

The Crime Of Having An Abortion Without Indication Of A Medical Emergency And Pregnancy Due To Rape (Decision Study Number 170 / Pid.Sus / 2019 / PN Bau)

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Abstract

Abortion is a social phenomenon that is becoming more and more alarming every day. A pregnant woman out of wedlock is forced to choose an abortion related to 12 reasons both internal and external underlying. Although the fetus belongs to the woman who is carrying it, abortion or the murder of the womb committed by herself is an act that is punishable, provided for in Article 346 of the Criminal Code. The judge in deciding the case of abortion cases in addition to paying attention to the provisions written in the law in order to fulfill the purpose of the conviction to provide a deterrent effect and improve, also uses his conscience based on a sense of Community Justice. The purpose of this study is to analyze the case study of the decision of the Baubau District Court decision number 170/Pid.Sus / 2019 / PN Bau concerning illegal abortion in accordance with Article 75 of Law Number 36 of 2009 concerning health is connected with the purpose of punishment. This research method uses normative juridical approach. The results showed that even if a woman aborts her own fetus without indication of a medical emergency and as a result of rape, she is punished according to applicable law. The panel of judges in this case has used his conscience considering the mitigating or aggravating circumstances of the defendant. The judge's consideration in giving the verdict has fulfilled the sense of justice and educated the public to avoid illegal abortion.

Keywords: Illegal Abortion, Conscience, Court Ruling

1. INTRODUCTION

A woman who has reached puberty, the reproductive system in her body has been perfect. If a man or woman who has reached puberty decides to have intercourse, a fetus may develop in the woman. So many problems that arise when the process of pregnancy. Among the health problems that can endanger the safety and health of the mother or fetus so that the fetus is forced to be removed for the safety of the mother. Another problem lies in a mother who carries a healthy fetus but due to pressure from the social side, forced to do an abortion.

Abortion is a social phenomenon that is becoming more and more alarming every day. The concern is not without reason, because so far the behavior of abortion causes many negative effects both for the perpetrator and for the wider community. This is because abortion concerns the norms, morals and laws of a nation's life. Abortion has been known for a long time,

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abortion has a long history and has been done using various methods be it natural or herbal, the use of sharp tools, physical trauma and other traditional methods. The contemporary era uses high-tech medicines and surgical procedures to perform abortions.

According to Muhadjir Darwin in Hanifta, if abortion is prohibited, there should also be solutions in the community for women who experience unwanted pregnancies, especially unmarried women, the majority of whom are teenagers who do not want to continue their pregnancies. Women who experience pregnancy outside of marriage inevitably get a negative stigma and are excluded from Family, School, and society. The state does not provide shelter to those who get blasphemy from the public, so the absence of shelter encourages women who experience pregnancy out of wedlock to choose the path of abortion.

According to Zamrotin, the Prohibition of abortion without providing a solution is an irrational act. If abortion is indeed prohibited, the government should provide shelter for women who experience unwanted pregnancies, and also bear the maintenance of children who will be born as a result of these pregnancies, because so far women bear all the reproductive burden to get pregnant and limit pregnancy. Therefore, to bridge the gap between legal norms relating to abortion which contain prohibitions and criminal sanctions with the increasing phenomenon of abortion in society, legal arrangements on abortion should be more fair to women by providing various solutions. The solution is in the form of a means of support that ensures a sense of security for women who suffer from unwanted pregnancies, so that they do not take shortcuts by having an abortion.

However, abortion is still prohibited in Indonesian positive law, not to mention abortions performed by women who own the fetus without indication of medical emergencies and pregnancy due to rape. In criminal law there are elements or characteristics of criminal, namely: 1. The punishment is essentially an imposition of suffering or mourning or other unpleasant consequences; 2. The punishment was given intentionally by a person or entity who has power; and 3. The penalty is imposed on a person who has committed a criminal offense according to the law. Of the three elements, experts formulate several theories regarding the conviction, which became the basis of the law and the purpose of the conviction (Strafrecht Theorie), namely : 1. De Vergelding Theorie (theory of absolutes or retribution); 2. De Relatieve Theorie (relative or objective theory); 3. De Vereniging theory; and 4. Integrated Theory of Criminal Punishment.

According to De Relatieve Theorie (relative or objective theory) this as the basis of the criminal is the main goal, which is to maintain public order. This theory views punishment not as retribution for the perpetrator's guilt, but as a means of achieving the beneficial goal of protecting society towards well-being. From this theory emerged the purpose of punishment as a

means of prevention, that is, general prevention aimed at the community. Based on this theory, the punishment imposed to carry out the purpose or purpose of the punishment, that is, to correct the dissatisfaction of society as a result of the crime. The purpose of punishment should be viewed ideally, other than that, the purpose of punishment is to prevent crime. The purpose of crime is the order of society, and to enforce the order of society it is necessary to be criminal. Crime is not just to take revenge or compensation to people who have committed a crime, but has certain useful purposes. Revenge itself has no value, but only as a means to protect the interests of society. The basis of criminal justification lies in that its purpose is to reduce the frequency of crimes. Crime is not committed because people commit crimes, but so that people do not commit crimes.

According to the Criminal Code, abortion is expressly regulated in the formulation of Article 346, Article 347, article 348, and Article 349 of the Criminal Code. Crimes against the life of the fetus can be divided into four groups according to the qualifications of the perpetrators with accompanying circumstances, namely: 1. The criminal offense of abortion or intrauterine murder committed by oneself, which is provided for in Article 346 of the Criminal Code. 2. The crime of abortion or intrauterine murder committed by another person without the consent of the woman herself, provided for in Article 347 of the Criminal Code. 3. The crime of abortion and intrauterine murder committed by another person with the consent of the pregnant woman, is provided for in Article 348 of the Criminal Code. 4. The crime of abortion and intrauterine murder committed by another person who has certain qualities, namely a doctor, midwife or pharmacist whether carried out with the consent of the woman or not with the consent of the woman, provided for in Article 349 of the Criminal Code.

If you again pay attention to the formulation of Article 346 of the Criminal Code, the elements of the crime of abortion (abortion) can be put forward as follows: (1) the subject is the woman's own woman or someone else she told; (2) intentionally; (3) abort or kill the womb. By looking at the elements of Article 346 of the Criminal Code, it can be concluded that those who can be subject to punishment under Article 346 of the Criminal Code are only women who are pregnant or women who are pregnant themselves. By taking into account the formulation of Article 346 of the criminal code contained the intent by the formulator of the law to protect the life of the fetus in the womb even though the fetus belongs to a pregnant woman.

The issue of abortion again received public attention in Indonesia when the enactment of Law No. 36 of 2009 on Health (Amendment of Law No. 23 of 1992). In Law No. 36 of 2009 on health Article 75 reaffirms that basically the law prohibits the practice of abortion (Article 75 paragraph 1). However, the prohibition is excluded if there is (Article 75 paragraph 2): first,

indications of medical emergencies that are detected from an early age of pregnancy, both life-threatening to the mother and/or fetus, suffering from severe genetic diseases and/or congenital defects, or that cannot be repaired so that it makes it difficult for the baby to live outside the womb or second, pregnancy due to rape that can cause psychological trauma to rape victims. Meanwhile, Article 194 stipulates that any person who intentionally performs an abortion not in accordance with the provisions referred to in Article 75 paragraph (2) shall be punished with a maximum imprisonment of 10 (ten) years and a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah).

In this case, the principle of *lex specialis derogat legi generali* is used which if interpreted as a special law (*lex specialis*) will override the general law (*lex generalis*), so that in this case it still uses Law No. 36 of 2009 on health before the enactment of law no. 17 of 2023. Regulation of abortion crime according to law on Health No. 17 of 2003 is regulated in Article 427 which reads "Every woman who performs an abortion not according to the excluded criteria as referred to in Article 60 shall be punished with imprisonment for a maximum of 4 (four) years". Based on the context described above, the author was interested in conducting research related to abortions performed alone without indication of medical emergencies and the consequences of rape and how the consideration of the panel of judges in deciding this abortion case.

2. RESEARCH METHOD

The type of research chosen is normative legal research that is research establish the law as a system of norms. The system of norms in question is about the principles, norms, rules and regulations. Peter Mahmud Marzuki that: 'normative legal research is a process of finding a rule of law, principles of law, as well as legal doctrines to answer legal problems faced. Normative legal research conducted to produce argumentation, theory or a new concept as a prescription in solving the problem at hand. research normative law is also called doctrinal legal research, namely research aimed at to provide a detailed systematic explanation of the rule of law governing the field of specific legal rules, analyze the relationship between the rules of law one denhan the other, explaining the elusive parts of a rule of law and it also includes predictions of the future development of a particular rule of law. Doctrinal legal research is library-based research whose focus is analysis of primary legal materials. This type of research is based on the thought that this study to analyze a system of norms or rules.

3. RESULT AND ANALYSIS

According to Kamus Besar Bahasa Indonesia (KBBI) Edition VI, abortion is defined as abortion. While criminal abortion is an abortion that is done deliberately for a reason and contrary to applicable law. While medical abortion is an abortion that is done through the administration of

drugs. Legal abortion is an abortion that is carried out with the knowledge of the authorities and illegal abortion has the opposite meaning to legal abortion.

Law and justice are interconnected, need each other. If we only emphasize one of them and ignore the other, then the result can be described in the following 2 (two) pameo, namely: first summum IUs summa iniuria which means that the highest justice is the highest injustice, so the more justice is demanded, the result is precisely injustice, second *lex dura sed tamen scripta*, which means that the law is harsh, but that is how it sounds. If we read an article of the law, it appears to contain provisions that are sincere, firm and not in doubt, and apply equally to everyone who violates it, then the result is injustice. Thus it can be said that the more precise and sharp the rule of law, the more justice is pressed. Therefore, it is necessary to give authority to the judge to interpret the legislation in such a way that justice and expediency can be considered.

According to Chazawi, the panel of judges in considering and taking a decision in the court session can consider several aspects: 1. The mistakes of criminals; 2. Motive and purpose of committing a crime; 3. How to commit a criminal offense; 4. The inner workings of the criminal; 5. Life and socioeconomic history; 6. Attitudes and actions of the perpetrator after committing a crime; 7. Criminal influence on the future of the offender; 8. Public view of the crime committed by the perpetrator.

Referring to the Judicial Power Law Number 48 of 2009 which regulates the functions of the judiciary in Indonesia. Article 1 of the Judicial Power law clearly states "the judicial power is the power of an independent state to administer justice in order to enforce law and justice based on Pancasila, for the implementation of the rule of law of the Republic of Indonesia. The principle of independence of judges is an important aspect of the Indonesian judicial system. This ensures that the judge can work without the intervention or interference of any party that can affect the conviction and the court's decision, including the executive, legislative, and private parties. Judges must have freedom in deciding cases based on Law, truth, and justice, without being influenced by political interests or other parties that have the potential to affect the objectivity of the judge's decision. The judge is the last bastion in law enforcement efforts, if the judge is destroyed then there is no point in all legal institutions and systems even though they are very good. In the hands of the judge where justice comes out. Therefore, the judge is not a mouthpiece of legislation or just an application of the law.

As law enforcers, judges carry out tasks in the judicial field, namely accepting, examining, deciding and resolving every case submitted to him and justice seekers certainly crave cases submitted to the court to be broken up by judges who are professional and have high integrity so as to give birth

to fair decisions. In this case, the independence of judges does not mean unlimited, since each judge must adhere strictly to the established code of ethics and guidelines for the behavior of judges. In Article 5 Paragraph (1) of the Judicial Power law states that judges and constitutional judges are obliged to explore, follow and understand legal values and a sense of justice that lives in society. This understanding is important in making decisions that are right, fair, and in accordance with the demands of community needs. In a judicial process that is open to the public, judges are expected to make objective and transparent legal considerations, so that the public can understand the rationale behind court decisions.

See Decision Number 170 / Pid.Sus / 2019 / PN Bau, the defendant is a 20-year-old female student who became pregnant out of wedlock. At first the defendant was in a courtship relationship with the witness Alsiyan Farma and also in the relationship then the defendant together with the witness Alsiyan Farma had intercourse until the next resulted in the defendant pregnant. In this case, the defendant's girlfriend refused to marry the defendant and as a result of this psychological pressure, the defendant with the help of the boyfriend aborted her own.

The indictment of the public prosecutor in this case is single, namely: The defendant's actions are regulated and punishable by criminal penalties in accordance with Article 194 and Article 75 paragraph (1), (2) of the law of the Republic of Indonesia number 36 of 2009 concerning health and Article 55 paragraph (1) to-1 of the Criminal Code. Meanwhile, in his lawsuit, the public prosecutor demanded a sentence of imprisonment for 9 (nine) months minus the entire period of detention that has been served by the defendant, with an order for the defendant to be detained and stipulate that the defendant pay a fine of Rp100, 000, 000.00 (one hundred million Rupiah) in the event that the defendant is unable to pay the fine, the defendant will undergo imprisonment for 2 (two) months. The public prosecutor dropped the charges on the basis that the defendant Masnaeni Nur Iman Fartian Binti Muh Syafar Muhidu has been proven legally and convincingly guilty of committing the crime of "intentionally participating in abortion " not in accordance with the provisions of the applicable law as referred to in Article 75 paragraph (2) of the law of the Republic of Indonesia number 36 of 2009 concerning health as regulated and criminalized in Article 194 joint article 75 paragraph (2) of the law of the Republic of Indonesia number 36 of 2009 concerning joint health Article 55 paragraph (1) to-1 Criminal Code as in the single charge of the Public Prosecutor.

Based on the law, by the panel of judges sentenced the defendant Masnaeni Nur Iman Fartian Binti Muh Syafar Muhidu to imprisonment for 3 (three) months and a fine of Rp.50,000,000.00 (Fifty Million Rupiah) provided that if the fine is not paid, it is replaced by imprisonment for 1 (one) month.

Referring to Article 194 of Law No. 36 of 2009 on health, the punishment received by the defendant is light. The judge in deciding this case sees things that are burdensome and relieve the defendant: Lightening things: 1) The defendant is straightforward in the trial so as to facilitate the trial; 2) The defendant regrets his actions and promises not to repeat; 3) The defendant committed the act due to psychological pressure due to the boyfriend who impregnated her not willing to marry; 4) The defendant was courteous at trial; (5) The defendant has not been convicted; 6) The defendant is desirous of continuing his education. The defendant is not liable for his or her actions, and the defendant is not liable for his or her actions.

If we look at the four theories of the purpose of punishment which are the legal basis of the purpose of punishment, in the relative theory, the imposition of a crime should be oriented to preventing the convict from the possibility of repeating his evil deeds in the future (special prevention), and preventing the wider community in general from committing crimes such as those committed by the convict or other crimes in order to achieve Public Order (general prevention). The panel of judges in this case is very thorough in considering the defendant's condition, guilt and consequences of the defendant's guilt. The defendant is a female student who is young in age and experience but the defendant is not supposed to have an abortion. The judge's decision in the case only convicts the defendant for 3 months and the judge believes the sentence is able to make the defendant a deterrent for his actions. The low period of criminal punishment in this case is because the defendant gets psychological pressure due to the boyfriend who impregnated him not willing to marry (external pressure), not the Pure will of the defendant. The purpose and purpose of the punishment is not merely to take revenge for his actions, but to educate the defendant in particular or the community in general, so that the defendant realizes his guilt and is expected not to commit unlawful acts again.

In addition, the defendant also behaved politely, frankly, regretted his actions and promised not to repeat his actions. In this case it has become commonplace that the judge uses the excuse of mitigating the crime "being polite, the accused is Frank, regrets his actions and promises not to repeat his actions". Article 197 paragraph (1) letter f of Law No. 8 of 1981 on Criminal Procedure Law (KUHAP) and Article 8 paragraph (2) of Law No. 48 of 2009 on Judicial Power explains that court decisions must consider factors that can alleviate or incriminate the defendant. In exercising his authority, the judge is required to consider the good and bad things of the defendant during the trial including a polite, frank attitude, the defendant's regret for his actions and promises not to repeat his actions again. These mitigating factors are legitimate factors used by judges to reduce criminal

sanctions, because they do not conflict with Indonesian positive law. In this case, the verdict of the judge has satisfied the sense of Justice. Judges, in addition to paying attention to the provisions written in the law, also pay attention to the laws that live in society and use conscience. The judge's ruling makes deterrent perpetrators aim to reduce or even eliminate the potential for unwanted events to occur in the future.

4. CONCLUSION

Although the defendant is a young woman who is a female student and has an abortion or murder of her own womb without indication of a medical emergency and as a result of rape, it is a crime provided for in the law. The panel of judges in deciding this case in a judicial hearing has considered various aspects, such as the guilt of the perpetrator, the motive for the crime, and psychological pressure outside the defendant. In accordance with the law on Judicial Power number 48 of 2009, judges are obliged to maintain judicial independence and ensure objective legal considerations. Deterrent and legal effects as preventive measures in the judiciary have an important role in social control and crime prevention. When looking at the theory of the purpose of the sentence, especially the relative theory, the judge must ensure that the verdict handed down achieves the purpose of effectively preventing crime. Judges in deciding cases in addition to paying attention to the provisions written in the law also pay attention to the laws that live in society and use conscience. The judge's decision in this case has fulfilled the purpose of a conviction that has a deterrent effect and Prevention of abortion practices in the community.

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