

A Little Mistake That Cost Lives: Mothers' Rights Arising from Doula Practices in Malaysia

Nurul Jannah binti Mustafa Khan, Siti Hafsyah binti Idris , Nadia binti Omar, Zuhaira Nadiah binti Zulkipli
Faculty of Law, UiTM Shah Alam, Selangor, Malaysia

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Abstract: Lately, there has been a disturbing rising trend of unsafe birth that is related with the so-called gentle birthing or also known as pro-birthing in Malaysia. This movement is promoted by individuals known as doula. In a developed country like the United Kingdom, the practice of doula has been long accepted and encouraged. In the United Kingdom, mothers' rights are said to be protected because of the existence of the Doula UK Code of Conduct. The situation is very much different with the Malaysian scenario where doula is not being recognized by any medical associations or being controlled under any regulatory measures. Therefore, this paper aims to examine any current related laws pertaining to mothers' rights arising from doula practices as to whether there is legal protection available to them. This paper employs a doctrinal analysis methodology in examining the relevant laws and related cases. This paper proposes ethical approach as a mechanism to protect mothers' rights arising from doula practices. At the end of this paper, it is hoped that mothers' rights and safety will be guarded and protected via appropriate regulations or mechanisms

1 INTRODUCTION

The implementation of various maternal and child health initiatives by the Ministry of Health has resulted in an evident decline in maternal and mortality rates in Malaysia to a very low level, making Malaysia of the equivalent level with the developed countries. However, lately there has been a perturbing rising trend of unsafe birth that is related with the so called gentle birthing or also known as pro-birthing in Malaysia promoted by a small community known as doula. The director General of Health, Datuk Dr. Noor Hisham Abdullah has expressed his concern regarding unsafe birth in Malaysia where in 2017, there has been five death cases related to doula been recorded by the Ministry of Health. At the surface, there is no issue for one to be a doula as vast body of research from other countries shows that emotional and physical support significantly shortens labor and decreases the need for caesarean deliveries, forceps and vacuum extraction and other intervention (Scott, Klaus and Klaus. 1999). In addition, based on a research, mothers supported by doulas during childbirth rate the experience as

being less difficult and painful than women who were not supported by a doula (Lantz, Low, Varkey and Watson, 2005).

However, in Malaysia, the concern rises when these doulas started promoting for delivery at home without even considering whether these pregnant women are of high risk birth (Aziz, 2018).¹ In addition, the non-existence of any guidelines or regulatory measures to control the practice of doula in Malaysia may increase the possibility of a doula to escape responsibilities if unfortunate event happened to mothers or babies as a result of doula practice. Based on the above concerns, this paper examines the rights of the mothers arising from doula practices in Malaysia. The method used to conduct this research is through doctrinal methodology based on statutes and case analysis as well as secondary sources analysis such as policy, guidelines, fatwa and government documents.

¹<https://www.bharian.com.my/berita/nasional/>

2 WHO IS A DOULA?

A doula can be defined as an individual who has undergone training and provide doula care during antenatal, intrapartum or postnatal periods with an amount of fees for women (Steel, Frawley, Adam and Diezel, 2015). American Pregnancy Organization defined doula as a trained professional who assist mothers, mothers-to-be or during the birth itself, emotionally and physically with the purpose to help women experiencing a safe and memorable birth experience.² The main role of a doula is to provide emotional support for the mother who is about to give birth, so that these mothers will have a more relaxing and serene experience of giving birth and not to assist the birth by herself. There are three types of doula, which are antepartum doula, labor doula and postpartum doula.

It is seen not to be a problem for a mother to seek to help from antepartum doula who provides the pregnant mother on the advice on giving birth, for an example ways to deliver. Nor it is seen to be a problem for the mother to seek help from a postpartum doula as this doula would definitely be of a great help as she assists the mother after the birth by taking care of the needs of the mother and her newborn. As for labor doula, she would be with the mother during the process of giving birth. However, it should be noted that in Malaysia, most hospitals' policy did not allow any party aside from the husband to enter the labor room during the actual process of birth.

2.1 Regulatory Frameworks to Protect Mothers' Rights Arising from Doula Practices in the United Kingdom

In other countries, there is really no issue with the practice of doula, as these doulas did not abuse their role by superseding the doctors' and midwives' power. For an example in the United Kingdom, these doulas support has always been encouraged and welcomed by the medical team (American Academy of Paediatrics). In the United Kingdom, the doulas are recognized by an organization known as Doula UK. It is expressly mentioned by the Doula UK website that a doula are not healthcare professionals and do not take the role of midwives (Doula UK, 2018).³ The Doula UK also has a Complaints Procedure, which allows the organization to audit

²<http://americanpregnancy.org/>

³<https://doula.org.uk/>

their membership and maintain good practice. The existence of Complaints Procedure will indirectly impose pressure on the doulas to adhere by the guidelines so as to protect the women from any misconduct. The practice of doula is being controlled or guided by a code known as the Doula UK Code of Conduct. It is noteworthy to mention that the Code emphasized that doulas should only offers practical and emotional support to women and not to perform any clinical, midwifery or medical tasks which of course include diagnosing medical conditions or giving medical advice. Besides that, the Code also accentuates that a doula will be accountable for herself and must work within the law and the framework of Doula of UK Guidelines. The Code provides that a doula must refer their clients to appropriate professionals if the client's needs are beyond their scope of role as a doula. Another significant guideline is that a doula is recommended to have a contract with their clients. The doulas should also accurately represent their doula education and experience and must not any time, mislead other doulas, clients or other birth professionals. These are all significant guidelines and principles that must be adhered by the practicing doulas in the United Kingdom as to protect the rights of women who opted for their services.

The existence of a Code shows the commitment of an organization in protecting the right of their clients and also acts as an internal guideline among the members. A code of conduct clarifies an organization's values and principles requiring the members to adhere with certain standards of conduct. A violation of the code may get the doulas accountable to their clients under the suit of negligence.

2.2 Regulatory Frameworks on Mothers' Rights Arising from Doula Practices in Malaysia

The situation is different with the Malaysian scenario where there have been reports of mothers' and babies' death because of the intervention of doula. In Malaysia, doula is not being recognized by any medical associations or bodies,⁴ therefore has no code or guidelines as in the United Kingdom (Aziz, 2018). The Malaysian Medical Association (2018) has been cited saying that a doula cannot replace trained midwives and doctors during birth.⁵ In Malaysia, there is a misconception that giving birth at home

⁴<https://www.bharian.com.my/berita/nasional>

⁵ <https://mma.org.my>

without medical intervention is natural process. These misconceptions have been fed by doulas who are profit oriented. A delivery without the supervision by the doctors and trained midwives is a great risk taken by these mothers. A delivery without the supervision much needed may attract complications such as severe bleeding, fits, ruptured uterus or infections to the mother. As for the babies, they may suffer brain damage, fits, physical or nervous system injuries if the delivery is unsupervised and complications not detected.

For the purpose of this paper, specifically section 14(1) the Midwives Act 1966 will be looked into to see whether a doula falls under the application of this Act and the effects. It should be noted here that a midwife is different with a doula in the sense that a midwife is a certified medical assistant and a professional who is being recognized and regulated under Midwives Act 1966.

A midwife is a person who, having been regularly admitted to midwifery educational programmes, duly recognized and has successfully completed in the prescribed course of studies in midwifery.⁶ She must acquire the requisite qualifications to be registered and or legally licensed to practise midwifery. Being a midwife is not simply having the ability to give continuous emotional and physical support for the mother and her partner throughout pregnancy and labour, like most doula do. A midwife is required to have the ability to give medical care includes preventive measures, the detection of abnormal conditions in mother and child, the procurement of medical assistance and the execution of emergency measures in the absence of medical help.

In Malaysia, a doula is not legally recognised as a midwife under the Midwives Act 1966 nor a medical practitioner under the Medical Act 1971 having regard to the qualifications. Unlike doula, nurses who specialised in midwifery are required to undergo a one-year course, pass the Malaysian Midwives Board's examination and obtain the midwife license before she is allowed to practise midwifery as required by the Midwives Act 1966. In contrast, some preparatory classes offered at several doula schools are ridiculously short. It is discovered that some of the classes offered only of a total of 21 hours and upon completion, one will become a 'certified' junior doula. Having only basic knowledge on delivering babies certainly does not make a doula qualified to perform midwifery care, leaving mothers with no protection under the law, if unfortunate events

happens to her or the baby. It shows that home births with only a doula in attendance are extremely dangerous to both mother and child.

For the purpose of this paper, it is essential to highlight the effects and rights of a mother as from legal contract perspective when dealing with doula. Did the mother aware of the consequences should they entered into a contract agreement with an illegal practicing doula? Did the mother know that she could lose their rights in the contract should any negligence by doula arises while the mother giving birth without the supervision of a qualified midwives?

The law is crystal clear. Any person, thus including a doula which are not certified and registered yet practicing midwifery has committed an offence in the eye of the law. In this case, the law will not give any assistance to the mother who found her cause of action upon an illegal act. A plaintiff whose cause of action appears to arise from a wrong done or transgression of a positive law of the country has no right to be assisted by the law. The mother's rights will not be assisted by the law because in this situation, the mother and the doula are equally at fault. In *Holman v Johnson*, the court mentioned that when both parties are equally at fault, the defendant would be in the better position against the plaintiff. Therefore, it is crucial for all mothers in Malaysia to be well aware that section 14 of Midwives Act 1966 clearly prohibits any person who is not registered under the Act to practice midwifery. Section 10 of Contracts Act 1950 (CA) in Malaysia further provides that for an agreement to be a contract, it must be made by the free consent of the parties competent to contract and that the consideration and object of the agreement must be lawful and are not expressly declared to be void. Further, by virtue of section 2(g) of the CA, an agreement not enforceable by law is said to be void. Next, section 24 of the CA has also laid down the situations wherein the consideration or object of an agreement could be unlawful specifically if (a) it is forbidden by law, (b) it is of such a nature that, if permitted, it would defeat any law, (c) it is fraudulent, (d) it involves or implies injury to the person or property of another or (e) the court regards it as immoral, or opposed to public policy.

By applying section 24 of CA, it is unlawful for any doula to enter into a contract with a mother for the purpose of midwifery tasks because it is clearly forbidden by the law. An agreement is void for illegality when the statute prohibits the act and the contract.⁷ This is by virtue of Section 14 of the

⁶<http://nursing.moh.gov.my>

⁷*Sababumi (Sandakan) SdnBhd v. Datuk Yap Pak Leong* [1998] 3 MLJ 151.

Midwives Act 1966 that stated any unregistered midwife who practice midwifery shall be guilty of an offence. In this paper it is contended by the authors that a doula is an unlawful object forbidden by the law and have no legality to enter into any contract relating to midwifery practices with any mother in Malaysia.

A contract made between a mother and doula can also be regarded as opposed to the public policy as doula practices may cause injury to the mother and the infant. The former Deputy Health Minister, Datuk Seri Dr HilmiYahaya emphasized that in the United States, instead of using doula services, expectant women are not advised to deliver at home or placed in situations which could prove harmful to them or their babies.

For that reason, mother should not put their right at stake. They should understand their position when dealing and contracting with a doula as their rights under the contract will not be protected by the law for the reasons discussed above. These mothers who contracted with doulas may encounter difficulties if they wanted to bring an action of negligence against doulas.

2.3 Protecting Mothers' Rights through Ethical Approaches

The contract made between a doula and a mother is void as doula is not a person being recognized under any body or regulation in Malaysia. Therefore, here the loophole will be manipulated by the doula if legal action is taken against them as there is no Code, guidelines or regulations that govern their conduct in Malaysia.

Hence, this paper proposes that the mothers' rights may be protected through ethical approach which can be the guiding principle for the court decision-making in the event the case is litigated in the absence of any code of conduct or legislations. Ethical principle in medical ethics such as Principlism propounded by Beauchamp and Childress (1994) which is used to resolve ethical dilemmas need to be considered in examining ethical issues affecting the rights of mothers arising from doula practices. This Principlism approach encompasses four principles namely respect for autonomy, nonmaleficence, beneficence, and justice. These four principles are developed based on common morality, which are the moral norms commonly shared by mankind throughout the world. Beauchamp and Childress (1994) explained that these principles "should function as an analytical framework that expresses the general values underlying rules in the common morality."

The principle of autonomy is based on the principle of respect for persons, which holds that individual persons have the right to make their own choices and develop their own life plan. In a democratic society, people recognise that they have a duty to let people make their own choices. Any notion of moral decision-making assumes that rational agents are involved in making informed and voluntary decisions. In health care decisions, respect for the autonomy of the patient would, in common parlance, imply that the patient has the capacity to act intentionally, with understanding, and without controlling influences that would mitigate against a free and voluntary act. This principle is the basis for the practice of "informed consent" in the doula/mother transaction regarding the doula practices. This is also expressed in the language of rights, by recognising the right of mother to make choices in delivering their babies. In a prima facie sense, the autonomy of the mother ought to always be respected. Such respect is not simply a matter of attitude, but a way of acting so as to recognize and even promote the autonomous actions of the mother. The autonomous person may freely choose values, loyalties or systems of religious belief that limit other freedoms of that person.

The principle of beneficence on the other hand, refers to a normative statement of a moral obligation to act for the benefit of others, helping them to further their important and legitimate interests, often by preventing or removing possible harms. The ordinary meaning of this principle is that health care providers have a duty to be of a benefit to the patient, as well as to take positive steps to prevent and to remove harm from the patient. These duties are viewed as rational and self-evident and are widely accepted as the proper goals of medicine. This principle is at the very heart of health care implying that a suffering supplicant (the patient) can enter into a relationship with one whom society has licensed as competent to provide medical care, trusting that the physician's chief objective is to help. The goal of providing benefit can be applied both to individual patients, and to the good of society as a whole. Hence, in this scenario, the health care providers must also play a role in urging the relevant authorities to regulate and monitor doula practices as to protect the rights of mothers who opted for alternative methods in delivering their babies (Darryl and Macer, 1995).

Nonmaleficence is known as the principle of do no harm. It can also be expressed as respect for human life and integrity. The principle of nonmaleficence requires of people to not intentionally create a harm or injury to others, either through acts of commission

or omission. In common language, it is negligence if one imposes a careless or unreasonable risk of harm upon another. Providing a proper standard of care that avoids or minimizes the risk of harm is supported not only by commonly held moral convictions, but by the laws of society as well. This principle affirms the need for health care providers' competence. Therefore, again it is emphasized here that the practice of doula should be regulated under a proper code or under a specific legislation so that their conduct can be measured against a standard of care for doula.

Justice principle emphasises the moral obligation to assure the fair and equitable distribution of benefits and burdens, in accordance to such things as needs, effort, or merit between competing claims. The formal principle of justice requires that society in general treat equal cases equally. It is generally held that persons who are equals should qualify for equal treatment. Therefore, by applying this principle, if negligence has been committed by a doula while assisting mothers during delivery, the doula should be treated equally as any other person who has committed negligence under the law. The same goes to the mother who should be able to get any damages or compensation if it has been proven that the doula has committed negligence towards her or her baby. It is contended in this paper that the mother's rights should be taken into consideration by applying this principle and not to extinguish it totally just because the mother may have ignorantly entered into a contract with a doula.

3 CONCLUSION

By looking at the rising trend of unsafe birth in Malaysia, it is proposed in this paper that there should be a specific regulation to control the conduct of doula. This is because, based on the discussions above, it can be seen that a contract made between a doula and a mother may be void because of illegality. Therefore, the mothers' rights may not be protected under the current law. The loopholes in the law could be manipulated by irresponsible people and this matter must be taken seriously as people's lives are at stake. It is noted that there has been plans by the Ministry of Health to regulate the conduct of doulas to protect the safety of women and babies from calamitous events.⁸ This plan by the Ministry of Health should be celebrated and the progress of the plan has to be monitored closely to ensure that it will

be realized hopefully soon. Alternatively, it is proposed in this paper that in the absence of law protecting mothers' rights who has contracted with a doula, the court may take into consideration the ethical approaches discussed above in coming to a just decision if there is any case between a doula and a mother being brought before it.

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⁸<https://www.bharian.com.my>

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