



بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ



— P R O C E E D I N G —

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**LAW AND  
SOCIETY**

Yogyakarta, 04 – 07 April 2017

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## **PROCEEDING**

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# Message from Chairman

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## **Yordan Gunawan**

Chairman, International Conference on Law and Society 6,  
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Assalaamu'alaikumWarahmatullahiWabarakatuh,

In the Name of Allah, the most Gracious and the most Merciful. Peace and blessings be upon our Prophet Muhammad (S.A.W).

First and foremost, I felt honoured, on behalf of the university to be warmly welcomed and to be given the opportunity to work hand in hand, organizing a respectable conference. Indeed, this is a great achievement towards a warmers multilateral tie among UniversitasMuhammadiyah Yogyakarta (UMY), International Islamic University Malaysia (IIUM), UniversitiIslam Sultan Sharif Ali (UNISSA), Universiti Sultan ZainalAbidin Malaysia (UNiSZA), Fatoni University, Istanbul University, Fatih Sultan Mehmet Vakif University and Istanbul Medeniyet University.

I believe that this is a great step to give more contribution the knowledge development and sharing not only for eight universities but also to the Muslim world. Improving academic quality and strengthening our position as the procedures of knowledge and wisdom will offer a meaningful contribution to the development of Islamic Civilization. This responsibility is particularly significant especially with the emergence of the information and knowledge society where value adding is mainly generated by the production and the dissemination of knowledge.

Today's joint seminar signifies our attempts to shoulder this responsibility. I am confident to say that this program will be a giant leap for all of us to open other pathways of cooperation. I am also convinced that through strengthening our collaboration we can learn from each other and continue learning, as far as I am concerned, is a valuable ingredient to develop our universities. I sincerely wish you good luck and success in joining this program

I would also like to express my heartfeltthanks to the keynote speakers, committee, contributors, papers presenters and participants in this prestigious event.

This educational and cultural visit is not only and avenue to foster good relationship between organizations and individuals but also to learn as much from one another. The Islamic platform inculcated throughout the educational system namely the Islamization of knowledge, both theoretical and practical, will add value to us. Those comprehensive excellent we strived for must always be encouraged through conferences, seminars and intellectual-based activities in line with our lullaby: The journey of a thousand miles begin by a single step, the vision of centuries ahead must start from now.

Looking forward to a fruitful meeting.

Wassalamu'alaikumWarahmatullahiWabarakatuh

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# Foreword

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**Trisno Raharjo**

Dean, Faculty of Law, Universitas Muhammadiyah Yogyakarta

Alhamdulillah all praise be to Allah SWT for his mercy and blessings that has enabled the Fakultas Hukum, Universitas Muhammadiyah Yogyakarta in organizing this Inaugural International Conference on Law and Society 6 (ICLAS 6).

This Conference will be providing us with the much needed academic platform to discuss the role of law in the society, and in the context of our two universities, the need to identify the role of law in furthering the progress and development of the Muslims. Muslim in Indonesia and all over the world have to deal with the ubiquity of internet in our daily lives life which bring with it the advantages of easy access of global communication that brings us closer. However, internet also brings with it the depraved and corrupted contents posing serious challenges to the moral fabric of our society. Nevertheless, we should be encouraged to exploit the technology for the benefit of the academics in the Asia region to crat a platform to collaborate for propelling the renaissance of scholarship amongst the Muslims.

This Conference marks the beginning of a strategically planned collaboration that must not be a one off event but the beginning of a series of events to provide the much needed platform for networking for the young Muslim scholars to nurture the development of the Muslim society.

UMY aims to be a World Class Islamic University and intend to assume an important role in reaching out to the Muslim ummah by organising conferences hosting prominent scholars to enrich the developmment of knowledge. This plan will only materialise with the continous support and active participation of all of us. I would like to express sincere appreciation to the committee in organising and hosting this Conference.

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# Measuring Feasibility of the Use of Chemical Castration Toward Offender of Sexual Violence Against Children in View of Human Rights And Proportionality Theory

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## ABSTRACT

The enactment of chemical castration through the Government Regulation in Lieu of Law (Perppu) No.01 Year 2016 presumably has brought a new hope in reducing high frequency of sexual violence against children in Indonesia. In spite of being relied as an effective measure, this punishment also attracts contentious arguments amongst various experts, and its feasibility starts to be questioned. In addition to violate code of medical ethics, the existence of paradoxal interests between children rights and the human rights of offender definitely become a substantial problem in resisting chemical castration as an effective way to protect children from sexual violence. Eventually, an issue is raised in this article is about the feasibility of the use of chemical castration in perspective of human rights and children protection in Indonesia. This article is written by using normative and theoretical approaches, which aims at measuring to what extent the feasibility of chemical castration in preventing sexual violence against children. The feasibility of chemical castration can be measured through two perspectives, namely human rights and proportionality. In view of human rights, the use of chemical castration is not justified and clearly constitutes human rights violation as prescribed in Article 7 ICCPR. Moreover, in accordance with Article 4 ICCPR, it is explicitly declared that free from this punishment is categorized as non-derogable rights. In perspective of proportionality principle, by considering criteria of *legitimacy ends, suitability, necessity, dan proportionality stricto sensu*, the use of chemical castration has not yet meet those criteria, thus its effectivity is still doubted.

Key words: *chemical castration, sexual violence, human rights, and proportionality theory*

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## I. Introduction

Child protection is an effort with simultaneous and continuous effect to improve the quality of current as well as future human civilization. Since the Convention on the Rights of the Child (CRC) was legalized on November 20<sup>th</sup>, 1989 through Resolution No. 44/25 of 1989, the child protection has been a major concern of the majority of countries in the world. Almost all countries, except the United States, Somalia and South Sudan, have ratified and integrated the CRC in law policies and strategies in each country.

These nations' great attention to child protection is generally based on an understanding that child is the best investment and irreplaceable for a nation and a country. Today's child is an adult in the future, and child, this time, is a leader and a civilization successor in the future. In addition, child is a weak individual who is potentially easy to be a victim of crime. David Finkelhor in his book entitled "*Childhood victimization*", states that children are the human that mostly becomes victim of crime in the society, in addition to be victims of conventional crime happening to adults, as well as the specific crimes to children, such as maltreatment and neglect<sup>1</sup>.

One type of crimes that increases significantly in Indonesia every year is a sexual abuse. Sexual abuse or sexual violence crimes has been transformed into the most frightening and alarming one. *The Jakarta Post* in 2016 even inspired an interesting question related to the sexual violence against children in Indonesia, it was "what has happened to Indonesia's moral?"<sup>2</sup>. The question surely arose together with getting more serious quantity and quality of sexual violence against children that happens in Indonesia.

In terms of quantity, the Indonesian Child Protection Commission (KPAI) also implicitly suggests an interest in the lives of Indonesian children. Since the quarter in 2014, there have been more than 400 cases of sexual violence against children reported in Indonesia. While, in 2015 the LPSK reported that there were approximately 1,726 cases<sup>3</sup>, and the quarter in 2016 there were about 290 cases reported to KPAI<sup>4</sup>.

In addition, the Directorate of Child Social Welfare - Indonesian Ministry of Social Affairs in 2015 also reported the prevalence of sexual violence against children aged 13-17, about 900,000 boys and 600.000 girls had experienced sexual violence<sup>5</sup>. The number is surely predicted to increase, and many increasing cases are not or have not been reported. Like an iceberg phenomenon, the number of cases reported or recorded is just the top of the iceberg, while the number of cases that are not recorded (dark number) is actually much larger

In terms of quality, the cases of sexual violence against children is getting more out of sense. In 2014 - 2016, there have been several phenomenal cases of sexual violence against children. Some of them are cases of pedophilia committed by Andri Subadri (2014), alias Emon who has victimized approximately 120 children, sexual abuse of 13 students in one of elementary schools in Kramat Jati, East Jakarta, committed by their own teacher at school, rape case of a 9-year-old girl in Kalideres who was then murdered (2015), and rape case of Yuyun by 14 teenagers in Bengkulu, which resulted death of the victim (2016).

The cases mentioned above are only a small number of sexual violence against children cases revealed to public. There certainly are still many sexual violence against children cases occurred in various environments and situations: within families, communities, schools, committed by people close to the child and strangers.

This condition is certainly not only alarming, but also very worrying. However, child sexual violence cannot be simply seen as only a sexual crime, but precisely more than just a crime against humanity. This crime can damage the child reproductive / sexual health, it also easily damages the psychological condition, honor, dignity, self-esteem, self-confidence, which if it continues, it will greatly affect the future of the child.

Considering being free from all forms of violence is the fundamental right of every child, without any exception, as explicitly stated in the Indonesian constitution, specifically Article 28 and paragraph (2) of the 1945 Constitution stating that "Every child has the right to live, grow, and develop as well as the right to have protection from violence and discrimination". Furthermore, referring to Article 19 of the CRC<sup>6</sup>, it states that "Each country shall take all Appropriate legislative, administrative, social and educational measures to protect the child from all forms of violence, therefore in the middle of 2015, Indonesian government planned to implement the surgical castration against perpetrators of sexual violence against children.

Various responses came up after the surgical castration discourse penalty was issued by the government. There surely were pros and cons. The Pros considered that surgical castration penalty was appropriate to reduce sexual violence against children that had been extremely massive, while penal and non-penal measures provided was considerably unable to overcome these problems

any longer. The Cons argued that the country needed to reconsider the surgical castration penalty, not only in the context of sentencing in general, but also in terms of human rights and the potential impacts that might occur as a result of the surgical castration penalties. The values of justice proportionality and benefits of chemical castration needs to be questioned.

In the middle of the pros and cons of the chemical castration imposition. In May 2016, the President finally signed (Perppu) No. 1 Year 2016 about the Second Amendment Act No. 23 of 2002 on Child Protection. The regulation brings new breakthrough not only increasing the quality of criminal sanction principal, but also the enforcement of chemical castration towards perpetrators of sexual violence against children with serious sanction quality, such as the repetition of actions, actions causing more than one casualty, resulting in serious injuries, mental disorders, infectious diseases, reproduction system impairment and / or fatalities.

In the middle of the pros and cons of the chemical castration imposition. In May 2016, the President finally signed (Perppu) No. 1 Year 2016 about the Second Amendment Act No. 23 of 2002 on Child Protection. The regulation brings new breakthrough not only increasing the quality of criminal sanction principal, but also the enforcement of chemical castration towards perpetrators of sexual violence against children with serious sanction quality, such as the repetition of actions, actions causing more than one casualty, resulting in serious injuries, mental disorders, infectious diseases, reproduction system impairment and / or fatalities.

Although the issue of Perppu No. 1 of 2016 has given juridical basis on the enforcement of chemical castration sanctions towards the perpetrators of sexual violence against children. Unfortunately, the existence of these regulations has not been able to ease the debates in various groups in society. Several national organizations, such as the National Human Rights Commission and the National Woman Commission did not approve the implementation of such sanction. In fact, the Indonesian Doctors Association (IDI) firmly rejected being the executor in the implementation since it was against the Doctor Code of Conduct.

Internationally, the castration penalty is actually not newly-enforced penalty known in handling perpetrators of sexual violence. At least 20 countries have enforced the penalty, as well as Germany and some Scandinavian countries. The enforcement which is always considered against the Human Rights would potentially cause juridical problems for the countries that enforce it. In addition, the negative impact of this penalty is quite serious on both physical and psychological health of the perpetrator, while the positive impact has not been considered significant. The Ambivalence handling of sexual violence against children through the chemical castration implementation is difficult to avoid. Conflict between the child rights protection from all forms of violence and human rights of the perpetrator influences the effectiveness of child protection from all forms of sexual violence. This condition requires further and deeper study on the proper existence of this sanction to the rules in Indonesia.

Based on the background mentioned above, therefore I propose the following title: MEASURING FEASIBILITY OF THE USE OF CHEMICAL CASTRATION TOWARD OFFENDER OF SEXUAL VIOLENCE AGAINST CHILDREN IN VIEW OF HUMAN RIGHTS AND PROPORTIONALITY THEORY. The legal issues that will be studied in this paper is whether it is viewed from the perspective of human rights and proportionality, the, chemical castration sanction theory towards perpetrators of sexual violence against children is still worth being maintained for child protection legislation in Indonesia?



## II. Discussion

### 2.1 Sexual Violence against Children and Chemical castration

Currently, any place in the world, sexual violence against children becomes a concern of the international community. Its hidden, sustainable, and very dangerous characteristics make the crime require serious action. Frank W. Putnam in his work entitled *"Ten - Year Research Update Review: Child Sexual Abuse"*, stating that the sexual violence against children is not just the behavior disorder but more about life experience which is complex and painful for the child<sup>7</sup>. It is say so, because the consequences suffered by children from this crime continues. Child Physical injury may recover over time with appropriate treatment and medical therapy, but the psychic wounds inflicted will be felt throughout his life, even until they become adults.

Principally, the United Nations through the UN Secretary - General's Study on Violence against Children clearly states that "No violence against children is justifiable and all forms of violence against children is preventable"<sup>8</sup>. Positively, the Indonesian government legalizes the enforcement of chemical castration to give a deterrent effect for perpetrator. In long term, it is expected to realize protection for children from repetition of such crimes in the future.

#### 2.1.1 Concept of Sexual Violence Against Children

To qualify sexual violence, it is needed to know what child is. Terminology of child without exact definition, perspective differences, knowledge limitation and society understanding triggers various definition of "child". Internationally, the definition of a child refers to Article 1 of the Convention Rights of the Child (the Convention on the Rights of the Child)<sup>9</sup>, "A child means every human being below the age of eighteen years UNLESS under the law applicable to the child, majority is attained Earlier". While the definition of a child in Article 1 paragraph 1 of Law No. 23 of 2012 on Child Protection almost fully adopts international definitions, "someone who is not yet eighteen years old, including children in the womb"<sup>10</sup>.

Compared to adults, children are more vulnerable to be victims of sexual violence either committed by adults or their peers. Their limited physical, psychological and social ability cause them not to have proper awareness and self-control especially towards the situation or people around to select.

In general, sexual violence against children can be defined as child involvement in any kinds of sexual activities occurring before the child reaches adulthood. The basic concept of sexual violence against children is actually rarely debated among experts. At least, although with various wordings, their definitions come to a common understanding. For example, a concept proposed by Frank W. Putnam, stating "sexual violence against children is an array of sexual activities to the child the which includes an intercourse, attempted intercourse, oral-contact genitals, fondling of genitals Directly or through clothing, exhibitionism or exposing children to adult sexual activity or pornography, and the use of the child for prostitution or pornography"<sup>11</sup>.

Phasar Bharati also argues that sexual violation against the children is "an inducement or coercion of children to engage in any sexual activity. This violence can take both a physical and mental form. Sexual violence against children includes both sexual abuse and sexual exploitation"<sup>12</sup> From this definition we can see that sexual violence against children includes physical and mental abuse, and can be divided into two categories; the sexual abuse and sexual exploitation.

Meanwhile, David Finkelhor, a Professor of Sociology and a director of the Crimes Against Children Research Center at the University of New Hampshire, defines sexual violence against children in more detail, that "the entire spectrum of sexual crimes and offenses in the which children up to age seventeen are victims. The definition includes offenders who are related to the

child victims as well as Reviews those who are strangers. It includes offenders who are adults as well as Themselves Reviews those who are children and youth. It includes Certain kinds of non-contact offenses, such as exhibitionism and using children in the production of pornography, as well as statutory sex crime offenses, in addition to the sexual fondling and penetrative acts that make up a majority of the cases”<sup>13</sup>.

Another concept is the concept used by UNICEF, defining sexual violence against children as follows: “contacts or interactions between a child and an older or more knowledgeable child or adult (a stranger, sibling or person in a position of authority, such as a parent or caretaker) when the child is being used as an object of gratification for an older child’s or adult’s sexual needs. These contacts or interactions are carried out against the child using force, trickery, bribes, threats or pressure”<sup>14</sup>.

According to several definitions above, I may conclude that sexual violence against children actually have a broad spectrum, both referring to its form and severity range, group of offender, and mode of the offender action. Either adults or children (including teenager) can be potential offender of sexual violence against children. The only purpose of their action is to satisfy their sexual desires, through performing some unlawfulness acts. The spectrum of sexual violence against children broadly encompassing various acts as follows:

- a) Child abuse and its derivatives, including experimental efforts;
- b) Child rape, along with their derivatives, including the experimental efforts;
- c) Sodomy;
- d) Incest;
- e) Child voyeurism;
- f) Child exhibitionist;
- g) Child Sexual exploitation for prostitution, pornography.

## 2.2. Castration and Its Risk

Gelding or castration actions in development has two forms: surgical castration or medically known *asorchectomy*, and chemical castration. According to the Dictionary of Medicine, surgical castration is surgical removal of the testes (*orchectomy*) or ovaries (*oophorectomy*) to stop sex hormone production<sup>15</sup>. While chemical castration is a procedure wherein medications are administered to reduce testosterone levels<sup>16</sup>. The two definitions above come to an understanding that castration is a medical procedure either surgical or chemical use to stop or reduce the function of the male organs (testes) and female (ovaries) in producing sex hormones.

As a solution to resolve the cases of sexual violence, the implementation of castration is actually not a new phenomenon. Linda Weinberger even argues that castration is more widely accepted as a method to reduce testoteron among sex offenders<sup>17</sup>. In the past, precisely in the middle ages, castration was used as a kind of penalties and action against the perpetrators of rape and adultery. Started in Europe in the early 20th century, Denmark in 1929, was the pioneer country that enacted the rule of castration as medical interventions against perpetrators of sexual violence. Soon, it was followed by Germany (1933), Norway (1934), Finland (1935), Estonia (1937), Iceland (1938), Latvia (1938) and Sweden (1944).

Justification theory applied by European countries in legalizing castration sanction at the time was believed that the sexual elimination or drive reduction was one of the dominant etiological factors to influence individual sexual drive behavior. In its development, some other countries eventually implemented castration against perpetrators of sexual violence. They were the UK

(1952), South Korea (2011), Poland (2010), Russia (October 2015), and the nine states in the United States: California, Florida, Oregon, Texas and Iowa have been implementing chemical castration against perpetrators of sexual violence<sup>18</sup>.

Denmark was a model country of castration practice against perpetrators of sexual violence for many countries. Castration Legislative process in Denmark was a long process. From 1935 to 1970, surgical castration was not considered as a penalty for sexual violence perpetrator, but as an option. Although it had been combined with psychiatric care, in 1970 the surgical castration practice in Denmark was suspended for being inhuman and against the human rights. Then in 1973, Denmark replaced it to chemical castration. This type of Castration was considered as the last resort, which was only imposed after series of therapeutic and psychiatric actions in Herstedvester Institute for Abnormal Offender and was declared as failure.

As a medical intervention on the handling of sexual violence perpetrators, the chemical castration imposition is basically intended as incapacitation act towards the perpetrator's sexual organs function to suppress the repetition of sexual violence. Referring to review analysis done by Weinberger, et al. Based on the success rate of castration observation in some countries, it is known that the administration of chemical castration does not have direct impact totally stop such crimes. Instead of permanently stopped, prisoners who underwent castration will potentially be able to repeat their actions with more serious degree. The castration practice only reduces but does not stop all the functions of the perpetrator's sexual organs. Therefore, the potential of such crime occurrence is still possible although the perpetrators of sexual violence have undergone the castration.

Other risks of chemical castration was stated by Crystal Lombardo in his review, entitled 7 Key Pros and Cons of Chemical castration, as follows:<sup>19</sup>

- a) Chemical castration is particularly at risk of developing osteoporosis or bone density lost. The greater the intensity of chemical castration administration is, the more inevitable fractures potential will be.
- b) Chemical Castration has various effects. For people who have certain psychological uniqueness, resulting various reactions of the body after castration administration, the reaction can be very fast, slow or even has no effect at all, therefore it causes no effect on sexual ability.
- c) Long term chemical Castration causes a diabetes mellitus risk, and prostate cancer for men, breast cancer for women.

In addition to the risks above, chemical castration which is conducted by applying antiandrogen drugs such as *medroxyprogesterone acetate*, *cyproterone*, *euprolide acetate* or *goserelin*, to human body will result in the acceleration of aging process<sup>20</sup>. Wimpie Pangkahila as Head of Andrology and Sexiology division in Medical Faculty of Udayana University also asserts that the effect of chemical castration is temporary<sup>21</sup>. If the treatment stops, sexual desire of offender will be coming back again. Briefly speaking, in order to achieve optimum performance, chemical castration should be applied sustainably. In term of the expense, chemical castration is also widely known as a costly punishment, for example, the implementation of chemical castration in South Korea. As the first country in Southeast Asia imposing chemical castration, South Korea must issue medical cost more and less US\$4.650 annually for each chemical castration including the three times drug injection, therapy and supervision<sup>22</sup>. While in Indonesia, the cost can be estimated as amount as 700.000 to 1 million Rupiahs<sup>23</sup>. If chronic perpetrator of sexual violence against children reach out more than a hundred man, we can easily calculate how much cost that must be covered by government for prevention of this crime.

### 2.3. Chemical Castration Feasibility in Perspective of Human Rights and Theory of Proportionality

#### 1) Chemical Castration as Human Rights Violations

In the context of crime prevention, criminal law is principally contradictory, dualistic or paradoxical. Criminal law protects legal interests (interests of the victims and the public)<sup>24</sup>, while at the same time attacks other legal interests (interests of offenders). Or, in other words, one side of the criminal law is to protect the human rights of the victim, but on the other side the implementation of criminal sanctions on the perpetrators' human rights is against itself. Therefore, many experts argue that implementing criminal sanctions to perpetrators is legalized human rights violations. It is said to be legal because it is done by the authorities with the legal procedures and clear ratio legis.

Although the imposition of criminal sanctions on the perpetrators is allowed by law, it does not mean the country is allowed to confiscate the human rights of perpetrators, or that does not mean that when someone is being convicted or imposed a sentence, will automatically lose all his basic rights, whatever his status is, universally in the Universal Declaration of Human Rights (UDHR) it is agreed that "All human being are born free and equal in dignity and rights". This principle must be the most fundamental principle that should be figured out by all parties.

In the perspective of human rights, everyone is potential to violate human rights, and on the contrary, his human rights is potentially violated, even he is a criminal. Human rights itself is often described as a universal moral matter. Some human rights are interaliable and unviolable, or commonly known as non-derogable human rights: human rights that can not be denied or violated even when the country in a state of "internal unrest", "civil war or public emergency"<sup>25</sup>.

Some human rights in UDHR are considered as non-derogable human rights, as detailed by Muladi as follows<sup>26</sup>: a) the right to life (Article 3); b) prohibition of slavery (Article 4); c) prohibition of torture (Article 5); d) the right to recognition as a person by the law (Article 6); e) rights to equality before the law (Article 7); f) prohibition of imprisonment solely for inability to fulfill a contractual obligation (Article 9); g) prohibition of ex post facto and rights to the presumption of innocent (Article 11); h) rights to have civil recognition (Article 16); and i) freedom of speak and religion (Article 18). In Indonesia, unalienable rights of all members of the human family later adopted in Article 4 of the Act No. 39 of 1999 on Human Rights.

Based on the understanding of non-derogable human rights above, it should be understood that a convicted person will or has been deprived of some rights would remain entitled to his human rights protection which are non-derogable. It is clearly stated in Article 12 of UDHR, which declares that<sup>27</sup>: "no one subjected to arbitrary interference with his privacy, family, or correspondence, or to attacks upon his honor and reputation, every one has the right to the protection of the law against such interference or attacks".

Within two years, Indonesian Government had issued two prominent regulations as the amendment of Child Protection Act No. 23 Year 2002, namely the Act No. 35 Year 2014 and the Government Regulation in Lieu of Law (Perppu) No. 1 Year 2016. An controversial issue raised from the enactment of Perppu No. 1 Year 2016 is about the imposition of chemical castration toward the offender of serious or repetitive sexual violence against children. Article 81, paragraph 7 stipulates that the imposition of chemical castration to the perpetrators of sexual violence is referred to those who are recidive (paragraph 4), and of serious sexual violence (paragraph 5), except child perpetrator (paragraph 9).

Regarding with imposition of this chemical castration, many parties such as Indonesian Medi-

cal Association, Woman Empowerment Commission, and Human Rights Commission, regret the inclusion of this sanction in Perppu No. 1 year 2016 because it is considered as a form of human rights violation itself. To see the extent of the feasibility of these sanctions from a human rights perspective, I will examine the existence of these sanctions on the views of some international instruments and national regulations below:

**a) International Instruments**

**(1) Universal Declaration of Human Rights**

It is clearly stated in Article 5 of the Universal Declaration of Human Rights (UDHR) that the imposition of any inhuman or degrading punishment is highly prohibited. Protection of physical integrity constitutes the fundamental human right, hence no one and even no country can be justified to execute any kind of punishment or treatment that may destroy or decrease that right in real<sup>28</sup>.

**(2) International Covenant on Civil and Political Rights (ICCPR)**

Similarly, Article 7 of the ICCPR is set in accordance with Article 5 of UDHR. In addition to stating that no one shall be subjected to inhuman or degrading treatment or punishment, the Covenant also particularly stipulates prohibition of medical or scientific experimentation without free consent of the people. Again, the imposition of chemical castration is a form of inhuman penalties. Administering chemical drugs which predictably will bring some negative impacts on perpetrator's health in the future, can not be justified, indeed. In addition, although the chemical castration is not a medical experiment, it includes medical measures requiring a medical approval or free consent from the related person. Thus, the implementation of castration without any consent from the related person (in this case the perpetrator), is clearly prohibited under this Covenant.

Furthermore, Article 10.1 of ICCPR also confirms that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. The provision implies that the loss of independence is the only misery imposed on perpetrators. Therefore, perpetrators should continue to be treated with humanity and respecting their dignities as individuals<sup>29</sup>.

**(3) Convention Against Torture and Other Cruel Degrading Treatment in Human or Punishment**

In addition to the UDHR and the ICCPR, the Convention Against Torture and Other Cruel Degrading Treatment in Human or Punishment strictly prohibits all forms of violence and other criminal treatments, which are inhuman and degrading and also basic human rights violation<sup>30</sup>.

We can see in Article 2 of this convention, it is clearly regulated that each State Party shall take any required effective measures, either legislative, administrative, judicial and other to avoid any acts of torture under its territory or jurisdiction (paragraph 1). It is added in paragraph 2, that no exceptional circumstances whatsoever may be invoke as a justification of torture.

Moreover, by Article 16.1, the convention also call for each State Party to avert any practices of cruel, inhuman or degrading treatment or punishment under its territory or jurisdictions when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Considering the prolonged impact to the health of perpetrator, in which severe pain and physical suffering are categorized as torture as mentioned in Article 1 of this Convention, it can be concluded that the imposition of chemical castration has also breached this Convention.

## b) National Legislation

### (1) The Constitution of the Republic of Indonesia Year 1945 (UUD 1945)

Without neglecting the mandate of various International Instruments related to the protection of perpetrator's human rights, Article 28 G paragraph (2) Constitution RI 1945 also regulates that "All persons have right to be free from torture or ill-treatment degrading human dignity and rights to obtain political asylum from another country". It constitutionally implies that Indonesia explicitly acknowledges that free from treatment degrading human dignity as human rights of every person that should be protected. Thus, in other words, the violation of this rights is similar to violation of the Constitution.

### (2) Act No. 39 Year 1999 on Human Rights

Similarly, the Human Rights Act also follows and adopts provisions regulated in both international instruments and The Constitution of Republic of Indonesia 1945. Precisely in Article 33 paragraph (1), it emphasizes prohibition of inhuman and degrading dignity punishment as mentioned in.

According to legal instruments, it is very clear that the imposition of chemical castration is full of human rights violation. Neither international instruments nor national legislation of Indonesia, justify its practices. Whatsoever the reason behind, implementation of chemical castration principally violates personal integrity as well as health of perpetrators as human being. It should have been protected in any exceptional circumstances, not destroyed by a reason of crime prevention which has not clearly enough its effectivity in the future.

### (3) Conflict between Child and Perpetrator Human Rights

Undoubtedly, sexual violence against children is not only a violation of law, but also a fundamental child rights violation. Both the Indonesian Constitution, Article 28 paragraph (2) of 1945 Constitution, and Article 58 paragraph (1) and Article 65 of Law No. 39 Year 1999 on Human Rights, and Article 9 and 15 of Law No. 35 Year 2014 on the Amendment Act law No. 23 Year 2002 on Child Protection, those 3 regulations explicitly states that children must be protected from any forms of sexual violence.

It is very rational when referring to the impact of physical and psychological health and future of children, the majority of people agree that sexual violence against children must be taken care of, no matter how. Besides increasing the severity of imprisonment and fines imposed on perpetrators, other repressive treatment of chemical castration for serious or repetitive sexual violence as mentioned in Perppu No. 1 Year 2016, seems to be a fatal final measure

Treated fairly, both sexual violence and the use of chemical castration are unacceptable human rights violations. Both victims (children) and the perpetrators have fundamental rights that are acknowledged both in international instruments and national legislation. On one hand, rights to be free and protected from sexual violence is recognized as a children rights. But on the other hand, to be free from penalties or inhuman treatment is also non-derogable human rights for everyone including perpetrator. Accordingly, conflict of rights between children as victim and human adult as perpetrator can not be avoided. Whose right should be prioritized? And, is it justified protecting one rights by violating other rights?. These two questions frequently become a dilemma amongst criminal law experts.

Here is the conflict of rights between the two opposing parties, as shown in the following table:

**Table 1. Contradiction Rights Violation in relation to the Enactment of Chemical Castration for Perpetrators of Sexual Violence Against Children**

NO	CHILD RIGHTS	PERPETRATOR RIGHTS
1.	Article 3,5, 22 UDHR	Article 5 UDHR
2.	Article 7 and 24 ICCPR	Article 7 and 10 (1) ICCPR
3.	Article 34 CRC	Article 2 and 16.1 Convention against Torture and Other Cruel in Human Degrading Treatment or Punishment
4.	Article 28 B paragraph (2) National Constitution of Indonesia Year 1945	Article 28 G (2) National Constitution of Indonesia Year 1945
5.	Article 58 (1) and 65 The Act No. 39 Year 1999 on Human Rights	Article 33 (1) The Act No. 39 Th. 1999 on Human Rights
6.	Article 13 (1) The Act No. 23 Year 2002 on Child Protection	
7.	Article 9 and 15 The Act No. 35 Year 2014 on Amendment for The Act No. 23 Year 2002	

At the point a and c in the considerations of Perppu No. 1 of 2016 shows that the chemical castration enforcement is normatively intended to ensure a deterrent effect and comprehensively prevent sexual violence against children, which finally can guarantee the fulfillment of protection right for children. However, referring to the table above, the chemical castration enforcement seems to be paradoxical. It means these sanctions enforcement protects the human rights of children by violating the perpetrator's human rights. The sanction is expected to indirectly guarantee the fulfillment of child right protection from sexual violence committed by the same person, however, the sanction existence is human rights violation which is under the protection of legal justification.

In connection with the conflict over the fundamental right above, basically human rights are universal, inherent and non-derogable. However, under certain conditions, being derogable or violation of rights done by government is tolerable, such as freedom deprivation of perpetrators by the government as part of the efforts of law enforcement to ensure public security.

Irregularities or exclusion of human rights is called the derogation. The term of derogation is a mechanism in which a country legally deviates its responsibilities for certain situation, such as an emergency that could threaten both the nation and security of its people. Here, the country can avoid its legal accountability for human rights even though the country has ratified the relevant international declaration<sup>31</sup>. However, this derogation can only be implemented against the enacted rights and obligations.

Based on Article 4 of the International Covenant on Civil and Political Rights (ICCPR), not all human rights can have derogation for emergency situations. There are some human rights are not justified for derogation under any circumstances, namely the rights in Articles 6,7,8 (paragraphs 1 and 2), 11,15,16, and 18. Considering the imposition of chemical castration can be classified as prohibited action under article 7 on prohibition, inhuman and degrading punishment and treatment, so the rights in article 7 can not be derogated under any circumstances. Thus, castration sanction from view of human rights clearly opposes and violates fundamental human rights.

### c) Chemical Castration in the view of proportionality Theory

In law enforcement, conflict of rights generally happens to almost all countries. The problems



potentially arise when there is a conflict of fundamental rights to determine which rights should be prioritized in law enforcement in connection with the problem solution, Matthew Klatt and Moritz Meister in their book entitled "The Constitutional Structure of proportionality", shows a formula applying the principle of proportionality. This formula is a continuation of the balancing theory developed by Dworkin and Alexis. The Implementation of proportionality principle in resolving this conflict of rights, according to Klatt and Meister, requires logical relationship between specific objectives and the ways to achieve them<sup>32</sup>.

The way out of rights conflict by using principles of proportionality must take four (4) test steps, they are legitimacy ends, suitability, necessity and proportionality *stricto sensu*<sup>33</sup>. In order to address rights conflict arising from the implementation of chemical castration, as well as to weigh the feasibility of this sanction, it is significant to use the principles of proportionality for that purposes, as follows:

#### 1) Legitimacy ends

This step measures the presence of the legitimate objectives to be achieved. In Perppu No. 1 Year 2016, the legitimate objectives indirectly can be seen on the consideration point(a). The consideration shows that the provisions of this Perppu including penal and non-penal facilities arranged in are intended to ensure child rights to survive, grow, and develop as well as rights to have protection from violence and discrimination as stated in Constitution of the Republic of Indonesia Year 1945.

#### 2) Suitability

This step is an attempt to measure whether the provisions are able to achieve the objectives. When talking about the feasibility of implementing chemical castration that in fact violates human rights, in achieving legitimate objectives mentioned in point 1, it is intended to measure the sanction effectiveness. The effectiveness probability of a sanction can be measured by weighing the positive and negative impacts of implementing the sanctions. Reviewing analysis of Weinberger and Lombardo as noted earlier, the negative impact of chemical castration exceeds the expected positive impact. The negative impact of such chemical castration tends to make the occurrence of sexual violence even greater because chemical castration is only temporary and latent. In addition, the chemical castration is dangerous for human health. It is potential to cause a various harmful diseases for the castration recipient, such as osteoporosis, heart attack, cancer, diabetic mellitus, high blood pressure, and early aging. Comparing to other crime prevention measures, chemical castration is surely not an efficient measure. It requires large funding continually, which one perpetrator at least need s three times injection annually. If it stops for a while, the sexual desires of offender likely come back, and can be more dangerous than the previous acts.

Thus, maintaining chemical castration in legislation of Indonesia not only violates human rights, but the effectiveness to achieve child protection and the efficiency of crime prevention are still in doubt.

#### 3) Necessity

This step measures which provisions do not impair the conflict of rights (the act impairs the rights as little as possible). Or in other words, are the provisions required?. The same question for chemical castration, is it really needed this time?. Are not there any other measures proposed as an alternative of chemical castration in protecting children from sexual violence? Considering the large extent of negative impacts and the costs, while its effectiveness is still uncertain, the chemical castration enforcement should be re-examined. In my opinion, sexual violence is not merely a matter of a person's biological drive, but psychological problems. Referring to Wille and Beier



(1989) that “ it is not the sex hormones which represent the decisive driving force (sexual violence), but psychological factors”<sup>34</sup>. Some experts such as Hicks and Estrich also assert that castration will not work because rape is not a crime about sex, but rather a crime about power and violence<sup>35</sup>. If it is said so, the existence of chemical castration in Perppu No.1 Year 2016, does not really has influential effect on reduction of sexual violence and children protection. Thus, it is necessary to provide other measures that can still guarantee child protection, without neglecting the perpetrator’s human rights

#### 4) Proportionality *stricto Sensu*

Proportionality *stricto sensu* can be simply interpreted as the principle of proportionality. This point 4 refers to Alexy’s balancing theory, as follows: “The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the goals”<sup>36</sup>. By Matthias Klatt and Moritz Meister, this theory has been interpreted as an attempt to measure the result of a reduction of rights to the goal achievement level enacted in a provision. In connection with the chemical castration enforcement, it should be measured more details in practice, perpetrator’s human rights with this measure will be proceeded with potential improvement to achieve the objectives. In other words, the chemical castration imposition—in fact, a violation of human rights— must be accompanied by the success of child protection and the quantity reduction of sexual violence against children to the four measuring components above, in my view, the chemical castration is not feasibly imposed as a measure to solve sexual violence against children. Principally, the chemical castration violates fundamental human rights with international and national acknowledgment, and its existence is still not convincing to achieve the goals of child protection, considering it is temporary and proportionality between risks (including cost) and benefit achieved is still doubted or uncertain.

### III. Closing

#### 3.1. Conclusion

Either by using human rights measurements, as well as the parameters of proportionality theory, chemical castration sanctions is not yet feasibly enacted in national legislation of Indonesia and needs to be more deeply re-examined. The existence of chemical castration itself is paradoxical contradictor or causes conflict to human rights. In view of human rights, the chemical castration as prevention measure of sexual violence against children can not be justified. According to Article 4 of the ICCPR, this sanction can be classified as prohibited action under article 7, which can not be derogated under any circumstances. In view of proportionality theory, under parameters of legitimacy ends, *suitability, necessity and proportionality stricto sensu*, the chemical castration imposition tends to cause a significant negative impact, however, the success level is still in doubt. Accordingly, it is necessary to provide other measures that can make simultaneous effect, which remain fulfilling child protection, but still respect for physical integrity of perpetrator as a part of his human rights.

#### 3.2. Recommendation

The recommendations can be given related to the issues presented in this paper are as follows:

- 1) Child protection is not a pragmatic effort, but rather a sustained effort based on systematic and integral strategy. Therefore, all of government parties should evaluate and improve current child protection system and together regulate the facilities, which are more humane and have long-term effects in solving the problems of child rights violations.

- 2) In determining the child protection policy through the penal, governments should do various scientific studies in advance, Especially, anything related to the proportionality of cost and benefit or risk and benefit, prior to legalize it in a legislation.
- 3) Considering the perception of human rights, the chemical castration enforcement is a form of human rights violation and according to balancing impact, the negative impact is higher than the expected positive impacts. it needs to do judicial and legislative review related to the existence of this sanction as a facility to solve sexual violence against children in Perppu No. 1 of 2016.

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- <sup>5</sup>Social Children Welfare Directorate, *Children Situation* (Strategic Issues in 2015), Kemensos RI, 2015
- <sup>6</sup>Artikel 19 of CRC mandates that “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent (s), legal guardian (s), or any other person who has the care of children”.
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