

APPLICATION OF THE LEX SPECIALIS DEROGAT LEX GENERALIS PRINCIPLE IN ABORTION LAW IN INDONESIA

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ABSTRACT

The term abortion or commonly known as abortion is the removal of the results of pregnancy from the uterus that is carried out prematurely. Abortion according to criminal law, namely a crime committed by an act that causes the womb to be born before the time to give birth according to nature. This crime against abortion is also defined as the premeditated murder of a child, where in the abortion there must be a live womb (vrucht) or baby (kidh), which is then killed. The legal arrangements for abortion in Indonesia have overlaps between the Criminal Code and the Law on Health. The Criminal Code as lex Generalis gives illegal status to abortion and prohibits abortion without exception, while Law Number 36 of 2009 as lex Specialis allows abortion in an emergency to save the mother's life, known as abortion provocatus. Lex specialis derogat lex generalis is a legal principle where special regulations can override general rules. The application of the principle of lex specialis derogate lex generalis in abortion law in Indonesia aims to facilitate law enforcement officers in the context of enforcing the crime of abortion itself.

Keywords: The Lex Specialis Derogat Lex Generalis, Abortion Law

INTRODUCTION

At the end of 2018, the Center for Reproductive Rights listed all abortion policies around the world. The indicators that determine whether an abortion can be performed include, among others, laws that explicitly cover a woman's mental health, permitted to have an abortion if a woman is in a rape case, permitted to have an abortion if a woman is in a case of incest, permitted to have an abortion if a woman has a fetal disorder (medical), spouse authorization required, parental authorization required, permitted if a woman had an abortion for additional (medical) reasons, abortion performed on the basis of sex is prohibited in a country, abortion is only permitted to maintain the woman's physical health, abortion is permissible if the law in an obscure state, and federal system; Laws vary at the state level. Apart from the above indicators, there are five regional divisions around the world, namely based on demand (pregnancy limits vary) such as suppressing the population, social or economic reasons of a particular country, for reasons of maintaining health, to save a woman's life, and absolutely forbidden to take any abortion. (Firdhy Esterina Christy, 2019)

In international law, the act of abortion is not regulated clearly or explicitly as a rule of human rights. However, we can find the clearest and clearest statement of women's right to abortion in the text of the Protocol on the Rights of Women in Africa or also known as African Women's Protocol, which was adopted by the African Union on July 11, 2003. At that time, African Women's The Protocol is the only legally binding human rights instrument, which stipulates that abortion is a human right and ensures that women's reproductive rights are human rights. In addition, according to General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights (ICCPR) on the right to life states that state members must provide information when the life and health of pregnant women is threatened. Opportunities for safe, legal and effective abortion, and where the pregnancy could cause pain or suffering to the expectant mother, especially if the pregnancy was caused by rape or incest. (Theresia Elfrida, 2021).

Abortion is an illegal act that violates the law in Indonesia. However, until now there are still many women in Indonesia who have abortions. Based on the results of research by the Guttmacher Institute, it is estimated that there are two million abortions in Indonesia every year. This is due to the large number of women who experience unplanned pregnancies so they choose abortion. The results of the study were compiled based on samples taken from a number of health facilities in six regions of Indonesia. This study reveals that there are 37 abortions in 1,000 women of reproductive age [15-49 years] every year in Indonesia. The prediction figure tends to be quite high when compared to abortion in other Asian countries. Of the 4.5 million births per year in Indonesia, about 760,000 or 17 percent are unwanted or planned. Most abortions are carried out by married women aged 30-39 years with a high school education level. The majority of those who had abortions never used contraception. Several other women had abortions because they wanted to continue their education before getting married. While about four percent of others have abortions to maintain their physical health. (Chelin Indra Susmita, 2020)

The legal arrangements for abortion in Indonesia are contained in the Criminal Code (KUHP) and Law no. 36 of 2009 concerning Health. Legal provisions regarding abortion are contained in Articles 295 to d. 298 The Dutch Penal Code 1881 which was declared null and void after abortion was legalized in the Netherlands with the enactment of the Law on Abortion on May 1, 1981 Stb. 1981, 257 which was later amended by Law on November 6, 1997, Stb. 1997, 510. In the Indonesian Criminal Code which is still valid today, abortion is regulated in Articles 346 to Articles. 349 of the Criminal Code which includes crimes against life, especially the life of a fetus.

It can be seen that the legal regulation of abortion in Indonesia has a dualism between the Criminal Code and the Law on Health whose material substance also has differences in it. The Criminal Code as lex Generalis gives illegal legal status to abortion and prohibits abortion without exception, while Law Number 36 of 2009 as lex Specialis allows abortion in an emergency to save the mother's life, known as abortion provocatus. This is where the legal principle of lex specialis derogat lex generalis plays a role in bridging the differences in these arrangements.

Legal principles often function as a resolution to conflicts between positive legal norms. For example, in the example above, there are a number of laws that are positive laws (both are in effect at one place). If there is a conflict between them, then the principles will appear according to their designation to determine which of the laws should be used as a reference. That is why,

the principle of law is often referred to as legal remedies (legal remedies). Conflicts between norms in statutory regulations can occur due to hierarchical differences (vertical conflicts), for example between the constitution and the law in a formal sense. Also between laws in the formal sense and government regulations, and so on following the level of legislation. It should be noted that all statutory regulations can also be called 'laws in a material sense'. The law in a formal sense is definitely a law in a material sense, but a law in a material sense is not necessarily a law in a formal sense. All laws in this material sense, in legal terminology in Indonesia are called 'statutory regulations'. (Shidarta dan Petrus Lakonawa, 2018).

Based on this background, the focus of the discussion in this paper is on how the criminal responsibility for abortion perpetrators in Indonesia and how the application of the principle of *lex specialis derogate lex generalis* in abortion law in Indonesia.

METHODOLOGY

Normative legal research, namely doctrinal legal research which is also known as library research or document study because this research is carried out or is aimed only at written regulations or legal materials. (Soerjono Soekanto and Sri Mamudji, 2004). The nature of the research used in this paper is descriptive analytical, which is a method that functions to describe or provide an overview of the object under study through information or samples that have been collected as they are without analyzing and making conclusions that apply to the public.. (Sugiono, 2009).

The legal materials used in this study are primary legal materials, namely legal materials related to statutory regulations and judges' decisions, then secondary legal materials, namely textbooks containing the basic principles of legal science and classical views of scholars who have high qualifications and tertiary legal materials, namely materials that provide instructions and explanations for primary and secondary legal materials. (Peter Mahmud Marzuki, 2011).

Information collection techniques used in this paper are library research techniques, namely research conducted based on reading sources such as laws, books, scientific research, scientific articles, mass media, and legal journals related to the subject matter. discussed in this paper. Information analysis used in this study is qualitative information analysis, where the information collected is not in the form of numbers that can be measured. However, based on the legislation to answer the problems of this research. Qualitative analysis produces descriptive information, by drawing information from inductive to deductive in terms of what is stated by the research target concerned in writing, verbally and real behavior.

DISCUSSION

Criminal Accountability Against the perpetrators of the Crime of Abortion in Indonesia

Criminal liability leads to the punishment of the perpetrator, if he has committed a criminal act and fulfills the elements that have been determined in the law. Viewed from the point of view of the occurrence of a prohibited action (required), a person will be held accountable for these actions if the action is against the law (and there is no exclusion of unlawful nature or *rechtsvaardigingsgrond* or forgiving reasons) for that person from the point of view of the ability to be responsible then only someone who is capable of being held accountable can be punished.

Criminal liability is an assessment carried out after all elements of a crime have been fulfilled or a crime has been proven. This assessment is carried out objectively and subjectively, the assessment is objectively related to the maker and the legal norms that he violates, so that related to actions and moral values it deserves to be reproached. An objective assessment is made of the maker that certain psychological conditions have violated morality, whether it is blameworthy or not. So it can be concluded that criminal liability is the responsibility or action taken by someone who can be accounted for as a criminal act or not. In criminal liability, a person must have subjective and objective elements so that he can be punished or be held accountable for this crime because the person has committed a crime. (Devi Arieftha Cahyani & Dr.Chepi Ali Firman Z, 2021)

The criminal responsibility system in Indonesian criminal law currently adheres to the principle of error as one of the principles in addition to the legality principle in Article 1 of the Criminal Code. Criminal liability is a form of action from the perpetrator of a crime against the mistake he did. Thus the occurrence of criminal liability because there is an error which is a criminal act that has been committed by someone, and there are rules that regulate the crime.

In their book on the principles of criminal law in Indonesia and their application, E.Y.Kanter and S.R.Sianturi explain that the elements of being responsible include: (EY. Kanter & SR Sianturi, 2012)

a. State of the soul:

1. Not bothered by persistent or temporary disease (temporary)

2. No defects in growth (stupid, idiot, limbecile, etc.), and

3. Not disturbed by surprise, hypnotism, anger overflowing, subconscious influence / reflex *bewenging*, *melindur* / *slaapwandel*, disturbing because of fever / *koorts*, cravings and so on. In other words, he is conscious.

b. Soul ability:

1. Can realize the nature of his actions;

2. Can determine his will for the action, whether to be carried out or not; and

3. Can find out the faults of the action.

A person who commits a criminal act will only be punished if he is legally and convincingly proven to have made a mistake, there is no point in holding the defendant accountable for his actions if the act itself is not against the law, then furthermore it can also be said that first there must be certainty about the existence of a crime. criminal act, and then the elements of error must also be linked to the criminal act committed, so that for an error that resulted in the conviction of the defendant, the defendant must: (Anggara Faisal, 2017)

1. Commit a criminal act;

2. Able to be responsible;

3. By intention or negligence; and

4. There is no excuse for forgiveness.

Based on the description above, if the four elements mentioned above are present, then the person concerned or the perpetrator of the crime can be declared to have criminal responsibility, so that he can be punished.

For the crime of abortion which is classified as a "crime", the types of criminal sanctions that can be threatened are as follows:

1. Imprisonment or fines as referred to in Article 283 paragraphs (1) and (2), and Article 283 paragraphs (1) and (2), and Article 299 paragraphs (1) and (2), except for Article 283 paragraph (3) which is punishable by imprisonment or imprisonment or a fine.
2. Imprisonment only as contained in Articles 346, 347, and 348.
3. Imprisonment with a weighting of one third and accumulated with additional punishment in the form of revocation of the right to work as a doctor, midwife, or medicine interpreter as stated in Article 349 of the Criminal Code

The crime of abortion which is categorized as a "crime", either a "crime of morality" or a "crime against life", is punishable by imprisonment or a fine. Meanwhile, the crime of abortion which is categorized as a "violation" is threatened with imprisonment or a fine as seen in Article 535 of the Criminal Code.

While the criminal sanctions against the crime of abortion regulated in the Health Law no. 36 of 2009 are as follows:

1. The Crime of Deliberately Taking Actions on Pregnant Women (Article 194). 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).
2. Criminal Acts of Health Service Facility Leaders and/or Health Workers Not Providing First Aid to Patients in Emergency Conditions (Article 190) (1) Sentenced to imprisonment for a maximum of 2 (two) years and a fine of a maximum of Rp. 200,000,000,00 (two hundred million rupiah). (2) Sentenced to a maximum imprisonment of 10 (ten) years and a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah).

Based on the legal arrangements for abortion, both in the Criminal Code and in the Health Act, both of them use a fixed/indefinite sentence system in which the formulation of criminal sanctions only includes the maximum sentence without mentioning the minimum sentence.

Application of the Lex Specialis Derogat lex Generalis Principle in Abortion Law in Indonesia

Efforts to control abortion as regulated in the Criminal Code are actually very adequate and even very serious, so that what Oemar Seno Adji said is correct that the Indonesian criminal law regarding abortion has an "illegal" status because it prohibits abortion without exception. Thus, the Criminal Code does not distinguish between abortion provocatus criminalis and abortion provocatus medicinalis/therapeuticus. This is different from the legal regulation of abortion contained in Law Number 36 of 2009 concerning Health where abortion is permitted to be carried out under certain conditions. Abortion regulated in Article 75 paragraph (2) of the Health Law is a type of abortion provocatus therapeuticus, namely the intentional termination of pregnancy from the outside, usually carried out to save the mother's life by doctors because pregnancy endangers the mother's life (Ibnu and Arianto, 2005). This type of abortion cannot be categorized as a crime because it has been excluded from the prohibition on abortion in the Health Law. Such a situation certainly creates confusion in terms of enforcement of the abortion law itself.

Basically everyone is prohibited from having an abortion based on Article 75 paragraph (1) of Law Number 36 Year 2009 concerning health. However, there are exceptions to the prohibition on abortion, namely in Article 75 paragraph (2) of the Health Law Number 36 of 2009, under the following conditions:

1. Indications of a medical emergency detected at an early age of pregnancy, both those that threaten the life of the mother and/or fetus, who suffer from severe genetic diseases and/or congenital defects, or which cannot be corrected so that it is difficult for the baby to live outside the womb; or
2. Pregnancy due to rape which can cause psychological trauma for rape victims.

Lex specialis derogat lex generalis is a legal principle where special regulations can override general rules. Former Chief Justice of the Constitutional Court, Jimly Asshidique, explained that in this principle, legal norms that are specific in nature can ignore legal norms of a general nature. Lex specialis derogat lex generalis can be used in resolving the conflict of norms that occur. This principle is important for law enforcers to apply the most appropriate rules in resolving conflicts between fellow laws and regulations. (Jimly Asshidique, 2010)

According to the former Chief Justice of the Supreme Court, Bagir Manan, there are several principles that must be considered in the application of lex specialis derogat lex generalis, namely: (Bagir Manan, 2004)

1. The provisions found in the general rules will still apply, except for those specifically regulated in the special legal rules.
2. Provisions of a specific nature must be equal to provisions of a general nature. For example, law by law.
3. Provisions of a specific nature must be in the same legal environment as provisions of a general nature. For example, the Commercial Code and the Civil Code both belong to the civil law environment.

Article 63 of the Criminal Code ("KUHP") states that:

1. If an act falls under more than one criminal law, only one of those rules will apply; if they are different, they will be imposed which contains the most severe basic criminal threats.
2. If an act is included in a general criminal code, it is also regulated in a special criminal rule, then only the specific one will be applied.

Memorie van Toelichting (MvT) stated that: Indien het eene strafbare feit slechts is eene bijzonder genoemde soort van het andere, en dus uit zijnen aard daaronder reeds is begrepen, dan geldt de regel lex specialis de ongate of ligz specialis lichter wordt gestraft en het genus, en onverschilg of zij al and niet een eigen naam heeft. (If a crime is only one particular type of another act, and the meaning has been understood, then the lex specialis derogat legi generali rule applies, regardless of whether the particular punishment is heavier or lighter than the general one, and regardless of whether he has his own name).

The meaning of lex specialis in Article 63 paragraph (2) of the Criminal Code, as confirmed by Masruchin Ruba'i, et al, which states that there are two definitions of special criminal rules in Article 63 paragraph (2) of the Criminal Code. First, what is

meant by special criminal rules is a criminal rule that contains all elements of a general criminal provision and is added to the existence of one or several special elements. Second, regarding special criminal rules, it has a broader meaning than the first understanding, which includes other rules that have no direct relationship with the form of aggravated or alleviated a crime, but between general criminal rules and special criminal rules there must still be equality of elements, meaning that in specific criminal rules there must be elements of general criminal rules. (Masruchin Ruba'i, 2015).

In this regard, if referring to Article 63 paragraph (2) of the Criminal Code above, the answer is very clear that what is applied is a special regulation (*lex specialis*), the *in quo* provision is the application of the *lex specialis derogat legi generali* principle derived from Roman law. adopted in Indonesian criminal law.

Adami Chazawi said that if the special criminal provisions were dealing with general criminal provisions, it could result in/become the opposite or exception to the absorption system, meaning that the judge was then forced not to choose the heaviest principal criminal threat but instead chose a special one which in fact the punishment was lighter than the criminal provisions. generally. Simply put, if there is an idealist consensus, one of which is a *lex specialis* rule, the focus is not on the heaviest criminal, but the focus is on a *lex specialis* rule without seeing the threat of a heavier or lighter punishment when compared to the rules that are *lex specialis general* (*lex generalis*). (Adami Chazawi, 2011)

Eddy OS Hiariej said that: From a political perspective of criminal law, the existence of the *lex specialis derogat legi generali* principle is actually a decisive legal principle in the application stage. This stage is the stage of applying criminal laws and regulations that have been violated to concrete events (*ius operatum*) through the law enforcement process. Therefore, the *lex specialis* principle becomes important for law enforcement officers when they will apply criminal laws and regulations to the criminal cases they handle. Meanwhile, Purnadi Purbacaraka and Soerjono Soekanto, explained that: The purpose of the principle of *lex specialis derogat legi generali* is that for special events it is mandatory to apply a law that mentions the event, although for such special events a law can also be applied which mentions more serious events. broad or more general that can cover the particular event. (Rubiyanto, 2018)

Based on the explanation and analysis of the regulations above, it can be seen that in terms of law enforcement on abortion in Indonesia, it uses Law Number 36 of 2009 concerning Health as a *lex specialis* and sets aside the Criminal Code as a general rule/*lex generalis*.

CONCLUSION

1. Criminal liability for abortion perpetrators is regulated in Article 299 and Article 346 to Article 349. The Criminal Code and Article 190 and Article 194 of the Health Law Number 36 of 2009. Based on these provisions, those who can be subject to crime are pregnant women, perpetrators other than pregnant women, and people who intentionally treat or order abortions.
2. The Health Law is a *lex specialis* of the Criminal Code so that based on the principle of *lex specialis derogat legi generali*, the Health Law which is special (*lex specialis*) overrides the general Criminal Code (*lex generalis*). This means that the criminal provisions for illegal abortion in the Criminal Code do not apply in terms of law enforcement on abortion which are excluded by the Health Law.

REFERENCES

- Adami Chazawi. (2011). *Pelajaran Hukum Pidana Bagian 2*. Jakarta: Rajawali Pers
- Anggara Faisal. (2017). *Pertanggungjawaban Pidana Terhadap Tindak Pidana Aborsi Berdasarkan Kitab Undang-Undang Hukum Pidana dan Undang-Undang No 36 Tahun 2009 tentang Kesehatan*. Medan : Fakultas Hukum Universitas Medan Area
- Bagir Manan. 2004. *Hukum Positif Indonesia: Satu Kajian Teoritik*. Yogyakarta: FH UII Press.
- EY Kanter & SR Sianturi. (2012). *Asas-Asas Hukum Pidana di Indonesia dan Penerapannya*. Jakarta : Storia Grafika
- Jimly Asshiddiqie. 2010. *Konstitusi dan Konstitusionalisme Indonesia*. Jakarta: Sinar Grafika.
- Masruchin Ruba'i, dkk. (2015). *Buku Ajar Hukum Pidana*. Malang: MNC Publishing,
- Peter Mahmud Marzuki. (2011). *Penelitian Hukum*. Jakarta : Kencana
- Soerjono Soekanto & Sri Mamudji. (2004). *Penelitian Hukum Normatif Cetakan ke-8*. Jakarta : PT Raja Grafindo Persada
- Sugiono. (2009). *Metode Penelitian Kuantitatif, Kualitatif, dan R&D*. Bandung : Alfabeta
- Theresia Elfrida. (2021). *Analisis Studi Kasus Legalisasi Aborsi berdasarkan Hukum Internasional dan Konsep Liberalisme*. Universitas Airlangga : Departemen Ilmu Hubungan Internasional
- Ibnu, Herdiyana dan Henry Arianto. (2005). *Abortus dalam Hukum Pidana Indonesia*. *Jurnal Lex Jurnalica*. Vol. 3 Nomor 1
- Devi Ariefta Cahyani, Dr.Chepi Ali Firman Z (2021). *Pertanggungjawaban Pidana Pelaku Aborsi Dihubungkan Dengan Undang-Undang Nomor 36 Tahun 2009 Tentang Kesehatan*. *Prosiding Ilmu Hukum Volume 7 No 1*
- Chelin Indra Susmita. (2020). *Ngeri! 2 Juta Janin Diaborsi di Indonesia Tiap Tahun*. Diakses melalui <https://www.solopos.com/ngeri-2-juta-janin-diaborsi-di-indonesia-tiap-tahun-1047436>
- Firdhy Esterina Christy. (2019). *Hukum aborsi di Dunia*. Diakses melalui <https://data.tempo.co/data/492/hukum-aborsi-di-dunia>
- Rubiyanto. (2018). *Lex Specialis Derogat Legi Generali*. Diakses melalui <https://www.rubi.web.id/2018/06/lex-specialis-derogat-legi-generalis.html>
- Shidarta dan petrus lakonawa. (2018). *Lex Specialis Derogat Lex Generalis : Makna dan Penggunaannya* . Diakses melalui <https://business-law.binus.ac.id/2018/03/03/lex-specialis-derogat-legi-generalis/>

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