

Ethicomedicolegal Perspective of Abortion of Fetuses with Major Congenital Malformations

Yoni Syukriani^a, Budi Handono^b, R. Ismadi S. Bektic^c, Sofwan Dahlan^d, Efa Laela Fakhriah^e

ABSTRACT

Abortion is considered illegal under the provisions of the 1981 Criminal Code; however, exceptions in the 2009 Health Law allow for abortions in instances where the fetus is deemed "unlikely to survive outside the womb". Despite this allowance, ethical concerns, ambiguities in legal interpretation, and the practical implementation of abortion procedures in healthcare settings persist. The research problem of this study is how harmonious is the alignment between legislation and medical ethics in navigating abortion of fetuses with major congenital malformation? The methodology used is normative juridical analysis, supplemented by descriptive analysis. The aim is to assess the adequacy of existing regulations concerning abortion in ensuring ethical practices. Results demonstrate the necessity for comprehensive guidance to ensure the legality and ethicality of abortion decisions and procedures. This entails delineating clear criteria for defining, classifying, and assessing the severity of congenital malformations, as well as establishing regulations or practical guidelines governing the diagnostic methods, healthcare facilities, and requisite expertise of medical professionals authorized to perform abortions. Additionally, attention must be directed towards fostering an ethical decision-making process surrounding abortion, alongside implementing robust supervision, monitoring, and evaluation mechanisms to uphold standards of care and ethical conduct within the realm of abortion services.

Keywords: abortion; congenital malformation; ethicomedicolegal; health law; penal code.

INTRODUCTION

The legal system in Indonesia prohibits abortion, with some exceptions, including abortion of fetuses that are "difficult to survive outside the womb". The term "difficult to survive outside the womb" refers to a condition wherein a fetus is unable to sustain life for an extended period beyond the confines of the womb due to various intrinsic factors. The determination of this term is contingent not on maternal factors, but on child-related factors, specifically major congenital malformations. These malformations may include the underdevelopment of vital organs, congenital abnormalities, or complications stemming from prenatal conditions. This delineation is crucially distinct from the concept of fetal viability, which denotes the ability of a fetus to survive independently under standard environmental conditions without extensive medical intervention, which applies for fetuses in later weeks of gestation. The determination of fetal viability remains a contentious topic within medical discourse, subject to ongoing debate and scrutiny. Defining the threshold of viability involves

^a Department of Forensic Medicine and Medicolegal, Faculty of Medicine, Universitas Padjadjaran, Jl. Pasteur 38, Bandung, 40161, Indonesia. Email: yonifuadah@unpad.ac.id.

^b Department of Obstetrics and Gynecology, Faculty of Medicine, Universitas Padjadjaran, Jl. Pasteur 38, Bandung, 40161, Indonesia.

^c Graduate Program, Health Law, Universitas Katolik Soegijapranata, Jl. Pawiyatan Luhur IV No.1, Kota Semarang, 50234, Indonesia.

^d Graduate Program, Health Law, Universitas Katolik Soegijapranata, Jl. Pawiyatan Luhur IV No.1, Kota Semarang, 50234, Indonesia.

^e Faculty of Law, Universitas Padjadjaran. Jl. Ir. Soekarno KM. 21 Jatinangor, Sumedang, 45363, Indonesia.

navigating complex ethical, medical, and legal considerations, underscoring the intricate nature of reproductive healthcare practices.¹

The Indonesian medical community has its own uncertainties regarding abortion. It is related to the Indonesian Doctor's Oath, which emphasizes protecting life from the time of conception while, on the other hand, realizing that there are practical problems when dealing with major congenital malformations. Studies on the prevalence of congenital malformation in Indonesia are still very limited. The WHO indicates that the prevalence in Indonesia is 59.3 per mill², which is considered high compared to other countries. However, the data of major types are very fragmented and usually are based on hospital-based coverage. While it is commonly assumed that medical professionals adhere to established professional standards in their clinical practice, there remains a gap in comprehensive research concerning the decision-making processes surrounding abortion procedures within healthcare settings.

Abortion is the ending of a pregnancy before the fetus is sufficiently developed to live outside the womb. The typical standard gestational age is before twenty weeks of gestation, or the fetus's weight is less than 500 grams³. There are two types of abortion: spontaneous abortion (miscarriage) and induced abortion. Spontaneous abortion is a natural mechanism that causes the cessation of the pregnancy process before 28 weeks of gestation. The cause can be due to the mother's disease or other causes, generally related to abnormalities in the reproductive system. Induced abortion is a purposeful termination of pregnancy prior to twenty weeks for developed countries and twenty-eight weeks for developing countries.⁴ It is difficult to confirm the abortion rate because not all countries report it but it is estimated that one in five pregnancies ends in an induced abortion.⁵ Induced abortion is risky, especially when it is performed in non-healthcare settings or by non-healthcare professionals. It is estimated that 29% of all pregnancies end in induced abortion, and 61% of all due to unintended pregnancies.⁶

The Ethical and Professionalism Guideline of Obstetrics and Gynecology in Indonesia⁷ dictates that abortion is generally prohibited for pregnancies deemed unwanted, with exceptions made only in cases of rape, as stipulated by law. Decision-making regarding abortion is primarily guided by medical considerations, focusing on maternal health issues (including psychological ramifications for

¹ Christian M. Pettker (*et al.*), "The Limits of Viability". *Obstetrics and Gynecology*, No.3, Vol. 142, pp. 725-726, 2023, E-journal online <<https://dx.doi.org/10.1097/AOG.0000000000005280>>, [accessed on 22 February 2024].

² Arnold Christianson (*et al.*), *March of Dimes global report on birth defects. The hidden toll of dying and disabled children: Executive summary*, March of Dimes Birth, New York: 2006, p. 2.

³ Anibal Faúndes A and Laura Miranda (Stella R. Quah ed.), *Unsafe Abortion, in International Encyclopedia of Public Health*, 2nd edn., Academic Press, 2017, pp. 301-310 ISBN 9780128037089.

⁴ World Health Organization, *Safe and unsafe induced abortion: global and regional levels in 2008, and trends during 1995-2008*, World Health Organization, Geneva, 2012, <https://iris.who.int/handle/10665/75174?show=full>, [accessed on 22 December 2023].

⁵ Jonathan Bearak (*et al.*), "Unintended pregnancy and abortion by income, region, and the legal status of abortion: estimates from a comprehensive model for 1990–2019", *The Lancet-Global Health*, No. 9, Vol 8, pp. e1152-e1161, 2020, E-journal online <[https://dx.doi.org/10.1016/S2214-109X\(20\)30315-6](https://dx.doi.org/10.1016/S2214-109X(20)30315-6)>, [accessed on 25/12/2022].

⁶ Jonathan Bearak, *Ibid.*, p. e1155

⁷ Dewan Pertimbangan Perkumpulan Obstetri dan Ginekologi Indonesia, [*The Ethical and Professionalism Guideline of Obstetrics and Gynecology in Indonesia*], *Good Practice in Obstetrics & Gynecology*, Dewan Pembina Perkumpulan Obstetri dan Ginekologi Indonesia, Jakarta, 2017, pp. 26-28.

rape-induced pregnancies) and fetal health concerns. Stringent penalties are imposed on the mothers and individuals involved in the procurement of abortions, particularly medical personnel who face augmented sanctions.

Medical professions in many countries have gone through a series of shifts in position regarding abortion. For example, early in its history, the American Medical Association (AMA) strongly opposed the right to abortion. In the mid-20th century, it shifted towards tolerance for abortion as part of reproductive rights. But in June 2022, after the US Supreme Court verdict in *Dobbs vs the Jackson Women's Health Organization*, the course is facing the challenge of being shifted. The US Supreme Court overturned the *Roe vs Wade* verdict in 1973 that protected abortion rights. The reason is that "the right to abortion is not deeply rooted in the Nation's history and tradition"⁸. The AMA's position is quite controversial because it considered the ruling leading to "preventing government interference in the practice of medicine"⁹.

In the United States, there is a sharp polarization in the society between pro-life and pro-choice movements. The legalization of abortion in 1973 did not solve the problem but sparked extreme polarization. The pro-choice group argues that every woman has a right to control her own body and that illegal abortions threaten public health; therefore, the government should provide accessible healthcare for those who need an abortion. On the other side, the pro-life group argues that it is the right of the unborn baby to be born alive; it is the right of the unborn baby to be born. This polarization from the United States has affected other parts of the world, including Indonesia. According to The Ethical and Professionalism Guideline of Obstetrics and Gynecology in Indonesia, The contentious debates between pro-choice and pro-life factions, as observed notably in the United States, need not be the focal point. Oversimplified categorization into these opposing camps is deemed disadvantageous, as it overlooks nuanced considerations essential for informed abortion-related decision-making. Beyond the viability of the fetus, due attention must be paid to the well-being of the mother and her familial context. Prioritizing the preservation of fetal life at the expense of maternal welfare is widely regarded as lacking in humane consideration.¹⁰

The position of many medical professional organizations is towards a balance between considering the fetus's right to life as a human right and the issue of access to reproductive rights, also as one of the human rights. Nowadays, many countries in the world have laws governing abortion. Among others, Sweden, Denmark, Japan, England, Singapore, America, the Netherlands, and communist countries like China and Russia. The World Medical Assembly (WMA) stated in 2018 that doctors in countries where abortion is legal could only be performed if there is a health problem according to evidence-based medicine and good clinical practice. It is recommended that the decision

⁸ US Supreme Court, The Syllabus of *Dobbs v. Jackson Women's Health Organization*, Legal Information Institute, Cornell Law Institute, 2022, p. 2, <https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf>, [accessed on 02/12/2022].

⁹ American Medical Association. "AMA announces new adopted policies related to reproductive health care", Press release, November 16, 2022, <<https://www.ama-assn.org/press-center/press-releases/ama-announces-new-adopted-policies-related-reproductive-health-care>>, [accessed on 01/12/2022].

¹⁰ Dewan Pertimbangan Perkumpulan Obstetri dan Ginekologi Indonesia, *Op. Cit.* p. 26.

on the need for a medically-indicated abortion should be agreed upon by a competent doctor, or in an extremely limited situation, by a qualified healthcare worker. It should also take into account the facilities that meet the standards. However, the position of the Statement is not binding on doctors/medical associations who reject abortion and recommends respecting local laws and norms.¹¹

Medical references demonstrate different views regarding a fetus's right to life, depending on how each defines the beginning of life. Some define that the beginning of life starts from 20 weeks of gestation; others suggest 12 weeks fetus can be considered a patient.¹² Some others strictly refer to the concept that life begins from an embryo stage (from a zygote up to eight weeks of gestation)¹³.

Another challenge is the classification of "major congenital malformations" that cause a fetus to be "difficult to survive outside the womb". Major congenital malformations include neural tube defects (brain/spinal anomaly), microcephaly (small head), microtia/anotia (small ear), orofacial clefts, congenital heart defects, stenosis or atresia of the intestines, abdominal wall defects, hypospadias (male genital anomaly), limb defects, renal agenesis/hypoplasia, and trisomy-21.¹⁴ Those malformations also have a spectrum of severity. Only a few of the major congenital malformations make it impossible for a baby to live outside the womb. The advancement of healthcare facilities available may also play a role. Immediate procedures and a good support system may provide life opportunities for specific disorders. A thorough assessment and expert judgment are needed to decide whether a fetus will be difficult to survive outside the womb. To date, the authors have not identified any regulations or professional standards in Indonesia delineating the specific criteria defining criteria for fetal malformations or for a fetus deemed as "difficult to survive outside the womb".

Although the ability to diagnose major congenital malformations early has been relatively developed, it still has some issues. For example, Anencephaly, a severe neural tube defect where some part of the brain and skull does not develop. Anencephalous fetuses can only survive a few hours to a few days and are often accompanied by defects in other organs. Anencephaly can be diagnosed as early as eight weeks of gestation, although some studies suggested the possibility to miss it in the first trimester. The accuracy of diagnosis by ultrasound in the second trimester reaches ~100%, which means that the fetuses have passed the 20 weeks (preterm pregnancy); thus, the terminology of abortion becomes no longer appropriate. On the hand, the Indonesian Penal Code, the term *menggugurkan kandungan* (termination of pregnancy) does not consider gestational age.

¹¹ World Medical Association (WMA), "WMA Statement on Medically-Indicated Termination of Pregnancy", 6th September 2022, <<https://www.wma.net/policies-post/wma-declaration-on-therapeutic-abortion/>>, [accessed on 01/12/2022].

¹² Soroush Dabbagh, "Fetus as Human Being: Where is the Cut-off Point?", *Journal of Medical Ethics and History of Medicine*, Vol. 2, pp. 2, 2009, E-journal online <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3713799/>>, [accessed on 02/01/2023].

¹³ Asim Kurjak (et.al.), "Facts and doubts on the beginning of human life-scientific, legal, philosophical and religious controversies", *Journal of Perinatal Medicine*, No. 1, Vol. 51, pp. 39-50, 2023, E-journal online <<https://dx.doi.org/10.1515/jpm-2022-0337>>, [accessed on 02/01/2023].

¹⁴ Centers for Disease Control and Prevention (CDC), "Selected major congenital malformations", Last reviewed November 19, 2020, <https://www.cdc.gov/ncbddd/birthdefects/surveillancemanual/chapters/chapter-1/chapter1-4.html>, [accessed on 25/11/2022].

Here we can see that the definition of abortion as a medical term might differ from “termination of pregnancy” as a legal term. Furthermore, the fact that some Anencephalous children can live for a few years, although the quality of life is not good¹⁵, could come into perspective and cause further debate.

Trisomy-21 (Down syndrome) is a major congenital disorder that has become a focus in many debates because people with Down syndrome can live and function socially to a certain extent. However, the abortion rate after prenatal diagnosis reached 67 to 85% in the US, although it is declining.¹⁶ Legalizing abortion seems to consider factors other than whether the fetus would die right after birth. Other factors include whether these abnormalities can be corrected right after birth (for example, in severe heart defects) or whether the baby can live but with severe disabilities. Although correction through surgery can be performed, other factors, such as accessibility and affordability, could play a role. For example, what is the success rate of surgery? Can insurance cover the surgery? Will the child be able to live normally afterwards? Will there be economic and social burdens in the long term?

Another critical question is about the proper legal term for reasons that are permissible for abortion. For example, the Netherlands uses the term “serious medical problem”, while Indonesia uses “difficulty living outside the womb”. The UK uses the term “fetuses that are not viable”. All have their problems and require further explanation or technical guidance. Inferring from the issue of Down syndrome explained above, the phrase “major congenital abnormalities” is not sufficient as legal terms to determine what condition the fetus is in which it is permissible to abort.

Abortion presents not only an ethical concern within the doctor-patient relationship but also implicates broader societal ethics considerations. States bear a responsibility to safeguard citizens' health and welfare, including the protection of fetal life. However, a blanket prohibition on abortion fails to address the complexity of situations necessitating this procedure. Nearly all countries maintain laws restricting induced abortion, permitting it solely as a medically justified intervention. Disputes arise among nations that have legalized abortion, particularly regarding permissible gestational ages for the procedure. For instance, France restricts abortion up to 14 weeks gestation, whereas the Netherlands permits it up to 24 weeks. In the United Kingdom, termination is limited to 28 weeks, with procedures beyond this termed as “child destruction”. In UK law, “child destruction” refers to the deliberate termination of a pregnancy with the intent to end the life of a fetus capable of surviving outside the mother's womb, typically applied after 28 weeks of gestation. The term “child destruction” carries a stringent connotation than “abortion” and implies heavier penalties for such actions. It's worth noting that from the medical perspective, the term “child destruction” does not

¹⁵ Holly Dickman (*et al.*), “Prolonged unassisted survival in an infant with anencephaly”, *BMJ Case Reports*, pp. bcr2016215986, 2016, E-journal online <<https://dx.doi.org/10.1136/bcr-2016-215986>>, [accessed on 25/12/2022].

¹⁶ Jaime L Natoli (*et al.*), “Prenatal diagnosis of Down syndrome: a systematic review of termination rates (1995–2011)”, *Prenatal Diagnosis*, No. 2, Vol. 32, pp. 142-153, 2012, E-journal online, <<https://dx.doi.org/10.1002/pd.2910>>, [accessed on 25/12/2022].

exist. Nevertheless, the stringent terminology "child destruction" within the legal framework in the UK resonates with the medical community's disapprobation of ending pregnancies after the first trimester of gestation in the absence of extraordinary humanitarian justifications.

The new Indonesian Criminal Law¹⁷, set to be enacted replacing the current one in 2026, legalized abortion in cases of medical emergencies and for pregnancies resulting from rape, a practice previously governed by the previous Health Law (Law No. 36 year 2009 that has been replaced recently by Law No. 17 year 2023). Abortion for fetuses that are "difficult to survive outside the womb" is not specifically regulated, but it is. The practice so far has been left to the consideration of obstetric and gynaecology specialists at each hospital. Doctors determine the fetus that is "difficult to survive outside the womb" by employing medical assessments, referencing scientific literature, and applying their individual interpretations of medical ethics. Subsequently, they defer the decision-making process to pregnant individuals, in accordance with their respective principles, whether aligned with pro-choice or pro-life perspectives. If there is doubt or confusion, the Medical Ethics Committee in the respective hospital could raise the decision.

The research problem of this study is how harmonious is the alignment between legislation and medical ethics in navigating abortion of fetuses with major congenital malformation? In this article we review the discrepancies in the interpretation of abortion regarding fetuses that are "difficult to survive outside the womb", notably between the perspectives delineated by criminal and health laws, juxtaposed with the human rights principles and medical ethics. This incongruity presents a potential challenge, as it may engender difficulties not only for medical professionals but also for law enforcement officials in discerning the legality of abortion procedures.

METHODS

Design

The objective of this study is to evaluate the adequacy of current regulations pertaining to the abortion of fetuses with major congenital malformations. Specifically, the study seeks to ascertain the extent to which Indonesian legislation addresses abortion in cases of major congenital malformations and to identify factors that might contribute to ambiguity, particularly among medical professionals. Employing a normative juridical approach, the study examines laws and regulations, which are legally binding norms established by state institutions or authorized officials through regulated procedures. These regulations serve to govern life within a country and provide legal certainty. An analysis is conducted to determine whether the provisions outlined in the laws and regulations are sufficiently clear to offer legal certainty to medical practitioners when making decisions regarding abortion for fetuses with major congenital malformations. This research seeks to address the following research inquiries:

1. What is the extent of legal permissibility for abortion of fetuses with major congenital malformations according to laws?

¹⁷ Law Number 1 year 2023 on Criminal Law, article 463.

2. What is the extent of allowance for abortion of fetuses with major congenital malformations as stipulated by the Indonesian medical code of ethics?
3. To what extent do laws and regulations align with the Indonesian medical code of ethics regarding abortion for fetuses with major congenital malformations?
4. What is the extent of feasibility for the effective implementation of existing laws and regulations concerning abortion of fetuses with major congenital malformations?

Data

The primary data utilized in this study consist of the statutory provisions delineated within Indonesian legal frameworks governing abortion, encompassing human rights law, criminal law, and health law.

Data analysis

Following the replacement of the current Criminal Code (Law Number 8 Year 1981) to the new Criminal Law (Law Number 1 Year 2023) that due to be enacted in 2026 and the previous Health Law (Law Number 36 Year 2009) to the current Health Law (Law Number 17 Year 2023), a comparative analysis was conducted to assess the congruence between the former and the latter legal frameworks in regulating abortion, particularly in fetuses with major congenital malformation. These laws were evaluated with respect to their appropriateness and effectiveness. However, the comparison did not extend to human rights law, as it has not undergone recent modifications; consequently, analysis was conducted only to assess the extent to which human rights law regulates abortion. Given that medical practice is underpinned by universal principles articulated in the Doctor's Oath, enshrined in the Indonesian Medical Code of Ethics, the congruence of the existing legislative framework with the Code requires scrutiny. The analysis was conducted utilizing the Principles of Biomedical Ethics¹⁸ (Jonsen, 2010) as benchmarks, given their widespread application as ethical guidelines in the global biomedical community. The analysis also assesses whether the legal frameworks and interpretations of biomedical ethics provide sufficient guidance for medical practitioners, legal practitioners, law enforcement and judicial agencies.

DISCUSSIONS

Legal permissibility for abortion of fetuses with major congenital malformations

Human Rights Law perspective

Human rights are at the core of the constitutional order, governing the structure of the State, decision-making, and oversight processes. Human rights are defined as a set of rights inherent in the nature and existence of humans as creatures of God Almighty and are His gifts that must be

¹⁸ Albert Jonsen (*et al.*), *Clinical Ethics: A Practical Approach to Ethical Decisions in Clinical Medicine*, 7th edition, LANGE Clinical Science, New York: 2010, p. 5, ISBN 9780071634144.

respected, upheld and protected by the state, law, government and everyone for the honor and protection of human dignity.¹⁹ This is in congruence Doctor's Oath, since the Hippocratic Oath, that explicitly prohibits abortion as an act of preserving human life. The Indonesian Doctor's Oath states, "I will protect human life since conception"; therefore, life must be respected even from the embryonic period.

In contrast to adults, where the right to life includes the right to defend life, fetuses are not able to protect their own life, so the decision to maintain life falls on the other party. As Indonesia's state philosophy, Pancasila outlines *Kemanusiaan yang Adil dan Beradab* (A Just and Civilized Humanity) as the basis for protecting life in the sense that no human being is allowed to be killed by another human being, except in extraordinary circumstances²⁰. The argument for the fetal right to live is focused on the right of every child to survive, grow, and develop²¹.

Nevertheless, not all children are born in good health and even disabled to varying degrees. Children born with disabilities are at risk of not getting sufficient attention from their parents or family because they are considered a burden, a disgrace, a disaster, or a curse. This might become a reason for parents to hide or throw away the child, or if it is known early in the pregnancy, they might abort them.²² This presents a heightened challenge as technology advances rapidly, enabling very early diagnosis of fetal abnormalities, which can serve as indicators for determining the fetus's potential survival outside the womb.

The prohibition on abortion also facing the issue of maternity rights, encompassing rights inherently associated with women due to their reproductive roles, including menstruation, pregnancy, childbirth, and breastfeeding. Moreover, in numerous jurisdictions, women's reproductive rights also encompass the entitlement to choose not to bear children. The Constitution has guaranteed the fulfilment and protection of maternity rights, in particular, the right to form a family and procreate²³, the right to personal and family safety²⁴, the right to live in prosperity, and the right to obtain health services²⁵. The guarantee of the fulfilment of this right is also confirmed by the Human Rights Law²⁶ and the ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)²⁷.

The explanation above underscores a contradiction between fetal rights and maternity rights within the context of abortion, stemming from divergent viewpoints regarding the moral and legal standing of fetuses versus the autonomy and bodily integrity of pregnant individuals. On one hand, fetuses, including those with malformations, are regarded as possessing moral and legal status as

¹⁹ Law Number 39 Year 1999 on Human Rights, article 1.

²⁰ Law Number 8 Year 1981 on Criminal Code, articles 104, 111, 124, 140, 340, 365, 444

²¹ The 1945 Constitution of the Republic of Indonesia (The 1945 Constitution), article 28B, paragraph 1.

²² Setia Pranata dan FX Sri Sadewo, "[Miscarriage, unplanned pregnancies and abortions in Indonesia]", *Buletin Penelitian Sistem Kesehatan (Bulletin of Health System)*, No. 2, Vol. 15, pp. 180-192, 2012, E-journal online <<https://lib.ui.ac.id/detail?id=20406262&lokasi=lokal>>, [accessed on 25/12/2023].

²³ The Constitution, *Op.Cit.*, article 28B, paragraph 1.

²⁴ The Constitution, *Ibid.*, article 28G, paragraph 1.

²⁵ The Constitution, *Ibid.*, article 28H, paragraph 1.

²⁶ Law Number 39 Year 1999 on Human Rights.

²⁷ Law Number 7 Year 1984 on Ratification of Committee on the Elimination of Discrimination against Women (CEDAW) Convention 1979.

human beings with an inherent right to life. Consequently, abortion is perceived as an infringement upon fetal rights, leading to the cessation of potential life, even if the potential life is a short one. This perspective often aligns with ethical and religious convictions that prioritize the protection of fetal life from conception onward, as articulated in the Indonesian Doctor's Oath. Conversely, proponents assert that pregnant individuals possess a fundamental right to bodily autonomy and reproductive freedom. They contend that decisions regarding pregnancy, including continuation or termination, should rest with the pregnant individual, free from external intervention or coercion. This viewpoint underscores the significance of women's agency in shaping their reproductive trajectories and safeguarding their physical and emotional well-being. The rights of humans who have been born into the world should take precedence over embryos or fetuses should be an adagium. They bear the right to life but should not threaten existing life, especially the mother's life as an individual and as part of the society that functions to maintain the sustainability of other human life.

Another important concern in major congenital malformation is regarding the issue of the beginning of life. The Indonesian Human Rights Law has not addressed the pivotal question concerning the beginning of life. The determination of when life commences is integral to deliberations regarding the entitlement of a fetus, especially if diagnosed with severe abnormalities that would be difficult to survive outside the womb, to be born or terminated. Consequently, the absence of prenatal testing advancements in Indonesia, despite the existence of numerous technologies capable of detecting various anomalies during the initial stages of pregnancy (10 weeks or 2.5 months), is underscored by this unresolved ethical and legal quandary. In practice, the ethicolegal interpretation of human rights would present significant challenges if the responsibility for determining the permissibility of abortion were left to individual doctors attending to pregnant women. The development of national regulations or guidelines is essential to provide guidance for medical practitioners in decision-making. However, this task poses significant challenges, particularly in Indonesia, where there are substantial variations in the interpretation of religious and cultural values concerning this issue.

Criminal Law perspective

The 1981 Indonesian Penal Code²⁸ (presently in force until replaced by Law No. 1 year 2023 as the new Criminal Law, scheduled to take effect in 2026) and the Ratification of CEDAW²⁹ regulate the practice of abortion. The Penal Code³⁰ prohibits and carries major penalties for abortions. The maximum penalties range from 5 to 15 years in prison, depending on the consequence to the mother. Moreover, when medical professionals perform an abortion, the sentence would be added by one-

²⁸ Law Number 8 Year 1981 on Criminal Code (Criminal Code).

²⁹ Law Number 17 Year 2023 on Health (Health Law 2023).

³⁰ Law Number 8 Year 1981, *Op. Cit.*, articles 299, 346, 347, 348, 349.

third with the risk of revocation of practice license. The Penal Code does not provide provisions for exceptions to abortion.

The new Criminal Law still upholds the fundamental prohibition of abortion³¹. It strictly prohibits abortion and essentially threatens criminal sentence for pregnant women and those who help, give hope, offer, or promise abortion with the same penalties if the abortion lacks a medically and legally justifiable rationales, and simultaneously protects medical professionals who perform legal abortions³².

The new Criminal Law includes medical emergencies as one of the pertinent criteria for permissible abortions, alongside the criteria concerning pregnancies resulting from rape. The new Law does not explicitly address major congenital malformations as a criterion for permissible abortion. Nevertheless, fetuses with major congenital malformations often present medical emergencies posing significant risks either to their health or their mothers' health. Consequently, urgent medical intervention to address immediate threats to their well-being becomes imperative. Hence, the existence of a major congenital malformation in fetuses may constitute grounds for a medical emergency.

The provisions permitting abortion under circumstances of medical emergencies and pregnancies resulting from rape is a departure from the absence of such exceptions in the 1981 Criminal Code. In the 1981 Criminal Code this rectification is addressed through the inclusion of permissions for abortion in cases of medical emergencies and instances of rape-induced pregnancies within previous 2009 Health Law³³. The new Health Law (2023)³⁴ also includes this provision. The legal ramifications for individuals involved in abortions as delineated in the new Criminal Law (*lex generalis*) are identical with those stipulated in the new Health Law (*lex specialist*).

The initial source of the current Criminal Code can be traced back to the *Wet boek van Strafrecht* (WvS) of 1918. This legal framework imposes criminal sanctions on all parties involved in abortion-related activities, including women seeking such services and individuals advocating for or providing assistance, without exception. From a historical perspective, the prohibition of abortion during this period possibly targeted practitioners such as healers, traditional birth attendants, or pharmacists who performed abortions lacking sufficient expertise, techniques, and both medically and legally justifiable rationales, thereby jeopardizing maternal safety. Whether the absence of abortion exceptions in the current Criminal Code reflects historical perspectives equating abortion with an offense against life is a matter for legal scholars and sociologists to debate. With the enactment of the new Criminal Code (Law #1 of 2023), the Indonesian Government and Legislative Assembly assert the nation's departure from colonial-era laws by promulgating its own Criminal Law.

³¹ Criminal Law 2023, *Op. Cit.*, articles 251, 408-410, and 463-465.

³² Criminal Law 2023, *Ibid.*, article 463, paragraph 3.

³³ Law Number 36 year 2009 on Health, article 75.

³⁴ Health Law 2023, *Op. Cit.*, article 60.

³⁵ Over a century later, Indonesia has endorsed a novel Criminal Law characterized as "new, reformative, progressive, and responsive" to contemporary challenges.

Health law perspective

The prior Health Law, Law Number 36 year 2009, provided detailed regulations concerning abortion, further specified by Minister of Health Regulation Number 3 of 2016 regarding Training and Implementation of Abortion Services for Indications of Medical Emergency and Pregnancy Due to Rape. Generally, abortion remains prohibited, except in circumstances of medical emergency, encompassing situations where the life of the mother and/or fetus is at risk, cases involving severe genetic diseases and/or congenital defects that are irreparable, thus impeding the viability of the fetus outside the womb. Moreover, abortion is permitted in cases of pregnancies resulting from rape due to the potential psychological trauma inflicted upon the victim.

Generally, every country has laws prohibiting induced abortion without justifiable medical reasons. Acceptable reasons are to help the mother and consider the child's safety, both physically and spiritually. Medical indications can change and are greatly influenced by medical advancement; biomedical technology now allows the very early diagnosis of major congenital abnormalities. Some countries, such as Sweden³⁶ and Switzerland³⁷, justify social, humanitarian and eugenic indications for allowing abortion.

Why is abortion specifically regulated in the Health Law, despite already being addressed in the Criminal Law? The Health Law, which governs the healthcare system, was primarily established with the objective of enhancing public health standards. Abortion pertains to determinants of fetal and maternal health, implicating healthcare professionals and facilities. Moreover, although abortion is a personal matter, the causes and societal ramifications of abortion are public health concerns. All these elements constitute components of the national health system (SKN)³⁸. Abortion measures are aimed at addressing health challenges, including prevalent abortion practices within society, through comprehensive, integrated, and sustainable promotive, preventive, curative, and rehabilitative interventions. Despite the general trend towards decentralization in healthcare regulation, national regulation remains necessary for matters involving the loss of human life, such as abortion.

The situation can be compared with it in the United States where abortion regulations are predominantly governed by an intricate combination of federal and state laws, along with judicial interpretations. Since the Supreme Court decision in *Roe v. Wade* (1973), which legalized abortion

³⁵ Ferry Sandi, "[After 104 years the Republic of Indonesia used the Netherland's Law, when will the Penal Code be enacted?]", December 8 2022, CNBC Indonesia News, <https://www.cnbcindonesia.com/news/20221208162013-4-395032/104-tahun-ri-pakai-hukum-belanda-kapan-kuhp-baru-berlaku>, [accessed on 25/12/2023].

³⁶ Terry-Lee Marttinen, "Eugenics, Admixture, and Multiculturalism in Twentieth-Century Northern Sweden: Contesting Disability and Sámi Genocide", *Journal of Critical Mixed Race Studies*, No. 2, Vol. 1, pp. 233-261, 2022, E-journal online <<https://doi.org/10.5070/C81258341>>, [accessed on 25/12/2022].

³⁷ Leena Schmitter L (Kristina Schulz, ed.), *Female Bodies-Fetal Subjects?* (in *The Women's Liberation Movement: Impacts and Outcomes*), Berghahn Books, New York-Oxford: 2017, pp. 51-66.

³⁸ Presidential Decree Number 72 Year 2012 on the National Health System, State Gazette No. 193 Year 2012.

nationwide, the legal landscape has undergone significant evolution and remains subject to ongoing debate and litigation. Under *Roe v. Wade* and subsequent rulings, a woman has a constitutional right to terminate her pregnancy within certain parameters. During the first trimester (first three months of pregnancy), States are generally prohibited from imposing significant restrictions on abortion access. In the second trimester, States may regulate abortion to protect maternal health, and in the third trimester, they may prohibit abortion except when necessary to preserve the life or health of the mother. However, States have considerable latitude in regulating abortion beyond these basic parameters, such as imposing waiting periods, mandatory counselling, parental consent or notification requirements for minors, gestational limits, regulations on abortion providers and facilities, and fetal abnormalities.³⁹

The issue of abortion involves many aspects, not only health matters but also social, economic, cultural and religious ones. However, the facts prove that women will always have abortions and will continue to do so, regardless of legal sanctions, religious prohibitions, or social norms. Even though the debate about whether abortion is ethical is still ongoing, some women who experience unwanted pregnancies will always do it secretly, asking for help from medical professionals or those who are not. Unsafe abortion poses many dangerous risks of complication, such as bleeding, sepsis, and trauma to the vagina, cervix and uterus, thus carrying a very clear message that access to safe and legal abortions will improve the health status of women.

For example, sociological insights could be drawn from the 2017 five-year demographic and health survey in Indonesia reveal that unwanted pregnancies accounted for 7% of total pregnancies, while the desired total fertility rate is 2.1 children, lower than the observed total fertility rate of 2.4 children.⁴⁰ The national estimate of abortion incidence in 2010 was 4%, with 6.54% classified as induced abortions (sample n=60,757). This indicates that in 2010, there were 43 abortions per 100 live births among the 53 million women aged 15-49 years, or 37 abortion cases per year per 1,000 women aged 15-49 years, based on a Crude Birth Rate (CBR) of 20 per 1,000 live births. Self-induced abortions comprised 49.3% of attempts, followed by procedures conducted by doctors and midwives (33.3%), by traditional midwives (11.8%), and other means (6.3%).⁴¹

The Indonesian Minister of Health Regulation Number 3 of 2016 regarding Training and Implementation of Abortion Services for Indications of Medical Emergency and Pregnancy Due to Rape regulates the implementation of training, certification and evaluation of personnel, implementation of services, including criteria for health facilities that are permitted to carry out abortions, the existence of an abortion eligibility team that plays a role in examining and making abortion decisions, recording and reporting, as well as supervision and guideline.

³⁹ Daniel Grossman (*et al.*), "Change in abortion services after implementation of a restrictive law in Texas", *Contraception*, No. 5, Vol. 90, pp. 496–501, 2014, E-journal online <<https://dx.doi.org/10.1016/j.contraception.2014.07.006>> [accessed in 24/02/2024].

⁴⁰ Ministry of Health of the Republic of Indonesia, "Basic Health Survey, Main Results 2018", *Lembaga Penerbit Badan Penelitian dan Pengembangan Kesehatan*, Jakarta, 2019, E-journal online, https://kesmas.kemkes.go.id/assets/upload/dir_519d41d8cd98f00/files/Hasil-risikesdas-2018_1274.pdf, [accessed 15/11/2023].

⁴¹ Setia Pranata dan FX Sri Sadewo, *Op. Cit.*, p. 188.

The legalization of abortion is feasible, particularly when aimed at enhancing women's health, consequently benefiting family health as well. Developing countries, often former colonies, tend to uphold prohibitions on abortion, a legal stance originating from colonial-era laws. Conversely, former colonial powers in Europe abolished such laws many decades ago. Legalizing abortion is perceived as a strategy to ameliorate women's reproductive health and mitigate mortality rates resulting from unsafe abortions. Nevertheless, the establishment and rigorous implementation of criteria, governance, and operational administration are imperative to ensure moral and social accountability.

Ethical perspective for abortion of fetuses with major congenital malformations

Ethics is commonly defined as moral philosophy, while law comprises statutory regulations established by the state to enforce societal norms and ensure order. Mochtar Kusumaatmadja's theory of the Law of Development posits that law constitutes a component of social regulations, albeit not the sole one, as society is also guided by intrinsic moral codes, religious precepts, ethical standards, and cultural customs.⁴² Moreover, ethical considerations frequently inform the formulation and interpretation of laws, with lawmakers and judges often drawing upon ethical principles to shape legal judgments. In certain instances, legal frameworks may adapt in response to shifts in societal ethics, mirroring changes in values and norms over time. In many situations, the problem of abortion cannot be solved solely by relying on laws without guidelines for practice. Here the biomedical ethics principles namely the principles of autonomy, beneficence, non-maleficence, and justice, introduced by Beauchamp and Childress, are used to assess the issues of legalization of abortion of fetuses with major congenital malformations.⁴³

Autonomy

The issue of autonomy in deciding on the abortion of a fetus that is "difficult to survive outside the womb" is related to maternal autonomy and the fetus's right to life. Since 2020, legalized abortion in the UK and the US, which use maternal autonomy as the basic argument, has faced challenges from people with disabilities. The legal actions initiated by individuals with Down syndrome in the United States and the UK serve as intriguing case studies. Down syndrome is a condition in which a person has an extra copy of chromosome 21; therefore, the medical term for this condition is 'trisomy-21'. The extra copy changes how the baby develop, causing mental and physical challenges for the baby and considered as one of the major congenital malformations. There is a spectrum of condition, which depends on whether the extra copy presents in some part, not all part of body cells. Although the appeal over a law that allows abortion up until birth for a fetus with Down syndrome has failed in the

⁴² M. Zulfa Aulia, "Hukum Pembangunan dari Mochtar Kusumaatmadja: Mengarahkan Pembangunan atau Mengabdikan pada Pembangunan?", *Undang: Jurnal Hukum*, No. 2, Vol. 1, pp. 370, 2018, E-journal online <<https://dx.doi.org/10.22437/ujh.1.2.363-392>> [accessed in 14 March 2024] : 363-392.

⁴³ Albert Jonsen, *Op. Cit.*, p. 5.

UK⁴⁴, several US states have decided to ban abortion based solely on a prenatal diagnosis of Down syndrome⁴⁵. In 2022, the United States Supreme Court changed the constitutional right to abortion, based on the ruling of *Roe vs Wade* in 1973, and handed over decision-making authority to the State. How the 2022 ruling will affect the whole world, as did the 1973 verdict, remains to be observed.⁴⁶

There are several fundamental questions related to the fetus's right to life. It includes when a fetus can be considered alive and bear the right to life. The types of fetal abnormalities that can be regarded as "difficult to survive outside the womb" are also critical. Based on that, there are questions regarding: When is considered the beginning of life (the personhood of an embryos or fetuses)? To what extent can the detection equipment and medical professionals detect this type of abnormality (the earliest possible diagnosis and the severity of malformations)? Moreover, should factors other than biological ones be considered in abortion decision-making? A concrete example of the latter question in the Indonesian context is that there are still significant differences between supporting health facilities for people with disabilities from one region to another. Even if these facilities exist, are they accessible and affordable for the parents of the fetus?

Another aspect pertinent to the discourse of autonomy pertains to the influence of religion on decision-making for individuals involved. Concerns may emerge among parents regarding the religious stance on abortion. This deliberation holds significance as it reflects the protection of individuals' human rights to practice their religion. In religiously oriented societies, religious decrees play a pivotal role in guiding decisions involving uncertain elements. Extensive literature demonstrates significant discussions on this topic, particularly from the perspectives of Islam and Catholicism. For example, from the perspective of Islam, the focus is on the boundaries of the beginning of life. Forty to one hundred and twenty days are the number that is generally used^{47 48}. As long as the diagnosis of severe fetal abnormalities, abortion can be performed before the 120th day. It implies the recognition of probabilism in assessing fetal survival outside the womb. In contrast, the Vatican, as the supreme authority of Catholics, argues that human life must be respected and protected from conception, and probabilism should not be used if human life is at stake.⁴⁹

The analysis towards the Indonesian Human Rights Law, Criminal Law, and Health Law and their derivative regulations above demonstrates the issues regarding the beginning of life and the right to life of embryo or fetuses with major congenital malformation have not been regulated. While it is

⁴⁴ BBC News, "Woman with Down's syndrome loses abortion law appeal", November 29, 2022, News, <<https://www.bbc.com/news/disability-63744073>>, [accessed on 20/01/2023].

⁴⁵ David Crary & Iris Samuels, "Down syndrom abortion bans gain traction after court ruling", PBS News Hour, 19th May 2021, <<https://www.pbs.org/newshour/nation/down-syndrom-abortion-bans-gain-traction-after-court-ruling>>, [accessed on 14/01/2023].

⁴⁶ Lynn M. Morgan, "Global Reproductive Governance after *Dobbs*", *Current History*, No. 840, Vol. 122, pp. 22-28, 2023, *E-journal online* <<https://doi.org/10.1525/curh.2023.122.840.22>>, [accessed on 25/01/2023].

⁴⁷ Abdulrahman Al-Matary and Jaffar Ali, "Controversies and considerations regarding the termination of pregnancy for Foetal Malformations in Islam", *BMC Medical Ethics*, No. 10, Vol. 15, pp. 1-10, 2014, *E-journal online* <<https://doi.org/10.1186/1472-6939-15-10>>, [accessed on 03/12/2022].

⁴⁸ Karim Hassanein Ismail Abd-El-Maeboudhuman, "Life Cycle and The Beginning Of Life: An Islamic Perspective", *Periodicum Biologorum*, No. 3, Vol. 111, pp. 365-372, 2009, *E-journal online* <<https://doi.org/10.13140/RG.2.1.4593.7685>>, [accessed: 12/03/2024].

⁴⁹ Catechism of the Catholic Church, "Libreria Editrice Vaticana", 2003, <https://www.vatican.va/archive/ENG0015/_INDEX.HTM>, [accessed on 14/01/2023].

deduced that fetuses with major congenital malformations have the potential to trigger medical emergencies for both the fetus and the pregnant mother, not all instances result in such emergencies, thus indicating weaknesses in the argument for their inclusion.

Thus, an in-depth philosophical, religious, sociological, and medical discussion is needed regarding the issue of the beginning of life and the criteria for the fetuses that are allowed to be aborted, and how it should be used as the basis for regulating this matter at a macro level. Apart from that, more detailed medical practice guidelines regarding the criteria for fetuses with major congenital malformations at the micro level are also needed to serve as a reference for medical professionals.

Beneficence and Non-maleficence

Beneficence is defined as the obligation to promote well-being in others, while non-maleficence is defined as the obligation not to cause harm or injury. The two principles are difficult to separate, particularly in the maternal-fetal relationship; therefore, they were combined to be used for utilitarian analysis of legalization of abortion of fetuses with major congenital malformations. Based on the experience of various countries, a total abortion ban can encourage people to have unsafe abortions. In the Middle East and North Africa, one in ten pregnancies ends in abortion⁵⁰, and at least 6% of maternal deaths can be attributed to unsafe abortions⁵¹. One example of success is in South Africa, namely the drastic reduction in maternal morbidity and mortality after the enactment of abortion regulations⁵². The opposite effect was seen when abortion was banned in Romania⁵³.

A qualitative study in the US revealed arguments from those who decided to abort their pregnancy due to fetal condition. The arguments related to the fetuses that are “difficult to survive outside the womb” includes: preventing personal emotional harm, preventing maternal physical harm due to pregnancy risks, personal expectancy for the child’s quality of life, preventing suffering of the future infant, child, or adult, and balancing needs of all family members.⁵⁴

Severe fetal malformations can cause pregnancy complications that cause maternal morbidity and even mortality. These complications include psychological trauma, pain, and other medical risks, including surgery. Mothers do not need to suffer in giving birth to a fetus, resulting in loss and wastage of energy, physical trauma, and psychological turmoil. The argument equates the maternal risk of

⁵⁰ Leila Hessini, “Abortion and Islam: Policies and practice in the Middle East and North Africa”, *Reproductive Health Matters*, No. 29, Vol. 15, pp. 75–84, 2007, E-journal online <[https://dx.doi.org/10.1016/S0968-8080\(06\)29279-6](https://dx.doi.org/10.1016/S0968-8080(06)29279-6)>, [accessed on 02/12/2023].

⁵¹ World Health Organization, *Op. Cit.*, p. 1.

⁵² Rachel Jewkes (*et al.*), “The impact of age on the epidemiology of incomplete abortions in South Africa after legislative change”, *BJOG: An International Journal of Obstetrics & Gynaecology*, No. 3, Vol. 112, pp. 355-359, 2005, E-journal online <<https://doi.org/10.1111/j.1471-0528.2004.00422.x>>, [accessed on 16/01/2023].

⁵³ Department for International Development of OHCHR, “How to Reduce Maternal Deaths: Rights and Responsibilities”, The United Nations Office of the High Commissioner for Human Rights, 2005, https://www2.ohchr.org/english/issues/development/docs/rights_maternal_health.pdf, [accessed on 02/01/2023].

⁵⁴ L.M. Gawron and K. Watson, “Documenting moral agency: a qualitative analysis of abortion decision making for fetal indications”, *Contraception*, No. 2, Vol. 95, p. 180, 2017, E-journal online <<https://doi.org/10.1016/j.contraception.2016.08.020>>, [accessed: 12 March 2024].

giving birth to a normal baby with the risk of a healthy mother giving birth to a baby with an abnormality. Pregnancy and giving birth to a normal baby is not without risks, including prepartum (age <17 years, age > 35 years), intrapartum (pre-eclampsia/eclampsia, pregnancy-related heart problems, bleeding, embolism, sepsis/severe infection, transfusion risk, respiratory distress), and post-partum (bleeding, depression).⁵⁵

Another risk of harm is the misdiagnosis of fetal abnormalities. In this case, the role of medical diagnostic technology to detect abnormalities accurately becomes crucial. As far as possible, the misdiagnosis of fetal malformations should not occur, which can usually be done in a good health facility⁵⁶. The competence of medical professionals is also vital. Misdiagnosis of fetal abnormalities is more likely to occur if only one health professional is involved or if the health worker is incompetent; therefore, many opinions suggest more than one practitioner is better in detecting abnormalities.

Justice

The principle of justice typically focuses on the distributive justice, how the decision could be affected with the consideration of resource allocation of economic and non-economic to achieve relational justice, such as distribution of maternal or family resources. Requesting a woman to maintain her pregnancy with a fetus known to have severe abnormalities means exposing her to medical risks. Therefore, it is not fair to demand the mother keep the pregnancy to full term and give birth to it. Requesting impoverished families to raise infants born with major congenital malformations without sufficient government support exposes these families to long-term economic vulnerabilities. Despite the rare instances where infants with severe malformations may survive for several years post-birth⁵⁷, the challenging life prospects for these children and the resultant impact on the mother and family warrant consideration. The principle of distributive justice underscores the substantial social costs associated with pregnancy and childbirth, including the allocation of limited healthcare resources that might be more effectively utilized for infants and children with better prospects of survival or a higher likelihood of leading a normal life. Presently, neither the Health Law nor the Minister of Health Regulations in Indonesia address these risks. Making medically acceptable and ethically sound abortion decisions entails a multifaceted process that cannot solely rely on individual healthcare professionals or the "abortion eligibility teams"⁵⁸ without comprehensive guidelines delineating various considerations.

Every country tries to base their laws on some notion of good and bad and uses legality as a kind of moral baseline. The law tries to distinguish acceptable behavior from behavior that demands punishment. Countries decide some acts are too harmful to allow and make them illegal and set

⁵⁵ Lesley A. Tarasoff (et al.), "Maternal disability and risk for pregnancy, delivery, and postpartum complications: a systematic review and meta-analysis", *The American Journal of Obstetrics and Gynecology*, No. 1, Vol. 222, pp. E1-27, E32, 2020, E-journal online <<https://doi.org/10.1016/j.ajog.2019.07.015>>, [accessed on 14/01/2023].

⁵⁶ Pippa M. Kyle (et al.), "Accuracy of prenatal diagnosis in a tertiary fetal medicine unit", *New Zealand Medical Journal*, No. 1288, Vol. 122, pp. 50-61, 2009, E-journal online <<https://pubmed.ncbi.nlm.nih.gov/19182842/>>, [accessed on 02/02/2023].

⁵⁷ Holly Dickman, *Op.Cit.*, p. 1.

⁵⁸ Minister of Health Regulation Number 3 of 2016 regarding Training and Implementation of Abortion Services for Indications of Medical Emergency and Pregnancy Due to Rape, article 15-18.

appropriate punishments. Law has an advantage over ethics because it's codified, although it's possible to behave legally but still be morally cruel and unjust. If only the law is used as the moral baseline, any behavior except behavior that gets punishment can be accepted. Relying on this maxim would render our society less trustworthy. Conversely, some behavior is ethically justified even though it's against the law. Disobeying unjust laws is a cornerstone of civil disobedience. Consequently, it can be inferred that if regulations are formulated with ethical principles as a moral philosophy, the law would be better positioned to achieve its objective, which is not solely to preserve order but also to function as a vehicle for upholding morality. Fortunately, ethics offer incentives to go beyond the legal minimum, and at least since the field of medicine has been written down in history for thousands of years, ethical principles have been used as moral guidelines in medical practice. Accommodation of medical ethics in the legal system in Indonesia, especially health law (ethicomedicolegal), seems to have been attempted from time to time; however, further efforts are still needed in cases of abortion of fetuses with major congenital malformation in accordance with advances in medical science and technology as well as socio-cultural challenges. public.

CLOSING

Based on the ethicomedicolegal analysis above, it can be concluded that although laws and regulations have opened opportunities for abortions in fetuses that are difficult to survive outside the womb, further regulation and guidelines are still needed for law enforcement agencies, healthcare providers, and the medical professionals in cases of fetuses with major congenital malformations. The requisite regulations primarily pertain to the issue of the beginning of life, which require thorough deliberation encompassing philosophical, religious, sociological, and medical perspectives. Additionally, guidelines are needed which mandate a comprehensive examination of cutting-edge science and technology to assess the viability of abortion, while concurrently considering the preparedness of the healthcare service system to address diverse challenges in the field, encompassing both fully equipped and under-resourced regions.

In the immediate term, to ensure that abortions are conducted in accordance with appropriate ethical and legal standards, it is recommended that national guidelines be established to delineate the permissible indications for the procedure. The guideline should at least cover the following issues:

1. The type and degree of abnormality of fetuses that can be categorized as "difficult to survive outside the womb".
2. Standard methods for diagnosing the type and degree of fetal abnormalities, including for areas with limited facilities.
3. Requirements for health facilities that can perform abortion diagnosis and procedures.
4. Standards for the number and minimum competence of medical professionals who can be authorized to diagnose and perform abortions.

5. A standard for the abortion decision-making process. An ethical decision-making process could use the following principles: medical indications for mother and baby, patient preference, quality of life for mother and baby, and contextual features (including social, cultural, economic, legal and religious aspects).

Mechanisms for supervision, monitoring and evaluation internally (the health facility) and externally (the local health authority).

REFERENCES

Book

Albert Jonsen (*et al.*), *Clinical Ethics: A Practical Approach to Ethical Decisions in Clinical Medicine*, 7th edition, LANGE Clinical Science, 2010, ISBN 9780071634144

Anibal Faúndes A & Laura Miranda (Stella R. Quah ed.), *Unsafe Abortion, in International Encyclopedia of Public Health*, 2nd edn., Academic Press, 2017 ISBN 9780128037089, <<https://dx.doi.org/10.1016/B978-0-12-803678-5.00001-1>>, [accessed on 03/12/2022]

Arnold Christianson, Christopher P. Howson, and Bernadette Modell. *March of Dimes global report on birth defects. The hidden toll of dying and disabled children*, March of Dimes Birth Defect Foundation, New York: 2006.

Leena Schmitter L. (Kristina Schulz, ed.), *Female Bodies – Fetal Subjects? (in The Women’s Liberation Movement: Impacts and Outcomes)*. Berghahn Books. New York-Oxford: 2017.

Journal

Abdulrahman Al-Matary and Jaffar Ali, “Controversies and considerations regarding the termination of pregnancy for Foetal Malformations in Islam”, *BMC Medical Ethics*, No. 10, Vol. 15, pp. 2-10, 2014, E-journal online, <<https://doi.org/10.1186/1472-6939-15-10>>, [accessed on 03 December 2022].

Asim Kurjak (*et.al.*), “Facts and doubts on the beginning of human life – scientific, legal, philosophical and religious controversies”, *Journal of Perinatal Medicine*, No. 1, Vol. 51, pp. 39-50, 2023, E-journal online, <<https://dx.doi.org/10.1515/jpm-2022-0337>>, [accessed: 2nd January 2023]

Christian M. Pettker (*et al.*), “The Limits of Viability”, *Obstetrics and Gynecology*, No.3, Vol. 142, pp. 725-726, 2023, E-journal online <<https://dx.doi.org/10.1097/AOG.0000000000005280>>, [accessed on 22 February 2024].

Daniel Grossman (*et al.*), “Change in abortion services after implementation of a restrictive law in Texas”, *Contraception*, No. 5, Vol. 90, pp. 496–501, 2014, E-journal online <<https://dx.doi.org/10.1016/j.contraception.2014.07.006>> [accessed in 24 February 2024].

Holly Dickman (*et al.*), “Prolonged unassisted survival in an infant with anencephaly”, *BMJ Case Reports*, pp. bcr2016215986, 2016, E-journal online, <<https://dx.doi.org/10.1136/bcr-2016-215986>>, [accessed: 25th December 2022].

- Jaime L. Natoli (*et al.*), "Prenatal diagnosis of Down syndrome: a systematic review of termination rates (1995–2011)", *Prenatal Diagnosis*, No. 2, Vol. 32, pp. 142-153, 2012, E-journal online, <<https://dx.doi.org/10.1002/pd.2910>>, [accessed: 25th December 2022].
- Jonathan Bearak (*et.al.*), "Unintended pregnancy and abortion by income, region, and the legal status of abortion: estimates from a comprehensive model for 1990–2019", *The Lancet-Global Health*, No. 9, Vol 8, pp. e1152-e1161, 2020, E-journal online <[https://dx.doi.org/10.1016/S2214-109X\(20\)30315-6](https://dx.doi.org/10.1016/S2214-109X(20)30315-6)> [accessed 25 December 2022].
- Karim Hassanein Ismail Abd-El-Maeboudhuman, "Life Cycle and The Beginning of Life: An Islamic Perspective", *Periodicum Biologorum*, No. 3, Vol. 111, pp. 365–372, 2009, E-journal online <<https://doi.org/10.13140/RG.2.1.4593.7685>>, [accessed: 12 March 2024].
- L.M. Gawron and K. Watson, "Documenting moral agency: a qualitative analysis of abortion decision making for fetal indications", *Contraception*, No. 2, Vol 95, pp. 175-180, 2017, E-journal online <<https://doi.org/10.1016/j.contraception.2016.08.020>>, [accessed: 12 March 2024].
- Leila Hessini, "Abortion and Islam: Policies and practice in the Middle East and North Africa", *Reproductive Health Matters*, No. 29, Vol. 15, pp. 75–84, 2007, E-journal online, <[https://dx.doi.org/10.1016/S0968-8080\(06\)29279-6](https://dx.doi.org/10.1016/S0968-8080(06)29279-6)> [accessed on 02 December 2022].
- Lesley A. Tarasoff (*et al.*), "Maternal disability and risk for pregnancy, delivery, and postpartum complications: a systematic review and meta-analysis", *The American Journal of Obstetrics and Gynecology*, No. 1, Vol. 222, pp. E1-27, E32, 2020, E-journal online, <<https://doi.org/10.1016/j.ajog.2019.07.015>>, [accessed 14 January 2023].
- Lynn M. Morgan, "Global Reproductive Governance after *Dobbs*", *Current History*, No. 840, Vol. 122, pp. 22-28, 2023, E-journal online <<https://doi.org/10.1525/curh.2023.122.840.22>>, [accessed on 14 January 2023].
- M. Zulfa Aulia, "Hukum Pembangunan dari Mochtar Kusumaatmadja: Mengarahkan Pembangunan atau Mengabdikan pada Pembangunan?", *Undang: Jurnal Hukum*, No. 2, Vol. 1, pp. 363-392, 2018, E-journal online <<https://dx.doi.org/10.22437/ujh.1.2.363-392>> [accessed in 14 March 2024].
- Pippa M. Kyle (*et al.*), "Accuracy of prenatal diagnosis in a tertiary fetal medicine unit", *New Zealand Medical Journal*, No. 1288, Vol. 122, pp. 50-61, 2009, E-journal online, <<https://pubmed.ncbi.nlm.nih.gov/19182842/>>, [accessed on 02 January 2023].
- Rachel Jewkes (*et al.*), "The impact of age on the epidemiology of incomplete abortions in South Africa after legislative change", *BJOG: An International Journal of Obstetrics & Gynaecology*, No. 3, Vol. 112, pp. 355-359, 2005, E-journal online <<https://doi.org/10.1111/j.1471-0528.2004.00422.x>>, [accessed on 16 January 2023].
- Setia Pranata and FX Sri Sadewo. "[Miscarriage, unplanned pregnancies and abortions in Indonesia]", *Buletin Penelitian Sistem Kesehatan (Bulletin of Health System)*, No. 2, Vol. 15, pp. 180-192, 2012, E-journal online.

<<http://ejournal.litbang.kemkes.go.id/index.php/hsr/article/view/2992>>, [accessed on 25 December 2022].

Soroush Dabbagh, "Fetus as Human Being: Where is the Cut-off Point?", *Journal of Medical Ethics and History of Medicine*, Vol. 2, pp. 2, 2009, E-journal online <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3713799/>>, [accessed on 12 January 2023].

Terry-Lee Marttinen, "Eugenics, Admixture, and Multiculturalism in Twentieth-Century Northern Sweden: Contesting Disability and Sámi Genocide", *Journal of Critical Mixed Race Studies*, No. 2, Vol. 1, pp. 233-261, 2022, E-journal online <<https://doi.org/10.5070/C81258341>>, [accessed: 25 December 2022].

Legislation

The 1945 Constitution of the Republic of Indonesia.

Law Number 8 Year 1981 on Penal code.

Law Number 7 Year 1984 on Ratification of Committee on the Elimination of Discrimination against Women (CEDAW) Convention 1979.

Law Number 39 Year 1999 on Human Rights.

Law Number 36 Year 2009 on Health.

Law Number 1 Year 2023 on Criminal Code.

Law Number 17 Year 2023 on Health.

Government Regulation Number 61 Year 2014 on Reproductive Health.

Presidential Decree Number 72 Year 2012 on the National Health System, State Gazette No. 193 Year 2012.

Minister of Health Regulation Number 3 of 2016 regarding Training and Implementation of Abortion Services for Indications of Medical Emergency and Pregnancy Due to Rape.

Other Sources

American Medical Association, "AMA announces new adopted policies related to reproductive health care", November 16, 2022, Press release. <<https://www.ama-assn.org/press-center/press-releases/ama-announces-new-adopted-policies-related-reproductive-health-care>>, [accessed: 16th January 2023].

BBC News, "Woman with Down's syndrome loses abortion law appeal", November 29, 2022, News, <<https://www.bbc.com/news/disability-63744073>>, [accessed: 20th January 2023].

Catechism of the Catholic Church, Libreria Editrice Vaticana, 2003, <https://www.vatican.va/archive/ENG0015/_P7Z.HTM>, [accessed: 14th January 2023].

Centers for Disease Control and Prevention (CDC), "Selected major congenital malformations", Last reviewed November 19, 2020, <<https://www.cdc.gov/ncbddd/birthdefects/surveillancemanual/chapters/chapter-1/chapter1-4.html>>, [accessed: 20th January 2023].

David Crary & Iris Samuels, "Down syndrom abortion bans gain traction after court ruling", PBS News Hour, 19th May 2021, <<https://www.pbs.org/newshour/nation/down-syndrome-abortion-bans-gain-traction-after-court-ruling>>, [accessed: 14th Januari 2023].

Department for International Development of OHCHR, "How to Reduce Maternal Deaths: Rights and Responsibilities", The United Nations Office of the High Commissioner for Human Rights, 2005, <http://www2.ohchr.org/english/issues/development/docs/rights_maternal_health.pdf>, [accessed: 2nd January 2023].

Dewan Pertimbangan Perkumpulan Obstetri dan Ginekologi Indonesia, [*The Ethical and Professionalism Guideline of Obstetrics and Gynecology in Indonesia*], *Good Practice in Obstetrics & Gynecology*, Dewan Pembina Perkumpulan Obstetri dan Ginekologi Indonesia, Jakarta, 2017, p.26-28, <<https://www.pogi.or.id/wp-content/uploads/download-manager-files/Panduan%20Etik%20&%20Profesionalisme%20POGI%20-%20DP.pdf>>, [accessed on 26 February 2024].

Ferry Sandi, "[After 104 years the Republic of Indonesia used the Netherland's Law, when will the Criminal Code be enacted?]", December 8 2022, CNBC Indonesia News, <<https://www.cnbcindonesia.com/news/20221208162013-4-395032/104-tahun-ri-pakai-hukum-belanda-kapan-kuhp-baru-berlaku>>, [accessed: 16th January 2023].

Ministry of Health of the Republic of Indonesia, "Basic Health Survey, Main Results 2018", Lembaga Penerbit Badan Penelitian dan Pengembangan Kesehatan, Jakarta, 2019, E-journal online, <https://kesmas.kemkes.go.id/assets/upload/dir_519d41d8cd98f00/files/Hasil-risikesdas-2018_1274.pdf>, [accessed 15 November 2023].

US Supreme Court, The Syllabus of Dobbs v. Jackson Women's Health Organization, 2022, <https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf>, [accessed on 02 January 2023].

World Health Organization, Safe and unsafe induced abortion: global and regional levels in 2008, and trends during 1995-2008, World Health Organization, Geneva: 2012, <https://apps.who.int/iris/bitstream/handle/10665/75174/WHO_RHR_12.02_eng.pdf;jsessionid=E7C6E4AC7613A5D20171ACB01E65EEC9?sequence=1>, [accessed on 22 December 2022].

World Medical Association (WMA), "WMA Statement on Medically-Indicated Termination of Pregnancy", 6th September 2022, <<https://www.wma.net/policies-post/wma-declaration-on-therapeutic-abortion/>>, [accessed on 21 January 2023].