

Chemical Castration in Indonesia: Limiting an Absolute Human Right

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Keywords

Chemical castration; human rights; child protection

Abstract

In 2016, the Indonesian government enacted Government Regulation in Lieu of Law Number 1 of the year 2016, adapted into Law number 17 of the year 2016. This regulation introduces chemical castration as a criminal sanction for child sex offenders, spurring human rights concerns. This article aims to assess whether chemical castration constitutes cruel, inhuman, or degrading treatment from the perspective of Article 7 of the International Covenant on Civil and Political Rights and whether such a human rights violation can be justified.

This article employs the normative research method, studying principles of law, systems of law, the synchronization of the law, the history of the law and policies, and laws in comparison to one another. The article bases its findings on laws, books, journals, judgments, and other documents.

This article finds that firstly, chemical castration constitutes cruel, degrading, or inhuman treatment and secondly, that such a violation can be justified according to the limitations of human rights. The significance of this article is the basis for the increased limitation of human rights to advance the cause of child protection.

Introduction

Around 79.6 million children call Indonesia home,² making up 22.6 percent of the world's 1.8 billion children.³ These children are vulnerable to exploitation, obliging Indonesia to protect them to the greatest possible extent to ensure their survival and development.⁴

Despite existing efforts to protect children, many fall victim to sexual violence. In response to a spike of 218 child sexual violence cases in 2015,⁵ the Indonesian government

enacted Government Regulation in Lieu of Law number 1 of the year 2016, adapted into Law number 17 of the year 2016, amending pre-existing child protection laws. Among other innovations in child protection measures, a key amendment this law introduces is chemical castration for child sex offenders.

Chemical Castration by Country

Indonesia is not the first country to introduce chemical castration as a means of controlling

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² Badan Pusat Statistik (2019). *Profil Anak Indonesia 2018*. Profil Anak Indonesia. Jakarta: Kementerian Pemberdayaan Perempuan dan Perlindungan Anak (KPPPA), p.9.

³ United Nations Children's Fund (UNICEF) (2018). *UNICEF Annual Report 2018*. UNICEF Annual Report.

⁴ Article 6(2), Convention on the Rights of the Child, *jo.* Article 1, Presidential Regulation Number 36 of the Year 19

⁵ Setyawan, D. Tahun 2017, KPAI Temukan 116 Kasus Kekerasan Seksual Terhadap Anak. September 27, 2017, Retrieved from <https://www.kpai.go.id/berita/tahun-2017-kpai-temukan-116-kasus-kekerasan-seksual-terhadap-anak>.

pathological sexual behaviour. Chemical castration is implemented to varying degrees in the United States, Australia, Poland, Russia, Moldova, Germany, United Kingdom, Denmark, Sweden, and South Korea. Chemical castration is reportedly being considered in India, due to the high rates of rape. However, Indonesia and South Korea are presently the only Asian countries to introduce chemical castration.

Chemical castration has yet to be implemented in Indonesia. However, a judgment has already been rendered, prescribing chemical castration to Muh Aris, a child sex offender who was convicted of raping 9 children in Mojokerto. He has been sentenced to 12 years in prison, after which chemical castration treatment will commence.

In South Korea, chemical castration has already been implemented in the Pyo case. Sentenced to 15 years in prison, Pyo was convicted of raping 5 teenagers and deemed 'incapable of self-control.' Thereupon, the court decided to prescribe Pyo chemical castration, making him the first recipient of chemical castration in Korea since the inception of the law in 2011. Pyo receives antiandrogen medication every three months, undergoing constituent psychotherapy.

Chemical Castration

Chemical castration is the process of controlling pathological sexual behavior by lowering androgen levels through the pharmacological intervention of antiandrogen drugs (Hill, Briken, Kraus, Strohm & Berner, 2003). Because male sexuality is dependent on androgen, inhibiting the production of androgen, androgen receptors, or desensitizing these receptors can lower the frequency and intensity of sexual thoughts, and consequently, performance of sexual activity. Consistently, the deprivation of androgen has been shown to

effectively erase interest in sexual activity (Koo et al., 2013).

Although child sex offenders are universally condemned as 'sick', many fail to consider that they are ill. Brain structural deficiencies are an important catalyst for child sexual violence. The main brain abnormalities that influence child sexual violence seem to be a combination of excessive androgen levels and poor response inhibition.

High levels of androgen are positively correlated with aggression (Wagels et al., 2019, p.2). Androgen inflames aggression by influencing adaptive decision-making (Wagels et al., 2019, p. 10). Aggressive reactions happen when an emotionally driven impulse is not intercepted by response inhibition (Wagels et al., 2019, p. 2). Indeed, the most distinctive shared trait of child sex offenders is impaired response inhibition, caused by reduced γ -aminobutyric acid (GABA) concentrations in the dorsal anterior cingulate cortex, which is an important hub for sexual processing (Ristow et al., 2018, p. 336). The offender suffers of a deficit in the main inhibitory neurotransmitter associated with self-control and is thus unable to exercise the self-control needed to inhibit sexual aggression.

Chemical castration seeks to protect children from sexual violence by treating the brain structural deficiencies which cause child sexual violence. The fundamental objective of introducing chemical castration is the welfare of the child.⁶ Chemical castration seeks to uphold the child's right to survival and development.⁷ Surges in child sexual violence⁸ suggest that pre-existing sentences failed to comprehensively prevent offences, proving insufficiently deterrent.⁹ The regulation cites the severity of the detrimental impacts of child sexual violence as reason for amending pre-existing laws.¹⁰ Pre-existing solutions have not effectively eradicated child sexual violence,

⁶ Paragraph (a), Preamble, Government Regulation in lieu of Law Number 1 of the Year 2016

⁷ Paragraph (a), Preamble, Government Regulation in lieu of Law Number 1 of the Year 2016

⁸ Paragraph (b), Preamble, Government Regulation in lieu of Law

Number 1 of the Year 2016

⁹ Paragraph (c), Preamble, Government Regulation in lieu of Law Number 1 of the Year 2016

¹⁰ Paragraph (b), Preamble, Government Regulation in lieu of Law Number 1 of the Year 2016

because they only mediate the effects of child sexual violence without extinguishing the causes, leaving children to continue suffering the lifelong effects of child sexual violence. It is because of this that chemical castration was introduced.

Sexual violence burdens its victims with many short-term and long-term costs, whether tangible or intangible. Tangible costs of sexual violence include medical care, mental health services, loss of economic productivity, insurance administration costs, police investigations, criminal prosecutions, and costs associated with the correctional system. The intangible costs of sexual violence encompass psychological pain, fear of victimization, feelings of powerlessness, impaired focus, lowered self-esteem, depression, and the development of phobias (Post, Mezey, Maxwell & Wibert, 2002, p. 775).

These intangible costs consolidate into tangible consequences: Sexual violence survivors are six times more likely to attempt suicide, especially if the assault happened before the age of 16 (Davidson, 1996, p. 550). This underlines the gravity of child sexual violence and the extraordinary urgency for prevention, which necessitates chemical castration.

Ideally, chemical castration should reduce sexually deviant behaviour, impulses, and fantasies, support or at least not impair non-deviant sexuality, and not cause other adverse side effects (Hill, Briken, Kraus, Strohm & Berner, 2003, pp. 407-421). However, the reality of chemical castration disagrees with the utopian ideal.

Manipulating hormones via antiandrogen drugs can cause imbalances in the body's natural equilibrium, manifesting in side effects such as erectile dysfunction, testis size reduction, hot flashes, weight gain, decreased body hair, asthenia, depressive mood, myalgia, cardiovascular complications, and bone mass density loss (Koo et al., 2013, p.

565). These side effects can condense into serious illnesses if left unmediated, calling into question the humaneness of chemical castration.

Chemical Castration and Human Rights

The introduction of chemical castration into national law has sparked numerous human rights controversies. These concerns originate from the invasiveness of the procedure, the potential adverse side effects, and most notably, the lack of requirement for consent from the offender.

It must be underlined that chemical castration is not a mandatory measure. The language of provision provides that chemical castration may be imposed, not that it must be imposed.¹¹ The determination of whether chemical castration is imposed lies with the court. This aids in ensuring that the sentence is tailored to the offence and offender.

However, while the imposition of chemical castration is court-mandated and not automatically ordained by the regulation, the offender does not have the choice to reject the measure. In other words, the offender has no choice but to accept the treatment. Although the offender can be informed of the implications of the chemical castration, the offender has no right to reject it. This may create issues with informed consent.

The most echoed outcry of human rights concerns in the context of chemical castration is that it constitutes cruel, inhuman, or degrading treatment. The right to freedom from cruel, inhuman, or degrading treatment is enshrined in Article 7 of the International Covenant on Civil and Political Rights, adapted into Indonesia's national law through Law number 12 of the year 2005. Indonesia's ratification of this human rights instrument entails the legal consequence of an obligation to respect, protect, and fulfil human rights. In this context, Indonesia must respect, protect,

¹¹ Article 81(7), Government Regulation in Lieu of Law Number 1 of

the Year 2016

and fulfil the right not to suffer cruel, inhuman, or degrading treatment.¹²

Although Indonesia has not ratified Optional Protocol number 2 of the International Covenant on Civil and Political Rights, Indonesia has an obligation to uphold the Covenant. This is because Indonesia has adopted the International Covenant on Civil and Political Rights into national law through Law number 12 of the year 2005. The implication of this law is Indonesia's obligation to respect, protect, and fulfil the human rights enshrined in the International Covenant on Civil and Political Rights.

The right not to suffer cruel, inhuman, or degrading treatment is also provided by Law number 39 of the year 1999¹³ and the Constitution of the Republic of Indonesia.¹⁴ However, the International Covenant on Civil and Political Rights has a wider scope of application, creating a broader range of responsibilities than the aforementioned laws. This means that the International Covenant on Civil and Political Rights casts a wider net for human rights protection than Law number 39 of the year 1999 and the Indonesian Constitution. This underlines the significance of the International Covenant on Civil and Political Rights within Indonesia's human rights framework.

The right not to suffer cruel, inhuman, or degrading treatment is a non-derogable right. This means that it is not subject to limitation in light of any exigency, even in states of emergency.¹⁵ No justifications or extenuating circumstances can excuse violations of the right not to suffer ill-treatment, including orders from authorities acting in an official capacity.¹⁶ For this reason, scholars have dubbed this right 'absolute.'

Innumerable bodies of work pontificate on the importance of upholding the right to

freedom from cruel, inhuman, or degrading treatment. However, there is little discourse on how to resolve instances in which the absolute right of one person conflicts with the absolute right of another. There is a gaping vacuum in place of a balance between the right of the perpetrator and that of the victim not to suffer cruel, inhuman, or degrading treatment. This article seeks to fill that gap by assessing whether chemical castration constitutes cruel, inhuman, or degrading treatment and whether such a violation can be excused according to the limitations of human rights.

Results and Discussion

Defining Cruel, Inhuman, or Degrading Treatment

There is no statutory definition of cruel, inhuman, or degrading treatment. The International Convention on Civil and Political Rights, the Convention against Torture, and other international law instruments do not define ill-treatment. The lack of a definition is intentional, aimed at providing more flexible boundaries on forms of ill-treatment.

Although there is no universal black and white demarcation line between ill-treatment and legitimate punishment, there are boundaries between unjustifiable human rights violations and criminal sanctions. Legal literature and international criminal tribunals can provide insight on what constitutes ill-treatment, serving as a supplementary means of interpretation.¹⁷

The European Court of Human Rights has held that for a conduct to be inhuman or degrading, the suffering and humiliation involved must go beyond the inevitable element of suffering or humiliation from a

¹² Inter-Parliamentary Union & United Nations Office of the High Commissioner for Human Rights (2016). *Handbook for Parliamentarians N° 26*. Geneva: Inter-Parliamentary Union & United Nations Office of the High Commissioner for Human Rights), p.31.

¹³ Article 33(1), Law Number 39 of the Year 1999

¹⁴ Article 28(G), the Constitution of the Republic of Indonesia

¹⁵ Article 4(2), International Covenant on Civil and Political Rights

¹⁶ Paragraph (3), United Nations *Human Rights Committee General comment No. 20: Prohibition of torture or other cruel, inhuman or degrading treatment or punishment (Article 7, of the International Covenant on Civil and Political Rights)*, 10 March 1992, A/44/40.

¹⁷ Article 32(2), Vienna Convention on the Law of Treaties

legitimate treatment or punishment.¹⁸ This sets a minimum level of suffering for inhuman and degrading treatment, with subjective considerations of age, sex, state of health, and position of inferiority and objective considerations of nature, severity, and duration of the acts.¹⁹

The threshold for cruel, inhuman, and degrading treatment is lower than that of torture. This can be seen in the semantics of the Convention against Torture, in that states are required to prevent 'other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture.'²⁰

The hierarchy of conduct between forms of ill-treatment begins with degrading treatment, ascends to inhuman treatment, and culminates in torture (Rodley & Pollard, 2009, p. 86). The different hierarchical classifications of degrading and inhuman treatment show that these forms of ill-treatment are distinct from one another.

Degrading treatment has the requirement of real and serious humiliation or a serious outrage upon human dignity, and whose intensity is such that any reasonable person would feel outraged. Degrading treatment grossly humiliates an individual before others or drives the individual to act against his will or conscience.²¹

Cruel treatment and inhuman treatment are synonymous terms. Inhuman treatment consists of acts which cause serious physical or mental pain or suffering or constitute a serious outrage upon individual dignity. Unlike torture, inhuman treatment and degrading treatment have no requirement of a specific purpose (International Committee of the Red Cross (ICRC) policy on torture and cruel, inhuman or degrading treatment inflicted on persons deprived of their liberty, 2011, p. 548).

In cases of ill-treatment, if evidence fails to show that the acts were perpetrated for a particular purpose, the conduct will qualify as cruel, degrading, or inhuman treatment, but not torture. This is despite severe mental and physical suffering and satisfaction of other elements.²² This illustrates how decisive the element of a prohibited purpose is in distinguishing torture from other forms of ill-treatment.

In one case, detainees were beaten with metal sticks and rifle butts, blindfolded, isolated, and restrained to stress positions for two days in a dark hut, without food and water.²³ The physical and mental harm suffered was unquestionably severe, however the conduct did not amount to torture due to the lack of a prohibited purpose. In this case, they were found only to have suffered inhuman treatment.²⁴

The European Court of Human Rights held that inhuman treatment is treatment that deliberately causes severe mental or physical suffering which, in the particular situation, is unjustifiable. The Court's deliberation points to the situation in which the mental or physical suffering occurs. This leaves room for ambiguity. It raises the question of whether there exist situations in which severe mental or physical suffering are justifiable. Because the deliberation referred to a particular situation in which mental or physical suffering is unjustifiable, it follows that there are situations in which severe mental or physical suffering can be justified.

A possible exemption is harm which arises incidentally to lawful sanctions. Even though the harm may be severe, because certain discomfort is unavoidable in criminal sanctions, there is a window of justifiability for the harm. The exception of harm arising from

¹⁸ *Ilascu v. Moldova & Russia*, App. No. 48787/99, 40 Eur. H.R. Rep. 1030, 1071, 1073, 1082 (2004)

¹⁹ *Prosecutor v. Brdjanin, (Trial Chamber Judgment)*, IT-99-36-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 1 September 2004, para. 484.

²⁰ Article 16, The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

²¹ Greek Case, App. Nos. 3321/67, 3322/67, 3323/67 & 3344/67,

1969 Y.B. Eur. Conv. on H.R. at 186 (Eur. Comm'n on H.R.).

²² *Prosecutor v. Krnojelac, (Trial Chamber Judgment)*, IT-97-25-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 March 2002, para. 252.

²³ *Prosecutor v. Delic, (Trial Chamber Judgment)*, IT-04-83-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 September 2008, para. 315-319, *jo.* para. 255-258

²⁴ *Ibid.*

lawful sanctions has long been embedded in customary international law, as shown in the Convention against Torture,²⁵ the Rome Statute,²⁶ and the decisions of international tribunals. These bodies of law are instrumental building blocks of the legal regime by which the International Civil and Political Rights abides and thus impact the implementation of the Covenant. This exception of certain harm is underpinned by the notion that some degree of discomfort is unavoidable in criminal sanctions.²⁷ The inevitable adverse side effects of criminal sanctions can therefore be excused.

However, this exception cannot be construed to be a *carte blanche* for states to act arbitrarily against detainees. It should be taken as an attempt to delineate a border between what constitutes a reasonable part of a penal system versus an arbitrary infringement on a detainee's human rights.

The Special Rapporteur on Torture and Cruel, Degrading, or Inhuman Treatment has provided that the administration of such punishments as stoning to death, flogging and amputation - acts which would be unquestionably unlawful in the context of custodial interrogation - cannot be deemed lawful simply because the punishment has been authorized in a procedurally legitimate manner, i.e. through the sanction of legislation, administrative rules or judicial order. To accept this view would be to accept that any physical punishment, no matter how torturous and cruel, can be considered lawful, as long as the punishment has been duly promulgated under the domestic law of a State.²⁸

The emphasis here is the lawfulness of the sanction from which the harm arises. However, qualifiers for lawfulness remain unclear. The standard of a lawful sanction is

relative to the society which creates it. The standard is contingent on political, cultural, religious, and societal considerations. In line with sociological jurisprudence, the *Volksgeist*, or spirit of the people, informs the law-making. Due to political, cultural, religious, and social diversity between countries, there cannot be a universal standard for what is considered right or wrong. Because different societies have different moral considerations, justice is relative to the jurisdiction that enforces it. Consequently, no concrete consensus exists on a threshold for the lawfulness of a criminal sanction. What remains clear, however, is that lawful sanctions cannot be inconsistent with the prohibition of torture and cruel, degrading, or inhuman treatment.²⁹

The qualifiers of inhuman and degrading treatment are the same as those of torture, however what distinguishes them is purpose and intent to harm. This can be seen from the nature, severity, and duration of the acts. Circumstances of physical or mental condition, the effect of the treatment, age, sex, state of health and position of inferiority of each individual case determine the qualification of chemical castration for inhuman or degrading treatment.³⁰ The calculation of the severity of the harm is contingent on these conditions, and thus the physical or mental suffering incidentally arising from chemical castration is also relative to the individual.

Chemical castration can give rise to side effects ranging from erectile dysfunction, testis size reduction, hot flashes, weight gain, decreased body hair, asthenia, depressive mood, myalgia, cardiovascular complications, and bone mass density loss, which can inflict physical or mental suffering (Koo et al., 2013, p. 565). This may qualify as inhuman treatment in

²⁵ Article 1(1), The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

²⁶ Article 7(2)(e), Rome Statute of the International Criminal Court

²⁷ *Ilascu v. Moldova & Russia*, Eur. Ct. H.R. 2004, para. 428.

²⁸ United Nations, Commission on Human Rights, Special Rapporteur on Torture, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, E/CN.4/1997/7, 10 January 1997, para. 8.

²⁹ Association for the Prevention of Torture (2002). *Guide to Jurisprudence on Torture and Ill-treatment: Article 3 of the European Convention on Human Rights*. Guide to Jurisprudence on Torture and Ill-treatment. Geneva: Association for the Prevention of Torture, p.24.

³⁰ *Prosecutor v. Brđjanin, (Trial Chamber Judgment)*, IT-99-36-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 1 September 2004, para. 484.

certain cases. It must also be noted that there may be a felt loss of dignity in the lack of ability to give consent to medical treatment, which can qualify as degrading treatment. However, this all depends on the individual and circumstances.

The Applicability of Limitations on Human Rights on Article 7 of the International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights stipulates that in time of public emergency which threatens the life of the nation, whose existence is officially proclaimed, the States Parties can derogate from their obligations to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.³¹ It is elaborated in the subsequent paragraph, however, that no limitation of the application of Article 7 is permitted.³²

This means that even in a state of emergency, the right to freedom from torture and cruel, inhuman or degrading treatment may not be curtailed, in light of even the most extraordinary exigencies. However, a limitation should be allowed.

Why Article 7 Should be Subject to Limitation

Arbitrariness is the common denominator between all cases of ill-treatment referenced in this article. These actions were carried out by individual actors seeking to inflict pain, whether as punishment, for the extraction of information or a confession, coercion, intimidation, discrimination, or for other reasons.

In the context of arbitrary acts of ill-treatment, the International Convention on Civil and Political Rights is correct in not limiting the right to freedom from ill-treatment. However, if a criminal sanction coincidentally results in ill-treatment, but has the medical potential to prevent even more cases of ill-treatment, some leeway should be granted.

The difference between the cases of ill-treatment referenced and chemical castration is that chemical castration is not arbitrary. It follows a clear procedural guideline and offers offenders requisite legal protection. Chemical castration is underpinned by the principle of due process of law. It is promulgated by statutory law, follows a clear procedure, is decided during fair and transparent legal proceedings in a court of law, and legal remedies are available to the offender should any objections arise.

The purpose of chemical castration is not the infliction of punishment, extraction of information or a confession, intimidation, coercion, discrimination, or any other malevolent reason. The purpose of chemical castration is to help child sex offenders not to infringe upon the right of children not to suffer ill-treatment.

The treatment may result in some incidental inhuman or degrading treatment, depending on the patient. However, chemical castration is not an arbitrary act of ill-treatment designed to harm child sex offenders. Any harm arising from chemical castration is a side effect of a rigorous medical procedure designed to treat mental afflictions that endanger the right of others not to suffer torture or ill-treatment.

In assessing the difference between chemical castration and arbitrary acts of ill-treatment, it may be useful to look to the difference between capital punishment and extrajudicial killings. 'Extrajudicial' means outside of the course of ordinary judicial proceedings. This means that procedural safeguards are forgone, and the law is taken

³¹ Article 4(1), International Covenant on Civil and Political Rights

³² Article 4(2), International Covenant on Civil and Political Rights

into the hands of individuals who carry out punishments without the requisite legal authority. Detainees are deprived of the right to fair trial and due process of law, and by consequence effective legal remedy. There is no standard of treatment or guideline to which the executors are held accountable.

Indeed, the word arbitrary comes from the Latin *arbitrarius*, meaning 'depending on the will.' The fate of the detainee depends on the will of the executors, without legal constraints to protect the rights of the detainee. Extrajudicial killings are arbitrary because they depend on the will of the executors, with no procedural safeguards to ensure that the perpetrators are afforded the legal protection to which they are entitled.

Capital punishment, by contrast, follows a set of strict legal constraints which prescribe a procedure, standards of treatment, and the availability of legal remedies. Detainees are afforded legal protection and the judgments which befall them are based on a fair trial, bolstered with legal protection such as right to fair trial and legal remedies.

The line between extrajudicial killings and capital punishment is arbitrariness. What makes a conduct arbitrary is that it does not follow due process of law. So it follows, the same applies to chemical castration versus ill-treatment.

The right to freedom from torture and cruel, inhuman or degrading treatment is said to be 'absolute', because it is not subject to limitation. The right is never referred to specifically as 'absolute' in the International Covenant on Civil and Political Rights, in General Comment number 20, or in other United Nations documents. Rather, it has been so dubbed by scholars. The right is referred to as 'absolute' because there currently is no room for limitation in light of any exigency. Even in states of emergency, these 'absolute' rights may not be curtailed for the welfare of the nation. The legal consequence of this is that the right

is essentially watertight to even the most urgent situations and cannot be limited.

This is fortified by Law number 39 of the year 1999 in that it stipulates that the human right to freedom from torture cannot be diminished under any circumstances whatsoever.³³ The scope of protection is narrower in that the Law only covers the non-derogable nature of the human right to freedom from torture, but does not touch upon other forms of ill-treatment. This creates a need to employ the International Covenant on Civil and Political Rights to provide a broader range of protection extending to forms of ill-treatment which do not amount to torture.

Innumerable bodies of work discuss the absolute nature of Article 7. They pontificate on the importance of respecting, protecting, and fulfilling these absolute rights. However, there is very little discourse on how conflicts between the absolute right of one person and the absolute right of another are resolved.

When a person infringes upon the right of another person not to be subjected to torture or cruel, inhuman, or degrading treatment, there occurs a conflict of rights. The victim's Article 7 right has already been infringed, while the right of the perpetrator is vehemently defended. Under the present framework of the law, the absence of a balance between the absolute rights of individuals suggests that one person's right is less absolute than the other's.

In the present discourse of human rights, when tailoring criminal sanctions to fit the constraints of Article 7, regard is had only to the human right of the perpetrator not to be ill-treated. The perpetrator is lathered in respect for human dignity, but the right of the victim not to be ill-treated is completely disregarded. Compared to the perpetrator, the victim is afforded less respect for inherent human dignity and less protection from torture or cruel, inhuman or degrading treatment. If the state must protect the perpetrator's Article 7

³³ Article 4, Law Number 39 of the Year 1999

right, the victim should be afforded the same treatment.

The state must take measures to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including that administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.³⁴

Failure to provide adequate redress to human rights violations means the state has failed to protect human rights. The state protects human rights by setting in place legal, institutional, and procedural mechanisms that can facilitate the realisation and full enjoyment of human rights (Kalin & Kunzli, 2009, p. 112).

Incepting chemical castration in tandem with rehabilitation prevents perpetrators or potential perpetrators from infringing upon the rights of others not to suffer torture and cruel, inhuman or degrading treatment. Chemical castration serves as a mechanism to facilitate the realisation and full enjoyment of human rights by protecting people from ill-treatment. Chemical castration is thus a means of upholding human rights.

There is a general failure to consider that the actions of child sex offenders originate from an untreated mental affliction. Chemical castration provides child sex offenders the opportunity at a normal life, free from the mental afflictions that caused them to violate the physical and mental integrity of children.

Chemical castration provides a solution to a pressing problem which less invasive measures failed to solve. In the year of 2014, 459 cases of sexual violence rattled the children of Indonesia. In the year of 2015, there were 218 cases of child sexual violence. This shows how pervasively sexual violence affected children and the insufficient effectiveness of pre-existing child protection efforts. In response to the alarming frequency of child sexual violence, the

government updated child protection laws with chemical castration. Interestingly, the number of child sexual violence cases plummeted to 120 cases in the year of 2016 and descended to 116 cases in the subsequent year.³⁵

If Article 7 Could be Limited, Does it Fulfil Elements of Proportionality?

All limitations of human rights are underpinned by the Siracusa Principles and the principle of proportionality. The Siracusa Principles dictate that limitations on human rights must be prescribed by law, based on a justifiable ground, and that limitations must be proportionate and necessary. The principle of proportionality further elucidates what constitutes a proportionate and necessary limitation of human rights.

Operating under the assumption that there are certain exigencies which excuse the limitation of Article 7 rights, chemical castration fulfils the elements of proportionality: Adequacy, necessity, proportionality in a strict sense, and the existence of a legitimate aim.

The adequacy of a measure is calculated through the probability of achieving the intended aim and a reasonable connection between the means and the end. A measure is necessary when it is effective and restrains human rights as minimally as possible. Proportionality in a strict sense is the balancing of conflicting rights through a cost benefit analysis. Illustrated in the image of scales, it weighs the benefits to one right against the detriment suffered due to the limitation of rights. A legitimate aim for the limitation of a right exists when it protects the fundamental democratic values in a society.

Chemical castration is adequate because it is suitable to achieve the intended aim. There is a reasonable connection between using chemical castration to prevent perpetrators from committing child sexual violence and

³⁴ A v. United Kingdom 1998-VI; 27 EHRR 611, para 22.

³⁵ Setyawan, D. Tahun 2017, KPAI Temukan 116 Kasus Kekerasan Seksual Terhadap Anak. September 27, 2017, retrieved from

<https://www.kpai.go.id/berita/tahun-2017-kpai-temukan-116-kasus-kekerasan-seksual-terhadap-anak>.

protecting the right of the child. Chemical castration is necessary because the intended aim could not be achieved to the same extent by using a less restrictive measure. Chemical castration is proportionate in a strict sense because it provides a balance between conflicting rights. The importance and urgency of child protection, the potential benefits of chemical castration, and the probability of attaining the benefits through chemical castration outweigh the potential damage caused by the limitation of the right. A legitimate aim exists for chemical castration, because it protects fundamental democratic values in society.

The limitation of a human right should never jeopardise the essence of the right concerned.³⁶ Chemical castration may limit child sex offenders' right not to suffer ill-treatment. However, this limitation does not jeopardise the essence of the right, because does not aim to inflict suffering through arbitrary ill-treatment. The aim of chemical castration is to prevent violations of the right to freedom from ill-treatment in the context of victims. It is a furtherance of the right because it prevents violations of the right concerned. Thus, limiting the right of child sex offenders not to suffer ill-treatment upholds the true essence of the right.

Human rights limitation clauses must be interpreted strictly and in favour of the rights at issue.³⁷ The right at issue is the right not to suffer torture and other ill-treatment. The reason for the limitation of the perpetrator's right not to suffer ill-treatment is to ensure that the perpetrator does not violate the sanctity of others' right not to suffer torture and other ill-treatment. Thereupon, the right at issue is the same one, but belonging to different parties and with ranging degrees of limitation or derogation. If a limitation of the right not to suffer torture or ill-treatment causes a lesser degree of harm to that same right, the

limitation can be seen as acting strictly and in favour of the right at issue.

Human rights limitations must be interpreted in the light and context of the particular right concerned.³⁸ If the limitation of the right not to suffer torture or other ill-treatment is interpreted in the light and context of that same right, it follows then that the chemical castration is necessary and proportionate. Limiting the right of a child sex offender not to suffer ill-treatment is necessary and proportionate, because it protects children's rights not to suffer torture or other forms of ill-treatment. The Article 7 right of one person cannot be upheld while the rights of others are derogated by that same person. It would be more just to limit one person's right not to suffer ill-treatment to prevent likely derogations of other persons' rights.

Limitations on a human right must be provided for by law and be compatible with the objects and purposes of the International Covenant on Civil and Political Rights.³⁹ The objects and purposes of the Covenant are the recognition of inherent dignity of the human person through universal respect for equal and inalienable rights. This culminates in the creation of conditions wherein the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can be attained.⁴⁰

Chemical castration seeks to recognise the inherent dignity of the human person by helping the perpetrator regain a semblance of a functional life through effective rehabilitation via pharmacotherapy. It respects the human rights of victims not to suffer torture and ill-treatment. It respects the inherent dignity of the victims and potential victims by giving perpetrators the correct medical treatment and preventing future offences. It frees people of the fear that their children may be ripped from their family by a mentally ill individual who could have benefitted from chemical castration.

³⁶ Siracusa Principles, para. 2

³⁷ Siracusa Principles, para. 3

³⁸ Siracusa Principles, para. 4

³⁹ Siracusa Principles, para. 5

⁴⁰ Preamble, International Covenant on Civil and Political Rights

Most importantly, it gives people freedom from the lifelong want for a childhood in which they were not sexually abused.

No limitation of human rights can be applied for any purpose other than that for which it has been prescribed.⁴¹ The purpose of chemical castration is to rehabilitate the perpetrator and to prevent offences and recidivism. This can be seen in that the preamble lists the failure of present child protection laws to prevent child sexual violence as a reason for chemical castration and that it is done in tandem with rehabilitation.⁴² No other reason exists to limit the right to be free from torture and ill-treatment in the context of chemical castration and whether these reasons are abided by is to be seen in its practical application.

No limitation of human rights can be applied in an arbitrary or unreasonable manner.⁴³ The limitation of the right to freedom from torture and ill-treatment in the context of chemical castration is by no means arbitrary. It is conducted for the purpose of protecting the human rights of victims and to rehabilitate the perpetrators. Chemical castration follows legal guidelines and early standard operational procedures, which will be fortified through coming ministerial regulations. This can be seen through the prescription of prerequisites such as rehabilitation, a cap on the maximum duration of treatment, mechanisms for ensuring the safety of the public by publishing the perpetrator's identity, and ensuring the compliance and safety of the perpetrator through an electronic tracking device.⁴⁴ A number of considerations were listed in the creation of chemical castration, drawing on the importance of protecting children, the rising number of child sexual violence, the adverse effects of child sexual violence on children and the public, and the failure of current child

protection laws to prevent offences.⁴⁵ This shows the rationale underpinning chemical castration. Limiting the right not to suffer ill-treatment in the context of chemical castration is not for the infliction of ill-treatment, but to ensure the safety and well-being of children and preventing children from suffering torture and ill-treatment. This is the furthest thing from arbitrary.

Every human rights limitation is subject to adequate safeguards and effective remedies, provided by law against the abusive application of limitations.⁴⁶ In the event that chemical castration is taken too far, procedural safeguards are in place to ensure that the patient may file a formal complaint. The perpetrator may file an appeal, cassation, or judicial review to overturn the decision to impose chemical castration. An internal complaint may also be submitted to an ombudsman. The perpetrator can submit a complaint through an administrative court, to seek compensation for damages incurred due to an administrative decision. This shows that effective legal remedies are available to the perpetrator, should the application of chemical castration turn abusive.

No limitation on a human right should discriminate contrary to Article 2(1) of the International Covenant on Civil and Political Rights.⁴⁷ Chemical castration does discriminate based on race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth, or other status. It is applied to anyone who directs violence or threats of violence against a child to coerce him or her into sexual intercourse,⁴⁸ in the event that this results in more than one victim, causes severe bodily harm, psychological trauma, a sexually transmitted disease, impairment or loss of function of reproductive organs, and/or death.⁴⁹ There is no element of discrimination

⁴¹ Siracusa Principle, para. 6

⁴² Preamble *jo.* Article 81A(3), Government Regulation in Lieu of Law Number 1 of the Year 2016

⁴³ Siracusa Principle, para. 7 *jo.* para. 16

⁴⁴ Article 81A(3), *jo.* Article 81A(1), *jo.* Article 81(6), *jo.* Article 81(7), Government Regulation in Lieu of Law Number 1 of the Year 2016

⁴⁵ Preamble, Government Regulation in Lieu of Law Number 1 of

the Year 2016

⁴⁶ Siracusa Principles, para. 8 *jo.* para. 18

⁴⁷ Siracusa Principles, para. 9

⁴⁸ Article 81(7) *jo.* Article 81(4), Government Regulation in Lieu of Law Number 1 of the Year 2016, *jo.* Article 76(D), Law Number 35 of the Year 2014

⁴⁹ Article 81(7) *jo.* Article 81(5), Government Regulation in Lieu of

in chemical castration, as the decisive criterion for the application of the measure is that an offence occurred. Race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth, or other status are not factors in imposing chemical castration. Thus, chemical castration is not contrary to Article 2(1) of the International Covenant on Civil and Political Rights.

Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation: (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant; (b) responds to a pressing public or social need; (c) pursues a legitimate aim; and (d) is proportionate to that aim. Any assessment as to the necessity of a limitation shall be made on objective considerations.⁵⁰ Chemical castration is based on a pressing public need for ensuring the safety of the child and that child sex offenders are given appropriate medical treatment that prevents offences and recidivism. The aim of preventing child sexual violence and recidivism is legitimate and the means of attaining this aim are proportionate. Chemical castration is adequate. There is a reasonable connection between the purpose and means of achieving chemical castration and the probability of efficacy.

In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.⁵¹ Chemical castration is necessary. There is no possibility of recourse to an alternative measure which would cause less damage to the right not to suffer ill-treatment, whilst fulfilling the same purpose. This is mentioned in the preamble of the law, in that a consideration for creating chemical castration was that pre-existing child protection law proved inadequate in preventing child sexual violence, shown in the rising number of cases.⁵²

Measures which restrict human rights less have not been shown to effectively combat the problem of child sexual violence. Chemical castration is necessary because its purposes could not be achieved to the same extent through less restrictive measures.

No limitation on the exercise of human rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.⁵³ Legal rules limiting the exercise of human rights shall be clear and accessible to everyone.⁵⁴ Chemical castration is prescribed by Government Regulation in Lieu of Law number 1 of the year 2016, later adopted into Law number 17 of the year 2016. It is formally embedded in national law. The law is readily available to anyone willing to read it and has been socialised and thoroughly discussed. There is no lack of transparency in the law on chemical castration or flaw in the promulgation of the law which stipulates chemical castration.

The expression public order as used in the International Covenant on Civil and Political Rights may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order.⁵⁵ Public order shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.⁵⁶ Chemical castration helps maintain public order by preventing child sex offenders from committing child sexual violence and saving children from sexual abuse. It respects the human rights of the public, the victims, and potential victims.

State organs or agents responsible for the maintenance of public order must be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.⁵⁷ Checks and

Law Number 1 of the Year 2016, jo. Article 76(D), Law Number 35 of the Year 2014

⁵⁰ Siracusa Principles, para. 10

⁵¹ Siracusa Principles, para. 11

⁵² Preamble, Regulation in Lieu of Law Number 1 of the Year 2016

⁵³ Siracusa Principles, para. 15

⁵⁴ Siracusa Principles, para. 17

⁵⁵ Siracusa Principles, para. 22

⁵⁶ Siracusa Principles, para. 23

⁵⁷ Siracusa Principles, para. 24

balances between state organs are ever-present in Indonesia's government. The *trias politica* keep one another in line. Ministries coordinate with one another and report to the president and other institutions. State auxiliary bodies oversee the three branches of government, independently. There is no shortage of oversight in chemical castration, from the drafting, to the formulation, promulgation, implementation, and adjudication.

Since public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, must demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.⁵⁸ The margin of discretion left to states does not apply to the rule of non-discrimination as defined in the Covenant.⁵⁹ Paedophilia is subject to very little cultural relativism. It is almost universally condemned, and perpetrators are seen as 'sick', 'disgusting', and 'inhuman.' In the current day, paedophilia transgresses public morality in most cultures, which necessitates chemical castration as a means of protecting public morality.

Two paradigms exist in the international approach to human rights: Universalism and particularism. While universalism argues for a universal legal order with uniform standards for human rights, particularism takes a more empirical and practical approach, recognising that the moral truths of one culture are different from another. The two paradigms often oppose one another, but can be reconciled. Universalism may serve as a general guideline, but where the moral truths of one culture diverge from another, a particularistic approach may have to be implemented. It is pointless to merely follow what the law says without ensuring that it is the law people need. The law must serve the society it seeks to

protect and it cannot do so if it does not conform to the needs and spirit of the society.

Indonesia has historically applied the crime control model in its legal regime, prioritising the prevention and deterrence of crime through harsher punishments over the protection of perpetrators' human rights. Often, criminal sanctions explicitly serve as retribution, with few restorative benefits. This approach to crime has been enmeshed in the social fibre of Indonesia. It can be seen in the prevalence of vigilante justice in Indonesia, where thieves are brutally beaten to pulp by ravenous citizens. Outcries of human rights concerns are stifled by louder outcries to severely punish criminals. The standard of what constitutes a morally good criminal sanction in Indonesia is vastly different from, say, the Netherlands. The *Volkgeist* of Indonesia is such that upholding victims' rights is more important than upholding perpetrators' rights. There is more tolerance for limitations of human rights in the name of public safety.

Public safety is protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.⁶⁰ The need to protect public safety can justify limitations provided by law. It cannot be used for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.⁶¹ Child sex offenders pose a danger to the safety, life, and physical integrity of children. There is a desperate need to protect against this danger, which justifies limitations provided by law. Chemical castration is not vague or arbitrary, as its standards and mechanisms have been clearly stipulated by law and will be fortified by ministerial regulations.

The scope of the rights and freedoms of others that may act as a limitation upon rights in the International Covenant on Civil and Political Rights extends beyond the rights and freedoms recognized in the Covenant.⁶² When a

⁵⁸ Siracusa Principles, para. 27

⁵⁹ Siracusa Principles, para. 28

⁶⁰ Siracusa Principles, para. 33

⁶¹ Siracusa Principles, para. 34

⁶² Siracusa Principles, para. 35

conflict exists between a right protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context especial weight should be afforded to rights not subject to limitations in the Covenant.⁶³ However, a limitation to a human right based upon the reputation of others shall not be used to protect the state and its officials from public opinion or criticism.⁶⁴ The limitation chemical castration poses on the human rights of child sex offenders is done in consideration of the human rights of others. Chemical castration seeks to strike a balance between the rights of child sex offenders and those of victims. The right in question is the right not to suffer torture and ill-treatment, which is recognised in the International Covenant on Civil and Political Rights. Fair consideration is afforded to both right-holders in the conflict of rights. Thereupon, if there is a conflict of rights, there must be a balancing between these rights, which is precisely what chemical castration does. No part of chemical castration can be construed to be used to protect the state and its officials from public opinion or criticism.

Conclusion

Article 81(7) of Government Regulation in Lieu of Law Number 1 of the Year 2016 is a violation of Article 7 of the International Covenant on Civil and Political Rights. It constitutes a violation because chemical castration without informed consent is cruel, inhuman, or degrading treatment.

Chemical castration in and of itself can be a legitimate medical procedure, bringing about tangible benefits by curing mental and physical afflictions which impede a normal life. However, the lack of requirement of consent can be inflicting serious mental pain on the perpetrator. The mandatory imposition of an invasive medical procedure may also constitute

a serious outrage upon individual dignity of an intensity by which any reasonable person would feel outraged. Chemical castration may produce side effects which cause serious mental and physical pain. Depending on the intensity of the pain, this may qualify chemical castration as inhuman treatment.

Such a violation can be justified according to the limitations of human rights, with respect to the application of Article 7 of the International Covenant on Civil and Political Rights. Under the current framework of the law, such a violation may not be excused, as the right to freedom from torture and cruel, inhuman, or degrading treatment is not subject to limitation. However, it should be.

Just as what sets apart detention from an unlawful deprivation of liberty under Article 9 of the International Covenant on Civil and Political Rights, chemical castration is distinct from mere ill-treatment. It is by no means arbitrary, as it is constrained by procedural guidelines and has standards of treatment. This offers perpetrators the requisite legal protection that is absent in traditional cases of ill-treatment, which tend to violate procedural guidelines and standards of treatment.

Additionally, chemical castration can be seen as a furtherance of Article 7, as it restores a balance of rights. There is no mention of what happens when Article 7 rights come in conflict. There is no mechanism yet to restore the balance of rights between that of the victim, which was taken away, and that of the perpetrator, which is vehemently defended by the state. Chemical castration seeks to restore that balance.

It must be reiterated that chemical castration limits the right of child sex offenders in order to protect the right of children not to suffer torture or ill-treatment. It is an effort to protect the rights of victims and potential victims and to give the perpetrator a chance at a normal life through rehabilitation and

⁶³ Siracusa Principles, para. 36

⁶⁴ Siracusa Principles, para. 37

pharmacotherapy. In this light, chemical castration is an important contribution to human rights.

Although introducing chemical castration as a penal measure is already a momentous leap forward, there are still things that can be improved. Issues with informed consent still pollute the discourse of chemical castration. Because the perpetrator's consent is not required for the imposition of chemical castration, it can impede with the human rights of the perpetrator.

The lack of informed consent is also in contradiction with national law, which mandates that any medical procedure must be consented to by the patient.⁶⁵ However, this requirement can be discounted due to the nature of the measure as a criminal sanction. Criminal sanctions do not require consent, but more consideration may be had to the consent of the perpetrator to the medical procedure before reaching a judgment.

Additionally, the prescription of the medical procedure of chemical castration should not be at the discretion of a judge alone. A medical professional should assess the judge's recommendation of this medical procedure and provide an expert opinion on the medical potential of chemical castration for treating the perpetrator. A thorough physical examination and psychiatric evaluation should be preliminarily undergone before any judgment can be reached. These medical examinations should be routinely performed through the course of the sentence, until the end of the sentence when chemical castration is to be administered. The fitness of the perpetrator must be ascertained as well as potential for adverse effects and efficacy of the treatment. Routine physical examinations and psychiatric evaluations must be maintained throughout the duration of the treatment.

Before the measure can be implemented, there must be clearer regulations stipulating in more detail the budgetary

aspects, standard operating procedures, standards of treatment, procedural aspects, and protection for doctors performing the treatment from malpractice allegations due to lack of informed consent. If clearer guidelines are implemented, the gap between *das Sollen* and *das Sein* of chemical castration can be bridged.

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⁶⁵ Article 45, Law Number 29 of the Year 2004

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