
Legal Analysis of Abortion in Cases of Anencephaly: A Study of Moral, Criminal Law, and Health Perspectives

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Abstract

Abortion is a controversial issue in society, related to moral and legal values. In Indonesia, abortion regulations are found in Law No. 1/1946 of the Criminal Code (KUHP) and Law No. 17/2023 of the Criminal Code, as well as the Health Law. Public perspectives are divided between those opposed to and in favour of abortion, particularly in the context of anencephaly. Maternal health is a focus, with the World Health Organization (WHO) emphasising the need for safe access to abortion. This study analyses the legal framework related to abortion in Indonesia, focusing on anencephaly, and identifies public views. A normative juridical method was used to review the relevant regulations. The results show a mix of criminal and health law regulations, reflecting concern for women's rights and ethical values. However, implementation still faces barriers, including availability of health facilities and consistent law enforcement. An in-depth understanding of people's moral perspectives is needed to design inclusive and sustainable policies on abortion, particularly in cases of anencephaly.

INTRODUCTION

Abortion is a reality that is a serious problem in society because it is debated, especially for people who link the values of norms and laws that make miscarriage of pregnancy a criminal act. (Istibsjaroh, 2012). There are laws relating to abortion today, namely Law Number 1 of 1946 concerning the Criminal Code (KUHP) which was amended into Law Number 1 of 2023 of the Criminal Code (KUHP) with provisions contained in Articles 463, 464, and 465. In addition, there is Law No. 7 of 1984 on the Ratification of the Convention on the Elimination of All Forms of Discrimination against Women and Law No. 17 of 2023 on Health, with relevant provisions in Articles 60, 61, and 62. This is also reinforced by Government Regulation No. 61 of 2014 on Reproductive Health and Minister of Health Regulation No. 3 of 2016 on Training and Implementation of Abortion Services for Indications of Medical Emergency and Pregnancy Due to Rape. Public opinion is divided into two categories: those who oppose abortion and support life, and those who fight for women's reproductive freedom and consider abortion a woman's human right. (Khoiriyani & Harahap, 2022).

The issue of abortion is not only related to medical ethics, but also has a broad impact that involves the entire society. (Herman & Wahyuni, 2023). Maternal health is one of the main concerns in the scope of global health. Data published by the Ministry of Health shows that the maternal mortality rate in 2021 was 183 per 100,000 births, in this data it is estimated that 11% came from unsafe abortion. It is difficult to find the exact figure because the officially recorded causes of death are hypertension, preeclampsia and eclampsia, as well as infection and haemorrhage which are actually associated with unsafe abortion. Meanwhile, data from the

Population and Family Planning Agency (BKKBN) shows that the pregnancy rate at the age of less than 20 years is still high, BKKBN said that the number of unwanted pregnancies is around 17.5%. The data is known from the total population of the adolescent group (age range 14 to 19 years) there are 19.6% cases of unwanted pregnancies and about 20% of abortion cases in Indonesia are carried out by adolescents. (Khandefa & Rinaldi, 2023).. The number of abortions performed due to anencephaly in Indonesia is not known with certainty, but the number that occurred at Hasan Sadikin Hospital in Bandung in 2018 found 0.22% of babies with congenital defects from all births, with anencephaly as the most common type of abnormality, which is 0.06%. (*Annual Report of the Department of Obstetrics and Gynaecology FK UNPAD Hasan Sadikin Hospital Bandung*, 2018)..

The state has a responsibility to create a healthy and safe environment for all its citizens, which includes the protection of unborn life. Absolute prohibition of abortion is not considered to solve the problem, given the need for abortion in society (Asmariah et al., 2023). (Asmariah et al., 2023).. There are compelling reasons to consider, such as therapeutic indications that are now generally accepted. Controversy exists in many countries where abortion is legalised, particularly regarding the age at which a foetus can be aborted.

The incidence of anencephaly varies from country to country, but there are no detailed reports from Indonesia. The development of science and technology allows detailed monitoring of foetal development, so that congenital abnormalities can be detected early. (Kusuma et al., 2022).. Pregnant women who learn that their foetus has severe defects and is unlikely to live can experience severe emotional distress. (M et al., 2023). Some legal experts in Indonesia have proposed legalising abortion, given the reality that abortion is still often performed illegally by non-medical personnel, increasing the risk of death or serious disability for women. If legalisation is not possible, it should at least be allowed for fetuses with congenital defects that cannot survive after birth, considering the significant mental and physical impact on the mother (Phang, 2017). (Phang, 2017).

The purpose of this study is to conduct a legal analysis of abortion cases in the context of anencephaly, focusing on moral, criminal law and health perspectives. This research aims to investigate the laws governing the occurrence of abortion in Indonesia, particularly in the case of anencephaly, by identifying relevant provisions in Law No. 1/1946 on the Criminal Code, Law No. 1/2023 on the Criminal Code, Law No. 7/1984 on the Ratification of the Convention on the Elimination of All Forms of Discrimination against Women, and Law No. 17/2023 on Health. In addition, the purpose of this article's analysis also includes understanding the public's views on abortion, both opposing and supporting it, as well as exploring the global health implications of the existence of unsafe abortion. Through this analysis, it aims to dedicate a more in-depth look at the complexity of the abortion issue, especially in the context of anencephaly cases in Indonesia, and provide constructive thinking regarding policy reforms that may be needed.

METHODOLOGY

Methodology is the key to revealing the truth and solving a problem in order to obtain the final result, the approach in this study is normative juridical. The normative juridical approach is used to analyse the legal framework governing abortion in the context of an

anencephaly case. The analysis begins by reviewing relevant legislation, such as Law No. 1/1946 on the Criminal Code (KUHP) as amended by Law No. 1/2023 on the Criminal Code (KUHP), Law No. 7/1984 on the Ratification of the Convention on the Elimination of All Forms of Discrimination against Women, and Law No. 17/2023 on Health. In addition, derivative regulations such as Government Regulation No. 61/2014 on Reproductive Health and Minister of Health Regulation No. 3/2016 on Training and Implementation of Abortion Services for Indications of Medical Emergencies and Pregnancy Due to Rape were also analysed. During the normative juridical analysis, the research looked at moral, criminal law, and health perspectives related to the issue of abortion. The twelve articles identified from the regulation form the legal framework that will be analysed in depth to understand the legal approach to abortion in the context of anencephaly. In addition, the research also involved analysing public views on abortion, taking into account the differences of opinion between groups that oppose abortion and support life, as well as groups that champion women's reproductive freedom. Thus, this research method combines normative aspects of the law with an analysis of people's views to provide a comprehensive understanding of the issue of abortion in cases of anencephaly.

RESULTS AND DISCUSSION

From a moral perspective, some societies oppose abortion by linking it to ethical and life values (Sa'dawi & Izzat, 2002). However, there are also those who view abortion as a woman's human right, especially in cases of anencephaly where the foetus cannot survive. This debate reflects the complexity of social and cultural values in society.

Society's views on abortion reflect the complexity of its ethical values and outlook on life (Arifin et al., 2023). Some groups oppose abortion on the basis of ethical values that relate it to the continuity of life and the right to life that the foetus is considered to have. These views often stem from religious values or moral convictions that place the importance of foetal life as a top priority.

On the other hand, there are groups that view abortion as a woman's human right, especially in cases such as anencephaly where the foetus has no chance of survival after birth (Siregar, 2021). This view involves consideration of a woman's right and freedom to make decisions regarding her own body and health. In the context of anencephaly, where the foetus has a serious incurable disorder, women's human rights advocates argue that continuing the pregnancy may impose an unfair physical, emotional and psychological burden on the mother.

The debate between these two perspectives reflects the complexity of social and cultural values in society. The conflict is not limited to the battle between pro-life and pro-choice views, but also encompasses deep cultural, religious and moral aspects. A group's ethical values often form the basis of beliefs and principles that guide society's views on the issue of abortion. Therefore, the abortion debate in the context of anencephaly involves not only scientific or medical considerations, but also involves reconciling ethical norms, religious values, and individual human rights. An in-depth understanding of these moral perspectives is important in designing just and sustainable public policies, as they reflect the plurality of values that exist in society.

In the criminal law framework, the articles related to abortion in the Criminal Code are the basis of consideration (Panjaitan & Purba, 2023). Meanwhile, Law No. 17 of 2023 on Health and its derivative regulations provide room for abortion in certain cases, such as anencephaly, to protect the mental and physical health of the mother.

Maternal health is an important aspect to consider, as stated by the *World Health Organisation* (WHO). The high rate of maternal loss of life due to unsafe abortion demonstrates the need for safe and legal access to abortion, especially in cases where the foetus has severe defects such as anencephaly (Buluran et al., 2021). (Buluran et al., 2021).

Indonesia has a complex legal framework related to abortion, including Law No. 1/1946 on the Criminal Code (KUHP) which was amended into Law No. 1/2023 on the Criminal Code (KUHP), Law No. 7/1984 on the Ratification of the Convention on the Elimination of All Forms of Discrimination against Women, and Law No. 17/2023 on Health.

The articles mentioned relate to criminal law related to abortion in Law Number 1 Year 2023 of the Criminal Code (KUHP) with provisions contained in Articles 463, 464, and 465. The purpose of these articles is to regulate and control the practice of abortion to be in line with the legal norms in Indonesia. The following is a more detailed explanation of the intent of each article:

1. Article 463: This article sets out the penalties for women who perform abortions. The intention is to penalise women who are directly involved in performing illegal abortions. However, this article provides exceptions if the abortion is performed because the victim is a victim of rape or other acts of sexual violence, and the pregnancy is less than 14 weeks or there are indications of medical emergency. These exceptions reflect considerations to protect victims of violence and take into account certain medical conditions.
2. Article 464: This article provides penalties for individuals who perform abortions on women. The intention is to penalise more severely those who perform abortions without consent or with consent but cause death. Different penalties are provided depending on these factors. The different penalties reflect the degree of culpability and the impact of the act on the welfare of the woman concerned.
3. Article 465: This article deals with additional penalties for doctors, midwives, paramedics, or pharmacists involved in performing abortions. The intention is to provide additional sanctions for medical personnel involved in illegal abortions. However, this article also provides exceptions if the abortion is performed due to indications of medical emergency or for victims of rape or other sexual offences. These exceptions reflect ethical and humanitarian considerations for certain cases that require abortion.

Overall, the creation of these articles reflects legislators' efforts to regulate abortion within a clear legal framework, protect women's rights, and sanction illegal abortion practices that can endanger women's health and lives.

It is also contained in the Health Law No. 17 of 2023, which reflects efforts to regulate the practice of abortion within a health framework. The following is an explanation of what each article means:

1. Article 60: This article stipulates that abortion is prohibited, except under criteria justified in accordance with the provisions of the penal code. The intention is to enforce the prohibition against illegal abortions, but to provide exceptions if the abortion is performed under certain criteria. Essentially, this article creates rules to control and regulate the practice of abortion in accordance with the criminal law. In addition, it sets out some additional conditions for the permissible performance of abortions, including that abortions may be performed by medical personnel and assisted by competent and authorised health personnel. The selection of qualified health facilities and the consent of the pregnant woman and her husband are also stipulated. The emphasis on the husband's consent, with the exception of rape victims, reflects certain social and cultural norms that the regulation seeks to accommodate.
2. Article 61: This article establishes the collective responsibility of the Central Government, Local Governments, and communities in protecting and preventing women from unsafe abortions that contravene laws and regulations. The intent is to emphasise the collective responsibility for protecting women from the risks of illegal and unsafe abortion. This article reflects the commitment of government and society to create an enabling environment for women's health and to prevent harmful abortion practices.
3. Article 62: This article authorises the government to further regulate abortion as referred to in Article 60 and Article 61 by Government Regulation. The intent is to provide flexibility for the government to adjust regulations in accordance with developments and community needs. Further provisions may include implementation details, procedures, and more detailed requirements related to abortion that fulfils certain criteria.

They therefore form a legal framework that controls and regulates the practice of abortion in a health context, involving aspects of medical, ethical, and social and legal responsibility.

The articles enumerated in Law No. 17/2003 and the Criminal Code (KUHP) related to abortion reflect legislators' efforts to regulate the practice of abortion within a clear legal framework in Indonesia. The articles stipulate penalties for women who have abortions, provide exceptions for cases of rape victims or pregnancies indicated by medical emergencies, and prescribe penalties for individuals involved in performing abortions. (Fatahaya & Agustanti, 2021; Syakirin, 2021).

In addition, the Health Law No. 17 of 2023 also regulates the practice of abortion in the context of health. The prohibition of abortion without a valid reason in Article 60 is accompanied by exceptions that allow abortion under certain criteria. Article 61 establishes the joint responsibility of the central government, local governments, and communities to protect women from unsafe abortion. Furthermore, Article 62 authorises the government to further regulate abortion by Government Regulation.

Taken together, these articles reflect a concern for women's health and rights while taking into account the norms, ethics and laws of society. The regulations provide a clear legal foundation to protect women, ensure that abortions are safe and legal, and set sanctions for violations of these rules.

However, while there is a push to legalise abortion in anencephaly, there is still a view that banning abortion outright is a form of protection for unborn life, reflecting an approach that prioritises fetal rights and protection.

This issue is not only medical ethics, but also has a broad impact that involves the whole of society (Prawiroharjo et al., 2019). Therefore, a balanced approach is needed, considering women's human rights, foetal protection, and the overall public health impact.

Within society, there is a significant difference of opinion. Those who oppose abortion and support life are at odds with those who champion women's reproductive freedom. Understanding and balancing these views is essential to formulating equitable and sustainable policies.

Whereas in Law No. 39 of 1999 on Human Rights, as a creature of God that must be respected, upheld and protected by the state, law and government for the honour and protection of human dignity, the right is imposed on humans who are able to bear it, meaning that humans who have been born into the world, embryos or foetuses in the womb are not the bearer of these rights because according to the law he will bear the rights and obligations if born and alive, Law No. 39 of 1999 on Human Rights clearly firmly rejects the practice of abortion, this can be seen in articles 52 and 53 on the rights of the child, namely:

1. Every child has the right to protection by parents, family, community and state.
2. The rights of the child are human rights and for the benefit of the child they are recognised and protected by law even from the womb.
3. Every child from the moment of conception has the right to life, survival and improvement of life.
4. Every child shall, from the moment of his or her birth, be entitled to a name and to the status of a nationality.

From the content of the law it is clear that the rights of children are recognised and protected by law from the womb, it is just not specified whether the severely disabled fetus is included or not. In applying the rights discourse to the issue of abortion, there has been a strong polarisation between the *pro-life* movement and the *pro-choice* movement, particularly in America where the 1973 legalisation did not solve the problem, but instead fuelled a strong and violent polarisation of society on this topic.

Arguments from the anti-abortion (*pro-life*) camp:

1. Human life begins at fertilisation or conception;
2. Because it is a living being formed from the moment of conception, it is already a person with various human rights, including the main one in this phase, the right to continue living;
3. Therefore, terminating a pregnancy from these early stages is against Morals and is considered the same as the act of killing a human being who has already been born.

Counter-argumentation by the pro-abortion (*pro-choice*) camp

1. The conceptus or zygote because it has no form is not yet a human being;
2. The difficulty of assigning person status to such a form;
3. Therefore, selective abortion for certain indications is morally acceptable because it removes a non-living, non-person from a person's body;
4. There is freedom of choice.

Although legislators' efforts to regulate abortion have been reflected in Law No. 17 of 2023 of the Criminal Code (KUHP) and Health Law No. 17 of 2023, the implementation of these regulations is still faced with several obstacles and potential problems. Some aspects that may become obstacles in the implementation of these regulations involve legal, health, social, and cultural aspects:

1. **Availability of Qualified Health Facilities:** Section 60 of the Health Law states that a legal abortion can only be performed in a qualified Health Care Facility. Obstacles may arise when qualified health facilities are not adequately available throughout the region, particularly in remote or difficult-to-access areas.
2. **Exceptions for Rape Victims:** Although the articles provide exceptions to abortion in the case of rape victims, determining and proving rape victim status can be a legal and social challenge. Some victims may be reluctant or have difficulty reporting the crime, and this can be a barrier to applying the exception.
3. **Husband's Consent:** Article 60 states that the husband's consent is required, except for rape victims. This reflects certain social and cultural norms, however, this policy may lead to controversy and debate regarding a woman's rights and freedom to make decisions regarding her body and health.
4. **Community Counselling and Education:** The implementation of this regulation also requires community counselling and education efforts, especially related to legal aspects, health, and women's rights. Low awareness or lack of understanding of the regulation can affect community understanding and effective implementation.
5. **Harmony between Criminal and Health Law:** There is potential tension between the criminal and health law aspects of regulating abortion. Bringing these aspects together requires good coordination and collaboration between relevant agencies, including health and law enforcement agencies.
6. **Law Enforcement:** Consistent and effective enforcement of abortion law violations needs to be ensured. This involves availability of human resources, continuity of training, and fair and equitable enforcement efforts.

By identifying and addressing these potential barriers, abortion legislation can be implemented more effectively, and women's rights and health can be better protected in accordance with the law. It is important to maintain a balance between women's human rights, foetal protection, and moral values when designing and implementing abortion policies. By understanding the complexity of these values, policies can be designed in a more inclusive manner that takes into account the diverse perspectives of society.

CONCLUSION AND SUGGESTION

The conclusion of the legal analysis of abortion in an anencephaly case reflects the complexity of the issue from various perspectives, particularly moral, criminal and health law. The issue of abortion is controversial because it involves ethical values, religious views, women's human rights, and reproductive health. On the one hand, there are views that emphasise the protection of unborn life, while on the other, there is support for women's reproductive freedom. In terms of criminal law, Indonesia has a complex legal framework regarding abortion, with Law No. 1/1946 on the Criminal Code amended by Law No. 1/2023

on the Criminal Code. The articles in these regulations reflect efforts to regulate and control the practice of abortion in accordance with Indonesian legal norms. In the context of health, the Health Law No. 17 of 2023 also regulates the practice of abortion. The importance of maternal health is a major concern, in line with the views of the World Health Organisation (WHO). Although abortion is prohibited without a valid reason, there are exceptions and regulations that allow for abortion in certain cases according to the likelihood of the foetus and the severity of the situation, such as in cases of anencephaly, to protect the mental and physical health of the mother.

However, the implementation of this regulation faces several barriers, including the availability of qualified health facilities, exceptions for rape victims, husband's consent, and the need for community counselling and education. There are also potential tensions between aspects of criminal and health law, which require good coordination. Suggestions include the need for a balanced approach to policy formulation, considering women's human rights, foetal protection, and overall public health impacts. Improving access to qualified health facilities, facilitating consent in certain cases, and counselling and education efforts can increase the effectiveness of regulation implementation. In conclusion, the complexity of the issue of abortion in the context of anencephaly demands in-depth understanding and a cautious approach to policy formulation and implementation. The fulfilment of women's human rights, the protection of maternal health, and the sustainability of foetal life need to be the main considerations in achieving a just and sustainable solution.

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