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### RESEARCH ARTICLE

#### RECONSTRUCTION OF LEGAL SANCTIONS POLICY ON UNDERAGED HOMOSEXUAL OFFENDER IN INDONESIA BASED ON THE VALUE OF PANCASILA JUSTICE

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#### Abstract

Homosexual behavior committed even by minors is threatened with criminal sanctions in Indonesia as stipulated in article 292 of the Criminal Code, article 82 of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, article 420 of the Criminal Code Bill and article 36 of the Law Number 44 of 2008 concerning Pornography. Homosexual perpetrators have not yet been specifically regulated in the Act so that they have not led to Restorative justice, even if Diversion is carried out in accordance with Law Number 11 of 2012 concerning the Juvenile Justice System, in the implementation of Homosexual offenders by minors is still equated with other child crimes and the forms of action are still subjectively up to the investigator. based on that the author would like to study it With the main issues (1) To analyze the weaknesses of the policy of legal sanctions for perpetrators of Homosexual Crimes by minors currently and (2) find an appropriate reconstruction of the policy of legal sanctions for Homosexual offenders by minors based on the values of Pancasila justice. The research methods used are (1) Research paradigm that is looking for sources of facts, events, and handling (2) the type of research is quantitative research. (3) Research specifications that will examine the current phenomenon of Homosexual behavior that affects minors and how to handle it. The results of the study shows that (1) Weaknesses in legal sanctions is that the word homosexual is not specifically written in the Article of the existing Law, the threat of legal sanctions between the Acts is different and there is no specific action if the perpetrators are minors (2) Reconstruction of the Law governing Homosexual acts article 292 of the Criminal Code, article 82 of Law Number 35 of 2014 concerning Amendment to Law Number 23 of 2002 concerning Child Protection, article 420 of the Criminal Code Bill and article 36 of Law Number 44 of 2008 concerning Pornography, so that if the offender is a minor, then the criminal sanctions are substituted in the form of Special Rehabilitation in Special Places with integrated special handling including Psychological, Spiritual and Medical recovery. As a consideration that Homosexual behavior especially by minors is special and uncommon behavior (Psychological and sexual disorders) and is dangerous to the future of themselves and their environment.

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## Introduction:-

Homosexual behavior according to Islamic law is strongly opposed and threatened with severe punishment, even the first Homosexual perpetrators on Earth were punished directly by Allah SWT namely the people of Sodom and Gomorrah of the people of Luth the Prophet. The event is enshrined in the Qur'an Chapter Huud verse 82: "When our doom came, we made the land of the people of Luth (upside down so) above and below, and We showered them with stones from the burning ground with stubble".

However, with the development of an increasingly modern era, it turns out that Homosexual actors are not diminishing but are actually increasing in number, even for a long time Homosexual groups have been protected by international human rights so that in some developed countries now they have permitted same-sex marriage within the State's constitution, such as America, Netherlands, Sweden, Taiwan, South Africa, Argentina, Australia, Netherlands, Belgium, Brazil, United Kingdom, Denmark, Finland, Ireland, Iceland, Germany, Canada, Colombia, Luxembourg, Malta, Mexico, Norway, France and many more others.

The Republic of Indonesia, although a major part of its population is Muslim, the constitution is not based on Islam and is not a State of Religion. Indonesia is a country based on Pancasila in regulating government. So homosexuals cannot be punished by Islamic Sharia law. Nevertheless Homosexual perpetrators themselves in Indonesian State Law have been regulated by the Act, among others:

### Article 292 of the Criminal Code which reads :

" Adults who commit obscene acts with minors of the same sex, are being known to or should be suspected of such immature matters, are sentenced to prison for up to five years' .

### Law number 44 of 2008 concerning Pornography article 36 which reads:

"Anyone who shows themselves or others in a performance or in public that describes nudity, sexual exploitation, sexual intercourse, or other pornographic content as referred to in Article 10, shall be liable to a maximum imprisonment of 10 (ten) years and / or criminal a maximum fine of Rp 5,000,000,000 (five billion rupiah). "

Application of the Act is usually used by investigators to the perpetrator Homosexuals who did a sex party act.

### Law No 35 year 2014 about changes on Law No 23 year 2002 concerning the protection of children .

Article regulating obscene acts committed against children is regulated in Article 82, the formulation of which is as follows:

"Anyone who intentionally commits violence or threat of violence, forcing, committing tricks, a series of lies, or persuading children to commit or allow obscene acts, to be sentenced to a maximum imprisonment of 15 (fifteen) years and a minimum of 3 (three) year and a maximum fine of Rp. 300,000,000.00 (Three hundred million rupiah) and at least Rp. 60,000,000.00 (Sixty million rupiah) "

Next there is an expansion in the imposition of legal sanctions on Homosexual perpetrators not only with minors but also with adult victims. This expansion is as regulated in Article 420 paragraph 1 and 2 of the Criminal Code Bill, but unfortunately the Criminal Code Bill itself has not yet been ratified by the Parliament so that it cannot yet be enacted. The article is as seen below :

Article 420

### Every person who did the act licentious against others of different or the same type of sex :

1. In front of the public shall be punished by criminal imprisonment no longer than 1 ( one ) year 6 ( six ) months or a criminal fine of the many category III.
2. are forced by violence or threat of violence shall be punished by criminal imprisonment a maximum of 9 ( nine ) years .
3. which was published as a charge pornography shall be punished by criminal imprisonment a maximum of 9 ( nine ) years .

**Any Person with Violence or the Threat of Violence compels another person to commit obscene acts against him / herself being sentenced to a maximum of 9 ( nine ) years in prison:**

From the description of the legislation above is explained that the perpetrator in the Act it is the " Every Person" in the case is the offender subjected to the entire life of yet, only crime Homosexual the adults to children under the age of just who is firmly set . And what if the perpetrator homosexual to a child under age is a child under the age too, has not been regulated in the Act mentioned .Children as perpetrators of acts of Criminal in the system of judicial arranged separately in Law No. 11 Year 2012 on the system of judicial children, through Rule Supreme Court of Indonesia number 4 Year 2014 on guidelines for the implementation of Diversion in the system of justice of children in Chapter II on diversion obligations, Article 2 , namely that children who are in conflict with the law must implement a Diversion .

**Driven by the phenomenon, and to look for construction that are in accordance with the principles of fairness and certainty of law, the author moved to make the study with the main issuesof :**

1. What is the weakness of the policy of underaged homosexual offender in Indonesia Currently?
2. How toreconstruct the policy of underaged homosexual offender in Indonesia based on values of Pancasila justice?

### **Method of Research:-**

The research methods used are (1) Research paradigm that is looking for sources of facts, events, and handling (2) the type of research is quantitative research. (3) Research specifications that examines the current phenomenon of Homosexual behavior that affects minors and how to handle it.

### **Research Result and Discussion:-**

#### **Weakness Of The Policy Of Underaged Homosexual Offender In Indonesia Currently**

To be able to study more comprehensively to be able to find the weaknesses of the current Legal Sanctions Policy on Homosexual Actors by Minors , the writer examines them using 3 different perspectives namely juridical, philosophical and sociological perspectives.

#### **Weakness from a Juridical perspective:**

##### **Criminal Code:**

**Weaknesses in the policy of legal sanctions on homosexual perpetrators contained in article 292 of the Criminal Code are:**

1. The word "homosexual" is not specifically stated in the sound of the article, it only mentions obscene acts committed with the same sex.
2. The phrase "adult" as an actor means that the perpetrators that can be charged with this article are only adult actors. While the Homosexual offender is not mentioned in the article, so it cannot be charged with that article.

#### **Law Number 44 of 2008 concerning Pornography:**

**The weaknesses in Law Number 44 Year 2008 concerning Pornography are as follows:**

1. The word "Homosexual" is also not explicitly mentioned in this Law, only the mention of who is engaging in sexual exploitation, describing nudity, sexual intercourse or something containing pornography in public. And the phrase "every person" Then includes adults, and children of any sex whether male, female, gay, lesbian, bisexual and transgender all within the reach of the enslavement of Law no. 44 of 2008 concerning Pornography.
2. Child offenders in this Law are not specifically regulated separately in the form of legal sanctions exceptions only if they are ensnared by this Act, then child offenders will undergo the juvenile justice system.

#### **Law Number 35 of 2014 concerning Amendment to Law Number 23 of 2002 concerning Child Protection .**

Weaknesses contained in Law No. 35 of 2014, that in terms of threats to the perpetrators listed the word "every person" means that the threat of legal sanctions this law is all people without exception and regardless of age. Child offenders have no exceptions to the article and like the other Acts, child offenders will be processed according to the juvenile criminal justice, namely carried out by diversion. Child actors should have exceptions and certain special actions in order to achieve restorative justice for children, namely in the form of recovery.

### **Weaknesses from a philosophical perspective**

From a number of Regulations and Laws currently regulating Homosexual offenders, in the philosophical point of view the author considers weaknesses, especially in the policy of legal sanctions against perpetrators of Homosexual Crimes by minors. In implementing Diversion for Homosexual child offenders there are no exceptions and are treated the same as other child crimes such as theft, fraud, detention and others.

Specificity in certain actions has not been explicitly regulated in the Act. Whereas homosexual behavior is unusual behavior in Indonesian culture, even if it is not in accordance with the culture of the Indonesian Nation, from the perspective of 5 (five) major religions in Indonesia, there is opposition in their respective teachings.

It should be noted that Homosexual groups in fact have a correlation of cause and effect on minors, both children as perpetrators and children as victims, which is an environment that provides a driving effect so that the child who was previously a victim as well as an adult does not rule out the possibility of becoming a Homosexual offender as well.

Therein lies the importance of handling seriously the diversion treatment of Homosexual offenders with Special Rehabilitation through integrated handling covering 3 (three) important aspects in order to obtain recovery guarantees as before through the role of legal sanctions policies and appropriate actions. So that after undergoing a special diversification through special rehabilitation, it is hoped that after returning to the environment it will be of little risk to re-repeat sexual deviations again. Because childhood is a volatile period and a period of self-discovery, in childhood like this is likely to be easier to overcome recovery compared with adult Homosexuals who are already far contaminated with deviant sexual relations.

### **Weaknesses from a sociological perspective**

Of all the laws and regulations governing homosexual offenders, homosexual offenders of underage children are not specifically regulated in each of these laws so that the handling only refers to Law Number 11 of 2012 concerning the System Criminal Justice for Children.

It is necessary to implement appropriate special measures, namely through special rehabilitation in special places based on the spirit to suppress the efforts of regenerating Homosexuals through proper handling of children, even if needed by children as victims of Homosexual perpetrators can also be the target of such rehabilitation, so that children as a whole the next generation is not killed in character and in the next life will grow and develop Normal in the middle of society so that it can work for the progress of the nation and state. And more importantly it can prevent them from regenerating efforts by Homosexuals through children.

### **The Reconstruction of The Policy Of Underaged Homosexual Offender In Indonesia Based On Values Of Pancasila Justice**

The application of legal sanctions to homosexual offenders by minors in Indonesia currently is the same as the threat of legal sanctions on adult homosexual offenders, namely:

1. Law Number 44 of 2008 concerning Pornography article 36
2. Law Number 35 of 2014 concerning Amendment to Law Number 23 of 2002 concerning Child Protection article 82
3. RUU KUHP article 420

**However, there are special things needed in handling justice for children who are in conflict with the law, namely with the following regulations:**

1. Republic of Indonesia Law Number 11 Year 2012 concerning the Criminal Justice System for Children
2. Government Regulation Number 65 Year 2015 concerning Guidelines for Implementing Diversity and Handling Children
3. Supreme Court Regulation Number 4 of 2014 concerning the Implementation of Diversity in the Criminal Justice System for Children;
4. Attorney General Regulation No. 06 / A / JA / 04/2015 concerning Guidelines for Implementing Diversity.

Minors will undergo a special juvenile justice system that requires Diversity efforts, and the implementation of Diversion is regulated in the Law mentioned above. The handling of diversion is very appropriate to be carried out on minors for the future of the child, however in the implementation of diversion in special cases such as children as

Homosexual perpetrators is still not appropriate, especially in the preparation of the Diversity agreement is still subjectively up to the investigator and treated the same as children who commit other crimes.

it is still not yet found out on how the Homosexual offender by the child if handled carelessly will have an impact on the surrounding environment, especially on the children in his environment, because his recovery is difficult to control so it is vulnerable to repeat again. Meanwhile, healing and recovering of handling children who behave Homosexually is a necessity with the intention to cut off or at least inhibit the rate of homosexual development in Indonesia through special rehabilitation that is fast and appropriate. During this time, even if there is rehabilitation from the agreement of diversion conducted on children as Homosexual perpetrators, the handling process is not optimal given that there are no strict rules that refer to the special rehabilitation handling of homosexual perpetrators by minors in the Law. Rehabilitation of homosexual offenders by minors should be regulated in a separate article and carried out integrated in the handling of spiritual aspects, psychological aspects and medical aspects. Whereas all this time his rehabilitation has only been considered on the spiritual aspect, which is to be placed in Islamic boarding schools and religiously educated.

Bapas and social workers as assistant staff, not all of them can carry out maximum follow-up monitoring after the diversion is carried out, whether the rehabilitation is successful or not is more likely to be ignored. This will have an impact on the maximum difficult to achieve the goal of rehabilitation, namely to restore the child's condition as before from Homosexual behavior.

Based on the consideration of the principle of justice and the purpose of punishment it is necessary to do a Reconstruction of the policy of legal sanctions for homosexual perpetrators by minors. This reconstruction is needed as a new formulation of other legal sanctions policies specifically for homosexual perpetrators of minors only. In the position of minors, they are very vulnerable as targets of adult homosexuals or targets of regeneration of homosexuals. And according to the results of the author's research that adult Homosexual perpetrators in general have experienced sexual violence in childhood. We all know that psychologically and physically children are weak that need to be protected, especially if it is associated with Homosexual groups, then appropriate action is needed for them so that children are not the target of regeneration of Homosexuals, because they are very vulnerable in the near future can become homosexual perpetrators against other minors.

For the purpose of preventing the development of the Homosexual community in Indonesia, it is necessary to strengthen the current legal sanction policy, namely by carrying out a reconstruction of the homosexual offender sanction policy by minors as anticipation by making laws or rules in order to face an increasingly modern era of life and can suppress the amount of Homosexual existence in the future.

With the existing legal sanctions policy available, it is necessary to reconstruct the ideal value of the legal sanctions policy for perpetrators of Homosexual crimes by minors based on the Pancasila justice value, considering that Homosexual perpetrators by minors are special behaviors (Psychological and sexual disorders) and still at a young age and the opportunity to be cured is great, it is necessary to take special measures and actions.

In this case the authors propose the Reconstruction of the Law governing Homosexual acts above, namely expressly stipulate that if the offender is a minor, then a substitute criminal sanction is given in the form of Special Rehabilitation in a Special Place with special handling for integrated recovery which includes aspects of Psychological, Spiritual and Medical.

### **Conclusion:-**

Weaknesses of legal sanctions for offenders of homosexual offenses by minors in Indonesia currently is that the word "homosexual" is not written explicitly and specifically in the article of all the existing laws, and the threat of legal sanctions from the law governing homosexual acts. with each other is different and there is no separation of legal sanctions for perpetrators, both adult and children are the same. With the existing legal sanctions policy available, it is necessary to reconstruct the ideal value of the legal sanctions policy for perpetrators of Homosexual crimes by minors based on the Pancasila justice value, considering that Homosexual perpetrators by minors are special behaviors (Psychological and sexual disorders) and still at a young age and the opportunity to be cured is great, it is necessary to take special measures and actions.

Reconstruction of the Law governing Homosexual acts above is to explicitly regulate that if the offender is a minor, sanctions will be given in the form of Special Rehabilitation in a Special Place with special handling for an integrated recovery which includes Psychological aspects, Spiritual and Medical.

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