonesiasaat ini dipandang sebagai fenomena yang mengkhawatirkan, sehingga keberadaan sanksi kebiri ini tidak serta merta dihapuskan dari hukum pidana Indonesia dimasa yang akan datang. Kedua, keberadaan sanksi kebiri masih diperlukan sepanjang diposisikan sebagai tindakan khusus dan alternatif terhadap pelaku kejahatan seksual berat*

Kata kunci: kebiri; pembedaan; pembaruan hukum pidana; hukum pidana.

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Introduction

The existence of criminal law is not separated from sanctions that can be said typical of other legal families. Sanction is suffering, a necessity of the existence of criminal law. Harbert Packer clarifies that it is very unlikely to address or negate the existence of criminal law, because it is very unlikely to face possible criminality in the present and future (Usman, 2011). Without legal sanctions, it would be impossible for criminal law to ensure human governance to achieve order and tranquility. Criminal sanctions imposed against the offenders are not separated from the objectives to be achieved, as the opinion of Emile Durkheim, criminal is not separated from the interests of society, because later

after committed crime, the offenders will live in society (Hiariej, 2014). The granting of criminal sanctions in the framework of the objectives to be achieved may not necessarily be applied freely. Pompe says that no criminal sanction is applied except on the basis of deeds against the law and mistakes that cannot be denied (Hiariej, 2014). The form of criminal sanctions in various Indonesian legal products, in general, does not differ considerably from those governed in the Criminal Code (KUHP) of Indonesia, Article 10. Even so there are several criminal acts outside the current Criminal Code that recognize the existence of several types of sanctions contained in article 10 of the Criminal Code of Indonesia, such as sanctions in the form of rehabilitation of addicts in the Law of the Republic of Indonesia Number 35 of 2009 on Narcotics, or Sanctions on the Seizure of certain goods as an additional criminal act in article 18 of the Republic of Indonesia Law No. 31/1999 on Corruption. But in general, this type of imprisonment and criminal fines are sanctions that are relatively often applied in several laws and regulations.

In 2016, the government responded to the phenomenon of increasing numbers of children who became the victims of sexual violence by pedophiles, which resulted in a Government Regulation in Lieu of Law Number 1 of 2016 on Second Amendment to Law of the Republic of Indonesia Number 35 of 2014 on Amendment to the Law of the Republic of Indonesia Number 23 of 2002 on Child Protection (hereinafter referred to as Government Regulation in Lieu of Law Number 1 of 2016). The content of article 81 paragraph (7) regulates the types of castration sanctions that are applied as follows: "Against the offenders as referred to in paragraphs (4) and (5) may be subject to chemical castration actions ...". This regulation was made with the aim of protecting children as vulnerable groups, as stated in the explanation of article 5 paragraph (3) of the Law of the Republic of Indonesia Number 39 of 1999 on Human Rights (Wahyuni, 2017). The weak position of women and children puts them at great risk of sexual violence which has negative impacts (Arief, 2017).

The uniqueness of castration is not the "evolution" of criminal sanctions contained in the Criminal Code. Castration is a form of punishment by giving an injection to a offender in which the function is to suppress a person's sexual desire. The birth of these sanctions is expected to be a deterrent effect for the society because child protection is needed in Indonesia today as an effort to protect the next generation.

The researchers would like to try analyzing castration from the view of Indonesian criminal law, especially from the side of criminalization. In addition, Indonesia is currently planning Criminal Code as well as the formulation of bill on the elimination of sexual violence. This paper is expected to give contribution to the efforts to harmonize the application of criminal justice in the Indonesian criminal system in the future.

Research Problems

As the core of this research, the researchers formulate problems as follows, *first*, how is the position of castration sanctions reviewed from the positive law perspective and the

renewal of Indonesian criminal law?, Furthermore, how the reconstruction of the Indonesian criminal law would be imposed in the future?

Research Methods

This research used juridical (normative) approach which is a research focusing on the application of conventions or norms in positive law to find the truth based on the legal science logic and normative side (Wiharyangti, 2011). The approach used was conceptual approach to analyze the problem of the castration sanctions in Indonesian government system. The legal material was obtained from several related legislation, while the literature came from books, journals legal seminars, and trusted online media. The analysis of legal materials was done qualitatively by describing the materials that had been collected in a qualified manner in the form of logical and effective sentences.

Discussion

Castration sanctions in the perspective of positive law and renewal of criminal law in Indonesia.

Criminal law recognized the term double-track system (DTS) which was interpreted as a two-lane system in the rationing of sanctions: on the one hand the type of criminal sanctions, and other types of sanction measures on the other. The researchers emphasized two different types of sanctions, which are criminal sanction and sanction measure. Criminal sanction is reactive to a deed, while sanction measure is more anticipatory to the offender. Citing the opinions of Jonkers, criminal sanctions are focused on the criminal accused to the crimes committed (Hiariej, 2014). Sanction measure has a social goal (Sholehudin, 2003). Criminal sanction can be said to further emphasize the element of suffering charged to lawbreakers, while sanction measure is a community protection effort and coaching or care for the offenders.

The background of DTS ideas suggests that in criminal law, its constellation is not only covering criminal acts but also relatively more educational actions (Nashriana, 2015). The emergence of DTS ideas illustrates the development of criminal decommitment, from the notion of "punishing" or that developed during classical school, towards the idea of "building during Neo-Classical school. Classical school believes that the crime done determines the purpose of crime, while neo-classical school looks at the impact of the punishment in the future. In other words, criminalization shows the impact in the future of offenders and others who have possibility of committing crime in a wider community.

Criminal sanctions are getting increasingly humane and are likely to be applied, so that it is useful in the context of re-socialization of the crime offenders. Criminal sanctions in the form of deprivation of liberty (prisons) are increasingly unpopular and out of date, and are starting to turn to sanction measure and rehabilitation since they are considered more humane (Muladi, 1985). Punishment for crimes is increasingly humanized during the emergence of neo-classical and positivism schools, thus reminding the researchers on the idea of individualization of criminal. The current penal system in modern criminal law

is oriented towards offenders and deeds (*Daad-Dader Straafrecht*) so that the type of sanctions imposed not only includes criminal sanctions but also sanctions involving the act of providing relatively more severe educational suffering. The notion of individualization of criminal has the following characteristics (Warsito, 2018):

- a. Criminal liability is personal/individual: personal principles;
- b. Criminal sanction only applied to the guilty person: the principle of culpability;
- c. Crime shall be adjusted to the characteristics and condition of the offender: there must be looseness/flexibility for the judge in selecting criminal sanctions (type or weight of sanctions) and there must be a possibility of criminal modification (change/adjustment) in the implementation.

If it is examined more deeply, the idea of DTS comes from what is called the philosophy of punishment. Philosophy of punishment is about the basic idea of punishment which clarifies the understanding of the nature of sanctions. This philosophy of punishment has two functions, namely basic function and theoretical function (Sholehudin, 2003). The philosophy of punishment is also a philosophical basis for formulating a measure/basis for justice in the event of a crime. Based on this philosophy, two types of justice emerged consisting justice originating from the philosophy of retribution (retributive justice) and justice originating from the philosophy of restoration (restorative justice). The concept of restorative justice is a recovery for those who surrender to crime, where offenders have the opportunity to be involved in recovery (Prayitno, 2012). The idea of a double-track system and restorative justice has a relationship in terms of emphasizing recovery versus punishment.

The philosophy of Pancasila demands a balance and harmony between the interests of individual, community, nation, and country. It is time for criminal sanctions and punishment in Indonesia to be oriented to the interests of individuals (offenders/victims of crime), and society. Indonesian society views crime/criminal offence as an interference in *evenwichtstoring*, harmony, and harmony of people live, resulting in individual or community damage. Punishment is a community reaction that aims to restore the destruction of balance, harmony, and alignment (Muladi, 1985). When considering Indonesia as a place of the renewal of criminal law, the national criminal law must be rooted in the values of people live who become the soul and mind of Indonesia, which is values based on Pancasila (Hartini, 2004).

Regarding sanction measures in particular, only those based on Pancasila values that can be applied in Indonesia in the future, to improve, restore, or treat offenders to be able to return to better humans physically, psychologically, and socially. The values of harmony and balance as characterized by the philosophy of Pancasila in criminal purification are depicted in the DTS idea which does not fully use one of the two types of sanctions, but both are used equally and proportionally. The two types of sanctions between defamation/suffering (imposing criminal sanctions) and the element of guidance (through sanction measures) are seen as equally important.

The development of philosophy and school of punishment also influenced the development of theories on criminal and criminalization purposes. Moreover, these objectives will be related to the enforcement and protection of the law. Modern criminal law sees criminal and punishment aims to restore offenders in social life. It acts not only in retribution or deterrence of offenders of crime/criminal act. This objective illustrates the existence of legal protection for the offenders in respecting their human rights, to avoid the emergence of arbitrariness from the authorities (Suhayati, 2013). Hence sanction measures are required to protect the offenders, so there is a balance between prevention objectives (in the relative theory) with the purpose of coaching (treatment) in combined theory.

Castration punishment contained in Government Regulation in Lieu of Law Number 1 of 2016 in the amendment of Article 81 paragraph (1) and Article 81a governs the use of castration sanction. Based on the two formulations of the chapter, there are important things about castration sanction as follows:

- 1) Castration is a form of sanction measures, not a criminal sanction;
- 2) Castration should be decided in conjunction with the basic sanctions;
- 3) Maximum time frame is 2 years;
- 4) Executed after undergoing basic sanctions;
- 5) Castration should be followed by rehabilitation.
- 6) Not imposed against child sex offenders.

The reasons underlying the castration sanction regulation, as stated in the general explanation of Castration, as stated in the general explanation of the Government Regulation in Lieu of Law Number 1 of 2016, are: The existing child protection laws have not been able to provide a deterrent effect and prevent sexual violence against children comprehensively. To achieve that goal, we need to add:

- a) The basic sanctions in the form of the death penalty and imprisonment for life, as well as an additional punishment in the form of announcement of the offender identity; and
- b) Provisions to conduct of chemical Castration, electronic detection, and rehabilitation.

The researchers compares the Government Regulation in Lieu of Law Number 1 of 2016 on Castration sanctions with rehabilitation sanction that have already been known in positive law of Indonesia. The researchers identified that the major difference between rehabilitation and castration was lying in its purpose. Rehabilitation has a balance between the aim to protect the community and to rehab the offenders, while castration is aimed more at protecting the public but does not prioritize the interests of the offenders. The opinion of the researchers is based on the entrapment purpose on the offenders, so that the sanctions appear to override the basic rights possessed by all humans, namely the right not to be tortured and the right to continue the lineage/have children. The fundamental right to continue the lineage in Universal Declaration of Human Rights is a right that cannot be revoked so that there is no reason for any party to take it. This right can no longer be negotiated and it must be given to every human being (Zulfa, 2005).

Pancasila as the philosophical basis of the state and the source of all legal resources holds a belief to actualize justice from the pattern and character of Indonesia, namely Pancasila justice. Justice referred to in Pancasila is the integration of all values contained in it starting from *Sila 1* to *Sila 5*. The researchers argue that Pancasila justice aims to give glory to humans. To implement Pancasila justice as a source of legislation, the criminal policy products must contain the values of balance and harmony between the interests of individuals, society, nation and state as a manifestation of glorifying humanity.

If we pay attention to Pancasila philosophy as a philosophy of criminalization, the problem of humanity and justice is the main thing. Sanction measures are given in an effort to improve, restore, or treat criminal offenders to become better human beings than before. "*Kemanusiaan yang Adil dan Beradab*" (A just and civilized humanity), as stated in Pancasila, *Sila 2* when viewed from the witness's perspective, it can be interpreted that criminalization must be based on the recognition of human dignity as God's creation. Criminalization must not identify human rights, not to mention the rights that cannot be eliminated so that humans cannot be demeaned for any reason. The implication is that the inhuman element and nature of the offenders cannot be put aside to release them from their evil thoughts, traits, habits, and behaviors. To overcome this matter, the existence of castration sanctions needs to be reviewed, especially to renew the criminal law of Indonesia. According to the witnesses of castration sanction, he was brought to justice based on basic human rights in continuing his lineage (Matompo, 2014).

Determination of human values in physical punishment imposed on sex offenders can be described from the opinions of several experts. Among them was the opinion of Dr. Eka Viora, Sp. KJ (K) as Deputy Chairperson of the Management Board of the Indonesian Mental Health Association (PDKSJI) who explained that drugs used in chemical castration have side effects, such as affecting the function of secondary male hormones that can be lost, thereby accentuating physical and psychological properties like what women have. This action can also accelerate bone damage. Wimpie Pangkahila (Sexologist from the Faculty of Medicine of Udayana University, Bali) also explained that chemical castration can accelerate body aging, accelerate bone loss, reduce muscle mass and increase fat that affect the risk of heart disease and blood vessels (Wijaya, 2016). Based on this opinion, it can be explained that castration sanctions not only take away the right of people to continue their lineage but also have side effects which further reduce human rights to physical and psychological health. In the view of the researchers, such an impact can be referred to as a form of indirect torture on the offenders, moreover the sentence was given by force through criminalization.

Humanitarian principles are also contained in article 6 paragraph (1) of the Law of the Republic of Indonesia Number 12 of 2011 on formation of laws, including Government Regulations in Lieu of Law Number 1 of 2016 which is the basis for the implementation of castration sanctions. Every material is needed to reflect the principles of protection and humanity. The researchers also reminded of the Standard Minimum Rules for the Treatment of Prisoners, which had been adopted by the first United Nations Congress, on

the Prevention of Crime and the Treatment of Offenders, in Geneva, Switzerland 1955. The minimum standards have changed the concept of the Indonesian Government, which was originally focused on retaliation/entrapment into penal concept based on the principles of rehabilitation and social reintegration, as stated in the general explanation of Law of the Republic of Indonesia Number 12 of 1995 on Corrections. Indonesia has also ratified the International Covenant on Civil and Political Rights in the Law of the Republic of Indonesia Number 12 of 2005, where article 10 paragraph (4) generally contains: Penal system must aim to improve and carry out rehabilitation in treating the convicts.

In terms of the purposes of criminal law, it generally recognizes three theories, which are retributive/retaliation (absolute) theory, relative theory, and combined/mixed theory (Hiariej, 2014). In addition to these three theories, Hiariej mentions a fourth theory called Contemporary theory, which is the development of the three theories above. Researchers divide contemporary theory into two: social control theory and restorative justice theory (Zulfa, 2014). There is one more theory about criminal law namely integrative theory (humanity in Pancasila system) that the researchers quoted from Muladi. This theory is based on the reality of the development of criminal law that pays more attention to factors concerning human rights and makes crime operate and function. Therefore, a multidimensional approach is needed based on the impact of criminal sanctions both individually and socially (Muladi, 1985).

In the General Explanation of Government Regulation in Lieu of Law Number 1 of 2016, castration sanctions serve as prevention efforts and provide a deterrent effect on the child sex offenders. The phrase "gives a deterrent effect" is a description of the purpose of the trap which has begun to be abandoned by modern criminal law, no exception in the ideals of Indonesian criminal law in the future. The purpose of this shift is seen in the General Explanation section of the Correctional Law which states that the function of criminalization is no longer merely a trap but also the rehabilitation and social reintegration of the offenders. This is in line with what is formulated in article 54, Bill of Criminal Code (RUU KUHP) as follows:

- (1) Criminalization purposes:
 - a. Prevent criminal acts by enforcing legal norms for the protection of society
 - b. Punish the offenders by carrying out development so that they become good and useful people;
 - c. Resolve conflicts caused by criminal acts, restore balance and bring peace to the society; and
 - d. Erase the guilt of the convicts.
- (2) Criminalization is not intended to tell and degrade human dignity.

It is undeniable that the problem of a child sex crime in Indonesia is indeed a remarkable crime phenomenon. The researchers tried to dig data on the subjects of sexual violence against children, which in 2016 reached 120 cases, 2015 by 218 cases, then in 2017 decreased to 116 cases (Krismiarsi, 2018). A large number of cases had emerged for instance the case of Andri Sobari involving 39 children as the victim (nasional.tempo.co).

By looking at the data, what the lawmakers proposed regarding the setting of castration policy is seen as relevant to the child sex crime prevention effort. The preventive measures must use enforcement of legal norms that prioritize the protection function, as contained in the bill of article 54 RKUHP. Considering this matter, the castration sanction is assessed as less relevant if it is associated with the protection purpose which is against the prevention purpose.

Initially, the bill of Government Regulation in Lieu of Law Number 1 of 2016 still uses prevention and rehabilitation as the distribution purpose of child sex offenders in addition to the entrapment purpose. However, what is contained in the consideration of the current Government Regulation in Lieu of Law has removed the provisions regarding rehabilitation purpose. If it is compared with the General Explanation in the Law of the Republic of Indonesia Number 12 of 1995 on the criminalization function which is no longer merely the entrapment but also a rehabilitation and social reintegration of the offenders, then it is considered as a contradictory to the entrapment purpose in Government Regulation in Lieu of Law Number 1 of 2016. The castration sanction debate appears more clearly on the bill of law on the determination of sexual violence in discourse, in which the bill of the castration sanctions is not listed. Whereas the Law is a law governing the efforts to eliminate sexual violence, where there is a section governing provisions on the issue of law enforcement and the sanction/criminalization of sexual violence offenders.

The bill of Criminal Code of Indonesia that does not include the castration sanction by the researchers is seen as a decline. The researchers tried to compare with other countries who have used castration sanctions as a type of criminal sanction. The purpose of the researchers was based on Muladi's opinion, that the national criminal law should be adaptive with new developments including international development of the World (Muladi, 1985).

South Korea is the first Asian country that applies the castration sanctions in 2011, and imposes it to the sex offenders aged over 19 years old. The South Korean government used chemical castration after health experts gave the results that it will give a deterrent effect to the offenders. The castration procedure will be done after the psychiatrist diagnosis, as the basis of prosecution process. The United States which is a liberal country and the main researcher of the Declaration on Human Rights, also adopted the castration sanction in 9 states including California, Florida, Oregon, Texas, and Washington (Mardiya, 2017).

Denmark since 1929 has adopted the castration sanctions in its criminal legal system (Mardiya, 2017). The sex crime rates decline after the castration sanction policy for sex offenders was applied in Germany, in which castration was not taken absolutely but became a personal choice of the convicts (Wijaya, 2016). Later in UK 2014, as many as 25 convicted pedophiles volunteered to do castration. While in Russia, the castration sanctions can be given to sex offenders whose victims are 14-year-old, and about pedophile, the predicate should be based on the doctor's decision. Almost the same as

Russia, in Poland the castration sanction has been known since 2010, which is imposed to the offenders who rape children aged 14 years and under. Prisoners who would carry on the castration sanction have to obtain a psychiatrist mentoring first (Mardiya, 2017).

Here castration sanctions is improperly positioned as a form of usual sanction measures, because it does not have the value of development or treatment/rehabilitation for the offenders, as a feature of sanctions in the DTS idea in the form of improvement purpose through means beyond the imposition of criminal sanctions (Wiharyangti, 2011). It can be said that these sanctions affect the basic human rights, which is the right to have children and the right not to suffer/being tormented. Entrapment as a civil sanction purpose is also irrelevant to the purpose of its establishment in the idea of correctional provision idea in Law of the Republic of Indonesia Number 12 of 1995, as well as in the ideals of reform of the national Criminal Law of Indonesia in the Bill. Human values in criminal purification are important, especially if they are related to the philosophy of Pancasila. The castration sanctions in some countries is seen as a solution to reduce the child sexual abuse rate, in terms of crime prevention or its impact.

By observing the two opposite sides, the researchers give the idea of Indonesian castration sanctions in the future. The castration sanctions need to be given space in the positive law of Indonesia in the future, but it is must be in a sanction special and action alternative. It must be considered given the justice of Pancasila that emphasizes human rights and gives equal rights in obtaining justice (Febriansyah, 2017). As a result, it works to see the convicts as social beings that still have the right and obligation without avoiding their obligations to suffer as a consequence of the crimes done. This view became the basic purpose of the formulation as an attempt to erase the guilt in the bill of Criminal Code of Indonesia.

Reconstruction of Castration Sanctions in the Future

Based on the construction of the current regulation of castration sanctions, there are a few things that need to be understood. *First*, the granting of castration that must be decided along with criminal sanctions, in the form of a criminal matter This was first formulated in the Indonesian criminal law system, where sanction measures (in this case castration) were given following criminal sanctions. During construction, this only applies to types of additional criminal sanctions. Construction is a breakthrough, in which sanction measures are decided together with the underlying criminal sanctions so that they can become references for the application of other sanction measures. The construction is relevant to what is contained in article 101 paragraph (2) of the bill of criminal Code of Indonesia as follows: "Actions that can be imposed along with the basic criminal forms are:

- a. Driving license revocation;
- b. Expropriation of profits derived from criminal acts;
- c. Crime-related improvements;
- d. Working exercises;

- e. Rehabilitation; and/or
- f. Treatment at the institution".

However, according to the researchers, the construction has a weakness when associated with the castration sanctions. Because it aims more at the prevention of crimes by the offenders, not the efforts of treatment/rehabilitation for the criminals. It is very much different from the purpose of rehabilitation on narcotics or other matters regulating rehabilitation. In the case of bill of Criminal Code of Indonesia, Article 101 as mentioned above does not support this construction.

If referring to the idea of DTS, then between criminal sanctions and sanction measures both should be based on the alignment and balance as characterized by the philosophy of Pancasila, as well as used equally and proportionally. As Sudarto's opinion, sanction measures are given to protect the society through the development and treatment of the offenders or given to the offenders who cannot bear the responsibly or innocent offenders (Wiharyangti, 2011). Researchers find it inappropriate if sanction measures (including castration sanctions) are given to the offenders who can be held responsible for their actions, and are guilty, and are not given in the context of treating the offenders.

Second, castration sanction is given after the offenders undergo criminal sanctions. It is better to allocate this kind of Construction to the sanction measures in the form of rehabilitation. But it is not quite right if allocated to the castration sanction approved. In addition, it is sound inhumane if someone who has been imposed of criminal sanctions, is still given sanctioned castration sanction (Bahiej, 2012). Moreover, it is a physical sanction that restricts a person's right to have children. This sanction not in accordance with human values as mandated by Pancasila. Therefore, it is not appropriate if the castration sanctions in the form of determination or the application of analogies in the request are the same as the additional criminal sanctions that already exist in the current positive law of Indonesia, or as stated in Article 101 paragraph (2) of bill of Criminal Code of Indonesia that can provide explanation in connection with the basic criminal sanction.

Third, the maximum period is 2 years, in which the maximum period in the determination of castration sanctions raises several critical questions of the researchers: whether in a maximum period of 2 years the offender can be guaranteed to be cured/made aware of not having any sexual relations? What if it takes more than 2 years to reach the purpose of castration sanction? Since the basis is medical effort, to measure the possibility of the effectiveness of such sanction application on the offenders, it can only be measured/examined by the related scientific field.

Fourth, it is about rehabilitation that follow the allocation of castration sanction. The formulation can provide multi-interpretation, in terms of the rehabilitation but in what order? Is it to rehabilitate sex offenders, or to diminish another impact of castration sanctions? The explanation section of the Government Regulation in Lieu of Law Number 1 of 2016 does not set it clearly. If the rehabilitation is intended to rehabilitate the offenders, then in the view of the researchers it is right because it is relevant to the purpose

of treatment/rehabilitation. If that is the case for the lawmakers, then rehabilitation become the most prominent thing of castration, rather than "rehabilitation following castration", but rather "approved castration" if the rehabilitation is unable to provide better change for offenders, as well as the prevention and protection for the society".

When using the second interpretation, it is not exactly right if rehabilitation is used in the framework to deal with the negligence of castration sanctions and its side effects. In other words, the state face the consequences castration that were done by the State itself. This situation indicates that rehabilitation has been out of its function and nature, which is used to rehabilitate/foster the effects of criminal offense, or at least because of the implementation of the judicial process (Rehabilitation of good name due to the judicial process). According to the researchers' knowledge, there is no such mechanism. If there is, the mechanism is also in the form of compensation (in the field of civil administration).

Fifth, castration approved has not been touched by the Criminal Code of Indonesia. In the formulation of bill of Criminal Code on the sanction, castration is not included in the type of sanction measures in section 101. The approved castration needs to be specifically regulated in the national Criminal Code in the future. These sanctions limit basic human rights that should not be limited by the State, which is the right to have children. *Sixth*, there are no rules regarding the implementation of castration sanctions, and the detailed rules regarding these sanctions are still lacking in the explanation of Government Regulation in Lieu of Law Number 1 of 2016. Seeing the critical identification of the above, various weaknesses from the current castration sanctions arrangement were found, so the researchers provide an overview on the need to reconstruct castration sanction rules, as an effort to prevent sex crime.

Based on the explanation above, essentially castration sanction is necessary to be regulated in the positive law of Indonesia. Judging from the perspective of the religious norms, where Indonesia is a country that recognizes the religion and the majority of the population practicing their religious teachings, then every legal policy certainly must pay attention to such reality. Indonesia as a country whose majority population is Muslim implies the lives of its people that cannot be separated from the values contained in religious norms, namely Islam. Therefore, regarding the jurisprudence of castration sanctions, the researchers consider a little bit perspective of Islamic law from the view of the ulemas in Indonesia.

Islam does not recognize the punishment called castration. Castration is categorized as illegitimate because it is banned to change what was set by Allah SWT, and it is forbidden in Quran Al-Ahzab verse 36. But on the other hand, castration which is prohibited by the Prophet Muhammad SAW is castration of singles who leave the pleasure of the world, and not as part of punishment. Because castration which does not function as a punishment is contrary to human creation purpose. Castration as a punishment is permissible as long as it is not permanent (Habiburrohman, 2017).

Indonesia has many Islamic organizations, the largest among them are Muhammadiyah and Nahdlatul Ulama (or commonly abbreviated NU). The theologians

from the two organizations also have different views on the castration sanction, some of them allow and others prohibit it. Especially for those who allow it, the reasons are: first, castration sanction applied in Indonesia is temporary and it can be reinstated; Second, castration sanction is the alternative for child sex offenders, in which the function is to protect the benefits of the general people; Third, castration sanction can be categorized as *Jarimah Takzir* (the rules that are not governed both in Quran and Hadith, but the determination of punishment is in accordance with the policy of the ruler to enforce the law based on Judge Decision) (Ratnasari, 2018).

From the various views in the discussion above, the researchers would like to give an idea of the construction of castration sanctions in the future Indonesian criminal law. The idea is as follows:

a. Castration Sanction as Punishment for Special Form of Action

Castration sanctions have different objectives compared to general sanction measures (e.g. rehabilitation). Based on the formulation of type of sanction measures in Article 101 paragraph (2) of the bill of Criminal Code of Indonesia, and by comparing it with the purpose of castration sanctions on the General Explanatory of Government Regulation in Lieu of Law Number 1 of 2016, then the castration sanctions emphasis more on the goal of entrapment of offenders rather than to development/treatment as the purpose of general sanction measures. The purpose of castration sanction has more impacts on the offenders, which also limits the fundamental rights of human beings to continue the lineage.

Castration sanctions in practice are a form of medical effort on the human body (through surgery or injecting substances). The definition of "action" for the proper castration sanctions, as the form of rehabilitation (medical) action as well as treatment, is formulated in Article 101 paragraph (2) of the bill of Criminal Code of Indonesia. Given the impact of the suffering received due to the castration sanctions imposed, it is necessary to add this form of sanctions as a type of special sanction measure and added in the alternative of the Criminal Code of Indonesia in the future. The researchers analogize this sanction in the position of capital punishment as a special criminal subject in article 66 of the Criminal Code, because it has almost similar character as capital punishment in terms of revocation/limitation of human rights. In the description above, castration sanctions has not been included in the bill of Criminal Code of Indonesia yet.

This sanction is formulated through the process of Government Regulation in Lieu of Law Number 1 of 2016 formulation, in which it becomes the right of the President with the approval of the People's Representative Council of the Republic of Indonesia. Although the hierarchy or formulation procedure is correct, substantively and philosophically the purpose of criminalization has not been appropriate. Moreover, article 6 of the establishment of legislation explains that the material of the legislation content must reflect the principle of humanity, which is precisely a dictionary of the

approved castration sanction law. Moreover, the castration sanctions are also not listed in bill of legislation on the elimination of sexual violence.

b. Castration sanctions can be given to the sex offenders in general

In this second idea, it is possible to impose the castration sanction to the sex offenders in general (not limited to child sex crimes). It is the implication of the first idea above. To include this sanction in the national bill of Criminal Code as a form of special and alternative action, then violations related to sex crimes and its punishments may occur. This idea also pays attention to the sex crimes rates in Indonesia that might increase in the future. Later the granting of this castration sanction must meet the requirements which is being imposed on the aggravated severe sex crimes. Regarding these aggravated sex offenders, the researchers explained it in the following 3rd discussion.

c. Threatened as Alternative and Was Given to the Aggravated Sex Offenders

The researchers approved the formulation of castration sanctions that has been induced already in Government Regulation in Lieu of Law Number 1 of 2016, which puts this sanction as an alternative form, as stipulated in the amendment of Article 81 paragraph (7), " the offenders as referred to in paragraph (4) and paragraph (5) might be given punishment in the form of a chemical castration ", where the use of the word "can" gives the interpretation that the sanctions are facultative/optional, which means that it might be imposed, nor to a child sex offender. If any sanction is imposed, it must fulfil the provisions of Article 81 and article 81 A as follows:

- a) proved to be a repetition act of violence or threat of violence forcing the child to do intercourse with the offender or with another person; Or
- b) proved as threat of violence or violence forcing the child to do intercourse with offender or with others, in which these acts cause: victims of more than 1 person, severe injuries, mental disorders, infectious diseases, impaired or loss of reproductive function, and/or fatality; Or
- c) not a child.

According to the researchers, the formulation was quite precise as it gave the limitation of castration sanctions only to the offenders who meet these conditions.

The problem is, when it is associated with the placement of castration sanctions in the formulation of special sanction measures in the Criminal Code of Indonesia, it is necessary to reconstruct the direction of sanctions. An alternative to the title of this sub-discussion is to regulate castration sanctions as the last option of other types of sanctions. Before giving these sanctions, it must first open up the possibility of giving other sanction measures, such as rehabilitation, treatment at an institution, or installation of electronic detector (Wijaya; 2016). Castration sanctions that have a negative impact are made as a last resort, so that if other sanction measures are still relevant to the perpetrators, then an action other than castration must be prioritized for the offenders. Placing castration sanctions as the last alternative is seen as being

able to provide the value of justice in the perpetrators' awareness by humanizing humans as well as the embodiment of Pancasila Justice (Febriansyah, 2017).

Then, regarding the limitation of offenders that can be imposed with castration sanctions, the researchers proposed an idea to modify the existing formula. In placing castration sanctions as a special sanction measure in the Criminal Code of Indonesia in the future, it is necessary to change the protected legal subjects; Not only children but also to everyone (adults and children) who are the victims of sexual violence. Considering this matter, the researchers gave the idea of limitation as follows:

- a) Sanction is given to any person who is shown to do repeated act of violence or threat of violence that forces an adult outside of a legitimate marriage or a child to engage in intercourse, with the offender or with another person;
- b) The proven violence or threat of violence that forces an adult outside of a legitimate marriage or a child to engage in intercourse with the offender or with another person, of which the such act cause a victim of more than 1 person, and/or Infectious diseases; Or
- c) Not given to children, or adults at a productive age who have not had children.

In addition to expanding the protected legal subjects, the researchers also gave the limitation of castration sanction from the side of the consequences posed by the crime. The researchers restricted only two consequences, i.e. the act of sexual violence causing more than one victim, or the act of sexual violence leading to infectious diseases. There are only two reasons are synchronized and in line with the purpose of sanction measures, which is prevention. The limitations given by the researchers have purpose below:

- a) prevent offenders of sexual violence that causes more than one victim. In the researchers' view, the offenders tend to repeat the same deeds.
- b) prevent the offenders with sexually transmitted disease to sexually transmit the diseases to others.

As a form of prevention, the formulation is also a form of social protection. Regarding the consequences of the deeds outside the two formulas, it is "enough" to give criminal sanctions (either basic or accompanied by additional criminal sanction) or sanction measures other than castration.

In addition, the researchers also expanded the limits of the offenders who could not be the subject to the castration sanction approved. This expansion is not in line with the previous provisions, so this sanction is not imposed on the adult offenders (not children) in the productive age between 20 to 40 years old (Apriliyanti, 2017). It is a form of protection of rights of offenders in the productive age who still can have children. For children or adults of productive age and have no child who involve in repetition of sex crimes or have sexually transmitted diseases, the castration sanction approved is given as the last and alternative sanction, therefore other sanction measures other than castration must be imposed to the offenders.

- d. Have a Maximum Time Limit According to Expert Standard

The maximum time limit for implementing castration sanctions has been set in Government Regulation in Lieu of Law No. 1 of 2016, article 81A paragraph (1), and basically the researchers agree if the execution time for castration sanctions is limited. The researchers disagree about the maximum (or minimum) time that cannot be determined. According to the researchers, the maximum time limit can affect the effectiveness of these sanctions to achieve the desired goals. Therefore the researchers had a view that there is no need to give a certain time limit. In deciding how long to implement an approved castration, the Judge must pay attention to the results of the study/research or expert recommendations/suggestions on the offenders.

e. The right of offenders to get remedies due to castration sanctions

This relates to the provision of castration sanctions as an alternative and the maximum time limit determined based on consideration/scientific review from the experts. Government Regulation in Lieu of Law Number 1 of 2016 regulates the provisions that the castration sanction imposed should be followed by rehabilitation, although the provisions still provide multiple interpretations, whether it aims to rehabilitate the sex offenders, or deal with the consequences of the offender's actions. The researchers gave the idea to overcome the vulnerable position of rehabilitation measures in the formulation in order to separate rehabilitation measures in an effort to rehabilitate the perpetrators and recovery as a post-operation effort of castration sanctions. Therefore, post-implementation restoration of castration must be given, if the offenders are subject to castration sanctions.

f. Judges in imposing castration sanctions must pay attention to the results of scientific studies/research conducted by doctors and psychiatrists

Marc Ancel explained that in modern criminal science there are three important components namely criminology, criminal law, and criminal policy aimed at formulating a criminal law policy that protects the whole society not only some or one party (Patria, 2014). Then science outside the law is needed to meet the demands of protection for the whole society. Castration sanctions in the context of whole society protection need to pay attention to the scientific opinions and studies in other fields outside of the law, in this case are the fields of medicine and psychology, or even from Social Sciences. This is in line with the bill of Criminal Code of Indonesia on the guidelines for criminalization. The researchers also analyzed it by regulating the Society research in the Law of the Republic of Indonesia Number 11 of 2012 on the Juvenile Criminal Justice System (SPPA), which regulates consideration from the social side (including education) and the offenders, as well as the criminal impact on the future of children. There are also several countries that implement the approved castration by considering scientific studies when the action is taken. It is an illustration showing that take the fundamental rights of an obligation through a long process may avoid the loss of others.

That is the basis for the need for medical and psychological reviews/scientific review before castration sanctions are imposed. This scientific study/review must be

carried out by an expert or institution appointed by the court/state, the results must be the primary consideration of the judge whether castration sanctions are appropriate or not. In addition, in the scientific study of the offenders, the experts also provide other recommendations on sanction measures, so that castration become an alternative or last choice.

Conclusion

There are two conclusions based on a discussion of the problems mentioned above. *First*, castration stipulated in Government Regulation in Lieu of Law Number 1 of 2016 Jo. Law Number 17 of 2016 is a type of sanction measures, which is sourced from the idea of double-track system in the framework of Indonesian criminal law renewal. Sanction measures should be aimed at rehabilitation, resocialization, and reintegration of the offenders in the society. But that does not seem to be the goal of the current castration sanction, which emphasizes the purpose of preventing crime and offenders from committing crime.

Second, Although there is a weakness in the formulation of the existing castration sanctions, it does not mean that the sanctions should be eliminated from the construction of criminal sanctions in Indonesian criminal law in the future since the sex crime rates (both child and female victims) is at an alarming point. It will be more appropriate when it is placed as a special sanction measures, which is applied in a limitation and alternative. This means that the castration can be applied to all aggravated sex crimes, and this sanction is the ultimate choice.

Suggestion

Referring to the Government Regulation in Lieu of Law number of 2016 Jo Law Number 17 of 2016 which places chemical castration as sanction measures but not formulated as it should, it is necessary to make improvements in the formulation of regulations so as not to draw a new ground. In the context of reforming the national criminal law, lawmakers are expected to place chemical castration as a special sanction measures in the same manner as death penalty in the bill of national criminal law and become the last option of sanction measures. It is also important to affirm the position of castration sanction in the bill of national criminal law for the elimination of sexual violence, to synergize the three laws in the future, which are Criminal Code of Indonesia, Law on Child Protection, and Law on the Elimination of Sexual Violence.

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