

**The Reform of the Law on Abortion in Malaysia:
Regulating Gestational Limits on Abortion to Promote the Availability of Safe Abortion**

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Abstract

It is frowned upon to have an abortion, and the law is not entirely clear in Malaysia. Many Malaysian women are experiencing difficulty seeking safe abortions due to the ambiguity and restricted abortion laws. They will thus have to resort to an unsafe and illegal procedure. This article examines Malaysia's abortion regulations from a civil law perspective and argues the case that they are ambiguous and restrictive. The article criticises the current legislative framework that governs abortion, drawing particular attention to legal gaps pertaining to gestational limits that fall under the purview of the legislation. This article will examine an idea for reform that would expressly regulate the gestational limits on abortion by comparing it with the abortion laws in England and Wales, and India. The authors conclude at the end of the article that women's access to safe abortions, where it is legal, has been hampered by Malaysia's restrictive abortion laws. The authors propose a legal reform that would guarantee women's rights to safe abortions in Malaysia by incorporating gestational limitations within the parameters of the law.

Keywords: Malaysia, Law Reform, Abortion, Gestational Limit, Autonomy, Safe Abortion.

1. Introduction

The issue of abortion rights in Malaysia, a country known for its religious diversity, pertains to the convergence of women's reproductive autonomy and nationalistic sentiments. The Malaysian legal system, which encompasses both civil law and Islamic law, encounters the

challenge of striking a delicate balance between religious doctrines, particularly within the predominantly Muslim community, and women's rights to obtain safe abortion services.

The recognition of safe abortion as a fundamental reproductive right is definitely acknowledged. It includes the entitlement of individuals to exercise autonomy over their own bodies and reproductive wellbeing without facing pressure, prejudice, or unwarranted barriers. Safe abortion services are crucial elements of comprehensive reproductive healthcare, playing a significant role in the overall health and wellbeing of individuals and communities.¹

Access to safe abortions is still an unresolved issue in Malaysia. Access to safe abortions is frequently hampered by the limitations and ambiguities of the law. Regulations and policies on abortion are poorly interpreted and understood, which leads to poor implementation and a lack of safe, accessible services, causing many women to opt for unsafe procedures. The authors examined the regulations on abortion in Malaysia from the perspective of civil law and offered a critique of the current legislative framework on abortion. The critics are notably scrutinising the loopholes pertaining to gestational limits on abortion within the scope of the law.

The paper will be centred around the examination of these two research questions.

- 1) Why does Malaysia need a law reform on abortion?
- 2) How regulating the gestation limits on abortion could encourage safer abortions in Malaysia?

The article will analyse the significance of law reform on abortion in Malaysia by first examining the literature that reflects the challenges encountered by women in Malaysia in accessing safe abortions. The authors argue that the existing legislation on abortion in Malaysia is both restrictive and disconcerting, thereby impeding women's ability to access safe abortions. Consequently, the authors assert that reforming the law is legitimate. In the next section, the authors will examine the legislative framework on abortion in Malaysia with a specific emphasis on the regulation of gestational limits for abortion. This analysis seeks to illustrate the implementation of law reform to encourage access to safe abortions in the country. The primary subject matter of the discussion will be the Penal Code and the Termination of Pregnancy Guideline (TOP) 2012, with a slight twist over the Fatwa suggestion on Muslim abortion by taking into consideration Malaysia as a country of Muslim-majority. Throughout the discussion, the authors will analyse and compare the legislative framework on abortion in Malaysia with the abortion laws of England and Wales, and India, utilising these frameworks as a blueprint for possible reform. The authors address the significance of limiting gestational limits in the following section. In the final section, which serves as the conclusion, the authors propose recommendations for reforming the legislation in Malaysia to enhance women's entitlement to obtain safe abortion.

¹ Andrés López Cabello and Ana Cecilia Gaitán, 'Safe Abortion in Women's Hands: Autonomy and a Human Rights Approach to COVID-19 and Beyond' (2021) 23(1) Health and Human Rights 191.

2. Methodology

In this conceptual study, a doctrinal comparative methodology is employed. The doctrinal comparative research approach entails a methodical examination of legal texts, legislation, case law, and other legal sources to deduce legal principles, doctrines, and norms. The focus is on the interpretation and implementation of law within its doctrinal structure, depending on precedent and legal authority to set legal standards. The legislative structures governing abortion in England and Wales and India will be compared in this article, with a particular emphasis on regulating the gestational limits on abortions in Malaysia. The doctrinal methodology is guided by critical ideas such as strict attention to legal sources, rigorous logical reasoning, and unwavering commitment to legal precedent. This doctrinal technique is utilised in different domains of legal research, such as statutory interpretation, case analysis, comparative law, and the development of legal theory. Statutory interpretation involves the examination of legislative texts and judicial interpretations to clarify the meaning and extent of legal legislation. The integration of data from many sources and thorough analysis has the potential to support future research about the ongoing discussion on abortion rights in Malaysia and promote policies and practices that prioritise the dignity, autonomy, and wellbeing of women.

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4. Research Question One: Why Does Malaysia Need a Law Reform on Abortion?

4.1. The Challenges That Women Encounter Upon Accessing Safe Abortion in Malaysia Are Due to Laws Which Are Restrictive in Nature

In Malaysia, abortions are commonplace although there are differences in terms of safety. No abortion registry exists in Malaysia.² Although official figures on abortion rates are not readily available due to underreporting and the omission of cases from official records, abortions are prevalent in Malaysia. Annually, 90,000 abortions are performed in Malaysia.³ The reform of the law on abortion in Malaysia is justified due to numerous challenges faced by women in acquiring safe abortion services.

The challenge in accessing safe abortion is primarily due to legal barriers because the law on abortion in Malaysia is restrictive and ambiguous in nature. These restrictive and ambiguous laws typically include several key elements that limit access to safe abortion services such as the lack of clarification on the regulatory requirements on abortion under the legislation, the ambiguity on the status of legality of abortion, limited legal grounds, and criminalisation. The restrictive nature of the law on abortion in Malaysia has significant consequences for women who seek reproductive healthcare services. Firstly, it restricts the availability of safe and

² Alifah Zainuddin, 'Doctor Clarifies Abortion Is Legal In Malaysia' (*CodeBlue*, 12 October 2022) <<https://codeblue.galencentre.org/2022/10/12/doctor-clarifies-abortion-is-legal-in-malaysia/>> accessed 4 April 2024.

³ Lim Hwei Mian, 'Country Profile: On Universal Access to Sexual and Reproductive Health Malaysia' (2015) Asian-Pacific Resource & Research Centre for Women <<https://arrow.org.my/publication/country-profile-on-universal-access-to-sexual-and-reproductive-health-malaysia/>> accessed 4 April 2024.

lawful abortion services, compelling numerous women to contemplate risky procedures. In the absence of access to medically supervised abortion services, women are forced to resort to other methods that carry significant risks to their health. Unsafe abortions may result in problems such as excessive bleeding, infections, perforation of the uterus, or even death.⁴ In contrast to the restrictive law in Malaysia, global trends in reproductive rights and healthcare advocate for policies that prioritise women's autonomy and safety. Many countries have moved towards the liberalisation, which includes decriminalising abortions and expanding access to reproductive healthcare services, recognizing that restrictive laws do not reduce the incidence of abortions, but instead drive it underground, where it becomes dangerous and inaccessible⁵ In addition to that, the law's restricted character has also played a role in limiting access to abortion information, resulting in a misconception about its legality and impedes women's ability to access safe abortion services altogether in Malaysia.⁶

There are 240 abortion facilities in Malaysia, according to RRAAM; however, not all of them have undergone safety or medical quality evaluations.⁷

The co-chair of RRAAM, Dr. Sim-Pooey Choong, emphasised that while the private sector is more concerned with mental health concerns than the public sector is, many medical professionals are still reluctant to conduct abortions because of the stigma associated with the procedure. Consequently, numerous doctors and facilities clandestinely perform abortions.⁸ Merely a fraction of the multiple individuals who carry out secure abortions, for instance, have registered to be included on RRAAM's website. Out of the 80 individuals interviewed by FRAAM around the nation, only 20 were willing to engage in the UNFPA initiative.⁹ The individual doctor's discretion primarily determines the provision of abortion services in Malaysia's public healthcare system due to the absence of legislation governing such treatments. There are several privately run abortion centres; however they typically operate privately.

The restrictive nature of Malaysia's abortion legislation exacerbates the incidence of unsafe and clandestine abortions, jeopardising the wellbeing and survival of women. Literature indicates that the existing legislation regulating abortions in Malaysia is rather restrictive. It deprives women of the ability to make their own decisions regarding abortions, even in situations involving rape, incest, or when the baby is diagnosed with a terminal disease shortly after being born. If duly licensed medical professionals determine, in a sincere and conscientious manner, that the potential bodily or emotional damage resulting from

⁴ Suravi Halder and others, 'Maternal Mortality and Morbidity Following Unsafe Abortion in a Tertiary Medical College Hospital' (2024) 6(1) *European Journal of Medical and Health Sciences* 67.

⁵ Women and Foreign Policy Program Staff, 'Abortion Law: Global Comparisons' (Council on Foreign Relations, 7 March 2024) <<https://www.cfr.org/article/abortion-law-global-comparisons>> accessed 28 June 2024.

⁶ Tong Wen Ting and others, 'Exploring Pregnancy Termination Experiences and Needs among Malaysian Women: A Qualitative Study' (2012) 12 *BMC Public Health* 743.

⁷ Amanda Tiew and others, 'An Exploration of Sexual and Reproductive Health (SRH) Services Provided by Private Clinics in Peninsular Malaysia' (Reproductive Rights Advocacy Alliance Malaysia, October 2020) <<https://www.rraam.org/research/>> accessed 4 April 2024.

⁸ Nandini Archer, 'The Law, Trials and Imprisonment for Abortion in Malaysia' *International Campaign For Women's Right To Safe Abortion* (Asia, 11 July 2018) <<https://www.safeabortionwomensright.org/news/feature-the-law-trials-and-imprisonment-for-abortion-in-malaysia/>>.

⁹ *ibid.*

continuing the pregnancy is not outweighed by terminating the pregnancy, then the termination of the pregnancy may be considered. Therefore, women are obligated to continue with the pregnancy. Consequently, numerous ladies frequently opt for unsafe services.¹⁰

A different body of study examines the experiences and requirements of Malaysian women in relation to induced abortions, emphasising the difficulties they face in obtaining abortion information and services. Abortion is legally permitted in Malaysia, provided that there are valid physical and mental health reasons to do so. However, the availability of abortion services is hindered by public stigma and legal limitations. According to the literature, women in Malaysia face challenges in trying to obtain abortion information and services due to a lack of trustworthy information in the media and healthcare institutions. The limited availability of information and services pertaining to abortion can be attributed to various obstacles, including cultural, spiritual, and societal factors, as well as a lack of awareness on abortion regulations. Due to the difficulties in accessing legal abortion services, some women may resort to dangerous, self-induced abortions. This highlights the pressing requirement for the government to reassess its obligation to offer easily accessible abortion services within the legal framework in Malaysia. Additionally, the literature emphasises the significance of formulating policies and initiatives to advocate for safe abortions, which could potentially decrease the prevalence of risky and covert abortions and mortality rates among women.¹¹

The World Health Organisation (WHO) reports that Asia experiences a higher incidence of unsafe abortions, with the majority occurring in South and Central Asia. Unsafe abortions and infant dumping are closely connected due to the same factor of unintended pregnancies. Women with unplanned pregnancies may turn to unsafe abortion techniques as a result of restricted availability of reliable and lawful abortion services or apprehension of public disapproval and legal consequences. When women are unable to access safe abortion services, they may feel driven to abandon or discard their newborn infants, leading to cases of baby dumping. Unsafe abortions and infant dumping are both consequences of circumstances such as tight abortion legislation, insufficient reproductive healthcare services, and societal taboos related to sexuality and reproductive decisions. Literature asserts that the phenomenon of baby dumping is not a new issue in Malaysia and has persisted for a significant duration. Research suggests that there has been an increase in cases of baby abandonment in Malaysia over the years. Factors that contribute to baby dumping in Malaysia include unwanted pregnancies, inadequate sex education, severe abortion laws, and societal taboos surrounding discussions about sex. Furthermore, the literature asserts that adultery and fornication are identified as factors contributing to the issue of baby dumping among Malaysian youth.¹²

Malaysia, a nation notorious for its high incidence of infant dumping in comparison with the rest of Southeast Asia, reportedly discards a neonate every three days, with the majority of

¹⁰ Belinda Jia Hui Chow, Gary Kit Min Ng and Chee Ying Kuek, 'Abortion Law in Malaysia: Time to Review?' in Yang Chik Adam and Shahrina Anis Binti Samsudin (eds), *Proceedings of the 3rd International Conference on Law and Digitalization 2023 (ICLD 2023)*, Advances in Social Science, Education and Humanities Research 791.

¹¹ Tong and others (n 6).

¹² Maisyarah Rahmi Hasan and Nik Nor Azeah Nik Azman, 'Baby Dumping in Malaysia and Indonesia: Between National Regulation and Islamic Criminal Law' (2021) 20(2) *Mazahib* 321.

abandoned infants being discovered deceased.¹³ Malaysian Police data reveals that a minimum of 10 infants had been abandoned within one month between 2018 and 2021.¹⁴ Between 2020 and 2022, there were a total of 256 cases of newborns being abandoned. In the year 2020, in Ampang, a newborn baby was discovered in a mineral water container while still attached to its umbilical cord.¹⁵ In 2021, a deceased baby with significant brain injuries was discovered in Kuching.¹⁶ In 2022, a newborn baby, whose mother was reportedly a victim of rape, was found deceased with stab wounds in Terengganu.¹⁷ It has been reported that some women who have been raped and women with fetuses possessing congenital abnormalities have been refused an abortion in Malaysia.

In conclusion, having to discuss the challenges women encounter in accessing safe abortions, it is wise for the authors to argue that the reform of the law on abortion in Malaysia is legitimate. With around 90,000 abortions taking place each year,¹⁸ the absence of an official registry and the secretive nature of many procedures underscore the difficulties of accessing safe and lawful abortion services. The stringent restrictive regulations pertaining to abortion in Malaysia, along with the social disapproval and insufficient provision of reproductive healthcare services, contribute to the high incidence of unsafe abortions. Women encounter numerous challenges while attempting to obtain access to abortion services, such as restricted availability of information, high charges imposed by unregulated providers, and apprehension of legal consequences. The consequences of these challenges are significant, resulting in a higher likelihood of maternal mortality and illness, as well as the distressing occurrence of newborn abandonment. The correlation between unsafe abortion and baby dumping highlights the pressing necessity for comprehensive policies that aim to promote safe abortion and tackle the underlying factors contributing to an unsafe abortion. To address the complex concerns surrounding abortion in Malaysia, new and effective abortion legislation needs to be enacted. A reform of law is legitimate. In situations where they are legal, these regulations would ensure that women can access safe abortions. However, considering that Malaysia has a predominantly Muslim population, any legal changes regarding abortion must consider the Islamic perspective and avoid becoming overly permissive, particularly when it comes to abortion laws.

¹³ Athira Nortajuddin, 'Southeast Asia's Baby Dumping Problem' *The ASEAN Post* (5 March 2020) <<https://theaseanpost.com/article/southeast-asias-baby-dumping-problem>> accessed 22 February 2023.

¹⁴ SinarDaily, 'Baby Dumping Still Rampant' *SinarDaily* (Kuala Lumpur, 17 February 2022) <<https://www.sinardaily.my/article/171553/malaysia/national/baby-dumping-still-rampant>> accessed 14 April 2024.

¹⁵ Bernama, 'Newborn Found Abandoned in Carton at Ampang Roadside' *New Straits Times* (Kuala Lumpur, 20 July 2020) <<https://www.nst.com.my/news/crime-courts/2020/07/609989/newborn-found-abandoned-carton-ampang-roadside>> accessed 14 April 2024.

¹⁶ DayakDaily, 'Fatimah: Baby Dumping Case under Investigation' *DayakDaily* (Kuching, 14 January 2021) <<https://dayakdaily.com/fatimah-baby-dumping-case-under-investigation/>> accessed 14 April 2024.

¹⁷ Rosli Ilham, 'Baby Boy, Just Born, Allegedly Stabbed to Death by Teen Mother' *New Straits Times* (Cukai, 8 February 2022) <<https://www.nst.com.my/news/crime-courts/2022/02/769754/baby-boy-just-born-allegedly-stabbed-death-teen-mother>> accessed 14 April 2024.

¹⁸ Tiew (n 7).

5. Research Question Two: How Does Regulating Gestation Limits on Abortion Encourage Safer Abortions in Malaysia?

5.1. The Legislative Framework of Abortion in Malaysia and the Need for Reform to Ensure Safe Abortion

The argument for the right to safe abortions constitutes the foundation of right-based philosophy. Reproductive rights encompass the essential liberties and entitlements that individuals possess with regard to their reproductive health and decision-making. Reproductive rights comprise the basic liberties and prerogatives that individuals hold in relation to their reproductive wellbeing and the capacity to exercise agency in matters surrounding it.¹⁹ Women are more likely to turn to riskier methods when they lack prompt access to safe and effective abortion services.²⁰

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) acts as a crucial symbol in the global effort to promote gender equality and protect women's rights. Malaysia has a responsibility to adhere to the tenets of CEDAW, which, in the context of this article, encompass the promotion of women's reproductive health and the guarantee of safe abortions. The legislative framework concerning women's reproductive rights, particularly the right to safe abortions in Malaysia, is intricate. The existing legislation imposes limitations on accessing safe abortion services and primarily criminalises women and the clinicians involved in these abortion procedures. The CEDAW mandate encompasses the protection of women's reproductive rights within the wider context of striving for gender equality. Article 12 of CEDAW acknowledges and upholds the entitlement of women to healthcare services, which encompasses the provision of family planning. It emphasises the importance of guaranteeing women's access to information, education, and services linked to reproductive health.

Paragraph 18 of the CEDAW General Recommendation 35 categorises the refusal to provide safe abortion services as a form of gender-based violence:

"Violations of women's sexual and reproductive health and rights, such as forced sterilisation, forced abortion, forced pregnancy, criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, forced continuation of pregnancy, and abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment."

Therefore, in referring above it is wise to say that Malaysia is obligated to protect and defend women's reproductive rights and ensure the provision of safe abortion services in nations where they are permitted by law.

¹⁹ Willie J Parker, 'The Moral Imperative of Reproductive Rights, Health, and Justice' (2020) 62 *Best Practice & Research Clinical Obstetrics & Gynaecology* 3.

²⁰ World Health Organization, *Safe abortion: technical and policy guidance for health systems* (2nd edn, World Health Organization 2012).

Ishola acknowledges that the safety conditions under which an abortion can be performed are substantially impacted by the legal framework governing abortions in each country.²¹ In Malaysia, abortion is considered taboo and is often discussed in private discourse. Currently, Malaysia lacks any government policy or legislation that expressly focuses on reproductive health,²² nor an abortion legislation itself, which prevents Malaysian women from exercising their entitlement to a secure and lawful termination of pregnancy.²³ The legal reform on abortion could be broad; therefore, the focus of this paper is on regulating the gestational limits on abortion to encourage access to safe abortion in Malaysia.

5.2 Reform of Law – Regulating Gestational Limits on Abortion

In Malaysia, the regulation of abortion is primarily governed by *Sections 312 to 316 of the Penal Code*, which is founded on civil law. *Section 312 of the Penal Code* is the primary provision to be referenced in cases regarding abortion.

Section 312 of the Penal Code stipulates:

"Whoever voluntarily causes a woman with child to miscarry shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both; and if the woman be quick with child, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Explanation—A woman who causes herself to miscarry is within the meaning of this section.

Exception—This section does not extend to a medical practitioner registered under the Medical Act 1971 [Act 50] who terminates the pregnancy of a woman if such medical practitioner is of the opinion, formed in good faith, that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or injury to the mental or physical health of the pregnant woman, greater than if the pregnancy were terminated."

The aforementioned clause, to put it simply, provides that anyone who knowingly induces a woman to miscarry can face a maximum sentence of three years in prison, a fine, or both. If the woman is in a more advanced stage of her pregnancy (referred to as being "quick with child"), the penalty can be heightened, with a maximum sentence of seven years of prison and a monetary penalty. Nevertheless, there is one exception: suppose a doctor registered under the Medical Act 1971 holds the genuine belief that prolonging the pregnancy would pose a greater risk to the woman's life or health in comparison to terminating it, the doctor has the legal authority to terminate the pregnancy.

²¹ Foluso Ishola, U Vivian Ukah and Arijit Nandi, 'Impact of Abortion Law Reforms on Women's Health Services and Outcomes: A Systematic Review Protocol' (2021) 10 Systematic Reviews 192.

²² Women Aid Organisation, 'We Must Improve Maternal, Sexual, and Reproductive Health Rights in Malaysia' *Women's Aid Organisation* (25 April 2022) <<https://wao.org.my/we-must-improve-maternal-sexual-and-reproductive-health-rights-in-malaysia/>> accessed 20 April 2024.

²³ Alyaa Nakhirah Binti Dato Hj Mohamad Shariff and Ambi ST Singam, 'Telemedicine Abortion During Covid – 19 And The Challenges In Its Applicability In Malaysia' (2023) 11(3) Russian Law Journal 964 <<https://russianlawjournal.org/index.php/journal/article/view/1385>> accessed 20 April 2024.

One noteworthy feature of this clause is that it leaves open the question of any gestational limits and its bearing on whether abortion is permitted under legislative definitions. It could be argued that the Medical Act of 1971 only permits registered doctors to lawfully end a pregnancy, and that the clause only permits abortion in specific situations, such as when the procedure is essential to safeguard the pregnant woman's life or uphold her bodily or emotional wellbeing. The question that thus arises is: When is abortion permissible under the law? What are the legal gestational limits at which abortion is permitted under the law? The absence of a precise delineation in the Penal Code concerning the permissible timing and gestational stage of an abortion by a physician has exacerbated the challenges women face in obtaining safe abortion services.

Comparing the Abortion Act 1967 to the laws of England and Wales, *Section 1(1)(a) of the Act* contains the pertinent provision that specifies when abortion is permissible, thereby rendering it legal and accessible.

Section 1(1)(a) of Abortion Act 1967 provides that:

"(1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—

(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or....."

According to this provision of the legislation, if a pregnancy has not progressed beyond the 24th week and two licensed medical professionals, with sincere intentions, concur that continuing the pregnancy would present a higher likelihood of physical or mental harm to the pregnant woman or her current children, then carrying out an abortion is not deemed to be an offence.

In India, the law has provided a gestation limitation under *Section 3(2)(a)* and *Section 3(2)(b) of the Medical Termination Act Amendment 2021*.

Section 3(2)(a) of MTP Amendment 2021 provides that:

In section 3 of the principal Act, for subsection (2), the following sub-sections shall be substituted, namely: —

"(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner, —

(a) where the length of the pregnancy does not exceed twenty weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners....."

Therefore, in simpler terms, a doctor may perform an abortion if the pregnancy is within its first twenty weeks. If the pregnancy is between twenty and twenty-four weeks and meets specific criteria, then, at least two doctors must agree to perform the abortion.

Both England and Wales, and India have explicit regulations that precisely outline the circumstances under which abortion is legally permissible. Any abortion that occurs beyond the specified gestational limits, as defined by the law, is considered a criminal offence under the Indian Penal Code in India and the Offences Against the Person Act 1861 in England and Wales.

The gestational limits for abortions are not specifically regulated by legislation in Malaysia. The Penal Code does not explicitly provide a specific time restriction for gestation, but it generally criminalises both women who seek abortions and the practitioners who perform them. Although Malaysian law does not specify a precise gestation limit, the judgment of doctors regarding the safe timing for abortion is likely influenced by the Termination of Pregnancy Guideline (TOP) established by the Ministry of Health in 2012. The guideline defines abortion as the intentional removal of an embryo or foetus, usually weighing 500 grams or having a gestational length of 22 weeks, from the uterus during a stage of pregnancy when it is incapable of surviving on its own. From a clinical perspective, the guideline recommends that abortions are considered safe when performed during the 22nd week of gestation.

However, the guidance provided in the TOP guideline conflicts with the decision made by the National Fatwa Council about the maximum duration for abortion in Malaysia. In Malaysia, in addition to civil law that applies to both Muslims and non-Muslims, Muslims are entitled to the application of fatwas issued by the National Fatwa Council, particularly when it comes to abortion. Fatwas are authoritative religious decrees or judgments issued by Islamic scholars or councils, grounded in their interpretation of Islamic Law (Sharia). The 26th Convention of the Fatwa Committee of the National Council for Islamic Religious Affairs addressed the issue of whether abortions are permissible when a doctor determines that the infant would have inevitable deformities. According to the scholarly consensus (ijma'), The Fatwa declares that it is considered makruh (disapproved) to abort a foetus that is between one and forty days old, unless there is a threat to the mother's health and both the husband and wife have provided their permission. The jurists uniformly concur that termination of a foetus less than 120 days old is permissible if it has severe abnormalities or illnesses that endanger the life of the mother. In addition, it is prohibited (haram) to abort a foetus that has reached a gestational age of more than 120 days, as this action is regarded as a type of homicide towards a foetus that has been endowed with a soul. The only exception to this limitation occurs when the termination of the pregnancy is required to protect the mother's life due to a serious deformity, and medical experts confirm that continuing the pregnancy poses a risk to the mother's life. In this scenario, it is acceptable to terminate the pregnancy to safeguard the life of the mother, which takes precedence within the specified gestation period.²⁴

Based on this Fatwa, it can be deduced that abortion is typically permissible. Nevertheless, it is required for the termination to occur within 120 days, subject to specific circumstances,

²⁴ Qarar Majma' al-Fiqh al-Islami, No. 277.

especially if there are serious malformations or illnesses that pose a threat to the mother's life. The Fatwa highlights that a pregnancy should only be terminated if necessary and after taking the mother's and the foetus' welfare into thoughtful consideration.

Given the circumstances between what the guideline suggests and the Fatwa suggestion on the gestational limits on abortion, it leaves open the question of gestational limits and its bearing on at what stage abortion is permitted under legislative definitions in Malaysia. The question that thus arises is which specific gestation limits should be adhered to, and is the suggested clinical gestational limits based on the TOP guideline or the one indicated by the Fatwa? Suppose a Muslim is subjected to the Fatwa advice regarding the gestational limits on abortion which can only be done before 120 days under specific circumstances, what then would be the impact on non-Muslims if the gestational limit is not regulated under civil law or the Penal Code? In Malaysia, while Muslims are bound by fatwas, which often establish religious guidelines, including a suggested gestational period of 120 days for abortions under certain circumstances, non-Muslims are subject to the Penal Code, which does not specify a legal gestational limit for abortion procedures. While the Fatwa is not legally binding on non-Muslims, the Penal Code, which governs all citizens, lacks explicit provisions regarding gestational limits for abortion. Suppose one adheres to the suggested gestation restriction outlined by the TOP guideline, in that case, it is wise to argue that the guideline is not legally binding and can be readily contested.

In conclusion, the lack of explicit laws governing the gestational age at which an abortion may be performed in Malaysia creates difficulty and uncertainty. The Penal Code prohibits abortion without offering any criteria for determining when an abortion is legally acceptable, resulting in an unclear definition of gestational restrictions. The Penal Code specifies penalties for individuals who facilitate abortions, but it does not provide clear guidelines for the specific stages of pregnancy at which abortion is permitted. In contrast, other countries like England and Wales, and India have laws that explicitly state the permissible gestational periods for abortion procedures. The Termination of Pregnancy Guideline (TOP) issued by the Ministry of Health contributes to the intricacy of proposing a gestational threshold of 22 weeks for safe abortion procedures, which may not correspond with religious interpretations or legal norms. The issuance of fatwas by the National Fatwa Council, which offers guidance on Islamic principles concerning abortion, adds complexity to the issue, especially for Muslim individuals. The Fatwa proposes a maximum gestational period of 120 days for abortion in certain situations, considering religious factors. The absence of agreement and definiteness over the limits of gestation gives rise to significant inquiries concerning the rights, independence, and availability of healthcare for women in Malaysia. It emphasises the necessity of implementing extensive legal changes that give priority to women's reproductive rights while also preserving religious and cultural values.

In order to progress, Malaysia needs to tackle these legal and ethical intricacies by implementing unambiguous and comprehensive legislation that strikes a balance between women's rights and religious and cultural factors. This involves evaluating the influence of gestational restrictions on the availability of secure and lawful abortion services for all individuals, irrespective of their religious beliefs. Moreover, it is crucial to give utmost importance to the advancement of comprehensive sex education and reproductive health

services to enable individuals to make educated decisions about their reproductive health and entitlements.

6. Navigating the Importance of Law Reform (Regulating Gestational Limits on Abortion): Perspective of CEDAW Within the Context of Local Legislation in Malaysia

Abortion laws and regulations often establish gestational age limits, which can be either permissive or restrictive. These constraints, which can be imposed through formal legislation, institutional policies, or personal practices of healthcare professionals, restrict the access to legal abortion based on the stage of pregnancy. Gestational age restrictions in many countries are established using grounds-based systems, where the limitations vary depending on the precise grounds or circumstances in which abortion is allowed.²⁵ Gestational age limitations vary depending on the reasons or conditions under which abortion is legal in different countries where they are tied to grounds-based methods.

Under international human rights law, it is against the law for governments to impose limitations or exert control over pregnancies or abortions, as this goes against their obligation to ensure that women and girls are not forced to resort to dangerous abortions. As a result, they must revise their laws in response.²⁶

In Malaysia, the highest law of the land is the Federal Constitution, which outlines the rights of Malaysians. This foundational legal document serves as the supreme guide for governance and legal interpretation within the country. However, it is notable that the Federal Constitution does not contain any explicit clauses that specifically mention or safeguard the rights of women, including their reproductive rights. This omission is particularly significant in the context of the right to safe abortion, a critical aspect of reproductive health and autonomy. Although Malaysia does not have explicit constitutional protection for women's rights, it has signed several international conventions that encourage and advance the cause of women's rights. Particularly relevant among these is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW, sometimes referred to as an international bill of rights for women,²⁷ requires signatory countries to ensure that women are treated equally in all spheres of life, including healthcare and reproductive rights, and to end discrimination against them in all forms. Malaysia, as a party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), has pledged to preserve the tenets of the agreement, which encompass protecting women's wellbeing and their autonomy in making choices regarding their reproductive health.

²⁵ World Health Organization, *Abortion Care Guideline* (World Health Organization 2022), ch 2 Abortion Regulation Including Relevant Recommendations <<https://www.ncbi.nlm.nih.gov/books/NBK578931/>> accessed 22 April 2024.

²⁶ Marge Berer, 'Abortion Law and Policy Around the World: In Search of Decriminalization' (2017) 19(1) *Health and Human Rights Journal* 13.

²⁷ Pooja Khanna, Zachary Kimmel and Ravi Karkara, 'Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) for Youth' (UN Women 2016) <<https://www.unwomen.org/en/digital-library/publications/2016/12/cedaw-for-youth>> accessed 30 June 2024.

CEDAW, while not explicitly addressing the protection of the right to safe abortions, has been interpreted by its separate committees to support the inclusion of safe abortion as part of broader reproductive health and rights. *Paragraph 9 of the General Recommendation No.24 of CEDAW* addresses the importance of women's access to health care services, including reproductive health care. Arguably, according to WHO, the right to health care includes the right to reproductive health because it encompasses both freedom and entitlement. Freedoms include the right to control one's health and body, such as sexual and reproductive rights.²⁸ Reproductive healthcare includes prenatal services, safe childbirth, access to contraception and access to safe and legal abortions.²⁹ In addition, the right to health encompasses the right to reproductive health, which is supported by research on the significance of gestational age in relation to abortion and human rights. It is argued that the right to health includes the right to reproductive health. Existing literature demonstrates that the right to reproductive health is an essential aspect of the right to health. It comprises the availability of comprehensive reproductive health care services, protection against harm, and the freedom to independently make choices regarding reproduction, including the option of safe abortions. To advocate for safe and high-quality abortion services as a health intervention, it is necessary to establish abortion legislations that are grounded in evidence.³⁰

The domestic legal framework in Malaysia, which is silent on these important issues and, for the purposes of this article, relates to the gestational limits on abortion to ensure the availability of safe abortions, contrasts strongly with the international commitment to CEDAW. The lack of clear constitutional provisions regarding women's reproductive rights in Malaysia underscores a notable disparity between the country's international commitments and its domestic laws, encompassing both the Federal Constitution and the Penal Code at a specific level.

The Penal Code of Malaysia is not in line with the CEDAW's principles on reproductive rights, particularly relating to the gestational limits on abortion to ensure the availability of safe abortion. Notwithstanding the emphasis placed by CEDAW on women's rights to health, autonomy, and access to quality reproductive healthcare, these rights are seriously restricted by the severe legal restrictions imposed by the Penal Code. As discussed throughout the article, the legislation governing abortion provided under the Penal Code in Malaysia is restrictive and lacks an explicit definition. The authors have stated that when comparing the laws on abortion in Malaysia with those in England & Wales, and India, Malaysian law is restrictive and lacks detailed clarity, particularly in terms of not regulating the gestation limits on abortion. The absence of clear information can lead to inequalities in the availability of secure and lawful abortion services, which may compromise women's entitlement to reproductive healthcare and rights as a whole.

Arguably, literature asserts that women possess the inherent entitlement to self-governance over their own physical being and choices related to reproduction. This idea is fundamental

²⁸ World Health Organization, 'Human Rights' (*World Health Organization*, 1 December 2023) <<https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health>> accessed 30 June 2024.

²⁹ ReproductiveRights.gov, 'Know Your Rights: Reproductive Health Care' (*ReproductiveRights.gov*) <<https://reproductiverights.gov/>> accessed 30 June 2024.

³⁰ Joanna N Erdman, 'Theorizing Time in Abortion Law and Human Rights' (2017) 19(1) *Health and Human Rights Journal* 29.

to the concept of reproductive rights and is universally acknowledged as a fundamental human right on a global scale. Setting gestational restrictions can offer clarity and guidance for women and healthcare providers, enhancing access to safe abortions. However, it also prompts concerns regarding the degree to which these regulations uphold women's autonomy. Literature reflects that one way in which regulating gestational age limits can be viewed as respecting women's autonomy is by providing clear information and guidance for informed decision-making. By establishing specific timeframes within which an abortion is legally permissible, regulations offer women a framework within which they can assess their options and make choices that align with their individual circumstances, values, and reproductive goals.³¹ Disregarding and restricting women's reproductive rights could be considered a violation of fundamental human rights. Reproductive autonomy is an individual's entitlement to make autonomous choices regarding their physical wellbeing and reproductive health, encompassing the ability to access safe abortions and contraception. The body of literature indicates that women's reproductive autonomy is a human right, and that depriving women of it would go against the principles of autonomy, nondiscrimination, and access to reproductive health care.

Further, safeguarding reproductive autonomy allows the essential entitlement to access comprehensive sexual and reproductive health care and knowledge, enabling people to lead extended and healthy lives.³² Denying women the liberty to make their own reproductive decisions is discriminatory and constitutes a violation of their fundamental human rights.³³ In addition, the lack of regulations regarding the maximum time limit for an abortion during pregnancy can be viewed as an infringement of human rights, specifically in relation to the right to health. The body of research suggests that higher rates of maternal death and unfavourable health outcomes are linked to gestational age limits. Pregnant women who are seeking abortion care after the legal gestational age limit encounter obstacles due to insufficient resources, exacerbating pre-existing gender and social disparities. Inadequate regulations and limitations on gestational age for abortion restrict access to healthcare and increase the risk for individuals with pregnancies. Delayed access to abortion services may increase health risks and compel some to resort to self-induced abortions or continue with unwanted pregnancies.³⁴

In summary, although the Federal Constitution of Malaysia is the ultimate legal document in the country, it does not contain any specific clauses safeguarding women's reproductive rights, including the right to a safe abortion at the specific level. The legal gap is particularly significant given Malaysia's commitment to international conventions such as CEDAW, which advocates for the elimination of discrimination against women and the safeguarding of their health and reproductive autonomy. The restrictive nature of the Penal Code in Malaysia on abortion further exacerbates this disparity, creating substantial legal barriers that hinder women's access to comprehensive reproductive healthcare. Disparities in access to safe and

³¹ *ibid.*

³² Dana-Sophia Valentiner, 'The Human Right to Sexual Autonomy' (2021) 22 German Law Journal 703.

³³ John A Robertson, 'Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth' (1983) 69(3) Virginia Law Review 405.

³⁴ Silvia De Zordo and others, "'The First Difficulty Is Time': The Impact of Gestational Age Limits on Reproductive Health and Justice in the Context of Cross-Border Travel for Abortion Care in Europe' (2023) 321 Social Science & Medicine 115760.

authorised abortion services are exacerbated by the absence of clear and enabling regulations, particularly with regard to gestational limitations for abortion. Consequently, this undermines women's ability to make well-informed and independent choices regarding their reproductive health. The literature underscores the importance of reproductive autonomy as a fundamental human right, and the lack of alignment between Malaysia's domestic laws and its international obligations represents a significant infringement on these rights. To rectify this, it is imperative for Malaysia to undertake comprehensive legal reforms that align its domestic laws with the principles of CEDAW. This entails implementing encouraging legislation on abortion including and for the purpose of the article, a gestational limit for abortion, guaranteeing that women have access to the requisite information and services needed to make well-informed decisions about their reproductive health. Through this action, Malaysia can enhance the safeguarding of women's health, preserve their autonomy, and achieve its obligations under international human rights standards.

7. Conclusion and Recommendation

In conclusion, the absence of specific legislation regarding the permissible gestational age for abortions in Malaysia poses significant barriers to women's healthcare and reproductive rights. The restrictive and ambiguous character of the abortion law in Malaysia and the uncertainty surrounding the gestational limits are highlighted when compared with the legal systems in other jurisdictions, such as England and Wales, and India. The lack of clarity in this situation might result in inconsistencies in the availability of safe and lawful abortion services, which may compromise women's entitlement to reproductive healthcare. Establishing regulations on gestational limits is crucial to guarantee prompt and secure access to abortion services while also considering the rights of individuals to control their reproductive choices, as well as the viability of the foetus and the health of the mother. Comprehensive regulations enhance the rights of women by equipping them with crucial information and guidance to make well-informed decisions regarding their bodies and reproductive options, while simultaneously upholding their autonomy. Non-compliance with gestational limitations could be deemed as a breach of basic human rights, specifically the right to health, and exacerbate the persistent prejudice against the women.

The correlation established in the existing literature between gestational age limits and increased rates of maternal mortality as well as unfavourable health outcomes has been discussed in this paper. This underscores the criticality of guaranteeing prompt availability of abortion services. Denying women the ability to make decisions about their reproductive health is a clear infringement upon their fundamental human rights. It perpetuates discrimination and unequal access to reproductive healthcare services, thereby contributing to their persistence.

In light of these considerations, the authors argue that the laws on abortion in Malaysia are restrictive and ambiguous in their details. The authors contend that, given that Malaysia is a signatory to CEDAW, an international agreement that promotes women's rights, the country should assess and amend its abortion laws to ensure that they comply with international human rights standards. This entails the establishment of transparent legislation including regulates the gestational limits on abortion. The primary objectives are to safeguard women's autonomy over their reproductive decisions, guarantee convenient availability of secure and lawful abortion services, and uphold their general health and welfare. The authors suggest

implementing regulations to establish specific restrictions on the duration of pregnancies during which abortions can be performed under the law. To achieve this within the civil law framework, the authors suggest that the Malaysian government could adopt the proposed gestational limits outlined in the TOP guideline while still adhering to the fatwa recommendations for Muslims, which stipulate a maximum of 120 days. Alternatively, for a unified and holistic strategy, the government could integrate the fatwa guidelines for a gestational limit of 120 days into civil law. This would take into consideration the demonstrated safety of the current gestational limitations on abortions, as both the Fatwas and the clinical gestational limits suggested by the TOP guideline are safe.

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