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Judges' Consideration on Criminal Law Imposition in Abortion Case in the Decisions Number 252/Pid.B/2012/PN.Plp and Number 124/Pid.Sus/2014/PN.Liw

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Abstract

The legislation regarding abortion is governed by Act Number 36 of 2009 on Health. According to Article 194 of the Health Act, individuals who intentionally perform abortions outside of the regulations mentioned in Article 75, paragraph (2) can be punished with a maximum prison sentence of 10 years and a maximum fine of 1,000,000,000 rupiahs. According to the two decisions, there is a discrepancy in the decision made by the panel of judges. In decision No. 252/Pid.B/2012/PN.Plp, it is clarified that the judge relies on the Indonesian Penal Code as the foundation for resolving a case. The judge invoked the Health Act to resolve the identical issue pertaining to the unlawful act of abortion. The research methodology employed in this study is the Yuridis Normative research approach. The judges' analysis of the application of criminal law laws to the

offense of abortion is discussed in Decision No. 252/Pid.B/2012/PN.Plp and Decision Number 124/Ped.Sus/2014/PN.Liw. Based on the investigation results, it is indicated that the judge's decision to terminate a case is influenced by Judgment Number 252/Pid.B/2012/PN.Plp and Judgement No. 124/Sus/2014/PN-Liw. In this context, the judge considers the indictment presented by the Prosecutor-General. In cases where an alternative charge is presented, the judge focuses on establishing the provisions of criminal law based on the prosecutor's accusation, without conducting an extensive investigation. Consequently, the judge determines that it is more appropriate to apply the law, particularly in cases of criminal abortion, which is explicitly regulated in the Health Act.

Keywords: Abortion, Criminal Law, Consideration

Introduction

Based on positive laws in Indonesia, the regulation of abortion is regulated in the Code of Criminal Law (hereinafter referred to as KUHP) and Act No. 36 of 2009 on Health. (Hereinafter Health Act). The punishment against the perpetrator of abortion as provided for in Article 194 of the Health Act states that "Any person who deliberately performs abortions not by the provisions referred to in Article 75, paragraph (2) is punishable by a penalty of imprisonment for a maximum of 10 (ten) years and a fine of up to 1,000,000,000,- (one billion rupiahs)"^[1].

The Code of Criminal Law (hereinafter referred to as KUHP) deals with abortion in several sections, among other things, Article 299 and Article 346-349 of the Code. It's because this abortion is the same as killing a child and planning a child.

To determine whether or not an act is a crime and liable to the perpetrator, the act must comply with the elements of the form of the offense established in the rule of law. For Moeljatno a punishable act must meet the elements, namely, as follows^[2]:

1. An action;
2. That fulfills the formula in the law (this is a formal requirement, relating to the validity of Article 1 paragraph (1) of the Covenant);
3. It's against the law. (hal ini merupakan syarat materil, terkait dengan diikutinya ajaran sifat melawan hukum materil dalam fungsinya yang negatif).

Criminal cases of abortion can be seen from several of the following court rulings, among others: Decision No. 252/Pid.B/2012/PN.Plp and Decision Number 124/Ped.Sus/2014/ PN.Liw. Based on 2 (two) such rulings there are differences

in the judgment decided by the judges' assembly, in decision No. 252/Pid.B/2012/PN.Plp explains that the judge uses KUHP as a basis to settle a case. Whereas in Judgment No. 124/Ped.Sus/2014/ PN.Liw, judges use the Health Act in settling the same matter that is a criminal act of abortion. The purpose of this study is to explain the judge's consideration of the application of the provisions of criminal law to the criminal offense of abortion in Judgment No. 252/Pid.B/2012/PN.Plp and Judgement No. 124 / Pid.Sus/2014 / PN.Liw.

Research Method

This is normative jurisprudence i.e. a system of logical exploration to find reality in the logical perspective according to the regulating perspective^[3]. According to Sri Mamuji and Soerjono Soekanto, normative law research also called library law research is legal research that utilizes data or secondary materials from libraries^[4]. The research uses a legislative approach, a case approach, a conceptual approach, as well as historical approaches. The data source used in this research comes from the legal research leaflets in which the legal study leaflet is searched through the library research^[5]. This research is mainly based on secondary data. Secondary data for this research uses primary, secondary, and tertiary legal material^[6].

Results and Discussions

The application of criminal law provisions to the criminal act of abortion is one of the sanctions. A sanction is a consequence of the law for a person who violates a provision of law or a means of coercion to enforce a rule or law^[7]. Criminal sanctions can be defined as imprisonment or punishment of a coercive and binding nature to a person to abide by an agreement and to obey the provisions of applicable law or law^[8]. Criminal sanctions also include and are part of a law specially regulated to provide security to law enforcement by imposing a reward or punishment on a person who violates such a rule of law^[9].

Punishment of action is a punishment that is not harassing but leads to education. It means controlling people and giving examples and acts of an educational nature, such as forced education, forced treatment, hospitalization, and so on^[10].

The criminal forms outlined in Article 10 of the Code shall also apply to holes written outside of the covenant unless the provisions of the law preclude them^[11]. The forms of criminal sanctions are, among others, substantive and additional penalties, fine penalties, and coverage penalties. Additional penalties consist of the deprivation of certain rights, the seizure of certain goods, and the announcement of a judge's judgment. Additional criminal sanctions are imposed only when substantive penal sanctions have been imposed, except in certain cases. Criminal sanctions are divided into two parts the other criminal substance and additional criminal. There are five types of penalties: Death, imprisonment, jail, fine, and cover.

Additional penalties listed in Article 10 of the Covenant on the part, additional penalties which include, the criminal deprivation of certain rights and the criminal confiscation of particular goods^[12]. About the definition of criminal sanctions against the offense of abortion, Sudarto argues that what is meant by criminal sanction is the suffering intentionally imposed on the person who commits an act that meets certain conditions^[13].

The connection of the case is contained in Decision No. 252/Pid.B/2012/PN.Plp and Decision No. 124/Sus/2014/NL.Liw with the criminal responsibility is that the accused has committed a clear act that the act is prohibited by material law or formal law, then from that the defendant should be held accountable for the act under the provisions of the criminal law in force in Indonesia.

In essence, the judge's ratio decidendi is the reason used by the judges' assemblies as the basis of legal consideration before deciding a case, in the process before this jurisdictional consideration is proved, then the Judge will first draw the facts in the proceedings that arise and is a cumulative conclusion of the testimony of the witnesses, the indictees, and the evidence. In connection with the defense of the judge's consideration, Lilik Mulyadi argues that "In fact, in the jurisdictional consideration of a judge giving evidence is an element of a hole, in which whether the defendant's act itself meets and conforms to the hole alleged by the public prosecutor/dictum judgment^[14]."

Rusli Muhammad also agreed that the judge's consideration can be divided into two (two) categories, i.e. juridic consideration which is a judge's consideration based on the juridical facts found in the trial and also in the Law has been established as something to be included in the judgment, for example, the prosecution prosecutor's indictment, the indicted testimony, the witness's testimonies, the items of evidence, and the articles of the criminal law. Besides, there are non-juridical considerations, these considerations can be known from the background, the consequences of the defendant's actions, the condition of the accused, and the religion of the defendant^[15].

The problem of abortion that is classified as a crime or a criminal act can only be seen in the CEDAW, although the Health Act also sanctions abortions. KUHP regulates all kinds of crimes and violations. One of the crimes regulated in the law is the issue of criminal abortion. The provisions concerning criminal abortion can be found in Chapter XIV of the Second Book of the Covenant on Crimes against Life, in particular Articles 346-349 of it. It is not explained what it is, and it is given a clear understanding of abortion and maternal killing. Thus, we know that the CEDAW only regulates Abortion Provokatus Criminalis, thus all forms of abortion are prohibited and not permitted by law, for whatever reason.

The arrangement of provocative abortion within the Dutch-era legacy of colonial law is contrary to the legal basis and policy of protecting the entire Indonesian nation and advancing the general welfare under Pancasila and the Constitution of the Republic of Indonesia of 1945, for prohibiting provocative Abortion without exception. It's a terrible burden to the medical community that has been forced to do a provocative abortion to save the mother's life, which has always been an extra-legal exception.

The provisions of these articles do not give the possibility of abortion if the enforcement of the provisions is absolute and there is no reason whatsoever. All forms of abortion are prohibited for women, without providing an alternative to providing safe reproductive health technology that can reduce the risk of death of pregnant women, owing to the risks of serious diseases that endanger the life of the pregnant woman. Consequently, the medical staff, especially doctors, midwives, and other officials, are considered to be offenders when they carry out abortions to save lives. Therefore, it is necessary to enact more effective regulations

that can provide appropriate solutions to the public and allow medical personnel to carry out abortions under well-defined conditions and limits.

Criminal cases of abortion can be seen in Judgment No. 252/Pid.B/2012/PN.Plp and Judgement No. 124/Ped.Sus/2014/ PN.Liw. In both judgments, the judges' assembly was resolved by different laws. The judge dismissed the accused under Article 346 of the Code of Criminal Procedure under Article 55 para. (1) of the first paragraph of the code in the decision No. 252/Pid.B/2012/PN.Plp. whereas in judgment No. 124/Pid./Sus/2014/PN the judge resigned the defendant under Article 194 of the Health Act under Article 75 para. (2) of the 1st paragraph.

When examined further, the rules on provocative abortion in the Health Act and Articles 299 and 346-349 of the KUHP differ from each other.

The code recognizes the prohibition of provocative abortion without exception, including provocative medicinalis and provocative provokatus without exception for provocative medicinalis and therapeutic provocative.

According to Criminal Law, there is a distinction between the old rules of law and the new ones, whereas the new rules are based on the *lex posteriori derogat legi priori*. This principle assumes that if a new rule is enacted without repealing an old rule that regulates the same matter and both conflict with each other, then the new one overcomes or abrogates the old one^[16]. Thus, Article 75 of Act No. 36 of 2009 which regulates about provokatus medicinalis abortion remains applicable in Indonesia even though the rules are different from the formulation of provokatus criminalis.

The implementation of the *lex posteriori derogat legi priori* is one of the government's efforts to develop Indonesian criminal law. Many of the rules of the Covenant that are in particular circumstances are no longer relevant to the present time. To address the weaknesses of the KUHP, the Government issued the Health Act in the hope that it could provide an atmosphere conducive to the dynamics of Indonesian society at present. The *lex posteriori derogat legi priori* is a legal foundation that is flourishing throughout the field of law. Its functions in law (especially criminal law) are only regulatory and explicit. This basis serves to explain the validity of Articles 75-78 when confronted with the articles of the CEDAW that regulate the issue of provokatus abortion.

Looking at the wording of Article 75 of Act No. 36 of 2009, it appears that it is clear that Law No.36 of 2009 prohibits abortion, except for the type of abortion *provokatus therapeuticus*. In the world of medicine, provokatus medicinalis abortion can be performed if the mother's life is in danger of death and can also be done if the child is expected to have serious defects and is indicated not to live outside the womb, for example the fetus suffers from ectopiakordalis prevalence, rakiskisis or anencephalus.

The Health Act has also regulated abortions performed by rape victims indicated to cause psychological trauma to the mother. If the old Health Act does not specifically cover abortion of rape victims, it raises debate and interpretation in various spheres, with the new Health Act, then it is no longer disputed its legal certainty because there has been an article specifically regulating it.

Based on the above description, it can be concluded that Article 75 of the Health Act regulates the provokatus abortion that is permitted in Indonesia, i.e. the provocative

abortions on medical indications or in the medical language called the *provocus medicalis*. It is further affirmed that the indication of medical presence means that some condition requires certain medical measures for the rescue of the mother. So what needs to be emphasized is that the medically prescribed presence is an attempt to save the mother's life the fetus is not able to live outside the womb due to severe defects.

One of the advantages of the provocative abortion articles of the Health Act is the provisions of the law. According to Article 194 of Law No. 36 of 2009, the crime threatened is a penalty of imprisonment for a maximum of ten years and a fine of up to Rs. 1,000,000,000,000. (One billion rupiahs). Whereas in the Code of Criminal Procedure, the criminal is threatened with a maximum of four years imprisonment or a maximum fine of three thousand rupees (Article 299 Code of Civil Procedures), a maximum sentence of four months imprisonment (According to Article 346 Code of Administrative Proceedings), a maximum of twelve years in prison (Articles 347 Code of Public Property), and a maximum penalty of five years and six months in jail. (Article 348 KUHP).

The criminal provision on *provokatus ciminalis* abortion in Act No. 36 of 2009 is considered good because it contains general prevention and specific prevention to suppress the crime of criminal abortions. Feeling the threat of such a serious crime, it is expected that criminalis abortion perpetrators to be silent and not repeat their acts, in the world of law this is called special prevention, that is an effort to prevent the abortive provokatus criminalis from repeating their actions. Prevention generally applies to citizens because of consideration before performing an abortion rather than being subjected to such severe criminal sanctions. This is the general prevention and special prevention that is expected by lawmakers to suppress the minimum possible crime of provocative abortion in Indonesia.

Conclusion

In conclusion, under Judgment No.252/Pid.B/2012/PN.Plp and Judgement No. 124/Sus/2014/ PN.Liw pointed out that the judge's consideration in terminating a case was based on the indictment put forward by the Prosecutor General, in an alternative charge, a judge only determined the establishment of the provisions of criminal law based on the allegation made by the Procurator General without conducting a thorough investigation so that found more appropriate law to apply (legal discovery/rechvinding), especially in the case of criminal abortion which has been explicitly regulated in the Health Act. Reference to Decision Number 252/Pid.B/2012/PN.Plp and Judgment No. 124/Sus/2014/PN-Liw that the offense relating to abortion has been committed by the accused after the entry into force of Law No. 36 of 2009 on Health, so it is more appropriate consideration of the judge referring to the law.

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