



Reconstruction of criminal sanctions in the Indonesian penal code on abortion offender based on justice value

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Abstract

In Indonesia, although abortion is prohibited, yet there are still many women who have abortions. The Abortion are done whether for a specific medical problem or a non-medical problem. Religious experts consider that whatever the reason, abortion is an act in contrary to religion, because it is eliminating the life of the fetus which means a murder, although there are those who argue that the life of the fet/us did not exist before 90 days. Reflecting on this, the author then discusses it in this article with the main issue of why criminal sanctions applied by judges to abortion offenders in Indonesia have not been based on justice values and how the reconstruction of criminal sanctions in the Penal code against abortion offenders based on the value of justice using Socio-Legal research approach and hermeneutics, which is based on legal norms and the theory of the existing legal enforceability. Thus in the writing of this article researchers used the approach of Socio-Legal. reviewing the juridical law from the standpoint of sociology and Hermeneutics (in everyday terms is defined as the " Interpretation Understanding.

Research shows that sanctions criminal who applied by the judge to the perpetrators of acts of criminal abortion in Indonesia is not based on the value of justice as meted out without looking at the background of the rear doing acts of criminal abortion and those who commit acts of criminal abortion is such that all the good actors and helper in abortion. This is regulated in Articles 346, 347, 348 and 349 of the Penal code. Due to the judge not to consider the value of the value that is contained in the Article are and not considering the wisdom of local and international. There must be an assessment to see whether abortions are carried out by the victims of rape are things that can be done if indeed the future of children who are born will bring psychic pressure against the women so the abortion can and can only be done if the act can-not cause harm to the mother wheter emotionally or physically While the fetus that arise due to rape are not guilty and still have the right to live and be protected. Kids that should remain are born, and if it is a child that will remind the mother to the rape of children that can be taken away from the mother so that reconstruction Sanctions Criminal In Indonesian Penal Code Against Perpetrators of Acts of Criminal Abortion Based On Value of Justice, by shifting the value of value, by basing on the wisdom of local and international wisdom. Wisdom value locally among other values of justice, the value of the balance, and the value of protection.

Keywords: reconstruction, penal code, abortion, justice value

Introduction

The Problem of *abortus provocatus criminalis* or what is known as abortion is a social health problem in Indonesia today ^[1]. The problem of abortion today is a polemic, there are pros but those that are cons. One of the factor pushing the increase in pregnancy rates outside of marriage that has an impact on abortion is the increasing number of pornography and porno-action as well as the use of narcotics, alcohol and addictive substances so that people can easily commit adultery such as prostitution, adultery and free sex ^[2].

This adultery is not limited to adolescents but also to adults of any social strata; there are even sexual deviant behaviors, for example the father intercourse with his biological child, the child intercourse with his mother, fellow siblings intercourse with each other, the stepfather intercourse with his step child ^[3].

The phenomenon of abortion itself is now alarming enough

for various groups. The number of abortion cases should be a concern of many parties involved in it. From various sources mentioned that the age of many who have abortions is among teenagers who are still of school age.

Lately, abortion cases have become the dilemma in Indonesia. On the other hand abortion for non-medical reasons is strictly prohibited in Indonesia ^[4] but on the other hand illegal abortion increases the risk of death due to lack of medical facilities and infrastructure, even illegal abortion is mostly carried out in a traditional way which further increases the risk of death ^[5].

In Indonesia, even though abortion is prohibited, there are still many women who have abortions. Either done based on certain medical indications or based on non-medical indications. Religious experts consider that whatever the reason, abortion is an act contrary to religion, because it is eliminating the life of the fetus which means to commit murder, although there are those who argue that the life of the fetus did not exist before 90 days.

¹ Dadang Hawari, *Aborsi Dimensi Psikoreligi*, Jakarta; Fakultas Kedokteran UI, 2006, p.vii

² Abi Muhammad Abdullah bin Ahmad bin Muhammad bin Qudamah. *Tt. Al-Mughni*. Cairo: Hajar, jilid 12,

³ Amiruddin dan Zainal Asikin, *Pengantar Metode Penelitian Hukum*, Jakarta,; RajaGrafindo Persada,, 2013,

⁴ Abul Fadl Mohsin Ebrahim, 1997, *Biomedical Issues, Islamic Perspective*. Terj. Aborsi, Kontrasepsi, dan Mengatasi Kemandulan, Jakarta: Mizan

⁵ Achadiat Charisdiono, 2007, *Dinamika Etika Dan Hukum Kedokteran*, Buku Kedokteran, Jakarta,

Health experts absolutely have not given a definite response, vaguely seen an agreement that abortion can be done by considering the cause, future of the child and psychological reasons, especially the mother's family, as long as it is done in ways that meet certain conditions and conditions. Likewise with social experts who have views that are not much different from health experts. Based on consideration of the moral and social side, it is difficult to let a mother who has to treat unwanted pregnancies mainly because of the results of rape, the results of commercial sex (with commercial sex workers) and mothers who know that the fetus they are carrying has severe physical disability^[6].

Children who are born in such conditions and environment, in the future will most likely be eliminated from normal social life, lack the protection and affection that should be obtained by children who grow up and grow up in a reasonable environment, so it is likely that the child will become a community trash^[7].

On the other hand, in terms of religious teachings, any religion will not allow humans to take action to stop the pregnancy for any reason, while in terms of law, there are still debates and contradictions from the pros and cons about perceptions or understanding of existing laws to date^[8].

Based on the matters described above, the problems discussed in this article is as follows:

1. Why are the criminal sanctions applied by Judges to abortion offenders in Indonesia not based on Justice values?
2. How is the reconstruction of criminal sanctions in the Penal code against perpetrators of criminal acts of abortion based on the value of justice?

Method of Research

The paradigm used in this research is the paradigm of constructivism. Constructivism is a paradigm that is almost the antithesis of understanding that lays observation and objectivity in finding a reality or science. This paradigm of looking at social science as a systematic analysis of the socially meaningful action through direct observation and detailed on the relevant social actors create and maintain or manage their social world. The method of Research approach used in writing this article is a qualitative research. Writing aims to provide a snapshot of a society or a particular group of people or a picture of a symptom or between two or more symptoms. Further, this research seeks to explain postulates fully investigated in accordance with the findings in the field^[9].

The approach in this study using the Socio-Legal approach and hermeneutics, which is based on legal norms and the theory of the existing legal enforceability. Thus in the writing of this article, researchers used the approach of Socio-Legal^[10] reviewing the juridical law from the

⁶ CB Kusumaryanto, *Kontraversi Aborsi*, cet. Ke-2, Yogyakarta: Jakarta, Grasindo, 2004.

⁷ Adami Chazawi, *Pelajaran Hukum Pidana 1, Stelsel Pidana, Tindak Pidana, Teori-Teori dan Batas Berlakunya Hukum Pidana*, Raja Grafindo, Jakarta, 2007.

⁸<https://yudicare.wordpress.com/2014/09/19/up-date-artikel-pro-kontra-aborsi> Accessed 27 January 2015.

⁹ Altherton & Klemmack dalam Irawan Soehartono, 1999, *Metode Penelitian Sosial Suatu Teknik Penelitian Bidang Kesejahteraan Sosial Lainnya*, Bandung, Remaja Rosda Karya, p. 63

¹⁰ Alimuddin, *Aplikasi Pembaharuan Hukum dalam Teori Socio Legal Studies*, Dirjen Badan Peradilan., www.badilag.net, Accessed December 26, 2018. (IUM Malaysia)

standpoint of sociology and Hermeneutics (in everyday terms is defined as the "Interpretation Understanding").

Research Result and Discussion

1. Criminal Sanctions Applied by Judges To Abortion Offender in Indonesia Currently

Fundamentally, the problem of abortion (abortion) which is qualified as a crime or a crime can only be seen in the Penal Code even though Law No. 36 of 2009 also contains sanctions against the act of abortion. The Penal code regulates various crimes and violations. One of the crimes regulated in the Penal code is the problem of criminal abortion. Provisions regarding criminal abortion can be seen in chapter XIV Book II of the Penal code on Crimes Against Life (Articles 299, 346 - 349). The complete formulation of these articles:

Article 299

- a. Anyone who intentionally treats a woman or orders her to be treated intentionally notifies or raises hope that because of the treatment the pregnancy can be aborted, is punishable by imprisonment for a maximum of 4 years or a maximum fine of three thousand rupiah.
- b. If the person who is guilty does so for profit or makes the act a quest or habit or if he is a physician, midwife, or medicine person, the penalty is added by one third.
- c. If the person who is guilty, commits the crime in carrying out the search, then the right to revoke the search can be revoked.

Furthermore, to find out why criminal sanctions against abortion are not in accordance with the value of justice, the authors present a number of court decisions regarding the application of criminal sanctions against abortion offender in Indonesia in the form of a table below^[11]:

Table 1: Court Decision for Abortion Offender

No	No Case	The maximum sentence according to the law	Punishment Sentenced by the Judge
1	118 / Pid.B / 2014 / PN.Kng	10 years in prison and a fine of 1 billion rupiah	7 months imprisonment and a fine of Rp. 10,000,000 (ten million rupiah)
2	38 / Pid.Sus / 2014 / PN.Kdr	a maximum imprisonment of 10 (ten) years and a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah).	imprisonment for 6 (six) months; criminal fines of Rp. 500,000.- (Five hundred thousand rupiah)
3	122 / Pid.B / 2014 / PN.Tmg	a maximum imprisonment of 10 (ten) years and a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah).	imprisonment for 8 (eight) months;
4	343 / Pid.Sus / 2014 / PN.Clp	a maximum imprisonment of 10 (ten) years and a maximum fine of Rp1,000,000,000.00 (one billion rupiah).	imprisonment for 1 (one) year 8 (eight) months and a fine of Rp. 100,000,000 (one hundred million rupiah).

From some of these cases it can be concluded that the application of criminal sanctions has not been fair and is very far from the maximum sanctions as stipulated in the Health Act and in the Penal code.

¹¹ <http://putusan.mahkamahagung.go.id/main/pencarian/?q=aborsi>, accessed 09 October 2019.

Considering, that the intent and purpose of punishment is not as a means of revenge for the actions of the defendant but as a means of educating and realizing the defendant for what has been done as well as all the considerations above, the Panel of Judges believes that the crimes imposed on the defendant are sufficient right, just and worth the mistakes.

The verdict handed down to the Defendant in the case of abortion was basically included in the combined conviction theory, which is a combination of the theory of relative and absolute punishment. Because the purpose of punishment is not just to retaliate, but to maintain orderly law.¹² The purpose of this punishment can be as a prevention of abortion especially for the community. And for this case, the sentence imposed is still too light, given that the act of abortion in the Penal code is included in crimes against lives where the maximum sentence is 4 (four) years in prison and in Law Number 23 of 1992 concerning Health, especially in article 80 paragraph (1) which threatens a maximum imprisonment of 15 (fifteen) years and a maximum fine of Rp.500,000,000 (five hundred million rupiah).

2. Reconstruction of Criminal Sanctions in the Penal code Against Abortion Offender Based on Justice Values

To be able to find the perfect reconstruction ideally, the authors present a comparison up in advance by the system of abortions that are in other countries as follows:

a. Malaysia

Abortion laws in Malaysia are regulated in Penal Code Section 312 of 1989. Similar to Indonesia, abortion in Malaysia is legal, if:

- 1) The Pregnancy threatens the mother's life.
- 2) Done on the basis of maintaining physical health.
- 3) Done on the basis of maintaining mental health.

However, abortion is still not permitted for victims of rape, financial reasons, social reasons, or the risk of fetal birth defects. Furthermore, before a woman can have an abortion, she must first approve the procedure and obtain pre-medical approval from a doctor or responsible health service. The legal period for having an abortion in Malaysia is 120 days from pregnancy.

According to a study led by Wen Ting Tong in 2012 and published in the journal BMC Public Health, the incidence of Malaysian pregnancy has decreased from 3.0 to 2.3 from 2000-2008, although the prevalence of contraceptive users has remained stable over the past 20 years. This number indicates that abortion often occurs throughout Malaysia, but there is no exact data on the number of abortions in this country.

b. Singapore

The abortion law in Singapore is legal and regulated in the statute of the Termination of Pregnancy Act, or TOP Act. This Statute regulates who and how abortion can be carried out, as follows:

- 1) Singapore citizen or spouse of Singapore citizen, or Singapore permanent resident or holding a permanent work permit, or the wife of a holder of a permanent work permit.

Illegal abortion is carried out for Singaporean immigrants with tourist or social permission.

2) A woman who has lived in Singapore for at least 4 months, although an abortion can still be performed if the period of stay is less than specified when considering the safety of the mother's life.

3) There is no age limit for having an abortion.

4) Women under the age of age (less than 16 but over 14 years old) are not required to obtain legal approval from parents before having an abortion. But only women aged 21 and over can request an abortion of their own free will.

5) Abortion is prohibited after more than 24 weeks (6 months), unless the pregnancy threatens the mother's life.

Similar to Indonesia, women who want to have an abortion in Singapore must first consult a competent doctor and counselor. In 2012, quoted from theasianparent.com Singapore's Ministry of Health (MOH) noted there were around 110,624 legal abortions carried out in Singapore, and only 6,431 of them were Singaporeans.

c. Philippines

Based on Article II of the Philippine Constitution 1987 and Articles 256, 258 and 259 of the Revised Penal Code of the Philippines, abortion is a criminal offense and can be charged with criminal law in the absence of exceptions, even the safety and life of the mother and / or fetus, and victims rape. Prison sentences for abortion ranged from six months to six years.

Based on data obtained from NCBI, in 2000, an estimated 78,900 women were in post-abortion hospital care, 473,400 people had had an abortion, and the incidence of abortion at that time reached 27 per 1,000 women aged 15-44 years.

Quoting from Irinnews.org based on survey data from the Guttmacher Institute, a non-profit organization focused on reproductive health, there were about 560 thousand cases of abortion in the Philippines in 2008.

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There are assessing abortions are carried out by the victims of rape are things that can be done if indeed the future of children who are born will bring pressure psychic against women such and abortion is lawful only done because it is not harming anyone else for that feel pain are women such. While the fetus that arise due to rape are not guilty and still have the right to live and be protected. Kids that should remain are born, and if it is a child that will remind the mother to the rape of children that can be taken away from the mother.

In Contrast to the data presented above, the Indonesian system of abortion offense shows various points that is important that later writers enter into the reconstruction Sanctions Criminal In the Penal code Against Perpetrators of Acts of Criminal Abortion Based On Value of Justice in Indonesia, with not leaving the value of the value that is based on the wisdom of local and international wisdom. Wisdom value locally among other values of justice, the

¹² Wahyu widodo, toebagus galang, Poverty, Evictions and Development: Efforts to Build Social Welfare Through the Concept of Welfare State in Indonesia, proceedings, 3rd International Conference on Globalization of Law and Local Wisdom (ICGLOW 2019), <https://dx.doi.org/10.2991/icglow-19.2019.65>

value of the balance, and the value of protection.

The reconstruction of the law is perfect Article 299 Book of Law. A Penal Law with change slightly its sanction in the article mentioned above to be as follows:

Article 299 before it is reconstructed.

1) To anyone who deliberately treat a woman or tell him so treated by deliberately tell or brought hope, that due to the treatment that the pregnancy can be terminated, threatened with a criminal jail a maximum of 4 years or a fine of the many three thousand rupiah.

2) If the guilty of doing so to seek profit or make actions such as search or habit or if he is a physician, midwife, or interpreter drugs, the penalty are added plus one third.

3) If the guilty, have evil intention in running a search, it can be deprived of its right to conduct a search.

The Proposed reconstruction from the author is to change the sanctions mentioned in the Article 299 above as it isnt in accordance with the value of justice into:

1) every person who treat a woman and because of the treatment that the pregnancy can be terminated, threatened with a criminal jail a minimum of 2 years and a criminal in prison maximum of 7 years, subject to criminal work social form of devotion in the area of remote and criminal fines of Rp. 3,000,000 (three million rupiah).

2) If the guilty are doing it for their position as a medical, physician, scribe medicine, quack worker then the sentence are paired with a form of social work in isolated areas in Indonesia for a period of no less than 2 years.

Conclusion

1. Sanctions for perpetrators of abortion crime in Indonesia is not based on the value of justice as meted out without looking at the background of doing the acts of abortion because of justifiable reason and those who commit the acts of abortion not because of a no good reason. This is regulated in Articles 346, 347, 348 and 349 of the Penal code. Due to the judge not considering the value of what is contained in the Article and not considering the wisdom of local and international. They must assess first whether the abortion could bring to the mother a physical or even mental trauma as for example, a victim of rape would be emotionally traumatic to raise the child of her rape perpetrator and as such could bring harm to the child. While the fetus that live due to rape are not guilty and still have the right to live and be protected. To children that has been born, if the child may remind the mother to her rape, the children then can be taken away from the mother for precaution.
2. Reconstruction Sanctions Criminal In Indonesian Penal Code Against Perpetrators of Acts of Criminal Abortion Based On Value of Justice, by shifting the value of value, by basing on the wisdom of local and International, the value of the balance, and the value of protection.

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