

Suatu tinjauan hukum pidana terhadap kriminalisasi perilaku beresiko dalam peraturan daerah tentang penanggulangan HIV dan Aids di Indonesia = A criminal law study against risk behavior criminalization on local regulation regarding HIV & AIDS care in Indonesia

Simplexius Asa, author

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Abstrak

Penelitian ini dirancang untuk menilai fungsionalisasi hukum pidana dalam mengatasi persoalan penanggulangan HIV & AIDS dalam Peraturan Daerah (PERDA) tentang Penanggulangan HIV & AIDS. Tujuannya adalah untuk mengidentifikasi perbuatan pidana dan subyek hukum pidana; menganalisis kesesuaian antara perilaku berisiko yang dikriminalisasi dengan teori kriminalisasi; serta menganalisis faktor-faktor yang mempengaruhi penegakan PERDA dalam masyarakat, sesuai perspektif hukum pidana. Penelitian ini adalah normative legal research dengan pendekatan deskriptive-analitic. Hasilnya penelitian memberi kesimpulan: (1) Perilaku yang dikriminalisasi adalah perbuatan yang dapat secara langsung menyebabkan seseorang tertular HIV dan AIDS, seperti: hubungan seks tanpa kondom; penyuntikan NAPZA dengan jarum suntik tidak steril secara bersama-sama dan berganti jarum; tidak menerapkan universal precaution; dengan sengaja mendistribusikan darah atau organ/jaringan tubuh yang sudah terinfeksi HIV kepada orang lain. Perilaku yang dapat menghambat upaya penanggulangan HIV dan AIDS, seperti: tidak menyelenggarakan pemberian informasi/penyuluhan tentang pencegahan dan HIV dan NAPZA; tidak memeriksakan kesehatan tenaga kerja yang berada dibawah pengawasannya; tidak merahasiakan status HIV seseorang; memberikan pelayanan kesehatan secara diskriminatif; telah membuka status HIV seseorang tetapi tidak melakukan tindakan medis apapun untuk meningkatkan ketahanan dan kualitas hidup ODHA. Subyek tindak pidana terdiri atas setiap orang; kelompok masyarakat secara komunal; petugas kesehatan; petugas laboratorium; paramedis dan dokter serta pejabat pemerintah; badan hukum privat dan atau badan hukum publik. (2) Perumusan perbuatan pidana telah sesuai dengan teori kriminalisasi, antara lain: perlindungan terhadap kepentingan umum; efisiensi dan efektivitas terutama cost and benefit principles; azas kemanfaatan yang lebih besar serta aspek legal morality. Kriminalisasi terhadap perbuatan pidana tertentu tidak diformulasi secara jelas dan pasti sesuai azas lex certa dan lex stricta sehingga dapat menimbulkan multi-interpretasi di kalangan penegak hukum dan masyarakat. (3) Kriminalisasi dan pembentukan norma hukum pidana belum memperhatikan aspek substance of law, structure of law dan culture of law sehingga sulit ditegakkan.

.....This research is designed to assess utilization of criminal law to contend HIV and AIDS problem in Local Regulation regarding HIV and AIDS care. In the perspective of criminal law, the purposes of the research are to identify the criminal offence and subject of wrongdoers; to analyze the conformity between criminalized risk behavior and theory of criminalization; and to analyze the influential factors in the implementation of the local regulation in the community. The research is a normative legal research with descriptive analytical approach. The research resulted the following concluding points: (1) the criminalized behaviors are actions that can directly cause HIV and AIDS transmission to a person such as: sexual intercourse without using condoms; narcotic substance injection through sharing of non-sterilized needles within the circle of injecting drug users; failure to apply universal precaution principle; and intentionally

distributing infected organ or blood transfusion to other people. Other criminalized behaviors can impede the effort to eradicate HIV and AIDS program such as failure to conduct information dissemination on HIV and AIDS and other dangerous substances; failure to carry out medical examination of employees by supervisors; failure to keep the confidentiality of people living with HIV and AIDS (PLWHA); provide a discriminative health services, disclosure of the status of an HIV infected person without subsequent medical intervention to ensure improvement of the quality of life of PLWHA. The potential criminal wrongdoers consist of: individual, community groups, health officer, laboratory officer, medical officer, medical doctor, government officer, private and/or public corporation. (2) In general, formulations of criminal offences are confirmed by criminalization theories, among others: public interest protections, efficiency and effectiveness in particular cost and benefit principles, principle of maximum utilities and principle of legal morality. Criminalization against specific offences is unclearly and uncertainly formulated as clear as principle of *lex certa* and *lex stricta*, thus it can cause such multi-interpretation in the circle of law enforcement officers. (3) Criminalization and formulation of the norm of criminal law is not grounded on the aspects of substance of law, structure of law and culture of law as yet causing difficulties in the enforcement.