



Legal Review of Medical Emergencies Arising Due to Failure of Abortion

Rizky Nurlailatul Wachidah

Magister of Law, University of Hang Tuah, Indonesia

*Corresponding Author: Rizky Nurlailatul Wachidah

Email: rizkynurlailatul@yahoo.com



Article Info

Article history:

Received 18 January 2021
Received in revised form 9
February 2021
Accepted 24 February 2021

Keywords:

Failure
Abortion
Pregnancy
Medical Emergencies
Doctor

Abstract

The purpose of this article is to investigate the legal responses to botched abortions. The main characteristics of this style of study are normative juridical, with a combination of a philosophical framework and legislation. Following the outcome of the abortion attempt, Article 53 of the Criminal Code was violated, along with those who assisted in the procedure and those who were victimized. Should an abortion result in the baby's death under article 346, 347, 348, and 349 of the Criminal Code Criminals may commit the crimes individually or in tandem. Hence, they are justly prosecuted, so that they can be designated as criminals or assistants. Article 50 was developed in response to failures by the abortion business; and it can't be penalized unless done in compliance with technical and organizational quality procedures. In general, you do not need a permit to use emergency measures. This does not extend to abortions carried out on the basis of medical emergencies except during counselling prior to and during the act of abortion in compliance with Article 75 of Law No. 36 of 2009.

Introduction

The legal status of abortion is an important indicator of women's ability to enjoy their reproductive rights. Legal restrictions on abortion often lead to high rates of illegal and unsafe abortion, and there is a link between unsafe abortion and maternal mortality. The Health Law (hereinafter abbreviated as UUK) and Government Regulations (hereinafter abbreviated as GR) also allow abortion because there are indications of medical emergencies detected from an early age in pregnancy, both those that threaten the life of the mother and/or the fetus with birth defects making it difficult to live outside the womb.

Efforts to prevent unsafe abortion from occurring are very important if Indonesia wants to achieve the fifth goal of the Millennium Development Goal (hereinafter abbreviated as MDGs) to reduce the Maternal Mortality Rate (hereinafter abbreviated to MMR) to 102 per 100,000 live births by 2015.

According to the Ministry of Health of the Republic of Indonesia in 2004, the causes of high maternal and infant mortality due to complications of pregnancy and childbirth are bleeding 45.2%, hypertension (preeclampsia and eclampsia) 12.9%, abortion 11.1%, postpartum sepsis 9.6%, prolonged labor 6.5%, anemia 1.6%, and 14.1% indirect cause of death. In Indonesia, abortion is the fifth leading cause of maternal death after bleeding 28%, eclampsia 24%, infection 11%, and complications during the puerperium 8%.

It is estimated that 4.7% - 13.2% of maternal deaths are attributed to unsafe abortion and each year around 7 million women are admitted to hospitals in developing countries due to unsafe abortion.

Medical abortion is the discharge of the product of conception before the fetus can live outside the womb, namely before 20 weeks and/or the fetus weighs less than 500 grams. In the medical

approach, abortion consists of two types, namely spontaneous abortion (abortion spontaneous) and abortion on purpose (abortion provocateurs). Abortion provocateurs are the termination or removal of the pregnancy results from the uterus prematurely. So far, the problem of abortion is generally considered by some people as a criminal act. However, in the positive law of Indonesia, abortion in certain cases is justified if it is a provocateur medicinalis abortion. Meanwhile, generalized abortion into a criminal act is better known as abortion provocateurs criminals.

Abortion and unwanted pregnancy are neglected problems in many developing countries, including Indonesia. As health workers who are integrated into the community, midwives are often visited by women with this problem. The causes of abortion and unwanted pregnancy include ignorance of their reproductive system, victims of rape, lack of knowledge about reproductive health, and contraceptive failure.

In Indonesia, abortion is regulated by several types of laws and regulations. Previously, the act of abortion was regulated in Article 15 of Law Number 23 of 1992 concerning Health which was later replaced by Law Number 36 of 2009 concerning Health, namely in Article 75.

The provisions in the KUHP are based on the idea that a child who is still in the womb is a legal subject so that he has the right to legal protection. Also, when viewed from the human rights aspect, everyone has the right to live and defend his life, so that abortion can qualify as an act that violates human rights. In other words, some thoughts prioritize children's rights to be guarded and protected. Therefore, in the Criminal Code, abortion qualifies as a crime against life.

Methods

This study using a normative juridical research type with a conceptual approach and a statutory approach. Conceptual approach is defined as a methodology wherein this article is conducted by observing and analysing already present information on a given topic. A statutory approach is used by learning all the law regulations related to abortion.

Results and Discussion

Definition of Abortion.

The word abortion comes from the Latin abortion which means miscarriage. Abortion is defined as the spontaneous or induced termination of a pregnancy before the baby can live his life. The National Center for Health Statistics, The Center for Disease Control and Prevention, and The World Health Organization all define abortion as terminating a pregnancy before 20 weeks of gestation or with a baby weighing less than 500 grams.

Abortion Classification.

William Obstetrics' classification of abortion is (1) Spontaneous abortion, Spontaneous abortion is divided into imminent abortion, incipient abortion, incomplete abortion, incomplete abortion, complete abortion, missed abortion, and septic abortion. (2) Recurrent Abortion (3) Induced abortion (Cunningham et al., 2010).

This provocative abortion is divided into 2 groups, namely the medicinal provoke abortion and the criminal provocateurs abortion, called a medicinal if it is based on the doctor's consideration to save the mother. From a legal perspective, abortion provocateurs can be classified into two types, namely (1) Legal abortion, namely abortion which is carried out according to the conditions and methods justified by law. The basic reason is to save the life of a pregnant woman; (2) Illegal abortion provocateurs, namely abortion which contains elements of a crime and does not meet the requirements and methods justified by law.

Legal Effects on Abortion in Indonesia.

Abortion is an act that disturbs the morality and religion of Indonesian society because if it is examined from a cultural, social, or religious perspective, abortion is not justified (Dewi & Suhandi 2011). The success or failure of law enforcement depends on three elements in the legal system, namely the substance (substance culture), structure (structure culture), and legal culture (legal culture) (Farelya, 2018).

Regulations related to abortion in Indonesia are regulated in several laws and regulations, namely : (1) The KUHP Articles 53, 299, 346, 347, 348, and 349. In Article 299 of the Criminal Code, the hope is that because of the treatment, the pregnancy can be aborted. Acts that are regulated as criminal acts that correlate with the act of abortion are more focused on the act of treating a woman who is pregnant or the act of ordering the woman to be treated in the hope that from the treatment her pregnancy can be aborted. According to Article 346, there is an element of intention. Therefore what is meant by "deliberately" is having the intention or desire to do something. Intentionally, in the criminal act of abortion, it can be in the form of taking high doses of menstrual-releasing drugs, inserting sharp objects into their genitals to abort the womb. Also, there is an element of "causing the womb to fall or die," meaning that the fetus in the woman's womb comes out prematurely as a result of coercion or an act done on purpose so that the fetus dies or dies (Jurdi, 2016).

Therefore, in this Article, aborting the womb means a fetus that is forced out of the mother's womb in a dead state. The KUHP only sees abortion as an act of killing a life, therefore abortion is regulated in Chapter XIX Book II of the KUHP which regulates crimes against life, and Chapter IV Book III of the KUHP which regulates immorality violations. Related to Articles 346, 347, 348 of the Criminal Code, it includes the following actions: "aborting the womb (driving van de vouch or vouch driving) and killing the womb (de dood van de vrucht veroorzaken or vrucht doden)". The KUHP does not explain the meaning of the womb, even the KUHP does not explain the difference in terms of aborting and terminating the womb. The meaning of this content is very important, meaning that it is the basis for the analysis of Articles 346, 347, 348 of the KUHP to determine when an act can be said to abort the womb or when an act is said to kill the womb. (2) Law Number 36 the Year 2009 concerning Health Article 75 and Article 76. According to the Criminal Code (Articles 299, 346, 347, 348), every act of killing or aborting a woman's womb is punishable without exception and for any reason. Like the Criminal Code, Law Number 36 the Year 2009 concerning Health basically prohibits abortion.

The difference is, according to the Criminal Code, abortion is prohibited without any exceptions including the abortion of the medicinal provocateurs, while Law Number 36 of 2009 concerning Health provides an exception that abortion can be performed for reasons or indications listed in article 75 paragraph 2. If it is based on Article 75 paragraph 1, that every form of abortion is prohibited. This principle is the same as the Criminal Code. The reason or indication of abortion according to Article 75 paragraph 2 is the basis that eliminates the unlawful nature of abortion, therefore it cannot be punished. The Health Law (hereinafter abbreviated as UUK) does not explain what is meant by a medical emergency as the basis for performing an abortion. According to the author, there should be a limit to the notion of medical emergencies itself, because along with the advancement of science and technology in the medical world, there have been many maternal and fetal health conditions that have been overcome or vice versa, there are the same maternal and fetal health conditions. Once it occurs, the abuse of abortion in the name of a 'medical emergency' can be minimized.

Starting from the elements above, the UUK does not differentiate between subjects who do

abortion, whether ordinary people or medicine, midwives, or doctors. The criminal imposition system is also an accumulation of imprisonment and fines (Kusmaryanto, 2002).

Government Regulation Number 61 of 2014 concerning Reproductive Health Articles 31, 32, 33, and 35. Unlike the Criminal Code, which does not mention the exclusion reasons for abortion, both in PP No. 61/2014 on Reproductive Health and Law No. 36/2009 on Health, it is stated that there are exceptions to perform an abortion. Exceptions to the procedure for abortion can be made for indications of a medical emergency that could threaten the life and health of the mother or fetus. Apart from that, pregnancy due to rape is also one of the exceptions where an abortion can be performed. In connection with this problem, agreement regarding medical or health indications is actually not clear within the medical community itself. Medical indications that are commonly used are based on the patient's clinical condition without paying attention to social factors.

Medical indications in the narrow sense are very limited to vital indications, namely abortion which is performed to save the life of a pregnant mother because of the danger of death which cannot be avoided by any means except by abortion (Say et al., 2014). Medical indications in a broad sense are indications for the safety or health of the mother. Medical indications from this abortion are always associated with efforts to maintain maternal health and or fetus (Wagiyo et al., 2016). From the applicable regulations and analysis of the above-mentioned regulations, it will be used to answer the problem formulations in this chapter. Based on the theory of the legal system by Friedman, the legal system cannot run without one of the three elements of the legal system, namely substance, structure, legal culture. The legal substance which includes the laws and regulations described above must be obeyed by the doctor to create justice, order, and benefit (Efendi & Makhfudli, 2009). Doctors who treat patients who try to scrape their wombs must also obey the law, and that compliance is practiced by saving the patient and the patient's fetus (Winoto, 2020). The legal structure which includes law enforcement officials also determines whether or not the law can be implemented properly. Therefore, for the law to run or be upright, it is necessary to have a credible, competent, and independent law enforcement apparatus.

Legal Protection for Doctors

(1) Law Number 29 of 2004 concerning Medical Practice Article 50 and Article 51; (2) Law Number 36 of 2014 concerning Health Workers Article 57 and Article 75; (3) Law Number 44 of 2009 concerning Hospitals Article 29.

Based on the prevailing laws and regulations in Indonesia, doctors have the right to legal protection as long as they carry out professional standards and standard operating procedures, especially in this study, medical emergencies that arise as a result of a patient failing to perform an abortion attempt.

If a patient who fails to attempt an abortion and a medical emergency arises is brought to the hospital, the patient will receive early help from the general practitioner on duty. In carrying out their profession, doctors are bound by legal provisions. During treatment at the ER, if the pregnant woman and/or the womb dies, the treating doctor has both civil and criminal responsibility.

The relationship between doctor and patient in a civil law agreement is included in the category of engagement based on the effort or maximum effort of the multibintenis inspectors). This is different from the bond that belongs to the category of binding based on the work result (resultaatsverbintenis). The patient must have evidence of harm due to non-fulfillment of the doctor's obligations by the applicable medical professional standards in a therapeutic contract.

The relationship between doctors and patients in therapeutic transactions (medical agreements) rests on two kinds of human rights which are basic human rights, namely the right to self-determination and the right to information (Astuti & SH, 2009). The therapeutic contract legal relationship is interpreted differently by the law even though in principle it is the same, namely the relationship between patients and medical personnel. UU no. 36 of 2009 concerning Health states that the parties to a therapeutic contract are patients with health workers, whereas Law no. 29 of 2004 concerning Medical Practices states that the parties to a therapeutic contract are patients and doctors or dentists.

In its implementation, this therapeutic agreement must be preceded by approval for the action of a health worker or doctor, or dentist on the patient, which is commonly called informed consent. The term transaction or therapeutic agreement is not known in the Civil Code, but the elements contained in a therapeutic agreement can also be categorized as an agreement as explained in article 1319 of the Civil Code, that for all agreements, whether they have a special name or are not well known under a certain name, subject to the general rules regarding the engagement in general. Apart from that, the general provisions regarding the engagement are based on the principle of freedom of contract which is regulated in Article 1338 jo. Article 1320 of the Civil Code, namely the main principles and validity of the agreement.

A valid agreement is an agreement that meets the requirements stipulated by law. A valid agreement is recognized and given a legal consequence or is also called a legally concluded contract. According to article 1320 of the Civil Code, the legal terms of the agreement are (1) There is an agreement of the will between the parties who have agreed (consensus) (2) There is the ability of the parties to agree (capacity). There is a certain thing (object) (3) There is a lawful cause (causa).

The first and second terms of article 1320 of the Civil Code are called subjective requirements because they are attached to the person who is the subject of the agreement. If these conditions are not met, the agreement can be canceled. But if the judge is not asked to cancel the agreement, the agreement will still be binding on the parties who agreed, even though the cancellation article is threatened before it has passed the five-year period of article 1454 of the Civil Code for the patient's recovery. Indirectly, as a result of this agreement, there will be an agreement between the two parties. Both parties agreed and promised to do something in the field of medicine or health. As a result of this agreement and agreement, there will be an agreement between the two parties, namely the doctor and the patient.

In the law, it is explained that what is meant by an engagement is a legal relationship between two or more people, with one party having the right to demand something from the other party, while the other party is obliged to fulfill that demand.

From this provision, it can be seen that in health services there is a relationship between the patient or the patient's family who asks for help and the doctor who with their expertise and skills can fulfill the assistance requested by the patient or the patient's family. In this case, it is said that the patient or family demands an achievement from the doctor.

A thing that can be sued is called an achievement and usually arises as a result of an engagement. According to article 1234 of the Civil Code, "Every engagement is to give something, to do something, or not to do something". In the doctor-patient bond, the main achievement is "doing something" even though in certain cases the achievement can "not do something".

In the medical field, doctors and society realize that doctors can't guarantee that treatment efforts will always be successful as desired by patients or their families. What a doctor can give is the maximum effort based on his ability and knowledge to help patients. The result of

these efforts is not a certainty of a cure. This is because the patient's immune system is not the same, the severity of the disease when the patient comes to the doctor or hospital also affects them, and the sensitivity or side effects of the drug for each patient are not the same.

The criminal responsibility of a doctor along with the increasing legal awareness of the community creates many problems, especially those related to negligence based on theories of error in criminal law. Criminal responsibility here arises if it can first be proven that there is a professional error, for example, an error in diagnosis or an error in the method of treatment or treatment. Mistakes or omissions will always be related to the unlawful nature of an act committed by a person who can take responsibility.

About the ability to be responsible in determining that a person is guilty or not according to the law, it is determined by three factors, namely the inner state of the person who did it, the meaning is that the perpetrator is aware that the act committed is an act prohibited by law and there is a relationship. the mind between the perpetrator and the deeds committed, namely in the form of *dolus* (deliberately) or *culpa* (negligence/negligence), as well as the absence of excuses.

Regarding negligence, it includes two things, namely because of doing something that should not be done or because it is not doing something that should be done. Errors or negligence of health workers can occur in the field of criminal law, as regulated in articles 263,267, 294 paragraph 2, 299, 304, 322, 344, 347, 348, 349, 351, 359, 360, 361, and 531 KUHP.

The important difference between ordinary crime and medical crime. In ordinary criminal acts, the main concern is the effect, while in medical crimes, the cause is concerned (Immergluck & Smith, 2006). Although the consequences are fatal, if there is no element of negligence or error, doctors cannot be blamed. An abortion that is performed without medical indication is an example of criminal malpractice that is deliberate. Regarding abortions without medical indication, although the reality on the ground is that many cases occur, not many cases have reached the courts.

In the medical law literature with the Anglo Saxon legal system it is said that a new doctor can be blamed if he meets 4D requirements, namely: duty, derelictions of that duty, damage, and direct causal relationship.

In carrying out medical practice, it is mandatory for doctors to make medical records and if medical action is to be performed, and informed consent is required. According to Permenkes No. 269 / MENKES / PER / III / 2008 concerning Medical Records, a medical record is a file containing notes and documents about patient identity, examination, treatment, actions, and other services that have been provided to patients. Meanwhile, according to Permenkes No. 290 / MENKES / PER / III / 2008 concerning Approval of Medical Action, approval for medical action is an approval given by a patient or immediate family after receiving a complete explanation of medical or dental action to be performed on the patient. The use of medical records and informed consent is when verification is needed.

If it can be proven that the doctor has treated the patient with the utmost effort to save the patient's life, then the doctor can medically and legally say that the doctor is doing his job and not breaking the law even though the baby died and it can be proven that the doctor did not violate the standard operating procedure and don't commit malpractice.

The important difference between ordinary crime and medical crime. In ordinary criminal acts, the main concern is the effect, while in medical crimes, the cause is concerned. Although the consequences are fatal, if there is no element of negligence or error, doctors cannot be blamed. An abortion that is performed without medical indication is an example of criminal

malpractice that is deliberate (Filkins, 2001; Vuletić, 2019). Regarding abortions without medical indication, although the reality on the ground is that many cases occur, not many cases have reached the courts.

In the medical law literature with the Anglo Saxon legal system it is said that a new doctor can be blamed if he meets 4D requirements, namely: duty, derelictions of that duty, damage, and direct causal relationship.

In carrying out medical practice, doctors are obliged to make medical records and if medical action is to be performed, informed consent is required. According to Permenkes No. 269 / MENKES / PER / III / 2008 concerning Medical Records, a medical record is a file containing notes and documents about patient identity, examination, treatment, actions, and other services that have been provided to patients. Meanwhile, according to Permenkes No. 290 / MENKES / PER / III / 2008 concerning Approval of Medical Action, approval for medical action is an approval given by a patient or immediate family after receiving a complete explanation of medical or dental action to be performed on the patient. The use of medical records and informed consent is when verification is needed.

If it can be proven that the doctor has treated the patient with the utmost effort to save the patient's life, then the doctor can medically and legally say that the doctor is doing his job and not breaking the law even though the baby died and it can be proven that the doctor did not violate the standard operating procedure and don't commit malpractice.

In Indonesia, abortion as a choice is still considered as a forbidden things. The abortion that allowed is only abortion with medical indication. Even if someone was raped, one can not terminate their pregnancy without medical emergency.

Conclusion

If the abortion does not result in the termination of the pregnancy, then a KUHP Article 53 paragraph 1 because it is included in an attempt to commit a crime. Even though it only informs or raises an expectation that someone's abortion can be threatened with Article 299 of the Criminal Code. If the abortion is carried out by the pregnant woman herself and causes the baby to die, the mother is threatened with Article 346 of the Criminal Code. Meanwhile, if the abortion was carried out by another person and resulted in the death of the mother and baby, then he would be threatened with article 347 or 348 of the Criminal Code. If the other person is a doctor, midwife, or mediator, based on Article 349 of the KUHP, the penalty can be added by one-third and the case for searching can be revoked. For someone who does, orders to do participates in, gives or promises something by abusing power or dignity, by using violence, threats or misdirection, or by giving opportunities, means, or information, deliberately encouraging other people to commit acts which are threatened by the Criminal Code Article 55 as Meanwhile, a person who deliberately provides assistance, opportunity, means and information to commit a crime is threatened with Article 56 of the Criminal Code and sentenced to assist a crime. The criminal threat for abortion perpetrators is also stated in Article 194 of the Health Law, which can ensnare anyone who deliberately has an abortion. Medical services by Law No. 36 of 2009 About Health, and Law No. 44 of 2009.

References

- Astuti, E. K., & SH, M. (2009). *Transaksi Terapeutik dalam Upaya Pelayanan Medis di Rumah Sakit*. Citra Aditya Bakti.
- Cunningham, F. G. H. J., Leveno, K. J., Bloom, S. L., Hauth, J. C., Rouse, D. J., & Spong, C. (2010). *Williams Obstetrics*. McGraw-Hill. *New York*.

- Dewi, R. W. L., & Suhandi, S. (2011). Aborsi bagi Korban Pemerkosaan dalam Perspektif Etika Profesi Kedokteran, Hukum Islam dan Peraturan Perundang-undangan. *Perspektif*, 16(2), 74-81.
- Efendi, F., & Makhfudli, M. (2009). *Keperawatan Kesehatan Komunitas: teori dan praktik dalam keperawatan*. Thesis, Universitas Airlangga.
- Farelya, G. (2018). *Etikolegal dalam Pelayanan Kebidanan*. Deepublish.
- Immergluck, D., & Smith, G. (2006). The impact of single-family mortgage foreclosures on neighborhood crime. *Housing Studies*, 21(6), 851-866.
- Jurdi, F. (2016). *Teori Negara Hukum*. Malang: Setara Press.
- Kusmaryanto, C. B. (2002). *Kontroversi aborsi*. Grasindo.
- Say, L., Chou, D., Gemmill, A., Tunçalp, Ö., Moller, A. B., Daniels, J., ... & Alkema, L. (2014). Global causes of maternal death: a WHO systematic analysis. *The Lancet global health*, 2(6), e323-e333.
- Wagiyo, N., Kp, S., Kep, M., Mat, S., & Putrono, S. K. (2016). *Asuhan Keperawatan Antenatal, Intranatal dan Bayi Baru Lahir Fisiologi dan Patologis*. Penerbit Andi.
- Winoto, E. (2020). Tinjauan Hukum Terhadap Kegawatdaruratan Medis Yang Timbul Akibat Kegagalan Usaha Aborsi. *Jatiswara*, 35(1).
- Filkins, J. A. (2001). " With No Evil Intent": The Criminal Prosecution Of Physicians For Medical Negligence. *Journal of Legal Medicine*, 22(4), 467-499.
- Vuletić, I. (2019). Medical Malpractice as a Separate Criminal Offense: a Higher Degree of Patient Protection or Merely a Sword Above the Doctors' Heads? The Example of the Croatian Legislative Model and the Experiences of its Implementation. *Medicine, Law & Society*, 12(2), 39-60.