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"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



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RECONSTRUCTION OF CRIMINAL SANCTIONS PENAL CODE ACTORS ON ABORTION CRIME BASED ON THE VALUE OF JUSTICE

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I. Introduction

Life is a gift given by God Almighty that must be respected by everyone. Life is given to every human being is a human rights that can only be revoked by the Giver of life.

The right to life is one of the human rights that are set out in the Constitution of the State, as described in Article 28 (a) of the Constitution of the Republic of Indonesia in 1945 which states that "Everyone has the right to live and to defend life and living". With the right to life of the country will preserve and protect the right to life of every citizen so that the state through the state law enforcement tool will act if there is known to occur and the removal of the right to human life.

Abortion (abortion) is always a conversation, either in forum resmi and unofficial concerning the fields of medicine, law and other disciplines. Abortion is not a new issue, abortion is an old problem that is always controversy. One of the controversies about abortion are the priority discourse of human rights as an excuse or reason for the pro-abortion cons of abortion.

Lately case of abortion the fruit simalakama in Indonesia. On the other hand non-medical abortion with reason is strictly prohibited in Indonesia but on the other side of illegal abortions increase the risk of death due to lack of medical facilities and infrastructure, even illegal abortions mostly done by traditional means which increase the risk of death.

In Indonesia alone, although abortion is prohibited, but still many women who have abortions. Well done based on specific medical indication or performed by non-medical indications. Experts religion sees that whatever the reason, abortion is an act contrary to the religion, because it is taking the life of the fetus, which means murder, though no one argues that the life of the fetus did not exist before 90 days.

Based on consideration of moral and social side, it's hard to let a mother who must care for unwanted pregnancies mainly as a result of rape, the result of commercial sex (with commercial sex workers) and women who know that the fetus has severe physical disabilities.

Children born in the conditions and environment such that, in the future will most likely be knocked out of the social life is normal, lack of protection and affection that should be obtained by a child who had grown up in an environment that is fair, so it was likely the child will be an outcast.

On the other hand, in terms of religion, any religion would not allow men to commit acts termination of pregnancy for any reason, while in terms of the law, there are still debates and contradictions of the pros and cons about the perception or understanding of the laws that exist to date.

Today many women became pregnant and had an abortion as a sign of moral degradation. Unwanted pregnancy is not a reason to kill the fetus. The fetus is a creature of Allah SWT. Why should be killed? What is wrong is not a rapist penzinanya or her fetus. The fetus also has the right to life. Legalize abortion is not the solution to reduce the number of maternal deaths. The amount will actually increase because there is the possibility of fetal owner claimed to be raped in order to be aborted.

In consideration of hunger, abortion is permitted with some conditions. First, the fetus was detected suffering from a genetic defect that is born later is difficult to cure. Then, pregnancy due to rape were determined by a team competent in it, among others, the victim, a team of doctors and scholars. Terms of abortion due to rape, the age of the fetus can not be longer than 40 days.

Criminal punishment against criminal abortion should be through the criminal justice procedure as formal criminal law or the law of criminal procedure. Criminal procedure law that can be formulated as a law establishing how the state uses its right to carry out criminal. Also commonly referred to as *Concreto* In criminal law, since it contains the rules of how the criminal law or criminal law materiel In *Abstracto* poured in reality.

As known, the setting is a criminal offense in the Criminal Code a criminal abortion contained in the Penal Code Book II Chapter XIV On Crimes Against Life, in Article 299, Article 346, Article 347, Article 348, Article 349. To simplify and ease in this study, the focus directed primarily to the criminal sanctions to abortion.

II. Formulation of the problem

Based on the description of the background of the aforementioned problems, then according to the author, the problem in this study can be formulated as follows, among others.

1. How does the application of criminal sanctions by the judge of the criminal abortion in Indonesia?.
2. Why is the criminal sanctions imposed by the judge to criminal abortion in Indonesia is not based on values of justice?.
3. How is the reconstruction of criminal sanctions in the Criminal Code against criminal abortion based on the value of justice?.

In this study, it is not necessary to propose any theory (either directly or indirectly) related to the field of law, but only a few are incidentally used.

1. Grand theory used in this research is Theory of Justice The Dignity.
2. Middle theory used in this research is the Theory of Human Rights.
3. Applied theory used in this dissertation research is the theory of the law enforcement.

III. Discussion

In terms of choosing with paradigm study, researchers interested in lifting this study with research paradigm constructivism. In this paradigm, the law is seen as something relatively established and understood transactional, subjective and dialectic.

Constructivism flows legal theories are more empirical. Roscoe Pound came up with the concept of "social jurisprudence" which is then followed by Karl Llewellyn and Jerome Frank with "realistic jurisprudence" (legal realism). Roberto Unger also appeared with the "critical legal studies" it. Thought this alternatif emerged as a reaction to the view that sees positive law works mechanically, deterministic, and separate and things outside the law, as introduced by the Dean of Harvard Law School, C. Langdell in 1870. She likens the law to a science in which the jurists working in the library as a laboratory.

The method used in this research is normative juridical method. Normative juridical method is legal research using secondary data only. Examines the effectiveness of a Law and Research wants to find a relationship (correlation) between the various symptoms or variable as a means of collecting data consisted of a study document.

The author has analyzed the problems related to the application of criminal sanctions against the perpetrators of the crime of abortion in Indonesia as described above, the authors present his conclusions were a response to the problems in this study, as follows.

1. The application of criminal sanctions by the judge of the criminal abortion in Indonesia today is still very low compared to a penalty contained in the Criminal Penal Code which carries a maximum of only four years in prison or a maximum fine of three thousand rupiah (Article 299 Penal Code), the longest four years' imprisonment (Article 346 Penal Code), Oldest twelve years' imprisonment (Article 347 Penal Code), and a maximum of five years and six months' imprisonment (Article 348 Penal Code). And the sanctions have not reflect the value of the maximum penalty in the Criminal Code of Justice in applying criminal sanctions against perpetrators of the crime of abortion in Indonesia have not dug the values contained in chapter chapters contained in the Criminal Code. Among others the value contained in the Criminal Code Article 299, namely the values of humanity, certainty of value, the value of protection. From the above values can not produce norms which could not meet justice. Regarding the legalization of abortion, in the view of the public should not be made except for emergency medical indications, because the fetus in the womb has a right to live and if abortion is legalized it will shift values and norms in society..
2. Criminal sanctions imposed by the judge to the criminal abortion in Indonesia is not based on the value of justice as meted out regardless of background does the crime of abortion and the person who committed the crime of abortion such as all those perpetrators and rescuers abortion. This is stipulated in Article 346, 347, 348, and 349 Criminal Code. Due also judge has not considered the values contained in the article and yet to consider the wisdom of local and international wisdom.

A judge of abortions performed by rape victims are things you can do if it is later born child will bring psychological pressure on the woman and the abortion is fine to do because it does not harm other people because the pain is the woman. While the fetus resulting from rape are not guilty and still have the right to live and be protected. The child must still be born, and if indeed the child will remind the mother in the rape of these children could be kept away from the mother.

3. Reconstruction of the Criminal Code of Criminal Sanctions Against Perpetrators of the Crime of Abortion Based On Value of Justice, by shifting values, basing on the wisdom of local and international wisdom. The value of local wisdom among others the values of justice, the equilibrium value, and the value of protection.

The reconstruction of the law was to improve the Code Article 299 Penal Code by changing a few sanction the article mentioned above so as to be as follows. Article 299 before the reconstructed reads.

- a. Whoever intentionally treating a woman or tell him so treated intentionally inflicted notify or hope, that because the treatment can be aborted the pregnancy, threatened imprisonment of four years or a maximum fine of three thousand rupiahs.
- b. If the guilty do so for profit or to make such actions as search or habit or if he is a physician, midwife, or interpreter drugs, plus one-third of the criminal.
- c. If guilty, committed the crime in carrying out a search, the inalienable right to conduct a search.

Proposed reconstruction of promovendus is changing criminal sanctions in Article 299 Issuer so after reconstructed it reads.

- a) any person who treat a woman and because of the treatment of the pregnancy can be terminated, for imprisonment for a minimum of 2 years and a maximum of seven years imprisonment, subject to criminal social work in the form of service in remote areas and fined Rp. 3.000.000, - (three million rupiah).
- b) If you are doing it is a medic, physician, scribe medicine, shaman, is coupled with the criminal punishment in the form of social work service in remote areas in Indonesia.

IV. CONCLUSION

From these results, the authors provide suggestions above suggestions, among others.

1. Criminal sanctions that should be imposed by the judge to criminal abortion promoting humanitarian values, the values of justice, protection value, the value of certainty, the equilibrium value .
2. It should be criminal sanctions in drop by Justice should not only imprisonment but also must be equipped with a criminal social work and criminal penalties.
3. 3. The judge in deciding criminal sanctions should also explore the value of local wisdom and values of international wisdom. So that the sanctions imposed sense of fairness to all parties.
4. Criminal Law is ultimum Remedium means of criminal law should be used as the last drug or the final step when the way - another way of settlement which could not meet the agreement or way out.

5. The law used to consider when facing a judge in criminal cases abortion should not only written law, but also live in a society of law or unwritten law.
6. In the verdict, the judge, based on two items of evidence, namely the testimony of witnesses and the testimony of the defendant, and based on the facts revealed in court, the judge considered that the defendant is guilty of the crime of abortion. While according to the author, these considerations are not the proper judge because the judge did not consider all the elements are there, the judge only consider the elements contained in that article, judges only decide based on the Criminal Code and Health Law. Of sanctions imposed by the judge can not necessarily provide a deterrent for criminal abortion and not necessarily able to give lessons to the public.

The implications of the research findings include two things, namely the theoretical and practical implications. The theoretical implications associated with its contribution to the development of theories of punishment and the practical implications of research findings related to its contribution to the implementation of the application of criminal sanctions against perpetrators of the crime of abortion in Indonesia. As a research that has been done, the conclusion drawn naturally has implications in the field of law as well as subsequent studies, based on the research that has been done, the theoretical implications of this study showed that in applying criminal sanctions related to the theory of law and theory of rights human rights in general and closely related to the theory of justice with dignity in particular. The results of this study reinforce the theory of justice bermartabat for humanitarian values form the basis for criminal sanctions for the crime of abortion, especially in Indonesia. In applying criminal sanctions in particular to the perpetrators of criminal acts could be more humanizing. Because of the criminal sanctions should contain the values of justice, certainty values, human values, the value of legal protection,

The practical implications of this research result is used as input in deciding judges and for prosecutors in prosecuting a criminal abortion. Fixing the cultures in the application of criminal sanctions in connection with the rise of the crime of abortion by women in Indonesia, with regard to criminal sanctions imposed by the judge.

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