



Abortion Law in Malaysia: Time to Review?

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Abstract. The legality of abortion varies among countries as abortion remains one of the most controversial and bitterly contested topics. The abortion debate on the right to life, right to choose, as well as the costs and benefits of abortion is rather polarised. The issue becomes more complex as different religious traditions hold different views on the commencement of life. Nevertheless, there has been an increasing number of countries taking a more liberal approach. At present, Malaysia being a multi-racial and multi-religious country generally prohibits abortion except in certain circumstances specified in the Malaysian Penal Code. With abortion rights gaining momentum in the society, there may be a need to reconsider the policy costs and benefits which raises the issue on whether Malaysia should review its current legal position on abortion. This article aims to examine whether Malaysia should adopt a more liberal approach towards abortion, especially on the scope of the circumstances that permit abortion. The article adopts the doctrinal research method, in which comparative legal analysis of the abortion laws of selected countries such as Singapore, United States and United Kingdom is conducted. For this purpose, the relevant statutes, case laws, international conventions and guidelines will be examined.

Keywords: Abortion, Malaysia, Legality, Penal Code, Termination of Pregnancy

1 Introduction

‘The decision to have an abortion is a deeply personal decision between a woman, her family, her doctor, her God; not her government, and not the public at large.’[1]
Margaret Hoover, American Conservative Political Commentator

Until the end of the 19th century, abortion was legally prohibited in the majority of countries around the world. The imperial countries played a crucial role in the sources of abortion law by imposing their restrictive abortion laws on their colonies. These countries include Britain, Italy, Portugal, Spain and France. There were three main grounds for restricting abortion: (1) to protect women as abortion was regarded as dangerous and harmful; (2) to deter abortion as it is viewed as a sin or immorality; (3) to protect the life of foetus in all or certain circumstances [2].

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Each year, it is estimated that there are 73 million induced abortions taking place worldwide [3]. Abortion rights is foundational to reproductive rights and justice granting women the right to determine whether to have children, allowing them to preserve a level of respect for their bodies and the decision on expanding the family. However, the abortion debate on the right to life, right to choose, as well as the costs and benefits of abortion is rather polarised. The issue becomes more complex as different religious traditions hold different views on the commencement of life. Being one of the most controversial and bitterly contested topics, the legality of abortion varies among countries. Nevertheless, there has been an increasing number of countries taking a more liberal approach towards abortion. At present, Malaysia being a multi-racial and multi-religious country generally prohibits abortion except in certain circumstances specified in the Malaysian Penal Code (“PC”). The Malaysian abortion law was last amended back in 1989. With abortion rights gaining momentum in the society, this article seeks to examine whether Malaysia should review its current legal position on abortion, especially on the scope of the circumstances that permit abortion.

The article adopts the doctrinal research method, in which comparative legal analysis of the abortion laws of selected countries such as Singapore, United States and the United Kingdom is conducted. For this purpose, the relevant statutes, case laws, international conventions and guidelines will be examined.

2. Abortion from The Legal Perspective (National Law)

2.1 Malaysia

Based on the Guideline of Termination of Pregnancy (TOP) that the Health Ministry published, abortion is defined as removal or expulsion of embryo or foetus from the uterus during pregnancy when it is incapable of independent survival. This refers to the stage where the foetus is 500 grams or 22 weeks gestation.

The current Malaysian population as of 2022 is estimated at 32.7 million with the female population comprising 48.01% of the population [4]. The Malaysian abortion law was established under the British Empire’s Indian 1871 Penal Code that criminalised abortion absolutely. In general, voluntary abortions are illegal pursuant to s 312 of PC, which criminalise any person which includes the pregnant woman herself who voluntarily caused miscarriage. However, this section does not extend to the registered medical practitioners who caused miscarriage in good faith if the continuance of the pregnancy would risk the women’s life or injure her mental or physical health, greater than the termination of pregnancy.

Good faith is a crucial requirement for a legal abortion as illustrated in the case of *Public Prosecutor v Dr Nadason Kanagalingam* [5]. Other than the woman herself, any person who assisted in or caused voluntary abortion against the woman would also be criminalised under s 312 of PC. It was determined in the case of *PP v Wong Ah Kean* [6] that the clinic assistant who caused the miscarriage of a woman who was more than 3 months pregnant, was imprisoned for 2 years.

Section 315 of PC laid down the exception that abortion is lawful if it was done in good faith to save the mother's life. Written consent of the mother must be obtained. In situations that involve Muslim couples, the husband's consent would also be required.

It is observed that pregnancy resulted from rape, sexual assault, or based on socio-economic reasons are not within the scope of permitted abortion in the PC. Moreover, health professionals are allowed to refuse terminating a pregnancy on the grounds of personal values or religious beliefs [7]. Therefore, legal abortion is not available upon a woman's request. Ultimately, the availability of a legal abortion lies with registered medical practitioners' assessment made in good faith. If the pregnant female is a minor, namely has yet to reach 18 years of age, TOP requires consent from the parents, or guardians. If the guardians are uncontactable, the minor's protector or the State may consent to her abortion.

When abortion was caused without the woman's consent, the offender will be guilty under s 313 of the PC. Similarly, if a person intends to cause the woman to miscarry and subsequently results in the woman's death, he would be liable under s 314 of the PC, regardless of whether the offender knew that such an act would likely to result in death. This is well-illustrated in the case of *Mary Shim v PP* [8] where the accused had inserted a stick into the pregnant woman's womb. It causes her to contract septicaemia, miscarry her baby and die from septic abortion. The accused was held liable for causing the miscarriage.

The Fatwa Committee of the National Council for Islamic Religious Affairs Malaysia had issued a number of fatwas permitting abortion up to 120 days of gestation: [9]

- (a) Abortion on the doctor's advice due to serious fetal impairment that endangers the mother's life (1990);
- (b) Abortion for rape victim where the foetus has serious impairment that endangers the mother's life (2002);
- (c) Abortion where foetus is affected by Thalassemia or it is a Thalassemia carrier and it endangers the mother's life (2002); and
- (d) Abortion when the mother is affected by Zika to the extent that endangers her life or abortion when the foetus affected by Zika will lead to serious impairment (2017).

Generally, it is forbidden to abort a foetus which is older than 120 days as it is considered to have been ensouled. Abortion will amount to committing a crime against the foetus in such a situation [10]. This is supported by the hadith (oral traditions attributed to the Prophet) narrated by Abdullah:

'Each one of you collected in the womb of his mother for 40 days, and then turns into a clot for an equal period (of 40 days), and turns into a piece of flesh for a similar period (of 40 days) and then Allah sends an angel...Then the soul is breathed into him.' [11]

Section 375 of Malaysian PC laid down situations where man has sexual intercourse with a woman are considered as rape. However, female who are below the age of 16 having sexual intercourse with or without her consent is deemed rape as victims of such young age could be easily exploited and influenced as they are still underage and immature. Therefore, the court has the duty in aggravating the sentence to protect young girls from the public without the need to prove consent to secure conviction [12]. Rape can also be established when a woman consented to sexual intercourse out of fear [13].

The question on whether a rape victim suffers greater physical or mental injury if the pregnancy is carried to term than termination of pregnancy, will ultimately be assessed by the registered medical practitioners in good faith. If the registered medical practitioners are of the view that continuance of pregnancy will be more harmful physically or mentally to the rape victim, then a legal abortion can be performed. In other words, pregnancy due to rape *per se* cannot be a ground for legal abortion unless the statutory criteria in the PC are met.

The rape victim would commonly suffer from urinary infections, swelling on the genital area, bruising around the vagina or sometimes suffers from sexually transmitted diseases such as syphilis, HIV, AIDS and others.

There are 30% of victims who had experienced one major depressive episode during their lifetimes after the occurrence of rape while 21% of the victims still experience major depressive episode at the assessment time. The victims would have a higher probability in developing substance abuse such as drugs and alcohol. There is also a rape trauma syndrome which is a form of specific version post-traumatic stress disorder (PTSD) occurred after rape that can be broken into 3 stages, which are acute, outward adjustment and resolution or integration [14]. In addition, the rape victims may face financial problem due to the unexpected pregnancy or even the risk of losing job. Given the health and social-economic impact on the rape victim, it may be timely to consider whether to widen the scope of permitted abortion under the PC.

2.2 Singapore

In Singapore, abortion is allowed if it is performed by an authorised medical practitioner on the request and with the woman's consent, or under health exceptions encapsulated in the Termination of Pregnancy Act 1974 (TPA), specifically s 3(3) which prohibits medical practitioners from carrying out termination of pregnancy unless it was immediately necessary to save the life of a pregnant woman.

Abortion is allowed on request provided that the pregnant woman is a Singaporean citizen or wife of a Singaporean citizen, a holder or wife of a holder of work pass issued under the Employment of Foreign Manpower Act 1990 or had been a Singaporean resident for at least 4 months before the treatment is to be carried out. Failure to comply with s 3 would render the offender liable of fine or imprisonment on conviction pursuant to s 3(4) of TPA. In contrast, the medical practitioner would not be found guilty if abortion was carried out upon the woman's request and with her written consent [15].

Abortion is prohibited if the pregnancy exceeds 24 weeks except in emergency situations to save the life or prevent grave permanent injury to the physical or mental health of the pregnant woman. It is also prohibited under circumstances where the pregnancy is more than 16 weeks but less than 24 weeks, unless the abortion is performed by a registered medical practitioner with the prescribed surgical, or obstetric qualifications or who possesses professional skill in abortion either in practice or holding appointments in approved institutions over the specified period.

Women allowed to undergo abortion are required to have mandatory counselling prior to the procedure and if she wishes for abortion procedure to be performed after receiving counselling, she can only do so when 48 hours have elapsed [16]. The case of *Bolam v Friern Hospital Management Committee* [17] laid down the test on standard of care where a medical practitioner would not be negligent if he acts in accordance with the practice deemed proper by other reasonable obstetricians and gynaecologists.

2.3 United States

Back in 1973, the US Supreme Court ruled in *Roe v Wade* [18] that the right to liberty guaranteed in the 14th Amendment to the US Constitution protecting personal privacy included the right to reproductive decision-making. Women were granted an absolute right to abortion in the first three months of the pregnancy and limited rights in the subsequent months. Abortion was held a fundamental right. Before viability, woman may decide whether to continue the pregnancy. The government has no right to prohibit abortion for any reason prior to viability.

However, in 2022, the Supreme Court overturned *Roe v Wade* in the landmark case of *Dobbs v Jackson Women's Health Organization* [19]. Justice Samuel Alito wrote the majority judgment that the US Constitution grants no right to abortion. The state regulation of abortion would be considered valid and sustainable when there is a rational basis the legislature could think it was to serve legitimate state interests.

In a 6-3 ruling, the abortion ban was reinstated by the US Supreme Court. This led to the shutting down of clinics granting abortion services turning abortion into a procedure that is only accessible to people that could afford to travel while the others would be forced to have illegal abortion. Some politically progressive states would have a high possibility of disregarding such abortion ban such as California and Washington while some states such as Texas and Mississippi would impose such ban swiftly [20].

Despite the development of abortion law in US, it would not have great impact towards abortion law in other countries considering that only 24 out of 195 countries prohibit abortion and it is now easily accessible as compared to the 18th century. The Council on Foreign Relations, 30 countries had amended their law legalizing abortion or granting an easier accessibility for one to get abortion services which had expanded through New Zealand, Switzerland, Togo, Micronesia, Asia, Europe and others [21].

2.4 United Kingdom

There has been a drastic change on the abortion law in UK as prior to the amendments made in 1837, UK imposed rigid law in regard to abortion which carried death penalty [22]. It was only after the amendments that abortion is punishable with life imprisonment. Another major step forward is when abortion was made legal by passing the Abortion Act introduced by David Steel, a UK politician to legalise abortion on certain grounds by registered practitioner with additional protection of free provision in National Health Service (NHS).

In England, Scotland and Wales, the Abortion Act 1967 allows termination of pregnancy to be done by a registered medical practitioner if they are in good faith deemed that: (a) where the pregnancy does not exceed 24th week and the continuance of pregnancy would involve greater risk of physical or mental health injury on the part of the woman or her children; (b) the termination of pregnancy will prevent grave permanent injury to the woman's physical or mental health; (c) the continuance of the pregnancy will threaten the pregnant woman's life; or (d) there is substantial risk that the child to be born would suffer from serious disabilities [23]. In determining the risk or injury to the physical or mental health of the pregnant woman, the registered medical practitioners can consider her actual or reasonably foreseeable environment. This provision is wide enough to include social pressure or economic concerns [24].

In November 2022, Heidi Crowter who suffered from down syndrome alongside Máire Lea-Wilson whose son had down syndrome contended that such law is discriminatory against disabled people and had contravened Article 8 of Human Rights Act on the right to respect of private life. The judges dismissed the appeal stating that there was no evidence showing discrimination within abortion law and the systems are in place to discourage any discrimination. The decision made was supported by Laura Hurley, the Communications Lead for Safe Abortion [25].

3 Abortion from The Legal Perspective (International Instruments)

3.1 European Convention on Human Rights (ECHR)

An unborn child is disregarded by ECHR as a person directly protected under Article 2 of ECHR, as it would implicitly limit the rights and interests of a pregnant woman. However, the ECHR did not rule out the possibility that safeguarding the foetus' right to life can be extended. In the case of *Vo v France* [26], the international human rights law recognised the basic rights as accruing at birth and it had established that prenatal protections shall be consistent or compatible with women's human rights.

3.2 Universal Declaration of Human Rights (UDHR)

Under the UDHR, Article 1 grants all human beings born free and equal in dignity and rights. The history of negotiations indicated that the term 'born' was used intentionally in order to exclude the prenatal application of the rights guaranteed in UDHR and

rejected the proposal of removing the term ‘born’. This showed their intention to exclude unborn babies.

3.3 International Covenant on Civil and Political Rights (ICCPR)

The ICCPR guarantees the right to life under Article 6(1). However, it is rejected that the said right extends to prenatal life. It is decided in *K.L. v Peru* [27] that the denial of therapeutic abortion constitutes a violation upon the women’s right to be free from cruel, inhuman or degrading treatment if the continued pregnancy would pose a significant risk to the life and mental health of the pregnant women.

3.4 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

CEDAW had explicitly laid down the fundamental principles of equality among all and non-discrimination that requires the rights of pregnant women to be prioritised over the interest of the foetus. As laid down in the case of *L.C. v. Peru* [28], the CEDAW Committee decided the right of the pregnant girl was violated when the right of a foetus was prioritised over her health.

Since the continued pregnancy would impose a substantial risk to her physical and mental health, the denial of therapeutic abortion and delay to provide surgery amounts to discrimination on gender basis and violated her rights to health and freedom from discrimination.

3.5 Convention on the Rights of Persons with Disabilities (CRPD)

The CRPD was enacted with the purpose of promoting, protecting and ensuring full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’.

The list of persons with disabilities includes persons with long term physical, mental, intellectual or sensory impairment where interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Article 5 of CRPD guarantees persons with disabilities equal and effective legal protection against discrimination on all grounds and prohibits state parties from discriminating against others on the basis of disability. Among the country that ratified CRPD is South Africa, which incorporated Article 5 of CRPD in their legislation namely the Choice on Termination of Pregnancy Act 1996 (CTPA). It allows abortion to the mother during the period up to and include the 20th week, if she is severely mentally disabled to the extent of being completely incapable to understand or appreciate the nature or consequence of her abortion.

There must be two medical practitioners or a medical practitioner with a registered midwife with the complete prescribed training course and consent of the mentally disabled mother’s natural guardian, spouse, legal guardian or curator personae.

4 Abortion from Social Perspective

4.1 Pro-Life View of Abortion

The pro-life view regarding abortion is that as a general rule, it shall be unlawful unless under special circumstances. The stance put up was that abortion would cause severe medical complications on the mother's life in the future. For instance, doubling the risk of ectopic pregnancy and increasing the chance of miscarriage pelvic and inflammatory disease [29]. Abortion is considered murder and it is considered as violating the unalienable rights of the unborn baby. There is inherent value in life and abortion destroys the value.

4.2 Pro-Choice View of Abortion

Based on Gallup, there are 56% of the people agreeing on abortion should only be legalised under certain circumstances such as to improve the quality of life as motherhood requires tremendous emotional capacities and raising children is one of the most conscious decisions that one could ever make [30]. It requires the parents to be emotionally and financially equipped in handling such situations. Contraception does not guarantee the prevention of unwanted pregnancy, thus, abortion must be made available to provide women with the right to freedom of choice. The 2018 National Academies of Sciences, Engineering, and Medicine report has found that legal abortion procedures are safe for women.

5 Recommendation and Conclusion

Among the challenges faced by Malaysians is access to information and services on abortion due to the confusion over the legality of abortion. Abortion is influenced more by moral consideration which includes personal stance, religious beliefs and social stigma rather than legal consideration.

In 2007, the Reproductive Rights Advocacy Alliance Malaysia (RRAAM) conducted a survey among 120 doctors and nurses. It revealed that 43% of the respondents were unsure of the ground of legal abortion, while 41% of the women who underwent legal abortion in private clinics were unaware of what situations an abortion is allowed.

It was estimated that about 100,000 abortions happened each year and the fees charged by private providers ranged from RM 700 to RM8,000 per procedure as there are no regulations regulating such fees [31].

Women, including girls who have yet to attain the majority age must be provided with unbiased and comprehensive information or resources in regard to sex, abortion, contraception and sexually transmitted diseases. Apart from introducing the Reproductive and Social Health Education (PEERS) Programme into the National Service curriculum, a greater length of initiative must be taken by the government to educate Malaysians, especially minors on such matters. Proper sex education should be

provided alongside safe sex discussion to ensure people are aware of their reproductive rights and would be able to make informed decisions.

Section 312 of PC was amended back in 1971 to allow abortion when the life of the woman is in danger. Eighteen years later, the amendments included legalising abortion to protect the woman's physical and mental health. The term 'good faith' under s 312 of the PC ultimately grants the registered medical practitioners the discretion to determine whether abortion is allowed.

The current law governing abortion in Malaysia is rather restrictive. It does not place the choice about an abortion in the hands of the woman even if the pregnancy is caused by rape or incest, or the foetus is diagnosed to be fatal shortly after birth. The woman is not spared from continuing with the pregnancy if the registered medical practitioners in good faith find that the possible physical or mental injury of continuing the pregnancy is not greater than termination of pregnancy.

In 2013, a group of lecturers from the Faculty of Medicine, University Malaya conducted a study by recruiting 279 respondents comprising medical staff from public hospitals all around Malaysia. The results showed that 9.3% of respondents strongly agreed that abortion should be legalised to make it available based on the mother's demand while 19.4% of the respondent agreed to it. On the other hand, 43.4% of respondents disagreed or strongly disagreed with such an approach. The majority opined that legal abortion should be extended to women who are pregnant due to rape or incest. The majority of 59.5% holds the view that abortion should be legalised for pregnancy resulted in due to rape or incest. [32]

According to a survey conducted by a group of academicians and specialist in 2013, with representatives from Johor which has the 4th largest number of thalassaemia patients in Malaysia, religion plays an important role in determining the termination of pregnancy. There were 73.4 % of the Muslim against termination compared to 25 % of Christians and 13.3 % of Buddhist [33].

Therefore, it is submitted that Malaysia should consider widening the scope of permitted abortion under s 312 of the PC, by taking into account pregnancy caused by rape or incest, or the foetus is suffering from severe disabilities. This may be challenging but it is possible, since the existing fatwas in Malaysia impose certain restrictions on abortion but at the same provide some exceptions. Though abortion is still considered illegal in general, a more liberalized approach should be taken.

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