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Criminal Liability of Midwives Perpetrators of Illegal Abortion Study Decision Number 131/Pid.Sus/2016/Pn.Kpg

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Abstract: This study examines the criminal liability of midwives who commit illegal abortions through a normative juridical analysis of Decision Number 131/Pid.Sus/2016/PN.Kpg. The three main issues studied include the legal regulation of the crime of illegal abortion by midwifery personnel, the fulfillment of the elements of criminal responsibility of the defendant, and the proportionality of the punishment imposed from the purpose of the crime and the principle of justice in Indonesian criminal law. This study uses a normative juridical method that is descriptive and analytical with a legislative approach, a conceptual approach, and a case approach. The results show that the Indonesian legal system has established a comprehensive normative framework in prohibiting the practice of illegal abortion by midwives, but inconsistency in law enforcement is its main weakness. All elements of the defendant's criminal responsibility were fulfilled conclusively, including the ability to be responsible, intentional in three grades, and the absence of a reason for criminal expungement. However, the three-month prison sentence imposed was considered disproportionate because the mitigating circumstances considered by the judge contained conceptual confusion and the construction of the indictment in the form of alternatives also contributed to the outcome of the sentence that was far from ideal, thus systemically weakening the effectiveness of the criminal law as an instrument to prevent the practice of illegal abortion by midwifery personnel in Indonesia.

Keywords: Criminal Liability; Illegal Abortion; Midwives

Introduction

Health is a human right guaranteed by Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia which affirms the right of everyone to obtain health services. This constitutional guarantee is then operationalized through various regulations in the field of reproductive health, including regulations on pregnancy and abortion. The ¹ *World Health Organization* reports that each year there are about 73 million intentional abortions, of which 45 percent are categorized as unsafe abortions. Unsafe abortion contributes to about 4.7 to 13.2 percent of maternal deaths globally each year.²

Social stigma against out-of-wedlock pregnancies, limited access to reproductive health services, and low consistency in law enforcement are factors that synergistically encourage the development of illegal abortion practices.³ The socially and psychologically distressed conditions for women who face unwanted pregnancies make them vulnerable to being exploited by health workers who offer illegal abortion services.⁴ Midwives as health workers who are closest to the community, are in the most strategic position and are the most vulnerable to abuse of their roles. More affordable rates and high

¹ Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Pasal 28H ayat (1)

² Bela Ganatra et al., "Global, Regional, and Subregional Classification of Abortions by Safety, 2010–14: Estimates from a Bayesian Hierarchical Model," *The Lancet* 390, no. 10110 (2017): 2372.

³ Widowati, "Tindakan Aborsi dalam Sudut Pandang Kesehatan di Indonesia," *Jurnal Fakultas Hukum Universitas Tulungagung* 6, no. 2 (2020): 6.

⁴ Muhammad Azinar, "Perilaku Seksual Pranikah Berisiko Terhadap Kehamilan Tidak Diinginkan," *Jurnal Kesehatan Masyarakat* 8, no. 2 (2013): 155.

public trust make midwives one of the most common practitioners of illegal abortion in the Indonesian context.⁵

The Indonesian legal system has actually built a comprehensive normative framework to prevent the practice of illegal abortion by midwives. Article 75 and Article 194 of Law Number 36 of 2009 concerning Health expressly prohibit abortion and threaten the perpetrator with imprisonment of up to ten years and a fine of up to one billion rupiah. Government Regulation Number 61 of 2014 concerning Reproductive Health and Law Number 4 of 2019 concerning Midwifery explicitly place abortion outside the limits of the midwife's authority under any conditions.⁶ Nevertheless, Barda Nawawi Arief emphasized that the effectiveness of criminal norms is not solely determined by the severity of the threat of sanctions, but also by the consistency and certainty of their application in judicial practice. When court decisions are consistently well below the available criminal threat, the preventive effect that is the primary goal of criminal law becomes unattainable.⁷

Decision Number 131/Pid.Sus/2016/PN.Kpg handed down by the Kupang District Court on September 27, 2016 is one of the most representative decisions to be reviewed. The defendant Dewi Sulita Bahren, a midwife who owns a maternity clinic in Kupang City, was proven to have carried out a series of medical actions between January 17 and 21, 2016 that resulted in the miscarriage of the victim's pregnancy named Siti Nuraini Nurdin Haji Kasim, a woman who experienced an out-of-wedlock pregnancy. The defendant received an advance of Rp5,000,000 from the victim and ordered the secret burial of the fetus at his other clinic.⁸ The public prosecutor demanded a nine-year prison sentence, but the panel of judges sentenced him to three months in prison and a fine of Rp50,000,000, a sentence equivalent to only 2.5 percent of the maximum available criminal threat.⁹

The striking gap between the charges and the verdict in this case reflects a broader problem in the Indonesian criminal system, namely the tendency to ignore the dimension of justice for victims and the importance of community protection in the interests of the defendant's rehabilitation. If such a light verdict is left uncriticized scientifically, there will be a perception that the legal risks of illegal abortion practice are so small that it does not provide adequate disincentives. Based on this description, this study examines this issue under the title "Criminal Liability of Midwives of Illegal Abortion Perpetrators: Normative Juridical Analysis of Decision Number 131/Pid.Sus/2016/PN.Kpg".

Methods

This research is a normative legal research that is descriptive and analytical, conducted through a legislative approach, a conceptual approach, and a case approach. The source of legal materials was obtained through literature studies which included primary legal materials in the form of the 1945 Constitution, the Criminal Code, the Criminal Code, Law Number 36 of 2009 concerning Health, Law Number 4 of 2019 concerning Midwifery, Government Regulation Number 61 of 2014 concerning Reproductive Health, and Decision Number 131/Pid.Sus/2016/PN.Kpg. Secondary legal materials include books, scientific journals, and related research results, while tertiary legal materials are in the form of legal dictionaries. The technique of collecting legal materials is carried out through literature and conceptual studies that are analyzed qualitatively by interpreting norms based on their context to answer the legal problems that are studied comprehensively.¹⁰

⁵ Budi Utomo et al., "Incidence and Social-Psychological Aspects of Abortion in Indonesia: A Community-Based Survey in 10 Major Cities and 6 Districts, Year 2000," *Reproductive Health Matters* 9, no. 17 (2001): 75.

⁶ "Undang-Undang Nomor 36 Tahun 2009 tentang Kesehatan," Lembaran Negara Republik Indonesia Tahun 2009 Nomor 144, Pasal 75, 76, dan 194; "Peraturan Pemerintah Nomor 61 Tahun 2014 tentang Kesehatan Reproduksi," Lembaran Negara Republik Indonesia Tahun 2014 Nomor 169, Pasal 35.

⁷ Muladi dan Barda Nawawi Arief, *Teori-Teori dan Kebijakan Pidana* (Bandung: Alumni, 2010), 52.

⁸ Pengadilan Negeri Kupang, Putusan Nomor 131/Pid.Sus/2016/PN.Kpg, 27 September 2016, hlm. 4–5.

⁹ Pengadilan Negeri Kupang, Putusan Nomor 131/Pid.Sus/2016/PN.Kpg, hlm. 33.

¹⁰ Salim HS dan Erlies Septiana Nurbani, *Penerapan Teori Hukum pada Penelitian Tesis dan Disertasi* (Jakarta: Raja Grafindo Persada, 2013), 7.

Results And Discussion

Legal Regulation of Illegal Abortion Practices Carried Out by Midwifery Workers in the Indonesian Legal System

The legal regulation of the crime of illegal abortion in the Indonesian legal system is comprehensive and spread across various complementary layers of laws and regulations. A systematic understanding of the entire arrangement is an important foundation before analyzing the criminal liability of the perpetrator, since the scope of the prohibition, the conditions of exceptions, and the threat of sanctions formulated directly determine the boundary between a legitimate medical act and an act that can qualify as a criminal act.¹¹

The Criminal Code has long regulated the prohibition of abortion through Articles 346 to 349. Article 349 of the Criminal Code, which explicitly provides for a one-third criminal penalty if the abortion is performed by a doctor, midwife, or pharmacist, and the perpetrator can also be deprived of his right to carry out his job. This provision reflects the recognition of the lawmakers that violations by health professionals contain a higher degree of error because they are committed by people who are supposed to protect patient safety.¹²

Law Number 17 of 2023 concerning Health, namely article 60, emphasizes that everyone is prohibited from having an abortion with very limiting exceptions, namely the indication of a medical emergency that threatens the life of the mother or fetus, or pregnancy due to rape that causes psychological trauma to the victim. Abortion in exempt conditions can only be performed before the age of fourteen weeks, by competent and authorized medical personnel, with the consent of the pregnant woman concerned, and in a qualified health care facility.¹³ All of these elements are cumulative, so a violation of one of the conditions alone is enough to qualify the act as an illegal abortion.¹⁴

The position and limits of the authority of midwives are specifically and restrictively regulated in Law Number 4 of 2019 concerning Midwifery. Article 46 of this law stipulates that the authority of midwives only includes maternal health services under normal conditions, child health services, and women's reproductive health services. There is no provision that gives the midwife the authority to perform abortion under any conditions.¹⁵ Even in medical emergencies, the authority of midwives is limited to initial treatment before making a referral to a higher health facility. Government Regulation Number 28 of 2024 which emphasizes that abortion can only be performed by doctors who have competence according to the set standards, in health service facilities that meet the requirements, and with strict procedures involving medical teams and psychological counseling.¹⁶

Based on the description mentioned above, a firm normative conclusion can be drawn that the Indonesian legal system has built a layered and consistent legal regime in prohibiting the practice of illegal abortion by midwifery. The most obvious weakness lies precisely in the consistency of law enforcement, where the sanctions imposed in judicial practice often do not reflect the severity of the criminal threat regulated in the law, thus directly weakening the preventive effect of the overall normative framework that has been built.¹⁷

¹¹ Andi Hamzah, *Asas-Asas Hukum Pidana* (Jakarta: Rineka Cipta, 2010), 115.

¹² Kitab Undang-Undang Hukum Pidana, Pasal 349.

¹³ "Undang-Undang Nomor 17 Tahun 2023 tentang Kesehatan," Lembaran Negara Republik Indonesia Tahun 2023 Nomor 105, Pasal 61.

¹⁴ "Undang-Undang Nomor 17 Tahun 2023 tentang Kesehatan," Pasal 60.

¹⁵ "Undang-Undang Nomor 4 Tahun 2019 tentang Kebidanan," Lembaran Negara Republik Indonesia Tahun 2019 Nomor 56, Pasal 46.

¹⁶ "Peraturan Pemerintah Nomor 28 Tahun 2024 tentang Peraturan Pelaksanaan Undang-Undang Nomor 17 Tahun 2023 tentang Kesehatan," Lembaran Negara Republik Indonesia Tahun 2024 Nomor 100.

¹⁷ Intan Andini Wermasubu, "Pertanggungjawaban Pidana Pelaku Aborsi di Indonesia dalam Perspektif Hukum yang Melakukan Tindakan Aborsi," *Ejournal Universitas Trisakti*, 92.

Fulfillment of the Elements of Criminal Responsibility of the Defendant in Decision Number 131/Pid.Sus/2016/PN.Kpg Based on the Theory of Criminal Responsibility

Criminal liability is one of the central concepts in criminal law that determines whether or not a person can be sentenced to a crime for the acts he has committed. This concept is based on the fundamental principle of *geen straf zonder schuld* or no crime without fault which means that a penalty can only be imposed if it is proven that there is a mistake in the perpetrator, not solely because an act has occurred that is prohibited by law. Moeljatno emphasized that to impose a criminal sentence on someone, two main conditions must be met, namely that the act must be an unlawful act and the person who commits the act must be blamed or accountable for his actions.¹⁸ Referring to the theoretical framework, the fulfillment of the elements of criminal responsibility of the defendant Dewi Sulita Bahren will be analyzed in order as follows:

a. Responsible Ability

The element of responsible ability (*toerekeningsvatbaarheid*) requires that the perpetrator be able to distinguish between good and bad deeds and determine his will based on that conversion, without the existence of a mental defect that erases this ability.¹⁹ The defendant Dewi Sulita Bahren is a midwife with a D3 Midwifery education who has been practicing independently for many years, so her intellectual and professional capacity is not in doubt. Gilda Saina's expert, Amd.Keb as the Chairman of the Kupang City IBI emphasized that the prohibition of abortion and the obligation to refer in emergency conditions are the standard knowledge of every midwife,²⁰ so that the defendant cannot take refuge behind the pretext of ignorance. There is also no excuse for forgiveness (*schulduitsluitingsgronden*) in the form of mental disorders as per Article 44 of the Criminal Code or forced circumstances, so that this element is fulfilled conclusively.

b. Intentionality as a Form of Error

The element of intentionality (*dolus/opzet*) in Indonesian criminal law doctrine includes three gradations, namely intentionality as intent (*opzet als oogmerk*), intentionality as certainty (*opzet als zekerheidsbewustzijn*), and intentionality as possibility (*dolus eventualis*).²¹ The three gradations proved to be fulfilled simultaneously in this case. Based on the facts revealed in the trial, the defendant's intentionality can be identified in the three gradations at the same time.

On January 17, 2016, the defendant told the victim "it's better to just have a miscarriage" and immediately injected the drug into the victim's right thigh, an act that reflected intentionality as the purest intention.²² On January 19, 2016, the defendant again injected the victim twice and received an advance of Rp5,000,000, a fact that directly aborted the humanitarian pretext and proved the existence of a planned transaction.²³ On January 20, 2016, the defendant ordered the administration of oxytocin to the victim. As an experienced midwife, the defendant understood exactly the effect of uterotonics in accelerating fetal ejection, so his actions reflected intentionality as certainty.²⁴ After the fetus was born dead, the defendant ordered the burial of the body secretly without notification to the authorities. Referring to Van Hamel's perspective, the effort to cover up the act is a strong indication of an awareness of the unlawful nature that cannot be ignored in the judgment of the law.²⁵

¹⁸ Moeljatno, *Asas-Asas Hukum Pidana* (Jakarta: Rineka Cipta, 2008), 153.

¹⁹ Chairul Huda, *Dari Tiada Pidana Tanpa Kesalahan Menuju Kepada Tiada Pertanggungjawaban Pidana Tanpa Kesalahan* (Jakarta: Kencana, 2006), 68.

²⁰ Pengadilan Negeri Kupang, Putusan Nomor 131/Pid.Sus/2016/PN.Kpg, hlm. 15.

²¹ Andi Hamzah, *Asas-Asas Hukum Pidana*, 122.

²² Pengadilan Negeri Kupang, Putusan Nomor 131/Pid.Sus/2016/PN.Kpg, hlm. 4.

²³ Pengadilan Negeri Kupang, Putusan Nomor 131/Pid.Sus/2016/PN.Kpg, hlm. 5.

²⁴ Pengadilan Negeri Kupang, Putusan Nomor 131/Pid.Sus/2016/PN.Kpg, hlm. 12.

²⁵ Moeljatno, *Asas-Asas Hukum Pidana*, 185.

c. No Excuse for Criminal Removal

No reason for criminal expungement was found, either a justification (*rechtvaardigingsgronden*) or a excuse for forgiveness (*schulduitsluitingsgronden*) in this case. The defendant implicitly put forward three excuses, namely that his actions were based on humanity, the delivery process occurred naturally, and he had suggested oral references, the three excuses were unacceptable.²⁶

These three excuses cannot be accepted as a valid reason for criminal expungement, including:

- a. Humanitarian reasons are not a justification recognized by Indonesian criminal law. Article 48 of the Criminal Code requires that there be a conflict between two equally legitimate interests, while in this case there is only one legal option available, namely referring the victim to the hospital.
- b. The excuse of natural childbirth is inappropriate because the series of drug injections on January 17 and 19 and the order to give oxytocin are a series of causals that directly accelerate fetal ejection. Based on von Buri's theory of causality *conditio sine qua non*, any condition without which the consequences would not have occurred was a legally relevant cause.
- c. Oral referral advice without any follow-up does not meet legal obligations, as referrals in obstetric emergencies require active and verified action.²⁷

Based on the analysis of the three elements of criminal liability above, it can be concluded that all elements of criminal responsibility of the defendant Dewi Sulita Bahren were conclusively fulfilled. The defendant has the ability to take full responsibility as an experienced midwife, his intentionality is proven in three gradations at once based on a series of contradictory facts of the trial, and no criminal removal reason was found that can absolve the defendant from responsibility for his actions. Thus, the decision of the panel of judges stating that the defendant was legally and convincingly proven guilty of committing the crime of abortion is not in accordance with the provisions as Article 194 of Law Number 36 of 2009 is normatively appropriate, although the issue of proportionality of the sentence imposed still requires further study as will be discussed in the next section.

The Proportionality of Crime in Decision Number 131/Pid.Sus/2016/PN.Kpg Reviewed from the Purpose of Crime and the Principle of Justice in Indonesian Criminal Law

Proportionality of punishment is a fundamental principle in criminal law that requires a balance between the severity of the crime imposed and the weight of the act committed by the defendant. This principle is rooted in Andrew von Hirsch's thinking in the theory of *just deserts* which asserts that the crime must be proportional to the level of guilt of the perpetrator and the impact of the act on the victim and society.³⁹ Muladi added that good punishment is one that is able to achieve the goals of general prevention, special prevention, protection of society, and restoration of the balance disturbed by crime simultaneously.²⁸ Referring to the theoretical framework, the proportionality of the punishment in Decision Number 131/Pid.Sus/2016/PN.Kpg needs to be criticized in depth.²⁹

The most striking aspect of this verdict is the very sharp disparity between the Public Prosecutor's demands and the verdict handed down by the panel of judges. The Public Prosecutor demanded a nine-year prison sentence based on Article 194 of Law Number 36 of 2009 which threatens a maximum prison sentence of ten years, but the panel of judges only sentenced him to three months in prison and a fine of Rp50,000,000. This sentence is equivalent to only 2.5 percent of the maximum available criminal threat, a disparity that goes beyond the limits of reasonableness in the context of criminal proportionality.³⁰ Johannes Andenaes emphasized that the deterrent effect of criminalization is highly dependent on public perception of the appropriateness of the sanctions that the perpetrator will receive, so that a consistently

²⁶ Pengadilan Negeri Kupang, Putusan Nomor 131/Pid.Sus/2016/PN.Kpg, hlm. 18–19.

²⁷ Andi Hamzah, *Asas-Asas Hukum Pidana*, 138.

²⁸ Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (New York: Hill and Wang, 1976), 66.

²⁹ Muladi dan Barda Nawawi Arief, *Teori-Teori dan Kebijakan Pidana*, 10.

³⁰ Pengadilan Negeri Kupang, Putusan Nomor 131/Pid.Sus/2016/PN.Kpg, hlm. 33.

light sentence will significantly weaken the deterrent effect and send a signal to potential perpetrators that the legal risks of illegal abortion practice are much less than those threatened by the law.³¹

Some of the mitigating circumstances considered by the panel of judges also contain conceptual confusion that needs to be criticized. The consideration that the death of the fetus is not a direct result of the defendant's actions is not normatively appropriate, because Article 194 of Law Number 36 of 2009 threatens the act of performing an abortion not in accordance with the provisions, not merely the act of causing the death of the fetus. Thus, even if the fetus has died before the defendant's series of actions begins, the defendant's act of performing medical actions outside his authority to remove the fetus still fulfills the elements of the alleged crime.³² The consideration that the defendant acted on the basis of humanity is also inconsistent with the fact that the defendant received a down payment of Rp5,000,000 from the victim. An action carried out in return for material things cannot be categorized as an action that is solely based on a sense of humanity.³³

The judge's consideration of making administrative sanctions in the form of revocation of a practice license as a factor that reduces the severity of the crime is also conceptually justifiable. Administrative sanctions and criminal sanctions are two legal instruments that stand alone and cannot replace each other. Philipus M. Hadjon emphasized that in the state of law, various types of sanctions can be imposed simultaneously against an act that violates various different legal norms without violating the principle of non bis in idem, as long as the sanctions come from different legal regimes.³⁴ Thus, the revocation of the practice license that will be imposed administratively should not be taken into account as a reduction in the criminal weight imposed in this case.

Based on the perspective of justice for the victim, the three-month sentence is clearly not commensurate with the suffering experienced by the victim in the form of incomplete abortion, hypovolemic shock, and anemia, as well as invaluable psychological impacts. A fair criminal justice system must be able to balance the interests of the victim with the interests of the defendant's rehabilitation, and failure to do this is a form of secondary victimization that is actually carried out by the legal system itself.³⁵ The disproportionate nature of this verdict also cannot be separated from the weakness of the construction of the Public Prosecutor's indictment which uses an alternative form of indictment, even though the complexity of the defendant's actions should encourage the use of cumulative indictments that combine Article 194 of Law Number 36 of 2009 with Article 349 of the Criminal Code concerning the imposition of one-third criminal penalty for midwives who perform abortions, so that the panel of judges has a stronger normative basis to impose a criminal sentence that is more proportional.³⁶

Based on the overall analysis above, it can be concluded that the three-month prison sentence imposed in Decision Number 131/Pid.Sus/2016/PN.Kpg is disproportionate and does not reflect the purpose of the punishment that should be achieved. The mitigating circumstances considered by the judge contain conceptual confusion, the weakness of the construction of the Public Prosecutor's indictment also contributes to a criminal outcome that is far from ideal, and the enormous disparity between the maximum criminal threat and the sentence handed down not only hurts the victim's sense of justice and the community, but also systemically weakens the effectiveness of criminal law as an instrument to prevent the practice of illegal abortion by midwifery personnel in Indonesia.

³¹ Johannes Andenaes, "The General Preventive Effects of Punishment," *University of Pennsylvania Law Review* 114, no. 7 (1966): 949, https://scholarship.law.upenn.edu/penn_law_review/vol114/iss7/2.

³² Adami Chazawi, *Malpraktik Kedokteran: Tinjauan Norma dan Doktrin Hukum* (Malang: Bayumedia Publishing, 2007), 92.

³³ Pengadilan Negeri Kupang, Putusan Nomor 131/Pid.Sus/2016/PN.Kpg, hlm. 31.

³⁴ Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat Indonesia* (Surabaya: Bina Ilmu, 1987), 30.

³⁵ Rena Yulia, *Victimologi: Perlindungan Hukum Terhadap Korban Kejahatan* (Yogyakarta: Graha Ilmu, 2010), 91.

³⁶ Andi Hamzah, *Hukum Acara Pidana Indonesia* (Jakarta: Sinar Grafika, 2014), 178.

Conclusion

Based on the results of the research and discussion, it can be concluded that the Indonesian legal system has established a comprehensive normative framework in prohibiting the practice of illegal abortion by midwifery, but inconsistency in law enforcement remains its main weakness. All elements of the defendant's criminal liability in Decision Number 131/Pid.Sus/2016/PN.Kpg were conclusively fulfilled, including the ability to be responsible, intentionality proven in three gradations at once, and the absence of a reason for criminal expungement. However, the three-month prison sentence imposed was disproportionate because the consideration of mitigating circumstances used by the judge contained conceptual confusion and the construction of the alternative indictment chosen by the Public Prosecutor also contributed to a sentencing outcome that was far from ideal, thus systemically weakening the effectiveness of criminal law as an instrument to prevent the practice of illegal abortion by midwifery personnel in Indonesia.

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