Original article:

Chemical Castration as an Action Sanctions in Legal Perspectives and Bioethics

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Abstract:

Background: The application of chemical castration sanctions is a form of solution issued by the Indonesia Government through the Law No. 17 of 2016 regarding Child Protection on the rampant cases of child sexual abuse. However, the imposition of sanctions is considered still many shortages in it. Starting from the element of uncertainty period of implementation, the negative side effects on the body, to the procedure and technical implementation of the castration actions contained in the article. **Objective:** The objective of this research is known as Chemical Castration Actions of sexual violence in the review of the perspective of the enforcement law, criminal law, human rights and bioethics. **Methods:** The authors used qualitative research methods with descriptive and analytical research. The sources of data are based on the information contained in the literatures bibliography and based on the interviews result. **Results:** The result of this study shows that chemical castration from a criminal law perspective cannot be categorized as an action sanction. From the perspective of human rights law, the right to be free from condescending punishment is an absolute right which cannot be limited at all. In the bioethics perspective, chemical castration has violated the four principles of medical ethics/bioethics. **Conclusion:** Chemical castration cannot be claimed action sanction of law because it violates the principles of bioethics which in result humiliates the dignity of medical doctor profession.

Keywords: Chemical castrations, criminal law, human rights law, enforcement law, bioethics

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Introduction

The rising cases of sexual violence caused incredible anxiety in the society. Sexual violence against children is a form of child abuse where an adult person uses a child for sexual stimulation¹. The President of Republic of Indonesia later revealed the Indonesia emergency sexual violence, so that the Government took serious steps by issuing Government Regulations in lieu of Law No. 1 of 2016 with the second amendment on Law No. 23 of 2002 concerning child protection^{2,3}. Again, the Government added strong sanctions on Article 81 section (7) namely the provision of chemical castration injections which then became the Law No. 17 of 2016 about the second amendment of Law No. 23 of 2002 concerning Child Protection

became Law⁴. The impact of the application of this law, then dragged the perpetrators of sexual violence named *Wawan Setiadin* known as *Babeh*(49) who had raped 41 underage children in Tangerang, Banten. He is threatened for 15 years prison sentence and additional punishment in the form of chemical castration⁵.

The sanctions of chemical castration have a significant impact, including the health effects which lie behind them. The application of chemical castration sanctions is a solution on the rising the cases of sexual violence against children. However, the application of this sanction is considered to be still lacking in it. It begins from the existence of uncertainty substance over the period of the implementation of the

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actions, negative side effects on the body, to the procedures and technical implementation of the actions mentioned in the article. In the execution implementation of chemical castration, Indonesian Doctors Association (IDA) refused to do so, because it had contradiction with the principles in medical ethics. IDA also considered that the application of chemical castration actions already contravened with the Medical Profession Oath⁶. From the Human Rights perspective, chemical castration has contravened the people's right to continue their decedents. Because a person through marriage can continue the decedents as form of the fulfillment of basic human rights such as the rights to have a family and a gift, and guidance taught by the religion. Along with that, it does not only give moral sanctions in the form of shame but also will make agitate physic condition to the convicted person.

Methods

This paper is based solely on author reflections on the various reports and plans regarding the application of chemical castration to perpetrators of sexual violence against children which in their application will intersect with the theories of criminal law, human rights law, and purposed enforcement law objectives including with the principles of medical ethics/bioethics. Therefore, authors use qualitative research methods with descriptive and analytical research. In this case, authors make the description systematically, factually, and accurately of the facts of the case. Then analysis of the facts is carried out according to the following procedures: (1) Data collection. (2) Data Classification (3) Data analysis. (4) Conclusion. The sources of data are based on the information contained in literatures bibliography and based on the interviews result.

Theoretical Review

Limitation on the Human Rights

Based on the Article 1 No. 1 of Law No. 39 of 1999 regarding Human Rights, Human Rights is a set of rights attached with the nature and among the mankind as creations of Almighty God and precious gift which compulsorily be respected, upheld and protected by the nation, government law and each person have the sake of honor and protection of dignity. In civil and political rights, there is a limitation between the non derogable rights with the derogable rights.

Which has included in to the category of non derogable rights is right to life, the right not to be tortured, the right not to be enslaved, the right to freedom of thoughts and embrace the religion and faith, the right to be treated equally before the law, the right not to be imprisoned for failure to fulfill contractual obligations, as well as the right not to be convicted based on the retroactive law. Regarding the implementation between both categories of rights, as well as non-derogable and derogable also has the limitations. Which is in the limitation, the country does not intervene and on the limitation the intervention must be applied⁷.

Limitation on the human rights is defined as the authority of the state to limit the fulfillment, protection and dignity of human rights under the certain conditions and fixed regulations. In general, limitation of human rights can be carried out by respecting the several principles, such as the reasons for limiting human rights that must be defined strictly and not in the framework of reducing the substance of respect for these mentioned rights, the application of restrictions on human rights should not be arbitrarily and discrimination, and restrictions must be made in accordance with the requirements set by the laws and regulations about the human rights⁸.

The Criminal Sanctions and Actions (Double Track System)

As seen from the background of its appearance, the basic idea of the double track system is 'Equality' between the criminal sanctions and action sanctions. Emphasis on the equality between the criminal sanctions and the action sanctions in the framework of the double track system, actually related to the fact substances of denunciation/suffering (by criminal sanctions) and substances of coaching (by action sanctions) are equally important. From the point of the view of the idea, equality of the position of criminal sanctions and sanctions of action is very useful for maximizing the use of both types of sanctions precisely and proportionally. Because, an integral and balanced sanctions policy, in addition to avoiding the application of fragmentary sanctions, it also guarantees an integrated system of sanctions that are individual and the functional sanctions system⁹.

The difference between the principles of criminal sanctions and actions lies in where there is a

substance of denunciation, not in the presence or absence of substances of suffering¹⁰. Whereas, the sanctions are more educative¹¹. The criminal sanctions are oriented to the idea of imposing sanctions on the perpetrators of certain action, while sanctions for action are oriented to the idea of protection of the community¹².

Health Law

The law regulates the human behavior in relation to the order of relation between the human beings, with certain rules and standards. The bioethics has currently overlapped or influenced by the legal norms and the financial, cultural and social background. In the juridical manner Doctor Patient Relationship (DPR) is included in the contract group. Doctor binds himself to provide the health services as well as the patient receives the health services¹³.

Bioethics

Ethics which correlated with the biological problems are known as bioethics¹⁴. Bioethics or biological ethics is defined by *Samuel Gorovitz* as "critical inquiry about the moral dimensions of decision making in the contexts related to the health and in the contexts of involving the biological sciences"¹⁵. The medical bioethics functions as a reflective critical guide or behavior, which is based on the 4 basic moral principles and their derivatives. In the medical profession there are 4 main moral principles, which are as follows¹⁶;

1. Principle of Autonomy

Autonomy is an individual condition whose meaning is like governing himself, the right to be free, personal choice, freedom of desire and being yourself¹³. Respect for the autonomy is shown through the acknowledgement of the ability of others to make that decision.

2. Principle of Beneficence

The principle of moral beneficence is a moral obligation to perform an action for the benefit or benefit of other persons (patients)¹³. The principle of beneficence complements the principle of autonomy, marked by a positive obligation on the medical profession. According to the *Beuchamp* and *Childress's* theory, this principle or rule not only requires humans to treat each other as autonomous beings and does not harm them, but it is also demanded that humans can judge the good

things of others furthermore¹⁷.

3. Principle of Non-Maleficence

The principle of non maleficence, which prohibits the actions that endanger or the worse condition of patient. This principle is known as "primum non nocere" or "do no harm". This principle is related to the Hippocratic expression which states "I will use therapy to help sick people based on my abilities and opinions, but I will never use them to harm or harm them". This principle requires no harm. The examples of danger in the context of medicine are negligent care by a doctor and refusal to life saving preparation. Most of the medical treatments and procedures carry the certain risks. This principle recommends a balance between potential hazards and benefits. Therefore, the positional danger of medical action can be justified as long as the benefits of the action are greater¹⁷.

4. Principle of Justice

According to the *Beuchamp* and *Childress*, this theory is closely related to someone's fair behavior to others, such as deciding who needs the first health assistance as seen from the severity of the disease¹⁷.

Results and Discussion

Chemical Castrations as an Action Sanctions for Perpetrators of Sexual Violence

Law is a phenomenon of justice that is to bring the happiness as much as possible for as many people as possible, so that the law not only for providing the certainty and justice, but to provide the benefits for the community. The chemical castrations action was initiated from Article 81 section (7) of the Children Protection Law, in its philosophy the law emphasizes that when looking at the development of criminal law in Indonesia there are two categories, which is criminal sanctions and action sanctions. The criminal sanctions initiated from the basic idea of why a criminal law is held, while the sanction of action comes from the basic idea for what the conviction was held. Indeed, the imposition of chemical castration is a category of action sanctions. In this case, the action of chemical castration that is applied as a punishment is intended as a trap against perpetrators of sexual violence in children. This action is not a way to maintain the health of human being, and chemical castration action actually damages the patient's health condition.

In the context of Article 81 section (7) the action of chemical castration is given by injection using the anti hormonal drugs to inhibit the release of testosterone, thereby reducing the sexual desire, especially in the male perpetrators. The research review shows that the chemical castration side effects both the physiological and physical of the doers. According to the *John Stinneford* a professor of Law at *Florida University*, the additional sanctions include the chemical castration, the subject of chemical castration will experience a process called paralyzing the organs and is referred to as a torture, even though the injection of castration does not directly last forever, so the reduction in sexual desire will not affect permanently. Therefore, it is difficult to provide the definition of action in a criminal law perspective for the act of chemical castration, by seeing the act of chemical castration as a sanction of action precisely gives the doers an effect^{18,19}.

Chemical Castration and Legal Purpose

The legal purposes in the legal knowledge disciplines are three aspects justice, usefulness/benefit and certainty. Criminalization to the perpetrators will be fair retribution for the harms he has done and pay attention to the aspects of the victim's side. *J.E Jonkers* emphasizes some criminal offences applied to the crime, while sanctions for action have a social purpose¹⁸. The chemical castration to be underlined in its application only for punishing physically to the perpetrator, not cure the source of the problem itself²⁰. According to the *Bentham's* theory, the act of chemical castration must pay attention to the elements of benefit in a regulation, because some regulations can work well in the community if it can fulfill the element of benefit for the general public, the element of legal certainty has given the shape concerning to the application of chemical castration action. However, chemical castration is actually contrary to the element of benefit including the rehabilitation for the perpetrator. In terms of legal certainty, there is uncertainty in the imposition of a period of application of chemical castration because there is no Government Regulation that regulates further the application of chemical castration action²⁰. Investigating the implementation of sanctions for perpetrators of a crime requires a process of justice (*fair trail*) to open up opportunities for wrongdoing against the

perpetrators. Indonesia adheres to the rule of law as stated in the Article 28D UUD NRI of 1945, so that, a country in making the legislation must cover the protection of human rights and legal certainty in its implementation. This means that the every formations of laws and regulations must have clear objectives to be achieved. The formulations of the Child Protection Law No. 17 of 2016 in particular in Article 81 section (7) does not fulfill the principle of legal certainty, whether this sanction will be applied if enough of one of the elements has been fulfilled, or all elements must be proven, because based on the rules of proportion between violation and punishment, if there are two violations occurring together, a more severe violation must also be subject to a more severe penalty, so that the offender of a lighter violation is motivated to stop do so. Two violations are said to occur together if someone has the ability and willingness to do both. With the same imposition of penalties on different violations the portion of punishment cannot be measured properly, even though the punishment cannot prevent the offender from committing the offense more severely because the perpetrator will think that even though the violation is getting heavier, the sentence will still be the same. Related to the article does not provide legal certainty due to unclear punishment parameters, although fundamentally chemical castration is an additional sanction in the form of action, it still must clearly state the parameters for the application of these sanctions for the perpetrators and law enforcement agencies to provide the legal certainty.

Chemical Castration as a Treatment that Degrading Human Degrades, Not Included in Derogable or Limitable

In the aspect of human rights law, the chemical castration cannot be said to be a form of torture, but it is included in actions that degrades the human status. Then the question is, is the right to be free from actions that degradethe human status including in the rights which can be reduced *derogablerights* or freedom which can be limited *limitable freedom*?

In principle, all categories of human rights may be reduced by fulfillment, protection and respect by the nation. However, there are several categories of rights that cannot be reduced under any circumstances including in emergencies as

referred to in derogation reasons. This is what is meant as non derogable rights. Non derogable rights are therefore interpreted as rights that cannot be reduced under any circumstances, even in emergencies that threaten the life of the people. Based on the Article 4 section (2) KIHSR, several categories of rights that cannot be reduced, but from the various categories mentioned in the Article, the right to be free from actions which degrades the human status is not included, then can it be limitable.

In general, limitation of human rights can be carried out while respecting the several principles, such as the reasons for limiting human rights that must be defined strictly and not in the framework of reducing the elements of respect for these rights, the application of restrictions on human rights should not be arbitrarily and discriminately, and the restrictions must be made in accordance with the prerequisites that have been determined by the laws and regulations on human rights. Different from the derogation which can only be done in an emergency, limitation can be done in a safe condition. Limitation is defined as the state's authority to limit human rights under the certain conditions and fixed rules. The provisions concerning this matter are contained in Article 29 section (2) of the Universal Declaration of Human Rights, Article 12 section (3) of the International Covenant on Civil and Political Rights, Article 21 and Article 22 section (2) of the International Covenant on Civil and Political Rights, and Article 70 Law No. 39 of 1999 concerning the Human Rights.

Based on the explanation above, the right to be free from actions that degrade humanity is not included in both derogable and limitable, but it is a natural right which is indeed the basis of obsolete human nature, it can not be reduced or limited by anyone, including in this condition is the country.

Chemical Castration According to Bioethics Studies

1. Principle of Autonomy

This principle does not apply to chemical castration actions ordered by the court, because the patient is controlled by the court resulting in the patient being unable to act according to his desires and plans. Limitation of autonomy in this case should not be permitted. Therefore, the principle of autonomy does not support the act of chemical castration as a measure of punishment.

2. Principle of Beneficence

The application of chemical castration acts ignores this principle. Because in its application, this action is not a remedy but only gives the disease to the patient. Thus, the act of chemical castration does not provide good or benefit to the patient.

The study review shows the possibility of the following physiological side effects: 1) no changes in the blood pressure; 2) no changes in the body chemistry; 3) possible weight gain; 4) dramatic decrease in sperm count; 5) normal basal insulin level, but also the causes of hyperinsulinemia response to glucose load; 6) irregular gallbladder function and diverticula infection in the long-term therapy; 7) fatigue that appears irregularly or lethargy; 8) reduction or shrinkage of the testicles; 9) diabetes mellitus; 12) no changes in the breast. Other reported effects are including chills, inflammation of veins, headaches, insomnia, nausea, nightmares, shortness in breath, high blood sugar level, leg cramps, loss of body hair, and an increase in basal body temperature. Most of the side effects are very rarely reported.

3. Non Maleficence Principles

The application of chemical castration action does not provide benefits that can offset the danger. The side effects of chemical castration action tend to be dangerous. In order not to violate the principle of non maleficence, the right action is rehabilitation due to the greater benefits.

The immediate impact of the first chemical castration is erectile dysfunction, or the inability to develop or maintain an erection. Erectile dysfunction can be caused by various factors related to aging, psychology, and physiology. Therefore, sexual violence perpetrators who have been castrated by chemistry may experience some degree of serious erectile dysfunction due to the effects of testosterone-reducing therapy. In addition, the very low testosterone levels that have been achieved through the chemical castration will increase the likelihood of more severe erectile dysfunction. The second direct effect of castration is infertility. Although, the chemical castration leaves the testicles intact, it still influences the sperm production because testosterone is an important factor in the male sperm production cycle. MPA injection will reduce the testosterone in the body, which then becomes a trigger for an ineffective sperm production. In addition to male

hormones, the testosterone also keeps the body's metabolism associated with the bone problems. If the hormone is suppressed or removed, the effect is fragility on the bone. Secondly, the quality decreases so that the risk of a heart attack can be in the risk²¹.

The indirect impact of male testosterone reduction has been well documented, with the majority of the literatures stating that it can cause of prostate cancer. Even so there is another more realistic impact, which is Andropause. It is a side effect of chemical effects, in which the level of testosterone increases at a rate much faster than it should be experienced during the normal aging. Among the most common physical symptoms of andropause are the hot flashes, hair loss, fatigue, and reduced physical strength due to reduced muscle mass. Another side effect of the andropause is bone density loss. The most severe locations are the spine, hips and forearms. Lack of bone mineral density will increase the chance of bone loss and changes can occur such as decreased height, changes in the body posture or skeletal alignment [reference needed].

4. Justice Principle

The application of the chemical castration action requires treating the offender who suffers from paraphilia and who does not suffer from paraphilia equally. Whereas; both are different, where paraphilia sufferers should be cured and those without paraphilia should be punished. The application of chemical castration action is not in accordance with the principle of justice.

Medical Profession Association such as Indonesia Medical Doctor Association certainly has profession dignity to utmost the patient interest and priority for humanity rather than doctor interest and social interest and political state as well as legal politic. By supporting castration action by sanction it will humiliate the dignity of medical profession that serves humanity mission to relief the suffer and pain, prolong the life, promote well being based on altruism.

In term of retributive justice theory, retributive justice is justice related to the occurrence of mistakes. Penalties given to a guilty person must be fair. This retributive justice model states that when a person commits a crime, the punishment received by the offender is a law intended to repay the crime committed by the perpetrator.

This retributive theory is that each person must be responsible for his behavior, consequently in having to receive the appropriate punishment. Penalties should be proportional to errors because people are convicted based on these errors and not for other reasons. Criminal sanctions are described as a gift of suffering, and officers can be declared to have failed if this suffering is not felt by the convicted person.

Retributive theory in the purpose of punishment is based on the reason that punishment is "morally justified" because the perpetrators of crime can be said to be eligible to accept it for their crimes. Important assumptions for justification for punishment as a response to a crime because the perpetrator of the crime has committed a violation of certain moral norms that underlie the rule of law intentionally and consciously and this is a form of moral responsibility and legal error of the perpetrator. This chemical castration sanction may in line with retributive justice theory to make all perpetrator being wary. In this concept, castration sanction may be rather relevant but for extraordinary cases with many victims and very strict cases without paraphilia as well as sexual violence addiction. Retributive justice in this case of sexual violence becoming addiction should consider carefully to find the effective sanction because there are many causes of addiction. It is impossible to focus on just one single cause and achieve results from methods based on only that specific cause, where many psychological, physiological, cultural and environmental factors exist²².

Conclusion

The chemical castration in the Child Protection Law is defined as a category of action, wherein the sanction of action should not be an element of denunciation. However, the victims in this case, the perpetrators of sexual violence will experience a process called paralyzing the organs and are referred to as torture, even though the injection of castration does not last forever, so the decline in sexual desire will not affect permanently.

The chemicalcastration is categorized as an act that demeans the human level where the right to be free from actions that degrade humanity is not included in the both derogable or limitable, but it is a natural right which is indeed the basis of obsolete human nature, not at all can be reduced

or restricted by anyone, including in this case is the country.

The chemical castration is a court order; therefore the patient is controlled by the court resulting in the patient being unable to act in accordance with his desires and plans. This certainly has violated the principle of autonomy in Bioethics. The application of chemical castration action requires to handle the offender who suffers from paraphilia and who does not suffer from paraphilia equally, even though the two situations have the different conditions, this certainly violates the principle of justice. Then the chemical castration also ignores the principle of beneficence because in its application, this action is not a remedy but only gives the disease to the patient, so that the chemical castration action does not give the patient good or benefit. Including the principle of non-maleficence, the application of chemical castration will not provide benefits that can compensate for the danger itself. This is the reason why chemical castration has violated the four principles that exist in Bioethics.

Conflict of Interest

I hereby declare that there is no conflict of interest in this study. We have no sponsorship for this research.

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