

IS A RIGHT TO ABORTION PROTECTIVE OF WOMEN'S REPRODUCTIVE HEALTH?

Exploring a Human Rights Dynamic of Abortion Law Reform in
Indonesia



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Abbreviation

BPS	:	Badan Pusat Statistik (Bureau Central Statistic of Indonesia)
CEDAW	:	Convention on the Elimination of all forms of Discrimination Against Women
DPR	:	Dewan Perwakilan Rakyat (Indonesia Legislative Assembly)
ECHR	:	European Convention for the Protection of Human Rights
ICCPR	:	International Convention on Civil and Political Rights
Kowani	:	Kongres Wanita Indonesia (Indonesian Women Congress)
KUHP	:	Kitab Undang-Undang Hukum Pidana (Indonesia Criminal Code)
MUI	:	Majelis Ulama Indonesia (Indonesia Council of Ulama)
NGO	:	Non Governmental Organization
NU	:	Nahdlatul Ulama
PKK	:	Pembinaan Kesejahteraan Keluarga (Family Welfare Guidance)
Propenas	:	Program Pembangunan Nasional (National Development Programs)
UDHR	:	Universal Declaration of Human Rights
WHO	:	World Health Organization

1 INTRODUCTION

1.1 Background

Abortion, whether legal or illegal, is always a complicated dilemma. The principal problem lies in the moral and religious controversy over the beginning of life, including the right of the unborn child.¹ The question of when human life begins has been considered throughout history and in diverse cultural contexts. But the answer varies all the time as it is deeply integrated with the beliefs, values and social constructs of the community or individual concerned.

Little agreement exists on the juridical status of the fetus or the embryo under international law resulting in more deference to local laws informed by local values but within limits set out by human rights treaties. These limits afford the fetus some protection as well as the mother, leaving open the question of how to balance the rights of each.²

In most developing countries, induced abortion remains an illegal practice. Yet these happen where women choose clandestine abortion to end their unwanted pregnancy.³ The practice of clandestine abortion is frequently unsafe, involving health risks as well as economic suffering for the woman and her family because of the high price paid for the service. Restrictive legislation penalizing both the woman who seeks an abortion and the practitioner, who offers abortion services, can be the key determinant of the unsafe abortion. In addition to legal strictures on abortion, religious influence has placed abortion outside the realm of what is “morally” correct or acceptable in the collective consciousness of many societies.⁴

¹ Smith (2005), p. 207.

² *Abortion and Protection of the Human Fetus* (1987), p. 14.

³ WHO estimates approximately 42 million pregnancies are voluntarily terminated every year—22 million within national legal system and 20 million outside it. This later case that abortion mostly performed by unskilled provider and or unhygienic conditions. *Unsafe Abortion: Global and Regional Estimates of the incidence of unsafe abortion and associated mortality in 2003* (2007), p. 1.

⁴ Scott (1989), p. 319.

Indonesia is a case in point that has, to a certain extent, conservative and restrictive laws on abortion. If we trace the abortion regulations in Indonesia, it can be seen that the status of abortion has long been a matter of debate. Modeled on the conservative criminal code of Dutch colonial government, Indonesian Criminal Code (KUHP, Kitab Undang-Undang Hukum Pidana) contains a series of articles that define the practice of abortion as a crime against morality and a crime against life. Chapter 14 article 299 of the KUHP addresses the morality issue forbidding the provision of abortion medicines and services. If the person providing the service was a doctor, midwife, or paramedic, not only was the punishment harsher, they could even lose their license to practice.⁵

Specification of abortion as a crime against life is contained in Chapter 19 Articles 346, 347, 348 and 349. These articles specify four years' imprisonment for a woman who aborts her own pregnancies (Article 346); 12 years for someone who forces a woman to have an abortion, or 15 years if the abortion results in the woman's death (Article 347); and five years for someone who performs an abortion at the woman's request, seven years if the procedure results in the woman's death (Article 348). These punishments were increased by a third if the person convicted of carrying out an illegal procedure was a doctor, midwife or paramedic (Article 349).⁶ The law, however, did not define clearly the illegal abortion in terms of gestational stage or procedure, resulting in the reluctance of physicians to offer abortion facilities openly to public.

In the 1970s Chief Justice shared his opinion relating to this matter providing more space for abortion. In his private meeting with some doctors that came seek his advice regarding the practice, he assured them that "procedures [of abortion] could not be regarded as illegal if they were carried out within the framework of normal medical practices, by specialists and doctors who had received standard training and used techniques that were professionally approved."⁷ This support encouraged some specialists to offer abortion facilities publicly, even though it was done cautiously as the 'permit' was only based on informal communication. Many attempts tried to promote

⁵ Hull (1993), p. 242-243.

⁶ Supra note p. 243.

⁷ Supra note.

an abortion law thereafter, but it was not until 1992 that abortion law was finally made part of the Health Law No. 23/1992.

Despite restrictive laws on abortion, termination of pregnancy has been a traditional practice among the people for a long time. Most women who want to terminate a pregnancy end up doing so in secrecy. They went to a traditional practitioner (*dukun*), regardless of the associated risk of infection arising from unsanitary conditions and practices and the possibility of serious complications arising from an incomplete abortion.⁸ Every year an estimated 2 million women choose to end their unwanted pregnancy through an abortion in Indonesia.⁹

The widespread practice of unsafe abortion became a matter of public concern in Indonesia and several women's organizations tried to persuade the handling of this issue as part of the basic women's reproductive health. The government has most of the time been hesitant to become involved in such contentious issue or respond to public concern in order to avoid confronting, amongst others, religious groups on the subject. Increasing politicization of Islam after the political reformation in 1998 has heightened Islamic fundamentalist movement in the political realm.¹⁰ This complicated the situation more as the *adat* and religious values in Indonesia place the practice of abortion as disorderly behavior within the realm of customary and religious values in Indonesia.

Over the last couple of decades, various world conferences on human rights, especially on women and population and development, has amplified the discourse regarding the promotion of abortion as a method of family planning and recommended that countries review laws containing punitive measures against women who have undergone illegal abortions. Though not all states accept the notion of using abortion as a method of family planning, all governments and relevant intergovernmental and non-governmental organizations are urged to strengthen their commitment to women's health. It is

⁸ *Abortion policies: a global review* (2003).

⁹ Research carried out in 10 big cities and 6 districts (*kabupaten*) in Indonesia held by Center for Health Research University of Indonesia (CHRUI), 2001. In: Utomo (2005), p. 111.

¹⁰ Sciortino (1996), p. 88.

recommended that all states pay attention to the health impact of unsafe abortion as a major public health concern and to reduce recourse to abortion through expanded and improved family planning services. This development has created discourse of an emerging i.e., a right to abortion.

1.2 Research question

Based on the background presented above, this research attempts to provide elaboration of the dynamics of human rights at play behind the abortion law reform in Indonesia.

Some of the sub-questions explored in the thesis will include:

1. How should abortion be regulated in view of the multiple norms and pluralism of laws informing women's right within the Indonesia society to reflect this mixture? How might this address competing claims that international human rights standards hold for the unborn child's right to life and pregnant women's rights for reproductive health.
2. How might justification for restrictive abortion regulation relating closely to the culture, public morality and religious value in the society is developed. How might this justification challenge national law to apply such restrictive regulation of abortion practices in a way that accommodates public moral and religious discourse in the society, yet without violating any international human rights standard? How proportionate ought such a law to be?

1.3 Hypothesis and expected result

The study will be conducted according to hypothesis:

1. That in Indonesia, *adat*, religious values and state ideology plays a part in the subordination of women in society on the basis of the close link between her reproductive role and her status as wife and mother.
2. That there is an emerging international public discourse connecting the issue of abortion to women's reproductive health through what has been described as a "women-centered" approach.
3. That there is need for a substantial commitment to legal and structural change at the national level in order for the law to represent the reality faced by women in relation to their reproductive health.

It is hoped that by the end of my research I would develop some recommendations for improvement of national policy related to women's reproductive health in Indonesia, and how related international human rights law may be adapted within the culture, tradition, religious, and state ideology in Indonesia. Further that the proposed national policy would be able to accommodate the values and interest of the community, not only internationally but also at the national and local level.

1.4 Scope and methodology

The scope of my thesis will be the practice of abortion and the dilemma faced by women undergoing abortion in Indonesia in view of the restrictive abortion law and existence of other source of law affecting women's value in religious and *adat* (customary law). It will be an interdisciplinary research using the descriptive method to explain the background of the problem. Jurisprudence in international and regional human rights systems will be used as a standard guideline for the implementation rule of law in national legal system. Hence, the international law will set an obligation that the national government has to comply with. However, the existence of more than one body of law or legal pluralism will be very important as a tool for analysis to evaluate the effectiveness of positive law on the subject.

Most of the research will be based on a literature review whereas data related to the case study will be collected and analyzed from the previous relevant research and international organization publication as well as state reports. Even though this is not a comparative research, case-law will be referred to, in order to provide a broad idea of jurisprudence relating to this matter.

As my hypothesis stands on the vague regulation of Health Law about abortion, and also the lack of protection for women's reproductive health, therefore analysis of the law content will be explored by assess its conformity with the international and regional standard. Through a process of collecting supporting evidence based on actual conditions of women on the ground and need assessment within the society, I hope to be able to contribute in offering some recommendations for the amendment process of the existing law.

1.5 Demarcation and thesis structure

The focus of this thesis will be the exploration of a human rights perspective on abortion law reform in Indonesia. Since I will be using mainly secondary sources in my literature research, I will try to supplement this by gathering data from some primary resources, including Indonesia's report to the CEDAW Committee, from reports and documents of relevant international organizations as well as previously undertaken related research undertaken in Indonesia.

Chapterwise breakdown of the thesis is as follows:

Chapter 1 : Introduction

Chapter 2 : The Indonesian Context

Chapter 3 : Legal Framework

Chapter 4 : Conclusion

2 THE INDONESIAN CONTEXT

Indonesia Reproductive Health Profile 2003 acknowledged that the problem of reproductive rights in Indonesia remains in their enforcement and implementation despite passage of laws on reproductive health. The problem is closely related to the social as well religious values and norms relating to sexual relationship and reproductive health, operating alongside the positive legal framework.¹¹ In order to place the controversy of the abortion issue in Indonesia in context, this chapter will focus on how religious, tradition and cultural values continue to shape woman's status and position in Indonesian society. It describes how these plural values construct notions of gender and sexuality for woman related to their reproductive role.

2.1 Legal pluralism: the existence of different legal source in Indonesia

Griffiths defines legal pluralism as a state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs.¹² Accordingly the legal order of all societies is not an exclusive, systematic and unified hierarchical ordering of normative propositions depending on the state, but has its sources in the self-regulatory activities of all the multifarious social fields present in society. Acceptance of the concept of legal pluralism has removed the assumption that the entirety of the laws in force in a population are or should be a single system, with all existing norms derived from a single source and ordered hierarchically.¹³

Indonesia presents an interesting case study of legal pluralism. It is a huge and diverse country with hundreds of ethnic groups that have their own language, tradition and cultural values as well as the country with the largest Muslim population. Past experience of Dutch colonization also contributes to the existence of different legal sources in Indonesia.

¹¹ Indonesia Country Gender Assessment (July 2006), p. 25.

¹² Petersen (1997), p. 152.

¹³ Woodman (1997), p. 189.

Prior to the arrival of Dutch traders and colonizers, the archipelago in the late 16th and early 17th centuries was ruled by indigenous kingdoms, each practicing its own system of *adat* (customary laws), as well as laws drawn from teachings of various religions and beliefs.¹⁴ Dutch colonization brought the existence of three types of law: the positive law of statutes taken from the French-Dutch Civil Law tradition, the customary law (*adatrecht*), and religious (Islamic Law), which informally held broader but varying jurisdiction across the archipelago.¹⁵ Thus, religious and customary law that had governed questions of personal status for centuries was allowed to remain nearly intact, as the colonial powers had little interest in the conduct of their subject's private lives, their family relations, social status and religious duties, and left most of the rules governing these aspects of life untouched by official enactments.¹⁶

The end of Dutch colonization spanning a period of 350 years, left Indonesia with a segmented legal structure, containing separate courts for Europeans and natives, in which judges applied separate sets of laws. This colonial policy of state-law pluralism resulted in the expectation, after independence, that their affairs would be judged under something other than the civil law tradition. It was perceived by some that this compartmentalization of laws, granted them a small measure of autonomy, whether as Muslims, or as members of an ethnic group.¹⁷

This basic interrelationship between separate sources of norms and laws was rethought after Indonesia gained independence. The Government drafted a preliminary constitution that allowed room for all ethnic groups and religions to be represented. This led to the Pancasila model, a “religiously neutral nationalism” based on five principles: believe in God, nationalism, humanitarianism, social justice, and democracy. The fact that the majority population in Indonesia is Muslims has not resulted in making Indonesia neither an Islamic state nor a state based on secular principles.¹⁸ At the time of independence when the Constitution was being written, conservative Muslim groups lobbied for inclusion of the Jakarta Charter. This charter consisted of only seven words

¹⁴ Supra note 11, p. 27.

¹⁵ Bowen (1998), p. 55-56.

¹⁶ Freedman (1993), p. 27.

¹⁷ Bowen (2003), p. 17.

¹⁸ Doorn-Harder (2006), p. 23

in Indonesian, but had it been applied, would add a significant element to the constitution: “Believe in one God, with the obligation for adherents of Islam to practice the *shari’a*. Yet, repudiation from other religious groups as well as disagreement among Muslims themselves regarding this wording resulted in the adoption of semi-Islamic Law in Indonesia society.¹⁹

Adat or religious law can be described in Sally Falk Moore’s words as “semi-autonomous” in practice to the extent that they are employed in resolving everyday disputes. Then *adat*, religious, and the positive law of statutes and decrees are each considered to be source of law, each providing rules that have legal force.²⁰ *Adat* can have many meanings, but here *adat* will refer to the rules or practices of social life, to feeling and a sense of propriety, or to a somewhat vaguer sense of tradition and custom.²¹

Petersen refers to the semi-autonomous concept of Sally Falk Moore, arguing that this is not a descriptive definition which encompasses only the situation in post-colonial societies, but also the situation of women in “modern” societies, who act “according to both formal and informal law and norms which they themselves create in their own interaction in the semi-autonomous fields in which they operate, and where they are not only acting according to, but also generating norms themselves.”²² In almost all former colonies the basic dichotomy between western-derived law governing public life and religion—or custom-derived law governing private life persisted. Freedman gave one simple example how this dichotomy has especially important consequences for women. If the most fundamental aspects of a woman’s life are governed by a separate set of laws, based on religion, then the secular constitutional principle of nondiscrimination will have little impact on her life. One simple example that he gave for instance, a state law banning gender discrimination in employment will mean nothing to a woman whose husband forbids her to work.²³

¹⁹ Supra note.

²⁰ Supra note 17, p. 12.

²¹ Supra note p. 13.

²² Supra note 12.

²³ Supra note 16, p. 21.

The inability of state law to reach deeper into the domestic or family life can be the source of the problem. As the critic of Susan Moller Okin for group rights, she stressed that the advocate of group rights mostly urge that individuals need “a culture of their own,” and “only within such a culture can people develop a sense of self-esteem or self-respect.” According to Okin, such arguments that typically will “neglect both the different roles that cultural groups impose on their members, and the context in which persons’ senses of themselves and their capacities are first formed and in which culture is first transmitted—the realm of domestic or family life.”²⁴

This deficiency of paying attention to internal differences and private spheres has brought out important connections between culture and gender that Okin further mentioned. Firstly, that the sphere of personal, sexual, and reproductive life functions as a central focus of most cultures, a dominant theme in cultural practices and rules. Most of the time religious or cultural groups put their concern mainly with “personal law”—the laws of marriage, divorce, child custody and control of family property, and inheritance. The defense of “cultural practice” then is likely to have much greater impact on the lives of women and girls, since far more of women’s time and energy is devoted into preserving and maintaining the personal, familial and reproductive side of life.²⁵

The second important connection is that most cultures have as one of their principal aims the control of women by men.²⁶ The powerful drive to control women—and to blame and punish them for men’s difficulty in controlling their own sexual impulses—has been softened considerably in the more progressive, reformed versions of many religions although it remains strong in their more orthodox or fundamentalist versions. Thus, according to Okin, many culturally based customs aim to control women and render them, especially sexually and reproductively, servile to men’s desires and interests.

²⁴ *Is multiculturalism bad for women?*(1999), p.12.

²⁵ Supra note p.12-13.

²⁶ Supra note, p.13.

This phenomenon raise a question about the relation between *adat* and religious values with gender discourse in Indonesia. How does the existence of these values affect or help in shaping the status and position of women in Indonesia? What about their reproductive role? These questions will be discussed in the next section that will mainly focus on women in Indonesia society. The discussion about legal pluralism in Indonesia initiated in the earlier part of this chapter will be used as a tool for analysis of the research questions since the awareness of the multiple influences that have shaped opinions concerning women is a crucial step in redefining the women's position in society and religion.

2.2 Women in Indonesian society

Current research on Indonesian literature and media shows that the ideal of weak, submissive women still dominates religious, social and cultural expression. The perfect wife as portrayed in the media excels in silent, selfless surrender to her husband, which in turn results in a harmonious household.²⁷ What is described in the media apparently represents what the society expects and thinks about the ideal role of woman. It is closely linked with women's marital status and her reproductive role as a mother. As women takes responsibility for the man's weaknesses or blaming herself when things go wrong, she will be considerate as perfectly in tune with her *kodrat*, an elusive concept signifying her innate or essential "womanly" nature.²⁸

The picture of women's ideal role or her *kodrat* as a woman are influenced by *adat* (custom), religion, and ideology of the Indonesian State, that are very critical in shaping the notions of gender and sexuality for Indonesian women. "Values and beliefs related to female sexuality are inextricably intertwined with broader sets of cultural values and norms regarding the position and role of women in society."²⁹ For when the complex intertwining of state, religious and customary law and practice are almost invariably confronted, then difference between the law as it is written and as it is practiced regarding with the women's life must be acknowledged.³⁰

²⁷ Supra note 18, p. 42.

²⁸ Supra note.

²⁹ Bennet (2005), p. 21.

³⁰ Supra note 16, p. 26.

2.2.1 Notion of gender equality

The Constitution of the Republic of Indonesia, Undang-Undang Dasar 1945, upholds a commitment to the principle of equal rights between men and women. Article 27(1) stipulates that: ‘every citizen enjoys equal status before the law and government, and is obliged to uphold this status without exception.’ The state’s commitment to achieve gender equality and justice was also included in the 1999 Broad Guidelines of State Policy that specifically calls for the empowerment of women to achieve gender equality and justice. This policy was translated into the Five Year National Development Programs (Propenas) 2000-2004, and the Annual Development Plans.³¹ The government, at its level therefore, by implementing legislation that provides fair and equal status to women, has sought to eliminate ideas of male superiority.

The national vision on women empowerment has been for the realization of gender equality and justice within the family, community and state. This vision translated into several missions namely: a) improvement of women’s quality of life; b) promotion of public awareness about gender equality and justice; c) elimination of violence against women; d) promotion and protection of women’s human rights; and e) institutional strengthening of women’s organizations.³² There are several women’s organizations created by government as part of the mechanisms for women empowerment in Indonesia, namely:

- a. KOWANI (Indonesian Women Congress), a federation of 78 women organizations established in 1928;
- b. PKK (Family Welfare Guidance), established in 1967 and reformed in 1998, exists through Indonesia and has been established to achieve the prosperity of the family;
- c. The Association of Civil Servants’ Wives (Dharma Wanita Persatuan), which commonly its Chairperson is the wife of the highest ranking official of ministries and state institutions.

Besides the above, efforts have been made to uphold gender equality of the sexes, Indonesian government in its combined second and third periodic reports to CEDAW

³¹ Indonesia combined fourth and fifth periodic report to CEDAW, p. 7.

³² Supra note.

admitted that there is still a great difference between what is prescribed by law and what cultural belief and religious philosophy dictate.³³ Indonesia, being a multicultural society is still facing a very challenging task of implementing policies to support the equality of sexes. Many religious customs and traditional norms of society favor male dominated social systems. Even though men and women have equal rights, responsibilities and opportunities under the law, the majority of men are not willing to give up their acquired privileges.³⁴ In order to promote equality between the sexes, the government felt the need for dismantling prejudice and cultural practices that are obstacles to equality, as well as the need for changing social attitudes as part of the strategy in improving the status of women, not only in the family level but also at the level of society and in the political arena.³⁵

One of the structural problems that may have direct affect on women is the decentralization program in Indonesia. The particular concern is that the decentralization process has been accompanied by a revival of gender roles based on conservative religious thinking as well as traditional customs. This trend could lead to the repression of women's rights.³⁶ The decentralization in Indonesia is facilitated by Regional Administration Law No.32/2004 (replaced the previous Law No.22/1999 of Regional Autonomy) and Law No.33/2004 that replace the original Law No.25/1999.³⁷ The implementation of regional autonomy was intended to give the regions more authority to manage their own development and affairs. It is also part of conflict resolution strategy through restoration of customary institutions, in the hope that traditional conflict resolution mechanisms will be able to prevent further outbreaks of communal violence.³⁸

The resurgence of customary institutions is closely linked to the demands for the implementation of *shari'a* law. There are at least ten other regions in Indonesia, in addition to Aceh, that have passed or are about to pass regulations allowing the

³³ Indonesia combined second and third periodic reports to CEDAW, p. 24.

³⁴ Supra note p. 28.

³⁵ Supra note p. 25.

³⁶ Supra note 11, p. 36.

³⁷ Supra note p. 37.

³⁸ Noerdin (2002), p. 182.

implementation of *shari'a* law. The problem about this regulation is that because the law implemented with its main program to repress women. As expressed by Dr. Musda Mulia, a Muslim intellectual, this development was a political shortcut to gain legitimacy by some political actors by creating a symbol of Islam.³⁹

The local authority rarely use the term *shari'a* to describe their policies but instead emphasize that their policy was in intention to uphold “morality and order” in the society. It is because they did not have legal authority for their actions. In order to have a legal force, a regional regulation approved by the regional legislature needs the endorsement of DPR. Somehow, some people are not bothering to wait for this endorsement but taking the law into their hands instead.⁴⁰ The regulation on dress code for women, either officials or students, or prohibition for women to go out after certain time at night are examples of this regulation.

The increasing demand for the *shari'a* law in several regions in Indonesia is closely related to the state ideology Pancasila that did not adopt the Jakarta Charter (as mentioned previously in page 7). Additionally, throughout the New Order period, both customary institutions and Islam experienced a repression by the ruling regime. Therefore, after the end of the New Order regime in 1998, the effort to revive the Jakarta Charter has strengthened and the demand for the introduction of *shari'a* law also increased in several regions in Indonesia. More discussion about the New Order regime will be discussed further in the next section.

Before move on to see how the women's status and its stereotype of Indonesia women, either through the building of state ideology during New Order regime and other factors, it can be summed up that legislative protection is not sufficient by itself to promote equality between men and women. According to Petersen, the descriptions of women's position based on legislation may give a false impression of societal equality for women. It because legislation is not value neutral in its effects if it is based on knowledge of men's life situation and conditions even if the vocabulary used is gender neutral. It's really important to take account the needs, values and interests of women as

³⁹ Supra note p. 184.

⁴⁰ Supra note.

a source of law.⁴¹ Therefore it is significant to understand and to know how women perceive themselves in relation to men. Unfortunately, there is no thorough analysis has been done to assess women's perception of themselves and of their socio-economic roles in the Indonesian society.⁴²

2.2.2 Women's status and its stereotype in Indonesia

An effort to improve women's role and status in Indonesia began a long time ago. In each period of history—colonial, post-independence, New Order and post-New Order—the women's movement has revealed its own dynamism, whether the initiative has come from the people or from the government.⁴³

During the colonial era, the struggle to improve the condition of women focused on the provision of education for women, which was felt to be a prerequisite for national liberation. Kartini was the leading figure struggling for women's empowerment at that time, challenging the limitations experienced by Indonesian women. Several issues that became the focus of the struggle included restriction of women to enjoy an education, the opposition to polygamy, and the restriction of women in the public domain. Throughout this era, the ideal of the 'good wife and mother' was firmly entrenched in Indonesia; a good woman should be able to manage her family and home well.⁴⁴ Thus any effort to improve the condition of women necessarily involved improving their capacity to manage their responsibilities in the domestic domain.

The domestication of women's role continued after Indonesia gained independence. Following the fall of President Sukarno in 1965, a New Order, under the Soeharto presidency emerged, marked by a powerful central government. National stability became the regime's political jargon in a bid to control the people's life politically, economically, socially and even religiously. The ruling regime took full control of state and dictated what is good for people, including what is appropriate for women. Gender relations and gender roles became important dimensions of state control. The public and domestic spheres were separated with women mostly involved in domestic sphere. The

⁴¹ Supra note 12, p. 174

⁴² Supra note 33, p. 28.

⁴³ Parawansa (2002), p. 68.

⁴⁴ Supra note, p. 69.

official ideology of the regime concerning women was based on a combination of Javanese and Islamic idealizations of the perfect wife.⁴⁵

As mentioned above, many women's organizations set up during the New Order were created as a mechanism for the advancement of gender equality. However in fact, all these organizations came under strict government control. The special association set up for female civil servants and spouses of civil servants, Dharma Wanita, in 1974, allowed direct control over men and women. Furthermore, the organization of PKK launched in 1980s, a program dedicated for the development of rural communities, facilitated government to control women in every region in Indonesia. Its hierarchical structures were similar to those of Dharma Wanita. Julia Suryakusuma, a woman activist described Dharma Wanita as espousing "the ideology of 'State Ibuism' [domesticated spouses], which defines women as appendages of their husbands and casts female dependency as ideal."⁴⁶

In a top-down approach, the "five duties of women" (Panca Dharma Wanita) lay an emphasis on women to be companions of their husbands, bearers of the nation's future generations, mothers and educators of children, managers of the household and contributors to the household income (that is not the main source of income), and finally, to be good citizens. This state ideology of the modern Indonesian woman tried to squeeze all women into the mould of middle-class housewives and to co-opt the Indonesian family into its development programs, thus "domesticating the domestic sphere."⁴⁷ To sum up, it may be stated that in an intentional effort to "mainstream" or "domesticate" women, the regime promoted gender differences with woman involved in domestic sphere and despite being discarded when the regime ended, this policy remains deeply engrained in Indonesian society.

The discussion of women's status and its stereotyping will be further elaborated through two sub-sections below about the patriarchal nature of society in Indonesia, in order to

⁴⁵ Supra note 18, p. 43.

⁴⁶ Supra note p. 44.

⁴⁷ Supra note.

describe the position of Indonesian women in society; and women's ideal role as a mother.

2.2.2.1 Patriarchal society: Javanese culture and Islam values?

As mentioned previously, in order to advance social stability and comprehensive order, the regime's restrictive ideology is targeted at women. The so-called 'housewifezation' process during the rule of New Order regime attracted attention from many women activists. The program aimed at the consolidation of a patriarchal state as part of an overall policy to "functionalize" the entire population.⁴⁸

Kate Millet investigated that the roots of women's oppression buried down in patriarchy's sex/gender system. Patriarchal ideology, according to Millet, exaggerates biological differences between men and women, ensuring that men always play the dominant role and women, the subordinate one.⁴⁹ However, it is difficult to say whether the patriarchal culture and inferior position of women compared to men in Indonesia derives from culture or religious value. Although Islam is often singled out as the strongest force shaping a patriarchal culture, according to observers of Javanese culture, the idea of women's inferiority to men derives from the pre-Islamic Hindu culture that later fused with Islam.⁵⁰

The Javanese world-view on womanhood is derived from various books written by Javanese Kings and literally writers (*pujangga*), passed down from one generation to the next by parents and society, for example *Serat Wulangreh Putri* (book dealing with teachings on ethics and morals for women) and *Serat Chadrarini* (Book on the Beauty of Women). Although these books nowadays are hardly known to many contemporary Javanese, but the stereotypes they prescribed remains strong.⁵¹ Among the stereotypes is the view that women, by nature, are weak and therefore need men's protection. The Javanese expression *swargo nunut neroko katut* (women follow men to paradise and to hell) implies that women's fate, good or bad, is fully in the hands of men. The social class called *priyayi*, the Javanese intellectual class of officials (that influence and

⁴⁸ Supra note.

⁴⁹ Munir (2002), p. 191-192.

⁵⁰ Supra note 18, p. 41.

⁵¹ Supra note 49, p. 196.

characterized New Order regime in Indonesia under Soeharto), in particular took their gender ideologies from the Javanese royal courts.⁵²

Javanese tradition and Islamic teachings share similar views on sexual relations as having a noble purpose that is “to implant the seed and obtain good offspring.”⁵³ Therefore it is emphasized the women’s role as a mother. A set of etiquette needs to be observed, not only for moral consideration but also to avoid mishaps befalling the child. Some of the do’s and don’ts in sexual relations are derived from *Hadits*⁵⁴. For example, a wife’s unconditional obedience in (male-biased interpretation of) Islam, is shared by the Javanese world-view. Women are perceived as passive sexual agents whose major task is to fulfill the needs of the male. A sexually active and aggressive woman is considered *saru* (improper). Women have to follow the culture, namely to accept the reality and not to protest if she is unhappy.⁵⁵

One example of Indonesia case brought up by Doorn-Harder from the Nahdlatul Ulama (NU) meeting in 1997 where the *kiai* (venerated scholar, teacher of Islam) agreed that there was no limit to women’s sphere or scope of work, they discussed the question of whether a woman has the right to refuse her husband when she is tired or sick. This discussion was inspired by the issues of domestic violence and marital rape occurring in society and the *kiai* firmly stayed within the frame that considers a woman’s refusal to be grounds for punishment or divorce. Their prevailing opinion was that a woman can never refuse.⁵⁶ This is a challenge to organizations working for women’s rights to negotiate and bring together layers of complex realities to achieve their ultimate goal of making Islam a vital and empowering force for women.

Inglehart and Norris investigate reasons why religion can be expected to exert a major influence over prevalent attitudes and practices regarding sex roles stating that:

⁵² Supra note 18, p. 42.

⁵³ Supra note 49, p. 197.

⁵⁴ For Muslim, the Qur’an is a sacred text and both the source of Truth and the means in realizing it in action. Access to its teaching are mediated by secondary religious (and literally) texts such as *Tafsir*, Qur’anic exegesis and *Hadits*, the narratives purportedly detailing the life and praxis of the Prophet Muhammad. Quote from Barlas (2002), p. 3.

⁵⁵ Supra note 49, p. 198.

⁵⁶ Supra note 18, p. 263.

“religious organizations particularly the Catholic Church and the evangelical movement among fundamentalist Christians and Islamic fundamentalist leaders in Muslim nations, have often sought to reinforce social norms of a separate and subordinate role for women as homemakers and mothers, buttressing traditional policies and the legal framework regulating marriage and divorce, abortion and contraception, family and children policy”.⁵⁷

After the political reformation in 1998 ending the repressive New Order regime in Indonesia, fundamentalist Islam gained more room to exist. The implementation of regional autonomy resulted in several regions attempting to restore customary institutions to carry out the role of Village Representative Body, or similar institutions named differently in other regions and stated in Article 104 of Regional Autonomy Law No 22/1999. However the said article is not accompanied by a regulation to prevent revitalization of the feudal and patriarchal values embedded in many of these customary institutions.⁵⁸

2.2.2.2 The ideal of women’s reproductive role

So, what is the ideal role for women in Indonesia? It is basically the same as everywhere else. The female gender ideal is to be a wife and a mother, practicing familial harmony. Ever since the colonial period the notion of woman (*perempuan*) and the ‘true mother’ (*ibu yang sejati*) has characterized Indonesian women suggesting that they should behave morally and modestly following Indonesian culture and Islamic prescriptions, not to adopt ‘Western practices and values.’⁵⁹ Stressing the cultural ideal of harmony, gender perceptions had national implications because they were “nationalized,” and part of an Indonesian national identity.⁶⁰

The image of the ideal woman as the dependent and obedient wife influences the government’s view of the place and position of women in social life. The official conception of women’s status and function as “good citizens” is marked by women’s customary roles as homebound child bearers and rearers, and loyal supporters of their

⁵⁷ Inglehart (2003), p. 49-50.

⁵⁸ Supra note 38.

⁵⁹ Locher-Scholten (2003), p. 54.

⁶⁰ Supra note.

husbands.⁶¹ Dualism existed here because on the one hand women were called upon to dedicate themselves to ‘the development of the nation,’ by pursuing education, participating in the labor market, and sustaining economic development and modernization. On the other hand, it was emphasized that their participation in the process of national development should concentrate on the domains which ‘best correspond with their female nature and their biological constitution’.⁶² Whilst prevail a strong stereotype of sex roles, it is very common in Indonesia for working women to help support the family and earn additional income. In short, double standards seems to apply since no one may oppose women going outside home to earn additional income, but she will be solely blame if something negative happens in the family.⁶³

Law No. 10/1992 on Population Development and the Development of Happy and Prosperous Family, in Chapter 1 Article 1 provided a definition of happy and prosperous family by in the following words:

*“A family which is formed on the basis of a legal marriage, capable of adequately fulfilling spiritual and material needs, devoted to God Almighty, possessing harmonious, proportionate, and balanced relations among its members and between the family and society and the environment.”*⁶⁴

The roles of husbands and wives in the family are spelt out in the 1974 Marriage Law. Article 31(3) states that “the husband is the head of the family and the wife is the mother of the household”. Further Article 32(1) states that “the husband shall have the responsibility of protecting his wife and provide all the necessities of life in a household in accordance with his capabilities” continuing in the second paragraph to say that “the wife shall have the responsibility of taking care of the household to the best of her ability.”⁶⁵

The ambiguity nevertheless makes the point, that status of men and women in marriage is equal within Indonesian society but they have different roles, as the head of the family and the head of the domestic maintenance of household. It is implicit then that

⁶¹ Hunter (1996), p. 169.

⁶² Hardee (1998), p. 4.

⁶³ Supra note p. 14.

⁶⁴ Supra note, p. 4.

⁶⁵ Hering (1976), p. 98.

the government's vision still looks at women's issue predominantly as one linked to their position as wives and mothers. Government policies on women did not address their advancement as such but rather improvement of their status within the family.

A woman is considered to be a mother, a wife, a sister, but her reproductive role is linked to her marital status. This was in line with traditional norms of Indonesian society that being married was considered the only proper social status in life, especially for women, and marriage traditionally implied social and political bonding of families.⁶⁶ Therefore the social stigma related to female sexuality is very strong. The hegemonic ideals of female sexuality are particularly salient on the values of marriage, motherhood and female virginity.⁶⁷ One example of social regulation of female sexuality is cultural and religious insistence on female virginity at the time of marriage, a notion affirmed by most religions. The Islamic, Christian, and Hindu faiths appear united in asserting that female virginity is compulsory before marriage. They also concur in idealizing marriage and motherhood, and equating female sexuality with reproduction.⁶⁸

Bennett demonstrated experiences of premarital pregnancy and abortion among single women drawn from her ethnographic research conducted between 1996 and 1998 in Eastern Indonesia.⁶⁹ Most young woman who experienced premarital pregnancy felt that there was no choice for them except an abortion. They strongly felt that while abortion is a sin, it was also acceptable in certain circumstances. Abortion was considered preferable compared to continuing a pregnancy if the man refused to take responsibility or rejected marriage as a solution. The argumentation behind that choice was that premarital pregnancy may cause personal and family shame because of having a child out of wedlock and raising a fatherless child were considered greater sins compare to abortion.⁷⁰ In case of married women, the acceptability of menstrual regulation accords with the Islamic view that ensoulment takes place at 120 days of

⁶⁶ Supra note 59, p. 49.

⁶⁷ Supra note 29.

⁶⁸ Supra note, p. 22.

⁶⁹ Bennet (2001), p. 37.

⁷⁰ Supra note, p. 39.

pregnancy⁷¹ and with state discourses that dictate women's obligation to practice family planning program, advocating that two children is enough.

Religious and cultural influences therefore contribute significantly to the divergence in the realm of sexuality relating to the apparent gaps between sexual ideals and sexual behaviors.⁷² The need to regulate woman's sexuality is strongly felt because it is only women who can get pregnant. The mechanism for social control over female sexuality is solely because sexual stigma can cause damage to female reputation, as well as the family honor. It creates considerable discrepancies between the social significance of sexual ideals for women and men.⁷³

From the discussion above, it may be argued that the social construction of women's identity and status is linked to their sexual behavior that sets the ideal requirement of "good" and "bad" women. It is why women's sexuality is strongly policed before marriage, to uphold the ideal of women's purity, and it is why women choose to 'conceal' their 'impure' actions. Reading the story of Chandra's death from an induced abortion⁷⁴ or learning Ishma's story from Eastern Indonesia by Bennet⁷⁵, has shown how "conspiracy" among women exists; mother, sister, friends help each other to support the woman abort her pregnancy. There will be a demand on her to maintain a silence about what she has been going through, for the benefit of her own reputation as a 'good' woman and also for the sake of family honor. The literature reveals the suffering of women who have undergone unsafe abortions that might end tragically in death as in the case of Chandra. However, in case of Ishma, despite her mental suffering, she also suffers problems with her reproductive organ as the after- affect of an unsafe abortion. Incidents such as these affect women's self-esteem, and they feel that no one will want them after what they have done.

⁷¹ It is based on Fatwa MUI about abortion released in 2005. Basically there are different schools of thought in Islam about abortion practices in Indonesia. For the Hanafi school of thought, termination of pregnancy can be tolerated when done before 120 days, whereas the Sja'fii school of thought, on the other hand, which is predominant in Indonesia, rejects this view. Djohan et.al (1993), p. 35.

⁷² Supra note 29, p. 23.

⁷³ Supra note.

⁷⁴ Guha (1997), p. 34-62.

⁷⁵ Supra note 69, p. 39-40.

The above experiences have led many to approach reproductive health by placing women as the focus of their approach since it is the woman who is always directly affected by her reproductive capacity. Freedman has identified three basic principles called “women-centered” that have emerged from the evolving field of reproductive health and how they connect law to health.⁷⁶ First, a women-centered approach to reproductive health is fundamentally about trusting women. The key to improving reproductive health is “women’s autonomy—enabling women to take control over their reproductive lives by entrusting to them both the authority to make decisions about reproduction and the ability to make those decisions based on access to adequate information and appropriate services”.⁷⁷ Second, a women-centered approach means understanding and addressing reproductive health in the way women experience it: not as a series of isolated biomedical phenomena, but as an integral part of everyday life. Third, a women-centered approach to reproductive health emphasizes the need to connect the different levels--international, country, community—at which policies and programs are developed and implemented.

Basically, it is the same principles that underlie feminist view of reproduction freedom. They mainly view the biological connection between women’s bodies, sexuality, and reproduction. This is an extension of the general principle of “bodily integrity,” or “bodily self-determination,” to the notion that women must be able to control their bodies and procreative capacities. The second is a “historical and moral argument” based on the social position of women and the needs that such position generates.⁷⁸ These two feminist views put abortion practices within the individual frame, which is women who experience it, and also from social frame as abortion is not merely biological (natural and unchanging) but also historical, related to women status in the society that is shaped by social and political situation.

To sum up, the sexual stigma attached closely and solely to woman is because of her reproductive ability. However, we have to bear in mind that women’s reproductive situation is never the result of her biological situation alone, but of biology mediated by

⁷⁶ Supra note 16, p. 19.

⁷⁷ Supra note.

⁷⁸ Petchensky (1984), p. 2.

social and cultural organization. That the women who should bear the main consequences of unintended pregnancy and thus that their sexual expression must be inhibited by that.⁷⁹

2.3 Abortion

Pregnancy is a very natural thing that happens to women. However, pregnancy can be one of suffering and misery when it is mistimed and unwanted. When it happens, women have no other option but that of abortion to end their unwanted pregnancy.

Abortion occurs when the fetus is expelled from a woman's uterus. Induced abortion is the term used for the intentional termination of pregnancy because of some compelling reason, before the fetus can live independently. It is to differentiate from a spontaneous abortion as the result of conception that is lost naturally (also called miscarriage). Abortion is considered to be elective if a woman chooses to end her pregnancy not because of maternal or fetal health reasons, and a therapeutic abortion will be performed in order to preserve the health or save the life of a pregnant woman.

There are various methods to perform the abortion, ranging from medical abortion, use drugs RU-486 that produces abortion, suction-aspiration, dilation and curettage, dilation and evacuation and prostaglandin abortion, a hormone that induces abortion. Abortions are safest when performed within the first six to 10 weeks after the last menstrual period. Abortion done in the first trimester of pregnancy (before 13 weeks) experience less complications compared to those performed during the second trimester. Abortion after 24 weeks is extremely rare and usually limited to situations where the life of the mother is in danger.⁸⁰

There are many reasons behind women's decision to end their pregnancy. It can be divided into two groups of women: married women and unmarried ones. The most common reason for married women to undergo an abortion is because of contraceptive (birth control) failure. Having too many children or the pregnancy occurring too close

⁷⁹ Supra note, p. 6.

⁸⁰ *Abortion, Induced*. In: <http://www.Surgeencyclopedia.com/A-Ce/Abortion-Induced.html> [Visited on 13 March 2008]

to the previous pregnancy can be one of the reasons. Other reasons include financial hardship, inability to take care of more children because of poverty. For the other group, i.e., single woman they may choose abortion to end premarital pregnancy because the pregnancy was unintended; they were pressured into having one by their partner, parents, or others, they are not ready to become a parent or even worse, because of rape or incest. Presently, the Indonesian legal system only allows the abortion because of physical conditions that endangers the women's life if the pregnancy were to continue. The existing law does not regulate the act of abortion beyond women's condition or health, for example because of rape, incest or forced pregnancy. The Indonesian abortion law will be discussed in more detail in the third chapter on legal framework.

2.3.1 History and politics of abortion

Anthropological studies show abortion to be widespread in ancient and pre-industrial societies throughout world history.⁸¹ Prior to Christianity abortion was a very common practice in the western world and considered acceptable during the early stages of pregnancy. This condition lasted for several decades with women helping each other to perform the abortion. It is possible that abortion was a universal action that was common during early times in Indonesia. Traditional abortion practitioners normally acquired their skills from their predecessors and not through formal training. It is still common practice in rural areas to find women with traditional techniques like massaging the woman's abdomen and making the herbal drink *jamu* for terminating pregnancy despite the illegality of abortion practice.

From its very beginning, Christianity considered abortion as sinful. Abortion in the earlier centuries was clearly considered a sin against the Church's sexual codes—but not a sin of 'killing.'⁸² However, throughout history the religious stand regarding abortion remains one of contestation. In the 19th century Pope Pius IV declared all women having abortions to be subject to excommunication, whatever the duration of the pregnancy terminated. By that time the Catholic Church had assumed its crusading role against abortion. This position does not seem to have changed very much nowadays. On his visit to Brazil recently, Pope Benedict XVI reaffirmed the Catholic

⁸¹ *The New Our Bodies, Ourselves* (1992), p. 370.

⁸² *Supra* note p. 371.

Church’s strong opposition to abortion.⁸³ He said that abortion is not only a crime against the unborn child but also against society.⁸⁴

The state itself did not prohibit abortion until the nineteenth century. Britain passed her first anti abortion laws in 1803, which then became stricter over the century. The United States followed, as individual states began to outlaw abortion at any stage of pregnancy. By 1880 most abortions were illegal in the United States, except those “necessary to save the life of the women.” By that time, abortion suddenly became a crime and a sin for a number of reasons including the dangerous procedure involved at the time thus gaining humanitarian support for its criminalization. However, “protecting” women from the dangers of abortion was actually meant to control and restrict them to their traditional childbearing role. Anti abortion legislation was part of an antifeminist backlash to the growing movements for suffrage, voluntary motherhood and other women’s rights in the nineteenth century. The public in those days condemned feminism and considered sex for pleasure as evil, with pregnancy as its punishment.⁸⁵

Nowadays abortion is permitted under many different conditions in many countries. In some countries access is highly restricted, in others pregnancy termination is available on broad medical and social grounds or on request.⁸⁶ (Table 1) However, there maybe discrepancies between the wording of the law (*de jure*) and its application (*de facto*), which means that common practice can help or hinder the procurement of legal abortion.

Table. Grounds on which abortion is legally permitted in 193countries, 2001

	To save the woman’s life	To preserve physical health	To preserve mental health	Rape or incest	Fetal impairment	Economic or social reasons	On request
All countries (n = 193)							
Permitted	89	122	120	83	76	63	52
Not Permitted	4	71	73	110	117	130	141
Developed countries (n = 48)							
Permitted	46	42	41	39	39	36	31
Not Permitted	2	6	7	9	9	12	17

⁸³ “Church and Abortion: Pope reaffirms Catholic Church’s anti-abortion stand” (11 May 2007), p. []

⁸⁴ Wooden (December 2005), p. [].

⁸⁵ Supra note 81, p. 371.

⁸⁶ *Unsafe Abortion* (2004), p.2

Developing countries (n = 145)							
Permitted	143	80	79	44	37	27	21
Not Permitted	2	65	66	101	108	118	124

Making abortion illegal has neither eliminated the need for abortion nor prevented its practice. In cases where women are determined not to carry an unwanted pregnancy to term, they have always found some way to try to abort. As observed by Linda Gordon who lays the groundwork for a feminist theory of reproductive freedom, throughout history, women have practiced forms of birth control and abortion; and recurrent moral or legal prohibitions against such practices merely “forced women underground in their search for reproductive control.”⁸⁷ Lacking better alternatives, all too often they have resorted to dangerous, sometimes deadly methods of unsafe abortion.

2.3.2 Unsafe abortion and its consequences

The World Health Organization (WHO) defines unsafe abortion as a procedure for terminating an unwanted pregnancy either by persons lacking necessary skills or in an environment lacking minimal medical standards or both.⁸⁸ Abortion is categorized as safe when performed by trained health care providers with proper equipment, correct technique and sanitary standards. Abortion performed safely will carry little or no risk at all, with the case fatality no more than 1 per 100 000 procedures.⁸⁹

Induced abortion when performed by qualified persons using correct techniques and in sanitary conditions is a safe surgical procedure. The mortality and morbidity risks associated with unsafe induced abortion depend on the facilities and the skill of the abortion provider, the method used, the general health of the women and the stage of her pregnancy. WHO reported that more than 18 million unsafe abortions are performed each year, and almost all took place in developing world. Where abortion is restricted by law, girls and women who can afford to pay often can find a private physician, or sometimes a nurse or midwife willing to perform an abortion. However, not all illegal abortions are unsafe. It might be that an abortion performed by trained professionals is medically safe, but technically an illegal procedure under the law. “The fact that women

⁸⁷ Supra note 78, p. 1.

⁸⁸ *Abortion and the International Community*. In: <http://www.unfpa.org/swp/1997/box15.htm>. [Visited 1 May 2008]

⁸⁹ *The World Health Report* (2005), p. 50.

seek to terminate their pregnancies by any means available in circumstances where abortion is unsafe, illegal or both, demonstrate how vital it is for them to be able to regulate their fertility.”⁹⁰

The consequences of unsafe abortion are dramatic. WHO estimated that the risk of dying from an unsafe abortion is around 350 per 100,000 and 68,000 women a year die in this way.⁹¹ The maternal death because of it could easily be prevented if women had access to contraceptive information and services as well as to safe medical care. In addition, the non-fatal complications contribute significantly not to mention the emotional turmoil that goes with so many unsafe abortions. Complications of unsafe abortion such as sepsis, hemorrhage, genital and abdominal trauma, perforated uterus or poisoning could be fatal if left untreated,⁹² and for some developing countries, the handling complications from abortions, also results in high costs for the health system.

The incidence of unsafe abortion is influenced by the legal provisions governing access to safe abortion, as well as the availability and quality of legal abortion services. Restrictive legislation is associated with a high incidence of unsafe abortion.⁹³ As abortions are mostly illegal, many women with unwanted pregnancies may attempt to abort their pregnancy using a variety of means or they may consult illegal practitioners such as traditional healer (*dukun*) and midwives and nurse-midwives acting illegally. Many decisions to abort may be shaped by social or cultural considerations such as the stigma of illegitimacy, a lack of social facilities for child care, economic constraints, and so on, as already described previously. This situation left no other choice for any women who want to end their pregnancy other than through unsafe abortions.

2.3.3 Abortion and its controversy

So long, as the burden to conform to the norm of the society falls on women, it will be very difficult to discuss openly and widely women’s right to abortion. It is because according to this line of thinking, if a woman is a “good woman” then she is not required an abortion and contraception facility.

⁹⁰ Supra note.

⁹¹ Supra note p. 51.

⁹² Supra note 9, p. 111.

⁹³ *Unsafe Abortion* (2007), p. 2.

As mentioned above there are huge gaps between the sexual ideals and sexual behavior among single women in Indonesia. Therefore we can assume that this situation might result in the high possibility of many teenagers falling into unwanted pregnancy because of their limited knowledge of sexuality. Unwanted and mistimed pregnancies also continue to occur in Indonesia since many sexually active women who do not want to have a child are not using contraception. Law No 10/1992 on Population Development and the Development of Happy and Prosperous Family stipulates that the provision of family planning services is restricted only to married women. Thus, in some way, restricts access to contraception for teenagers and sexually active women that are not married.

Women with an unwanted pregnancy face a high risk of maternal morbidity and mortality since they tend to neglect the care of their pregnancy or try to abort it. Many unintended pregnancies end in induced abortion, most incidents of which are unsafely performed in places that do not meet the minimum standards of medical hygiene. Indonesia Central Bureau Statistic in 1998 counted eight percent of all pregnancies as unwanted.⁹⁴

Unwanted pregnancy among single women might force woman to enter into early marriage and or forced pregnancy against their will. Early or teenage marriage and early pregnancy can double the risk of maternal death and increase the chance of infant death. It often leads to low self-esteem and regret among women. Unwanted pregnancy among teenagers does not leave many options for them. Young pregnant women find that they must leave school, leading to fewer opportunities later to get a better job and higher income, thus resulting in increased economic dependency on their husbands or families. These consequences, according to Dworkin, are the price that women have to pay because of the denial to an abortion. Dworkin stressed that the impact of criminalization of abortion on particular people—pregnant women—as being far greater. He said that “a woman who is forced by her community to bear a child she does not want is no longer in charge of her own body. It has been taken over the purposes she does not share.” And further, he even categorized the forced pregnancy as partial enslavement

⁹⁴ Supra note 9.

because bearing a child that they not wanted might make women no longer can live the life as they believe they should.⁹⁵

There are two consequences of induced abortion that become a concern to practitioners in Indonesia. The direct importance is the medical consequences (as explained above) of providing or denying abortion. But there is also indirect consequences related to psychological reactions of woman who must consider options surrounding abortion in an environment of inherent uncertainty and conflicting pressures. Though the medical consequences have diminished with the improvement in medical technology, legal restrictions have made women choose dangerous ways in ending their unwanted pregnancy, resulting in the increased rate of abortion.

In relation to the psychological effect of abortion, the unwanted pregnancy brings different stigma for married women and unmarried ones. As abortion becomes increasingly safe and accessible, the pressures on women considering pregnancy termination have increased, specifically pressures of social perceptions and attitudes concerning sexual behavior. Indonesian public generally accepts the idea that a married women with many children may choose to have an unwanted pregnancy aborted at an early stage, since this can be defined as “contraceptive failure.” It can also be regarded as a reasonable choice in a country where the government urges every family to have no more than two children.⁹⁶

However, religion appeared to be the strongest determining factor influencing the views of health care providers on abortion. Many of these including general practitioners (GPs), family planning workers (PLKB), gynecologists, and especially traditional birth attendants (TBAs), describe the social ostracism that young women experience if they were not married and became pregnant.⁹⁷ When the woman is unmarried, and moreover if, despite her age, she is defined as a “girl” (for example because she is a student), her family and community are likely to regard her consideration of abortion as a factor compounding her obvious “sin” of premarital sex. Conflict arises between groups, for

⁹⁵ Dworkin (2004), p. 373.

⁹⁶ Supra note 5, p. 249.

⁹⁷ Supra note 71, p. 37.

example, when religious leaders condemn any attempt to provide family planning and abortion information to unmarried young people, and also between generations, as when parents and grandparents press a young couple to get married, regardless of the couple's financial and personal resources.

The situation mentioned above indicates consistency with the provider's attitude towards abortion. They express a degree of compassion towards married women requesting an abortion, but not single women. Abortion for married women was considered most justifiable if the women had two or more children and she fell pregnant because of contraceptive failure. It is because the provider invokes the official ideal of 'small and prosperous family.' In contrast, even when they were willing to undertake an abortion for single women, they will remind the young women about the immorality of premarital sex and abortion, and warn them against premarital sex in the future.⁹⁸

Previously there has been mention of the need of understanding and addressing reproductive health in the way of women experience it. Therefore, reforming laws and systems of access to law is still a continuing priority as law helps shape the social world in which women live. The central challenge in developing reproductive health strategies is giving real meaning to the right of couples and individuals to determine, freely and responsibly, the number and spacing of their children.

Nowadays we can see many changes in behavior among young generations. They were expected to go to school as a necessary step to find better occupation, a situation that might contribute to evolution of cultural notions in this regard. Culture, tradition and religion so deeply entrenched within the society and shaping the behavior and notion of gender and sexuality of women is not stagnant or static but may change over time. The modernization theory hypothesizes that "human development brings changed cultural attitudes toward gender equality in virtually any society that experiences the various forms of modernization linked with economic development." Further, it said that "cultural shift in modern societies are not sufficient by themselves to guarantee women

⁹⁸ Supra note 69, p. 41-42.

equality across all major dimensions of life; through underpinning structural reforms and women's rights, they greatly facilitate this process.”⁹⁹

The theory that modernization has led to secularization was emphasized in the work of Max Weber and was popularized during the 1950s and 1960s. As its simplest, this theory suggests that modernization leads to the decline of religious beliefs. Some indicators are used to describe these decline as such the erosion of church attendance, denominational allegiance, and faith in religious authorities; the loss of prestige and influence of religion's symbols, doctrines, and institutions; and the growing separation between church and state. However, on the other hand, they also acknowledge the rise of and heightened fundamentalism especially within Islam in the society.¹⁰⁰

This situation is better described in the abortion controversy in Indonesia. The sexual gap exists, just as mentioned above. The era of globalization has brought a change in the behavior of people, but at the same time, culture and religious values is entrenched very deeply in society. Sexual stigma is still very strong in the society and the rise of fundamentalist Islam after the reformation era in 1998 has also made discussion about abortion more controversial.

Reproductive health strategies must be built around a core insight that women as full, thinking personalities, shaped by the particular social, economic and cultural conditions in which each of them lives, are central to their own reproduction. Thus, health policies and programs cannot treat reproduction as mere mechanics, as isolated biological events of conception and birth; rather they must treat it as a lifelong process inextricably linked to the status and roles of women in their homes and society. It is only women who can get pregnant and bear all the consequences of the pregnancy and responsibility for children; it means that the conditions of reproduction and contraception affect them directly and in every aspect of their lives. Therefore, it is women primarily who should have control over whether, when, and under what conditions to have children.

⁹⁹ Supra note 57, p.11.

¹⁰⁰ Supra note p.51.

Society at large should also be aware of the realities of health risks faced by women as they fulfill the social role demanded of them as “good woman”, as bearers of future generations, who at the same time, as “good citizen” should support the family planning program advocating a two child family. Legal clarity regarding abortion will diminish existing confusion in relation to the practice of abortion practice in Indonesia and also help to uphold the protection for women’s reproductive health.

This line of thinking has gradually been taken as the position of the fundamental and non negotiable demand for women, despite many controversies related to the practice of abortion. This position may be based either on an assumption of the inalienable right of women to control their bodies or on the understanding that since women are socially responsible for child care, they should also have the option of deciding whether to assume that responsibility.¹⁰¹

Reforming existing laws and improving systems and access to law and rights is a continuing priority to achieve reproductive rights for women. However national, regional and international frameworks for rights are inter linked and require discussion and analysis. Therefore the next chapter will elaborate the legal framework behind the human rights dynamic of abortion legal reform within Indonesia legal framework. It will also illustrate the evolution of a human rights discourse about reproductive health and abortion from regional and international legal framework.

¹⁰¹ Supra note 78, p. 1-18.

3 LEGAL FRAMEWORK

Indonesia ratified the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW) in 1984 and implemented it in the national law through Law No. 7/1984. This in effect has consequences for the state to uphold the protection and promotion for all women's rights within their boundaries. However, it is important to note that explanation of this law incorporating CEDAW points out the importance of regulating its implementation by adjusting the cultural values, norms and *adat* still practiced and followed by Indonesia community as a whole.¹⁰² Fulfilling their obligation to uphold women's human rights in all aspect of their life is a challenge for the Indonesian government as many traditional, cultural and patriarchal values accepted widely in society undermine women's human rights rather than uphold them. In reality many human rights instruments have already been ratified and adopted within national law, but most of the time not successfully internalized within the community, sometimes even considered contradictory to national or local values, as mentioned previously with CEDAW. This cultural relativism regarding the international human rights framework to national law will be the main focus in this discussion. First it will take a look into national legal framework related to abortion.

3.1 National Legal Framework

Abortion in Indonesia is regulated as part of Health Law No. 23/1992 in Section 2 of Family Life Article 15 although not mentioned directly. Paragraph 1 state that "in case of emergency, and with the purpose of saving the life of pregnant woman or her fetus, it is permissible to carry out certain medical procedures." However, the legal prohibitions in reality never deter women from having abortions.

The gap between what is ruled by the law and what is in reality practiced by women, has led several NGOs and women's organizations to persuade the government to revise

¹⁰² Valentina, R. *20 Tahun Ratifikasi CEDAW menjadi UU RI No. 7 Tahun 1984: Saya dan CEDAW*. KOMPAS, August 2, 2004. In: <http://institutperempuan.blogspot.com/2007/06/20-tahun-ratifikasi-cedaw-menjadi-uu-ri.html> [Visited April 2008]

the Health Law and give more protection to women's reproductive health. The discourse generated by the amendment has been ongoing and consistently under discussion since 2002. One of the amendments is about adding one chapter specially on reproductive health, which is not regulated in the current Health Law.

3.1.1 Abortion Law and Its Controversy

As mentioned in chapter one, the Indonesian Criminal Code (*Kitab Undang-Undang Hukum Pidana, KUHP*), is modeled on the Dutch Criminal Code. The abortion law, enacted in 1918 by the Dutch Colonial government, adopted a restrictive view of abortion that defines the practice as a crime against morality and life. Under this law, any person performing an abortion and any woman willfully inducing her own miscarriage is subject to imprisonment. Physicians, midwives, and pharmacists are subjected to harsher penalties that might result in the revocation of their license to practice their profession.¹⁰³

Utomo et.al. (1982) analyzed the content of the law that has the effect of (1) outlawing any attempt to advertise, encourage, or carry out abortions; (2) punish any woman who undergoes an abortion; and (3) deregister any physician involved in carrying out an "illegal" abortion. However, the law failed to figure out an illegal abortion in terms of gestational age, method of procedure, or indications for the procedure that left the implementation of the law open to interpretation by the courts, police, and professional medical associations.¹⁰⁴ Since an understanding was reached in the 1970s about practices of abortion based on jurisprudence of the Chief Justice of the High Court, several health practitioners started to offer the abortion service, though they still did it cautiously as it was based only on an informal statement. From that time onwards, an effort to reform the abortion law has been initiated by members of the legal and medical professions as well as by women's organizations resulting in the drafting a bill concerning abortion that became law in September 1992.¹⁰⁵

¹⁰³ Supra note 5, p. 243.

¹⁰⁴ Supra note.

¹⁰⁵ Supra note 8.

The implementation of Health Law No. 23/1992 is meant to codify the permissibility of abortion to protect the women's health or life. However, the ambiguity of the wording of the law led to debates about what it did and did not mean. Essentially, article 15 of Health Law did not automatically change the legal status of abortion, because it did not revoke the existing law.¹⁰⁶ Article 15(1) of the Health Law allowed abortion in certain conditions. The uncertainties appear because of the linguistic confusion. Explanation of that article further stated that "any medical procedure in the form of "abortion" for any reason is forbidden, as it violates the legal and ethical norms and also norms of propriety. However, it is permissible to do certain medical procedures with the purpose to save the life of pregnant women and or the fetus, only in emergency." Thus this certain medical procedure can not be abortion as it is forbidden under any circumstances and while abortion may save the life or preserve the health of a woman, it never intended to do the same for the fetus.¹⁰⁷ The ambiguity in its wording, the inconsistencies within the articles and the explanation of the article, has resulted in a never ending debate, adding to the controversy of the abortion issue rather than clarifying it.

The issue of abortion issue is always controversial. Part of the constraint is about the enforcement and implementation of abortion law. Laws and regulations are enacted as part of the efforts to protect people; yet there is the problem that positive law has to operate alongside social conventions, religious values and norms, as well as traditional rules relating to sexual relationship and reproductive health.¹⁰⁸ The importance to uphold religious and cultural values shown is seen through the Indonesian statement in the Cairo meeting in 1994. It is emphasized that "the formulation and implementation of population policies is the sovereign right of each nation and should be consistent with its religious, cultural norms and values, traditional and national laws. There has to be a balance between the rights and responsibilities of individual and the rights of family and the community or society as a whole."¹⁰⁹

¹⁰⁶ Supra note 71, p. 39

¹⁰⁷ Supra note 5, p. 245.

¹⁰⁸ Supra note 9, p. 117

¹⁰⁹ Indonesia Statement , p. 5.

Several important points arise from that statement including the following:

1. Indonesia adheres to the belief that the family is the basic unit of society and ought to be continuously strengthened. However, in accordance with the socio-cultural traditions and national laws, the government only recognizes families which are legally and/or religiously formed between men and women.¹¹⁰ This explains why Law on Population and Prosperous Family Development No. 10/1992 stipulates that the provision of family planning services is restricted only to married women. This means that only legally married couples can legally access family planning services and practice contraception.¹¹¹

2. In addressing the closely-related subjects of sexual and reproductive health, sexual and reproductive rights, underlying the debate on these issues is the basic right of all couples and individuals to decide freely and responsibly the number and spacing of their children and to have the necessary information and means to do so. Again, government underlined the important to take into account the religion, culture, norms and values, cultures and stage of development of each country. Indonesia government is in the position that decisions concerning sexual and reproductive matters are family decisions and therefore are not solely the exclusive rights of an individual. Instead, the exercise of these rights should, to a certain degree, be carried out in consultation with other relevant family members.¹¹²

3. Regarding the issue of abortion, the government clearly stated that “abortion is essentially prohibited and permitted only for health reasons and strictly regulated by law...If there are treatments given to solve complications of unsafe abortion then these treatments are purely out of humanitarian and health consideration.”

Based on the above statement, it is proposed to elaborate a little regarding the stand of the government that the family must be based on legal marriage. The state, in its normative formulation of laws and the implementation of program of social welfare, imagines a society based on a nuclear families—parents and children—that is oriented toward the creation and nurture of rising generations.¹¹³ However, there was a pattern

¹¹⁰ Supra note.

¹¹¹ Supra note 9, p. 117.

¹¹² Supra note 109, p. 7-8.

¹¹³ Hull (2003), p.60.

of change in the society found by Hull in his research on demographic perspectives of the Indonesian family. He investigated the trend of fertility falling which is the result of the educational and economic activities of young women, together with the decline among young women of the importance of the orthodox family as a major organizing unit in society.¹¹⁴ The behavior of Indonesian women is drifting away from officially recognized social norms that connect the status of women to their marital status.

It is important progress that education and career priorities have postponed the time when women want to get married. Faced by this development, the government certainly needs to revise its policy relating to contraception and abortion in order to guarantee the protection of women's reproductive health. Presently, there is progress towards revising the abortion policy in Indonesia which will be discussed in the next chapter on the political dynamics behind the amendment process of abortion policy, and reasons behind the pro and contra arguments within the Indonesia society.

3.1.2 The Political Dynamics of Abortion Law Reform

Since its adoption, the Health Law No.23/1992 has raised many controversies, especially the article relating to abortion. Recently many NGOs concerned with women's issues has been working together to persuade the government to immediately amend the law and pay more attention to the protection of women's reproductive health.¹¹⁵ Coalition for Health Indonesia together with many alliances since the end of 2001, have urged the government to change the current Health Law. The effort to amend the law was adopted through channel initiative right DPR in 2003 (through the Commission VII) and in November 2006 through Commission IX of Indonesian Legislative Assembly (DPR) that presented the new draft of the Health Law. Through the President's letter dated 4 January 2007, President Republic of Indonesia instructed the Ministry of Health to follow up the initiative from DPR.¹¹⁶

¹¹⁴ Supra note p.61.

¹¹⁵ Many NGOs that concern with the amendment of Health Law 23/1992 were collaborated and create network to support their action. In: <http://www.koalisi.org/dokumen/dokumen5031.pdf> [Visited April 2008]

¹¹⁶ Diskusi pembiayaan kesehatan pada DPR Civic Info Fair 2007 (Health funding discussion in DPR (Indonesian legislative assembly) Civic Info Fair 2007). In: <http://www.koalisi.org/detail.php?m=4&sm=15&id=580> [Visited on 5 May 2008]

The new legislation draft of the Health Law regulates abortion in Chapter X of Reproductive Health, articles 56 until 60. In Article 60(1) it states that “government is responsible to protect women from abortion practice that is unqualified, unsafe and irresponsible through legislation.” Further, in the second paragraph it is stated that “abortion service that is unqualified, unsafe and irresponsible as pursuant in article 60(1) includes practices as such:*

- a. done forcefully and without the agreement from the women;
- b. done by unprofessional health practitioner;
- c. done without the profession code of ethic;
- d. done discriminatively and give priority for the cost of the service compare to the women’s safety.”

Two different groups, one pro and the other contra may be identified regarding the new draft legislation. Muslims, Christians, Hindus, Buddhists as well as persons belonging to other religions are united in asserting themselves against the government plan. They released a joint statement denouncing plans to amend the Health Law and called on the public to “preserve life from conception.”¹¹⁷ Christian leaders stressed that under no circumstances is abortion allowed, it is prohibited because it can be categorized as murder. But Muslim leaders proposed an exception that abortion is morally unjustifiable unless it is to save the women’s life. Basically their concern is more about morality since the draft, if ratified as law, would allow women to have an abortion on request, without the consent of the father. There is concern that the law will be used as legal grounds for abortions, especially among teenagers, and it will encourage free sex practice among young people.

On the other hand, many NGOs concerned with women’s reproductive health, are keeping up their effort to persuade the government to immediately ratify the draft legislation. Their main reason is to minimize the effect of unsafe and or illegal abortion

* Note. Previous legislation related to abortion most of the time avoids to use the word *aborsi* (abortion) and choose to use the euphemism term *pengguguran kandungan*. *Pengguguran kandungan* is common term for abortion in Indonesia, but it seldom used in medical circles since it literally means the “destruction or removal of the womb.” The artificial meaning of Article 15 of Health Law 23/1992 use term of ‘certain medical procedures’ instead of abortion.

¹¹⁷ “Indonesia Religious Leader Unite against Abortion.” In: <http://www.euthanasia.com/indo.html> [Visited February 2008]

(note that not all illegal abortion practice is unsafe). They do not agree with arguments of religious groups that legalizing abortion may increase the practice of free sex among young people. It is because abortion is also practiced by many married-women from a harmonious family and they have to resort to it because of contraception failure. Women's groups and NGOs stressed the awareness that abortion is not solely because of premarital relation among teenager, but many married women also need this service because of contraception failure or did not understand the contraception service or have not used contraception yet.

The pro and contra viewpoints of this draft legislation are basically focused on the discourse that the new draft law will not only legalize but also liberalize the practice of abortion. Many NGOs concerned with women's rights think that this is an important step in guaranteeing the women's reproductive health. But the wording in the draft seems that implicitly it will not legalize, but also liberalize the abortion practice. Why is that so?

From the 5 articles in the chapter on reproductive health in the draft legislation, there is no single article that mentions any requirement under which women are allowed to perform an abortion. Compare with the wording in the current law Article 15(1): "In case of emergency.....with the purpose of saving the life of a pregnant women or her fetus..." Is it implicitly meant that this new draft not only will legalize the abortion, but also will liberalize it? It is difficult to make a conclusion for now. But if we based our argument and assumptions on the wording of the legislation, then no requirement might mean that women can choose to abort their pregnancy at will, without any medical or emergency reason. The only concern in the draft legislation is mainly the consequences caused by abortion practices that are unsafe, discriminatory to women, and performed by an unqualified health practitioner, as mentioned in article 60, paragraph 2.

The draft legislation if ratified can bring important progress in the field of reproductive choices for women as they will be able to choose to abort their unwanted pregnancy without being threatened or punished. Essentially, the wording in the new draft law is a reflection of the words in the Cairo meeting. Effect of the emerging discourse of women's right to abortion in order to guarantee women's reproductive health in

international human rights framework will be elaborated in the next section. It will start with reproductive health within the international human rights framework.

3.2 Abortion and Reproductive Health

The concept of ‘reproductive health’ was developed by institutions mostly those involved in international family planning network, also the World Health Organization (WHO). Within the framework of WHO, health is defined as “a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity.”¹¹⁸ “Reproductive health addresses the reproductive processes, functions and system at all stages of life. Reproductive health, therefore, implies that people are able to have a responsible, satisfying and safe sex life and that they have **the capability to reproduce and the freedom to decide if, when and how often to do so** [emphasis added].”¹¹⁹

The wording, that woman has the capability and the freedom to decide if, when and how often to do so in relation to her reproductive role makes the discussion about women’s reproductive health controversial. Recently, human rights and reproductive health is increasingly used to require governments to handle and minimize causes and consequences of unsafe abortion, despite state’s restrictive regulation on abortion.

Rebecca Cook has given several ways in which human rights have been and could be applied to reduce the causes and harmful consequences of unsafe abortion to women and their families. It suggests that it is necessary to “conduct a human rights needs assessment that identifies how laws, policies or practices facilitate or inhibit the availability of and access to services at the clinical and health system levels, and that addresses underlying inhibiting social or economic conditions.”¹²⁰ Evidence based on reproductive health arguments suggests the need to liberalize restrictive laws and improve access to safe abortion service. It is evidently proved that abortion law is necessary but it is not enough to uphold the guarantee for the availability of safe

¹¹⁸ “WHO: Reproductive Health.” In: http://www.who.int/topics/reproductive_health/en/ [Visited May 2008]

¹¹⁹ Supra note.

¹²⁰ Cook (2006), p. 15.

abortion service. Efforts to change the law must be accompanied by national discourse on abortion and human rights.

As Freeman says “women’s human rights begin at home. They were not invented at Geneva or Strasbourg where international bodies meet and craft the premises of international human rights instruments.”¹²¹ Reforming laws and systems of access to law will always be a continuing priority to improve the women’s status throughout the world. However, it is impossible to discuss national human rights norms without mentioning international human rights norms. Therefore, in order to gain more comprehensive understanding about the women’s reproductive issue, it will continue the discussion from the international and regional human rights frameworks. Basically, it will focus on two major concerns, the question about whether the protection of right to life covers protection of the fetus, and how it will affect the rising discourse about the guarantee of women’s reproductive health, specifically in relation to the practice of unsafe abortion.

3.3 International Human Rights Legal Framework

This sub-chapter will provide a brief account of the human rights legal framework related to abortion practices, a discussion on whether the right to life includes protection for the fetus, and also other basic rights related reproductive health and family planning. It will comprise the United Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) and other major developments at the international level contributing to international human rights law relating to women, including the World Conference on Human Rights held in Vienna in 1993 (the Vienna Conference), the International Conference on Population and Development in Cairo, 1994 (ICPD), and the Fourth World Women Conference, Beijing 1995 (the Beijing Conference).

¹²¹ Freeman (1994), p. 559.

3.3.1 Right to Life and Fetus Protection

3.3.1.1 Universal Declaration of Human Rights (UDHR)

Since the Universal Declaration of Human Right of 1948, human rights in international law goes beyond the exclusively national focus of nation state, and start to place the individual at the centre of international legal concern. In effect, the individual enjoys rights to protection through state, but also to protection against his or her own state, and against the nation's neglect of provision of services upon which the safety and dignity of the individual depend.¹²² It is basically the obligations of states under international human rights law often summarized as respect protect and fulfill.

Article 1 UDHR begins with the fundamental statement that “All human beings are born free and equal in dignity and rights”. At the time of the drafting, representatives of two states, Ecuador and Venezuela supported dropping the word “born”, to avoid the implication that equality existed only at birth and not from the conception of a human being until its “development had been completed.”¹²³ Significantly, the word “born” was used intentionally to exclude the fetus or any antenatal application of human rights.¹²⁴

In connection with the negotiations on UDHR article 3, “everyone has the right to life, liberty and security of person”, the representative from Chile proposed that the clause be amended to stipulate that the right to life should be protected from the moment of conception. Contrary to this, the Danish representative stated, in a rather formal argument, that the suggestion that article 3 should include a clause protecting the fetus from the moment of conception was unacceptable because the legislation in many countries included the possibility of provoked abortion.¹²⁵ Evidently this is not solved in the UDHR, that it is not settled when exactly the protection starts. Nor is it in existing legally binding human rights conventions as discussed further below.

¹²² Supra note 120, p. 16.

¹²³ Lindholm (1999), p. 58.

¹²⁴ R. Copelon et.al (2005), p. 121.

¹²⁵ Rehoff (1999), p. 92.

3.3.1.2 International Covenant on Civil and Political Rights, ICCPR

The right to life has justifiably been characterized as the supreme human right, since without effective guarantee of this right, all other rights of the human being would be devoid of meaning.¹²⁶ Article 6(1) ICCPR states that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” The affirmative placement of the inherent right to life led the Committee to conclude that the right to life must not be interpreted restrictively, and stressed the obligation of states to take positive measures to ensure the right to life.¹²⁷

There are several borderline problems of a medical, ethical and juridical nature with respect to Art.6. These have to do with, on the one hand, the definition of human life, i.e., its beginning and its end, and on the other hand, the extent of the state’s duty to ensure the right to life. Art. 6 of the Covenant do not expressly determine the point at which the protection of life begins. However, from the *Travaux préparatoires* clearly indicates that the life in the making was not (or not from the conception) to be protected. The Commission ultimately voted to adopt Article 6, which has no reference to conception, by a vote of 55 to nil, with 17 abstentions.¹²⁸ The legislature is under the obligation to ensure protection of the unborn child, although it is entitled to discretion in exercising this positive duty. The right of the unborn child, at the same time would have to be balanced against other basic rights (principally, the right of the mother to life and privacy).

Subsequently, the Human Rights Committee, which interprets and monitors States parties’ compliance with the International Covenant on Civil and Political Rights, has repeatedly emphasized the threat to women’s lives posed by prohibitions on abortion that cause women to seek unsafe abortions. It has also repeatedly called upon states to liberalize criminal laws on abortion. In its General Comment on the equality between men and women of March 2000, the Committee urged states to provide information on

¹²⁶ Nowak (2005), p. 121.

¹²⁷ Supra note p. 122.

¹²⁸ Supra note 124, p. 122.

any measures to help women prevent unwanted pregnancies, and “to ensure that they do not have to undergo life-threatening clandestine abortions”.¹²⁹

3.3.1.3 Right to Life on UN Convention on the Rights of the Child, CRC

CRC in its preamble (para. 9) provides that “bearing in mind that, as indicated in the Declaration of the Rights of the Child, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.” The wording, before as well after birth, does not directly mean the extended protection of the right to life for the fetus. It can be shown in its explanation of the Committee on the Rights of the Child’, the expert body that interprets and applies the Child Rights Convention, on its General Comments No. 4 of Adolescent Health and Development para. 31, stated that “States parties should take measures to reduce maternal morbidity and mortality in adolescent girls, particularly caused by early pregnancy and unsafe abortion practices....”¹³⁰ Further, in its Concluding observations on various State Reports, the Committee has also recognized that safe abortion is part of adolescent girls’ right to adequate health under Article 24, noting that “high maternal mortality rates, due largely to a high incidence of illegal abortion” contribute significantly to inadequate local health standards for children.

3.3.1.4 CEDAW

Article 16(1)(e) urges all States parties to the women’s convention to

“take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women, the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”

However, CEDAW does not explicitly protect the right to life or the right to abortion.¹³¹

Its preamble does reaffirm the UDHR recognition “all human beings are born free and equal in dignity and rights” and states that “everyone is entitled to all rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex...”

¹²⁹ HRC General Comment 28 (200), § 10.

¹³⁰ General Comment Committee on the Rights of the Child No. 4 (2003) § 31.

¹³¹ Supra note 124, p. 123.

Because of the inextricable inter-relationship between the right to make reproductive decisions and women's equal right to life, the CEDAW Committee has frequently had occasion to address issues concerning abortion and the status of foetus life in the context of women's equality.¹³² In its General Recommendation 21 (thirteenth session): Equality in Marriage, the Committee made clear that equality of rights to reproduce is not consistent with spousal veto of abortion (Para.21):¹³³

"The responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women. The number and spacing of their children have a similar impact on women's lives and also affect their physical and mental health, as well as that of their children. For these reasons, women are entitled to decide on the number and spacing of their children."

CEDAW Committee in its General Recommendation No. 24 (20th Session, 1999), affirming that access to health care, including reproductive health is a basic right under the CEDAW. It recognised the importance of women's right to health during pregnancy and childbirth as closely linked to their right to life. The Committee explained that coverage of reproductive health services is an essential aspect of women's equality, stating that "It is discriminatory for a state party to refuse to legally provide for the performance of certain reproductive health services for women." It describes as barriers to appropriate health" laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures" (Para 14). Further, it recommends government to" prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion."¹³⁴

From the several major human rights conventions, it can be affirmed that consequences of unsafe abortion might endanger many women's human rights. The effort to protect women's health, either from her right to health or other aspects, might be applied to reduce unsafe abortion. Therefore, it is necessary for laws, policies or practices to

¹³² Supra note.

¹³³ CEDAW General Recommendations 21 about Equality in Marriage and Family Relations (04/02/94).

¹³⁴ CEDAW General Recommendation No. 24 (20th Session, 1999).

comprehensively comply with human rights principles. “Ultimately, application of human rights principles in national systems is not a bloodless exercise in constitutional interpretation, but rather a dynamic attempt to make the law work for the people”.¹³⁵

3.3.2 UN International Conferences in Reproductive Health

Reproductive rights were clarified and endorsed internationally in the Cairo Consensus that emerged from the 1994 International Conference on Population and Development.¹³⁶ Building on the World Health Organization's definition of health, the Cairo Programme defines reproductive health as:

a state of complete physical, mental and social well-being and...not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant (para 72).

Furthermore, the Cairo Programme of Action clearly spells out the concept of reproductive rights in Chapter 7. This states in part, that such rights

"rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of reproductive and sexual health. It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion, and violence as expressed in human rights documents."

Cook stressed that the Cairo Programme of Action reflected the realization that women's choice to terminate pregnancies, whether originating from their free acceptance of sexual relations or imposed by rape and other forces they lacked the power to resist, results from their individual moral reflection on their circumstances and the duties they owe to their families, to their communities, and to their health and welfare. It means that the Cairo Programme of Action recognized the authenticity of

¹³⁵ Supra note 121, p. 566.

¹³⁶ Supporting the Constellation of Human Rights. In: <http://www.unfpa.org/rights/rights.htm> [Visited February 2008]

each woman as the central decision-maker in her own life and future, including her reproductive future.¹³⁷

The Platform for Action, which was adopted by 189 delegations at the Beijing Women's Conference, reaffirms the Cairo Programme's definition of reproductive health and advances women's wider interests. Paragraph 96 states:

"The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences."

It is accordingly a human rights infringement when women who have suffered the violation of rape are compelled to endure pregnancy against their will by the coercion of criminal sanctions.¹³⁸ The platform further in paragraph 135 condemns "torture...sexual slavery, rape, sexual abuse and forced pregnancy." Forced pregnancy describes both forced initiation of pregnancy, and forced continuation of pregnancy.¹³⁹

3.4 Regional Legal Framework

In this section, we will basically look at the relation between the protection of the right to life with the abortion practice and the women's reproductive health within the regional frameworks of human rights. From case-law of the European Commission of Human Rights we can draw upon the jurisprudence related to the protection of the rights to life and abortion. The Inter-American Convention on Human Rights in Article 4 protects the right to life from the moment of conception but from the Commission's jurisprudence it is evident that this is not an absolute protection for the fetus.

3.4.1 The Inter-American Human Rights

American Convention on Human Rights is the only convention that explicitly refers to ante-natal right to life. Article 4 establishes that "Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of

¹³⁷ Supra note 120, p. 17.

¹³⁸ Supra note p. 565.

¹³⁹ Forced pregnancy recognized also as a crime against humanity in the Treaty of Rome constituting the jurisdiction of the International Criminal Court, Article 7(1)(g).

conception. No one shall be arbitrarily deprived of his life.” However, these wordings do not imply that the fetus enjoys an absolute protection in the Convention. This is evident from the decision of the Commission in the case of the Baby Boy in USA.¹⁴⁰

The Inter-American Commission on Human Rights, in the case of *White and Potter v. USA* (Baby Boy case) required the Commission to interpret both Article 1 of the Declaration of the Rights and Duties of Man on the right to life, liberty and personal security; and Article 4 of the American Convention on the right to life. The case brought to the attention of the Commission was that the “baby boy” was removed by Dr. Kenneth C. Edelin in performing an abortion in Boston on October 3, 1973. According to the claimants, the intentional interruption of pregnancy constitutes an offence against the right to life and it is a violation of the American Declaration of the Rights and Duties of Man. The decision rests upon interpretation of the right to life in the American Declaration, since the United States is not a party to the Convention.¹⁴¹

The Commission, in this case, came to the conclusion that none of the rights in the American Declaration had been violated. It found that the right to life of the fetus as outlined in that document is not absolute.¹⁴² Looking first at the Declaration, the Commission studied the drafting history of Article 1, it found that elimination of explicit language from an early draft of the Declaration protecting fetal life demonstrated the intent of the drafters that such protection not be extended. The draft in question had provided that ‘Every person has the right to life. This right extends to the right to life from the moment of conception, to the right to life of incurables, imbeciles and the insane’. The second sentence was deleted and this deletion provided the basis for the Commission’s conclusion that no protection was intended.

Another basis for non-inclusion of fetal right in Article 1, according to the Commission, was the existence of abortion rights in a number of American states at the time of drafting the Declaration. The acceptance of an absolute concept of the right to life from

¹⁴⁰ Resolution 23/81, Case 2141 (United States), March 6, 1981. Annual Report of the Inter-American Commission on Human Rights 1980-1981. In: <http://www.cidh.org/annualrep/80.81eng/USA2141.htm> [Visited 14 May 2008]

¹⁴¹ Supra note 2, p. 3.

¹⁴² Eriksson (2000), p. 314.

the moment of conception, would imply the obligation of many countries to derogate from their Penal Codes in force in 1948, because of excluding the penal sanction for the crime of abortion if performed in one or more of the following cases: to save a life, interrupt the pregnancy victim of rape, protect the honor of women, prevent the transmission hereditary of contagious diseases to fetus or because of economic reasons.¹⁴³ The Commission referred to a number of states that permitted abortion. Thus, a ban on abortion from the moment of conception was rejected because it would have invalidated the laws in force at that time in eleven member states of the Organization for the American States.

3.4.2 African Charter on Human and People's Rights

On 11 July 2003, the African Union adopted the Protocol on the Rights of Women in Africa to supplement the 1981 African Charter. The Protocol has been ratified by 15 African states that explicitly articulated a right to abortion. It recognizes the duty of the state to take “all appropriate measures....to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus” (Art 14(2(c)))

At the same time, the 1999 African Charter on the Rights and Welfare of the Child provides in Article 5(1) “Every child has an inherent right to life. This right shall be protected by law.” Read together, the two instruments make clear that the right to life referred to in the African Charter is not meant to apply pre-natally or to protect a fetus where that would contradict the right of women to abortion.¹⁴⁴

3.4.3 The European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 2(1) of ECHR provides “Everyone’s right to life shall be protected by law...” without any limitations of the right to life, and in particular, does not define ‘everyone’ whose ‘life’ is protected by the Convention.¹⁴⁵ Within the Council of Europe the Strasbourg organs have so far left open the question whether, if at all, and if so, to what

¹⁴³ Summary of the case para. 18 (f). Supra note 140.

¹⁴⁴ Supra note 124, p. 125.

¹⁴⁵ Ovey (2006), p. 69.

extent, access to legal and safe abortion is guaranteed by the European Convention on Human Rights. Drafters of the ECHR relied heavily on the UDHR and did not even debate the question of dating rights from conception. The long standing jurisprudence of both the European Commission on Human Rights and European Court establish that the fetus is not a human being entitled to the “right to life” under Article 2(1) and, further, that granting the fetus human rights would place unreasonable limitations on the rights of women.¹⁴⁶

In 1980, *X v United Kingdom*, the Commission considered an application by a man complaining that his wife had been allowed to have an abortion on health grounds. They explicitly rejected the claim that the right to life in Article 2 covered the fetus. The Commission went on to examine whether Article 2 was ‘to be interpreted as not covering the fetus at all; as recognizing a “right to life” of the fetus with certain implied limitations; or as recognizing an absolute “right to life” of the fetus’. Although it did not express an opinion on the first two options, it categorically ruled out the third interpretation, having regard the need to protect the mother’s life, which was in dissociable from that of the unborn child.¹⁴⁷ The Commission further recognizing the inseparability of the fetus and the pregnant woman, it gave precedence to the woman’s rights under Article 2. *Paton* was followed in *R.H. v. Norway* (1992) and *Boso v. Italy* (2002), likewise cases brought by husband seeking to prevent their wives’ abortions based on the right to life of the fetus, but which sustained the permissive abortion laws at issue.

Recently, in *Vo v. France* (2004), the Court again refused to extend the right to life to fetuses. The court concluded that it was neither desirable, nor even possible as matters stood, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention. The state enjoys a margin of appreciation to decide, under its domestic law, when the right to life begins. The European Commission and Court have thus repeatedly reaffirmed in the cases brought before them that the Convention protects women’s fundamental right to a safe abortion. Although the European jurisprudence recognizes some discretion in the States to balance protection

¹⁴⁶ *Supra* note 124, p. 124.

¹⁴⁷ *Supra* note 145, p. 70.

of fetal life against human rights of women, it has never invalidated a permissive abortion law nor stated (or been required to state) to what extent European law requires legalization of abortion.¹⁴⁸ From the practice of the European Commission it may be concluded that there is no absolute prohibition against abortion and that the fetus enjoys some protection that can be more or less absolute in certain contexts.

It can be summarized that within the previous years, international law has become more responsive to women's need. However, based on Indonesia case, there're still many challenges for the full realization of the right to reproductive health, as it is based on the good will of states to respect their international obligations. Eriksson argued that "the recent endorsement of the new concept "reproductive health" requires among other things a holistic and comprehensive approach to existing law, i.e. the linking of several human rights provisions with the right to family planning..."¹⁴⁹ Yet, traditional customs, practices which maintain discrimination against women, patriarchal values and other stereotyping of social roles that still exist and practice within the society may well conflict with the norms of international human rights. The Women's Convention openly condemn this such kind practices and some progress occurred at the June 1993 World Conference on Human Rights where the resultant Vienna Declaration reaffirmed "the international community's commitment to the universality of human rights and condemned religious and cultural practices which restrict women's human rights."¹⁵⁰

¹⁴⁸ Supra note 124, p. 124.

¹⁴⁹ Supra note 142, p. 315.

¹⁵⁰ Packer (1996), p. 108.

4 CONCLUSION

The discussion about gender equality has been of concern for a long time. The Indonesian government also has put gender equality as part of her program and even stated it in the national Constitution UUD 1994. Ever since the political reformation in 1998, there have been several amendments to the Constitution resulting in the addition of several articles on many aspects of human rights. The serious intention of the government in guaranteeing human's rights protection for its citizens is also shown by the ratification of several major human's rights convention, later institutionalized within domestic legal system. Indonesia, through its National Action Plan of Human Rights, also tried to domesticate many human's rights norms from the central government to the regions by building many human rights institutions and by the synchronization of centre and regional regulation.

However, the written law does not always reflect reality. The existence of many customary norms, *adat* and religious values influence the way of living of and social stigma for certain actions persuade people to behave in a certain manner. The role of Indonesian women is widely spelt out even before the building of Indonesia as a nation state. In the era prior to Dutch colonization, it was common to find women lead and rule a kingdom. Many women were involved in the independence movement and many famous women patriots lead movements, such as Tjut Nyak Dien, Dewi Sartika, Martha Christina Tiahahu, not to mention many women's organizations actively involved in the independence movement.

A prominent woman in the women's movement in Indonesia was RA Kartini. Her thinking focused around social conditions, especially the native women's condition at the time. Her ideas and views may be extrapolated through her correspondence with her friends in Europe. Later these letters was compiled under the title "Door Duisternis tot Licht" or famous in Indonesia as *Habis Gelap Terbitlah Terang* (glaring light will come after the darkness). In her letters Kartini expressed her concern about the need to improve the condition of women in Indonesia through education. She was very

concerned about Javanese culture which in her view impeded women's development. She dreamt of the freedom for women to enjoy education. She described in her letter the suffering of Javanese women at that time, who had to stay at home, had no freedom to move and socialize (*di pingit*), could not go to school, had to accept an arranged marriage and had also to allow and accept the practice of polygamy which was regarded as a status symbol of wealth and power.

The world Indonesian women are living in today is totally different from what Kartini's experienced. Today, women in Indonesia are free to go outside either to study or work outside their home. Polygamy is also prohibited, without the consent of the wife. Women in Indonesia nowadays can talk openly and argue, fight for their rights. However, women's development most of the time is very politically driven. The subordination or marginalization of women has existed for a long time. The New Order era in Indonesia entrenched a state ideology that can be said to be a combination of Javanese *priyayi* and religious value of Islam. The intention of the ruling regime at that time was to take a full control of its people life, which also impacted on women's development.

Two parallel streams of thought and action have emerged. On the one hand, the Indonesian government recognizes and appreciates the international development related to human rights, by ratifying many major international covenants. Simultaneously, an effort to control social norms in the name of state's stability creates the wrong pattern of women's development. The stigma built by the regime relating to women's reproductive choices, is not very different from Javanese values, that the official conception of women's status and function as "good citizen" is marked by women's customary role as homebound child bearers and rearers, and loyal supporters of their husband. The place of women in Indonesian society determines her reproductive function as a mother, the control of female sexuality. Therefore, her position is closely linked to her marital status.

This social stigma is linked very closely to the abortion discourse in Indonesia. Abortion has since a long time always been and remains, a controversial issue mainly because of the unusual character of the fetus. It will always attract disagreement with a

strong dividing line between supporters and detractors of abortion, as well as the legal status, if any, of the fetus. The groups of people that consider the fetus as a human being that has its own right to live consider abortion as morally inappropriate; in fact they consider abortion as equal to murder. On the other hand, many think that this recognition of fetus's right to life might sometime conflict with the rights that women have. Continuation of pregnancy at times may result in endangering women's life and thus it is important to acknowledge a continuing right to life for women.

If we trace back to Indonesia Criminal Code, we see that it has categorized abortion as crime against life and crime against morality. The influence of religious values is very strong which considers abortion as immoral and equated with murder, by taking the life of the fetus. But then in 1992, abortion law was formulated as part of Health Law 23/1992 on article 15. Despite the vagueness of formulation that it has, the slight progress made was that abortion is allowed in cases of emergency to save the woman's life.

What is clear is that there is a gap between conceptions of the right to abortion on the basis of woman's marital status and that pre marital sexuality is simply not allowed. We then have to question how far the law can give protection in case of rape or incest for example. The political dimension in abortion regulation is also very strong. The ambiguity of the Health Law at the time was because of the strong resistance from religious groups that still think that abortion is never to be justified in any case. That is why the wording "to save the women life and or the fetus" basically represent the government position on the illegality of abortion practice.

Now, the Health Law is in the process of amendment. It is still part of the health law and the new draft law places the abortion regulation in Chapter X on reproductive health. The important progress in this new draft is that it does not mention any requirement or conditions under which a woman may undergo an abortion. The new draft only stressed the importance of government to guarantee the protection of women from the act of abortions that are unsafe, by unqualified persons and in dangerous situations by unskilled practitioners that might endanger the women's life. The wording in the new draft is basically following the wording in the Cairo meeting.

The notion of reproductive health has been developed a long time ago but was not until the Cairo meeting that the reproductive health got worldwide recognition. Nowadays, we can see the emerging discourse of abortion as women's human rights. However, the central dilemma for reproductive health is that diverging systems often puts the law governing reproduction beyond the reach of secular authorities. International and regional human's rights law gave no absolute protection for the fetus right to life. But the implementation in national legal systems of many Muslim countries for example, family relations are governed by a body of personal status law derived from religion and customary practices. Often these laws are enforced by religious authorities and adjudicated in religious courts. With the rise of Muslim fundamentalism in Indonesia and its pressure to adopt *shari'a*, or Islamic Law, there is pressure on the government to place its authority behind that of religion. This will result in policies that will marginalize women in the name of morality and culture.

Therefore, there are several points that should be taken into consideration by Indonesian Government relating to the promotion and protection of women's reproductive health in Indonesia:

1. Government must realize the fact that there will always be women who will try to abort their pregnancies. The demand of women now to continue their education or even their career might make women postpone their marriage plans. Then, it can easily happen that single young women will be caught in premarital pregnancy. Therefore, it certainly is the need of the government to change its policy on contraception facility limited only to married women;
2. Abortion is not only monopolized by single women. Married women might experience unwanted pregnancy because of contraception failure. It is also congruence with government policy in family planning. Therefore, the government needs to provide abortion facility as well as the legal certainty for the practitioner who performs legal abortion. Government must provide the counseling facility for women, in order for them to find the best decision for their reproductive health. The service that must be effective, friendly and accessible for all communities in Indonesia;
3. It is no doubt a real move forward for the government to promote and guarantee women's reproductive health by drafting a special article about women's reproductive health. However, drafting of the law is not enough. The State needs to implement a

comprehensive strategy, by drafting a law that promotes the protection of woman's rights and make sure the effective implementation of the law that reaches all levels of the community. In case of abortion law, it is necessary for government to immediately ratify the new draft law, despite resistance from religious groups, and assure legal certainty and clarity in its implementation in purpose to end abortion debates and controversy within the society. It certainly will decrease number of unsafe abortion practices in Indonesia;

4. In order to develop gender equality, government needs to strictly regulate regional law that might discriminate and marginalize women in the name of moral, culture or religious values. We need to change the commonly held view, that women's *kodrat* is to be a house wife and serve the husband, of being pregnant and deliver babies. Granted that the biological situation is that only women experience pregnancy, but it does not mean that domestic matters are solely women's duty and responsibility.

5. The need for government to popularize in society, many regulations in the human rights conventions, particularly related to women's human rights. Despite many efforts of the government in setting legal framework to uphold women's human rights in all of its aspects, women's position is still vulnerable to sexual abuse, most of the time done by a close family or relative. Therefore, the effort to raise women's awareness for their rights either through education or law enforcement remains important.

The main and urgent need is not about making abortion legal, but how to make it safe for women. It is part of the public health responsibility of the government and of the guarantee for women's reproductive health. There are so many different reasons why women choose to do an abortion, and there will always be a reason to do so. Mostly it is a very personal reason and they approach it with a lot of thought. Cultural values, *adat* and custom are not static; they will evolve through the time and the government policy in relation to abortion will get more representatives of the views of the international framework in reproductive health. The critical question remains: are we ready to give women the autonomy do decide what they think is best for her body? I believe, now it is the time.

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