

MEDIA

JURNAL FILSAFAT -TEOLOGI
SEKOLAH TINGGI FILSAFAT SEMINARI PINELENG

1. Apakah << Emphati >> dapat Digantikan << Sesama >> ?
Sebuah Permenungan atas “Sesama” bersama
Edmund Husserl
(*Antonius Baju Nujartanto*)
2. Is The Common Law an Appropriate Mechanism for
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(*Nova Vincentia Pati*)
3. Fakta dan Makna Peristiwa Kenaikan Yesus ke Surga
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Refleksi Teologis Peringatan 85 Tahun Paroki Purworejo
(*Albertus Sujoko*)

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IS THE COMMON LAW AN APPROPRIATE MECHANISM FOR GOVERNING ABORTION LAWS IN AUSTRALIAN REGULATION?

Nova Vincentia Pati

Abstrak

Dalam artikel ini, saya hendak mengemukakan mengenai apakah hukum umum dapat berlaku dalam mekanisme undang-undang aborsi dalam regulasi Australia. Aborsi menjadi isu yang sangat krusial di setiap negara karena menyangkut keberadaan manusia. Ini berkaitan dengan kehidupan bayi. Walaubagaimanapun, dalam pandangan saya, seorang dokter dapat secara legal melakukan aborsi jika yang bersangkutan memiliki tes yang masuk akal yang menunjukkan bahwa tindakan ini diperlukan untuk melindungi wanita dari bahaya serius yang berkaitan erat dengan kesehatan fisik dan mental sejauh diperlukan dan kehidupannya terhindar dari bahaya. Walaubagaimanapun, undang-undang negara membatasi seseorang yang melakukan aborsi secara ilegal. Untuk itu hukum diperlukan untuk mengatasi kesenjangan keputusan pengadilan yang diharapkan dapat menolong para dokter dalam tugasnya melakukan aborsi kepada pasiennya. Hal ini dibutuhkan sebelum para dokter melakukan aborsi kepada pasiennya.

Keywords: Abortion, common law, australian regulation, reasonable test, doctor's duty, statutory law.

Introduction

Abortion has become a universal issue with its controversy and conflict because this issue relates to human being – it's about a third party's life. A pregnant woman may more understand that the meaning of an abortion is the death of a living human being, yet they still choose to abort. Relating to this issue, every country has passed laws or established rules that concerning induced abortions. However, Dr. Mukesh Haikerwal in his recent comment on a newspaper states that "abortion laws are unclear and complex and vary from state to state, which could lead to legal ramifications for doctors and patients" (The Age, 2005). In relation to determine whether or not common law is an appropriate mechanism for governing abortion laws, there are several legal points need to be considered here. First, it is crucial to understand the notion of abortion. Second, this article will look at regulations for abortion laws established under both common law and statutory law. Third, this article will

consider medical aspects of abortion and finally this article will examine doctor's duty on engaging his or her patient's need of terminating her pregnancy.

1. The Notion of Abortion

The concept of abortion in medical terms is the termination of pregnancy up to the twenty-eighth week after conception.¹ Baird states that abortion is an issue about the women's well-being.² On the other hand, Kisil thinks that abortion is the murder of an innocent human being.³ These arguments come up based on two perspectives that exist in the society. First, the pro-life perspective believes that "the fetus is a person, thus requiring protection from the state against assault by others."⁴ (Frohock, 1983, p. ix) Second, the pro-choice argues that "the embryo is not a person, thus not requiring state protection."⁵ According to Roman law, abortion does not constitute murder, because the child in the belly of its mother is not a person.⁶

In relation to concept of abortion, Plato explains that a woman who becomes pregnant after the age of 40 should be induced to have abortions.⁷ Aristotle considers that to determine the number of children a married couple may have and to prevent an increasing number of children allotted by pregnant women, the state should take an action by allowing women to have abortion.⁸ However, Hippocrates does not approve of abortion and he also includes

¹ Tony McMichael, "Abortion: The Unenforceable Law - The Reality of Unwanted Pregnancy and Abortion in Australia," *The Abortion Law Reform Association of Victoria* (Melbourne, 1972), p. 7. "After the twenty-eighth week, the foetus is regarded, medico legally, as viable; any subsequent expulsion of the foetus is called a still-birth."

² Fred M. Frohock, *Abortion - A Case Study in Law and Morals* (London: Greenwood Press, 1983), p. 5.

³ *Ibid.* Baird and Kisil are two activists who concern on abortion issue. The difference between both of their argument mainly because Baird bases his argument on pro-choice approach; and Kisil bases his argument on pro-life approach.

⁴ *Ibid.*, p. ix.

⁵ *Ibid.*

⁶ Marie Costa, "Contemporary World Issues - Abortion," *ABC-CLIO* (California, 1991), p. 1. Legal regulation of abortion that exists in Roman Empire is purposed to protecting the rights of the father, but not the fetuses. Wives who procure an abortion without their husband's consent are subject to exile, as are women who administer contraceptives or abortifacients.

⁷ *Ibid.*

⁸ *Ibid.* Aristotle also adds that the fetus first has a vegetable soul, which is succeeded by an animal soul, and finally, when the body is fully develop, by human soul, so that clearly abortion is not the killing of a human being.

a clause against abortion in his medical promise.⁹

Christian thought related to abortion is whether early abortion is a murder.¹⁰ Several church documents that concern on abortion not allow women to kill the fetus by abortion or destroy the infant already born.¹¹ The Roman Catholic Church passes an abortion issue under a papal bull which declare that “an abortion at any stage of pregnancy is a homicide, both a moral sin and a secular crime, and is punishable by excommunication.”(Costa, 1991, p. 3) In another document of Roman Catholic Church a papal pronouncement states that “reinstates the concept of delayed humanisation and recommends that church penalties for abortion of unanimated fetus be no stricter than civil penalties.”(Costa, 1991, p. 3)

An abortion is the violent removal of a developing baby from the womb of his or her mother using surgical, mechanical or chemical ways.¹² For some countries abortion is illegal act, however, for instance in the People’s Republic of China, abortion is legal and it is mandatory under certain circumstances. Abortion is used to control population growth and to get rid of unwanted children, including surplus girls, a physical defects baby and the second in a pair of twins.¹³ Finally, Callahan states that “abortion is a nasty problem, a source of social and legal discord, moral uncertainty, medical and psychiatric confusion and personal anguish.”¹⁴

The question now is when someone’s life begins? This is not only referred to women who have full right to decide for themselves whether or not to terminate their pregnancy. Once, abortion is a moral issue, medical, legal, sociological, philosophical, demographic and physiological dilemma. The nature and the control of initial human life is the reason abortion becomes a moral problem. When a woman decides to have abortion, this act is not only a relation with a woman and her baby, not only a relation with a woman and a doctor, but also a moral responsibility with a woman and her society. Therefore, the next question is whether or not to keep abortion legal is a matter of life and death?

2. Australian Regulations for Abortion Law – Common Law and Statutory Law

The concept of unlawful abortion has been recognised throughout

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.* In the middle Christian Era, Hurst describes that abortion is a sin if it is used to conceal evidence of the sins of fornication or adultery.

¹² Janet Podell, *Abortion* (New York: The H.W. Wilson Company, 1990), p. 5.

¹³ *Ibid.*

¹⁴ Daniel Callahan, *Abortion: Law, Choice and Morality* (London: Collier-MacMillan, Ltd, 1970), p. 1.

Australia as in the criminal codes in all jurisdictions.¹⁵ In Victoria and New South Wales have applied the *Menhennit* rules¹⁶ which results reasonable grounds used by doctors in respect of abortion is lawful if provides the certain requirements. These include necessary to protect the woman from a serious risk to her life or her physical or mental health¹⁷ which the persistence of the pregnancy would involve¹⁸; and not out of proportion to the risk to be prevented.¹⁹ *Roe v Wade*²⁰ case has given a significant contribution on developing the legislation of abortion.²¹ In the early 19th century, only British common law regulated abortion. From 1800 to 1825, freedom of abortion had by most women until quickening. They believed "no human life existed in the embryo or fetus until quickening."²² In *Roe* case, first, the use of the viability adopted by the Court and denied the validity in law of people of America believes that life begins at conception.²³ Second, the fetus of a woman could have been confined to specific social practices. Third, the rights of fathers of the fetus or parents of the woman who would have abortion not subject to abortion decisions. Therefore, the woman who wants to terminate her pregnancy would have been uncontroversial power over her pregnancy.²⁴ The arguments that appear against *Roe* decision mainly a question whether any legal decision is possible on abortion.²⁵ The equality is a crucial issue because a legal protection in abortion not extend certain protection for pro-life, only for pro-choice.²⁶

The issue of viability also has ambiguous meaning.²⁷ Viability is a purpose of medical technology. Viability pushed significantly neonatology²⁸ for the

¹⁵ Loane Skene, *Law & Medical Practice - Rights, Duties, Claims & Defences*, 2nd ed. (Chatswood: Butterworths), p. 350.

¹⁶ *Ibid.*, pp. 350-351. This rule invented by Menhennit J. in *R v Davidson* (1969) VR 667 at 672 (SC(Vic)); *R v Wald* (1971) 3 DCR (NSW) 25 (DC(NSW)); *CES v Superclinics Australia Pty Ltd* (1995) 38 NSWLR 47.

¹⁷ *Ibid.* (not being merely the normal dangers of pregnancy and childbirth).

¹⁸ *Ibid.* This act is known as a necessity test.

¹⁹ *Ibid.* The proportionality test.

²⁰ 410 US 113 (1973) (US UC).

²¹ Fred M. Frohock, *Abortion - A Case Study in Law and Morals*, p. 59.

²² *Ibid.* This statement expressed in the common law.

²³ *Ibid.*, p. 70. There were substantial number of people in America who believe that life begins at conception. However, the Court would not have had to decide the morality of abortion.

²⁴ *Ibid.*, pp. 70-71.

²⁵ *Ibid.*, p. 71.

²⁶ *Ibid.*

²⁷ *Ibid.*, p. 85.

²⁸ Neonatology is the subspeciality of newborn care.

fetus.²⁹ The continuing concerns over viability are that because of its marginal issues in certain terms. However, in identifying a difference of abortion and birth late and the conflict addressed by the physician's discretionary power and the fetus potential for life, there have been overlapped.³⁰

Common law has been recognising the *Wald* test that is resulted from *R v Wald*³¹. Reasonableness is crucial to determine whether or not a woman is seriously endangered during the currency of her pregnancy.³² Further, a reasonable ground can be taken into account by the doctor if he or she finds certain mother's circumstances³³ "after the birth of the child, for instance, because of the very economic and social circumstances in which she will then probably find herself." (Skene, 2004, p. 351) Basically, there are three situations which can be penalised by recent laws. First, when a woman terminates her pregnancy by herself. Second, a woman terminates her pregnancy because induced by other person, and in engaging an abortion, a woman by herself or induced by other person supplying instruments or drugs, knowing that they are intended for use in inducing an abortion illegally. The *Crimes Act 1958*³⁴ has regulated the penalties related to abortion³⁵, self-induced abortion³⁶ and supplying instruments.³⁷ In Victoria and New South Wales, the law is comparatively clear where common law ruling have recently been given.³⁸ The only possible ground is there must be having serious danger to the mother's life or to her physical or mental health.³⁹ In Victoria, social or economic considerations are irrelevant. However, in practice, some abortions

²⁹ *Ibid.*, p. 86. The issue of *who* and *what* determine viability are pushing in view of the gravity of homicide. See *Commonwealth v. Kenneth Edelin* (1976). The Supreme Judicial Court states that there was insufficient evidence that there was a live birth. Dr. Edelin returned to his practice.

³⁰ *Ibid.*, p. 89.

³¹ (1971) 3 DCR (NSW) 25 (DC (NSW)). This is a concept of 'serious danger to the mother's life or health. Loane Skene, *Law & Medical Practice - Rights, Duties, Claims & Defences*, 2nd ed., p. 351.

³² *Ibid.* Levine DCJ says that the accused need not have believed that the woman's health was in 'serious danger' at the time of consultation.

³³ See *CES v Superclinics Australia Pty Ltd* (1995) 38 NSWLR 47.

³⁴ In Victoria. In NSW - *Crimes Act 1962*; South Australia - *Criminal Law Consolidation*.

³⁵ Section 65 (15 years).

³⁶ Section 65 (15 years).

³⁷ Section 66 (3 years).

³⁸ Tony McMichael, "Abortion: The Unenforceable Law - The Reality of Unwanted Pregnancy and Abortion in Australia," *The Abortion Law Reform Association of Victoria*, p. 15.

³⁹ *Ibid.*

are performed by general hospitals on eugenic grounds.⁴⁰

Victoria's abortion law is recognised by authorities as being unenforceable because it violates social reality. The professed objective of the law is to prevent unlawful abortion. The actual practice is merely to control abortion and to hide it from the public gaze. The social reality is that 10,000 to 20,000 women have abortions in Victoria each year. More than half women are married, and only a minority of these women have precise and clear-cut medical indications for abortion, but the majority of unwanted pregnancies are unwanted for a variety of social, psychological, economic and family reasons. It is why the existing law is out of touch with reality, and is punitive in its effects on the thousands of women whose need for abortion, in personal life-situation terms is real and dire. Abortion exists as a widespread social fact. The question is not whether it should exist, but how it should best be performed and controlled. A large proportion of women clearly believe that it is their prerogative to determine the outcome of unwanted pregnancy. They believe firmly and sincerely that it is their right to determine when and where they will bear children, and that this right is more urgent and relevant than disputed notions of the foetal right to life.⁴¹

Obviously, the Parliament's role in regulating abortion is vital to the final form of the Bill and its passage. The problems arise when the Parliament will form this Bill; it has to value balance of pro-life and pro-choice.⁴² It is realised that there will result many arguments from both sides if the policies do not cover pro-life and pro-choice needs. Parliament must be wise to determine this by opening discussions which is expected can help the Parliament to form the Bill or rules equally. Verbal discussion is one way to gain the views of public social elements such as the pro-choice and anti-choice lobby groups, health professionals, the media and finally the Australian Community. All of these elements play a vital role in order to campaign the legislation made by Parliament. Therefore, this should be taken seriously by the Parliament to ensure that the passage of legislation that regulates an abortion law is campaigned and recognised in the society. A related objective is to ensure the certainty and clarity in the law so that women and their doctors would not be at risk of prosecution.⁴³

Although doctors providing abortions had threatened to withdraw their services, they are persuaded not to do so while the legislation is being debated. However, in mid May it became clear that the legislation was stalling in the Lower House with claims from the anti-choice side that the debate could be

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, pp. 20-21.

⁴² Wendy Weeks, Lesley Hoatson and Jane Dixon, *Community Practices in Australia* (NSW: Pearson Education Australia, 2003), p. 97.

⁴³ *Ibid.*

prolonged indefinitely by the introduction of amendments. At this point, the doctors points that they would withdraw abortion services within two weeks if the legislation is not passed. Coincidentally, senior Government ministers finally exerted leadership and the legislation is passed on May 21, 1998. In Western Australia, the final legislation allowed for abortion on request with informed consent up to 20 weeks gestation, after which abortion was only available under special circumstances. There are special requirements for dependant minor under 16 years and a requirement for notification of all abortions to the Health Department. There were requirements to offer pre and post abortion counselling and a conscience clause allowing practitioners and health care facilities to refuse to carry out abortions. Although there are still provisions in the Criminal Code for unqualified persons and for the doctors performing abortions unlawfully, an abortion is regulated by the Health Act. The law has provided certainty for women and doctors to the legality of abortion, although ironically there are more restrictions than previously.

3. Medical Aspects of Pregnancy

Abortion is regularly performs by surgical terms, from the vaginal feature before the uterus or womb grows too big to be withdrawal from, for instance before the twelfth week of pregnancy.⁴⁴ Yet, when legal abortions are not available, there are many anxious women seek illegal abortions. Illegal abortions are usually dangerous because they are more possible to be performed secretly by inexperienced persons under infected conditions, and more likely to be delayed to later phase of pregnancy, which need more dangerous methods. According to Potts⁴⁵, there are five types of fertility control measures used by clinicians. The five types are contraception⁴⁶; postcoital⁴⁷; contragestional⁴⁸; and abortion;⁴⁹ and sterilisation.⁵⁰ Abortion based on hysterectomy, hysterotomy, or urea instillation that carry the risk usually associated with labour and delivery, carry additional risk due to massive saline infusions, to water intoxication, or to haemorrhage and infection.

U.S. Supreme Court states in 1973 that the states cannot interfere in the abortion decision during the first three months of pregnancy, but during the

⁴⁴ *Ibid.*, p. 57.

⁴⁵ Hyman Rodman, Betty Sarvis, Joy Walker Bonar, *The Abortion Question* (New York: Columbia University Press, 1987), p. 51.

⁴⁶ Prevents the fusion of the gametes.

⁴⁷ Procedures affect events between fertilization and implantation.

⁴⁸ May be used between implantation and the time when fetal organs are formed.

⁴⁹ Refers to termination after 14 weeks LMP.

⁵⁰ Act by preventing sperm from leaving the man's body in his ejaculate or by preventing sperm from through the Fallopian tubes to reach the ovum.

second trimester, when abortion is more dangerous for the woman, the state's interest in the health of the woman permits the enactment of regulations to protect maternal health.⁵¹ However, The Supreme Court in United States rules that the states could not necessitate all second trimester abortions to be performed in a hospital.⁵² Within the second trimester, prostaglandin induced abortion are apparently more likely to expel fetuses which exhibit reflex activity. For this reason and because prostaglandin may cause side effects on some women, combination methods are being investigated by clinical researchers.⁵³

There are novel technologies have been established for the termination of very early post-conceptional pregnancy. The two methods are menstrual extraction and prostaglandin therapy. Menstrual extraction is usually called mini abortion, mini suction, and menstrual induction.⁵⁴ The prostaglandins are being used in multicentric clinical trials for the termination of early post conceptional pregnancy.⁵⁵ Of the most significance from medical point of view is the understanding that the earlier in pregnancy medical termination is undertaken, the easier and safer it is.⁵⁶ This is a substance of knowledge to most gynaecologists, but it is also well-documented that the physical hazards and complications of abortion add to as pregnancy advances. Moreover, there is a little doubt that the interruption of very early pregnancy, before the main growth of embryology is much more satisfactory emotionally and psychology both to the mother and the operator than is late abortion.⁵⁷

A legalising abortion does dispensable ensure that all the women in need have right of entry to safe abortion and it is clear that in many parts of the world the ease of use of abortion services has not kept speed with liberal legislation.⁵⁸ The conditions to assure availability and full use of abortion services must comprise an adequate number of medically-trained personnel, willingly accessible medical facilities, and an extensive communications system to notify all women including those in rural or remote areas that services are available.

⁵¹ *Ibid.*, p. 58.

⁵² *Ibid.* See *City of Akron v Akron Centre for Reproductive Health*.

⁵³ *Ibid.*, p. 59.

⁵⁴ Mostyn Embrey, *Developments in Medical Technologies for Fertility Regulation and Their Implications for Medical Legislation* (London: Commonwealth Secretariat, 1977), p. 3.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, p. 9.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, p. 11.

4. Doctors' Duty

A doctor is required by law not to terminate a pregnancy apart from on health ground.⁵⁹ Before engaging in abortion, a doctor must believe on reasonable grounds that termination is necessary to protect the woman from a serious danger to her life or her physical or mental health which the persistence of the pregnancy would involve and in the circumstances not out of amount to the danger to be avoided.⁶⁰ A doctor also must believe that giving birth to and raising, a gravely disabled child presents a serious danger to the mother's physical or mental health.⁶¹ A doctor may apply a less rigorous test that serious danger to the mother's life or physical or mental health.⁶² A doctor can be prosecuted for abortion except there are special circumstances. This is because of political reasons. In many cases, patients' documentation are confidential and although it is possible for police to expand to patients' records with a search warrant, that cannot be done without a prior court order on the ground that there is reason to believe that a criminal offence has been committed.⁶³ In great cases, even if the circumstances may fall outside the legal test, the records test will remain secret; doctors and their patients agree that an abortion is appropriate.⁶⁴

However, a dilemma may arise if a doctor does an abortion on a woman who later regrets it and informs the doctor to the police.⁶⁵ In this case, the patient must prove that there are no grounds for the doctor to have formed an honest belief that the abortion is necessary. A necessity test is important to determine whether or not a doctor has been illegally performed an abortion to his or her patient. In *Australian Medical Association Code of Ethics* 2003 paragraph 1.1 states that "doctors who are prevented from recommending some form of therapy because of personal moral judgement or religious belief alone should inform the patient so that the patient can seek treatment elsewhere."⁶⁶ In this case, some doctors may not desire to do abortions.

Apparently, even if doctors are unlikely to be prosecuted for abortion or child destruction, a doctor's duty will depend upon whether or there are reasonable grounds used by a doctor to perform abortion either for preventing a serious danger to the mother's life or physical or mental health or economical

⁵⁹ Loane Skene, *Law & Medical Practice - Rights, Duties & Defences*, 2nd ed., pp. 367.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² See *CES v Superclinics Australia Pty Ltd* (1995) 38 NSWLR 47 at 58.

⁶³ *Ibid.*, p. 368.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, p. 369.

reasons of the mother. However, statutory law limits someone who performs abortion illegally. Where there is a gap between statutory law and common law regarding abortion, it is expected that common law can fill the gap over court decision which is hoped can help a doctor to perform well his or her duty in engaging abortion with his or her patient. A necessity should be taken by a doctor before performing abortion to his or her patient. It is important to determine whether or not a doctor the abortion is legal. However, the decision that is made by the mother, it should be based on the best interest of the baby as well. The equality of right must be concerned by both the mother and the doctor before deciding to have abortion.

Conclusion

To conclude, common law is an appropriate mechanism for governing abortion laws, where there is a gap between statutory and common law in relation to solving disputes between a doctor and his or her patient in performing an abortion. However, the Court must take into account if there is no reasonable ground and necessity approach when a doctor performs abortion to his or her patient.

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