

THE JURIDICAL REVIEW OF LIABILITY FOR ABORTION CRIMINAL OFFENDER (A CASE STUDY OF JAKARTA DISTRICT COURT DECISION: 567 / PID.SUS / 2016 / PN.JKT.)

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ABSTRACT

This study aims to assess and analysis liability for abortion criminal offender (a case study of jakarta district court decision: 567 / Pid.Sus / 2016 / PN.Jkt.) This research is a normative legal research. Normative legal research or doctrinal legal research, namely legal research that uses secondary data sources or data obtained from the library materials. The results of this study: (1) Provisions regarding abortion law in Indonesia's positive criminal law are regulated in the Criminal Law Act (Lex Generalis) and the Health Act (Lex Specialist). Provisions on the regulation of abortion in Law Number 36 Year 2009 are outlined in the Articles 75, 76, and Article 77. Article on abortion regulated in the Criminal Law Act also contradicts the Article 75 paragraph (2) of Law no. 36 of 2009 concerning Health, in which the principle of abortion is prohibited (Article 75 paragraph (1), however, the prohibition can be excluded based on: first Indications of medical emergencies detected early in pregnancy, both those that threaten the lives of mothers and/ or fetuses, who suffer from severe genetic diseases and/ or congenital defects or that cannot be repaired making it difficult for the baby to live outside the womb; or second, Pregnancy due to rape that can result in psychological trauma for the victims of rape. The Panel of Judges in number 567/ Pid.Sus/ 2016 / PN.Jkt.Pst considers the charges that were more in accordance with the facts revealed in the trial, since all elements in the indictment violate the Article 194 of Law Number 36 Year 2009 concerning Health Jo Article 55 Paragraph (1) First Jo Article 56 Paragraph (1) of the Criminal Code has been legally fulfilled according to the law, then the defendant dr. Muhammad Nazif has been proven guilty of committing a criminal offense.

Keywords: Criminal offender, abortion, criminal liability.

INTRODUCTION

According to Amin, law is a collection of regulations consisting of norms and sanctions. In the Article 1 paragraph (3) the 1945 Constitution of the Republic of Indonesia states that "The State of Indonesia is a state of law". This statement gives understanding that the state of Indonesia is a country that provides limits on the behavior of the state apparatus and citizens in a regulation or norm, so that without violations the sanctions may not be imposed.

Restrictions on acts that are prohibited and which must be carried out are then known as criminal law. Van Hammel, in his understanding, stated that criminal law is an overall basis and rules adhered to by the state in its obligation to enforce the law by prohibiting an act that is against the law (*onrecht*) and imposing a misery (*suffering*) on those who violate the prohibition.¹ Meanwhile, the purpose of the criminal law itself is to regulate it so that peace and justice and sanctions are imposed on those who are proven to have violated the law intended to support the above objectives.²

Based on the description above, it can be interpreted that the rules and prohibitions made by the state can cover all fields, including health. This is very reasonable since health is a human right and one of the elements of general welfare and the state of Indonesia is a welfare state in accordance with the Preamble of the 1945 Constitution of the Republic of Indonesia. Related to health issues, reproductive health is an important part to be maintained by everyone. Reproductive health is a state of physical health, mental, and social as a whole, not solely free from diseases or disabilities associated with reproductive systems, functions, and processes in both men and women. In the Article 71 paragraph (2) of Law Number 36 of 2009 concerning Health stated that: "Reproductive health includes: (a) period before pregnancy, period during pregnancy, childbirth, and after childbirth; (b) regulation of pregnancy, contraception, and sexual health; and (c) reproductive system health ". From the statement in the article above, it can be interpreted that the government has an important role in the effort to grant rights in Article 71 above. Thus, all actions that contradict that effort are prohibited by law, including abortion.

In essence, life is a gift given by God Almighty that must be respected by everyone. The life given to every human being is a human right that can only be revoked by the giver of life, that is God. As the target of the mission and vision of Islam, humans according to the Qur'an are the most honorable creatures of God compared to His other creations.³ In terms of the Indonesian legal perspective, deprivation of the right to life can be threatened with severe penalties as stipulated in the Criminal Code, such as premeditated killings, or actions caused by negligence that cause death of people. In addition, the reproduction rights that are based on the recognition of human rights for each partner or individual to determine freely and responsibly regarding the number of children, capturing children, and determining the birth of their children.

¹ Sudaryono dan Natangsa Surbakti, 2005, *Criminal Law Handbook*, Surakarta: Faculty of Law, University of Muhammadiyah Surakarta, p 21.

² Rien K.Kartasapoetra, 1988, *Introduction to Complete Legal Studies*, Jakarta: Bina Aksara, p 49.

³ Mia Amalia, "Women's Violence in Legal and Sociocultural Perspectives". *Journal of Insight Yuridika* Volume 25, Number 2, 2011, p. 401.

By the legalization of abortion in some countries, the medical profession faces a new situation. In 1970, the World Medical Association responded to the new situation by issuing a declaration at its General Assembly in Oslo, Norway. The Oslo Declaration states that in countries that allow it according to law, abortion should only be carried out as a therapeutic measure. The decision to terminate a pregnancy must be approved by two doctors who are competent in that field by meeting the local legal requirements. Thus, the World Medical Association only allows therapeutic abortion. After the Oslo Declaration, they did not extend the permit to include non-therapeutic abortion.⁴

Indonesia is not bound by the declaration since abortion is illegal in Indonesia for any reason, even if it is with the approval of a doctor and performed by health workers safely and follows the existing medical procedures. The crime of abortion is regulated in the Criminal Code, one of which is in the Article 346 which stated: "A woman who intentionally aborts or turns off her womb or orders someone else for it, is threatened with a maximum of four years in prison".

Regarding this act of abortion is more specifically regulated in Law Number 36 of 2009 concerning Health, particularly, in the Article 75 which stated as follow:

Everyone is prohibited from having an abortion.

Prohibitions as referred to in paragraph (1) may be excluded based on:

Indications of medical emergencies detected from an early age of pregnancy, both those that threaten the lives of mothers and/ or fetuses, who suffer from severe genetic diseases and/ or congenital defects, or which cannot be repaired making it difficult for the baby to live outside the womb; or

Pregnancy due to rape that can cause psychological trauma for the victims of rape.

The actions referred to in paragraph (2) can only be carried out after going through pre-action counseling and/ or counseling and ending with post-action counseling carried out by competent and authorized counselors. (4) Further provisions regarding indications of medical emergencies and rape, as referred to in paragraph (2) and paragraph (3) shall be regulated by Government Regulation.

Meanwhile, the criminal provisions are more clearly regulated in the Article 194 of Law Number 36 of 2009 concerning Health which stated: "Any person who intentionally had an abortion does not comply with the provisions referred to in the Article 75 paragraph (2) convicted with imprisonment a maximum of 10 (ten) years and a maximum fine of Rp1,000,000,000.00 (one billion rupiah)".

In Indonesia, there are many abortion cases that occur due to pregnancy as a result of sexual relations outside of marriage (promiscuity). In this case, there are also acts of abortion caused by abuse of authority by a medical person, namely seeking profit by breaking the law, as in Decision 567/ Pid.Sus/ 2016/ PN.Jkt.Pst stated that the defendant dr.Muhammad Nazif who worked at the Clinic of dr.Ihsan Oetama SpOG (Obstetrician-Gynecologist) having his address at Jalan Cisadane No.19, Rt.02/ 003, Kel.Cikini, Kec.Menteng, Central Jakarta, managed by Mr. Zaenath Tutupoly since November 2015 until the case this was investigated by the Police, where in his work at dr.Ihsan Oetama SpOG Clinic (Obstetrician-Gynecologist), the defendant's job was to have an abortion with the highest obstetric age of 8 (eight) to 10 (ten) weeks, performing pairs/ unplug spiral KB and obstetric consultation. Here, in carrying out the abortion, the defendant did not have a formal legal basis, but based on his experiences and skills while being a doctor, the defendant's skill in carrying out the abortion was obtained by the defendant since 2007, obtained from his education at the Faculty of Medicine, Sriwijaya State University in 1986 and the experience gained from a doctor at Tugu Hospital in 1987. On Friday, February 19, 2016 the defendant was contacted by Ms. Retno (nurse/ midwife) telling the defendant that there was an order from Mr. Zaenath Tutupoly as the Clinical Manager of dr.Ihsan Oetama SpOG (Obstetrician-Gynecologist) to carry out an abortion of a patient named Vivi (pseudonym) and a patient named Melan (pseudonym) on the order, the defendant performed an abortion of these patients. The chronology of the implementation of the abortion is that first, the pregnant patient comes to see the nurse then performed an ultrasound to determine the age of the womb, then the results of the ultrasound are reported to Mr. Zaenath Tutupoly as the Manager of dr. Ihsan Oetama SpOG Clinic to determine/ decide the cost of abortion that must be paid, after being repaid then Mr. Zaenath Tutupoly ordered the defendant and the nurse to have an abortion.

Then, the nurse laid the patient on the Gynecology table in a state of no pants, then the defendant cleaned the patient's external vaginal stimulation with a cotton that had been given betadine, opened the vaginal wall with a speculum then cleaned it with the cotton that was given the betadine, in the open vaginal position then the nurse prepare a medicine that is Lidocain 5cc for local anesthesia in the mouth of the uterus, then a device in the form of suction inserted into the vagina that is used to suck the blood of the fetus in the uterus, then the aspirated blood comes out through the tube and accommodated in the reservoir tube, after which the vagina is cleaned return to use cotton that has been given betadine, after that the patient able to get up to be given antibiotic drugs and able to immediately return to home. Meanwhile, the results of abortion in the tube are then discarded by an officer named Edi into the toilet. It turned out that the defendant's act of carrying out an abortion was not in accordance with the applicable rules and the investigator found out with a citizen report so that shortly after the defendant committed an abortion toward the patient, then a member of the Police came to conduct a raid at the dr. Ihsan Oetama SpOG Clinic (Obstetrician Expert Gynecology) by finding objects related to the abortion as a sample for medical forensic investigation and examination while the woman/ person who requested an abortion has already left the Clinic. By this issue, the researcher discusses the legal basis used by judges in issuing verdicts on abortion and obstacles for judges in issuing verdicts on abortion. Based on the background above, the researcher intends to explore more deeply on the problems associated with abortion in a legal writing entitled: "The Juridical Review of Liability for Abortion Criminal Offender (A Case Study of Jakarta District Court Decision: 567/ Pid.Sus/ 2016/ PN.JKT.)".

⁴ K. Bertens, 2001, *Abortion as an Ethical Issue*, Jakarta: Gramedia Widiasarana Indonesia, p 10.

RESEARCH METHOD

Research is a basic tool in developing science and technology.⁵ In the search for scientific truth, research methods become a quite significant part in compiling a study. A research can be trusted if the truth is prepared with the right method. Research is a scientific activity related to analysis and construction which is carried out methodologically, systematically and consistently. Meanwhile, Soetandyo Wignjosoebroto stated that legal research can be distinguished between doctrinal legal research and non-doctrinal legal research.⁶

Normative law research uses normative case studies in the form of legal behavior products, for example studying the law. The subject of the study is the law which is conceptualized as a norm or rule that applies in society and serves as a reference for everyone's behavior. Thus, normative legal research focuses on an inventory of positive law, principles and doctrines of law, legal discovery in concrete cases, systematic law, synchronization levels, comparative law and legal history.⁷ This research is a normative legal research. Normative legal research or doctrinal legal research, namely legal research that uses secondary data sources or data obtained from the library materials.⁸

In the legal research, there are several approaches and these approaches will get information from various aspects of the issue where the answer is being sought by the researcher. The approaches used in legal research are the statutory approach, the case approach, the historical approach, the comparative approach and the conceptual approach.⁹ Therefore, this research applied a statutory approach and a conceptual approach. The statutory approach referred to by the researcher in this research is to examine the law that concerns the revocation of criminal liability for abortion offender. Meanwhile, the conceptual approach moves from the views and doctrines in the science of law, researcher will find ideas that give birth to legal understandings, legal concepts, and legal principles that are relevant to the issue at hand. The understanding of the views and doctrines is the basis for researcher in building a legal argument in solving the issues being examined, which is in this case related to criminal liability for the perpetrators of criminal acts of abortion.¹⁰

The legal material collection technique used in this research was literature study. Literature study is a technique for gathering legal material by examining laws and regulations, law books, legal papers, legal journals, magazines and newspapers.¹¹ The research source collection technique used in this research was the study of literature, namely the collection of secondary data from legislation, books, documents, articles, and the internet.

The legal material analysis technique used by researcher in this research was the deduction method. The deduction method stems from the submission of a major premise. Then the minor premise is submitted. From these two premises, a conclusion is drawn.¹² It can be concluded that the deduction method is defined as a method for analyzing legal material that presents matters that are formulated in general and then draws conclusions that are in accordance with the factual case being studied. In this analysis the essence of the decision will also be formulated, both from the first court level, the appeal level up to the cassation level, as well as presenting various legal considerations on which to base the court decision. Furthermore, discussion / analysis of court decisions will be carried out in relation to applicable laws and regulations, legal principles, legal theories, and relevant legal doctrines, with due regard to interpretation and legal construction. Then, to draw conclusions can be done by using the deductive method and the inductive method, deductive deduction that is drawing conclusions from things that are general towards things that are specific. Inductively is drawing conclusions in a way that departs from specific knowledge and then assesses a common event.

DISCUSSION

A. The Legal Regulations for Abortion

Abortion, the expulsion of a fetus from the uterus before it has reached the stage of viability (in human beings, usually about the 20th week of gestation).¹³ In medicine, an abortion is a loss of pregnancy due to the premature exit of the products of conception (the fetus, fetal membranes, and placenta) from the uterus due to any cause. An abortion may occur spontaneously (termed a miscarriage) or may be medically induced. In addition, abortion is the termination or removal of pregnancy before the womb reaches 20 weeks of age or the baby weighs less than 500 g, that is, before the fetus can live outside the womb independently. Abortion is a pregnancy that stops the process at the age of pregnancy below 20 weeks, or the weight of the fetus born 500 grams or less. Abortion means the cessation of pregnancy that occurs between when the embedded egg cell (blastocytes) has been bleeding until 28 weeks of pregnancy. Abortion is the discharge of the fetus before reaching viability, where the gestation period has not reached 22 weeks and weighs less than 500 grams.¹⁴ WHO recommends viability if the gestation period has reached 22 weeks or more and the fetus weighs 500 grams or more.

According to Fact Abortion, Info Kit on Women's Health by the Institute for Social, Studies and Action, March 1991, in terms of health abortion is defined as the termination of pregnancy after the implantation of an ovum that has fertilized the uterus, before the fetus reaches 20 weeks.¹⁵ Abortion based on the Indonesian English dictionary is defined as the deliberate termination of a human pregnancy, most often performed during the first 28 weeks of pregnancy. In the Black's Law Dictionary, the word

⁵ Soerjono Soekanto, *Normative Legal Research A Brief Review*, Rajagrafindo Persada, Jakarta, 2013, p 35.

⁶ Sulistyowati Irianto dan Shidarta, *Legal Research Methods; Constellation and Reflection*, Yayasan pustaka Obor, Jakarta, p 121.

⁷ Abdulkadir Muhammad, *Law and Legal Research*. 1st Printed. Bandung: PT. Citra Aditya Bakti, 2004, P 52.

⁸ Mukti Fajar ND dan Yuliyanto Achmad, *Dualism of Normative & Empirical Law Research*, Yogyakarta., 2010, p 154.

⁹ Peter Mahmud Marzuki, *Legal Research*, Kencana, Jakarta, 2016, p 19

¹⁰ Peter Mahmud Marzuki, *Legal Research*, Prenadamedia Group, Jakarta, 2014, p 136

¹¹ Peter Mahmud Marzuki, *Op.cit* p 237-240

¹² Peter Mahmud Marzuki, *Op.cit*, p 89

¹³ R. Atang Ranoemihardja, 1991, *Judicial Medicine (Forensic Science)*, Tarsito, Bandung, p. 50

¹⁴ Cecep Triwibowo, 2014, *Health Ethics and Law*, Nuha Medika, Yogyakarta, P. 166

¹⁵ *Ibid.*,

abortion is defined as a miscarriage with the release of an embryo or fetus which does not merely occur due to natural processes, but it also occurs due to deliberate action or occurs due to human interference (provocation).

However, it can be critically drawn that a general abortion is not only due to a pregnancy outside of marriage (premarital pregnancy, carried out by a girl), but also occurs within a marriage, by women of the wife's status. It is either abortion due to pregnancy outside of marriage or in marriage, both have several different reasons, and both are covert phenomena that tend to be covered by the subject or perpetrator.¹⁶

Abortion provocatus is developing very rapidly in Indonesian society, this is due to the many factors that force actors in society to do so. Perpetrators feel they have no better choice than to take actions that are not in accordance with the law and morals, namely having an abortion. Several factors that encourage perpetrators to take abortion provocatus are mentioned as follow:¹⁷

- a. Pregnancy as a result of sexual relations outside of marriage.
- b. Socio economic reasons.
- c. Having too many children.
- d. Unpreparedness to have children
- e. Pregnancy due to rape.

Provisions regarding abortion law in Indonesia's positive criminal law are regulated in the Criminal Law Act (*Lex Generalis*) and the Health Act (*Lex Specialist*). This, when viewed from the Criminal Code and the history of legislation, prohibited abortion is aimed at infants in living wombs, that is, lawmakers assume that life begins at the moment of conception. The law does not matter whether the meeting of the cell (conception) has had a pregnancy or not, and the law only explains that the content has a juridical meaning, thus, killing or taking the life of a child who is still in the womb is included in the crime against the lives of potential human beings. Therefore, provoke abortion in any form is prohibited in the field of law. The Criminal Code does not allow abortion with any reason and by anyone. The following is a description of the regulation of abortion provocatus contained in the Criminal Code.

1) Chapter XIV of the Criminal Code concerning Crimes Against Courtesy

Article 299

- (1) Anyone who deliberately treats a woman or orders her to be treated, is notified or raises hope, that because of the treatment, her pregnancy can be aborted, threatened with a four-year long prison sentence or a maximum fine of three thousand rupiah.
- (2) If the person who is guilty, does so for profit, or makes the act a livelihood or habit, or if he is a doctor, midwife or drug remover, the penalty can be added by one third.
- (3) If the person who is guilty, commits the incident, in carrying out the livelihood, the right to revoke the livelihood may be revoked.

2) Chapter XIX of the Criminal Code concerning Crimes Against People's Souls

Article 346 of the Criminal Code:

A woman who deliberately aborts or eliminate her womb or orders someone else to do so is threatened with a maximum prison sentence of four years.

Article 347 of the Criminal Code:

- (1) Anyone who intentionally aborts or kills a fetus in a woman's womb without her consent, is threatened with a maximum prison sentence of twelve years"
- (2) If the act results in the death of the woman, the offender is threatened with a maximum imprisonment of fifteen years.

Article 348 of the Criminal Code:

- (1) Anyone who intentionally uses or kills a fetus in a woman's womb with the woman's consent, is threatened with a maximum imprisonment of five years and six months.
- (2) If the act results in the death of the woman, the offender is threatened with a maximum imprisonment of seven years.

Article 349 of the Criminal Code:

Jika seorang dokter, bidan atau juru obat membantu melakukan kejahatan berdasarkan pasal 346, ataupun membantu melakukan salah satu kejahatan dalam pasal 347 dan 348, maka pidana yang ditentukan dalam pasal itu dapat ditambah dengan sepertiga dan dapat dicabut hak untuk menjalankan pencaharian dalam mana kejahatan dilakukan.

With the passage of Law Number 36 Year 2009 concerning Health which replaces the previous Health Act namely Law Number 23 of 1992, then, the issue of abortion gained legitimacy and affirmation. Explicitly, in this law, there are articles that govern abortion, although in the medical practice it contains various reactions and causes controversy in various walks of life. Although, the law prohibits the practice of abortion, but in certain circumstances there is permissibility. The provisions on abortion in Law Number 36 Year 2009 are set forth in the Articles 75, 76, and Article 77. The following is a complete description of the abortion arrangements contained in these articles:

Article 75:

- (1) Everyone is prohibited from having an abortion.
- (2) Prohibitions as referred to in paragraph (1) may be excluded based on:
 - a) Indications of medical emergencies detected from an early pregnancy, both those that threaten the lives of mothers and/ or fetuses, who suffer from severe genetic diseases and/ or congenital defects, or which cannot be repaired making it difficult for the baby to live outside the womb; or
 - b) Pregnancy due to rape that can cause psychological trauma to the victims of rape.

¹⁶ Hartono Hadisaputro, Abortion and Protection of Women's Reproductive Rights, Paper, Semarang, January 30, 2010, p. 2

¹⁷ Yayah Chisbiyah, et al., *Unwanted Pregnancy*, PPPK-UGM, Yogyakarta, 1997, p. 47

- (3) The actions referred to in paragraph (2) can only be carried out after going through counseling and/ or pre-action counseling and ending with post-action counseling by competent and competent counselors.
- (4) Further provisions regarding indications are calculated from the first day of last menstruation, except in the case of medical emergencies and rape, as referred to in paragraph (2) and paragraph (3) are regulated by Government Regulation.

Article 76:

Abortion as referred to in article 75 can only be done:

- a) Before pregnancy 6 (six) weeks;
- b) By health personnel who have the skills and authority that have certificates established by the minister;
- c) With the consent of the pregnant woman concerned;
- d) With the permission of the husband, except for rape victims; and
- e) Health service providers that meet the conditions set by the Minister.

Article 77:

The government is obliged to protect and prevent women from abortion as referred to in Article 75 paragraph (2) and paragraph (3) which is unqualified, unsafe, and irresponsible and contrary to religious norms and the provisions of the legislation.

Article 194:

Every person who intentionally has an abortion that is not in accordance with the provisions referred to in Article 75 paragraph (2) shall be sentenced to a maximum imprisonment of 10 (ten) years and a maximum fine of Rp 1,000,000,000.00 (one billion rupiah).

The Criminal Code does not allow abortion for any reason and by anyone. This provision is in line with promulgation in the era of the Dutch East Indies government until now and the provision has never changed. And this provision also applies generally to anyone who does, even for doctors who do will be subject to criminal charges. Deliberate abortion by violating various legal provisions (*abortus provocatus criminalis*) contained in the Criminal Code adheres to the principle of "illegal without exception" considered very burdensome for paramedics in carrying out their duties. Article on abortion regulated in the Criminal Law Act also contradicts with the Article 75 paragraph (2) of Law no. 36 of 2009 concerning Health, in which the principle of abortion is prohibited (Article 75 paragraph (1), however, the prohibition can be excluded based on:

- 1) Indication of medical emergencies detected early in pregnancy, both those that threaten the lives of mothers and/ or fetuses, who suffer from severe genetic diseases and/ or congenital defects or that cannot be repaired making it difficult for the baby to live outside the womb; or
- 2) Pregnancy due to rape that can result in psychological trauma for the victims of rape.

Legalization of abortion needs to be considered more wisely, however, it is not in the sense of being able to provide abortion liberalization as in Law Number 36 of 2009 concerning Health, Article 75 through Article 77 and Government Regulation (PP) Number 61 of 2014 concerning Reproductive Health in the Article 31 up to Article 39 it is regulated about the permissibility of abortion with certain conditions.¹⁸

B. The Considerations of Judge in Dropping Decision Number 567/ Pid.Sus/ 2016/ PN.JKT.PST

Abortion offenders must take responsibility for their actions since abortion offenders fulfill all the requirements in the criminal liability. The element of error from abortion is that it violates the provisions of KUHP article 348.¹⁹ The Panel of Judges in number 567/ Pid.Sus/ 2016/ PN.JKT.PST considered the charges that were more in line with the facts revealed in the trial, namely the Primair Indictment as regulated in the Article Primair Article 194 of RI Law No. 36/2009 concerning Jo's Health Article 55 Paragraph (1) Jo's 1st Article 56 Paragraph (1) of the Criminal Code whose elements are as follows:

1. Everyone;

The law does not require certain characteristics that must be possessed by the perpetrators, thus the understanding of who or each person applies to anyone in the sense of the "who" element which includes legal subjects, both individuals and legal entities that commit acts that are threatened with crime and the law Invite those who can be accounted for (*toerekenings vaan baarhaeid*). Thus, everyone is a legal subject who commits a criminal act (investigating handling) that can be accounted for (*toerekeningsvaanbaarhaeid*) to the person. That since the investigation stage, the investigation until the state of prosecution in advance of the trial, the person/ human being submitted in advance of this trial acknowledged named DR. MUHAMMAD NAZIF who according to the facts of the trial the defendant was physically and mentally healthy and had grown up, and there were no matters that could Forgive or eliminate the criminal offense for the defendant as referred to in article 44 paragraph (1) of the Criminal Code. Thus, this first element has been fulfilled according to the law.

¹⁸ Aji Maulana, *Legal Protection of Women and Children as a Result of the Abortion Act of Criminalist Provocatus Yuridika Insights*, Vol. 1. No. 2. September 2017 Pages: 139-154 <http://ejournal.sthb.ac.id/index.php/jwy>

¹⁹ Anggara Faisal, Alvi Syahrin, Marlina Marlina, *Criminal Liability for Abortion Based on the Criminal Code and Law Number 36 Year 2009 Regarding Health*, Mahupiki Journal, Vo1, No 1, Year. P 1. <https://jurnal.usu.ac.id/index.php/jmpk/article/view/19514/8251>

2. Deliberately;

That according to Criminal Wetboek, 1809; "On purpose" is the willingness to do or not to do acts that are prohibited or ordered by law. And according to *Memorie van Toelichting* (MvT) "Deliberately" is the conscious will of committing a certain crime. Meanwhile according to Prof. Satochid Kartanegara, SH; opzet is a person who commits an action intentionally, must wills (*willen*) the act and must realize/ understand (*weten*) the consequences of that action.

That observing the proceedings of the trial has obtained legal facts that corroborate the evidence as follows:

- 1) That it is true that in carrying out the practice of abortion the defendant is not a person as a health personnel who has a certificate/ permit to carry out the abortion, therefore, the person does not have a formal legal basis;
- 2) That it was true that on Friday, February 19, 2016 the defendant dr. Muhammad Nazif was contacted by Ms. Retno (nurse/ midwife) stating that there was an order from Mr. Zaenath Tutupoly as the Clinical Manager of dr.Ihsan Oetama SpOG (Obstetrician-Gynecologist) to carry out an abortion of a patient named Vivi (pseudonym) and a patient named Melan (pseudonym) on the order, the defendant performed an abortion on these patients.
- 3) That it is true that as a general practitioner the defendant knows and realizes that the defendant is not a gynecologist who has permission for it and the defendant knows that what is done is in violation of the laws and regulations, especially article Article 75 paragraph (2)", but it is still being done by the defendant, due to economic factors that require money from the results of the abortion.

Thus, according to the law, the element deliberately here has been fulfilled.

3. Conducting an abortion that is not in accordance with the provisions

Considering, that having an abortion that is not in accordance with the provisions referred to in the Article 75 paragraph (2), namely that every person is prohibited from having an abortion is excluded based on: a. indications of medical emergencies detected at an early age, both those that threaten the life of the mother and/ or fetus, which have severe genetic diseases and/ or congenital defects, or which cannot be repaired making it difficult for the baby to live outside the womb or b. pregnancy due to rape which can cause psychological trauma to the victims of rape.

That during the trial process, the legal facts were obtained which stated as follows:

- 1) That it was true that on Friday, February 19, 2016 the defendant was contacted by Ms. Retno (nurse/ midwife) stating to the defendant that there was an order from Mr. Zaenath Tutupoly as Clinical Manager dr. Ihsan Oetama SpOG (Obstetrician-Gynecologist) to carry out an abortion of a patient named Vivi (pseudonym) and a patient named Melan (pseudonym) according to the order, the defendant performs an abortion against patients called abortion.
- 2) That it is true that in carrying out the abortion practice the defendant is not a person as a health worker who has a certificate/ permit to carry out the abortion.
- 3) That it is true that in carrying out the practice of abortion the defendant does not have a formal legal basis since it is not based on applicable laws and regulations.
- 4) That the patients who carried out the abortion are not included in the provisions as regulated in article 75 paragraph (2) but mostly for reasons of pregnancy out of wedlock.

Thus, the element "having an abortion is not in accordance with the provisions referred to in Article 75 paragraph (2)" has been proven.

4. Who committed action, who is thorough and participates in doing the deeds;

Considering, that during the trial process, legal facts were obtained which stated as follows:

- 1) That prior to an abortion the patients first meet with Mr. Zaenath Tutupoly to determine and make payments, after completing the payment, Mr. Zaenath Tutupoly ordered the defendant dr. Muhammad Nazif to carry out an abortion of the patient using medical equipment that had been prepared by the Clinical Office Manager of dr.Ihsan Oetama SpOG namely in the form of Suction, a hose for suction, kanule (small tube), 5 cc syringes, lidocain 2 ampoules, then, each time after the abortion was done the defendant did so, Mr. Zaenath Tutupoly as the Manager of Dr.Ihsan Oetama SpOG Clinic (Obstetrician-Gynecologist) gave a service fee to the defendant in the amount of Rp. 300,000.- (three hundred thousand rupiah);
- 2) That it was true that on Friday, February 19, 2016 the defendant was contacted by Ms. Retno (nurse/ midwife) stated to the defendant that there was an order from Mr. Zaenath Tutupoly as the Clinical Manager of Dr.Ihsan Oetama SpOG (Obstetrician-Gynecologist) to carry out an abortion of a patient named Vivi (pseudonym) and a patient named Melan (pseudonym) on the order the defendant performed an abortion of these patients.

Thus, the element "who committed action, who orders to do and who participates in doing" has been fulfilled here.

Since all the elements in the indictment violated the Article 194 of RI Law No. 36/2009 concerning Jo's Health Article 55 Paragraph (1) Jo's 1st Article 56 Paragraph (1) of the Criminal Code has been legally fulfilled according to the law, then the defendant DR. Muhammad Nazif has been proven guilty of committing a criminal offense "who committed action, who ordered to do and who participated in the act of deliberately having an abortion "and against the defendant must be punished.

CONCLUSION

1. Provisions regarding abortion law in Indonesia's positive criminal law are regulated in the Criminal Law Act (*Lex Generalis*) and the Health Act (*Lex Specialist*). The arrangement of provocation abortion contained in the Criminal Code. Chapter XIV of the Criminal Code concerning Crimes against Politeness, Chapter XIX of the Criminal Code concerning Crimes against People's Souls. With the passage of Law Number 36 of 2009 concerning Health which replaces the previous Health Act namely Law Number 23 of 1992. Provisions on the regulation of abortion in Law Number 36 Year 2009 are outlined in the Articles 75, 76, and Article 77. The Criminal Code does not allow abortion for any reason and by anyone. Article on abortion regulated in the Criminal Law Act also contradicts the Article 75 paragraph (2) of Law no. 36 of 2009 concerning Health, in which the principle of abortion is prohibited (Article 75 paragraph (1), however, the prohibition can be excluded based on: *first* Indications of medical emergencies detected early in pregnancy, both those that threaten the lives of mothers and/ or fetuses, who suffer from severe genetic diseases and/ or congenital defects or that cannot be repaired making it difficult for the baby to live outside the womb; or *second*, Pregnancy due to rape that can result in psychological trauma for the victims of rape.
2. The Panel of Judges in number 567/ Pid.Sus/ 2016 / PN.JKT.PST considers the charges that were more in accordance with the facts revealed in the trial, since all elements in the indictment violate the Article 194 of Law Number 36 Year 2009 concerning Health Jo Article 55 Paragraph (1) First Jo Article 56 Paragraph (1) of the Criminal Code has been legally fulfilled according to the law, then the defendant dr. Muhammad Nazif has been proven guilty of committing a criminal offense "who committed action, who ordered to do and who participated in the act intentionally having an abortion "and against the accused himself must be punished.

REFERENCES

- Abdulkadir, M. (2004). *Law and Legal Research*. First Printed. Bandung: PT. Citra Aditya Bakti.
- Aji, M. (2017). Legal Protection of Women and Children as a Result of the Abortion Act of Criminalist Provocatus. (pp. 139-154) *Yuridika Insights*. Vol. 1. No. 2. September. <http://ejournal.sthb.ac.id/index.php/jwy>
- Anggara, F and Alvi. S. (2017). *Marlina Marlina, Criminal Liability for Abortion Based on the Criminal Code and Law Number 36 Year 2009 Regarding Health*. (p. 1). *Mahupiki Journal*. Vol 1. No 1. p.<https://jurnal.usu.ac.id/index.php/jmpk/article/view/19514/8251>
- Bertens, K. (2001). *Abortion as an Ethical Issue*. Jakarta: Gramedia Widiasarana Indonesia.
- Cecep, T. (2014). *Health Ethics and Law*. Yogyakarta: Nuha Medika.
- Criminal Code (KUHP)
- Hartono, H. (2010). *Abortion and Protection of Women's Reproductive Rights*. Paper. Semarang, January 30.
- Jakarta District Court Decision: 567/ Pid.Sus/ 2016/ PN.JKT
Law Number 36 of 2009 concerning Health
Law Number 23 of 1992 concerning Health
- Mia, A. (2011). Women's Violence in Legal and Sociocultural Perspectives. *Journal of Insight Yuridika*. p. 401. Volume 25, Number 2.
- Mukti, F. N. D dan Yuliyanto, A. (2010). *Dualism of Normative & Empirical Legal Research*. Yogyakarta: Legal Research.
- Peter, M. M. (2016). *Legal Research*. Jakarta: Kencana.
- Peter, M. M. (2014). *Legal Research*. Jakarta: Prenadamedia Group.
- Atang, R. (1991), *Judicial Medicine (Forensic Science)*. Tarsito: Bandung.
- Rien, K.K. (1988). *Introduction to Complete Legal Studies*. Jakarta: Bina Aksara
- Soejono, S. (2013). *Normative Legal Research A Short Review*. Rajagrafindo Persada: Jakarta.
- Sulistiyowati, I and Shidarta. (2000). *Legal Research Methods; Constellation and Reflection*. Yayasan pustaka Obor: Jakarta.
- Sudaryono and Natangsa, S. (2005). *Criminal Law Handbook*. Surakarta: Faculty of Law. Muhammadiyah University. Surakarta.
- Sudaryono. (2010). Legal Theory. *Journal of Law Justissica*, Vol.6, Faculty of Law, Muhammadiyah University, Surakarta.

The 1945 Constitution of the Republic of Indonesia

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