Legality of Abortion in Cases of Down Syndrome Diagnosis: Indonesian Criminal Law and International Perspectives

Cendani Madya Nhingswari[1*], *I Putu* Sheva Korry Dafila Satria[1], *Gusti* Agung Dananjaya Mandala[1] and *Putu* Riski Ananda Kusuma[1]

[1] Universitas Pendidikan Ganesha, Singaraja, Indonesia

Abstract Abortion is a complex legal, moral, and humanitarian issue, particularly when it relates to a medical diagnosis such as Down syndrome. In Indonesia, abortion is prohibited in principle and is categorized as a criminal offense under the Criminal Code (KUHP) and the Health Law. This study aims to analyze the legality of abortion in cases of Down syndrome pregnancies from the perspective of Indonesian criminal law and international law. The research method used is normative legal research with regulatory, conceptual, and comparative approaches. The regulatory approach is used to examine the 1945 Constitution, the latest Criminal Code, Law Number 17 of 2023 concerning Health, and Government Regulation Number 61 of 2014. The conceptual approach is used to examine criminal law and human rights doctrine, while the comparative approach involves the association of abortion regulations in France, Singapore, and El Salvador. The research findings indicate that Indonesian law essentially prohibits abortion but provides for withholding under certain conditions, including pregnancies with medical emergencies caused by genetic abnormalities. In comparison, France and Singapore allow abortion under certain conditions, while El Salvador prohibits it altogether. This research is expected to provide a scientific contribution to the development of criminal law and health law studies, particularly on the issue of abortion related to the diagnosis of Down syndrome.
Keywords: Legality of Abortion; Down Syndrome; Indonesian Criminal Law; International Law

1 Introduction

Indonesian constitution, namely the 1945 Constitution, more precisely in article 1 paragraph (3) has stated that Indonesia is a state of law. This means that the existence of law in Indonesia is very important and has binding force for all citizens and the government that takes place. Broadly speaking, there are two legal systems that exist in the world, namely Continental Europe (civil law system) and the Anglo Saxon legal system (common law system). The civil law or Continental European legal system is adopted by a number of countries in Mainland Europe, such as Germany, France, the Netherlands and Italy, as well as other countries such as Japan, Thailand, Indonesia and the Latin American region. This system makes laws and regulations the main source of law, thus prioritizing the existence of written law. Therefore, this system is often referred

to as the codified legal system. In contrast, the common law or Anglo-Saxon system, which originated from the English legal tradition, spread to countries such as the United States, Canada, Australia and other North American regions. In this system, the main source of law comes from court decisions or jurisprudence, where judicial decisions have an important role in shaping legal principles and creating legal certainty that is generally binding. The codification of law in the civil law system adopted by Indonesia contains various types of regulatory classifications, one of which is the type of Criminal Law. According to Moeljatno, criminal law contains three things, namely; (1) Certain actions prohibited by the state and the threat of sanctions against them; (2) The conditions under which violators can be punished; (3) How to punish violators . As for the Big Indonesian Dictionary (KBBI) itself, criminal is defined as a "crime", but the word "criminal" is also closely related to 'suffering' or "torture" [1].

In terms of abortion is the abortion of the womb, the discharge of the results of conception or fertilization prematurely [2]. The new Indonesian Criminal Code (KUHP) prohibits abortion except with certain criteria, which in Article 463 of the Criminal Code states that; (1) Every woman who performs an abortion, shall be punished with a maximum imprisonment of 4 years; (2) The provisions referred to in paragraph (1) shall not apply in the event that the woman is a victim of a crime of rape or other crime of sexual violence that causes pregnancy whose gestational age does not exceed 14 weeks or has indications of medical emergency [3,4]. The phrase "indications of medical emergency" has sparked debate about the legality of abortion for Down syndrome babies [5].

Down Syndrome is a genetic disorder in which there is an extra chromosome on chromosome 21, so it is often referred to as trisomy 21 disorder. The extra chromosome in this condition causes excessive amounts of certain proteins that interfere with the normal growth of the sufferer's body and cause changes in brain development that have been previously organized [6]. The high risk of medical problems that Down syndrome babies will experience raises considerations of abortion from various sides. The first is about the right to life of the child who will potentially suffer more, and the second is about the right to the physical and emotional body of the mother who will give birth to it. This issue is crucial, given the specific human rights stated in Article 53 of Law No. 39/1999 on Human Rights (HAM) that every child from the womb has the right to live, survive, and improve their standard of living.

This issue has also become a debate at the international level, variations in the policies of each country in the world about abortion raises questions about how to standardize human rights regarding abortion in the international context. This is closely related to the objective of this research, which focuses on uncovering the legality of abortion in cases of Down syndrome pregnancies from the perspective of Indonesian criminal law and international law. Therefore, Indonesia has regulations regarding Down syndrome pregnancies. Based on this background, there are three problem formulations that can be discussed through this article, namely how Down Syndrome can be diagnosed since in the womb, how the criminal law of abortion of Down Syndrome babies in Indonesia, and how the law of abortion of Down Syndrome babies in the eyes of the International law.

2 Methods

This study uses a normative legal research method with a legislative, conceptual, and comparative approach. The legislative approach is used to examine the 1945 Constitution, the latest Criminal Code, Law No. 17 of 2023 on Health, and Government Regulation No. 61 of 2014 on Reproductive Health. The conceptual approach is used to examine criminal law doctrine and human rights related to abortion, particularly the principle of lex posterior derogat legi priori. Meanwhile, the comparative approach is conducted by comparing abortion regulations in several countries, namely France, Singapore, and El Salvador. The legal materials used consist of primary legal materials in the form of legislation and international legal instruments (e.g., ICCPR and African Women's Protocol) [7], secondary legal materials in the form of books, journals, and relevant scientific works, and tertiary legal materials in the form of legal dictionaries and encyclopedias. The technique for collecting legal materials was conducted through literature study, while the analysis was carried out using qualitative normative methods by interpreting regulations, comparing legal systems, and linking them to existing legal doctrines.

3 Results and discussions

3.1 Diagnosis of Prenatal Down Syndrome

The pregnancy or prenatal period is seen as one of the most important life stages for the development of an individual. This is because many fundamental aspects of human physical, emotional and intellectual development begin to take shape while still in the womb. Therefore, this period requires special attention so that the baby can be born healthy and has the potential to grow and develop optimally, both physically and mentally. Although it lasts for a relatively short period of time, the prenatal period is characterized by a very rapid and complex developmental process. Various structures and functions of the body begin to form, and any disruption at this stage can have long-term consequences for the child's life. Experts refer to this phase as the time of fetal evolutionary change due to the massive transformation in such a short period of time [8].

Therefore, special attention is required for the fetus in this period, including the detection of abnormalities such as Down syndrome, so genetic screening and testing procedures remain a major concern in obstetric practice. Over the past twenty years, technological developments have brought significant improvements in the detection methods of fetal abnormalities, including Down syndrome. Testing for these disorders can now be done early in pregnancy through two approaches, namely screening tests and diagnostic tests. Diagnostic tests indicate a high likelihood of a serious disease or condition when the result is positive. Screening tests, on the other hand, are designed to assess a person's level of risk of developing a disease or disorder. One of the main screening methods used to detect Down syndrome is ultrasonography (USG), which is generally performed in the first and second trimester of pregnancy [4].

Prenatal screening for Down syndrome detection has been shown to have a high level of validity and plays an important role in the early identification of chromosomal abnormalities during pregnancy. Ultrasound examination performed in the first trimester

is an effective initial method, especially when combined with serum biomarker results. Some of the markers observed through ultrasound at this stage include increased nuchal translucency, absence of nasal bone (nasal os), presence of hygroma cysts, and impaired blood flow in the ductus venosus based on Doppler examination. The combination of these markers and serum biomarkers results in a more sensitive screening approach for Down syndrome risk [9].

In the second trimester, ultrasound screening remains of high clinical significance with a sensitivity rate of 82% and a false positive rate of 4%, especially when the cumulative score of observed markers exceeds two. Markers used in second trimester screening include thickened nuchal fold, echogenic intracardiac focus, hyperechoic bowel, choroid plexus cyst, absent nasal bone, shorter than normal long bones, pyelectasis, disproportionate ear length, narrowed iliac wing angle, curvature of the fifth finger (clinodactyly), and the presence of a single umbilical artery. The detection of one or more of these markers is a strong indicator in estimating the likelihood of Down syndrome. Although prenatal screening shows high validity values, this method remains predictive and not conclusive. So it can be said that there is no absolute validity for the detection of Down syndrome in the fetus.

3.2 Criminal Law on Abortion of Down Syndrome Infants in Indonesia

The act of abortion has been regulated in Article 60 of Law No. 17 of 2023 concerning Health, which states that every person is prohibited from performing abortion except in accordance with the criteria allowed and in the implementation of these criteria must be by medical personnel assisted by health personnel who have the competence and authority, at health facilities that meet the requirements set by the minister, and with the consent of the pregnant woman concerned with her husband except for victims of rape. This is in line with Article 463 of the new Indonesian Criminal Code (KUHP) which states that; (1) Every woman who performs an abortion shall be punished with a maximum imprisonment of 4 years; (2) The provisions referred to in paragraph (1) shall not apply in the event that the woman is a victim of a crime of rape or other crime of sexual violence that causes pregnancy whose gestational age does not exceed 14 weeks or has indications of medical emergency [10].

Then in article 62 of Law Number 17 Year 2023 on Health it is stated that further provisions regarding abortion in articles 60 and 61 are regulated by Government Regulation (Peraturan Pemerintah/PP in Indonesia). Meanwhile, according to Government Regulation No. 61/2014 on Reproductive Health in CHAPTER IV of the second section “Indications of Medical Emergencies”, there is article 32 which complements the information in the previous article 31 related to the criteria for abortion that can only be done based on indications of medical emergencies or pregnancy due to rape. The indications of medical emergencies in question, namely; a) pregnancy that threatens the life and health of the mother; b) pregnancy that threatens the life and health of the fetus, including those suffering from severe genetic diseases and / or congenital defects, as well as those that cannot be repaired so that it makes it difficult for the baby to live outside the womb.

Abortion does violate Article 53 of Law No. 39/1999 on Human Rights, which states that every child from the womb has the right to life, survival, and improvement.

However, given the principle of "Lex Posterior Derogat Legi Priori" which means that new regulations override old regulations, then based on positive law in Indonesia, abortion for babies diagnosed with Down's Syndrome can be considered valid if it is carried out based on the procedures and criteria in the law, which in this case the specific law is 60 Law Number 17 of 2023 concerning Health. This is because babies with Down syndrome have a low life expectancy due to the risk of complications such as congenital heart disease, digestive tract disorders, immune system disorders and infections, blood cell disorders, vision disorders, hormonal problems, ENT (Ear, Nose, and Throat) problems, neurological problems, and bone and muscle problems especially in the first year of life. In fact, congenital heart defects are found in 40-60% of infants with Down Syndrome and some children even have more than one heart defect. Down syndrome babies with congenital heart defects have a five times higher risk of mortality in their first year of life than Down syndrome babies without congenital heart defects.

But actually, Down Syndrome babies still have the opportunity to have a high life expectancy with early identification and proper and periodic multidisciplinary treatment. It is also possible for people with this genetic disorder to be able to achieve and succeed in life as other normal people. One proof is that children with Down syndrome in SLB E Negeri Pembina North Sumatra Province have won several sports competitions, namely bocce sports in Porseni (Sports and Arts Week Event in Indonesia) activities by winning 1st place at the North Sumatra provincial level, O2SN (National Students Sports Olympiad in Indonesia) won 1st place at the North Sumatra Provincial Level and O2SN National Level in Jakarta by winning 1st place as well. In addition, despite having a high percentage of accuracy, the prenatal Down Syndrome screening and diagnosis method is still not fully valid because there is a possibility of false positive factors.

3.3 International Legal Perspectives on Down Syndrome Infant Abortion

Abortion in international human rights law has become a crucial and complex issue in many countries around the world. The controversy surrounding abortion is not only legal, but also influenced by a variety of views relating to morality, medical considerations, individual and family ethics. In addition, religious perspectives have played an important role in shaping public opinion and policy on abortion, making this issue one of the most sensitive debates in the global human rights arena. In the United States, two groups have emerged as a result of the division in the abortion debate: pro-life and pro-choice. The situation has become increasingly heated and chaotic, with supporters and opponents seeking support based on "human rights" arguments [7].

From the perspective of international human rights law, abortion is not explicitly prohibited. However, the clearest recognition of women's right to abortion can be found in the Protocol on the Rights of Women in Africa, or the African Women's Protocol, which was adopted by the African Union on July 11, 2003. This protocol is a legally binding human rights instrument that explicitly guarantees women's reproductive rights, including the recognition that abortion is a legitimate and legal medical procedure [2]. Both the International Covenant on Civil and Political Rights (ICCPR) and the African Women's Protocol explicitly recognize abortion as a protected human right. In this context, women have the right to undergo an abortion if the pregnancy threatens their health or safety, causes significant psychological distress, or is the result of incest or coercion [7]. However, the legalization of abortion has not been fully accepted globally,

as many countries still impose legal restrictions based on social, cultural, and religious factors. The discrepancy between international norms and national implementation highlights the need for policy harmonization and a stronger global understanding that abortion is part of reproductive rights that must be protected.

Based on this understanding, international law views abortion as part of women's human rights and therefore cannot be categorized as a crime. When comparing countries around the world, there are diverse views on the legality of abortion. For example, in Singapore abortion can only be performed on a Singaporean citizen, the wife of a Singaporean citizen, and if she has lived in Singapore for a minimum of 4 months, 4 as well as on request during the 24 weeks of pregnancy, which is the first 6 months. In contrast, El Salvador is the most restrictive country on abortion, where abortion is illegal under no circumstances and there are no exceptions. On the other hand, French law allows women to have an abortion up to the end of the twelfth week of pregnancy, if it is more than twelve weeks then French law only allows abortion if confirmed by a doctor and after consultation that carrying the pregnancy to term would jeopardize the health of the mother, or there is a possibility of health problems for the child if born. The phrase "health" of the child in this French law can define medical disorders such as Down syndrome that can lead to other health problems as well. Given the legal complexities of abortion, the legality of abortion is important to discuss in order to develop a formal and standardized global legal framework. This includes the abortion of Down syndrome infants, which touches on issues of validation of diagnosis, disorders with a high risk of health problems and even death, and the physical and emotional health of the mother.

4 Conclusion

Termination of pregnancy in cases of Down Syndrome diagnosis is a complex issue involving legal, medical, moral, and human rights aspects. Under Indonesian law, abortion is generally prohibited, but exceptions are made in certain medical emergencies, including severe genetic disorders, as stipulated in Law No. 17 of 2023 and its implementing regulations. At the international level, instruments such as the African Women's Protocol and the ICCPR recognize abortion as part of women's reproductive rights, although national regulations vary widely, ranging from permissive models (France, Singapore) to absolute bans (El Salvador). Based on these findings, it is recommended that Indonesia establish clearer and more operational legal provisions regarding abortion due to genetic abnormalities, accompanied by improved accuracy and accessibility of prenatal screening and comprehensive counseling for pregnant women. Harmonization between national and international legal frameworks should also be strengthened to ensure fair and inclusive protection of reproductive rights. For further research, it is recommended to conduct empirical studies on the implementation of abortion regulations in health facilities, expand comparative analysis to more countries in Southeast Asia, and develop interdisciplinary research that integrates legal, medical, ethical, and psychological perspectives.

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