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Decriminalizing abortion in South Korea: the role of the Constitutional Court and the National Assembly

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Contents

Introduction

At the time of this writing, the world is witnessing a historic setback for women's rights in the United States as the Supreme Court has repealed its longstanding Roe v. Wade judgment, thereby allowing severe restrictions to women's access to abortion services to be enacted by federal states once again. The outrage this decision has sparked demonstrates how polarizing the topic remains, even in countries that are thought to have securely locked down the right to abortion decades ago. Meanwhile, in South Korea, the past few years have seen sudden developments in the abortion debate, yet trending in a different direction. These developments have culminated in the decriminalization of abortion as of 2021. Similarly to what took place in the United States, the verdict of a Constitutional Court was the primary factor in this movement. South Korea's Constitutional Court declared in April 2019 that the penal code's provisions on abortion, in existence since 1953, were unconstitutional. As of January 2021, the "crime of abortion" (낙태죄) can no longer lead to prosecution, neither of the mother seeking abortion (or inducing it herself) nor of a medical doctor performing the procedure.

The case of South Korea's abortion decriminalization offers an interesting example of democracy at work. It was in fact a petition submitted and signed by citizens on the Blue House website that prompted the executive branch (the Mun Chae-in administration at the time) to address the growing debate on the topic and suggest revision of the existing legislation. Not long after this, the Constitutional Court declared the legislation unconstitutional, cementing the necessity for amendment by the legislative. Thus, different actors – civil society as well as the executive, judiciary, and legislative branches – all contributed to some extent and within a relatively short time to the eventual repeal of a longstanding and somewhat dormant statute. Yet, it is simultaneously undeniable that - just like in the United States - the topic remains highly divisive as conservative and religious voices have opposed amendment to the penal code. This thesis will focus on these recent developments in the abortion debate, in particular the constitutional review and legislative amendment procedures, in order to answer the question: How did South Korea decriminalize abortion? More specifically, what were the main issues and arguments in the abortion debate, both on the judiciary and legislative level, that have eventually led to the decriminalization of abortion? This thesis will also discuss the failure – thus far – of the legislative branch to reach a consensus on the amendment of the Criminal Code's relevant provisions, let alone to enact effective legislation to regulate legalized abortion. The scope of this thesis will not, however, extend to discussing the ramifications and effects of the legalization of abortion and ensuing legal vacuum on South Korean women and society.

This thesis will firstly include a review of the history of abortion in South Korea - limited to the period following its prohibition in 1953 – and overview of the scholarly discussion assessing the country's

abortion legislation and legal reasoning of the Constitutional Court in its first review of the abortion ban in 2012. Following this, the methodology will briefly be explained. This thesis will then examine different actors' contributions to the decriminalization of abortion. Due to time and space constraints, this thesis will focus on the judiciary and the legislative, as the Constitutional Court decision can arguably be considered the key catalyst without which the statements of the executive might have turned out to be an empty promise, especially after the election of a more conservative administration.

Literature review: History of South Korea's abortion ban

The act of inducing one's own abortion or having a medical professional perform abortion was criminalized in 1953. This was a blanket ban concerning all abortions under any and all circumstances. One of the relevant provisions of South Korea's Criminal Code enacted that year stated that a pregnant woman who induced abortion through the use of drugs or other means may be fined or be punished by a prison sentence of up to one year. A person found guilty of helping a pregnant woman abort with her permission was to be subject to the same punishment. If the actions of this person lead to injury or death of the pregnant woman, they may be sentenced to respectively up to three years or up to seven years in prison.[1] This provision (article 269) was slightly amended in 1995 to reflect changes in language use and update the value of the aforementioned fine to 2 million won (currently roughly 1500 euro), but the content has otherwise remained unchanged since 1953.[2] Article 270 of the Criminal Code stated that any medical professional, such as a doctor or a midwife, found guilty of performing an abortion at the request of a pregnant woman was to face up to two years in prison. If the abortion was carried out without consent of the pregnant woman, the maximum prison sentence was increased to three years. In cases of the procedure leading to injury or death of the patient, the medical professional could be sentenced to, respectively, up to five years and up to ten years in prison, with their medical qualifications concurrently being revoked for no more than seven years.[3] Again, the 1995 amendment to this provision only brought minor changes in wording.[4]

In 1973, the Mother and Child Health Act (모자보건법) introduced specific exceptions to the general ban on abortion as set out in the Criminal Code.[5] Article 8 ("limits of permission for induced abortion procedure", now article 14) allowed for medical doctors to perform an abortion only in cases where one of the following conditions applies: 1) the woman or her spouse suffers from a genetic mental or physical disorder, 2) the woman or her spouse suffers from an infectious disease, 3) the pregnancy is the result of rape or "quasi-rape"[6], 4) the mother and father are blood relatives who may not legally marry, or 5) the pregnancy is seriously harming or likely to harm the health of the pregnant woman. The conditions that qualify under 1) and 2) are further specified through presidential decree, the Enforcement Decree of the Maternal and Child Health Act (모자보건법 시행령). The presidential decree was revised in

[1] Hyŏngbŏp (Penal Code) 18 September 1953, art. 269.
[2] Hyŏngbŏp (Penal Code) amended by Act. No 5057, 29 December 1995, art. 269.
[3] Hyŏngbŏp (Penal Code) 18 September 1953, art 270.
[4] Hyŏngbŏp (Penal Code) amended by Act. No 5057, 29 December 1995, art. 270.
[5] Mojabogŏnbŏp (Mother and Child Health Act) 8 February 1973.
[6] As a legal term, "quasi-rape" refers to rape in situations where the perpetrator takes advantage of the victim's reduced mental and/or physical ability to resist (typically when intoxicated) as opposed to rape through the use of violence or threats. '준강간죄 의미' (*LawTalk*) <https://www.lawtalk.co.kr/posts/39076> accessed 30 August 2022.

2009 to considerably shorten the list of relevant genetic conditions, now only mentioning achondroplasia (which causes dwarfism), cystic fibrosis, and "other hereditary diseases with a high risk to the fetus". As for infectious diseases, the decree now lists "rubella, toxoplasmosis, and other infectious diseases with a high medical risk to the fetus". Furthermore, the time frame for performing a legal abortion was reduced to 24 weeks from conception.[7] These amendments were intended to reflect progress in medical science allowing for a fetus to be viable outside the womb around the 24-week mark, as well as the growing number of diseases that are now considered curable or treatable and thus no longer pose a significant threat to a potential child.

Article 14 (previously 8) of the Mother and Child Health Act also specifies that when a pregnancy may be ended for one of the aforementioned reasons, the permission of both the woman and her spouse is required for the procedure to take place. Abortion at the sole request of the pregnant woman is only permitted if her spouse is deceased or declared missing. If the pregnant woman and/or her spouse are unable to legally consent to abortion due to mental disability, permission may be granted by a parent, guardian, or caretaker. Again, while the law was amended in 2009, no significant changes to the content were made.[8]

Some of the problematic and ambiguous aspects of this legislation have been pointed out by scholars. For example, Cho argues that the scope of the term "spouse" (배우자) in article 14 is unclear: as a legal term and in this specific context, it is understood as referring to the man legally married to the pregnant woman. However, considering a number of the exceptions to the ban on abortion focus on hereditary conditions, it would be more sensible to focus on biological parenthood rather than the marital relationship between mother and spouse, since pregnant women are not necessarily married to the individual they conceived with.[9] If the term "spouse" must be understood as solely referring to the legally married partner, this also means that it would be impossible for an unmarried pregnant woman to fulfill the requirement of obtaining permission. Yet if the term is meant to more broadly include the biological father, it may mean that women impregnated due to rape would need to obtain permission for abortion from their aggressor. It is unclear whether the legislative at the time considered these situations in which a pregnant woman may be confronted with the impossibility of obtaining an abortion even when one of the exceptions may be applicable.[10]

[7] Mojabogŏnbŏm shihaengnyŏng (Enforcement Decree of the Maternal and Child Health Act) amended by Act No. 21618, 7 July 2009, art. 15.
[8] Mojabogŏnbŏp (Mother and Child Health Act) amended by Act No. 9333, 7 January 2009, art. 14.
[9] Cho Hong-sŏk, '낙태죄와 임신중절의 문제' (2018) 18 법학연구 175, 180.
[10] ibid 180–181.

Furthermore, Cho views the delegation[11] of legislation – where the Mother and Child Health Act orders certain exceptional health conditions to be further determined by presidential decree - as problematic, arguing that the scope of delegation should be more specifically limited in the Act. While the Act seemingly only allows for certain health conditions to be further determined by presidential decree, the decree in question also states the time limit within which a woman may seek an abortion. This seemingly falls outside of the delegation scope allowed by article 14 of the Act. Moreover, as discussed above, article 15 of the Enforcement Decree of the Maternal and Child Health Act goes on to list conditions allowing abortion in rather broad terms ("other hereditary/infectious diseases"). While this may be interpreted as leaving the decision of whether a specific condition is to fall under this umbrella up to the discretion of the medical doctor, it is nevertheless too broad and vague in the context of criminal legislation as it prevents a pregnant woman and her doctor from being able to determine with certainty whether performing abortion due to a specific health condition falls within the scope of allowed exceptions, or whether they run the risk of prosecution.[12] In this same vein, the condition of "harm to the health of the pregnant woman" is insufficiently clear, as this may or may not include a woman's mental health.[13]

Not only has the relevant legislation as listed above raised questions regarding its structure and degree of predictability, the content of the provisions has also been deemed incompatible with women's rights guaranteed through binding treaties South Korea has ratified, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).[14] While these treaties do not mention a right to terminate pregnancy, Wolman argues – in agreement with the UN - that the criminalization of abortion does infringe upon or at least hinder the safeguarding of fundamental rights such the right to life and right to health, as the absence of legal abortion means abortions will be performed secretly in potentially unsafe conditions, not uncommonly leading to complications or even death.[15] Wolman also posits that South Korea's anti-abortion legislation has a discriminatory effect – which, according to international human rights law, is possible even if a law "appears gender-neutral on its face" – because in practice, the law obviously lays a heavier burden on women than on men. This is of course to an extent unavoidable due to the ability to bear children being exclusive to women. Denying a woman the right to have an abortion when she does not wish to bear a child may however also perpetuate discriminatory outcomes such as "reinforcing women's traditional role" and "continuing their dependency on men or on the state". Additionally, one

[11] 'Delegate' (*Legal Information Institute*) <https://www.law.cornell.edu/wex/delegate> accessed 30 August 2022.
[12] Cho Hong-sŏk (n 9) 181.
[13] ibid 182.
[14] Andrew Wolman, 'Abortion in Korea: A Human Rights Perspective on the Current Debate over Enforcement of the Laws Prohibiting Abortion' (2010) 9 Journal of International Business and Law 153, 163.
[15] ibid 164–167.

could also argue that forcing a woman to bear a child against her will constitutes a form of cruel and inhuman treatment, as prohibited under the ICCPR and the Convention Against Torture. Wolman also suggests that the right to abortion may be motivated based on the right to privacy as reproductive choices are increasingly acknowledged as belonging to the sphere of a woman's personal life, but remarks that this has so far not been a commonly used argument by human rights bodies on an international level.[16]

While the original prohibition in 1953 constituted a strict blanket ban, the law has historically rarely been enforced - even during the time no exceptions were legally allowed. This is in large part linked to South Korea's history of family planning policies. The country is considered a successful example of the use of family planning for population control, as it went from an average of 6 births per woman in 1960 to a fertility rate of 1.6 children per woman in the 1990s.[17] The Korean Family Planning Association (대한가족계획협회),[18] hereafter KFPA, was founded in 1961 under the Pak Chŏng-hŭi administration due to concern that the sustained rapid population growth was hindering economic progress. Starting in 1962 with a family planning program under the slogan "fewer children, more prosperity", the KFPA helped achieve significant reductions in population growth over the course of several decades through the implementation of family planning policies, which focused on providing contraceptive services.[19] These policies went as far as to facilitate access to de facto abortion despite the contents of the Criminal Code. Alongside measures such as propagating contraception methods and designing policies disadvantageous to large families,[20] the Korean government subsidized the costs of a procedure termed "menstrual regulation" (월경조절), focusing in particular on impoverished rural areas.

This method, first introduced in South Korea in 1973, was described as being "performed on women who are at risk of becoming pregnant by aspirating the contents of the uterus, before conducting a pregnancy test".[21] The procedure was to be carried out within two weeks following a woman's missed menstruation. The KFPA itself described it as an "intermediary operation/procedure", as it took place after the moment of potential conception, yet before a woman was established to be pregnant. Thus a woman undergoing "menstrual regulation" may not necessarily be pregnant. Because of this, the KFPA reasoned the procedure had a preventative function and lumped it together with contraceptive

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[16] ibid 171.

[17] Chi Sŭng-kyŏng, '대한가족계획협회의 초기 임신중절로서의 월경조절술(Menstrual Regulation) 제공에 대한 연구(1974-1990): 국가의 위법적 재생산 정책에 대한 소고' (2019) 36 여성학논집 121, 128; Heeran Chun and Monica Das Gupta, 'Gender Discrimination in Sex Selective Abortions and Its Transition in South Korea' (2009) 32 Women's Studies International Forum 89, 90.

[18] Currently named Population Health and Welfare Association (인구보건복지협회) since 2004.

'인구보건복지협회' (*Namu Wiki*, 25 June 2023)
<https://namu.wiki/w/%EC%9D%B8%EA%B5%AC%EB%B3%B4%EA%B1%B4%EB%B3%B5%EC%A7%80%ED%98%91%ED%9A%8C> accessed 30 June 2023.

[19] Chun and Das Gupta (n 17) 90.

[20] Chi Sŭng-kyŏng (n 17) 129.

[21] ibid 127.

methods.[22] Nonetheless, because this method was considered a "grey area" – the KFPA itself admitting that it was not entirely clear how "menstrual regulation" could be differentiated from abortion – and thus legally on shaky ground considering the unforgiving content of the Criminal Act, the KFPA was one the main proponents of the Mother and Child Health act as this allowed for the legalization of the procedure at least in a number of cases without needing to amend the penal code.[23]

According to Chi, the KFPA's wide implementation of family planning policies including the use of the menstrual regulation procedure was solely intended as a means of fulfilling population growth reduction quota, rather than being focused on women's reproductive health and safety. Chi discusses how the KFPA's own reports at the time show a complete disregard for any considerations – such as the impact on women's physical and mental health or the reasons for the lacking use of contraceptive methods – beyond the concrete impact of the widened use of "menstrual regulation" on the country's fertility rate. The KFPA and the Ministry of Health and Social Affairs pushed for partial legalization of abortion through the Mother and Child Health Act so that "menstrual regulation" could be widely implemented.[24] To this end, KFPA actively promoted this procedure without any mention of possible negative ramifications or ethical considerations. While the Mother and Child Health Act only allowed for a restricted number of exceptions to the ban on abortion, the KFPA largely ignored this caveat and treated the procedure as being legal.[25]

Considering the wide availability of abortion in early stages under the euphemism "menstrual regulation" and its promoted use on the same level as preventative contraceptive methods or even in place of contraception, it is hardly surprising that abortion was anything but rare during these decades. Initially, surveys conducted in the 1960s estimated the percentage of women to have undergone abortion at least once to be as high as 33 or 34%.[26] Considering discrepancy between law and practice was already quite significant, debates among professionals regarding whether abortion should therefore be legalized in some form took place in as early as 1965.[27] Due in large part to the influence of the KFPA and the propagation of "menstrual regulation", the percentage then continued to steadily rise over the decades, culminating in 1991 at 54% - meaning 54% of surveyed women between 15 and 44 years old, nationwide, claimed to have experienced abortion at least once.[28] The "menstrual regulation" procedure was widely practiced up until the 1990s.[29]

[22] ibid 135–136.
[23] ibid 129.
[24] ibid 132–133.
[25] ibid 135–136.
[26] Chŏn Hyo-suk and Sŏ Hong-kwan, '해방 이후 우리나라 낙태의 실태와 과제' (2003) 12 의사학 129, 134.
[27] ibid 135.
[28] ibid 137.
[29] Chi Sŭng-kyŏng (n 17) 131.

While the KFPA considers the use of menstrual regulation to have occurred on a voluntary basis, the association did have quota to fulfill, aiming for a certain number of women to operate on each year and usually surpassing the target quota.[30] For this reason, Chi argues the implementation of family planning policies during this time amounted to state-sanctioned violence against women - as there was a much heavier focus on making women undergo menstrual regulation or tubal litigation than on men having vasectomies, for example - and violation of their right to health. Chi finds there has as of yet been insufficient public reflection on a national level regarding this morally questionable aspect of South Korea's history with abortion.[31] As Kim remarks, in South Korea - unlike in the United States for example – abortion has mainly constituted a political and economic consideration for the government, rather than an issue tied to religious belief or morality.[32] Kim agrees with Chi that the state's approach to family planning has been disproportionally focused on women's bodies as a tool for population control rather than on women's wellbeing.[33]

The enactment of the Mother and Child Health Act, which brought about a legal basis for abortion in a limited number of scenarios, was not without controversy even at the time, as it was submitted and passed by the emergency State Council put in place by Park Chunghee following his dissolution of the National Assembly, declaration of martial law, and approval of the highly authoritarian Yushin Constitution. The status of legislation enacted during this period was uncertain since there was no room for political debate, and legislation created by an appointed rather than democratically elected organ can hardly be considered to reflect the will of the people.[34] There was barely any awareness of abortion among the general population. The opinions of women on the subject were also considered irrelevant.[35] Nevertheless, the Park administration and the following authoritarian government under Chun Doohwan further attempted to expand the grounds for legal abortions on several occasions in the late 1970s and 1980s, only to be met with backlash from religious circles.[36]

Another significant reason – closely tied to family planning policies - for the relatively high abortion rates throughout the second half of the 20th century despite its criminalization, was the phenomenon of male child preference. Rooted in the belief that having a son ensures continuation of the family lineage and care of the parents in old age (while daughters leave their family after marriage), sons have generally been more valued than daughters in Korean society. As a result, during the time the Korean government encouraged limiting the number of children born within one family, South Korea saw higher birth rates for boys due to the introduction of technology for prenatal sex selection in the 1980s which made sex

[30] ibid.
[31] ibid 152.
[32] Sunhye Kim, 'Reproductive Technologies as Population Control: How Pronatalist Policies Harm Reproductive Health in South Korea' (2019) 27 Sexual and Reproductive Health Matters 6, 7.
[33] ibid 8–9.
[34] Chŏn Hyo-suk and Sŏ Hong-kwan (n 26) 135.
[35] Chi Sŭng-kyŏng (n 17) 134–135.
[36] Chŏn Hyo-suk and Sŏ Hong-kwan (n 26) 136.

selective abortions possible.[37] This practice was even encouraged by the KFPA, using testimonials from women who felt shamed by their families for giving birth to a daughter and promoting "menstrual regulation" as a way of avoiding this disappointment.[38] Although the use of screening technology for sex identification was outlawed in 1987, the sex ratio remained skewed well into the 1990s as the law was barely enforced.[39] The ban on these screening technologies was declared unconstitutional in 2008.[40]

The civil society debate on the topic of abortion did not properly start until around 2010.[41] That year, an organization of "pro-life" doctors filed a criminal complaint against a number of obstetricians and gynecologists they suspected of habitually performing illegal abortions. This sparked protest from women's right organizations who defended access to abortion.[42] South Korea's major human rights advocacy groups, on the other hand, did not address the issue.[43] The public debate was further stirred by the conservative Yi Myŏng-pak administration at the time suggesting plans to crack down on illegal abortions and enforce the existing prohibition when this had historically rarely been done. Proponents of this tougher approach either viewed it as a necessary measure to increase the country's fertility rate – which, by 2009, had become the world's second lowest at 1.22 – or were obstetricians who objected to performing abortions for religious and ethical reasons.[44] During his time, the cost of undergoing an abortion in a clinic skyrocketed and fake medical abortion pills were traded on black markets, profiting from the fear that obtaining an illegal abortion would soon be more challenging and risky than it already was.[45] A few years earlier, the government had already removed contraceptive measures from the national health insurance coverage, in line with its pronatalist policies.[46] While human rights groups remained silent, the government's renewed anti-abortion stance did prompt a number of Korean women's rights groups to vocally oppose the criminal punishment of women for having abortions, stating that the government's intentions demonstrate women are considered "instruments for childbirth rather than human beings with reproductive rights".[47] Wolman argues that enforcing the law more consistently at this particular point in time would violate the principle of non-retrogression, a human rights law principle which proposes that while a state cannot necessarily be expected to observe every internationally recognized human rights to the fullest as soon as it ratifies a treaty pertaining to those rights, a state should at least show progressive developments – rather than regression - towards

[37] Chun and Das Gupta (n 17) 89.
[38] Chi Sŭng-kyŏng (n 17) 138.
[39] Chun and Das Gupta (n 17) 94; Wolman (n 14) 157.
[40] Wolman (n 14) 158.
[41] Chi Sŭng-kyŏng (n 17) 134–135; Wolman (n 14) 153.
[42] Pak Ch'an-kŏl, '공법: 낙태죄의 합리화 정책에 관한 연구' (2010) 27 법학논총 199, 199.
[43] Wolman (n 14) 156.
[44] ibid 154.
[45] Kim (n 32) 9; Yang Hyŏn-a, '낙태죄 헌법소원과 여성의 "목소리": 낙태경험에 대한 인식을 중심으로' (2013) 30 법학논총 5, 6.
[46] Kim (n 32) 9.
[47] Wolman (n 14) 154.

increasingly greater human rights protection. While there is no international treaty protecting women's right to have an abortion, Wolman finds that a crackdown on abortions would nonetheless amount to a reduction of other internationally agreed upon rights, such as the right to privacy, health, freedom from discrimination and cruel or inhuman treatment.[48] Additionally, in line with Wolman's prediction, the UN Committee on the Elimination of All Forms of Discrimination Against Women urged South Korea, in 2011 and again in 2018, to repeal the provisions prescribing criminal punishment for abortion.[49]

Amidst this newly growing debate, a Korean midwife filed (in 2010) a petition with the Constitutional Court of South Korea challenging the constitutionality of the Criminal Code's prohibition on abortion.[50] In 2012 the Court responded to this petition with a split-decision, with four judges ruling that articles 269 and 270 of the Criminal Code were constitutional, while another four judges found that they were unconstitutional if interpreted to prohibit even first-trimester abortions. Since a minimum of six votes are needed to pronounce a statute unconstitutional, the review was unsuccessful and the prohibition on all abortions other than those specified in the Mother and Child Health Act remained in effect.[51]

Several scholars have discussed the problematic or inconsistent aspects of the 2012 ruling. For example, the reasoning that any fetus should be protected and granted the right to life because it has a "high potential to develop into a human" in the absence of adverse circumstances was pointed out to be lacking: both McGuire and So argue that this natural development into a viable human being is far from evident and is dependent on a number of factors. A considerable proportion of fetuses do in fact lack the potential to ever become a human being. This standard is thus too broad and simplistic. Yet the Court did not see the right to life as being at all dependent on the timing of a fetus' viability outside the womb or whether it has developed consciousness. The Court ruled that all fetuses were to be considered equally deserving of a fundamental right to life by virtue of constituting potential human beings.[52]

As McGuire points out, however, this is inconsistent with the more utilitarian nature of the exceptions granted by Article 14 of the Mother and Child Health Act. Acknowledging that in some case, a "cost-benefit reasoning" can motivate an exception to the ban on abortion means that a fetus' fundamental right to life is not in fact absolute or worthy of the exact same protection as a born human's life.[53] Similarly, the pragmatic reasoning that, according to the Court, the punishment for abortion as a crime remains necessary to avoid abortion becoming even more prevalent, is quite different in nature to the argument of a fetus' right to life stemming from its inherent potential to become a human being.[54] Not only does this argument move away from a morality based perspective, it is also factually incorrect, as

[48] ibid 171–172.
[49] Cho Hong-sŏk (n 9) 177.
[50] Hŏnbŏpchaep'anso (Constitutional Court) August 23, 2012, 2010Hun-Ba402.
[51] John McGuire, 'Should Abortion Be Decriminalized in Korea?' (2018) 21 한국의료윤리학회지 129.
[52] ibid 133–135.
[53] ibid 136.
[54] ibid 133.

several scholars have pointed out: the yearly number of abortions in South Korea is anything but low despite the criminalization of the procedure.[55] In 2010, Pak claimed the yearly number of abortion may be anywhere between 346,000 and 2,000,000: due to the vast majority of abortions taking place in secrecy, the numbers are challenging to estimate and not published officially but by various different sources.[56]

McGuire argues that the discussion on abortion and the extent to which it should be permitted cannot be solved through a moral rights based approach – as the woman's right to self-determination and the fetus' right to life will always be fundamentally incompatible in this regard – and instead necessitates weighing the costs and benefits of abortion legislation.[57] In stark contrast, Cho concludes in his work that abortion is a moral issue at its core. Its legalization should not be spurred by legislators or public opinion, nor dependent on government policies for population control, but should instead entirely depend on the decision of the Constitutional Court (which had not yet taken place at the time of his writing) and its interpretation of the right to human dignity granted by article 10 of the South Korean Constitution. While Cho acknowledges a balance must be found, he ultimately places the emphasis on the state's duty to adequately protect human life as being the primary aim of legislation on abortion.[58] Kim agrees with Cho to the extent that women's access to abortion should not be dependent on population control policies, but bases this conclusion on the state's failure to effectively and consistently safeguard women's reproductive health and basic human rights, rather than on the state's responsibility to protect unborn human life and recognize the human dignity of a fetus.[59]

In August 2017, the new administration in South Korea, headed by then-president Mun Chae-in, announced that it would respond to any petition that receives more than 200,000 signatures. The following month it received a petition, signed by more than 235,000 citizens, calling for "the decriminalization of abortion and legalization of abortion pills". These proponents of decriminalization consider abortion to be a personal matter covered by women's right to self-determination. In response, the Secretary for Civil Affairs, Cho Kuk, announced that the government would launch a fact-finding study in 2018, collect opinions, and examine the reasons for Korea's ban on abortion. In acknowledging "the glaring disparity between the strict law and actual practices" regarding abortion in Korea, Cho's remarks were understood as hinting that the Mun administration would endeavor to revise Korea's existing abortion law, prompting religious and pro-life groups to speak out in defense of this law.[60]

[55] ibid 138–139.
[56] Pak Ch'an-kŏl (n 42) 200.
[57] McGuire (n 51) 139.
[58] Cho Hong-sŏk (n 9) 187–188.
[59] Kim (n 32) 10.
[60] McGuire (n 51) 131; Cho Hong-sŏk (n 9) 177.

In 2017, another case[61] was submitted for constitutional review via a petition by a Korean doctor facing prosecution for performing abortions.[62] This case, concluded in 2019, will be discussed in the following chapter on the Constitutional Court's judgments.

[61] Hŏnbŏpchaep'anso (Constitutional Court) April 11, 2019, 2017Hun-Ba127.
[62] McGuire (n 51) 131.

Methodology

The aim of this thesis is to analyze the judicial and legislative processes of the legalization of abortion in South Korea, in order to evaluate how and why decriminalization has taken place. This will be achieved in two parts. Firstly, I will compare and contrast the 2019 Constitutional Court review on the Criminal Code's abortion provisions with its 2012 review of the same law. This analysis will focus on the main themes recurring in these reviews and how the Court's approach to these themes has fundamentally evolved and thus lead to ultimately declaring the provisions on abortion unconstitutional. Concurring and dissenting opinions in both the 2012 and the 2019 review will be included in the analysis so as to provide a more comprehensive overview of the different evolving opinions within the Constitutional Court. My findings in this chapter will be supported by legal theory, as I will make use of sources that deal with theories of legal reasoning and legal analysis methods to help me assess the significance of the Court's arguments and possible motivation behind them.

Secondly, I will analyze the discourse that has taken place in South Korea's legislative branch, the National Assembly, since the Court's 2019 decision on the anti-abortion law's unconstitutionality. For this purpose, I will examine the statements of invited expert speakers and National Assembly members present at a public hearing held in December 2020, less than a month before the deadline after which the relevant legal provisions criminalizing abortion became null and void. To analyze this political discourse, I will rely on sources on critical discourse analysis and political discourse analysis theories in order to firstly discern the main recurring themes in the debate, and secondly take note of the discursive strategies speakers use to solidify or question arguments in the debate. In particular, the work of Reyes on strategies of legitimization in political discourse will serve as a guide to uncover these discursive strategies.[63]

[63] Antonio Reyes, 'Strategies of Legitimization in Political Discourse: From Words to Actions' (2011) 22 Discourse & Society 781.

Constitutional reviews: comparing old and new reasoning

Some views on the Constitutional Court's 2012 judgment on the "crime of abortion" have been discussed in the literature review. In this chapter, I will compare and contrast the legal reasoning in both the 2012 and the 2019 constitutional reviews of the anti-abortion legislation – including their concurring and dissenting opinions – in order to examine how the Court distanced itself from its previous conclusions and eventually arrived at a verdict of unconstitutionality.

South Korea's Constitutional Court came into existence in 1988, right after the country's democratic transition and amendment of the constitution in 1987. The Constitutional Court was tasked with "adjudicating all constitutional matters, including review of the constitutionality of statutes and other issues such as impeachment".[64] The Constitutional Court is composed of nine Justices, who each serve renewable six-year terms.[65] The Court has the exclusive mandate to nullify statutes if it finds them unconstitutional,[66] although it can only do so when this is "material to the adjudication of a concrete case".[67] The Court is not involved in constitutional review of legislation before it goes into effect.[68] Constitutional reviews can be prompted either by a lower court "when the constitutionality of a statute is at issue in a [pending] trial"[69] – meaning an ordinary court cannot make its own decision as to the unconstitutionality of a statute[70] – or via a constitutional complaint, which any citizen may file directly with the Court when they consider a statute to directly infringe upon their constitutional rights.[71] This constitutional complaint may also be submitted – without needing to wait for the judgment of an appellate court - when an ordinary court dismisses a party's motion for the court to request a constitutional review.[72] If the Constitutional Court holds that the statute in question is indeed unconstitutional, the law then becomes invalid following article 47 of the Constitutional Court Act, and all ordinary courts are thereby bound by this decision and may not apply the statute to any case at issue.[73]

In 2012, the Court declared the so called "self-abortion provision" (article 269 of the Criminal Code) and article 270 section 1 of the Criminal Code (relating to abortion performed by a medical professional

[64] Seokmin Lee and Fabian Duessel, 'Researching Korean Constitutional Law and the Constitutional Court of Korea Academic Materials' (2016) 16 Journal of Korean Law 265, 267.
[65] 'Organization: Justices' (*Constitutional Court of Korea*) <https://english.ccourt.go.kr/site/eng/01/10102010000002020081101.jsp> accessed 12 October 2022.
[66] Lee and Duessel (n 64) 272.
[67] Hŏnbŏpchaep'ansobŏp (Constitutional Court Act) art. 41 para. 1.
[68] Chaihark Hahm, 'Beyond Law vs. Politics in Constitutional Adjudication: Lessons from South Korea' (2012) 10 International Journal of Constitutional Law 6, 29.
[69] Taehanmin'gunghŏnbŏp (Constitution) art. 107.
[70] Kang-kook Lee, 'The Past and Future of Constitutional Adjudication in Korea' in Laurent Mayali and John Yoo (eds), *Current Issues in Korean Law* (Robbins Collection Publications 2014) 8.
[71] Hŏnbŏpchaep'ansobŏp (Constitutional Court Act) art. 68.
[72] Lee (n 70) 5.
[73] Hŏnbŏpchaep'ansobŏp (Constitutional Court Act) art. 47 and art. 75; Lee (n 77) 8-9.

at the request of a pregnant woman) to be constitutional, as the Court determined that the former did not excessively or disproportionately violate a woman's right to self-determination and that the latter did not violate the principle of proportionality "between criminal culpability and punishment".[74] Four Justices dissented from this decision on the grounds that both provisions infringed upon a woman's right to self-determination by imposing a complete and uniform ban on abortion even when sought in the early stages of pregnancy. One Justice wrote a separate concurring opinion to the dissenting opinion, expressing the view that abortion should be legal in the early stages of pregnancy and that this legalization must be accompanied by legislation allowing a woman to make her decision "after careful consideration" and ensuring her access to a medically safe procedure.

The 2019 review on the constitutionality of the abortion provisions was requested by an obstetrician-gynecologist who was indicted for performing abortions from 2013 to 2015 upon the request of pregnant women. While the case was still pending before the Gwangju District Court, the obstetrician filed a motion for the District Court to refer the case to the Constitutional Court for constitutional review (as provided for by article 41 of the Constitutional Court Act), on the grounds that the two criminal provisions on abortions were unconstitutional and, secondarily, that it would be unconstitutional to interpret these provisions as applicable in the first three months of gestation. The petitioner's motion was rejected by the District Court in 2017. Consequently, the petitioner filed a constitutional complaint directly with the Constitutional Court in accordance with article 68 of the Constitutional Court Act. Constitutional adjudication took place in 2019.[75]

Both the 2012 and the 2019 constitutional reviews readily assume that the purpose of the Criminal Code provisions on abortion is the protection of life. This can be argued based on a teleological or purposive interpretation, meaning one argues that the statute exists to fulfill the purpose of effectively protecting the unborn life and that this should be the primary consideration when assessing and interpreting the statute.[76] It can also be argued from a historical perspective, where one relies on the historical circumstances and legislative history - the considerations of the legislative at the time - to argue that the law was enacted by the National Assembly with the legislative intent of protecting unborn life and that this original intent must be respected.[77] Yet these assumptions regarding the purpose of criminalizing abortion are not without issue considering South Korea's extensive history of deploying abortion as a method of population control, not uncommonly with very little care for women's health. During much of the law's existence, the protection of unborn life was merely subservient to the goal of reducing the country's fertility rate. Even at the time the law was initially proposed, the objective was restoring South Korea's population levels after the devastating Korean war, rather than the protection of the sanctity of

[74] Hŏnbŏpchaep'anso (Constitutional Court) August 23, 2012, 2010Hun-Ba402.
[75] Hŏnbŏpchaep'anso (Constitutional Court) April 11, 2019, 2017Hun-Ba127.
[76] Odile Ammann, *The Interpretative Methods of International Law: What Are They, and Why Use Them?* (Brill Nijhoff 2020) 208.
[77] ibid 213.

human life in itself.[78] Considering this history, the claim that the abortion ban serves the purpose of protecting human life and was created with this purpose in mind should not be too readily made.

The 2019 decision nonetheless differs in its appraisal of the law's assumed purpose by at least questioning its effectiveness at achieving this goal. It points out that considering the rare enforcement of the legislation, the low number of convictions for abortion,[79] and the fact that the procedure is very common in South Korea despite the ban, it should be concluded that the criminalization of abortion is "unable to effectively protect the life of a fetus". This decision thus demonstrates a more realistic and practical approach, where the 2012 judgment fails to adequately address the concrete impact – or lack thereof – of the legislation in modern Korean society. On the contrary, the 2012 judgment raised the issue of the detrimental effect that would supposedly come from decriminalization, predicting it would lead to abortion "being much more widespread than it is currently". The Court also added at this time that other factors such as proper sex education, the wide availability of contraceptive measures, or special support for pregnant women are all insufficiently effective ways of preventing abortions. The Court has made these claims without any substantiation whatsoever, presenting this conclusion as a self-evident fact when this is far from the case. Considering abortions rates in Korea were never particularly low throughout the time the procedure was criminalized,[80] there is little reason to assume that the legalization of abortion would correlate with higher abortion rates as the Court suggests. Nonetheless, this argument is reiterated in the 2019 dissenting opinion.

It is concerning that the Court decided in 2012, based on the above reasoning – listing what are essentially unsubstantiated assumptions - that the near total limitation of the woman's right to choose whether to continue her pregnancy was not excessive nor disproportional. South Korea's Constitution provides strict conditions for limiting fundamental rights in a general exception clause applicable to all listed rights. Assuming the issue of abortion falls within the scope of a fundamental right protected by the Constitution – which the Court did even in 2012, admitting that limiting abortion restricts the right to self-determination known to follow from article 10 – the conditions listed by article 37 section 2 of the Constitution are the following.[81] There must be a necessity for restricting a fundamental right ("for reasons of national security, maintenance of law and order, or public welfare"), the restriction must be unavoidable (meaning a less restrictive alternative must be favored if it exists), the restriction must be as minimal as possible, and lastly must be stipulated by law passed by the National Assembly.[82] In assessing the constitutionality of the anti-abortion provisions, both decisions rely on the principle of proportionality, which amounts to assessing whether the second and third requirements listed are

[78] Chŏn Hyo-suk and Sŏ Hong-kwan (n 26) 133.
[79] Wolman (n 14) 156.
[80] McGuire (n 51) 138.
[81] Taehanmin'gunghŏnbŏp (Constitution) art. 37.
[82] Dai-kwon Choi, 'The State of Fundamental Rights Protection in Korea' in Laurent Mayali and John Yoo (eds), *Current Issues in Korean Law* (Robbins Collection Publications 2014) 96–97.

fulfilled.[83] While the 2012 review arrives at the conclusion that the restriction of women's right to self-determination is not disproportional, the Court, in its evaluation of proportionality, mostly advanced arguments that essentially amount to unfounded assumptions as explained above. Regardless of whether one ultimately agrees with its conclusion, the 2012 decision insufficiently demonstrates how and why the near-total abortion ban abides by the constitutional conditions for limiting fundamental rights. Comparatively, the 2019 review offers a much more elaborate and convincing argumentation for the abortion ban being disproportionate and therefore unconstitutional in light of the conditions in article 37 of the Constitution.

On the other hand, the 2019 dissenting opinion simultaneously takes an even more conservative stance than the 2012 majority decision. Where even the 2012 majority opinion acknowledged the issue of abortion falls within the scope of the right to self-determination, the 2019 dissenting opinion takes a step back and casts doubt on the Court's previous approach.

> "We have fundamental doubts about whether the freedom of abortion, which may terminate the physical existence and life of a fetus, can possibly be protected by the right to self-determination. Even if we accept the premise that the fetus is a part of its mother's body, we do not see that a woman's right to self-determination includes the positive freedom to terminate a fetus's life, because the fetus itself possesses at least the internal value of life."[84]

While the final majority decision of the Court in 2019 demonstrates a radically different, more progressive and individual-centered approach, it would seem that those Justices in favor of maintaining the criminalization of abortion are instead doubling down and voicing their stance in a more resolute manner, claiming for example that abortion is "not a matter of free choice, but a matter of unethical act of taking the life of a living being". The dissenting opinion essentially denies the agency of a pregnant woman, explicitly stating that since she herself chose to have sexual intercourse, she must naturally bear the responsibility for pregnancy and childbirth and thus "find happiness not by terminating the pregnancy, but by saving the fetus". In the view of these Justices, "such a woman corresponds to the (…) ideal human image posited by our Constitution". The opinion also reduces abortion to the taking of human life "based on convenience". Overall, this rather unforgiving dissenting opinion is quite jarring to read when juxtaposed with the majority opinion, which describes the burden of pregnancy and childbirth in completely opposite terms with regards to the various physical, mental, social and other consequences pregnant women face.

The 2019 concurring opinion - which agrees with the verdict of unconstitutionality - adopts yet another, more progressive stance in support of complete abolition of the abortion ban on the grounds that a partial

[83] ibid 97.
[84] Hŏnbŏpchaep'anso (Constitutional Court) April 11, 2019, 2017Hun-Ba127.

ban which allows for exceptions "merely exempts a pregnant woman from liability for abortion if she falls within those exceptions by according her the status of 'a person who has no other choice but to abort'", essentially arguing that a woman who is allowed abortion under certain conditions is not actually freely choosing based on her own will nor exercising her right to self-determination. From this narrower perspective on the right to self-determination, it logically follows that such a restriction entirely incompatible with the right to self-determination can only be unconstitutional. Thus, as a whole, the 2019 constitutional review demonstrates several harshly contrasting interpretations not only of the extent to which abortion can legally be limited, but also of the scope of the constitutional right to self-determination.

Previous research discussed in the literature review has analyzed the 2012 judgment as presenting the issue within a particular frame or dichotomy, where the right to self-determination of a pregnant woman is placed in direct opposition to the right to life of a fetus.

- "The self-determination right of a pregnant woman, which is a private interest limited by the provision of the crime of self-abortion, cannot be regarded as more important than the public interest of protecting the right to life of the unborn child."[85]

Specifically, the protection of the fetus' life is considered a public interest which is undoubtedly more important than the personal interest of a woman wishing to end her pregnancy. While effectively protecting the right to life is one of the core obligations of the South Korean state both under its domestic Constitution – which does not explicitly mention the right to life but is understood to include this right under article 10 – and under international human rights law,[86] the judgment does not further explain what public interest the near total ban on abortion served. Neither the South Korean Constitution nor the international human rights treaties the country has ratified make mention of extending the right to life to the unborn fetus. Comparatively, the right to self-determination of an individual follows relatively more directly and explicitly from article 10 of the Constitution than the right to life of a fetus does. One might wonder whether the public interest in forbidding abortion in almost all cases and throughout pregnancy is rooted in natalist policies in the context of an extremely low birth rate. In any case, concluding that a woman's personal interest cannot prevail over a public interest is insufficiently convincing when the nature of this public interest is not elaborated upon. More importantly, allowing infringement of a woman's right to self-determination on the mere basis that it must yield for a public interest also ostensibly violates the principle of proportionality as contained in article 37 of the Constitution: assessing the proportionality and thus constitutionality of a statute necessarily entails

[85] Hŏnbŏpchaep'anso (Constitutional Court) August 23, 2012, 2010Hun-Ba402.
[86] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art. 6(1).

cautious weighing and balancing of conflicting rights and interests,[87] so that it cannot be said that an interest automatically prevails due to its public nature.[88] If this were the case, there would hardly be a need for constitutional review.

In 2019, the dissenting opinion (claiming the abortion ban is not unconstitutional) once again reflects the aforementioned dichotomy: "A fetus's right to life and a pregnant woman's right to self-determination are in an adversarial relationship. It is impossible to reconcile these two rights in any situation". In contrast, the majority opinion of the Court explicitly moves away from placing the decision of whether to permit abortion within the narrow frame of pregnant woman versus fetus.

- "Pregnancy, childbirth, and childrearing are important issues that can have a fundamental and decisive impact on a woman's life, therefore a woman's decision to maintain or terminate a pregnancy depends on her own outlook on life and society. It is a holistic decision that reflects the result of an in-depth consideration of physical, psychological, social, and economic circumstances."[89]

The 2019 majority and concurring opinions thus put a woman's decision of whether to continue or terminate her pregnancy into much more nuanced wording which more accurately reflects the wide range of considerations and personal circumstances that may be at play in a woman's decision. Rather than viewing the decision to abort from the perspective of the state's interest in this decision, this perspective clearly centers around the individual, full-fledged human capable of making the right decision for herself. The court also demonstrates several times throughout the ruling its awareness of the ramifications and impact of having children which women in modern Korean society face, arguing that in this context, a near-total ban on abortion simply cannot be considered a necessary, unavoidable, and "sufficiently minimal" infringement of women's right to self-determination. The 2019 majority opinion also distances itself from the previously mentioned reasoning which put a woman's personal interests in opposition to the public interest of protecting life, establishing as suggested above that the public nature of an interest is not in itself a justification for limiting a constitutional right:

- "Human beings must never be treated as a means to enhance some values, attain other purposes, or promote legal interests, but must be respected as ultimate ends and values of themselves."[90]

The Court justifies this shifted focus on the interests of the individual based on article 10 of the South Korean constitution, which states:

[87] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012) 248.
[88] ibid 265.
[89] Hŏnbŏpchaep'anso (Constitutional Court) April 11, 2019, 2017Hun-Ba127.
[90] Hŏnbŏpchaep'anso (Constitutional Court) April 11, 2019, 2017Hun-Ba127.

- "All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals."

The right to self-determination is closely linked to the human worth and dignity article 10 aims to guarantee. As the Court explains, by analogy, it then follows quite naturally that "the right to self-determination includes the right of a woman to freely create her own private sphere of life based on her own dignified right to personality, and the right of a pregnant woman to determine whether to continue her pregnancy and give birth is included in such right as well".[91] The Court arrives at this conclusion on the basis of its legal precedent - a number of previous Constitutional Court judgments which have consolidated and further clarified the nature of the right to self-determination.[92] The Court deliberately chooses to forgo interpreting article 10 based on its legislative history and a historical interpretation, as from this particular perspective, an alternative interpretation would be that the legislator did not, at the time the Constitution came into being, foresee nor intend for the notion of "human worth and dignity" to include a right to abortion. Thus, through its chosen method of legal interpretation, the Court demonstrates it views the constitution as a "living constitution", a term which suggests a constitution has significance beyond its original text and its interpretation needs to expand and evolve over time.

On the other hand, the 2019 dissenting opinion is in complete contrast to this approach, and favors sticking to a historical interpretation of article 10 through an a contrario reasoning: "the right to abortion is written nowhere in the Constitution, and the citizens who were vested with the constituent power did not intend to endow women with that right as well."[93] Like the 2019 dissenting opinion, the 2012 majority opinion also rooted its defense of the right to life of a fetus in article 10 of the Constitution, but failed to explain why the article should be understood to protect the unborn life and simply ascribes the qualities and consequently the level of enjoyment of fundamental rights of a born human being to a developing fetus, on the basis that the fetus has a chance of becoming a fully formed human being. The idea of the fetus enjoying the right to life is more clearly explained in the 2019 dissenting opinion as being rooted in natural law, which transcends positive (codified) law. In this way, the dissenting Justices do not need to find protection of the unborn life in the written text of the Constitution itself:

> "Human life is invaluable; it is the source of dignified human existence, which cannot be replaced by anything else in this world. Although the right to life is not enshrined in the Constitution, it is a natural right, transcending time and space, rooted in the human instinct to survive and the purpose of human existence. It is unquestionably clear that the right to life is the

[91] Hŏnbŏpchaep'anso (Constitutional Court) April 11, 2019, 2017Hun-Ba127.
[92] The Court refers to its following judgments: Hŏnbŏpchaep'anso (Constitutional Court) May 28, 1998, 96Hun-Ka5; Hŏnbŏpchaep'anso (Constitutional Court) February 23, 2006, 2004Hun-Ba80.
[93] Hŏnbŏpchaep'anso (Constitutional Court) April 11, 2019, 2017Hun-Ba127.

most fundamental right (…); it is not significant whether the bearer of life is conscious of this dignity and capable of safeguarding the life of his or her own."[94]

Proponents of a historical approach may find the Court's 2019 reasoning in including the right to abortion within the scope of article 10 to amount to judicial activism. Indeed, this would not be the first time that criticism is voiced regarding the judicial branch's increasingly common involvement in lawmaking and policymaking.[95] However, both the conclusion that the concept of human dignity covers a woman's freedom to terminate her pregnancy and the conclusion that the concept of human dignity applies to a fetus can potentially be justified based on article 10. This is because of the very general wording of the article itself, in combination with article 37 section 1 of the Constitution which states "freedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution". Neither interpretation follows explicitly from a textual reading of article 10, but considering the legislative intent – reflected in article 37 - of using the Constitution as a living instrument rather than an exhaustive list of fundamental rights,[96] both interpretations can be defended so as to fit within the legal framework provided by the Constitution. This makes it especially challenging to argue that one of the conclusions is more legally sound than the other, and means that falling back on natural law and moral values to fill in the concept of human dignity is to some extent unavoidable.[97] The 2019 majority opinion acknowledges the issue of moral plurality, stating that discussion on the topic of abortion are "affected by various factors, including one's sense of values, one's experiences, one's attitude toward human life, one's ethical standards, and historical and social realities. One's opinion and conclusion regarding abortion must be respected in themselves, as one's own belief, and whether they are right or wrong cannot be decided easily."[98] This expresses that deciding on the unconstitutionality of a matter that is unavoidably tied to value-based considerations is challenging for the Court, which must make a decision regardless of the multitude of conflicting opinions that exist on the matter.[99]

As mentioned above, the 2012 majority opinion and the 2019 dissenting opinion adopted a natural law inspired perspective on the life of a developing fetus, based on which the life of a fetus ought to enjoy the same level of protection as that of a born human being, regardless of its developmental stage. In this way, a fetus newly implanted in the womb is considered a full-fledged human being based on moral

[94] Hŏnbŏpchaep'anso (Constitutional Court) April 11, 2019, 2017Hun-Ba127.
[95] Hong Sik Cho, 'The Justifiability and Limits of Judicial Governance' in Laurent Mayali and John Yoo (eds), *Current Issues in Korean Law* (Robbins Collection Publications 2014) 50–56; Hahm (n 68).
[96] Choi (n 82) 91–92.
[97] Choi, 91–92.
[98] Hŏnbŏpchaep'anso (Constitutional Court) April 11, 2019, 2017Hun-Ba127.
[99] "Judicial decision, especially on matters of high constitutional import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle; for it is folly to believe that where the meaning of the law is in doubt, morality always has a clear answer to offer. (…) No doubt because a plurality of such principles is always possible it cannot be demonstrated that a decision is uniquely correct: but it may be made acceptable as the reasoned product of informed impartial choice. In all this we have the 'weighing' and 'balancing' characteristic of the effort to do justice between competing interests." HLA Hart, 'The Concept of Law' (1961) 204–205.

arguments tied to the inherent sanctity of human life. As other analyses have pointed out, the 2012 review ignores the contradiction that this reasoning then creates within South Korea's anti-abortion legislation, as it does not account for the exceptions listed in article 14 of the Mother and Child Health Act. The 2019 dissenting opinion contradicts itself by on one hand emphasizing how social issues and other adverse conditions faced by pregnant women should be tackled at their root cause rather than by allowing abortion, yet admits the grounds for abortion recognized in article 14 reflect situations "where it is patently unreasonable to expect in light of social norms that the mother can continue the pregnancy". Prioritizing the sanctity of life as being absolute from the moment of conception is arguably incompatible with allowing this life to be ended in some specific cases due to pragmatic reasons. It also ignores that the penalty for illegal abortion is very far removed from the penalty for murder (as the 2019 majority opinion points out), meaning even the legislative did not intend for a fetus to be accorded the same level of protection as a born human.

Pointing out this contradiction, the 2019 majority opinion dismisses the idea that protection of the fetus should be consistent with that of born humans from the moment of conception by pointing out that South Korea's legal system does allow for different levels of protection of life depending on its developmental stage, since there is no legal obligation – neither in the Constitution nor under international law – to treat a fetus like a person. Therefore, a cutoff point before which abortion may be permitted is a viable legal possibility. This cutoff point is then estimated around the moment a fetus likely becomes viable outside the womb, assuming it receives the best possible care. However, the 2019 decision fails to elaborate on why viability should be the decisive factor in allowing or restricting abortion. In many cases, a fetus still may not survive outside the womb for some time after the cutoff point, despite receiving the best possible care. Estimation of viability is far from an exact science and will differ case by case. It is then undeniable that legally setting the cutoff point at a certain number of weeks after conception remains arbitrary, and the Court unfortunately fails to address this point. It merely states that a fetus can be considered "considerably more human" at the point of viability, which is an extremely vague characterization. When does a fetus become sufficiently human to fully enjoy the right to life, and what does this entail? By neglecting to address this arbitrariness, the Court also fails to effectively rebut the 2019 dissenting opinion's remark that the "development of life (…) cannot be distinctly separated into stages" and that, for instance, "we do not observe that a 12-week fetus and a 13-week fetus have any fundamental difference requiring a different degree of protection". It is clear that ultimately, the Court favors discussing the practical arguments for allowing abortion during a certain period, focusing on the woman needing time to discover her pregnancy and to carefully consider how to move forward. Moral arguments on the nature and beginning of human life are then subservient to this pragmatic, individual-centered approach.

The Court eventually arrives to a conclusion of "nonconformity to the Constitution" rather than "simple unconstitutionality", the different being that the latter would entail the immediate obsolescence of the

relevant Criminal Code provisions. The Court finds this would create an "unacceptable legal vacuum" in which abortion at any stage is unregulated. The Court recalls it is the exclusive mandate of the legislative to decide on an appropriate amendment of the law, albeit in accordance with the findings of the Court. The legislative is thus tasked with setting the length of the so-called "determination period" during which abortion must be legal, as well as including socioeconomic reasons as grounds for legal abortion during this determination period and determining whether any kind of procedures, such as counseling, are required before abortion. Effectively, the Court not only requests amendment in the text of legal provisions, but more broadly demands active effort by the state to guarantee that women can have access to safe and legal abortion within a certain timeframe. This entails setting up a healthcare system in which the procedure is made readily available. This undoubtedly means additional legislation and policy regarding access to abortion must be created. This later on proved to be a particularly contentious and problematic task for the legislative: at the time of writing, the provisions on abortion remain null and void and no substituting legislation has been agreed upon as of yet, despite several amendment proposals. The legal void the Court feared has therefore become a reality since January 1st, 2021.

The legislative amendment process in South Korea's National Assembly

In this chapter, I will analyze the political discourse in South Korea's National Assembly on the legislative amendments proposed in regards to the "crime of abortion". This analysis will focus on the common points of contention and on how arguments are constructed in order to assess the impact of the Constitutional Court review on South Korea's legislative and the extent to which the legislative has been able to complete the task set by the Court. The context of the discourse analyzed here is the public hearing organized in the National Assembly on December 8th 2020.[100] This was the first and, so far, only legislative debate on the issue of abortion since the Court's review was published. As a result, the legislative has failed to amend the unconstitutional provisions before the set deadline, and the relevant provisions have thus been null and void since January 1, 2021.

Following the Constitutional Court decision in April 2019, no further discussion or action was undertaken by either the executive or legislative until October 2020, when the Moon Chae-in administration announced an amendment proposal aimed at modifying the Criminal Code in conjunction with the Mother and Child Health Act. The official announcement on the pending proposal claims "opinions from various fields such as the legal, medical, women's, and religious circles have been widely collected" in order to arrive at a proposal that respects the Court's decision while providing access to safe abortion within the – to be widened – scope of the Criminal Code. The amendment broadly contains the following points: the definition of abortion should be widened in order to allow for drug induced abortion in early stages rather than only offering surgical abortions, organizations must be established for support and counseling of women in doubt about whether to maintain their pregnancy, and doctors must fully inform women about the procedure and require their written consent. Third party consent would be needed only if the pregnant woman suffers from a mental disability. Minors may undergo abortion without consent of a legal guardian so long as they undergo a compulsory counseling process. Doctors may refuse to perform abortion if this goes against their personal values, but they then must refer a woman to pregnancy counseling institutions so that they may obtain information on abortion elsewhere. Furthermore, better education on contraception and reproductive health would be facilitated in order to prevent unwanted pregnancies.[101] These points constitute the proposed amendment to the

[100] Video recordings and transcripts of National Assembly meetings can be found on the National Assembly's website. '제 21 대국회 제 382 회 제 14 차 법제사법위원회' (*National Assembly Minutes*, 8 December 2020) <http://likms.assembly.go.kr/record/index.jsp>.

[101] '모자보건법 일부개정안 입법예고' (법제처, 7 October 2020) <https://www.moleg.go.kr/lawinfo/makingInfo.mo?lawSeq=60963&lawCd=0&&lawType=TYPE5&mid=a10104010000> accessed 11 November 2022; '모자보건법 개정안 입법예고' (보건복지부) <http://www.mohw.go.kr/react/al/sal0301vw.jsp?PAR_MENU_ID=04&MENU_ID=0403&CONT_SEQ=360203&page=1#:~:text=%EB%B3%B4%EA%B1%B4%EB%B3%B5%EC%A7%80%EB%B6%80(%EC%9E%A5%EA%B4%80%20%EB%B0%95%EB%8A%A5%ED%9B%84,('19.4.11.)> accessed 11 November 2022.

Mother and Child Health Act. As for the permissible legal scope of abortion (time frame and permissible grounds), this is to be transferred to the Criminal Code itself.[102] The amendment proposes allowing abortion regardless of circumstances up to 14 weeks, following which it would be allowed up until 24 weeks if one of the listed criteria (roughly similar to those present in the then-existing legislation) is fulfilled, with the addition of adverse social or financial circumstances as an accepted ground for legal abortion. This widened scope would be stated in article 270-2 to be added to the Criminal Code, leaving the existing provisions (269 and 270) on the "crime of abortion" essentially untouched.

The government's amendment proposal attracted strong criticism, as its content suggests that while the permissible scope for abortion is to be widened, the procedure would still be listed as a punishable criminal offense in the Criminal Code and would therefore still be illegal in principle, when performed outside of the permissible scope. Many supporters of access to abortion felt this amounted to "reviving" the criminalization of abortion after the Constitutional Court gave many supporters hope the "crime of abortion" would be abolished in its entirety when the relevant provisions were pronounced unconstitutional. [103] However, as several of the speakers at the public hearing point out, the Constitutional Court did not decide criminalizing abortion was in itself unconstitutional. It merely held that the law as it existed at the time constituted an excessive infringement on women's right to self-determination. Apart from the government proposal, there were a number of other amendment proposals on the table, several of which proposed a complete abolition of the abortion crime. The core of the problem to be solved at the legislative stage thus seems to be whether abortion should remain in the Criminal Code but access to it should be widened – both in terms of timeframe and permissible grounds - or whether it should be entirely decriminalized. In the former instance, women may still be prosecuted for seeking an abortion depending on the circumstances, and this in particular appears to be a significant point of contention.

The experts invited to speak at this National Assembly public hearing include attorneys, law professors, professionals in the field of obstetrics and gynecology, a research fellow, and a professor in liberal arts.

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[102] '형법 개정안 입법예고' (국민참여입법센터, 7 October 2020) <https://opinion.lawmaking.go.kr/gcom/ogLmPp/60959?opYn=Y&lsNm=%ED%98%95%EB%B2%95&isOgYn=Y&edYdFmt=2020.+10.+7.&stYdFmt=2020.+4.+1> accessed 11 November 2022.

[103] '"다시 돌아갈 수 없다" 낙태죄 정부안의 문제점과 올바른 입법방향' (희망을만드는법, 23 October 2020) <https://hopeandlaw.org/%eb%82%99%ed%83%9c%ec%a3%84-%ea%b0%9c%ec%a0%95%ec%95%88%ec%9d%98-%eb%ac%b8%ec%a0%9c%ec%a0%90%ea%b3%bc-%ec%98%ac%eb%b0%94%eb%a5%b8-%ec%9e%85%eb%b2%95%eb%b0%a9%ed%96%a5/> accessed 11 November 2022.

The "protection of life versus right to self-determination" frame

Most of the speakers and parliament members present interpret the Constitutional Court decision as demanding a re-weighing of women's right to self-determination and the fetus' right to life. While the Constitutional Court found there has been a lack of balance in the sense that insufficient consideration has thus far been given to women's right to self-determination including whether and when to bear a child, a number of statements made during the public hearing suggest a tendency to place the two values in direct opposition of each other, reflecting the simplistic frame used by the Constitutional Court in 2012. This is suggested for example through the wording chosen by some of the parliament members in their questioning:

National Assembly member Sin Tongkŭn: "(…) Then, professor, do you think we should find a compromise between the right to self-determination and the protection of the life of the fetus?"

Another speaker points out in response that this opposition is an insufficiently nuanced representation of the issue at stake as several different women's 868686rights are impacted by abortion legislation.

National Assembly member Sin Tongkŭn:: So you are saying that the right to self-determination is more important than protecting the life of the fetus?
Speaker Kim Chŏng-hye: Yes, but it is not just the right to self-determination that is being violated. Tight to equality, the right to health and maternal protection, even the right to bodily integrity, various women's rights are being violated, and the Constitutional Court reflected on these aspects as well.

Overall, however, the two aforementioned rights are presented as existing on either end of a spectrum and as though the discussion on the legislative amendment amounts to determining where on this particular spectrum abortion legislation should sit. For example, speaker Ŭm Sŏn-p'il, professor of law, states he is personally of the opinion that "the right to life should prevail" although he concedes that this would not be consistent with the latest Court review. Going a step further, attorney Yi Hŭng-rak expresses doubts that there is at all a need for more balance between a woman's right to decide and the fetus' right to life, as he considers the right to life to be absolute (which is legally speaking not the case)[104] and therefore to be prioritized at all times above other rights such as another person's right to self-determination. In essence, this perpetuates the idea that the rights of the fetus and those of the pregnant woman are fundamentally incompatible.

Supporters of maintaining the criminalization of abortion based on this supposed fundamental incompatibility of human rights legitimize this frame by utilizing emotionally charged language rather

[104] ICCPR (n 86) art. 6; Hyŏngbŏp (Penal Code) art. 41.

than legal arguments, drawing the focus to the life of a fetus and the threat it faces. Several speakers use wording essentially equating a fetus to a fully grown and self-aware human being. Speaker Yi Hŭng-rak states that "because survival becomes possible at 22 weeks, from that point onwards [the fetus] is [scientifically] regarded as a life just like a person (사람과 똑같은 생명)". Therefore, for ethical reasons, we should "save [any] fetuses that can be saved". To add to the effect, this speaker chose to show images of very prematurely born fetuses that have gone on to become healthy children "brought home in the arms of their parents". Another speaker, attorney Yŏn Ch'ui-hyŏn, chose to articulate her viewpoints acting as the "representative of the fetus" and speaking on behalf of the unborn child. Speculating on what a fetus might be thinking or what it would say, this speaker essentially equates the fetus with a fully developed child aware of its existence and of the situation it finds itself in. The speaker claims for example that at 13 weeks, the fetus develops the ability to sense and fear abortion. Additionally, the speaker uses phrases such as "fetuses are not trash" and "fetuses are being murdered", exaggerating and oversimplifying abortion proponents' standpoint and thereby constructing a strawman argument that can only serve to derail the debate on the content of legislation.

As for legal arguments, some proponents of criminalization argue that while the Constitutional review demands an amendment of the law, completely decriminalizing abortion would amount to yet another form of unconstitutional lawmaking, as the lack of balance between fundamental rights would then swing in disproportionate favor of the pregnant woman. It is difficult to assess whether this would indeed be the case, as the Constitutional Court's majority arguments focused mainly on the lack of regard for women's circumstances. It did not define, on the other hand, to what extent the fetus should enjoy a right to life under article 10 of the Constitution or what minimum level of protection the state should offer a fetus through legislation. In theory, complete decriminalization is within the realm of possibilities left open by the Court. It is however not unthinkable that future compositions of the Constitutional Court - potentially including more conservative Justices - could find that new legislation regulating broad access to abortion is indeed unconstitutional for failing to adequately protect the right to life.

The effectiveness of criminalization and enforceability of legislation

On the other hand, several voices – both among the invited speakers and among the assembly members present – raise a question more fundamental than the content of future law. Moving away from the discussion of how many weeks would constitute an appropriate cut-off point and of what conditions would qualify as eligible grounds for abortion, these discussants express doubts regarding the viability of anti-abortion law in the current day and age and the enforceability of any law that would allow for prosecution of women or their doctor.

Notably, assembly member Ch'oe Kang-uk of the Open Democratic Party, the only opposition member present, established that only ten convictions of abortion had been issued over the past ten years. Upon his questioning, the chief of the Department of Justice admitted that the reason some individuals are convicted when the vast majority of abortion cases are not prosecuted is unknown. In other words, there does not seem to be any particular circumstance that differentiates the convicted cases from the countless others that go unpunished. As Choi points out:

National Assembly member Ch'oe Kang-uk: (…) That is quite unfortunate. I am inclined to agree with criticisms questioning why women should be punished, whether punishment can make abortion disappear from our society, or whether criminal sanctions are really the solution.

Similarly, Assembly member Pak Pŏm-gye finds the debate on the conditions of legal abortion misguided when there is still insufficient awareness of the practical impact and effectiveness of abortion legislation. Pak goes as far as to state the exact content and scope proposed in the amendment are wholly irrelevant as the factual likelihood of enforcement is negligible, considering the handful of prosecutions over the past years as well as the fact that the overwhelming majority of abortions take place in the early stages of pregnancy. He finds such a law therefore has no normative effect or regulatory power (규범력) on citizens and thereby casts doubt on whether the amended law could effectively exist as criminal legislation.

Indeed, a law which – for whatever reason – is rarely and selectively enforced is considered undesirable in any legal system governed by the rule of law, as it threatens the fundamental principle of legal equality. Before enacting any criminal law provision, the legislative should therefore keep in mind a number of norms before even beginning to consider the details of its content, in order to avoid undermining the normative power of a legal system by creating law that will essentially amount to a dead letter. Most notably, a law ought to be enforceable, fairly applied, and must treat similarly situated people equally.[105] As discussed in the literature review and again at this public hearing, the history of South Korea's abortion ban indicates the law in question has hardly ever functioned according to these principles and has been historically and systematically undermined by the state itself. It is thus crucial that this issue be raised first and foremost, lest the future amended legislation on abortion be reduced to a dead letter yet again.

Additionally, some speakers and assembly members doubt the practical enforceability of the government amendment based on the proposed content as well. The amendment allows abortion in cases

[105] Randall Peerenboom, 'Varieties of Rule of Law', *Asian Discourses of Rule of Law* (Routledge 2004) 2; Hart (n 99).

of adverse social or financial circumstances, but this broad wording makes it unclear how this is to be assessed case by case. The decision of whether such circumstances apply would likely be entirely at the discretion of a doctor after discussion with his patient. A prosecutor arguing after the fact that these circumstances did not actually exist and that the abortion was therefore performed illegally then seems very implausible. It would then make more sense to eliminate the mention of specific grounds for legal abortion altogether so that a woman can obtain an abortion for any reason she herself deems significant enough, instead of assessing the legality of an abortion based on a predetermined list of exceptions that are challenging to verify and practically unenforceable.

The feminist perspective

Other speakers argue for the same course of action –complete decriminalization of abortion - from a feminist perspective rather than from a legal theoretical. Speaker Kim Chŏng-hye, research fellow at the Korea Institute for Women's Policy, argues that continuing to criminalize abortion under certain circumstances means women do not actually enjoy a right to self-determination, as their fate still depends on whether or not the law allows abortion in their particular circumstances based on an exhaustive list. Thus, the enforceability issue mentioned above is not the only reason to move away from a list of predetermined exceptions. Furthermore, receiving appropriate information and having safe and timely access to abortion can only be guaranteed when the procedure is not associated with the taboo of possibly constituting a criminal offence, but rather viewed entirely as healthcare, to be discussed exclusively between a woman and her doctor. Kim argues the state must create legislation on abortion on the basis of trust in doctors and their patients, and reproductive rights must be supported through other policies rather than under the threat of criminal punishment. Kim's viewpoint is thus overall more in line with the 2019 review's concurring opinion that finds the majority opinion too conservative still.

Both the speakers in favor of complete abolition of the "crime of abortion" and those in favor of maintaining a degree of criminalization used language to elicit an emotional reaction in order to legitimize their arguments. Abolitionists emphasized the physical and emotional struggles faced by women who do not wish to be pregnant but are confronted with the inaccessibility of legal abortion. Kim poignantly summarized the issue at stake in the following terms: "criminalizing abortion means forcing pregnancy, childbirth, and child raising" and "living in a body that has the capacity to get pregnant in a country that criminalizes abortion means [one] could lose control over [one's] body at any time", highlighting the opposition and power imbalance between an individual woman and the state, rather than between a woman and her fetus. Such wording draws attention to how potentially life-altering and stifling the existence of anti-abortion legislation is to any Korean woman, as it puts their right to self-determination at the mercy of the state. Kim Hye-ryŏng, liberal arts professor specialized in ethical

theology, underlined the moral issues in forcing a woman to have a child she does not wish for: "giving birth to a child is an act of love, and this act of love cannot be forced through law". She concludes by urging the attendees to reflect on why the discourse on abortion so easily criminalizes and blames women when the majority of participants in this discourse – men – will never experience the pain of being confronted with an unwanted pregnancy. The mentioned speakers agree that the core of the issue is not about whether to "save fetuses" or to allow or even encourage abortions, but ultimately whether the legislative wishes to see women prosecuted for seeking the procedure. These speakers also mention the discriminatory aspect of maintaining an abortion ban, claiming it solidifies "women's position in society as second-class citizens" and perpetuates traditional gender roles that are detrimental to women. Thus, the argument of abolitionists speaking from a feminist perspective focuses on urging their audience to understand the reality of women's personal experiences and deep impact of anti-abortion law on their lives, rather than to rigidly adhere to a viewpoint based on more abstract moral considerations or legal theory.

In contrast, speaker Ch'oe An-na (secretary of the Special Committee on Obstetrics and Gynecology Abortion Law), who also claims to speak from a feminist perspective, fears that full legalization of abortion would not serve women's rights since abortion is a potentially risky procedure that may harm a woman's health, and because more women might be coerced by their partner or family to undergo the procedure if their pregnancy is deemed shameful. Yet Ch'oe is simultaneously against criminal punishment, as she sees women as victims rather than perpetrators of abortion. Instead, she argues for harsher punishment of abortion against the will of the pregnant woman and for a crackdown on the distribution of abortion inducing medication, as this "only exposes women to greater danger". It is notable that throughout her presentation, Ch'oe does not once mention the pregnant women's own right to self-determination or the role of women's personal circumstances in their decision.

Kim Chŏng-hye is the only speaker who chose to consolidate her feminist perspective by alluding to the applicable international legal framework and how the standards set by human rights treaties and their monitoring bodies may guide the Korean national debate (as previously discussed by Wolman). While the Constitutional review is limited to assessing the validity of a statute based on the South Korean Constitution, international human rights law is also a significant, not to mention binding source of legal obligations that should play a guiding role in the legislative debate and might be especially useful considering the lack of consensus at national level. Among other UN recommendations on decriminalization, Kim notably refers to the views of the Human Rights Committee, a UN body tasked with monitoring implementation of the International Covenant on Civil and Political Rights (ICCPR) which South Korea has been a party to since 1990. The right to life, contained in article 6, has recently

been further clarified by the Human Rights Committee.[106] Considering the lack of consensus on this controversial issue worldwide, human rights treaty bodies and international courts have consistently been reluctant to prescribe a position regarding the extent to which abortion violates the right to life. Again, in its latest publication on article 6, the Committee remains silent on whether the right to life applies to the unborn child. Instead, it focuses on the protection and safeguarding of safe access to abortion: although states "may adopt measures designed to regulate voluntary terminations of pregnancy", these measures may not "jeopardize [women's] lives, subject them to physical or mental pain or suffering (…), discriminate against them or arbitrarily interfere with their privacy". Most notably, states may not regulate abortion "in a manner that runs contrary to their duty to ensure that women and girls do not have to undertake unsafe abortions" by for example subjecting women or medical service providers to criminal sanction, "since taking such measures compels women and girls to resort to unsafe abortion".[107] These views of the Human Rights Committee thus urge party states to decriminalize abortion, conflicting with some of the stances voiced in the South Korean National Assembly.

Admittedly, the legal status of such treaty bodies' views is uncertain. Some scholars argue the scope of rights outlined in these documents should be readily applied by states as they have ratified the ICCPR and thereby accepted the authority of the Human Rights Committee.[108] Since South Korea has also ratified the optional protocol to the ICCPR - allowing individuals to submit complaints regarding violations of their rights under the ICCPR by the state - it has arguably agreed to be held accountable for any failure to adequately implement rights under the treaty if the Committee finds that this is the case - although such a decision would not be legally binding. On the other hand, South Korean courts have so far been reluctant to directly apply international human rights treaties, and the Constitutional Court in particular has previously denied the supremacy of international law over domestic law in cases of conflict, even for human rights treaties.[109] This potentially diminishes the incentive for the legislative to amend law in a way that is consistent with the content of international human rights law and the evolving views of its monitoring bodies. In any case, in the public hearing which is the focus of this chapter, barely any attention was paid by any Assembly member present to Kim's mention of international human rights standards as a potential guide in the amendment debate. This may suggest that the South Korean legislative fails to appreciate the binding nature of international human rights or finds that abortion is too controversial a matter to be influenced by international perspectives and is to be exclusively determined by the sovereign state's democratically elected legislative.

[106] UN Human Rights Committee (HRC), 'General comment no. 36: Article 6 (Right to Life)' (3 September 2019) UN Doc. CCPR/C/GC/35.
[107] Ibid, para. 8.
[108] Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press 2022).
[109] Whiejin Lee, *The Enforcement of Human Rights Treaties in Korean Courts* (Brill Nijhoff 2019).

Conclusion

It is telling that the public hearing analyzed here was the first and only discussion held in the National Assembly on the topic of abortion since the 2019 constitutional review. The official government amendment proposal was presented nearly a year and a half after the Court's verdict. Evidently, the legislative has been reluctant to spend the necessary time and effort on an issue that has not yet gathered sufficient consensus to arrive at an agreement on all the various elements to be considered in the amendment process. The lack of consensus is perceptible in the different themes raised during this public hearing. It appears amendment of abortion legislation is not merely a matter of discussing and adjusting the content of the relevant provisions following the Constitutional Court's guidelines. More fundamentally, the legislative cannot avoid considering the nature and purpose of the law and whether abortion is an act that should be considered a crime or should be restricted at all. This leads to discussion on the topic lacking direction and a clear objective as there are too many different points of contention, both substantive and procedural in nature.

It seems the Constitutional Court was too optimistic when it left the amendment task up to the legislative with significant room for input. The Constitutional Court does not have mandate to legislate and thus cannot set guidelines more specific than it did. It can only evaluate the constitutionality of the existing legislation at the time of review. Nevertheless, the legislative was evidently much too far away from reaching a consensus even within the timeframe set by the Court. Some National Assembly members are in favor of a moderate widening of access to abortion maintaining strict conditions, while others argue for complete decriminalization. The different stances on the issue broadly reflect the contrasting verdicts of the 2019 majority, concurring, and dissenting opinions. The gap between these different stances is challenging to bridge, especially as they each can be justified from different perspectives, as demonstrated during the public hearing. Through its verdict, The Constitutional Court majority opinion has attempted to set new norms with an approach to women's rights that it deemed fitting in modern Korean society and supported by a dynamic interpretation of its Constitution, but that is not yet widely reflected in the National Assembly. It is then challenging to task the National Assembly with drafting legislation that adheres to the spirit of the constitutional review. This is presumably why some Assembly members ask the lawyers present at the public hearing to what extent the legislative is obliged to follow the constitutional review and whether a contrary majority opinion within the National Assembly would bear any weight, potentially raising fundamental questions on the separation of branches of government and the supremacy of a democratically chosen legislative.

It is also regrettable that most of the opposition was not present at this hearing, as most members of opposition parties walked out following an earlier conflict between the opposition members and the speaker of the National Assembly. Due to these circumstances, it is unclear how the opposition parties

at the time viewed the government proposal or any other proposals submitted by Assembly members. It is likely that even stronger and more varied criticism would have been voiced, potentially offering better insight into why the National Assembly has failed to work on this amendment in a timely manner and which points of contention are the biggest obstacles to decriminalization. In any case, the fact that there was only one such meeting and that the opposition did not find the issue of abortion significant enough to attend the hearing despite their previous disagreements is telling of the lack of urgency and limited interest in the issue. At the time of this writing, it is unclear how this will further develop. Currently, the absence of valid anti-abortion provisions means that regardless of circumstances, abortion can no longer lead to criminal sanction.

Conclusion

In this thesis, I have explored the process of decriminalization of abortion in the judiciary and legislative of South Korea in order to answer the question: How did South Korea decriminalize abortion? After reviewing the historical context of abortion, I analyzed the discourse on the issue in the judgments of the Constitutional Court and in the National Assembly debate. Both show similar recurring frames such as the direct opposition of the right to life of the fetus and the right to self-determination of women, the inherent and absolute sanctity of human life, and the feminist perspective of the ramifications of an unwanted pregnancy in modern South Korean society. The Constitutional Court spurred the debate on abortion by adopting an individual-centered perspective vastly different from its 2012 review. The National Assembly was however unable to utilize the 2019 judgment as a catalyst for amending the ineffective legislation on abortion. The deep discrepancies in opinion between proponents of anti-abortion legislation and proponents of decriminalization demonstrate that there was insufficient consensus as to the purpose of such legislation and the role of criminal sanction, let alone consensus on the content and various details to be determined. Unlike the Constitutional Court, the legislative branch failed to contribute in a significant manner to the decriminalization of abortion, and the act was eventually decriminalized due to the deadline set by the Constitutional Court, without any clear direction for new legislation.

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