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FOETAL ANOMALY: THE RIGHT TO ABORT AND THE POSSIBILITY OF A WRONGFUL BIRTH CLAIM IN MALAYSIA

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ABSTRACT

A pregnancy can be terminated because of the problem of foetal anomaly. However, parents may lose the right to terminate the pregnancy if there is negligence in prenatal diagnosis. Such negligence may consequently result in the mother giving birth to a disabled child. This article examines whether women in Malaysia have the legal right over a wrongful birth claim should there be negligence by the doctors who carried out the prenatal diagnosis. This article employs the doctrinal comparative method. First, this article reviews the relevant literature on the topic of women's right to terminate a fetus with abnormalities and the legal status of the foetus. Next, the article will analyse the Utilitarian theory and the Principle of Reproductive Autonomy, which the authors claim will provide the fundamental argument for women to have the right to abort a pregnancy with foetal anomaly. A negligent prenatal diagnosis that results in the woman delivering a disabled baby undermines a woman's right to reproductive autonomy, her right to make an informed consent for a legal abortion. Following that, an acknowledgment of the woman's right to reproductive autonomy and the right to initiate a wrongful birth claim is demonstrated by highlighting and discussing several international court cases. The analysis of comparison is the final part, in which the authors present the possibility of women in Malaysia claiming a wrongful birth claim should there be negligence in the prenatal diagnosis by medical practitioners. In conclusion, the authors have made the case that women in Malaysia have the right to legally abort a pregnancy with foetal anomaly and could sue for wrongful birth if a prenatal diagnosis was made negligently. However, it might be challenging to prove the claim given the ambiguity of Malaysia's abortion legislation. This article has made an important contribution to the current literature as it has discussed the potential rights of women in Malaysia to file a lawsuit over a wrongful birth claim should there be negligence in the prenatal diagnosis by medical practitioners.

Keywords*:* Abortion, foetal anomaly, Malaysia, legal reform, utilitarianism, reproductive autonomy.

INTRODUCTION

The legal claim known as "wrongful birth" has a historical background that dates back to at least the 1960s. It first appeared with the legal claims for "wrongful life" and "wrongful conception." These are contentious medical malpractice claims brought forth by the mother of a disabled child against a medical provider who, by failing to offer her a proper prenatal diagnosis and information, prevented her from having an abortion, as well as the cases involving the improper handling of sterilization procedures. A wrongful birth claim is typically filed by the parents of a child born alive with a disability, alleging that the doctor was negligent in allowing the pregnancy to continue to term. This claim often involves an assertion that the parents were not properly informed or given the opportunity to make decisions based on the potential for disability. On the other hand, a wrongful life claim is generally brought by, or on behalf of, the child born with a disability. In this case, the child asserts that, had the disability been detected earlier, they would not have been brought into existence. In contrast, wrongful birth claims are usually filed by the child's mother. Parents of a child born alive but with a disability commonly initiate a wrongful birth claim, alleging that the doctor was negligent in allowing the pregnancy to continue and subsequently in delivering their child.

The debate over whether to recognize the wrongful birth cause of action is just as intense as the debate over abortion itself. Western countries frequently recognize the wrongful birth claim to protect a mother's right to reproductive autonomy and ensure justice should prenatal diagnosis errors or negligent behavior by the doctors lead to the delivery of a child with foetal disabilities (Frati et al., 2017). There are numerous conflicting approaches to the problem among the various common law countries (Fordham, 2004). Just as much as the issue of abortion remains undeveloped in Malaysia, the acknowledgment of the mother's right to claim wrongful birth remains discrete and very rarely brought to be adjudicated in the Malaysian Court. Although it is theoretically feasible to initiate a wrongful birth lawsuit in Malaysia should there be negligence in prenatal diagnosis by medical professionals. Following the argument presented in this paper, the outdated law on abortion in the country often disregards women's rights to reproductive autonomy. There is no avenue to make any significant claims when the law itself is jeopardizing the right of women in accessing safe abortion and also the right of the medical practitioners providing the services. This is clearly illustrated in the case of the unreported Nirmala Tapa at the Section Court level and also the case of *PP v Dr Nadason Kanagalingam [1985]*, respectively.

This article comprises five parts. The introduction is covered in Part 1. The methodology is in Part 2. The literature on a woman's right to abort an abnormal foetus is provided in Part 3. Part 4 examines the connection between the Principle of Reproductive Autonomy, Utilitarian theory, and a woman's right to abort when there is foetal anomaly. In this part, the authors will use these theories to argue for the women's right to abort when there is an anomaly in the foetus and when there is negligent prenatal diagnosis that will result in the delivery of a disabled baby. Should such negligence occur, it will undermine a woman's right to reproductive autonomy and deprive her of the possibility of giving informed consent for a lawful abortion. Therefore, the right of a mother over a wrongful birth claim is legitimate. Part 5 will reflect on the recognition of a woman's right to reproductive autonomy over a wrongful birth claim by the International Court by presenting examples of several court cases. In Part 6, the author presents a comparative analysis and compiles information on Malaysian women's rights

over a wrongful birth if the medical practitioners negligently make a prenatal diagnosis. Part 7 is the conclusion.

In this article, the authors have argued that women have the right to abort when there is foetal anomaly by applying the tenets from the theory of utilitarianism and the Principle of Reproductive Autonomy. In addition to having these rights, the present paper will argue that a woman in Malaysia is theoretically able to file a wrongful claim if a doctor's negligence during a prenatal diagnosis caused the mother to give birth to a child with a foetal disability, even though this may not be a common practice in Malaysia. In addition to that, the outdated and ambiguous abortion laws in Malaysia, particularly concerning the grounds for abortion, may make it challenging for Malaysian women to pursue their claims. The exploration of wrongful birth claims in the context of prenatal negligence is significant for several reasons. It highlights the crucial issue of reproductive autonomy, emphasizes the need for legal reform in Malaysia, and has the potential to influence policy and medical practice. By advocating for more transparent regulations and legal protections, the study contributes to the broader discourse on reproductive rights and medical accountability. Ultimately, it is aimed at ensuring that women have the necessary tools and support to make informed decisions about their pregnancies and to hold medical practitioners accountable for their actions.

METHODOLOGY

This conceptual paper uses a doctrinal comparative research methodology. Data collection was based solely on evaluations, reviews, and comparisons of information from previous research and case law. The literature review employed a variety of methods, including the use of online databases to gather secondary data relevant to the topic. The sources reviewed included statutes, journal articles, case law, and books, among others, to ensure a comprehensive understanding of the subject matter. The author used a Boolean operator in Google Scholar to search for materials online. A thorough comparison and analytical reading were used to analyze the collected online data. A combination of data from various sources and a rigorous comparison analysis generates research outcomes that could potentially facilitate future investigations concerning the termination of a pregnancy with foetal anomaly and women's right to wrongful birth claims in Malaysia.

WOMEN'S RIGHT TO REPRODUCTIVE AUTONOMY VS FOETUS RIGHT

Prenatal diagnostics has made significant strides in recent years, leading to the diagnosis of an increasing number of foetal abnormalities. Many women who receive this diagnosis opt to abort their pregnancies (Mansfield et al., 1999). Anatomical or functional defects that develop before birth are known as congenital anomalies (WHO, 2023).

Deciding to terminate a pregnancy after losing hope for a healthy child is a challenging and emotionally taxing decision (Howard, 2006). Prolonged consequences of this devastating experience may include sadness, extreme grieving, and post-traumatic stress disorder (Howard, 2006). Given that the choice to end the pregnancy in these circumstances needs to be taken quickly, the parents would likely have serious concerns (Durand et al., 2010). One of the most significant duties of medical professionals is to assist couples in making informed choices by providing information and counselling without passing judgment, as well as by clearly outlining the potential health risks of existing circumstances (Jotkowitz & Zivotofsky, 2010). This is because a cornerstone of contemporary medical ethics and patient rights

is that every woman has a right to obtain information about her foetus and that every practitioner is responsible for disclosing it. The abortion debate centers around the opposing rights of women's reproductive freedom and the recognition of the baby's rights, particularly when it comes to terminating a pregnancy with abnormalities or health risks (Jotkowitz & Zivotofsky, 2010).

Proponents of choice commonly claim that women need to be free to decide whether and when to have children since it will improve their socioeconomic status, overall health, and wellbeing. This is known as reproductive autonomy (Nepal et al., 2023). International law upholds the human rights to life, equality, privacy, and bodily integrity, which include the right to sexual and reproductive health and rights, including the autonomy of women, girls, and those who are capable of becoming pregnant to make decisions about their bodies (United Nations Population Fund, 2023).

Furthermore, a pioneering argument was put forth by philosopher, Judith Jarvis Thomson, in which she presents a philosophical argument for the moral permissibility of abortion, even if one assumes that the foetus has a right to life (Minehan, 2022). Judith Jarvis Thomson claimed that women own their bodies, and the foetus is a trespass on their domain; thus, the woman has the right to remove the foetus from her (Markowitz, 1990). She then further her analogy in supporting women's right over their bodies and reproductive by using the violinist argument to illustrate her point:

> "You wake to find yourself back to back with an unconscious violinist who is extremely famous. He has a fatal kidney ailment, and you are the only one who has the right blood type to help. The Society of Music Lovers kidnapped you, so you are there involuntarily. If you unplug yourself from him, he will die. However, if you stay there for nine months, he will recover. The question is whether it is morally wrong to not save his life?" (Jotkowitz & Zivotofsky, 2010).

The question of whether it is morally required of humans to save those who are unable to protect themselves has highlighted the need to take a stand on behalf of those who are unable to do so. Like the Siamese twins, the comatose, and the violinist, the unborn is incapable of expressing wishes, making sensible decisions, or attempting to survive. In these situations, it is acceptable to put one's interests and desires ahead of saving the life of another, especially if doing so means sacrificing the latter.

Jotkowitz and Zivotofsky, in their research, further explain that Judith Jarvis Thomson argues that, without the woman's consent, the fetus has no inherent right to use her body (Jotkowitz & Zivotofsky, 2010). He argued by using the analogy that a thief does not have the right to enter a house because the homeowner has left the windows open. Based on this analogy, he has asserted that a woman has complete control over her body, and no one should do anything to it without her permission.

On a different note, pro-life advocates will argue that a foetus has rights. It is more about personhood than life when it comes to the unborn. According to the Greek philosopher Aristotle, every living creature, including mindless plants, has a purpose or an end unique to their species, which is how they naturally evolve from a formless or potential state (Morgan, 2013). Thus, reflecting on the dilemma of the rights of a foetus, it should become clear that killing embryos or foetuses is morally wrong because they will someday grow up to be adult humans. The embryo and the foetus have the right to life because they have the potential to grow into intelligent, self-aware, and logical beings (Morgan, 2013).

Literature supporting a foetus's rights claims that human existence begins at conception. Foetuses exhibit human physical traits and the necessary genetic coding to be considered human. Since foetuses

and newborn babies or neonates have the same biological makeup, it follows that having an abortion is wrong if killing a person is wrong. Don Marquis argues that because he thinks an embryo or foetus has a "future like us," an intentional abortion is immoral and belongs in the same category as adultery or the assassination of an innocent person (Marquis, 1989). He further argues that since the foetus may belong to no other human species, the conclusion that it has the right to life is justified (Marquis, 1989). Jotkowitz and Zivotofsky further discuss Martin Rhonheimer's theory, which posits that while a fetus is biologically a human entity, it does not yet qualify as a person. Instead, the fetus is a human being in the process of becoming a person. Rhonheimer also introduces the concept of retroactive identity to support his argument, suggesting that if a fetus were to be terminated by abortion, it would infringe upon the fetus's right to life and its interest in survival (Jotkowitz & Zivotofsky, 2010).

For this article, which is about aborting anomalous foetuses, it is essential to note that even if it is demonstrated that the foetus has a certain moral value, this does not always mean that an abortion is illegal. Michael Tooley's assertion that a foetus has no intrinsic right to life is met with dispute (Tooley, 1972). According to Stevens (1984), an organism can only be considered to have a serious claim to life if it recognizes itself as a living subject shaped by experiences and other mental processes. He goes on to say that a person may only be considered a human if they have the will to live. Peter Singer concurs that no foetus ought to be entitled to live on an equal footing as an adult human (Singer & Buckle, 1993). This is because a foetus has no legal rights, that is up until it separates from the woman carrying it, it is not a legal person. Although the umbilical cord does not need to be severed, it must be completely removed from her body, alive and able to exist without her (Fovargue & Miola, 2010). Until these conditions are met, the foetus is to be regarded as an essential component of the pregnant woman and has no legal rights of its own. This has been confirmed by additional literature, which indicates that a foetus has no moral standing because it is fully integrated with the pregnant person's anatomy and physiology, just like other elements of its body (Kingma & Finn, 2020). Ben Bayer discusses Ayn Rand's radical case for abortion rights, highlighting Rand's argument that if it were accepted that ending an embryo or fetus is immoral due to its potential life, then by the same logic, the destruction of sperm or eggs could also be considered immoral. Rand further illustrates this point by suggesting that, under this view, every time a man ejaculates, he would be killing or destroying the potential life of his sperm (Bayer, 2019).

In light of the foregoing debate, it is prudent to conclude that there are often conflicting viewpoints about the rights of the mother and the foetus and these rights will come up when discussing abortion, including the termination of an abnormal foetus. Divergent opinions exist over the extent to which women should have complete control over their bodies or whether the foetus should have greater rights than the mother. In this article, the authors have argued that women should be allowed to choose what is best for their bodies, even if that means terminating the pregnancy. To support their claims that a mother's right should not supersede that of her foetus, the authors of this article will further support their arguments in the next section by discussing the pertinent tenets of utilitarian theory and the principle of reproductive autonomy.

REPRODUCTIVE AUTONOMY AND UTILITARIANISM: THE DEBATE OVER THE ABORTION OF ANOMALOUS FOETUS

Rights-based paradigms are a fundamental component of modern development theory. The right to an abortion is a human right that includes many other rights, such as the freedom of religion and conscience, equal protection under the law, the right to be free from cruel and degrading treatment, and

the rights to health, life, reproductive healthcare, integrity, autonomy, and decision-making (Walsh et al., 2009). The concept that women possess an inherent right to exercise control over their own bodies and reproductive wellbeing has been advocated by several international agreements, such as the CEDAW, the UNHRC, the UNCRC, and the UNCESCR.

In this paper, there will be two theories on the issue of women's rights and their rights to end pregnancies with an abortion that the authors will analyze further. The theories are utilitarianism and the Principle of Reproductive Autonomy. Jeremy Bentham was an English philosopher, jurist, and social reformer, best known for founding the philosophy of utilitarianism. Utilitarianism is an ethical theory that advocates for actions that maximize happiness and minimize suffering for the greatest number of people. Bentham's philosophy was grounded in the belief that the moral worth of an action is determined by its contribution to overall utility, which he defined as pleasure or happiness, and the avoidance of pain (Agarwal & Pareek, 2022). Within the line of thought known as consequentialism lies the philosophy of utilitarianism. One may recall that hedonistic utilitarianism is exclusively concerned with feeling pleasure and suffering. Thus, the focus of this theory will be on the amount of happiness and suffering experienced in situations when abortion is legal, as opposed to the amount of happiness and suffering experienced in situations where abortion is illegal (Agarwal & Pareek, 2022). This approach provides most individuals maximal usefulness, happiness, and pleasure, which is the essence of moral behaviour. For instance, when a mother's life is in jeopardy because of a pregnancy, medical practitioners suggest abortions based on the utilitarian principle. This demonstrates the reason that it is preferable to save the mother's life rather than that of the foetus. According to Stefan, a foetus has potential and can only become a human being if a successful birth occurs; as such, a mother's rights come before those of the foetus. Socially prominent individuals like spouses, friends, doctors, and family members have a big say in what is considered morally right or wrong when it comes to abortion (Stefan,1991). Typically, medical concerns, socioeconomic conflict, rape concerns, and deformities of the foetus are some of the variables that affect the moral decision whether to have an abortion.

Originally, the term "autonomy" was used to describe self-rule or self-government. It is derived from the Greek words *autos* (self) and *nomos* (rule, governance of law) (Rodriguez-Osorio & Dominguez-Cherit, 2008). According to Ronald Dworkin, if someone is able to make an informed decision to choose death over drastic amputation or a blood transfusion, we respect their right to a life shaped by their values (Dworkin, 1993). Beauchamp and Childress define autonomy as the individual self-government unencumbered by personal constraints that offer significant choice and by the interference and control of others (Beauchamp & Childress, 2009). Reproductive autonomy, also called "procreative liberty" or "reproductive autonomy," is the application of the autonomy concept to the domain of human reproduction (Robertson, 1994).

Reproductive autonomy ought to encompass having the capacity to procreate with the genes of our choosing, to have lawful access to them, and to do so in a way that reflects our preferences for reproduction and the kind of individuals we think should be produced (Cavaliere, 2020). Twelve Black women created the phrase "reproductive justice" in 1994 while staging a protest at a Chicago pro-choice conference to call for the legal recognition of their rights to sexuality and reproduction (Luna, 2016). A woman's ability to decide whether or not to reproduce, carry, or end an unwanted pregnancy and select the kind of family planning and contraception that she likes is referred to as her right to reproductive choice. These rights are predicated on acknowledging the fundamental rights of all individuals and couples to freely and responsibly choose the number, spacing, and timing of their children, as well as the right to the best possible sexual and reproductive health. The International Conference on Population

and Development's 1994 Programme of Action (ICPD) acknowledged the importance of women's rights to sexual and reproductive health (Garcia-Moreno & Amin, 2019).

How are these theories used to reflect on the right of a woman to abort a pregnancy with an anomalous foetus? And what is the extent to which these theories indicate that a woman's reproductive autonomy may be jeopardized in the event of a prenatal diagnosis that is performed negligently, leaving the mother with a child who is disabled?

In this regard, the utilitarian theory first and foremost considers the welfare of the mother's wellbeing. This is because the news that a woman is expecting a disabled child can be emotionally upsetting and have a substantial effect on her mental health. Research indicates that parents of children with disabilities, especially moms, tend to report worse physical and mental health than mothers of children who develop normally (Gilson et al., 2018). Furthermore, other data indicates that moms would inevitably experience difficulties in their social and familial lives if they had a disabled child. Mothers who bear psychological and physical burdens encounter personal challenges and imbalances, and they despair and their levels of anxiety have been impacted (Yarar et al., 2020). Many of them may occasionally feel guilty or question whether whatever they did during their pregnancies had contributed to the impairment of the child. Simultaneously, the extra expenses of having a disabled child, such as medical bills, therapy, and specialized equipment, can lead to financial stress, which further exacerbates anxiety and depression. Research indicates that families with disabled children will spend more since they are more likely to have unreimbursed costs for assistance due to the child's impairment, and they frequently end up in distress (Anderson et al., 2007). Thus, the present authors contend that aborting an abnormal foetus is reasonable and legitimate, it is to guarantee that the children are desired and that the mother's mental health is well looked after.

However, although women have the right to terminate their pregnancies in principle and based on the arguments from the tenets of utilitarian theory, a study on the abortion of anomalous foetuses revealed that women who terminate their pregnancies due to foetal anomalies do not receive enough support and are even unable to grieve the loss of their children because there is a lack of public awareness of this kind of loss (Chaloumsuk, 2013). What this means is that the decision to end the pregnancy will have significant psychological effects on the parents, even if it is seen as the best course of action given the circumstances. These reactions have been documented in almost all research, particularly in the initial weeks and months following pregnancy termination (Basile & Thorsteinsson, 2015). Research showed that the majority of these women experience sleep issues, restlessness, despair, and guilt, with 14% of them experiencing signs of severe depression. In conclusion much of the previous literature has demonstrated that while women never wanted to abort their children, sometimes they had to secure a better life and their mental wellbeing.

Furthermore, based on the concept of reproductive autonomy, the authors of this paper have contended that misdiagnosing an abnormal foetus is unfair and violates women's autonomy to make decisions about their bodies, which might lead to the delivery of a disabled child. It is well established in the literature that making well-informed decisions correlated favorably with psychological effects like reduced decisional conflict (Berg et al., 2006). Studies have shown that for women to fully consent to the pregnancy, they must be well informed about it. In addition, women should be informed about the condition of the foetus and advised to consider all the available options, along with the advantages and disadvantages of each decision (Damman et al., 2023). Therefore, if a disabled foetus has been negligently diagnosed, a mother may give birth to a disabled child. If this should occur, it would compromise her right to complete reproductive autonomy due to her inability to decide on what is best

for her own body. When doctors withhold crucial information or neglect to provide prompt, accurate prenatal diagnostics, a mother is denied the opportunity to make an informed decision about her pregnancy. She ends up having to deliver a baby who is impaired. They will be entitled to a wrongful birth claim if this negligence occurs.

In conclusion, adhering to the principles of reproductive autonomy and utilitarianism, one could reasonably contend that aborting an abnormal foetus is permissible to improve the wellbeing of the mother and her family's quality of life and mental health. Applying the concept of reproductive autonomy has revealed that it is unfair and undermines the right of women to give informed consent over their bodies when a pregnancy results in a woman having to give birth to a disabled child due to a negligent prenatal diagnosis. Therefore, the right of a mother over a wrongful birth claim is legitimate.

RECOGNITION OF WRONGFUL BIRTH CLAIMS IN LANDMARK INTERNATIONAL COURT CASES

Prenatal diagnosis (PD) is an increasingly popular method of assessing the health and genetics of unborn children and alerting expectant mothers to potential foetal abnormalities and diseases that could negatively impact the physical, mental, and social wellbeing of parents and families (Carlson & Vora, 2017). PD uses a range of technologies, including foetal ultrasonography. However, the new developments in PD have resulted in a flood of claims for alleged "wrongful life" or "wrongful birth." The number of tests has grown over time, as have the cases claiming medical professionals were negligent. Globally, courts have come to recognize wrongful birth claims (Frati et al., 2017), but arguably in Malaysia, they remain unheard and unacknowledged.

In the Canadian landmark case of *Arndt v. Smith (1997),* the Supreme Court acknowledged wrongful birth damage but defended its ruling of not allowing the affected mother to get an abortion. Carol Arndt sued her doctor in this case for failing to warn her of the risks of contracting chickenpox while pregnant. The doctor argued that since the patient would have brought the pregnancy to term, he could not have been held legally responsible. The woman asserted that she would have ended the pregnancy if she had been given enough information regarding the risk to the foetus.

The Brussels Court of Appeal in Belgium held that parents might file lawsuits against doctors who fail to identify significant fetal deformities, with the presumption that they would terminate their pregnancy if they were adequately told. The Muslim woman who claimed that the hospital had neglected to notify her of the severe illness her foetus was suffering from, was one of the specific cases that the Brussels Court of Appeal specifically addressed. The hospital justified the failure to disclose the missing details by saying that the illness was detected after the Islamic cutoff date for abortions. After acknowledging the claim, The Court determined that since negligence resulted in the birth of a disabled child, compensation was required (Court of Appeal of Brussels (2010), Case No.14675).

In the Australian case of Veivers v. Connoly (1995), the Supreme Court of Queensland ruled in favor of a mother who gave birth to a child with severe impairments as a result of her doctor's negligence in failing to correctly diagnose her rubella infection and to warn her of the risks this posed for the unborn child (Petersen, 1997). In *Cattanach v Melchior (2003),* the High Court's deliberations centered on the issue of wrongful birth claims, particularly acknowledging the harm caused by the loss of earnings and the costs associated with raising a child with a disability. Most appeals in similar cases have been accepted, recognizing the financial and emotional burden placed on the parents due to the child's care

and support needs. The Court's decision reflected a broader understanding of the damages resulting from such situations.

In the precedent case of Kelly Molenaar (2005), a Dutch girl was born with multimental and physical disabilities. Here the Dutch Supreme Court awarded all the costs of Kelly's education and care as well as moral damages both to the parents (including the costs for psychiatric treatment for the mother after delivery) and to the child. The Dutch Supreme Court recognized the mother's entitlement to non-economic damages and payment for expenses related to the child's growth in the 1997 case of the missing IUD, which marked the beginning of the legal recognition of wrongful birth claims. In its 2003 decision, the Court went into great details to explain why the parents should get compensation for this kind of loss. In this case, the baby was born with multiple physical and mental defects because a prenatal anomaly was not detected right away. The doctor's negligence resulted in a violation of the mother's legal right to choose an abortion. As a result, in addition to the costs for hospital care of the child, the hospital was mandated to reimburse the parents.

In Japan, the wrongful birth claims for damages are generally accepted. Wrongful birth claims for damages are typically accepted because under Article 721 of the Civil Law 1896, a child who is born disabled is able to file a claim against the person who injured them in the mother's womb. However, the parents of a stillborn child are not able to recover damages as administrators for the wrongful death of their child. They are only able to recover damages for pain and suffering related to the stillbirth of the child. The landmark case of the Hakodate Case (2014) in Japan where the Hakodate District Court ordered a clinic and the obstetrician, as well as the gynaecologist who was the director of the clinic in question, to pay 10,000,000 yen in damages. The Court awarded the damages to mentally suffering parents in tort or default on the medical contract. This approach is legally justified because it breaches the doctor's duty to advise on the possibility that a child may be born with disabilities.

In South Africa, the law recognizes the claims for wrongful pregnancy and wrongful birth—the first case involving wrongful birth in the South African Court in 1996 was in the Friedman case. In the case of *Friedman v. Glicksman (1996),* a mother of a disabled child accused the doctor of causing the child's congenital disabilities because, had she been provided with accurate information, she would have had the pregnancy terminated. The core issue was whether Dr. Glicksman's alleged negligence constituted wrongful birth. Wrongful birth claims involve parents seeking damages for the additional costs and emotional distress of raising a child with disabilities that they claim would have been avoided if not for medical negligence. The plaintiffs sought damages for the costs associated with raising a child with disabilities, as well as for emotional distress. The Court found in favor of the Friedmans. It held that the negligence of Dr. Glicksman in interpreting the genetic test results and advising the Friedmans constituted a case of wrongful birth. The Court determined that the Friedmans were entitled to damages for the costs associated with raising their child who was born with the genetic disorder.

The European Court of Human Rights acknowledged a wrongful birth claim in the case of *R v Poland (2011).* This case involved a woman alleging a connection between giving birth to a kid who had Turner syndrome and then being refused access to prenatal genetic testing. The Court ruled in favor of the mother by pointing to violations of the prohibition on cruel, inhuman, or degrading treatment and the right to respect one's private and family life. In the ruling, it was also mentioned that the prenatal genetic test's failure had infringed the woman's rights to health information and personal autonomy. However, in Chile, due to the permanent ban in Chilean law on abortions, a "wrongful birth" claim is not admissible.

Following the above review of international cases of wrongful birth claims, it has become clear that many countries recognize them. The courts in following the principles of contemporary medical practice, have recognized the liability of those violating a woman's right to self-determination. There is negligent conduct when there is failure on the doctor's part to inform a patient about the presence of foetal disabilities. The medical practitioner is responsible for any damages brought on by an unintended birth, which makes them liable to pay compensation. This is because the doctor has denied the patient the chance to make an informed decision about ending the pregnancy as a result of the lack of knowledge regarding the likelihood of bearing a disabled child.

In conclusion, following the court rulings above, there should not be any doubt remaining in one's mind that that many countries have indeed recognized wrongful birth claims, especially in cases where negligence in prenatal diagnosis has occurred. Wrongful birth claims typically involve parents seeking compensation for the additional costs, emotional distress, and challenges associated with raising a child with disabilities or congenital anomalies that they believe were not correctly diagnosed or were the result of medical negligence.

WRONGFUL BIRTH CLAIMS IN MALAYSIA – DO WOMEN HAVE RIGHTS?

Doctors are responsible for disclosing to their patients any known pregnancy-related risks or issues. Medical professionals may be liable for malpractice if they do not comply with this. In order for a wrongful birth claim to be deemed valid, the mother must establish that if the doctor had accurately diagnosed the medical condition or provided her with sufficient medical information, she would have been informed about the potential dangers and would have made the decision to terminate the pregnancy.

English Law & Australian Law

For several decades, the English tort case of *Bolam v. Friern Hospital Management Committee (1957),* from which the Bolam Test was established, governed the legal position on the standard of care test in medical negligence. Under English jurisdiction, a medical malpractice claim that follows the tort law standard of proof must demonstrate the presence of a duty of care, its breach, and the consequences of that breach. The locus classicus to determine negligent diagnosis and treatment, considering the features of neglect during the prenatal diagnosis, is called the Bolam test. The prudent patient test in *Montgomery v. Lanarkshire Health Board (2015)* will be relevant if the patient is not informed of a material risk, that eventually leads to the birth of a child with an illness or disability.

Based on English law, the Bolam test establishes the level of care a medical professional owes the patient concerned. In the case of Bolam, Justice McNair, in his direction to the jury, said that "if a doctor follows a course of action that a responsible group has approved of medical professionals trained in that field, he is not acting negligently just because other people have a different perspective." This means that even though the duty of care is lower than the standard, under the Bolam Test, a person is not guilty of negligence or a breach of duty if they behave according to a practice approved by a "responsible professional board." Following this, the standard of care established by the medical body thus appears to promote the interests of medical professionals, placing a significant burden on the claimant or aggrieved party to demonstrate the harm done to the patients as a result of negligence. The case of *Bolitho v. City and Hackney Health Authority (1996)* called into question the validity of the doctor-centric Bolam test. In this case, the House of Lords ruled that if a medical professional follows a body

of medical opinion that is responsible, reasonable, or respectable, or if it has a logical basis, then the doctor is not negligent when it comes to diagnosis and treatment. The Supreme Court did not apply the Bolam test in the latter case of *Montgomery v. Lanarkshire Health Board (2015)* in terms of offering advice and disclosing the risk of the treatment. Following the Montgomery case, it was decided that a doctor is responsible for informing a patient of any significant risks associated with the suggested course of treatment.

Another case involving the disclosure of risks came from the Commonwealth in 1992. In *Rogers v. Whitaker (1992),* an Australian court rejected the idea that doctors could not be held accountable for malpractice if they forewarned a patient and as long as they followed accepted medical procedures. To put it another way, Australian courts have therefore, decided that the Bolam test did not apply to patient risk disclosure. Patients have the right to know about significant risk factors connected with prescribed courses of treatment from their doctors, and doctors have a duty to disclose such risks to their patients. In this case, the assessment of the standards of care is transferred from the body of medical professionals to a judicial conclusion. However, the patient-centered approach in Roger's provision of advice and disclosure of risk is comparable to the ruling in the English case of *Montgomery v. Lanarkshire Health Board* (2015). In the Montgomery case, the UK Supreme Court addressed the standard of disclosure required from medical professionals. The case involved a pregnant woman who was not informed of the risks associated with a vaginal delivery, which led to complications for her baby. The Court ruled that doctors must disclose all material risks that a reasonable person in the patient's position would need to know to make an informed decision. The impact of this ruling was that the Court established that the standard of care requires a patient-centered approach, where the disclosure of risks should be based on what a reasonable patient would consider significant rather than what a reasonable doctor would deem necessary. This shift emphasized the importance of understanding and respecting the patient's perspective and the right to make informed choices about their treatment.

Position in Malaysia

In Malaysia, the case of *Foo Fio Na v Dr Soo Mun & Anor (2007)* opens for consideration the two contradictory tests for the standard of care in *Bolam and Rogers v. Whitaker (1992).* In cases involving medical negligence in Malaysia, the Court has to decide which of the two tests should be used. It should be emphasized that although the Federal Court did not reject either of the standards, it did rule that the most crucial factor to consider is whether or not a doctor acted logically and reasonably. This strengthened the argument for using the Bolam Test as an alternative to judicial adjudication of the standards of care. The issue was whether or not the Bolam Test should be used as the appropriate method for evaluating the standards of care for a medical operation on which a judge lacks knowledge.

This legal enigma was resolved in the case of Zulhasnimar Hasan Basri (2007), where the Federal Court decided on the distinction between diagnosis and treatment, and the disclosure of risks. The Court decided that the Bolam standard would apply to the former, *whereas Rogers v. Whitaker's* standard would apply to the disclosure of risks. In summary, the *Rogers v. Whitaker* standard is limited to the duty to disclose risks connected with any proposed treatment. At the same time, the Bolam test (qualified by Bolitho) applies to the standard of care for diagnosis and treatment. The same decision was reflected in the case of Dr. Hari Krishnan (2018). The Malaysian Federal Court made a distinction in this case between the standard of care for the duty to warn of danger and the standard of care for diagnosis and treatment. It was decided that the "prudent patient" test applied to the standard of care for the duty to warn, while the Bolam test applied to the standard of care for diagnosis and treatment. This

implies that the patient should be informed of the risk based on what they should and want to know, not what the doctor should tell them.

At this juncture, it is important to consider the important question raised in the present article: do mothers in Malaysia have the right to file a claim for wrongful birth if a medical professional negligently results in the delivery of an unintended child and a child with a foetal disability? Following the discussion above and reflecting on the ruling of clinical negligence in relation to the issue of a wrongful birth claim in Malaysia; it is clear that in theory, a woman in Malaysia has the right to file a wrongful birth claim against a medical professional for committing clinical negligence during the prenatal diagnosis. However, to put it simply and following the general rule for medical negligence, for the woman to succeed in the wrongful birth claim, the woman must be able to demonstrate in retrospect that she would have terminated the pregnancy if she had been informed or advised about the foetal abnormality, that an abortion could have been obtained lawfully, and that there was a direct correlation between the harm caused by the medical professional's breach of duty and the woman's ability to get an abortion. Depending on what kind of prenatal negligence it is, the Bolam test will still apply to negligence in diagnosis and treatment. On the other hand, if the patient is not informed of a material risk and the child is born impaired, the Roger prudent patient test will be applied.

As was previously discussed, while in theory and principally by law, Malaysian women can file a claim for wrongful birth, doing so is difficult because of the country's restrictive and outdated abortion laws. Any discussions about or occurrences of abortion are frowned upon in Malaysia. In Malaysia, the grounds for abortion are only limited to two circumstances. Section 312 of the Penal Code provides the grounds where abortion is allowed. Provided under this section is the first ground where abortion is permitted when abortion is done to save the pregnant woman’s life. The second ground is where the abortion is done to protect the mental and physical state of the woman. Administering abortion must be carried out only by a qualified and duly registered medical practitioner under the Medical Act 1971, provided that the medical practitioner decide it and do it in good faith. Only a registered medical practitioner has the power to determine “in good faith” whether the pregnant woman’s life or health is at risk if she continues with the pregnancy.

The good faith requirement is crucial, as illustrated in the case of *Public Prosecutor v Nadason Kanagalingam [1985]*. An obstetrician and gynecologist were found guilty of voluntarily causing miscarriage, not in good faith, for the purpose of saving the woman’s life who was suffering from bad or enlarged varicose veins, which might cause a pulmonary embolism. She was 16 weeks pregnant at the time. The Court was not convinced that the accused had reasonably considered that causing miscarriage was the only avenue to save the woman’s life, even with medical experts testifying in favor of the accused. This case has reflected the uncertain nature of the law on abortion in Malaysia, where the law recognizes the expertise of the medical practitioners to abortion under good faith. Still, it remains questionable within the Court of law.

The restrictive and ambiguous abortion legislation in Malaysia not only impacts the healthcare professionals and abortion providers who offer lawful services, but it also infringes upon women's right to seek safe and legal abortions. In the landmark case of Nirmala Thapa, the conviction was deemed unlawful upon reaching the Penang High Court (Archer, 2018).

The Nirmala Thapa case is an important turning-point in the ongoing debate about abortion legislation in Malaysia, specifically regarding women's rights for obtaining safe reproductive healthcare. Nirmala, a migrant worker from Nepal, became the focal point of a legal dispute when she attempted to obtain

an abortion at a private clinic in Penang in May 2014. The abortion was conducted in accordance with Malaysian law, which permits abortion when the pregnancy endangers the woman's life or health, including her mental well-being. However, the scenario underwent a significant change when Nirmala was apprehended and formally prosecuted under Section 315 of the Malaysian Penal Code. The purpose of this provision is to prohibit the deliberate termination of pregnancies in order to prevent the birth of a living child. Many people viewed the interpretation of this regulation in Nirmala's case as excessively stringent and not in accordance with the legislative provisions that allow abortion under specific circumstances. Nirmala's case attracted significant attention, both domestically and globally, with human rights organizations and women's rights groups mobilizing to support her. They contended that the accusations were unfair and underlined the inconsistencies and uncertainties in Malaysian abortion legislation. The case also exposed the challenges that marginalized populations, namely migrant workers like Nirmala, encounter while trying to obtain legal and secure abortions. These populations are frequently more vulnerable because of their lack of understanding of local legislation, apprehension towards authorities, and insufficient access to legal and medical assistance.

Nirmala's legal actions received criticism due to the potential infringement on her rights to health and bodily autonomy. Critics contended that the rule was being erroneously implemented in a manner that could dissuade women from obtaining essential medical treatment, due to apprehensions of facing criminal charges. This has wider ramifications for public health, as it may compel women to resort to hazardous, unlawful abortions. In October 2014, the charges against Nirmala were dismissed after a prolonged period of legal disputes. The acquittal of the individual was perceived as a triumph for supporters of reproductive rights, while also highlighting the necessity for greater precision in the legal structure that regulates abortion in Malaysia. The case underscored the uneven enforcement of the law and the necessity for more explicit directives to safeguard the rights of women who are seeking abortions within the confines of the legal framework (Archer, 2018).

Position in Malaysia – Fatwa Ruling

Furthermore, complicating matters is the fact that Malaysia has two different legal systems regarding abortion: the Penal Code applies to both Muslims and non-Muslims in the country, and Sharia law also applies to Muslim abortions.

According to Muslim scholars, there are various situations in which an abortion may be considered lawful. The Shafi'i madhab, the prevailing school of thought in Malaysia, allows for abortions to be performed within a time frame of 120 days (Ibrahim B, 2013). Ibn Abidin holds that the legality of abortion depends on the legitimacy of the reasoning (Abidin & Al Mukhtar, 1974). Ibn Najeem made the point that it is against Shar'iah to kill one soul in order to save another. This viewpoint suggests that even in situations where the mother's life is at risk, it may not be permissible to terminate or abort the unborn child, as such an act would be tantamount to taking a life. However, the position will not be relevant until the embryo has reached the stage of ensoulment, which occurs after the gestation limit of 120 days (Alkali et al., 2015).

The 26th Convention of Fatwa Committee of the National Council for Islamic Religious Affairs, held on 7th March 1990, affirms the scholarly consensus (ijma') that it is deemed makruh (disapproved) to terminate a foetus between one and forty days old, unless there is a risk to the mother's well-being, and both the husband and wife have given their consent, medical procedures or decisions related to pregnancy may not be pursued. This condition ensures that any medical intervention respects the rights and health of both parties involved. Legal experts unanimously agree that the abortion of a foetus, which

is under 120 days old, is allowed if it has severe defects or illnesses that pose a threat to the mother's life. Furthermore, it is strictly forbidden (*haram*) to terminate a pregnancy that has surpassed a gestational period of 120 days, as this act is considered a kind of homicide towards a foetus that has been bestowed with a soul. An exemption to this restriction arises only in cases when terminating the pregnancy is essential to safeguard the mother's life; the foetus has developed a severe deformity and medical professionals verify that prolonging the pregnancy will endanger the mother's life. In this situation, it is permissible to end the pregnancy in order to protect the mother's life, which is given priority during the designated period of pregnancy (Mufti of Federal Territory's Office, 2020).

The Islamic authority, JAKIM, has issued a fatwa stating that abortion is prohibited (*haram*) in Islam. However, abortion can be permitted if there are compelling medical grounds, such as when the foetus has a severe medical condition, and as long as the pregnancy has not exceeded 120 days. However, beyond a period of 120 days, abortion is entirely illegal, unless the continuation of the pregnancy poses a threat to the mother's life. The Dialogue Fatwa Committee of the National Council for Islamic Religious Affairs in Malaysia issued a fatwa regarding the validity of abortion for rape victims during its 52nd meeting on July 1, 2002. They determined that it is unlawful if the foetus is beyond 120 days old, as at this point, the foetus has acquired a soul (Mufti of Federal Territory's Office, 2020).

It is opportune at this point to be reminded that the primary focus of this article is the issue of the abortion of a baby with a foetal anomaly in the context of Malaysia. It appears that the issue is unresolved; whether or not abortion is legal in Malaysia in cases involving foetal anomalies due to the ambiguous and restrictive nature of both the common law and Sharia law. This is true even though women may theoretically claim the right to a wrongful birth. At this point of the discussion, it has to be contended that the abortion laws in Malaysia lack uniformity and allow for disproportionate flexibility under both the Penal Code and Sharia Law. The divergence of viewpoints on the matter stems from inconsistencies between the Penal Code and the Fatwa. According to the Penal Code, abortion is permitted only in cases where it is necessary to protect the life and mental well-being of women. However, the National Fatwa allows abortion under additional circumstances, such as when there is the risk of a foetal impairment. Furthermore, the National Fatwa permits abortion up to a gestational limit of 120 days, although the Penal Code does not specify any gestational limit for legal abortion. The Penal Code solely applies to the criminalization of women. There are no commonalities between these legal systems and this leads to their applicability a challenging issue.

The dilemma is exacerbated by the fact that each state in Malaysia has its own rulings and sentencing guidelines concerning abortion, rendering the federal Fatwa inapplicable or redundant in its applicability (Zainuddin, 2022). For instance, the fatwa database of Malaysia's Department of Islamic Development (Jakim) on 'abortion' showed at least 15 different fatwas on abortion for different states, including that in Selangor, Sarawak, Sabah, Negeri Sembilan, Pahang, and Johor, as Islamic law falls within state jurisdiction. Some fatwas addressed the distribution of contraceptives to those who are high-risk, to those who have different illnesses such thalassemia, Zika, and tuberculosis, and to trauma survivors. However, it seems that only two fatwas on the matter have been officially published in the gazette.

A 2010 fatwa regarding the provision of contraceptives to high-risk individuals and the termination of pregnancy has been gazetted in Pahang. The said fatwa allows for abortion to be performed within a gestational period of 120 days (equivalent to four months) in cases involving rape victims, HIV patients, and individuals with mental and physical disabilities. Abortion is prohibited after 120 days of pregnancy, unless a morally honest Muslim medical practitioner advises it to save the woman's life.

Abortion is prohibited for pregnancies resulting from extramarital relationships, unless it poses a threat to the woman's well-being. Extramarital use of contraception is prohibited. A fatwa regarding the termination of pregnancy for Zika patients was declared in Sabah in 2017 and this fatwa has also been officially published. Abortion is generally prohibited, even for pregnant women who have contracted the Zika virus, unless the woman's life is in danger — a situation that must be confirmed by reliable medical professionals. The primary mode of transmission for Zika is through the bite of an Aedes mosquito that is carrying the virus. According to the United States' Centre for Disease Control and Prevention (CDC), the virus can be transmitted from a pregnant woman to her foetus, and if the infection occurs during pregnancy, it can lead to specific congenital abnormalities. According to Sabah's Fatwa, it is required that the woman's partner gives consent to the abortion as well. Under these conditions, the abortion must be performed within a maximum of 120 days after conception.

After considering the discussion around the issue of fatwa on abortion in various states in Malaysia, it is evident that there is inconsistency in the criteria for allowing abortion, which contradicts the recommendations of the National Fatwa. The presence of these ambiguities and conflicting stances regarding the justifications for abortion creates difficulties for women in asserting their right to pursue a legal claim for wrongful birth due to negligence in prenatal diagnosis. It might be argued that a nation's abortion laws, whether they come from the Common Law or the National Fatwa, should be transparent and uniform in order to protect women's rights to claim wrongful birth.

Comparison of Legislation on Wrongful Birth Claim

The abortion laws in Malaysia are less defined and more restrictive compared to in England and Wales. According to Section 1(1)(d) of the Abortion Act 1967, there is currently a clear legal basis for abortion if there is a significant possibility that the unborn child will have physical or mental abnormalities that would cause it to be gravely handicapped. In relation to wrongful birth claims, the United Kingdom, unlike Malaysia, recognized a wrongful birth claim, and this type of claim has been intended for a variety of situations, including cases involving negligent behavior, the failure to diagnose a foetal anomaly that would have required the mother to have an abortion, the failure to achieve an abortion in cases involving women who posed particular risks, and cases involving the improper handling of sterilization procedures.

In the United Kingdom, the courts recognized significant sums for expenses related to the school, loss of wages, and the development of the child who was born with a congenital disability. In the case of *CW v. Hospital NHS Trust (2010),* the Court ruled in favor of the mother who had accused the hospital of negligence in identifying the foetal abnormalities during the 20-week scan—namely, that the unborn had three arm bones in each foetus's arm — throughout the investigation. The woman asserted that she would have chosen an abortion before the 24-week gestation period if the medical staff had informed her that the foetus had an abnormality. The baby was born via Caesarean section on January 26, 2007, and was given the name SW in court documents. The baby was born with an ulnar mammary syndrome caused by a hereditary chromosome 3 inversion, which caused a multitude of impairments, including extreme arm shortening and the absence of all hands due to the absence of the ulna in both arms. The baby also had modest cardiac septal hypertrophy, epispadias, and an anorectal abnormality at birth. The mother took the case to the law courts so that damages could be calculated after the defendant (the hospital) admitted breach of duty of care and causation following several complaints to the hospital on issue. Damages were requested for (a) the pain, suffering, and loss of amenity caused by the pregnancy's continuation and the startling finding that SW was born without hands and with severely shortened arms, as well as (b) the additional expenses associated with raising SW as a result of his birth with these

abnormalities, as well as other abnormalities that were found after his birth. The decision is similar to the case of *Rand v East Dorset Health Authority No.2 (2000),* in which the parents were not informed of a test result that showed the mother was most likely to give birth to a kid with Down syndrome. The Court ruled that the parents were entitled to damages for child support losses because they were unable to exercise their right to an abortion.

With regard to the case of failed sterilization, the precedent case of *Parkinson v. St James and Seacroft University Hospital NHS Trust (2001),* in which Ms. Parkinson's disabled child was born as a consequence of a failed sterilization surgery is pertinent to the discussion of botched sterilizations. The hospital advised Ms. Parkinson that the foetus would likely be born with problems, but she refused to abort the pregnancy. After the House of Lords' judgment, this was the first case to be heard by the Court of Appeal where the Court ruled that because the boy was impaired, the parents should only be paid for the costs associated with raising him. Similar to the case of *Rees v. Darlington Memorial Hospital NHS Trust (2003),* the mother in this case was severely visually impaired and decided to have a sterilizing treatment because she did not feel that she could care for a newborn. The sterilizing procedure was unsuccessful, and the mother gave birth which resulted her in suing the hospital that performed the sterilization. The Court of Appeal determined that because the plaintiff is disabled, she is eligible to file a claim for additional costs associated with raising her child. She would be in a position similar to those mothers who were not disabled if these other expenses were reimbursed to her.

Based on the cases that have been decided, it is clear that while Malaysia continues to undermine wrongful birth claims, the United Kingdom and several other European countries have long recognized them.

CONCLUSION

Women have the right to terminate an abnormal pregnancy. By applying the Theory of Utilitarianism and the Principle of Reproductive Autonomy, the authors have argued that women have the right to abort a baby with foetal anomaly. This is because according to the Theory of Utilitarianism, one has to consider the welfare of the mother's well–being, to give most individuals the greatest amount of utility, enjoyment, and pleasure, especially to the mother and person involved in the pregnancy journey. In addition to that, by applying the Principle of Reproductive Autonomy, it is argued when a doctor has been negligent in the prenatal diagnosis, resulting in the mother delivering a disabled baby, this could potentially undermine the mother's right to reproductive autonomy. This issue relates to the ability of a woman to make a decision about her own body, including the pregnancy. Therefore, should this negligence happen, they have the right to claim a wrongful birth.

Furthermore, having discussed the legitimacy of the women's right to abort a baby with foetal anomaly, the authors have further examined the women's right to claim a wrongful birth. The authors have highlighted the fact that many countries have started to recognize the right to a wrongful birth claim should there be negligence in the prenatal diagnosis. The negligence would include failure to diagnose a foetal anomaly that should have required the mother to have an abortion, the failure to achieve an abortion in cases involving women who were subject to particular risks, and cases involving the improper handling of sterilization procedures. In addressing the issue of wrongful birth claims in Malaysia, the authors have concluded that theoretically, a woman in Malaysia can bring a claim over a wrongful birth. Following the tort law standard test for a medical negligence claim, in order to successfully pursue a wrongful birth claim, the woman must be able to demonstrate that an abortion

was legally permissible and that, had she known about the foetal abnormalities, she would have opted to end the pregnancy. It would, therefore, be good to have evidence to support the assertion that the lady was deeply concerned about the likelihood of foetal abnormalities or that she gave importance to this risk during her pregnancy. However, although in theory Malaysian women are entitled to compensation for a miscarried pregnancy, they may find it challenging to pursue this claim because of the country's outdated abortion laws. In Malaysia, incidences and situations pertaining to abortion are frowned upon. The authors of the present article have recommended that Malaysia should begin enacting legislative reform on abortion to guarantee that the country has a stable and transparent law on abortion, primarily related to the grounds for abortion. By doing so, women will then have more rights regarding their pregnancies, including the ability to sue for a wrongful birth in the event of a negligent prenatal diagnosis by medical practitioners. In this regard, the country's legislative reform will indirectly respect a woman's right to reproductive autonomy and enable her to make decisions about her own body.

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CONFLICT OF INTEREST

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