

Castration to the Pedophile in Indonesia: Over-Criminalization or Not?

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Abstract-The controversy after the issuance of Law Number 17 of 2016 concerning Child Protection which among others regulates the imposition of sanctions for perpetrators of sexual violence against children or better known as pedophile in the form of chemical castration actions accompany the existence of this law. Various reasons were allegedly a criminal policy that over-criminalization for pedophile. Those reasons are the issue of the effectiveness of application in the form of weak data supporting the application of castration, the problem of the effectiveness of the application of castration in several countries, the problem of the effectiveness of castration in the world of medicine and psychology, and the problem of castration in the perspective of criminal law. Whereas a criminal policy besides aiming to provide a deterrent effect for perpetrators and preventive functions against crime is also oriented towards criminalization which is more "humanizing" offenders in the form of treatment. Therefore, this study employed a normative research method and was carried out by using the statutory approach through a review of laws and regulations as well as regulations relating to the issue discussed. Legal materials were obtained from Law Number 17 of 2016 concerning Child Protection and the Criminal Procedure Code (KUHP) as the primary materials. The secondary legal materials were obtained from books, journals, and other literature. Meanwhile, the data collection technique used is library research by examining legal materials relevant to the research discussion.

Keywords-castration, pedophiles, criminalization

Introduction

On May 25, 2016, the President of the Republic of Indonesia, Joko Widodo, issued Government Regulation in Lieu of Law (PERPPU) Number 1 of 2016 concerning Second Amendment to Law Number 23 of 2002 concerning Child Protection. Furthermore, this PERPPU was later passed into Law Number 17 of 2017 concerning Child Protection (hereinafter referred to as the "Child Protection Act"). Among others, Article 81, 81A, 82 and 82A Law Number 17 of 2017 regulates new provisions, namely the weighting of sanctions for perpetrators of sexual violence against children, namely criminal sanctions dead, for life, and a maximum of 20 years in prison and additional crimes in the form of announcements of the perpetrators' identities. Furthermore, the perpetrators may also be subjected to "treatment" in the form of **chemical castration** and installation of electronic detectors.

State policy in issuing Amendments to the Law on Child Protection that includes provisions regarding castration was motivated by the emergence of violent crimes against children, including pedophilia that occurred massively in decades. Besides, many voices from the public demanded that pedophiles are severely convicted and some even suggest emotionally to castration. This public emotion was inseparable from the low level of court decisions in similar cases. According to Huda (2011), public reactions were an emotion, parallel with the consequences that result. At times, the crime is no longer necessary for public emotions that have gradually disappeared. This is a positive response to the operation of the so-called criminal law system.

The data released by the National Commission of Women's Rights in 2016 (the year PERPPU was enacted), sexual abuses that occurred in private domain reached 32.752 cases and ranked second. Out of those cases, rape dominated with 72% (2.399 cases), molestation with 18% (601 cases) and sexual harassment of 5% (166 cases). Meanwhile, in public domain, there were 5.002 cases or 31%. Therefore, sexual abuse dominated the violence against women by 61%. In the context of a nation, sexual abuses also occurred in the past related to violence against human rights, virginity test in formal institutions, etc. Perpetrators of Sexual Violence are cross-age, including offenders from among children. In Indonesia, the number of children who are victims of sexual crimes according to official records of ILO (International Labour Organization) and UNICEF (United Nations Children's Fund) reaches 70,000 people each year and of that number, 21,000 are on the Java island (UNICEF, 2017).

On the other hand, Indonesia has issued Law Number 5 of 1998 concerning Ratification of the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, which includes the provision of:

“Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1 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. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment”.

Besides, Indonesia has also issued Law 12 of 2005 concerning Ratification of the International Covenant on Civil and Political Rights, which states:

“No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

Based on the above problems, this study focused on the discussion of critical analysis in the perspective of criminal law on state policies in the application of criminal sanctions in the form of chemical castration as stated in Law Number 17 of 2016 concerning Child Protection allegedly a criminal policy that becomes over-criminalization.

Research Method

This study uses a normative research method that was conceptualized as an observable phenomenon in real life. This study is carried out by using the statutory approach through a review of the laws and regulations as well as regulations relating to the issue discussed, and in this case, the various rules of law which are the focus of research. Besides, the legal conceptual approach is also used. This research is started by describing the legal facts, then looking for a solution to a legal case to solve it. In this study, legal materials are obtained from the Children Protection Law. In addition, the secondary legal materials are obtained from books, journals, and other literature related to the discussion. The data collection technique used is library research by examining legal materials relevant to the research discussion.

Discussion

Definition

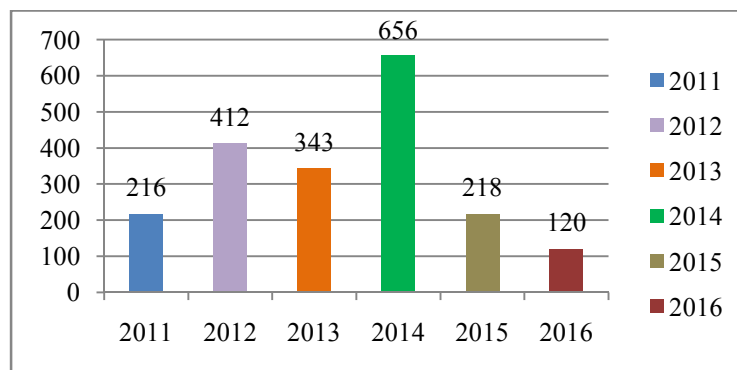
The word “pedophilia” is derived from the Greek words for love (*philia*) of young children (*pedeiktos*). Pedophilia is typically defined as a recurrent sexual interest in prepubescent children, reflected in persistent thoughts, fantasies, urges, sexual arousal, and behavior (American Psychiatric Association, 2000). According to Seto (2004), pedophilia and sexual offending against children are often conflated, but they are not synonymous. Some pedophiles have not committed sexual offenses against children, and some sex offenders with child victims are not pedophiles. The definition of “child” in Indonesia based on the age limit in several laws was interpreted as under the age of 18 years old. This was contained in Law Number 3 of 1997 concerning The Children’s Court, Law Number 39 of 1999 concerning Human Rights, Law Number 23 of 2002 concerning Child Protection, and other laws.

Questioning the Effectiveness of Castration

Weak Data Supporting the Implementation of Castration

As data used by government and the House of Representatives (DPR) in issuing Law Number 17 of 2017 concerning Child Protection which includes provisions regarding castration, among others based on data from Indonesian Children Protection Commission (KPAI) (2016), children as the victims of sexual violence in Indonesia from 2011 to 2016 was fluctuated. The data from Indonesian Children Protection Commission (KPAI) (2016) was illustrated in the table below:

Table 1. KPAI’s Data on the Number of Children Victims of Sexual Crimes from 2011 to 2016

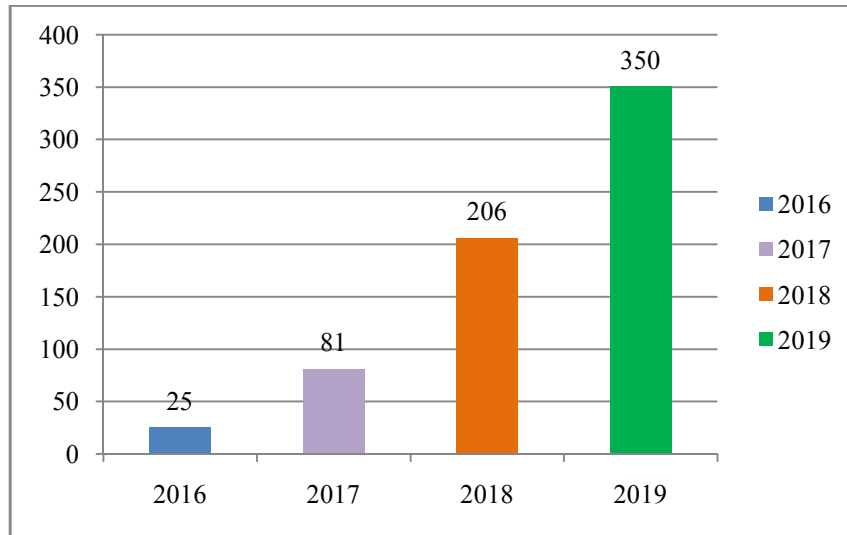


Source: Indonesian Children Protection Commission (KPAI) (2016).

The Table above explained that there were 216 cases in 2011, 412 cases in 2012, 343 cases in 2013, 656 cases in 2014, 218 cases in 2015, and 120 cases in 2016.

Meanwhile, based on data after the issuance of Law Number 17 of 2017 concerning Child Protection which includes provisions regarding castration from Witness and Victim Protection Agency in Indonesia (LPSK) (2019), children as the victims of sexual crimes in Indonesia from 2016 to 2019 were in fact increasing in high numbers. The data from Witness and Victim Protection Agency in Indonesia (LPSK) (2019) was illustrated in the table below:

Table 2. LPSK’s Data on the Number of Children Victims of Sexual Crimes from 2016 to 2019



Source: Witness and Victim Protection Agency in Indonesia (LPSK) (2019).

The Table above explained that there were 25 cases in 2016, 81 cases in 2017, 206 cases in 2018, and 350 cases in 2019.

Seen from those numbers, it is evident that the pedophilia case in each year has never been absent in filling out a list of child victims as pedophilia victims themselves. However, other crimes other than pedophile are also never absent each year.

As stated in the Preamble, the issuance of PERPPU into Law was due to the increase in cases of sexual violence against children that should be seen comprehensively. The data above present cases of sexual violence against children that occurred from 2011 to 2016 experienced a decrease in the number of victims, even though in 2014 the number of victims of sexual violence against children increased sharply. However, at least in 2014, after the issuance of Law Number 35 of 2014 concerning Child Protection, there was an escalation decrease in the number of sexual violence against children.

In addition, there is no data to prove that the level of recidivism (repetition of crime) of sexual violence against children in Indonesia was high. Besides being unable to prove the emergency condition of sexual violence against children, the state was also unable to provide recidivism for perpetrators of sexual violence against children in Indonesia. Therefore, by looking at the recidivism rate, we can assess whether the criminal policy that has been carried out so far has been effective or the opposite to determine the specific form of intervention to respond to it (Widodo, Sofian & Akbari, 2016).

Effectiveness of Castration Application in Several Countries

World Rape Statistics (WRS) proves that the death penalty or the penalty of castration was not effective in creating a deterrent effect (Women’s Coalition, 2016). World Rape Statistic published every 2 years, shows that countries which apply the death penalty or castration penalty occupy the top 10 positions as the country that has the highest case in the world. Up to now, there have been 10 countries imposing capital punishment and 20 countries imposing castration penalty for rape perpetrators (Widodo, et al, 2016).

Data from World Rape Statistics in 2012 shows the 10 countries that have the highest rape cases in the world, respectively: America, Africa, Sweden, India, Britain Germany, France, Canada, Sri Lanka, and Ethiopia.

Meanwhile, then World Rape Statistic in 2014 also presents the top 10 countries with the highest rape cases, respectively: India, Spain, Israel, America, Sweden, Belgium, Argentina, Germany, and New Zealand. This World Rape Statistics data has confirmed that the assumption of the application of castration will have a deterrent effect turned out to be a myth. Even though several countries that apply the death penalty or castration penalty also recognize the decreasing number of reported rape cases does not reflect the real situation, due to a large number of unreported cases, especially if the perpetrators are part of the family (Widodo, et al, 2016).

Effectiveness of Castration in the Medicine and Psychology Perspectives

Punishment in the form of an act of castration can be interpreted into 2 (two) actions. First, in the form of cuts aimed at eliminating testicular function in males or ovarian function in females. Castration can be done on either animals or humans. Second, it can be in the form of chemical injections or known as chemical castration (Indonesian Ministry of Health, 2019). From the 2 types of castration penalty process, chemical castration processes are carried out in Indonesia. This castration process is done by injecting certain chemicals, called chemical injection or castration, antiandrogen drugs, such as Medroxy Progesterone Acetate (MPA) or Cyproterone Acetate (CPA). Both are drugs that can suppress the function of the hormone testosterone, which is to reduce testosterone levels, the male hormone responsible for the onset of libido (Kompas, 2015).

According to Cauley (2014) from Iowa University, injecting chemical fluids into perpetrators of sexual violence against children in the form of Medroxy Progesterone Acetate (MPA) is believed to reduce testosterone levels that have implications for decreasing sexual desire. However, The Food and Drug Administration in the United States (US) rejected the provision of MPA to perpetrators of sexual violence against children. According to the provision, to reduce sexual desire, perpetrators of sexual violence against children must be injected with chemical castration at a dose of 500 milligrams given every week within a certain period to result in impotent perpetrators. The Food and Drug Administration in the US argues that it is not necessary to make the perpetrators of sexual violence against children impotent, besides, the MPA injection can result in the disruption of the function of reproductive organs to the offenders. Moreover, the MPA injection will also cause more serious problems that are difficult to predict as its implications.

Cauley (2014) also argues that chemical castration has many legal issues, in terms of not only material law but also related to procedural law. Academically, Cauley also cited the view of criminologists that what triggers sexual violence is a factor of “power and violence” and not a factor of “sexual desire.” Thus, what must be reduced is the motivation of violence rather than the motivation of sexual desire. According to him, the most appropriate thing to give to perpetrators of sexual crimes in children is therapy and not treatment in the form of chemical injection. Psychological therapy might help many perpetrators of sexual violence against children for what they face is what they call a “psychological problem” not a “medical problem.” By conducting psychological therapy, it might reduce the impact on drug dependence and the negative effects of chemical castration will disappear.

On the other hand, Law Number 17 of 2016 containing the regulation of castration states that prosecutors will execute chemical castration. However, the prosecutors do not have the competence to inject chemical castration. Professionals (doctors) are required to carry out the punishment. However, the Indonesian Doctors Association (IDI) refused since it was considered violating the code of ethics of medical practice mentioned in Law Number 29 of 2004 concerning Medical Practices. Furthermore, the doctors refused to do it for they are aware that the effects of chemical castration have a dangerous effect (Tajudin, Luthfie & Yudiana, 2019). Additionally, the Indonesian Doctors Association (IDI) has issued an Official Circular dated 9 June 2016 to all doctors in Indonesia asking that doctors not be executors of castration.

Castration in Criminal Law Perspective

Discussion on the application of castration in the perspective of criminal law stated in the Child Protection Law as a *lex specialis* provision (special provisions). It can be seen in 2 (two) sources of criminal law as its *lex generalis* (general provisions). First, it is based on the current Law of Criminal Code (KUHP). Second, it is based on the Draft Law of Criminal Code (RKUHP) that soon be enacted which explicitly contains The Purpose of Criminal Law.

Castration Based on the Current Law of Criminal Code (KUHP)

Seen from the criminal laws system in Indonesia, castration as regulated in Article 81 paragraph (7) Law Number 17 of 2017 concerning Child Protection collides with criminal sanctions provided for in the current KUHP that is explicitly regulated in Article 10 of the KUHP. According to this article, there are 2 (two) forms of criminal punishments, namely the primary punishment and additional punishment. Primary punishment consists of capital punishment, imprisonment, confinement, fines, and incarceration. Meanwhile, additional punishment consists of cancelation of certain rights, confiscation of certain objects, and the announcement of judge conviction. Thus, punishments in the form of castration are not known in the criminal law system in Indonesia based on the provisions stated in the current KUHP.

Constitutionally, all laws outside of the current KUHP that contain criminal provisions are obliged to pay attention to the general principles set out in the First Book of KUHP. This is also in line with Arief's (2015) argument that when seen from the whole criminal law system, the "criminal provisions" in each special law, are only a sub-system of the entire main criminal law system regulated in the current KUHP. Likewise, the Child Protection Law that regulates castration violates the General Provisions in Article 10 of the current KUHP.

Castration Based on the Draft Law of the Criminal Code (RKUHP)

The formulation of the Draft Law of the Criminal Code (RKUHP) has entered the final stage in its discussion (Drafting Team, 2019). The influence of the development of the world of criminal law globally, especially after several times the United Nations International Congress on the handling of perpetrators of crimes, including the United Nations (UN) Resolution on "The Prevention of the Crime and the Treatment of Offenders," discourse on law the criminal underwent a significant overhaul. One of the developments is a criminal orientation that is more "humanizing" offenders in the form of treatment (Packer, 1968).

The use of criminal law is not always a necessity, if preventive activities that are not criminal law still have a strategic position, even holding key positions that should be intensified and effective (Muladi & Arief, 1984). Thus, when criminal law efforts are prompted, Indonesia should renew its rigid and imperative criminal law system into a criminal law system that prioritizes the humanitarian aspects that uphold justice.

This is in line with the arguments of Ross (1979) who stated, Prevention, or more generally the influencing of behavior, is the only adequate answer when the question is posed as one of the aims of penal legislation. Retribution, i.e., the requirement of guilt as a precondition and measure of punishment, is the only adequate answer when the question is posed as one of what restrictive moral consideration limits the state's right to use as means of influencing behavior. According to Curzon (1997), the legislature to leave unexpressed some of the mental elements of the crime.

In line with the above provisions, the Purpose of Criminal Law that is not contained in the current Law of Criminal Code (KUHP), thus Article 55 paragraph (1) and (2) of the Draft Law of the Criminal Code (RKUHP) explicitly states that criminal law aims to:

- a. *Prevent criminal offenses by enforcing legal norms for the protection of the community;*
- b. *Humanize the convicted person by providing treatment to be a good and useful person;*
- c. *Resolve conflicts caused by crimes, restore balance, and bring a sense of peace in society; and*
- d. *Free the guilt on the convict.*
- e. *Punishment is not intended to narrate and demean human dignity.*

If the sanction of castration is related to the purpose of criminal law in the RKUHP above, then it can be considered that castration seems only as an act of retaliation from the government without any efforts to improve the personal perpetrators of sexual violence. Whereas the purpose of criminal law is not only to make a deterrent but also to provide protection and education for the convict. Therefore, castration punishment is only based on mere retaliation and overrides the personal improvement of the offender which causing the offender's personality worse and does not resolve the roots of the crime of sexual violence against children.

Criminal sanctions aim at giving special punishment perpetrators to make them feel the consequences of their actions. Besides aimed at the imposition of suffering on the perpetrators, criminal sanctions are also a form of declaration of the reproach of the perpetrators' actions, while the sanctions in the form of actions are more educational in nature. Seen from the perspective of criminal law theory, sanctions are sanctions that do not retaliate. It is solely aimed at special prevention, namely protecting the community from threats that can harm the interests of the community (Utrecht, 1987). In short, criminal sanctions are oriented to the idea of imposing sanctions or punishment on perpetrators of acts, while sanctions are oriented to the idea of community protection.

The orientation of the criminal system in the RKUHP is very much different from the policy of penalty in the form of castration in the Child Protection Law. Although the type of sanction in the Law is a penalty it is precisely to give suffering or misery to the perpetrators. The nature of such sanctions is more similar to criminal sanctions such as primary punishment that have been specified in Article 10 of the current KUHP, namely imprisonment, confinement, life imprisonment, capital punishment, and fines. Based on the foregoing, the castration application policy contained in the Child Protection Law is considered to deviate from the criminal law system both in the current KUHP and in the Draft Law of the Criminal Code (RKUHP) that soon be in force.

Policy on the Criminalization of Castration to the Pedophiles

In essence, the criminalization policy is part of a criminal policy using the means of criminal law (penal policy) (Arief, 2003). Meanwhile, the definition of "criminalization" was mentioned in the Black's Law Dictionary

by Garner (2009), “Criminalization” is the act or an instance of making a previously lawful act criminal, usually by passing a statute. Honderich (1979) defined criminalization as making a given behavior and the attendant formal and informal processes and effect no longer punishable by criminal law. Criminalization is also defined as a process to make an act as a crime to be prosecuted and determine its sanctions (Dine & Gobert, 2003). According to Soekanto (1981), criminalization is an act or stipulation of the authorities regarding certain acts that are considered by the community or groups of people to be criminal. Whereas, according to Soedarto (2007), criminalization is a process of determining an act that initially not a crime became a crime. This process ends with the formation of a law in which the act is threatened with criminal sanctions.

In contrast to criminal law experts who partly explore criminalization theories that originate from the criminal law itself, Husak (2009) bases his theory of criminalization from the outside the criminal law. State power in making criminal laws is not only limited by some criteria that originate from criminal law (internal constraints) but is also limited by criteria that come from outside the law (external constraints). Husak (2009) asserted that the criminalization policy must meet internal constraints including evil prohibited acts, the non-trivial harm or evil constraint, the wrongfulness constraint, the principle of giving a fair sentence, proportionally in punishment, and the burden of proof constraint.

Husak (2009) also pointed out the importance of paying attention to criteria outside criminal law that he called external constraints. The legislators are obliged to pay attention to the constraints regarding the basis of criminal justification. Thus, if the external constraint in issuing criminal policy is related to the regulation of castration, then this requires a deeper elaboration. However, Indonesia has briefly issued Law Number 5 of 1998 concerning Ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Law Number 12 of 2005 concerning Ratification of the International Covenant on Civil and Political Rights. Both of these laws are essentially ratifications of international conventions concerning the prohibition of torture or other cruel, inhuman, or degrading treatment or punishment against criminals. The nature of criminal law as *ultimum remedium* should be the final consideration for the legislators. There is no need to use criminal law as a means if there are other means to achieve goals.

If the definition of criminalization above is related to pedophilia cases using the Child Protection Law regime as it includes provisions regarding castration, the settlement of these cases is directed towards providing criminal sanctions in the form of “punishment” which turns out to be also contradictory with the legal system of criminal sanctions mentioned in the current Law of Criminal Code (KUHP). Meanwhile, if the definition of criminalization is also directed to the granting of “sanctions” which are also contrary to the legal system of criminal sanctions contained in the Draft Law of the Criminal Code (RKHUP) that will soon be enacted, in particular Article 55 paragraph (1) of the RKUHP regarding the Purpose of Criminal Law.

Seen from the chronology of the issuance of the Amendment to the Child Protection Law that regulates castration provisions, a Government Regulation in lieu of a Law issued by the President, namely Government Regulation in Lieu of a Law Number 1 of 2016. In the constitutional system in Indonesia, Government Regulation in Lieu of a Law (PERPPU) is a provision that can be issued by the president based on an “emergency state.”¹ Furthermore, regarding what is meant by “emergency state” has been regulated in PERPPU Number 23 of 1959 concerning Dangerous Conditions.²

Seen from its “emergency state,” PERPPU that underlies the issuance of the Amendment to the Child Protection Law, which regulates the provisions regarding castration, has not yet been fulfilled. As stated previously on the previous explanation in this paper, the emergency state cannot be met because there are lack of supporting data in the application of castration, the ineffectiveness of the application of castration in reducing pedophilia crime in several countries that have applied it in criminal sanctions, the problem of the effect of castration on pedophiliacs from the medical aspect, and the problem of applying castration in the criminal law system. All of which have

¹Article 22 Paragraph 1 of the 1945 Constitution that “*Should exigency compel, the President shall have the right to determine Government Regulations in lieu statutes.*” Cf. Article 1 Paragraph 4 No. 12/2011 concerning Making Rules “*Government Regulation In Lieu of Law is the Rules set by the President in case of urgency.*”

²In Article 1 paragraph (1) PERPPU No. 23/1959 concerning Dangerous Conditions, it is stated that a state of danger with a degree of civil emergency or military emergency or war situation, occurs if:

- a. *Security or law order in all regions or parts of the Republic of Indonesia are threatened by rebellion, riots, or due to natural disasters, feared that it cannot be overcome by ordinary equipment;*
- b. *War arises or war danger or feared rape of the territory of the Republic of Indonesian in any way;*
- c. *State sustainability in a state of danger or from special circumstances it turns out there is or is feared some symptoms can endanger the life of the State.*

answered the question that the application of castration for pedophiles constitutes over-criminalization in the politics of criminal law in Indonesia.

Furthermore, if seen from the development of cases of sexual violence against children after the issuance of Law Number 17 of 2017 concerning Child Protection in 2016, it turns out that based on existing data from 2016 to 2019 as described in Table 2, it has not disappeared or decreased. Therefore, the writer consider that compared to the application of castration, other means can be given to overcome the emergence of pedophilia cases. For example, applying the most severe penalty for pedophiles in a court decision following the provisions that have been mentioned in the current Criminal Code and Law Number 23 of 2002 concerning Child Protection. Where so far, the emergence of the emotional public is inseparable from the low court decisions for similar cases. According to Huda (2011), "public reactions are an emotion, parallel with the consequences it causes. At times, the crime is no longer necessary for public emotions that have gradually been disappeared. This is a positive response to the operation of the criminal law system."

Another means that can be used is the use of psychological therapy for pedophiles. This is in line with the opinion of Cauley, that pedophiles need therapy not treatment in the form of chemical castration. Psychological therapy might help many perpetrators of sexual violence against children because they face a "psychological problem" not a "medical problem." Moreover, psychological therapy might reduce the impact on drug dependence and the negative effects of chemical castration (Cauley, 2014).

Conclusion

Even though it has not been proven effective in tackling acts of sexual violence against children, including pedophilia cases, many countries have implemented castration in their criminal law systems. Indonesia has also implemented castration in its penal system as mentioned in Law Number 17 of 2016 concerning the Amendments to Law Number 23 of 2002 concerning Child Protection. However, in many perspectives, especially the perspective of criminal law, it turns out that the state policy in issuing this law is over-criminalization that can be a bad influence in overcoming cases of violence against children, especially in the case of pedophilia in the future.

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