

## **Disparity of Penalties Against Participating in Abortion (Analysis No. 252/Pid.B/2012/PN.Plp and No. 124/Pid.Sus/2014/PN.Liw)**

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### **Abstrak**

Salah satu permasalahan dalam penanganan kasus turut serta melakukan aborsi adalah munculnya disparitas pidana dalam hal penjatuhan pidana. Sumber masalah ini adalah keputusan hakim. Kekuasaan kehakiman sebagai kekuasaan negara yang bebas dan merdeka di satu sisi memberikan dampak yang sangat positif bagi upaya penegakan hukum di Indonesia. Dalam hal ini hakim menjadi badan yang mandiri dan keputusannya tidak dapat dipengaruhi oleh badan atau kekuasaan lain. Namun di sisi lain, kebebasan hakim dalam mengambil keputusannya juga membawa dampak negatif yaitu munculnya disparitas pidana itu sendiri. Disparitas pidana dalam hal ini adalah penerapan pemidanaan yang tidak seimbang terhadap kejahatan yang sama atau terhadap tindak pidana yang sifat bahayanya dapat dibandingkan.

**Kata kunci:** Disparitas, Hukuman



### **Abstract**

One of the problems in handling cases of participating in abortion is the emergence of criminal disparities in terms of sentencing. The source of this problem is the judge's decision. Judicial power as a free and independent state power on the one hand has a very positive impact on law enforcement efforts in Indonesia. In this case, the judge becomes an independent body and his decision cannot be influenced by other bodies or powers. But on the other hand, the freedom of judges in making their decisions also has a negative impact, namely the emergence of criminal disparities themselves. Criminal disparity in this case is the application of unequal punishment to the same crime or to criminal acts whose dangerous nature can be compared.

**Keywords:** Disparity, Sentencing

### **PRELIMINARY**

The 1945 Constitution confirms that the Republic of Indonesia is a state based on law (rechtstaat). As a rule of law country, Indonesia always upholds human rights and guarantees that all citizens have the same position before the law and government without exception.

Ideally as a rule of law country, Indonesia adheres to a system of rule of law over the rule of law, that is, law has the highest authority in the country. As a rule of law, Indonesia adheres to one important principle, namely the presumption of innocence. Apart from being found in Law Number 8 of 1981 (KUHAP), this principle can also be observed in Law Number 48 of 2009 concerning Judicial Power. It is stated that every person who is

suspected, arrested, detained, prosecuted and or presented before a court hearing, must be considered innocent until a court decision states his guilt and obtains permanent legal force.

Court decisions will have a human dimension if they are based on the principles of equality before the law and the presumption of innocence, because these two principles contain human rights values which must also be protected and paid attention to by law enforcers, especially judges who have the authority to decide cases. Court decisions are important milestones for the reflection of justice, including court decisions in the form of sentencing and sentencing.

Judges in imposing their sentences, of course, aside from being based on (positive) statutory provisions, also consider human values, the principle of expediency, effectiveness in carrying out sentences and changes in behavior that cause a deterrent effect after leaving the penitentiary. The judge in his decision without considering these aspects will cause legal uncertainty and injustice in giving punishment. It appears that there are many cases of unequal criminal application of the same offense in practice in court. According to Molly Cheang, as quoted by Muladi, the case for the application of the sentence is called the disparity of sentencing or the disparity of sentencing.

This disparity in the judge's decision will have fatal consequences, when it is associated with the administration of convict development. The convict after comparing the punishment imposed on him with other people then feels that he is a victim (victim) of the uncertainty or irregularity of the court will become a convict who does not respect the law, even though respect for the law is one of the results to be achieved in the purpose of punishment. The optics of the purpose of punishment will appear to be a serious problem, because it is an indicator and a manifestation of the failure of a system to achieve equality of justice in a rule of law state and at the same time will weaken public confidence in the system of administering criminal law (criminal justice system). The system will run effectively when there is good coordination between the sub-systems and have the same vision in law enforcement.<sup>1</sup>

The crime of participating in carrying out an abortion at the Palopo District Court and Liwa District Court, in decision No. 252/Pid.B/2012/PN.PIp and No. 124/Pid.Sus/2014/PN.Liw is a research sample that found disparities in judges' decisions from hundreds of decisions in the same case.

Based on positive law in Indonesia, the regulation of abortion is contained in two laws, namely Law Number 36 of 2009 concerning Health. This article regarding abortion is further emphasized in Article 75 Paragraph (1) It is stated emphatically that "Everyone is prohibited from having an abortion ". It is further explained that certain medical procedures or abortions in question can only be carried out:

1. Based on medical indications that require the action taken.
2. By health personnel who have expertise and authority.
3. Approved by the pregnant woman concerned or her husband or family.
4. In certain health facilities.

This provision regarding the prohibition of abortion is exempted based on Law Number 36 of 2009 concerning Health Article 75 Paragraph (2), based on:

1. Give an indication of a medical emergency that is detected at an early age in pregnancy, whether it threatens the life of the mother and/or fetus, suffers from severe genetic disease and/or congenital defects, or which cannot be repaired, making it difficult for the baby to live outside the womb.
2. Pregnancy as a result of rape which can cause psychological trauma to the victim of the rapist.

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<sup>1</sup> Wahyu Nugroho. 2012. Disparity of Sentences in Cases of Weighted Theft, Review of Decisions Number 590/Pid.B/2007/PN.Smg and Number 1055/Pid.B/2007/PN.Smg. Jakarta: Judicial Journal Vol. 5 No. December 3, 2012: 261 – 282, page 262

As an explanation of this, this abortion procedure can only be carried out after going through post-operative counseling carried out by a competent and authorized counselor. If the exception to this abortion action is forced to be carried out, several other requirements must be met, including Article 76 of Law Number 36 of 2009 concerning Health:

1. Before 6 (six) weeks of pregnancy, counting from the first day of the last menstruation, except in cases of emergency.
2. By a health worker who has the skills and authority, namely a certificate determined by the Minister.
3. With the consent of the pregnant woman concerned.
4. With the husband's permission, except for rape victims.
5. Health service providers who meet the requirements set by the Minister.

### **Criminal Sanctions**

Law Number 36 of 2009 concerning Health regulates the criminal sanctions listed in Article 194 which states:

Any person who intentionally has an abortion not in accordance with the provisions referred to in Article 75 paragraph (2) shall be subject to imprisonment for a maximum of 10 (ten) years and a fine of a maximum of 1,000,000,000.- (One billion rupiah).<sup>2</sup>

The Criminal Code itself discusses Articles 299, 346-349 concerning abortion because termination of pregnancy actually has the same tone as child homicide and premeditated homicide.

#### **Article 299:**

- a. Any person who with deliberate intent treats a woman or orders her to be treated, by notifying or raising the hope that by means of such treatment her womb will be aborted, shall be punished by a maximum imprisonment of four years or a maximum fine of forty-five thousand rupiahs.
- b. If the guilty person does this for profit, or makes the act a work or habit, or if he is a doctor, midwife or pharmacist, the sentence can be increased by one third.
- c. If the person who is guilty of committing the crime is carrying out his work, then his right to do that work can be revoked.

#### **Article 346:**

A woman who deliberately causes the death or death of her womb or orders other people to do so, is sentenced to a maximum of 4 (four) years in prison.

The similarity between child killers and abortion or homicide is that there must be a womb (*vruch*) or baby (*kidn*) that lives and is then killed. This similarity also causes the crime of abortion to be included in the title XIX of Book II of the Criminal Code concerning crimes against people's lives.

The main difference between child killing and abortion is that in child killing there must be a baby who is born and alive, whereas in abortion or abortion, what comes out of the mother's body is a womb, which is alive but not yet a baby (*onvoldragen vrucht*), or a dead baby (*voldragen vrucht*). This difference also causes the maximum penalty for abortion to be 4 (four) years less than for the murder of a child of 7 (seven) years.

Abortion is not permitted for any reason that encourages the mother to do it, so it is not like in the case of killing a child, where it is stated as a reason the mother's fear will be known about the birth of the child. If the abortion or abortion is carried out by another person, and again without the mother's consent, then according to Article 347 paragraph (1) the maximum sentence is increased to 12 (twelve years) imprisonment, and according to paragraph (2) it is increased again to 15 (five) fifteen years in prison, if this action causes the death of the mother.

If the act is committed with the consent of the mother, then according to Article 348 paragraph (1) the sentence is reduced again to a maximum of 5 (five) years and 6 (six) months in prison, and according to paragraph (2) it is increased again to a maximum of 7

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<sup>2</sup> Soekidjo Notoatmodjo. 2010. Health Ethics and Law. Jakarta: Rineka Cipta, page 138

(seven) years in prison if caused the death of the mother. In the case of this abortion, the goal is the content inside the mother's body, not the mother herself.

If the target is the mother and not the womb, then a person who causes an abortion without the mother's permission can be deemed to have committed a criminal act intentionally seriously injuring another person from Article 354, this relates to Article 90 which includes aborting or killing the womb into term serious injury. If this is considered to have happened, then the maximum sentence is reduced to 8 (eight) years in prison which can be increased again to 10 (ten) years in prison if the mother dies.

According to Article 349, if a doctor, midwife or pharmacist assists in a crime under Article 346 or is guilty of committing or assisting one of the crimes under Articles 347 and 348, then the sentence specified in that article may be increased by one third, and may be revoked. his right to carry out the work in which he committed the crime.<sup>3</sup>

With regard to determining whether or not an act is a crime and can be accounted for by the perpetrator, the act must fulfill the elements of the formulation of a criminal act specified in a statutory regulation. According to Moeljatno, an act that can be punished must fulfill the following elements:<sup>4</sup>

1. There is an act
2. Those who fulfill the formulation in the law (this is a formal requirement, related to the entry into force of Article 1 paragraph (1) of the Criminal Code)
3. Is unlawful (this is a material requirement, related to following the teaching of unlawful materiality in its negative function).

The development of the concept of criminal responsibility which was originally based on the existence of errors both in the form of intentional and in the form of negligence, then placed the concept of alternative criminal responsibility or what is called Vicarius Liability.

So what can be taken from accountability in the concept of Vicarius Liability is that someone can be punished because it has something to do with crimes and violations of the law committed by one or more perpetrators. Almost every crime that occurs is committed by more than one person. So in every crime it is always seen more than a person, which means there are other people who participate in the implementation of the crime outside of the perpetrator.

Each participant took or gave his contribution in the form of an act towards another participant so that the crime was committed. In this case, logically the responsibility must be shared among the participants, they must also be held responsible for their actions, since without their actions it is impossible to complete the crime.

Thus, it can be said that participation in a crime occurs if there are more than several people or more than one person in a crime or crime. The relationship between participants in completing the crime can vary, namely:

1. Together to commit a crime.
2. Someone has a will and plans a crime while he uses another person to carry out the crime.
3. Only someone who commits a crime, while other people help carry out the crime.

Since each participant of the crime can take various forms, this inclusion principle is based on: "Determining the responsibility of the participant for the crime that has been committed". Besides determining the responsibility of each participant, this teaching also questions the role or relationship of each participant in a criminal act, what contribution has been given by each participant, so that the crime can be resolved.

The participation can be divided according to its nature. Inclusion or deelnemng issues can be divided according to their nature in:

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<sup>3</sup> Wirjono Prodjodikoro. 2012. *Certain Criminal Acts in Indonesia*. Bandung: PT Refika Aditama, page 75.

<sup>4</sup> Tongat. 2008. *Fundamentals of Indonesian Criminal Law in the Perspective of Renewal*. Malang: Muhammadiyah University of Malang (UMM)-Press, page 107

1. Stand-alone form of inclusion: This type includes those who commit and participate in committing a crime. Accountability of each participants are assessed or rewarded individually for all the actions or actions taken.
2. Forms of inclusion that do not stand alone: Included in this type are persuaders, assistants and those who order to commit a crime. The responsibility of one participant depends on the actions of other participants.

If another participant commits an act that can be punished by one participant, he can also be punished. In the Criminal Code there are two forms of participation, namely what is referred to as:

- a. Maker or dader in Article 55 of the Criminal Code.
- b. Helpers or medeplichtigheid are regulated in Article 56 of the Criminal Code.

**Article 55** of the Criminal Code defines four categories that can be punished:

1. Actor or dader.
2. Ordered to do or doenpleger.
3. Participate or participate.
4. Advocate or uitlokker.

**Article 56** of the Criminal Code states who is convicted as an accomplice in a crime, namely there are two groups:

- a. Those who deliberately provide assistance when a crime is committed.
- b. Those who provide the means or information to commit a crime.<sup>5</sup>

Based on the description above, the main issues can be drawn, namely, First, how is the study of criminal law against participating in abortion? and How to find out the application of criminal law to participating in abortion?

## METHODS

In simple terms the research method is the procedure for how to conduct research.<sup>6</sup> Research usually begins with curiosity (nieuwgierigheid) to find an answer to the actual problem faced. A scientific research is intended to obtain correct knowledge about the object under study. That is why scientific knowledge is knowledge that has been verified.<sup>7</sup>

The function of the research method is to serve as a tool to find out a problem to be studied. Therefore, the object and types of research will determine the function of a research.<sup>8</sup> The research methodology in law essentially functions to provide guidelines, regarding the procedure for a researcher to study, analyze, understand in conducting a legal research.<sup>9</sup> Thus, methodology is an element that absolutely must exist in scientific research and development.<sup>10</sup>

### Research Specifications

This type of research uses normative juridical research or as Soerjono Soekanto and Sri Mamudji said, namely research on library law. In line with this, normative legal research in the view of Jonaedi Efendi and Johnny Ibrahim can also be referred to as doctrinal legal research.<sup>11</sup> In line with this, normative legal research in the view of Jonaedi Efendi and Johnny Ibrahim can also be referred to as doctrinal legal research.<sup>12</sup> Furthermore, Soerjono

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<sup>5</sup> Teguh Prasetyo. 2015. Criminal Law. Jakarta: Rajawali Press, page 205

<sup>6</sup> Jonaedi Efendi and Johnny Ibrahim. 2016. Normative and Empirical Legal Research Methods, First Edition. Jakarta: Kencana, page 2

<sup>7</sup> Ibid., page 3.

<sup>8</sup> c. Legal Research Methods, First Edition, Eleventh Print. Jakarta: Sinar Graphics, page 21.

<sup>9</sup> H. Ishaq. 2017. Legal Research Methods, and Thesis Writing, Theses, and Dissertations. Bandung: Alfabet, page 26

<sup>10</sup> Soerjono Soekanto. 2014. Introduction to Legal Research, Third Edition. Jakarta: University of Indonesia (UI-Press), page 7

<sup>11</sup> Soerjono Soekanto and Sri Mamudji. 2010. Normative Legal Research A Brief Review, First Edition, Twelfth Printing. Jakarta: Rajawali Press, page 14.

<sup>12</sup> Jonaedi Efendi and Johnny Ibrahim. Op. Cit., page 124

Soekanto and Sri Mamudji in Dyah Ochterina Susanti and A'an Efendi stated that normative legal research includes:

- a. Research on legal principles.
- b. Legal systematic research.
- c. Research on the level of vertical and horizontal synchronization.
- d. Legal comparison.
- e. Legal history.<sup>13</sup>

Furthermore, this normative juridical research leads to research on legal principles, in which a legal research aims to find the applicable legal principles or positive legal doctrines. This type of research is commonly called dogmatic studies or doctrinal research.<sup>14</sup> Also research on legal systematics that can be carried out on certain legislation or registered law. The main objective is to identify the main or basic understandings in law, namely legal community, legal subjects, legal rights and obligations, legal events, legal relations and legal objects.<sup>15</sup>

The nature of the research in writing this thesis proposal is prescriptive in nature, namely studying the purpose of law, the values of justice, the validity of the rule of law, legal concepts, and legal norms.<sup>16</sup> Soerjono Soekanto said that if a research is intended to get suggestions about something that must be done to solve a particular problem, then the research is called prescriptive research.<sup>17</sup>

### **Approach Method**

The approach method used in this study uses a statutory approach (statute approach), a conceptual approach (conceptual approach). The statutory approach is carried out by examining all laws and regulations that are related to the legal issues raised. The statutory approach is carried out within the framework of legal research for practical purposes as well as legal research for academic interests.<sup>18</sup>

The conceptual approach is carried out not departing from the rule of law because there is not yet or there is no rule of law for the problem at hand. In using a conceptual approach, it is necessary to refer to legal principles found in the views of legal scholars or legal doctrines.<sup>19</sup>

## **RESULTS AND DISCUSSION**

### **Study of Criminal Law Against Participating in Abortion**

The crime against participating in having an abortion can be studied through two laws.

1. Law Number 36 of 2009 concerning Health specifically regulates abortion which is contained in Articles 75.76 and 77. Then the criminal provisions are contained in Article 194 of Law Number 36 of 2009 concerning Health.

The contents of **Article 75** are as follows:

- a. Everyone is prohibited from having an abortion.
- b. The prohibition as referred to in paragraph (1) may be excluded based on:  
Indications of medical emergencies detected at an early age in pregnancy, whether those that threaten the life of the mother and/or fetus, suffer from severe genetic diseases and/or congenital defects. Even those that cannot be repaired, making it difficult for the baby to live outside the womb; or
- c. Pregnancy as a result of rape which can cause psychological trauma for rape victims.

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<sup>13</sup> Dyah Ochterina Susanti and A'an Efendi. 2014. First Print Legal Research. Jakarta: Sinar Graphics, page 19

<sup>14</sup> H. Zainuddin Ali. Op. Cit., page 25.

<sup>15</sup> Soerjono Soekanto and Sri Mamudji. Op. Cit., page 15.

<sup>16</sup> Peter Mahmud Marzuki. 2010. Legal Research. Jakarta: Kencana, page 22.

<sup>17</sup> Soerjono Soekanto. Op. Cit., page 10

<sup>18</sup> Dyah Ochterina Susanti and A'an Efendi. Op. Cit., page 10.

<sup>19</sup> Ibid., page 115.

- d. 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 a competent and authorized counselor.
- e. Further provisions regarding indications for medical emergencies and rape, as referred to in paragraph (2) and paragraph (3) are regulated in a Government Regulation.

**Article 76:** Abortion as referred to in Article 75 can only be carried out: Before 6 (six) weeks of pregnancy, it is counted from the first day of the last menstrual period, except in cases of medical emergencies; By health workers who have the skills and authority certificates stipulated by the Minister; With the consent of the pregnant woman concerned; With the husband's permission, except for rape victims, and; Health service providers who meet the requirements set by the Minister.

**Article 77:** The government is obliged to protect and prevent women from having abortions as referred to in Article 75 paragraph (2) and paragraph (3) which are of poor quality, unsafe and irresponsible and contrary to religious norms and provisions of laws and regulations.

Regarding the criminal provisions set forth in **Article 194:** Anyone who intentionally has an abortion not in accordance with the provisions referred to in Article 75 paragraph (2) shall be subject to imprisonment for a maximum of 10 (ten) years and a fine of up to Rp. 1,000,000,000.00 (one billion rupiah).

Based on the explanation of the articles contained in the health law such as Article 75 paragraph (3) what is meant by "counselor" in this provision is any person who has a certificate as a counselor through education and training. Those who can become counselors are doctors, midwives and health workers/medical personnel.

The elucidation of Article 76 contains the terms and conditions for carrying out an abortion, namely: Before 6 weeks of pregnancy, counting from the first day of the last menstruation, except in medical emergencies; By health workers who have the skills and authority who have certificates set by the minister; With the consent of the pregnant woman concerned; With the husband's permission, except for rape victims; Health service providers who meet the requirements set by the minister.

Then in the elucidation of Article 77 what is meant by the practice of abortion that is not of good quality, unsafe and irresponsible is an abortion that is carried out by force and without the consent of the woman concerned, which is carried out by unprofessional health workers, without following professional and service standards applicable, discriminatory, or prioritizing material rewards rather than medical indications.

In connection with Articles 75, 76, 77 and Article 194 of Law Number 36 of 2009 concerning Health it contains more about the actions of doctors, midwives, health workers/medical personnel or the main actors. Based on the explanation above, only doctors, midwives, health workers/medical personnel and the main perpetrators can be punished under the health law.

The Criminal Code (KUHP) regulates the problem of criminal abortion. Provisions regarding criminal abortion are regulated in Articles 299, 346, 347, 348, and Article 349 of the Criminal Code.

The contents of **Article 299** are as follows: Any person who with deliberate intent treats a woman or orders her to be treated, by informing her or giving rise to the hope that by means of such treatment her womb will be aborted, shall be punished by a maximum imprisonment of four years or a maximum fine of forty-five thousand rupiahs; If the guilty person does this for profit, or makes the act as a job or habit, or if he is a doctor, midwife or pharmacist, the sentence can be increased by one third; If the person who is guilty of committing the crime is carrying out his work, then his right to do that work can be revoked.

**Article 346:** A woman who deliberately causes the death or death of her womb or orders someone else to do so, is sentenced to a maximum of four years in prison.

**Article 347:** Any person who with deliberate intent aborts or kills the womb of a woman without her consent, shall be punished by a maximum imprisonment of twelve years; If said act results in the death of the said woman, shall be punished by a maximum imprisonment of fifteen years.

**Article 348:** Any person who with deliberate intent aborts or kills the womb of a woman with her consent, shall be punished by a maximum imprisonment of five years and six months; If said act results in the death of the woman, it shall be punished by a maximum imprisonment of seven years.

**Article 349:** If a doctor, midwife or pharmacist helps commit a crime under Article 346, or commits or helps commit one of the crimes described in Articles 347 and 348, then the sentence specified in that article can be added to one third and the right to carry out search in which the crime was committed.

The Criminal Code (KUHP) does not provide an explanation regarding the meaning of the womb itself and provides a clear meaning regarding abortion and killing (killing) the womb. Thus we know that the Criminal Code (KUHP) only regulates provocatus criminalis abortion, where all types of abortion are prohibited and not permitted by law for whatever reason.

Provocatus abortion arrangements in the Criminal Code (KUHP), which is a legacy from the Dutch era, are contrary to legal foundations and politics, namely "to protect the entire Indonesian nation and to advance public welfare based on Pancasila and the 1945 Constitution because it prohibits provocatus abortion without exception".

This is felt to be very burdensome for the medical community who are forced to have a provocatus abortion to save the mother's life, which so far has been an exception outside the law. An example is the enactment of Article 349 of the Criminal Code, if this article is applied absolutely, then doctors, midwives, nurses, health workers/medical personnel can be accused of violating the law and subject to imprisonment.

Even though they could have performed a provocatus abortion to save the mother's life. Therefore, it is necessary for a new law and regulation which contains aspects of high legal protection for health workers/medical personnel in carrying out their obligations.

The need for these new laws and regulations is fulfilled in Law Number 36 of 2009 concerning Health. In its development, regulations regarding provocatus abortion or criminal abortion can be found in Law Number 36 of 2009 concerning Health. If Articles 299,346,347,348 and 349 of the Criminal Code do not regulate the issue of provocatus medicalis abortion.

With regard to the two regulations are different from each other. The Criminal Code (KUHP) recognizes the prohibition of abortion provocatus without exception, including abortion provocatus medicalis or abortion provocatus therapeuticus. But Law Number 36 of 2009 concerning Health actually allows provocatus medicalis abortion to occur with therapeutics specifications.

According to the context of criminal law, there is a difference between the old laws and regulations (KUHP) and the new laws and regulations, Law Number 36 of 2009 concerning Health. Even though the laws and regulations here apply the principle of "lex posteriori derogat legi priori". This principle assumes that if a new regulation is promulgated without repealing the old regulation which regulates the same material and the two are mutually contradictory to each other, then the new regulation overpowers or paralyzes the old regulation.

Thus, Article 75 of Law Number 36 of 2009 concerning Health which regulates abortion provocatus medicinalis can still apply in Indonesia even though the rules are



actually different from the formulation of abortion *provocatus criminalis* according to the Criminal Code (KUHP). The application of the *Lex posteriori derogat legi priori* principle is actually one of the government's efforts to develop Indonesian criminal law.

Many of the rules in the Criminal Code (KUHP) which in special situations are no longer relevant to be applied today. To overcome the weaknesses of the Criminal Code (KUHP), the government issued Law Number 36 of 2009 concerning Health in the hope of providing a conducive atmosphere for the dynamics of Indonesian society today.

The principle of *Lex posteriori derogat legi priori* is a legal principle which is developed in all fields of law. Its function in the science of law, especially the Criminal Code (KUHP), is only regulatory and explanatory (explaining). This principle serves to explain the application of Articles 75, 76 and Article 77 of Law Number 36 of 2009 concerning Health when confronted with articles from the Criminal Code (KUHP) which regulate the issue of abortion *provocatus*.

Looking at the formulation of Article 75 of Law Number 36 of 2009 concerning Health it appears that Law Number 36 of 2009 concerning Health clearly prohibits abortion except for the type of abortion *provocatus therapeuticus* (abortion performed to save the life of the mother and/or her fetus). In the world of medicine, *provocatus medicalis* abortion can be done if the mother's life is in danger of death and can also be done if the child to be born is estimated to have severe defects and it is indicated that he cannot live outside the womb, for example the fetus suffers from an abnormality of *ectopia chordalis* (the fetus to be born without a chest wall so that visible heart), *rachischisis* (fetus that will be born with an open spine without being covered by skin) or *anencephalus* (fetus will be born without a big brain). The Health Law Number 36 of 2009 concerning Health also regulates abortions performed by rape victims which are indicated to cause psychological trauma to the mother.

The old Health Law did not specifically contain abortion for rape victims, causing debate and interpretation in various circles. With the existence of the new Law Number 36 of 2009 concerning Health, this matter is no longer debated regarding legal certainty because there is already an article that specifically regulates it. Based on the description above, it can be concluded that Article 75 of Law Number 36 of 2009 concerning Health regulates *provocatus* abortion which is permitted in Indonesia, namely *provocatus* abortion for medical indications or in medical language it is referred to as *abortion provocatus medicalis*. It was further emphasized that the intended medical emergency indication is "a condition that really requires certain medical measures to be taken in order to save the mother".

It should be emphasized that the indication of a medical emergency is an effort to save the life of the mother. The fetus is indeed not possible to live outside the womb because of severe defects. One thing that is an advantage of Law Number 36 of 2009 concerning Health is the criminal provisions regulated in Article 194.

The criminal threat given to the perpetrators of *provocatus criminalis* abortion is much heavier than the similar criminal threats provided for in the Criminal Code (KUHP). In Article 194 of Law Number 36 of 2009 concerning Health, the punishment that is threatened is imprisonment for a maximum of 10 (ten) years and a maximum fine of Rp. 1,000,000,000,000.- (one billion rupiah).

Meanwhile, in the Criminal Code (KUHP), the maximum punishment is only 4 (four) years in prison or a maximum fine of Rp. years of imprisonment is regulated in Article 346 of the Criminal Code, a maximum of 12 (twelve) years in prison is regulated in Article 347 of the Criminal Code, and a maximum of 5 (five) years and 6 (six) months in prison is regulated in Article 348 of the Criminal Code. Criminal provisions regarding abortion *provocatus criminalis* in Law Number 36 of 2009 concerning Health are considered good because they contain general and specific prevention measures to reduce the crime rate of criminal abortion.

The threat of severe punishment is expected to be able to deter criminal abortion perpetrators and not repeat their actions. In the legal world, this is referred to as special prevention, namely efforts to prevent abortion *provocatus criminalis* perpetrators from repeating their actions. Meanwhile, prevention generally applies to members of the public because they consider carefully before having an abortion rather than being subject to these

very heavy criminal sanctions. It is this general prevention and special prevention that the legislators hope to reduce to a minimum the number of provocatus abortion crimes in Indonesia.<sup>20</sup>

Regarding Participating by yourself, it is regulated in Article 55 paragraph (1) 1st of the Criminal Code Sentenced as a perpetrator of a crime (dader): Those who do, who order to do, and who participate in doing the deed; Those who give or promise something, abuse their power or prestige, use violence, threaten or mislead, or provide opportunities, means or information, deliberately encourage other people to take action.

The definition of participation is a crime committed by more than one person, in which between one person and another there is a very close mental attitude and or action relationship to the realization of the crime.

A criminal act is an unlawful act that has been committed intentionally or unintentionally by a person who can be held accountable for his actions through sanctions that have been determined by law. Meanwhile, according to Muljatno, a crime is a condition that is made by someone or something that is done and that action refers both to the consequences and those that cause the consequences.

So if the act violates Article 55, it must fulfill the elements of the offense. According to Projudikoro, there are three categories of participants in the crime: The one who did the deed (plegen, dader); The one who orders the action (doel pleger, middelijke dader); Those who participate in the deed (madepleger, mededader).

D Samosir argues that, if a person commits a crime without other people, it is generally referred to as the perpetrator (dader), but if several people jointly commit a crime, then everyone involved (participator) in the crime is seen as a participant.<sup>21</sup>

According to the author's opinion, if the criminal elements in the case of participating in an abortion are clearly found in the Criminal Code (KUHP), then the act has violated the law and can be punished according to applicable laws.

### **Application of Criminal Law Against Participating in Abortion**

Knowing about the judge's considerations in making a decision on the perpetrators of the crime of participating in having an abortion, we will first describe:

#### **Basis for consideration of Judges at the Palopo District Court:**

1. Letter of Indictment from the Public Prosecutor to bring the accused to trial.
2. The defendant in this case was the perpetrator of the abortion.
3. Statements from witnesses submitted by the Public Prosecutor in which it can be seen that the defendant has committed the crime of participating in having an abortion using the methods stated in the facts at trial.
4. The defendant did not object to what the witnesses had said.
5. The defendant gave information during the trial according to the chronology of the case in the indictment.
6. The evidence presented by the Public Prosecutor includes: 1 (one) pack of Gastrul medicine that has been used is confiscated for destruction;
7. Legal facts obtained based on evidence.
8. It is proven that the accused has been charged against the defendant.
9. The defendant has been charged by the public prosecutor with charges.

As regulated in Article 346 of the Criminal Code in conjunction with Article 55 paragraph (1) 1st of the Criminal Code, the elements are as follows: Those who do, who order to do, and who participate in doing the deed; Whoever; Who with; abort or kill the womb or order someone else to do so;

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<sup>20</sup> Annette Anasthasia Napitupulu. 2013. "Journal of Criminal Law Renewal Against Abortion Crimes in Indonesia". Medan: Faculty of Law, University of North Sumatra.

<sup>21</sup> Fauzia Rahawarin. "Journal of Views of Criminal Law Practitioners Concerning Criteria for Participating in Committing (Medeplegen) and Assistants (Medeplichtigheid)".

ad. 1. Elements of "those who do, who order to do, and who participate in doing the deed"

"The elements of those who do, who order to do, and who participate in doing the deed" refers to humans, with the understanding of everyone, whether men or women who are able to be responsible for their actions, both those who do those who order them to do and participate in doing them. deed.

ad. 2. The element of "whoever"

The "whose element" is referring to people or humans. With the understanding that every person, whether male or female, is capable of being responsible for his/her actions/mind/mind is not disturbed.

ad. 3. The "With whom" element

The "element with whom" is to stop the act and realize the consequences.

ad. 4. The element of "aborting or turning off the womb or ordering someone else to do it"

"The element of aborting or killing the womb or ordering someone else to do it" is the action specified in this element is alternative.

10. If all the elements mentioned above have been fulfilled, the defendant is declared legally and convincingly proven to have committed the crime as charged in the indictment.
11. The defendant must be held accountable for his actions because there is no justification or excuse in the case.
12. If the accused is capable of being responsible, then he must be found guilty and sentenced.
13. The accused has been subject to lawful arrest and detention, so the period of arrest and detention must be deducted entirely from the sentence imposed.
14. The accused is detained and the detention of the accused is based on sufficient reasons, it is necessary to determine that the accused remains in detention.
15. The evidence presented at trial for further consideration is as follows: 1 (one) pack of Gastrul medicine that has been used is confiscated for destruction;
16. Aggravating circumstances: The defendant committed an abortion because he was afraid of his family;
17. Mitigating circumstances: The defendant regretted his actions; The defendant was not complicated in giving information; he accused confessed frankly; The accused has never been convicted; The accused is married; The accused is still in college;
18. Sentenced punishment to the defendant under Article 346 of the Criminal Code in conjunction with Article 55 paragraph (1) 1st of the Criminal Code.
19. Sentenced to imprisonment for 6 (six) months.
20. Burdening the defendant to pay court fees.

#### **Basic considerations of Judges at the Liwa District Court:**

1. The defendant was brought to trial by the public prosecutor with an indictment.
2. The defendant was charged with Article 194 in conjunction with Article 75 paragraph (2) of Law Number 36 of 2009 concerning Health.
3. The defendant stated that he understood and did not object to the charges put forward by the public prosecutor.
4. Statements from witnesses which explain the chronology of the incident as stated in the facts of the trial.
5. The defendant confirmed the testimony of the witnesses.
6. The evidence presented by the Public Prosecutor is in the form of:
  - a. 1 (one) unit white Honda spacy motorcycle with police number BE 5250 MN, number: JFA11031424, number: MHIJF117CK032551 Returned to Surya Dinata Bin Insanul Haq (Alm.);

- b. 1 (one) piece of white pillowcase.
  - c. 1 (one) white women's undershirt.
  - d. 1 (one) piece of women's underwear with black and white stripes.
  - e. 1 (one) hoe with blackish brown wooden handle.
7. The legal facts that occurred during the trial were in accordance with the testimony of the defendant and witnesses.
  8. Fulfillment of all the elements of the article charged has been legally and convincingly proven to have committed a crime.
  9. The defendant was charged with alternative charges, namely:
    - a. The actions of the defendant as regulated and threatened violated Article 194 in conjunction with Article 75 paragraph (2) of Law No. 36 of 2009 on Health in conjunction with Article 56 1 of the Criminal Code.
    - b. The actions of the defendant as regulated and threatened violated Article 346 of the Criminal Code in conjunction with Article 56 1st of the Criminal Code.
    - c. The actions of the defendant as regulated and threatened violated Article 194 in conjunction with Article 75 paragraph (2) of Law No. 36 of 2009 concerning Health in conjunction with Article 55 paragraph (1) 1st of the Criminal Code.
    - d. The actions of the defendant as regulated and threatened violated Article 346 of the Criminal Code in conjunction with Article 55 paragraph (1) 1st of the Criminal Code.
  10. The judge considered the charges that were relevant to legal facts, namely the third charge which, as stipulated and is punishable by law in Article 194 in conjunction with Article 75 paragraph (2) of Law No. 36 of 2009 concerning Health in conjunction with Article 55 paragraph (1) 1st of the Criminal Code, the elements of which are as follows:
    - a. Everyone;
    - b. Intentionally;
    - c. Performing abortions not based on medical emergency indications detected at an early age of pregnancy, either threatening the life of the mother and/or fetus, suffering from severe genetic disease and/or congenital defects, or those which cannot be repaired, making it difficult for the baby to live outside the womb or pregnancy as a result of rape which can cause psychological trauma to the victim of rape;
    - d. As the one who did it, ordered it to do it and participated in it;
      - ad. 1. The "everyone" element "Elements of every person" is as a legal subject who is able to be held accountable for the actions that were charged against him.
      - ad. 2. The element of "intentionally" The "element on purpose" according to Memorie Van Toelichting (MVT) is Willens En Wetens which means wanting and knowing "The meaning that a person commits an evil deed must be "willing and knowing", both his actions and the consequences that occur.
      - ad. 3. The element of "Performing an abortion not based on medical emergency indications detected at an early age of pregnancy, either threatening the life of the mother and/or fetus, suffering from severe genetic disease and/or congenital defects, or those which cannot be repaired making it difficult for the baby to live outside pregnancy or pregnancy as a result of rape which can cause psychological trauma to the rape victim" "Abortion elements" The medical definition of abortion is the termination of pregnancy through any means before the fetus is able to survive at gestational age before 20 weeks based on the first day of the last normal menstruation or the weight of the fetus is less than 500 grams (Williams Obstetrics, 2006). The definition of abortion according to the Big Indonesian Dictionary is a miscarriage of the fetus, having an abortion (intentionally because you don't want the baby to be conceived). In the medical world, abortion is known as abortion, meaning the expulsion of the products of conception (meeting of the egg and sperm cells) before the fetus can live outside the womb, this is a process of ending the life of the fetus before given a chance to live. There are three types of abortion known in the medical world, namely:
        - a. Spontaneous or natural abortion is taking place without any action. Mostly caused by the poor quality of egg cells and sperm cells

- b. Artificial or intentional abortion is the termination of pregnancy before 28 weeks of gestation as a result of intentional and conscious actions by both the expectant mother and the abortionist (in this case the doctor, dukun beranak).
  - c. Therapeutic or medical abortion is an artificial abortion performed on medical indications.
    - ad. 4. The element "As the doer, the one who orders to do it and the one who participates in doing it" "Elements as those who commit, those who order to do and those who participate in doing", in this case the law does not explain what is meant by inclusion offenses, but inclusion offenses according to the Criminal Code: Participation is regulated in Article 55 and Article 56, Based on Articles The participation is divided into two major divisions, namely:  
Maker/Dader (**Article 55**) consisting of:
      - a. The perpetrator (pleger) is a person who commits an act himself which fulfills the formulation of an offense and is deemed responsible for the crime.
      - b. Those who order to do (doenpleger) are people who carry out actions through the intermediary of other people, while the intermediary is only used as a tool. Thus there are two parties, namely the direct maker (manus ministra/auctor physicus), and the indirect maker (manus domina/auctor intellectualis).
      - c. Participating (medepleger) is a person who intentionally participates in or participates in the occurrence of something. Therefore, the quality of each participant in a criminal act is the same.
      - d. Advocate (uitlokker).
11. The defendant's actions must be accounted for because there is no reason to justify and forgive in his case.
  12. Observing and exploring the backgrounds of the witnesses and the defendants in giving testimony to provide information for the Panel of Judges to assess the extent to which the statements of witnesses and defendants can be trusted so that repressive law enforcement can be realized and bring justice and truth.
  13. The defendant is capable of being responsible and has been proven guilty and should be sentenced to a prison sentence commensurate with his guilt.
  14. The period of detention served by the accused is deducted entirely from the length of the sentence imposed.
  15. Consider the evidence presented at trial.
  16. The aims and objectives of punishment aim to: Make corrections to the defendant, so that after serving this sentence, the defendant obeys and complies with all applicable laws and regulations.
  17. The sentence that will be imposed on the defendant is considered fair.
  18. The defendant was proven guilty and burdened with paying court costs.
  19. Weighting matters: That the actions of the defendant damaged the values of religious norms and decency.
  20. Mitigating matters: That the defendant was polite during the trial; That the defendant has never been sentenced to a crime; That the defendant followed his actions, regretted it, and promised not to repeat his actions again.
  21. Sentenced punishment to the defendant under Article 194 in conjunction with Article 75 paragraph (2) of Law Number 36 of 2009 concerning Health in conjunction with Article 55 paragraph (1) 1st of the Criminal Code.
  22. Sentenced to imprisonment for 7 (seven) months and a fine of Rp. 1,000,000. (one million rupiah).
  23. Burden the defendant to pay court costs.
- Before making a decision, the Judge based on the Criminal Procedure Code (KUHAP) based on Article 182 paragraph (4) the basis for the Panel of Judges to deliberate in order to make a decision was the indictment and the facts revealed at trial.
- According to the writer's opinion, based on the explanation above, it can be seen that before imposing a sentence on the defendant, the judge has the basic considerations as

described above. It was from this basis that the judge imposed a sentence on the defendant, in which there were differences in the articles given to the defendant, as well as the criminal threats. But his actions are equally involved in carrying out abortions.

Judging from the two decisions above, there is a disparity in criminal justice. However, with the existence of these basic considerations, it is clear enough as the Judge's reason for adjudicating and deciding a case so that the disparity in criminal justice can be accepted because indeed the method of committing and the amount of loss for each crime is different, even though charged with different articles, but the actions are equally involved. do and Indonesia also adheres to the principle of *Lex specialis derogat legi generali* which means that laws that are specific (*lex specialis*) override general laws (*lex generalis*).

## CONCLUSION

Criminal law studies on participating in abortion can be found explicitly in the Criminal Code (KUHP) which is regulated in Articles 299,346,347,348 and Article 349 concerning abortions carried out by medical and non-medical personnel and Law Number 36 of 2009 concerning Health Article 75,76,77 and Article 194 which are carried out by health workers/medical personnel or the main actors and regarding participating in carrying out themselves are regulated in Article 55 paragraph (1) 1 of the Criminal Code and the application of criminal law against participating in having this abortion, that before imposing a sentence on the defendant, the judge based on the Criminal Procedure Code (KUHAP) based on Article 182 paragraph (4) the basis for the Panel of Judges to deliberate in order to make a decision was the indictment and the facts revealed at trial. With this the Judge has the basic considerations as described above. It is from this basis that the judge imposes a sentence on the defendant, in which there are differences in the articles given to the defendant, as well as different criminal threats. But his actions are equally involved in carrying out abortions and Indonesia also adheres to the principle of *Lex specialis derogat legi generali* which means that laws that are specific (*lex specialis*) overrule general laws (*lex generalis*).

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