

Legal Responsibility of Obstetric and Gynecological Doctor for Abortion with Indication of Fetal Deffects

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Abstract

An undeveloped fetus in the mother's womb leads to congenital disabilities where the baby can be fully dependent on his mother. Fetal defects in the Health Law are included in medical emergencies to be treated with full requirements and provisions regulated by law. Article 32 paragraph (1) points (a) and (b) of the Government Regulation on Reproductive Health explains the scope of indications of medical emergencies include a condition where it threatens the lives of mothers and babies and babies with disabilities where it resulted in a difficult for the baby to live outside the womb or the condition where the baby has some defects and cannot be cured. Article 75 paragraph (2) of the Health Law states if doctors do an abortion with indications of a medical emergency such as the fetus suffering from a severe genetic disease or congenital defects, the doctors cannot be convicted. So the principle of prudence is needed in determining the diagnosis to bring off an abortion because abortion is closely related to crime if it is not appropriately treated.

Keywords: *Legal Responsibility, Doctor, Abortion, Fetal Defects.*

Introduction

One of obstetrics and gynecology cases, for example, is a baby in the womb that is not developing properly or normally or having a disability. It becomes such concern since when the baby is born, there may be many possibilities for the baby to experience some deficiencies, and result in babies' dependency on parents, especially on the mother. The dilemma that occurred is that if a pregnancy is terminated, the child will die, reducing the burden on parents and children themselves. However, this choice, without any doubt, includes the act of abortion. An indication of a medical emergency detected from an early age of the pregnancy, whether it is life-threatening to mother and baby, suffering from severe genetic diseases or congenital defects, or

it cannot be treated back to the normal conditions, will give difficulties for the baby to live outside of the womb. These two conditions surely head-on the dilemma. If the choice is to let the baby born, then there will be many difficulties faced; on the other sides, the termination will terminate the pregnancy.¹

Based on the Maternal-Fetal Medicine Department's data, in Russia between January 2002 and December 2010, 962 women underwent uterine termination because of fetus abnormalities based on four specialists' ultrasound examinations using Voluson 730 Expert (GE Healthcare). Most cases are predicted to have down syndrome, and others will have congenital disabilities such as heart defects. Termination of pregnancy is identical to an abortion performed by the mother or the doctor who provides the service.²

According to Law No. 36 of 2009 on Health (referred to as the Health Law),³Indonesia allows abortion with complicated requirements and emphasizes medical emergency to save pregnant women's life. Legislation on abortion in the Criminal Code considers abortion a criminal offence. This rule creates additional problems

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with the occurrence of many illegal abortion practices. The practice of illegal abortion often results in illness, complications, bleeding and leads to maternal death. The Criminal Code states abortion in 4 articles (299, 346, 347, and 348)⁴, which rigidly regulate punishment for the perpetrator and abortion assistants, including doctors, nurses, and midwives. In the Health Law, this problem tries to be resolved by providing an opportunity for an abortion in an emergency to save pregnant women's life. However, this article is not detailed and has multiple interpretations because it uses the terms "emergency conditions" and "certain medical measures". These two terms have a big chance to be interpreted in various ways.

Article 76 of the Criminal Code stipulates that abortion may only be performed at the maximum gestational age limit (6 weeks), carried out by certified medical personnel at qualified service providers, with the consent of pregnant women and husbands (except for victims of rape).⁴ Meanwhile, the fetus is the result of conception, indicated by a fetal heart rate at eight weeks of age by an ultrasound examination or fetal detection devices.⁵ The problem is that abortion is also related to the Indonesian doctor's oath to respect every life. The issue of abortion is further explained in Government Regulation No. 61 of 2014 on Reproductive Health dated July 21, 2014.⁶ The publicity of this government regulation is relatively high considering that abortion is a controversial issue. It is more popularly known as the Government Regulation on abortion rather than Kespro. Abortion permitted in this regulation is abortion with the indication of medical emergency and abortion of rape-caused pregnancy.

Discussion

Abortion Regulations in the Criminal Code

Basically, the problem of abortion qualified as a crime or a criminal act can only be seen in the Criminal Code even though the Health Law contains sanctions for abortion. The Criminal Code regulates various crimes and violations. Abortion in Indonesia's Criminal Code is categorized as a criminal act or better known as *Abortion Provoctus Criminalis*. In the Criminal Code, the criminal act of abortion is regulated in article 299,

articles 346-349.⁴ Provisions on abortion are regulated in chapter XIV of the second book of the Criminal Code on crimes against lives (Articles 346-349).⁷

According to the juridical construction of Indonesian laws and regulations, abortion is an intentional act of aborting or terminating the womb by a woman or person ordered to do so. According to the Criminal Code, the term of a pregnant woman is a woman with her wish to abort her womb, while a doctor, midwife or medic can perform the abortion. There are various ways of abortion. One example of abortion is with the drug. The woman can directly drink the drug or inserted using a particular device into the woman's uterus through the female genital opening. Abortion can consist of several types; spontaneous abortion, induced abortion, and therapeutic abortion. Usually, spontaneous abortion happens because of the low quality of eggs and sperm cells. Induced abortion is the intentional termination of a pregnancy before 20 weeks of gestation. Induced abortion because of medical indications is called therapeutic abortion.⁸

As stated in Article 346 of the Criminal Code, a woman who intentionally aborts or kills her womb or orders someone else to do it is punishable by a maximum sentence of four years. Based on this article of the Criminal Code, the criminal act of abortion consists of objective elements and subjective elements. The objective element consists of the elements of aborting or killing or ordering other people to abort or telling other people to kill their womb. In contrast, the subjective elements consist of aborting the womb, turning off the womb, ordering other people to abort and ordering other people to terminate the womb. There are four actions prohibited in Article 346 of the Criminal Code: aborting the womb, killing the womb, ordering other people to abort the womb, and ordering other people to kill the womb. Aborting the womb is committing an act of force by any means to cause the fetus or baby to come out prematurely.⁹

There are two deliberation points aimed. It is birth to release a fetus or baby from the womb and the fetus or baby's death. Whereas in aborting act, its intentional elements are only aimed solely at the birth or discharge of a fetus or baby from the womb, whether life or death

does not matter. Therefore, killing a womb is declared as completed after the act has resulted in the fetus or baby's birth and death. Meanwhile, aborting can only be declared as realized or completed after the act has been completed or has resulted in a baby or fetus coming out of the womb. In this context, a birth is a birth that is not due according to nature. It can be in the form of alive or dead baby or fetus.⁹

The third and fourth elements in Article 346 of the Criminal Code are ordering other people to abort the womb and ordering someone else to terminate the womb. This action involves two people who play a role in causing the baby or fetus to come out prematurely and causing the death of the baby or fetus. The meaning of involving two people is where two or more people do the act of aborting and killing a fetus or baby. The first is a pregnant woman who orders to abort and kill the baby or fetus, and the party ordered to do the act.⁹

A woman who intentionally aborts or kills her womb is subject to Article 346 of the Criminal Code, while a person ordered to abort or kill another woman's womb is subject to Article 348 of the Criminal Code. Although specifically, people who are ordered to abort are subject to Article 348 of the Criminal Code, however, there are similarities to Article 346 of the Criminal Code where there is an agreement between women who deliberately want to abort their womb and other people who are ordered to abort their wombs. In this case, at least both parties have the same intention to abort or kill the womb.

The element of violations in Article 346 of the Criminal Code is "intention", preceding all other elements of Article 346 of the Criminal Code. Therefore, "intention" must be aimed at the elements of the act of aborting, killing, or ordering someone else to do the act on the object of her womb. In other words, the woman is willing to perform these actions in her womb, and she knows the consequences of her actions or other people's actions will result in the death of the womb.

Still, based on article 346 of the Criminal Code, a woman who intentionally aborts or kills her womb or orders someone else to do so is punishable by a maximum imprisonment of four years. The intentional element placed in the front means all the elements behind

must be overwhelmed with the intentional element. The perpetrator's intentions in Article 346 of the Criminal Code are aimed at the womb's death. It means the abortion of the womb or the womb's death must be something intended, aimed at, desired, or imagined by the perpetrator that his actions will cause the death of the womb.

The Criminal Code only sees abortion as an act of taking a life away. Therefore, there are more articles regulating abortion in Chapter XIX, the second book of the Criminal Code, which regulates crimes against lives, chapter XIV regulates crimes against decency, and Chapter IV of the third book regulates violations of decency are only regulated each in one article. Meanwhile, abortion is related to the loss of life, but far from it, there are a series of previous actions that led to an abortion.

Following Articles 346-348 of the Criminal Code, in the case of the abortion of the fetus, it applies the term "killing the womb". It is because, logically, the term killing is only applicable to animated creatures. Judging from the description of the fetal growth process mentioned above, the only pure fetus (aged between 16-40 weeks in the womb) has been alive and have signs of life such as blood circulation, heart rate, and the fetus can move around in the womb. Regarding articles 346-348 of the Criminal Code, there are two different terms: aborting the womb and killing the womb. The grammatical meanings of the two terms are different. However, the punishment imposed on each of the perpetrators remains the same. It has a maximum of four years in prison (Article 346), a maximum of twelve years in prison (Article 347) and a maximum of five years and six months in prison (Article 348).

According to obstetrics, if the periodization of fetal growth becomes the basis, Article 346, 347, and 348 of the Criminal Code only apply to the term aborting the womb, which causes the abortion in the form of pure and advanced embryos (fetus aged 0 until before the 16th week). Meanwhile, the term "killing the womb" means causing death or eliminating the womb's life as a pure fetus. For this term, other articles concerning murder must be subject to (for example, infanticide, because a pure fetus can already be equated with a baby).

Article 346 of the Criminal Code ensnares women who intentionally abort or kill the womb either by doing it themselves or by ordering someone else, whereas if another person aborts or kills a woman's womb without the woman's consent, then it will be subjected to Article 347 of the Criminal Code.

Based on the Health Law, Article 75 that every person prohibited from having an abortion can be excluded based on an indication of a medical emergency detected from an early age of the pregnancy. As stated in Article 75 and strengthened by Article 77, the government must protect and prevent women from abortion, as referred to those mentioned above regarding the acts of abortion. It includes low quality, unsafe and irresponsible acts contrary to religious norms and provisions of laws and regulations. In the Health Law, the problem of abortion is regulated in Articles 75, 76 and 77.

Article 75 paragraph (1) states that everyone is prohibited from having an abortion. Paragraph (2), The prohibition as referred to in paragraph (1) may be exempted based on a) Indication of medical emergencies detected early in pregnancy. Medical emergencies include conditions of those that threaten the mother and fetus's life, suffering from severe genetic diseases or congenital defects, or the condition where it cannot be cured back into normal and resulted in a difficult for the baby to live outside the womb; and b) rape-resulted pregnancy, which can cause psychological trauma for the victim. Paragraph (3), the actions referred to in paragraph (2) can only be carried out after going through pre-action counselling or advice and ending with post-action counselling given by a competent and authorized counsellor. Paragraph (4), Further provisions on the indications of medical emergencies and rape, as referred to in paragraph (2) and paragraph (3), will be regulated by the government. Article 76 of the Health Law regulates that abortion, as referred to in Article 75, can only be carried out a) before 6 (six) weeks of pregnancy, counting from the first day of the last menstrual period, except in the case of a medical emergency; b) by authorized and certified health workers stipulated by the Minister; c. With the consent of the pregnant mother; d. With the husband's permission, except for the victim of rape; and e. Health service providers who meet the requirements

set by the Minister. The Criminal Code strictly prohibits abortion, but the provisions regarding the prohibition of abortion are excluded under the Health Law Article 75 paragraph (2) based on an indication of a medical emergency detected from an early age in pregnancy. It includes conditions of those that threaten the mother and fetus's life, suffering from severe genetic diseases or congenital defects, or the condition where it cannot be cured back into normal and resulted in difficulties for the baby to live outside the womb. Medical indications for the mother whether she is suffering from various diseases such as heart, kidney, liver, or hypertension. If the pregnancy continues, these diseases can threaten the life of the mother. Usually, the medical team will provide an alternative for the woman to discontinue her pregnancy full of risks. The child's medical indication to be born is if it is known that the child is suffering from severe defects and has no hope of life, chromosomal abnormalities in the child, or if the mother has rubella (German measles).¹⁰ The criteria for fetal defects are not stated in the laws or regulations clearly, but according to the theory of fetal defects, it indicates a failure in developing organs and tissues while in the womb, which causes the fetus not to grow and develop according to its age. Then, an abortion can be done if the child (fetus) to be born considered having serious genetic diseases or abnormalities (severe defects). It is indicated that the baby cannot live outside the womb and make it difficult for the baby. For example, the fetus is suffering from EctopiaKordalis abnormalities (a fetus that will be born without a chest wall so that its heart can be seen), Rakiskisis (a fetus that will be born with an open spine without being covered with skin) and Anencephalus (a fetus will be born without a large brain).¹¹

The Legal Responsibility of Doctor Who Perform Abortions with Indication of Fetal defects in the Womb

The statutory regulations, in this case, apply the principle of "lex posteriori derogate legi priori". This principle assumes that if a new regulation is promulgated without repealing the old regulation, which regulates the same material and both contradicts one another, then the new regulation will defeat the old regulation. Thus, Article 75 of the Health Law, which regulates abortusprovocatusmedicinalis, can still be applied in

Indonesia even though the rules are different from the formulation of criminal provocatus abortion according to the Criminal Code. The enactment of the *lex posteriori derogate legi priori* principle is one of the government's efforts to develop criminal law in Indonesia. Many of the Criminal Code, rules which in particular situations are no longer relevant to be applied today. To overcome the Criminal Code's weaknesses, the government issued a Health Law to provide a conducive atmosphere for Indonesian society's current dynamics. The principle of *lex posteriori derogate legi priori* is a legal principle developed in all areas of law.¹²

Articles 75, 76, 77 and Article 194 of the Health Law states the provisions for regulating abortion; meanwhile, the prohibition on abortion is also regulated in Article 75 paragraph (1) of the Health Law. The exception described in Article 75 paragraph (2) of the Health Law against having an abortion is given only in 2 conditions. The act of abortion as regulated in Article 75 paragraph (2) of the Health Law can only be carried out after pre-treatment counselling or advice and ends with post-action counselling given by a competent and authorized counsellor as described in Article 75 paragraph (3) of the Health Law.

The explanation on medical action is described in the Regulation of Minister of Health No. 290 of 2008, in Article 7 paragraph (3) at least includes diagnosis and procedures for medical action; b. The purpose of the medical action being measured; c. Other alternative actions and their risks; d. Risks and complications may occur; e. The prognosis for the action taken; f. Estimated cost.

As explained in Article 75 paragraph (2), a doctor who performs an abortion with indications of a medical emergency, such as the fetus suffers from a severe genetic disease or congenital defect, cannot be convicted. Article 4 paragraphs (1) to (3), Regulation of the Minister of Health No. 290 of 2008 on Approval of Medical Action,¹³ if the mother who is going to be aborted in an emergency, the doctor may take action without the permission of the mother and or her family to save her life,¹⁴ then the doctor's action cannot be convicted. It is also applicable for other emergencies conditions such as the mother has severe bleeding, severe depression due to

rape, life-threatening pregnancy, and a pregnancy where it threatens the fetus's health and life (suffering from severe genetic diseases or congenital defects)

Conclusion

The legal norms for abortion of fetal defects in the womb in Indonesia are stated in the Criminal Code, articles 346-349. It is categorized as criminal acts (*Abortus Provocatus Criminalis*). In contrast, the Health Law, article 75 paragraph (2) excludes the prohibition of abortion with an indication of the emergency of mothers and babies which is suffering from severe genetic diseases or congenital defects, or the condition where it cannot be cured back into normal and resulted in difficulties for the baby to live outside the womb. The legal responsibility for doctors who do an abortion with the indication of fetal defects in the womb is regulated in article 4 paragraph (1), (2) and (3), Regulation of the Minister of Health No. 290 of 2008 on Approval of Medical Action. If the mother who will be aborted is an emergency, the doctor may take action without any permission from her or her family to save her life,¹⁴ then the doctor's action cannot be convicted. It is also applicable for other emergencies conditions such as the mother has severe bleeding, severe depression due to rape, life-threatening pregnancy, and a pregnancy where it threatens the fetus's health and life (suffering from severe genetic diseases or congenital defects)

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