

Abortion Legislation in Vietnam and Lessons Learned from Regulations on International Fetal Rights

Dr. Nguyen Thi Bao Anh¹,

Lecturer of Law Faculty, Can Tho University, Vietnam

Abstract: Abortion has long become a significant issue for Vietnam in particular and for humanity in general. The laws of countries worldwide are almost always significantly different in regulating this issue. It depends on whether the government considers the mother's physical freedom or the fetus's right to life more meaningful. In Vietnam, the rules on abortion are often dominated by the economic level of society and the traditional customs of East Asia, so the Law has not caught up with the general development trend of the world. Within the limit of the article, the author will analyze and clarify the contradictory issues leading to abortion regulations that are not yet guaranteed in terms of human rights and the laws of some developed countries. From here, appropriate recommendations will be initiated and developed to improve the Law on abortion in Vietnam.

Keywords: abortion, the right to life of the fetus, physical freedom, humanity

1. General theory on abortion in Vietnam

1.1. Concepts

Currently, abortion is diversely defined without a general agreement on its concept. Abortion, in common sense, is understood as "the use of procedures or drugs to terminate a pregnancy at an early stage of the pregnancy cycle." There is another view that "abortion is a procedure to terminate pregnancy in women before they are conceived" or "abortion is a method of suspending pregnancy by a procedure to remove embryos or fetuses and placentas from the womb or use abortion pills." It is possible to state the following concepts.

According to the national guidelines on reproductive health services: "*Abortion is the active use of various methods to terminate an intrauterine pregnancy until the end of 22 weeks of age.*"²This view is considered the complete concept because it is outlined in a general and comprehensive way of abortion. Although the concept is not specific, it allows readers to understand that abortion is formed from two behaviors: using an intrauterine method of terminating a pregnancy and performing it until the end of 22 weeks. It is available because abortion is done by different procedures such as abortion pills, vacuum aspiration, and dilation-curettage and evacuation. With the constant development of medicine, many other methods may be applied soon. Additional views on the limitation of abortion, the mother has the right to abortion only when the fetus is from 01 day old to 22 weeks old. That regulation is a combination of Law and medicine.

According to experts, abortion is recommended only when the fetus is less than 22 weeks old and has a moderate size and weight. When the fetus was over 22 weeks old, the body parts were wholly formed, and the fetus was firmly attached to the uterine muscle layer. Abortion is now highly life-threatening to women. Although there are many views on abortion, there is something in common about the behavior of "intentionally using pregnancy termination measures by removing the embryo or removing the fetus from the uterus before the birth is due." The concept has ruled out abortion due to ectopic pregnancy. Ectopic pregnancy is required to be removed, so, in this case, abortion is considered a treatment.

Standard abortion methods include the following:

- Using abortion pills: This is a non-invasive intervention, only using drugs based on the natural miscarriage mechanism. This method is only used for pregnancies that are only 5-7 weeks of age. At this time, the embryo has moved into the uterus, and the mother does not have diseases such as coagulation disorders, or severe anemia, the body is not allergic to the ingredients of the drug, etc.
- Vacuum aspiration is the most used method. This is only used for pregnancies of 6 - 12 weeks of age, which have entered the uterus, and the mother has neither pathologies nor non-defective genitalia.
- Dilation - curettage and evacuation measure is taken for fetal cases between 13 - 18 weeks of age.

¹ Responding author

²Page 372, National Guidelines on Reproductive Health Services, attached to Decision No. 4128/QĐ-BYT dated July 29, 2016 of the Minister of Health.

How to determine gestational age: Obstetricians calculate gestational age based on the day the previous menstruation began. Determining the exact gestational age contributes to monitoring the development of the fetus, besides helping to apply appropriate abortion methods and procedures safely for each stage of pregnancy.

1.2. Factors influencing abortion decisions

Considered a part of the superstructure, relationships related to the marriage and family sphere are often dominated by elements of the substructure, such as socioeconomic, custom, morality, etc. Specifically, they are divided into the following groups:

- *The impact of socioeconomic development level: After 1986, with the development orientation of the Party, Vietnam determined to build a market economy with a socialist direction.* In addition to the positive aspects, such as promoting the process of industrialization, modernization of the country, or integration with other countries in the world, it also significantly affects social relations in general and legal relations in particular. At the same time, the differentiation of rich and poor is a normative trend in every society, especially in the market economy and the import of the Western lifestyle. When people, especially the young, do not have proper cognition, they quickly run their lifestyles, which is also one of the leading causes of unwanted pregnancy. As can be seen, the impact of the social economy also affects human psychology. With the hasty pace of life and the open-minded lifestyle, people began to break away from traditional moral conceptions. At this point, the personal finances of the mother will be one of the essential factors affecting the “retention” or “abortion” of the child.
- *The impact of traditions, customs, and social ethics: Although we have a more open view at present, social norms and traditional moral conceptions are still present in the thinking of East Asians.* Typically, about children, customs of male chauvinism, and preference for the oldest are considered the principles of conduct in family relations in Vietnam over thousands of years of feudalism.³ Confucian rites have constrained women within religious ceremonies, whose freedoms are often restricted, especially in marriage and childbirth. It is even more severe if they become pregnant unintentionally; they receive negative or violent things from people around them or their relatives. The affection between mother and children is a relationship of love and natural care but full of a sense of responsibility and obligation to society. In many cases, to ensure “honor” for themselves and their families, mothers are pressured by public opinion to force their children to adopt others. It is more reprehensible when they deprive the child of the right to life in the womb.
- *The impact of education and Law: To change this issue, education and training are essential for all countries and people⁴.* Education begins first among young people. To avoid unfortunate incidents from occurring, sexuality-health education courses are crucial. The most significant benefit is to help young people take measures to protect themselves from pregnancy when the body has not fully matured or from the transmission of sexually transmitted infections. One of the most objectionable reasons for abortion is that the sex of the child is inconsistent as the father or mother expected. It is because, in modern society today, there are still many backward views, such as perpetuating the family lineage or the sex of the child depending on the mother. Through social communication, especially in a loving environment as a family, scientific knowledge will contribute to changing backward thoughts and views, such as having a son to perpetuate the family lineage or the sex of the child. Although having many practical implications, sex education classes have not been included in the training program in secondary and high schools due to common hesitant psychology and the influence of closed living in East Asia. Therefore, it is necessary to have a standard mandatory adjustment tool that the Law introduces sex education programs in formal classes to ensure comprehensive implementation.

2. Provisions of applicable Law on abortion in Vietnam

2.1. Provisions of International Law on human rights

To study abortion, we first must explore issues related to fetal rights, especially the right to life, because these two issues are always in tandem. Indeed, the fetus’s life depends on the mother’s will. Motherly love is considered the religious sentiment of humanity. However, the mother was forced or willingly left her child for some reason. Moreover, as per human rights law, abortion is governed by individual rights without an agreement. The above issue will be seen through the provisions of ‘international law on human rights.’

³Phan Dang Thanh – Truong ThiHoa: *Matrimonial and family regimes - Once & Now*, Ho Chi Minh City General Publishing House, 2012, page 52.

Human rights are a category of natural rights, innate and inherent, independent of the will of the State. However, to ensure effective implementation in practice, the State must recognize and acknowledge it in national laws and international agreements (guaranteed by the State). The right to life is considered the most critical issue and is regulated in international human rights documents for a fetus who cannot exist independently from the mother. The 1948 “Universal Declaration of Human Rights (UDHR)” is a fine example. It is the first international document of high legal value focusing on human rights and freedoms. The contentious use of the word “born” means that negotiations have historically “indirectly” deprived a fetus of their human rights and have created controversial waves in the Member States. However, the human rights brief should not be construed in a narrow sense. The phrase “everyone” could mean comprehensively plus the fetus, for the Declaration refers to some passages about the human being. The Portuguese version of the standard replaces “everyone” with “human beings.” In addition, the right to life is not merely the integrity of life. It should include aspects that ensure the survival of people.

Under the above approach, ensuring the right to survival requires States to find ways to boost longevity while lowering child mortality. In broad terms, the steps taken include both passive and active actions⁵. Therefore, at the moment, the issue is whether the fetus (embryo) is considered to be a human being to enjoy the inherent rights. Religious researchers believe life begins at conception, and the source has human life, like every person born. From the above points of view, it is easy to see that although there are many negotiations about the human rights of the fetus, they need to be protected due to being a “prerequisite” for human biological development. From the perspective of international Law, most relevant regulations are directed toward safeguarding child subjects. Historically, since the fourteenth century, in Europe, there have been public projects for children (SpedaleDegliInnocenti hospital in Florent, Italy). Also, during this period in Asia, the Hong Duc Code of Vietnam established the responsibility of the people and local authorities to help disabled children and orphans who do not have a place of refuge, reduce sentences, and postpone the execution of penalties for pregnant women, women nursing children, etc.

An important legal event that has been in use since the beginning of the twentieth century, the legal term “child rights” was officially introduced in the 1924 “Geneva Declaration on the Rights of the Child.” In particular, CRC is the most basic and comprehensive international document on children’s rights. According to children’s rights experts, there are four basic principles underpinning the CRC, the first of which is: *Children are also human beings: This principle defines the equal status of children with adults in terms of the subject of rights. It affirms that children have the same values as adults and must be recognized and protected from an early age*⁶. From the first principle, there have been many controversial views on whether or not a fetus is considered a child or when human rights were applied. Most documents, such as UDHR, ICCPR, ICSCR, etc., do not provide the concept of time to determine the specific time for this issue. Returning to the CRC, under Article 1, children are persons under 18 unless provided by National Law. Thus, this is an open regulation in which the age of 18 is considered the standard but not fixed, mandatory for every country. In other words, this allows countries to specify the period considered as children maybe under 18. Therefore, the age at which children are considered may vary in different Member States. According to the above definition, CRC does not specify when children are considered children. Still, according to the Preamble, “...children need to be protected and cared for especially, including legal protection before and after birth”. This provision implies that the protection and care of children need to be done right “in the egg,” not until the time of birth.

A comparison of ECHR with other human rights documents proves that it is a very perplexing text. Firstly, as various other papers have done, it lacks restrictions on the imposition of capital punishment on pregnant women. Secondly, the revision of the standard, “everyone’s right to life shall be protected by law...” appears to point at a form of subjectivity and individualization (comprised in the term “everyone”) that is devoid of the following explanation of the moment of protection, causes valid misgivings and uncertainty. Because of the diversity of concepts, the drafters finally opted for an impartial version – (it stands to date) – to hold the signatory states accountable. Undeniably, this peripheral section is necessary to avert a continuous violation of article 2 of the ECHR. It’s noteworthy that countries are still accompanied by differences in their specific termination of pregnancy and reproductive engineering laws. The reality is that in the initial years of the Convention, those differences are more profound. Nearly all the signatory countries had laws permitting abortions before the ratification of the Convention and failed to create reservations under Article 64 of the

⁵Donna, Gomien (1993), *Extending the borders of human rights*, Vietnam National University Press, Hanoi.

⁶School of Law – Vietnam National University, Hanoi: *Curriculum of Law and Principles of Human Rights*, Vietnam National University Press, Hanoi, pp. 253 – 257.

ECHR to Article 2 thereof. This observation can serve as sufficient evidence to defend that in the first place. The ECHR has always been interpreted as not including the fetus.⁷

One of the contradictions between the rights of the fetus and the mother is posed by the fact that if a woman can be forced to keep a pregnancy against her will, does the mandatory retention of the child violate the mother's right to privacy and physical integrity? For a fetus to survive, it needs to exist in the woman's womb because nutrition is provided through activities of daily living and dependence directly on the mother. On the other hand, if the case is life-threatening, the choice to retain the mother or child remains is out of the legal corridor. Usually, the choice will depend on the specific issue and is governed by the relatives' will, primarily husbands.

In conclusion, from the above analysis, we can see that abortion is a medical activity that leads to the termination of the right to life of a fetus. Also, there are certain contradictions between the right to life of the fetus and the interests of the mother. In the current human rights law framework, we can conclude that the embryo in International Law is not viewed as a human person (since the natal birth requirement for one to be termed "a person"). Therefore, using human personality as a reference, we can say that it is a "potential person" but not a natural person. The apparent result is that the embryo does not qualify for human rights. However, this position does not mean that a source does not deserve any form of protection, which can be termed "objective protection." Thus, in international Law, there is still no consistency, and it is only toward fetal protection in some exceptional cases. The regulations on abortion are only of a caring, encouraging, and gradually perfecting nature in the country's laws.

2.2. Provisions on the sanction of abortion practices in criminal and administrative Law

The right to abortion was first recognized in Clause 1, Article 44, of the "1989 Law on the Protection of People's Health": "*1. Women have the right to abortion, as they wish;..*"⁸. This Law is the basis for acknowledging women's right to abortion. Thus, Vietnamese Law still allows women to have an abortion. However, there are still some instances in which the Law prohibits abortion, such as the provisions of Clause 2, Article 7 of the 2003 Population Ordinance guided by Clause 3, Article 10 of Decree 104/2003/ND-CP: "*Eliminating the fetus for reasons of sex selection using abortion, supply, use of chemicals, drugs and other measures*" is prohibited by Law. Thus, abortion is still agreed by Vietnamese Law according to the woman's will, but abortion is strictly forbidden because of the sex of the fetus.

In addition, according to Section 7 on Safe Abortion in Decision No. 4620/QD-BYT dated November 25, 2009, of the Ministry of Health, promulgating the "National Guidelines on Reproductive Health Services," all abortions more than 22 weeks are against the Law. According to the above provisions, all abortions of more than 22 weeks old or abortions due to the selection of the fetal sex are strictly prohibited. The Law only allows abortions of 22 weeks or less and must meet the health, technical and equipment conditions, etc., as detailed in Decision 4620/QD-BYT of the Ministry of Health.

Thus, it is seen that in Vietnam, it is not allowed to remove the fetus due to sex selection or it is over the prescribed age. In other words, if the abortionist does not violate the Law's prohibitions, abortion is still acceptable. However, it should be noted that abortion will affect health, psychology, and especially, the woman's life. Abortion must be performed in a good, state-licensed medical facility, not abortion anywhere, by any means.

Unauthorized abortion is considered the act of performing an abortion on another person without the permission of a competent authority, leading to death or severe harm to the person's health.

From a criminal law perspective, illegal abortion is a crime committed by abortion to another person without a practicing certificate or during the suspension of practice, provision of abortion services without an operation license or during the period of temporary suspension of activity, abortion beyond the scope of professional activities stated in the practice certificate or operation license; application of an unrecognized method of abortion. In the 1985 Penal Code, there was still no provision for abortion. The 1999 Penal Code marked the first step in recording the criminal sanction for an illegal abortion, Article 243 of the Penal Code states as follows:

Influenced and inspired by the 1999 Penal Code, the 2015 Penal Code (amended and supplemented in 2017) provisions on illegal abortion in Article 316 as follows:

Unlike the 1999 Penal Code, the 2015 Penal Code has quantified the damage caused to determine crimes. However, in the 2015 Criminal Code, there are only two penalty frames: "up to 3-year probation" or "imprisonment from 01 to 03 years". This is unsatisfactory because the category of "killing people" does not

⁷Vera LúciaRaposo, CatarinaPrata& Isabel Ortigão De Oliveira (2009): Human Rights in Today's Ethics: Human Rights of the Unborn (Embryos and Foetus)?, University of Coimbra – Portugal, p.101

⁸Clause 1, Article 44 of the 1989 Law on Protection of People's Health

equate with “harming health.” Apart from the provisions on illegal abortion as mentioned above in the 2015 Criminal Code, there are no other provisions governing the same acts. No regulation of the applicable Law on the issue of coercion of other people to have abortions is against the Law. Assuming that a woman is forced to have an abortion against her will by her husband or family and in the course of the abortion procedure leads to her death, what are the legal consequences? This behavior has causes and effects but is not governed by Law. Forced abortion has also violated the right to physical freedom, even leaving enormous mental damage. Vietnamese criminal Law is still missing this issue.

2.3. Provisions in relevant legislation

For fetal rights in the womb following the applicable Law, they are protected with some privileges such as property, labor, or regulations to safeguard the mother’s rights, precisely :

First, the rights of a fetus in civil Law are defined as natural rights. One of the typical rights we can have is the right to inherit. As per Article 613 of the 2015 Civil Code: These cases are substitute inheritance⁹, as well as Civil Law in Vietnam. The Civil Code in France regulates the substitute inheritance for the subordinate line. Thus, if the fetus has been formed before the deceased dies, then it is born and survives at the time of commencement of the inheritance, and the conditions for receiving the inheritance shall be satisfied.

Secondly, the rights of the fetus in marriage and family law. Under Clause 3, Article 51 of the 2014 Law on Marriage and Family stipulates that the husband has no right to request a divorce in case the wife is pregnant. The Law specifies that the fetus’s rights are protected during the mother’s pregnancy. In addition, the child born to the pregnant wife during the marriage is the ordinary child of the husband and wife (Clause 1, Article 88). This guarantees the right of the fetus to have a parent when they are born. In addition, Articles 94 to 100 of the Law on Marriage and Family in 2014 also specify pregnancy for humanitarian purposes. These provisions protect the rights and development of the fetus during the gestational period and the obligations of relevant persons during gestational surrogacy for adoption, guardianship, and support when the fetus is born in case of gestational surrogacy for humanitarian purposes.¹⁰

Thirdly, the rights of the fetus in labor law. The Labor Code in 2019 also has many regulations to protect pregnant employees. Point d, Clause 2, Article 35 on the “right to unilaterally terminate the labor contract of the employee” stipulates that pregnant employees must leave work as prescribed in Clause 1, Article 138 of this Code is one of the cases in which they have the right to discontinue employment without notice unilaterally; Clause 3, Article 37 stipulates the cases in which the employer is not entitled to unilaterally terminate the labor contract, including instances in which the female employee is pregnant, the employee is on maternity or breastfeeding a child under 12 months of age leave. In addition, the provisions from Article 137 to Article 141 of the Labor Code in 2019 on maternity benefits and mandatory restrictions when handling disciplines limit the rights of employers, protecting the rights of pregnant women and indirectly protecting the rights of the fetus.

Fourthly, “the rights of the fetus” in the Law on health insurance. As in the dependency relationship, the relevant regulations protect the formation and development of the child during the maternity leave of female employees. Health insurance is a form of non-profit health care implemented by the State to help people minimize health care costs, treatment, rehabilitation, etc. Pregnant women must participate in health insurance to ensure their best benefits. During pregnancy, health insurance will help pregnant women reduce the burden of periodic pregnancy examinations and the costs for the birth period later. As a result, pregnant women save a relatively stable price of childbirth and have better conditions to respond to possible risks. Many cases that need to be examined and treated for abnormal pregnancy or maternity complications will also be covered by health insurance. Conditions to enjoy maternity benefits for female employees giving birth, female employees who are gestational carriers, mothers requesting surrogacy, and employees adopting children under six months of age are stipulated in the Law on Social Insurance 2014 and related documents. Pregnant women who do not have health insurance can still participate voluntarily in the household insurance. After 30 days from the insurance payment date, pregnant women can use the health insurance card for pregnancy examination and will be covered by the insurance fund on a “case-by-case basis.”

In general, the applicable regulations relating to fetuses in Vietnam are incorrect compared to their importance. Still, they refer to the right to property for the fetus (the right of substitute inheritance). Compared to the “indirect” protection provisions, the “direct” provisions protecting the rights of the fetus, such as sanctions in affecting the abortion decision of the mother, are only “slight” administrative sanctions, such as violation of regulations on fetal sex selection, Acts of eliminating the fetus due to sex selection, violation of

⁹In the Chinese-Vietnamese sense, the word "substitute" means “replacement”.

¹⁰Nguyen Hoang Nam: *Provisions on embryos and fetuses in Vietnam*, Journal of Legislative Studies No. 09 (433), May 2021).

rules on the forced implementation of family planning, etc¹¹. To be licensed to establish a private abortion practice or procedure, the legal establishments must meet the conditions prescribed by the Ordinance on Private Practice of Medicine and Pharmacy. A private medical or pharmacy establishment that fails to meet the requirements specified by the Ministry of Health and the qualification certificate for personal medical or pharmacy practice shall have its certificate of eligibility for private medical or pharmacy practice revoked. When a practicing certificate holder violates the stipulations laid out by the Law on medicine and pharmacy, it shall be revoked.¹²

3. Recommendation on the improvement of the Law on abortion in Vietnam

Firstly, the right to life of a fetus should be appreciated and enforced urgently because the fetus is not only a subject protected by human rights but also the future of the nation and the planet. To implement this issue in practice, it is necessary to remove the distinction in the protection of subjects because every subject needs the safety of the Law, and the inherent right is the right to life. Changing the status of abortion and protecting the fetus's right to life is also a stepping stone for human rights in Vietnam to be developed more fully. Therefore, the author proposes to create a separate regulatory document that the "*Law on the protection of the rights of Vietnamese fetuses.*" It exercises strict control over this issue and also introduces cases of legal abortion, including "safe for the pregnant woman" and "humane for the fetus." The mother's life, health, and the baby's long-term development are considered a prerequisite for any other exceptions. At the same time, the competent entity making the diagnosis and deciding on the issue must meet the conditions of the Law on quality practice.

Second, developing criminal sanctions to regulate illegal abortions. It can be seen that the imprisonment penalty applied to point an of Article 316 of the Penal Code is unsatisfactory for the act of killing people but falls into the frame of 01 - 03 years of imprisonment under a less severe crime. To put it more clearly, it is necessary to develop specific penalty frameworks for each act according to the quantitative figures already in the 2015 Criminal Code. It is advisable to prescribe each penalty framework for each different behavior separately.

Third, in addition to stricter regulation of the conditions for providing abortion services, the Law will have to offer stricter regulation of the requirements for abortionists, including a voluntary commitment to abortion with the consent of the husband (if married) or the permission of the parents or guardians (if under 18 years of age); an identity card to identify the full name and place of residence; a subclinical confirmation of the diagnosis of pregnancy before the abortion procedure is performed. In particular, the requirements of gestational age and causes of abortion must be supplemented, such as to save the woman's life when the pregnancy is life-threatening; to protect the woman's physical health; to protect the woman's mental health; in cases of rape or incest; owing to an abnormal pregnancy, congenital impairments may influence the child's life later; economic or social reasons such as being unable to care for the kid, being too young, unmarried, or being in unacceptable circumstances; and There are no particular rules governing the age of abortionists at the moment. In actuality, though, the age of the abortionist is reviving.

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