

Comparative Studies Between Islamic Criminal Law and Positive Law about Castration as Additional Punishment for A Pedophile

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Abstract—A castration punishment for a criminal offender of pedophilia is a surgical action given to the perpetrator for a crime committed against a child due to the perpetrator's abnormal sexual development. In Indonesia, castration as additional punishment that has been passed into law by the government, yet there are still pros and cons in society.

Islam views castration as additional punishment either through surgical methods or injectable chemicals for the perpetrators of pedophilia is relevant. This is because criminal act of pedophilia is considered as a criminal act that threatens the nurture of reason. The purpose of the punishment is already relevant to the purpose of Islamic law that is to protect the public from the fear caused by the crime. Meanwhile, according to the positive legal perspective, castration as additional punishment is an imposition form of suffering to the perpetrator for violating the law and human rights with the aim to protect children from the crime of the pedophiles. From these two perspectives, castration as the additional punishment is a reasonable punishment that can be executed to criminal offenders of pedophilia to give a deterrent effect.

In line with the foregoing conclusion, to the authorities to strictly impose castration as the additional punishment to the criminal offenders of pedophilia in Indonesia in order to create a sense of security and peace in society from the threat of this crime, especially to protect children as the next generation.

Keywords—*hoax; fake news; takzir; act against the law; positive law*

I. INTRODUCTION

Crime is an act against the law, this term in Dutch is known as "*rechterdelicten*", i.e. acts that are contradictory to justice, whether the action is threatened with criminal law or not [1]. Nowadays crime happens everywhere, ranging from minor crimes such as insult to crimes resulting in the loss of a person's life such as murder. The perpetrators of criminal acts are not only people who are thugs, but also those of state officials and law enforcement officers are often reported in various media related cases that are against the law, for instance committing a criminal act of corruption.

The more the society is developing, the more crime is growing in Indonesia. Tragically, the victims of crime are not only adults, but also minors as they often become the subjects to crime. Starting from cases of abuse, sexual harassment, rape, and even sexual violence resulting in death.

Sexual violence against children tends to be done by a *pedophile*. The crime committed by a *pedophile* is called pedophilia. Pedophilia is a psychosexual developmental disorder in which individuals have abnormal erotic desires toward children [2]. The main target of these pedophiles is innocent children by giving them gift, money and others as the form of seduction. Once fulfilled his sexual desire, he will commit violence and threaten the child not to tell anyone including the child's parents about his crime.

To protect children from *pedophilia* crime, the president of the Republic of Indonesia, Soesilo Bambang Yudhoyono during his tenure issued Presidential Instruction No. 5 of 2014 on the National Movement of Anti Sexual Crime against Children. Criminal penalty to perpetrators of sexual aberration that make children an object of sexual desire impingement is regulated in Article 82 of Law No. 23 of 2002 on the Protection of Children.

The availability of criminal penalty as referred to Article 82 of Law No. 23 of 2002 on the Protection of Children was obviously not able to suppress the pedophiles. This was evidenced by the increasing number of crimes committed by the *pedophiles*. In three years, the number of violence against children reached 21,689,797 cases. Ironically, 58 percent of that number was sexual offenses resulting in prolonged trauma for the victims [3].

The National Commission for the Protection of Indonesian Children (KPAI) notes that since 2007, the most type of child crime is sodomy against children. From 1.992 cases of child crimes reported to KPAI, that year, as many as 1.160 cases or 61.8 percent, was a child sodomy case [4]. Moreover, KPAI receives reports of sexual violence cases that are increasing every year. From 2011 to 2014, there has been a significant increase. "In 2011 there were 2178 violence cases, in 2012 there were 3512 cases, in 2013 there were 4311 cases, and in 2014 there were 5066 cases." From the case reports, 1366 cases were pornography and 1032 cases were cybercrime. In January to May of 2015, KPAI received 500 reports of child abuse cases. KPAI estimates that the number was in fact much higher [5].

Based on these realities, people are in fear and worry about their children that they have an initiative to impose castration as the punishment for the criminal offenders of pedophilia as already imposed in other countries, such as

California, South Korea, Georgia, Montana, Oregon, Wisconsin, Florida, Iowa, Louisiana, and Texas.

Kebiri or commonly called castration is a technique to amputate the genetic tissue done on a man's testicle [6]. Testicles are male reproductive organs that produce sperm and testosterone [7]. In several countries, techniques of castration punishment are varied, some in traditional ways which are surgical methods by discarding the testicles (*buah dhakar*), known as physical castration, or injecting certain chemicals, called castration injection or chemical castration [8].

People's opinions, including the Minister of Social Affairs, the Minister of Health, the National Commission for Child Protection, the Governor of Jakarta and the Governor of West Java, on the castration punishment was then approved by Jokowi, President of the Republic of Indonesia [9]. By 2016, the government has legalized that form of punishment in the constitution as an additional punishment for perpetrators of pedophilia crime [10].

The enactment of castration as additional punishment for the perpetrators of pedophilia crime by the government inflicts pros and cons in society. The community who view sexual assault as a crime that must be immediately eliminated considers that the additional punishment, in this case the act of chemical castration is the best way to give a deterrent effect for the perpetrators of sexual violence against children. On the other hand, many parties oppose and reject the additional punishment, one of which is the human rights activists. Therefore, there should be in-depth study about castration as the additional punishment according to the perspective of Islamic criminal law and positive law.

II. LITERATURE REVIEW

A. Pedophilia Act

The definition of pedophilia as proposed by Sawitri Supardi [2], is a psychosexual developmental disorder in which individuals have abnormal erotic desire toward children. According to Law No. 3 of 1997 states that a person is a child if he meets two basic requirements. First, a child is limited by age ranging from eight to eighteen years old. Second, a child has never married, meaning he is not bound in marriage or ever marry and then divorced. If the child is bound in marriage or his marriage is terminated due to a divorce, then the child is considered as adult even though he is under eighteen years old. While in Article 45 of the Criminal Code (KUHP) states that a person is a child if he is not yet reached the age of sixteen.

In majority, the pedophilia crimes are experienced by men. Such crimes can be heterosexual or homosexual. The heterosexual crime refers to a criminal act of pedophilia against the opposite sex, while homosexual one is against the same sex. Pedophiles are not only people who do not have partners, but also frequently those who have families.

The perpetrator of pedophilia crime is called *pedophile*. The crime committed by *pedophiles* is synonymous with fornication. In this molestation, abuse rarely occurs, but

there is a chance that it can happen. Pedophiles classified into sexual sadistic or psychopathic group usually hurt their lust objects physically that can cause serious injury [10].

Rape is an act that can be criminalized in Indonesia, but the victim must provide two witnesses of the incident which is difficult for the children. The crimes usually committed are stroking the child's hair, playing the child's genitals, asking the child to play his genitals, inserting his genitals to the child's, molesting, even killing the child. The crime committed by pedophiles accompanied by threats to the child, such as threatening the child to not tell anyone about the crime. Victimologically, children are one of the vulnerable groups who are obliged to get the protection from the State because they are unable to protect themselves physically and psychologically.

A pedophile has a strong subjective interest to encourage the pedophilia crime against minors. *Pedophiles* generally know the children they rape, like neighbors or family friends. Alcohol and stress may increase *pedophilic* desire to rape children [11]. *Pedophiles* have a sexual fantasy [12] about children when their mood is negative. Pedophiles also have social maturity, self-esteem, impulse control [13] and low social skills.

This crime belongs to the violation of immoral norms that will bring terrible effect for the psychological development of children, such as continuous trauma [14] so that children do not want to go to school and play with their friends. They feel frightened even when they are inside the house. The consequence of pedophilia crime is affecting the intelligence of the brain, which can eliminate the balance of reason, ignorance and mind error, and make people feel depressed due to fear and worry because of the pedophiles' daring behavior to commit crime against minors.

B. Castration Punishment

Castration punishment is one of the handlings of pedophilia disorder. Biological handling by *kebiri* is by the castration or cutting the testicles and chemical injection to weaken the testosterone hormone [8].

In the history of human civilization, the act of castration has many purposes. Victor T. Cheney [16] declares that castration had been done to livestock in the Eastern Mediterranean in 8,000-9,000 years ago. The goal was to have more female cattle than the male. There is no definitive record of when the castration was done to humans. However, in Egypt in 2,600 BC castrated slaves were valued higher because they were considered more diligent and obedient to their masters. Similar actions were found in Greek slaves around 500 BC, Harem guards in Persia, as well as treasurers and a number of Chinese imperial officials [8].

In Indonesia, the occurrence of rape cases against children inflicts public outcry that prompts the state to take serious action. The politicians have relatively single opinion that the punishment for the perpetrators must be exacerbated.

In 2016, the President of Indonesia authorized Perppu No. 1/2016 on the second amendment to Constitution No. 23/2002 on Child Protection [10] in response to the rampant cases of sexual violence, including child rape. This regulation applies chemical castration as the additional punishment for any person who perpetrates violence or threats of violence while forcing a child to have sexual intercourse with him or with another person who inflicts more than one victims, resulting in serious injury, mental illness, infectious disease, disruption or loss of reproductive function, and/or death.

III. CASTRATION PUNISHMENT IN ISLAMIC CRIMINAL LAW AND POSITIVE LAW PERSPECTIVES

A. Castration Punishment in Islamic Criminal Law Perspective

Islam as the religion of rahmatan li al-'alamin teaches about the importance of establishing law for maintaining religion (*hifz al-din*), soul (*hifz al-nafs*), reason (*hifz al-'aql*), descent (*hifz al-nasl*) and treasure (*hifz al-mal*) [16].

The purpose of Islamic law based on the decree of *Allah* and the provisions of *Rasul* is for the happiness of human life in the world and in the hereafter by taking the beneficial and preventing or rejecting the harm, which is useless for life. In other words, the purpose of Islamic law is the benefit of human life [17], both spiritual and physical, individual and social.

In Islamic criminal law, the determination of punishment that has not been determined yet is then included *astakzir* punishment, so that the minimum and maximum levels can be determined by the judge. Therefore, since the castration punishment is a punishment that has not yet existed in Islamic history, its levels can be determined by the judge.

It is clear that castration as additional penalty for pedophilia criminals is relevant. Because it is considered to have reached the benefit of the people, and the achievement of *hifz al-'aql* (protecting reason), especially on the victims. In Islam, protecting reason is one of the five main pillars that must be protected, otherwise it will threaten human life, such as the feeling of insecurity, fear, and worry because of this pedophilia crime.

The punishment can bring goodness to society because it can provide deterrent effect for the perpetrator, preventive function against possible repetition of the same type of crime, and repression to educate the perpetrator to be a good person and realize his mistakes.

The purpose of *shari* 'in the formation of the law which aims to realize the benefit of mankind, is applied with the effort to ensure its basic needs (*daruriyah*) and meet the secondary needs (*hajiyyah*) as well as complementary needs (*tahsiniah*) [18].

The sanctions application in the form of castration punishment to preserve reason (*hifz al-'aql*) in pedophilia crime is an important thing to do as an effort to give deterrent effect and prevention for the perpetrator so that by applying this punishment, it is expected to give security for people, especially children who are the main targets of this

crime. Therefore, in this case, the existence of the castration punishment is a fundamental solution (*daruriyyah*) to deal with pedophilia crime.

Maintaining reason is important in Islam, the existence of reason which should be used to think of useful things for life in this world and the hereafter needs to be protected, whether from trauma, fear, and worry that disturb human life, and will bring loss. Therefore, castration is imposed as the additional punishment with the aim to create the benefit for humankind. As is the case in Islamic fiqh: "to reject harm should take precedence over bringing benefits."

B. Castration Punishment in Positive Law Perspective

Good law is a law that meets several elements: (1) as an attempt to retaliation, (2) forgiving the sin, (3) giving a deterrent effect, (4) protecting the community, and (5) as an effort to fix the offender [20]. Laws are enforced with the aim of creating public order.

Jail sentence for criminal offenders of pedophilia seems unable to achieve the objective of criminal law, which is to give deterrent effect and prevention. This is evidenced by the increasing number of pedophilia crime each year. One of the alternatives to achieve the purpose of the criminal law objective is the enforcement of castration punishment as additional punishment and rehabilitation of sexual disorder suffered by the perpetrators.

In California, in 1996, the second technique in handling *pedophiles* was used as an additional punishment to deal with the *pedophiles* released from prison [21]. As a criminal sanction that is reactive to an action and action sanction which is anticipatory against the perpetrator of the action [1]. This constitution is used in a new era in which applying the castration punishment as the penalty given to rehabilitate the perpetrator. The purpose of applying this additional punishment is to protect children as the next generation from the *pedophilia* crime. It is as described in the criminal law that the purpose of the establishment of punishment is to maintain security and orderly social interactions.

In some countries, additional punishment of castration used as one of criminal sanctions has been imposed with the aim to protect the community. These countries include nine European countries, nine American states, one Latin American country and one Southeast Asian country [22]. The nine European countries are Britain, Poland, Russia, Germany, Czech Republic, Denmark, Sweden and Spain. While the nine US states are California, Florida, Georgia, Iowa, Louisiana, Montana, Oregon, Texas and Wisconsin. One Latin American country that enforces the castration punishment is Argentina and one country in Southeast Asia is South Korea.

In general, there are two kinds of criminal law theory [23] about the purposes of this punishment, covering the absolute theory (*vergeldings theorie*) and relative theory (*doel theorie*). The purposes of applying a punishment as absolute theory (*vergeldingstheorie*) in criminal law, are:

1. The practice of the punishment will satisfy the revenge feelings of the victim, whether the feeling of justice for the victim, the victim's family and society.
2. The criminal law is intended to give a warning to others that each crime will be punished.
3. The criminal law is intended to show the existence of equal comparison between deeds and the imposed penalty.

Moreover, the purposes of sentencing according to relative theory (*vergeldingstheorie*) in criminal law are:

1. The practice of criminal penalty is expected to create a deterrent effect for the perpetrator so as not to repeat his actions (special preventie) and notify the public that doing things that violate the law will get a similar penalty (general preventie).
2. Based on the guidance given to the perpetrator during the time in prison, it is expected to improve his personality so that he can be a good person to the community when he is released.
3. Killing the perpetrators by imposing death sentences and making them helpless by imposing life sentences.

IV. ADDITIONAL ANALYSIS OF CASTRATION PUNISHMENT FOR A PEDOPHILE

A. *Analysis of Islamic Criminal Law Perspective about Castration as Additional Punishment*

The government's policy towards castration as additional punishment for the perpetrators of pedophilia crime is a blessing. This is the goal of the benefit for humankind as embodied in Islam, as the rule: "the policy of a leader for his people must be linked to the goodness" [24].

Castration as the additional punishment is beneficial as a punishment which aim is to eliminate harm and bring the benefits of generating common virtue in the absence of a pedophilia crime. Therefore, the benefit is to bring secure feelings and peaceful thoughts. Moreover, people can develop their creativity to think of the goodness for the world and the hereafter.

As a punishment that can lead to a sense of justice for the community, where the pedophilia crime is based on abnormal biological development, so that the need for castration punishment that can rehabilitate the main factor of the crime. The consequence from rehabilitation of the perpetrator by the castration method is there will be no pedophilia crime so that people get their rights to have a calm and peaceful life and free from the threats of the crime.

Basically, Islam requires the interests, the benefit, and the happiness of all human beings. The cleric asserts that anything ordered by *shari'* is not merely being ordered except the presence of the benefits contained in it. Castration punishment is applied solely to protect the victims from the pedophilia crime. It is clear that the punishment has a common purpose to preserve reason (*hifz al-'aql*) as contained in Islam.

B. *Analysis of Positive Law Perspective about Castration as Additional Punishment*

Castration as one type of criminal sanctions has been imposed in several countries with the aim to protect the community. In punishment theory, castration as a criminal sanction aims to paralyze or make the perpetrator of pedophilia crime no longer able to commit his crimes. The purpose of the punishment in disabling theory is to prevent, at least to reduce the chances of future violations [25].

The castration punishment for the perpetrators of pedophilia crime includes elements of the nature of the law, which are:

1. As an attempt to retaliate against the act of violating the law and the established provisions.
2. To forgive the sin because the castration punishment can free the guilty feeling of the society.
3. To providing a deterrent effect for criminals so as not to commit the same offense, or even as a lesson for others not to do the same.
4. To protect the community by providing a sense of security to children.
5. As an effort to fix the perpetrators of crime because castration punishment can reduce libido, especially for pedophiles so that it can control the abnormal sexual desire.

Based on the previous description, it can be concluded that castration as the additional punishment for the perpetrators of pedophilia crime is to take action against the pedophiles who have been released from prison either using surgical methods by cutting testicles or injecting chemicals by injecting certain drugs to weaken the testosterone hormone established by the government as a form of suffering imposition to the perpetrators for violating the law in order to protect the child from the *pedophilia* crime.

V. CONCLUSION

Based on the research, it can be concluded that:

- a. Castration as the additional punishment according to the Islamic criminal law perspective is a merit, as a punishment which aims to eliminate harm and bring the benefits of generating common virtue in the absence of the pedophilia crime.
- b. Castration as the additional punishment according to the positive law perspective is a form of suffering imposition to the perpetrators for having violated the law and human rights with the aim to protect children from the pedophilia crime.
- c. Castration as the additional punishment according to the Islamic criminal law and positive law perspectives equally aims to give a deterrent effect for the pedophiles. Therefore, the implementation of castration as the additional punishment must be attached to the pedophiles so that the law can work effectively in society.

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