

ABORTION IN KOREA: A HUMAN RIGHTS PERSPECTIVE ON THE CURRENT DEBATE OVER ENFORCEMENT OF THE LAWS PROHIBITING ABORTION

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I. INTRODUCTION

For decades, the Republic of Korea¹ has seen hardly any debate about abortion rights.² Although abortion is illegal based on Korea's criminal code drafted in 1953, it is actually very common. Since 1973, the law has provided broad exceptions to this ban on abortion, allowing abortions for victims of rape or incest, women whose health is at risk, cases where the fetus is suspected of having a genetic disorder, and cases where the pregnant woman or her spouse suffers from a list of communicable or hereditary disease.³ In practice, these exceptions have been used to justify abortion on demand, and the law prohibiting abortion in normal circumstances has gone largely unenforced. Although there has been some opposition to this non-enforcement from Korean religious leaders, it has been relatively subdued. Unlike the United States and many other countries, abortion has not been a political lightning rode in Korea.⁴

As of January 2010, however, it can no longer be said that there is a lack of discussion on abortion within Korean society. On the contrary, debate on the future of abortion regulation is raging in newspapers, Internet chat rooms

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¹ This article will use the term 'Korea' to refer to the Republic of Korea.

² See So-yun Kim, *A Secret Scourge*, JOONGANG DAILY, Dec. 5, 2007, available at <http://joongangdaily.joins.com/article/view.asp?aid=2883512> ("It is not an exaggeration to say there has never been any serious discussions about abortion").

³ Mother-Child Health Act, art. 14 (Limited Permission of Induced Abortion Operations) in 6 CURRENT LAWS OF THE REPUBLIC OF KOREA 3456-4 (Korea Leg. Research Institute ed. 1992).

⁴ See, e.g., Press Release, National Human Rights Commission of Korea, Chairperson Ahn Kyong-Whan Meets with Cardinal Nicolas Cheong Jin-Suk (Nov. 15, 2007) (on file with author); Casimiro Song, *Korean Church: "Unite the World Against Abortion"*, ASIANEWS, Jan. 8, 2008, available at <http://www.asianews.it/index.php?l=en&art=11191&dos=117&size=A>.

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and the halls of government.⁵ Specifically, the debate centers on whether the government should crack down on illegal abortions and enforce the existing law (or some revised version of it). Proponents of a crackdown come from two camps. First, there are governmental officials who advocate cracking down on abortions in order to increase the fertility rate, which as of 2009 was the second lowest in the world at 1.22%.⁶ Second, there is a group of obstetricians who have emerged to argue for government enforcement of abortion laws. While some of these obstetricians oppose abortion for religious reasons, others are non-religious and oppose abortion because it violates their ethical precepts.

In response to governmental calls for a crackdown, some Korean women's rights groups have vocally opposed the idea of punishing women for having abortions. For example, a coalition of women's groups stated that "this plan illustrates the anti-human rights stance of the government which portrays women as an instrument for child birth rather than human beings with reproductive rights."⁷ Meanwhile, mainstream human rights groups, including the National Human Rights Commission, have yet to comment on this issue.

This article will closely examine the current debate regarding the enforcement of the criminal laws on abortion in Korea from the perspective of international human rights law, focusing primarily on the international human rights treaties that have been ratified by Korea.⁸ Section II will provide background on abortion regulation in Korea and the current debate, and Section

⁵ See, e.g., Bae Ji-Sook, *Campaign Underway Against Abortion*, KOREA TIMES, Nov. 22, 2009, available at http://www.koreatimes.co.kr/www/news/nation/2009/11/113_55937.html; Si-Soo Park, *Anti-Abortion Campaign Ignores Doctors' Plight*, KOREA TIMES, Dec. 2, 2009, available at http://www.koreatimes.co.kr/www/news/nation/2009/12/117_56560.html; Hai-ri Ahn, *Birthrate Crisis Forces Tougher Stand on Abortion*, JOONGANG DAILY, Nov. 16, 2009, available at <http://joongangdaily.joins.com/article/view.asp?aid=2912604>.

⁶ UNITED NATIONS POPULATION FUND, STATE OF WORLD POPULATION 2009 88 (2009) (this figure refers to the total fertility rate, or the "number of children a woman would have during her reproductive years if she bore children at the rate estimated for different age groups in the specified time period." *Id.* at 93-94).

⁷ Ji Young LeeAn, *Low Birth Rate Blamed on Women*, IPS NEWS, Dec. 19, 2009, available at <http://www.ipsnews.net/news.asp?idnews=49752> (citation omitted).

⁸ This article will not examine Korean statutes or constitutional rights, nor will it look closely at the extensive abortion jurisprudence in other nations, which has traditionally centered on domestic civil rights arguments rather than international human rights jurisprudence. However, an increasing number of domestic courts are in fact basing abortion decisions on an analysis of international human rights law. See WOMEN'S LINK WORLDWIDE, HIGH IMPACT LITIGATION IN COLUMBIA: THE UNCONSTITUTIONALITY IN ABORTION LAW 28-29, 45 (Women's Link Worldwide 2007), available at http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf (citing *In re Abortion Law Challenge in Colombia*, Corte Constitucional, Sentencia C-355/06 (2006) (overturning Colombia's law criminalizing therapeutic abortion in part because of recommendations of the CEDAW Committee)).

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III will attempt to clarify the human rights implications of a crackdown. Finally, Section IV will draw conclusions from the analysis, namely that criminally punishing women who undergo abortions and their abortion providers would run counter to a number of Korea's international human rights commitments, and thus the government should instead use alternative human rights-beneficial methods in its attempts to raise the birth rate.

II. ABORTION IN KOREA

A. Historical Background

Articles 269 and 270 of the 1953 Korean Criminal Code prohibit abortions, providing penalties for both the pregnant woman and the doctor involved.⁹ In 1973, Article 14 of the Maternal and Child Health Act set up a system of exceptions to this general prohibition.¹⁰ Specifically, doctors were permitted to perform abortions within the first twenty-four weeks of pregnancy on women who were victims of rape or incest. Abortions could be performed if a fetus was suspected of having a genetic disorder or if continuation of the pregnancy was likely to damage the woman's health. Additionally, if the pregnant woman or her spouse suffered from a communicable disease or from a "eugenic or hereditary mental or physical disease" specified by a Presidential Decree, an abortion could be performed.¹¹ After the twenty-four week period, abortions were prohibited under all circumstances.¹²

If a woman did not qualify for one of the listed exceptions, the punishment for undergoing an abortion was up to a year in prison and 2 million Won (\$1,740) fine.¹³ A doctor who performed an abortion in the absence of an exception could be punished up to two years in prison if there was no injury to the woman operated on.¹⁴ If the woman was injured during the abortion, the

⁹ See Korean Criminal Code, art. 269(1), 270(1) in CURRENT LAWS OF THE REPUBLIC OF KOREA 797-8 (Korea Legislation Research Institute 1992).

¹⁰ Mother-Child Health Act, *supra* note 3.

¹¹ *Id.* (In 2009, the list of diseases justifying a legal abortion was considerably narrowed by the government, eliminating several diseases, including schizophrenia, chicken pox, hepatitis, hemophilia, bipolar disorder and hereditary epilepsy and HIV). See Bae Ji-Sook, *Rules on Abortion Toughened: Contraction of HIV, Hepatitis Won't Justify Abortion*, KOREA TIMES, June 30, 2009, available at http://www.koreatimes.co.kr/www/news/nation/2009/06/117_47720.html.

¹² Mother-Child Health Act, *supra* note 3, art. 270. The deadline for abortions was previously set at 28 weeks, prior to the 2009 revision.

¹³ *Id.*

¹⁴ *Id.*

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punishment for the doctor is raised to three years. If the woman died the doctor could be jailed for up to five years.¹⁵ Furthermore, the doctor can lose his or her medical license for up to seven years for performing an abortion.¹⁶

Nevertheless, these punishments are seldom administered due to widespread non-enforcement of the law. In fact, from the early 1960s to the late 1990s, the Korean government actively encouraged women to get abortions as a means of heading off the perceived dangers of overpopulation.¹⁷ Currently, the government no longer encourages abortions nor does it enforce the abortion laws, as the country is faced with a low birth rate. According to one report, there were a total of seventeen abortion-related indictments between 2005 and September 2009.¹⁸

However, the number of abortions has skyrocketed. According to Korea's Ministry of Health, there are 350,000 abortions each year, as compared to 450,000 live births.¹⁹ The real number is assumed to be even higher: according to Rep. Chang Yoon-seok, of the ruling Grand National Party, the number of illegal abortions exceeds 1.5 million a year.²⁰ Others have estimated the figure as high as 2 million a year.²¹ Since abortions often go unreported, nobody really knows the true number of abortions that take place in Korea each year.

Until recently, there was little discussion regarding abortion in Korea, especially not as a human rights issue. The National Human Rights Commission, the most prominent national advocacy institution for human rights since its founding in 2002, has not addressed the issue of abortion, only noting that it was a controversial issue in the 'Right to Life' section of its 2007 National Action Plan.²² Major non-governmental human rights advocacy groups, such as Minbyun – Lawyers for a Democratic Society and People's Society for Participatory Democracy, have not developed a stance on the issue of abortion.²³

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Tom Welsh, *Why Feminists Object to Korea's High Abortion Rate*, KOREA HERALD, Dec. 18, 1998.

¹⁸ Hai-ri Ahn, *supra* note 5.

¹⁹ *Id.*

²⁰ Bae Ji-Sook, *supra* note 5. It is unclear if there is any hard evidence behind this figure, but it has often been cited in the current debate.

²¹ Park Soo-Mee, *After 30 Years of Abortion, Protesters Urge Change*, JOONGANG DAILY, Feb. 10, 2003, available at <http://joongangdaily.joins.com/article/view.asp?aid=1932288>.

²² National Human Rights Commission of Korea, National Action Plan for the Promotion and Protection of Human Rights 2007-2011 at 121-22 (2006) (in Korean).

²³ This can be contrasted to the major Western international human rights organizations, which

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While reproductive rights were not widely discussed in Korea, for many years there has been debate at both the international and domestic level regarding the human rights implications of sex-selective abortions in Korea and the human rights implications of an over-reliance on abortion.²⁴ The selective abortion of female fetuses became a serious problem in Korea, as well as in some other Asian countries, with the advent of affordable ultrasound facilities in the early 1980s. This preference for male children was due to the strength of the traditional patriarchal family system typical of Confucian societies. The International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and Convention on the Elimination of all Forms of Discrimination Against Women (“CEDAW”) Committees have repeatedly expressed their concern with the practice of sex-selective abortion in Asian countries, and have called upon States to implement a comprehensive strategy to overcome the traditional gender stereotypes that underlie the practice.²⁵

In 1987, the newly democratic Korean government attempted to curb the practice of sex-selective abortion by passing a law that prohibited doctors from revealing to the pregnant women the gender of their fetuses.²⁶ The penalty for doctors violating the law was up to three years of incarceration and a fine of up to 10 million won (\$8,700). Yet, this law did not succeed in preventing sex-selective abortions and the ratio of boys to girls at birth rose steadily until the mid-1990s, after which it started to decline.²⁷ In 2008, the Constitutional Court declared the law unconstitutional, noting that it violated women’s right to know

generally have clear-cut positions in favor of reproductive rights and decriminalizing abortion. See Human Rights Watch, *Abortion* (Mar. 31, 2009), available at <http://www.hrw.org/en/news/2009/03/31/abortion> (“equitable access to safe abortion services is first and foremost a human right”); Amnesty International, *Sexual and Reproductive Rights*, available at <http://www.amnesty.org/en/campaigns/stop-violence-against-women/issues/implementation-existing-laws/srr> (“Imprisonment or other criminal sanctions for seeking or having an abortion is a violation of women’s reproductive rights”).

²⁴ See, Naryung Kim, *Breaking Free From Patriarchy: A Comparative Study of Sex-Selective Abortions in Korea and the United States*, 17 UCLA PAC. BASIN L.J. 301 (1999).

²⁵ See, e.g., International Committee on Economic, Social and Cultural Rights (ICESCR), *Concluding Observations: Republic of Korea*, ¶ 81, Nov. 5, 2001, E/C 12/1/Add.59; Convention of Elimination of All Forms of Discrimination Against Women (CEDAW), *Concluding Comments: China*, ¶¶ 17- 21, Aug. 25, 2006, U.N. Doc. CEDAW/C/CHN/CO/6 (2006); CEDAW, *Concluding Observations: India*, ¶¶ 38-39, Feb. 2, 2007, U.N. Doc. CEDAW/C/IND/CO/3 (2007).

²⁶ Medical Practices Act, art. 19.2 (Prohibition of Divulgence of Secrets) in 6 CURRENT LAWS OF THE REPUBLIC OF KOREA 3457-5 (Korea Leg. Research Institute ed. 1992).

²⁷ Woojin Chung and Monica Das Gupta, *Why is Son Preference Declining in South Korea? The Role of Development and Public Policy and the Implications for China and India* 8 (Policy Research Working Paper No. 4373, 2007).

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and restricted the freedom of medical professionals.²⁸ Since the Constitutional Court allowed the law to continue in effect until December 31, 2009, it is too soon to tell if its repeal will affect the number of sex-selective abortions. It is suspected to have little effect, since the law was not widely enforced, with only two doctors being convicted of illegally revealing a fetus' gender between 2004 and 2008.²⁹

There is evidence that the traditional preference for sons and practice of sex-selective abortion may be far less widespread than it used to be. In 2008, the gender ratio at birth, 106.4 boys for every 100 girls, fell within the normal range of 1.03 to 1.07 for countries that do not engage in sex-selective abortions.³⁰ The Constitutional Court, in its decision allowing doctors to reveal the gender of fetuses, concluded that the age-old preference for boys had lessened and the skewed gender ratio due to sex-selection abortion had dropped to an acceptable level.³¹ In fact, one recent survey revealed that both mothers and fathers in Korea are more likely to prefer daughters than they are to prefer sons.³²

In addition to sex-selection, the other human rights issue regarding the peculiarly high rate of abortion in Korea has seen some public debate. As mentioned previously, the exact number of abortions performed annually in Korea is unknown, but very high. According to the 2005 official figures of the Ministry of Health, Welfare and Family Affairs, 30 out of 1,000 Korean women between the ages of 15 and 44 had abortions in 2005.³³ This would make Korea one of the top three countries (along with Russia and Vietnam) in number of abortions per capita.³⁴ The CEDAW Committee has repeatedly expressed its concerns over the high number of abortions in general in Korea, and in 2007 over the particularly "high rate of abortion among women between the ages of 20 and 24."³⁵

The reasons for the large quantity of abortions in Korea are complex,

²⁸ Judgment of Constitutional Court, July 31, 2008, 2004 Hunma 1010, 2005 Hunba 90 (S. Korea).

²⁹ Park Si-Soo, *Ban on Telling Fetus Sex Unconstitutional*, KOREA TIMES, July 11, 2008, available at http://www.koreatimes.co.kr/www/news/nation/2008/07/117_28574.html.

³⁰ Editorial, *Daughter Preference: Changing Trend Reflects Crumbling Confucian Values*, KOREA TIMES, Jan. 13, 2010, available at http://www.koreatimes.co.kr/www/news/opinion/2010/01/202_58940.html.

³¹ Judgment of Constitutional Court, July 31, 2008, *supra* note 29.

³² Editorial, *supra* note 30.

³³ Kang Hyun-kyung, *'Anonymous Birth' to Slow Down Falling Birth Rates*, KOREA TIMES, Mar. 18, 2009, available at http://www.koreatimes.co.kr/www/news/nation/2009/03/116_41513.html.

³⁴ *Id.*

³⁵ See CEDAW, Concluding Comments: Republic of Korea, ¶ 29, Aug. 10, 2007, CEDAW/C/KOR/CO/6 (2007).

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but clearly center on a lack of societal acceptance of effective means of contraception. According to one study, 20.5% of Korean women use either the coitus interruptus or the rhythm methods of birth control, both of which are generally less effective than condoms or hormonal treatment.³⁶ Birth control pills have yet to achieve significant market exposure and are widely mistrusted by Korean women.³⁷ This has led some to view abortion as simply another form of contraception.³⁸ Clearly, there is an ongoing human rights imperative for the Korean government to engage in more effective sex education programs in order to ensure that women and men are aware of and willing to use more efficient means of contraception.

B. Recent Developments

Since his election in 2007, President Lee Myung Bak has hinted that he might favor a harder line on the enforcement of abortion laws.³⁹ In mid-2009, legislators took a small step in this direction by tightening the restrictions on performing abortions in the current law, removing certain diseases off the list justified for the use of legal abortion and revising the deadline for legal abortion to twenty-four weeks from conception instead of twenty-eight weeks.⁴⁰ However, the issue of criminalization did not truly come to a head until a few months later, with the November 2009 issuance of a report on declining birth rates by the Presidential Council for Future & Vision. The Council's report proposed a slew of measures aimed at increasing the birth rate, including: giving a family's third-born child financial support for high school, university fees and advantages in university entrance and employment; encouraging the use of paternity leave; giving special mortgage rates to families with three or more

³⁶ Bae Ji-sook, *Tips on Contraception for Women*, KOREA TIMES, Dec. 9, 2007, available at http://www.koreatimes.co.kr/www/news/art/2009/11/147_15248.html.

³⁷ Naryung, *supra* note 24 at 319. See also, Ellen R. Wiebe, et al., *Ethnic Korean Women's Perceptions about Birth Control*, 71 *CONTRACEPTION*, 623, 625 (2006) (noting deep distrust for hormonal methods of contraception among women of Korean ethnicity in Vancouver).

³⁸ *Id.* at 315 n.71. Human rights treaty bodies have attempted to counter such views, which are detrimental to women's health. See, CESCR, *Concluding Observations: Lithuania*, ¶ 50, June 7, 2004, U.N. Doc. E/C.12/1/Add.96 (calling upon Lithuania to "strengthen its efforts to promote awareness of sexual and reproductive health, safe contraceptive methods and the health risk of using abortion as a method of birth control").

³⁹ See, e.g., Editorial, *Enhancing Abortion Rights: Fetus-termination Is Not Something Seoul Should Encourage*, KOREA TIMES, Feb. 15, 2008, available at http://www.koreatimes.co.kr/www/news/opinion/2008/02/202_19018.html (reporting Lee Myung Bak's statement that strict control would automatically solve the low birthrate issue).

⁴⁰ Bae, *supra* note 11.

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children; extending retirement age for parents with multiple children; lowering of the elementary school entrance age one year, to age five, in order to reduce private education costs; and providing financial support for artificial insemination treatments.⁴¹ The council also called on the government to relax immigration rules and allow dual citizenships, in order to increase the number of immigrants to Korea.⁴² Most controversially, however, these plans also called for an extensive anti-abortion campaign.⁴³

While the report did not directly advocate criminal prosecutions for illegal abortions, the implication was certainly there, and other legislators and governmental officials began to broach the issue. For example, the Minister of Health, Welfare and Family Affairs, Jeon Jae-hee, commented that “even if we don’t intend to hold anyone accountable for all those illegal abortions in the past, we must crack down on them from now on.”⁴⁴ Rep. Chang Yoon-seok, of the ruling Grand National Party, stated that “[t]he most important thing will be for the doctors to understand that abortion is a serious crime.”⁴⁵ Eventually, President Lee Myung Bak announced that it was “time to start the debate” of revising the Mother and Child Health Law⁴⁶ and scheduled public hearings on a revised law for January 2010. In addition, the government commenced a public relations campaign to discourage abortions, including subway posters stating: “With abortion, you are aborting the future.”⁴⁷

Although it has proved tempting to blame the low birth rate on the lack of enforcement of anti-abortion laws, this is not necessarily a convincing explanation. Many commentators assert that there are other causes of Korea’s low birth rate. For example, one recent study pointed to the high differentials in salaries between Korean men and women as a possible reason for the country’s low birth rate.⁴⁸ Another study highlighted labor market insecurity, marriage trends (i.e., a delay in marriage, decrease in marriage and increase in incidence

⁴¹ Presidential Council for Future & Vision, *Comprehensive Plans for New Birth Rate*, Nov. 25, 2009, available at

http://www.future.go.kr/01.activity/02_Activity_broadcast.php?mode=view&tID=41 (in Korean).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Choe Sang-Hun, *South Korea Confronts Open Secret of Abortion*, N.Y. TIMES, Jan. 5, 2010, available at <http://www.nytimes.com/2010/01/06/world/asia/06korea.html>.

⁴⁵ Bae Ji-sook, *OB/GYNs to Refrain From Illegal Abortions*, KOREA TIMES, Oct. 19, 2009, available at http://koreatimes.co.kr/www/news/nation/2009/10/113_53809.html.

⁴⁶ Choe, *supra* note 44.

⁴⁷ *Id.* (citation omitted).

⁴⁸ Kim Tae-Gyu, *Gender Equality in Salary to Boost Low Birth Rates*, KOREA TIMES, Dec. 22, 2009, available at http://www.koreatimes.co.kr/www/news/nation/2009/12/123_57775.html (citing study by the LG Economic Research Institute).

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of divorce), increased female participation in higher education and the employment market, and greater female control over child-bearing decisions.⁴⁹ Others have blamed Korea's dearth of public welfare programs and unequal distribution of income.⁵⁰ Regardless of its effectiveness in raising birth rates, the policy of prohibiting abortions in order to increase a state's population actually has a long and peculiarly undistinguished history as a policy tool, having been used by some of the twentieth century's most coercive and authoritarian regimes.⁵¹

At the same time the governmental report was issued, there was a parallel movement underway among Korean doctors to call for enforcement of abortion laws. Starting in October 2009, a group of obstetricians and gynecologists, calling itself GYNOB in English, began quite vocally campaigning for enforcement of the anti-abortion laws. While the motivations of GYNOB's members vary, the group's public statements tend to emphasize the ethical problems with abortion and have largely avoided the religious rhetoric of existing (Christian) anti-abortion groups and the population growth rhetoric of government policy-makers. As of January 2010, around 680 obstetricians had joined GYNOB.⁵²

GYNOB has three stated objectives: to end all abortions in Korea; as a short-term measure, to reduce the number of abortions in Korea to 100,000 within ten years; and to eliminate all forms of abortion except when necessary to save the life of an expectant mother.⁵³ The group has already set up a hotline

⁴⁹ See Doo-Sub Kim, *Theoretical Explanations of Rapid Fertility Decline in Korea*, 3(1) THE JAPANESE JOURNAL OF POPULATION 2 (2005).

⁵⁰ Joung-Woo Lee, Op-Ed, *On the Relationship Between South Korea's Income Distribution and Birth Rate*, THE HANKYOREH, Nov. 21, 2009, available at http://english.hani.co.kr/arti/english_edition/e_opinion/389003.html.

⁵¹ For example, in 1936, Joseph Stalin outlawed abortions in the Soviet Union (reversing Lenin's policy of legalization) in order to increase population growth. See Libor Stloukal, *The Politics of Population Policy: Abortion in the Soviet Union*, 12 (Australian National University Working Papers in Demography No. 43 1993). The Nazi regime in Germany also cracked down on abortions (by 'Aryans'), which had been classified as misdemeanors and widely tolerated by the Weimar regime, in order to increase 'desirable' population growth. Tessa Chelouche, *Doctors, Pregnancy, Childbirth and Abortion During the Third Reich*, 9 ISR. MED. ASSOC. J. 202 (2007). More recently, Nicolae Ceausescu's regime in Romania prohibited abortions (which had previously been available on demand) from 1966 to 1990, in order to increase Romania's population. Ceausescu asserted that "the fetus is the socialist property of the whole society . . . giving birth is a patriotic duty." Charlotte Hord et al., *Reproductive Health in Romania: Reversing the Ceausescu Legacy*, 22(4) STUD. FAM. PLAN., 231, 232 (1991).

⁵² E-mail Interview by Steve Weatherbe with Dr. Anna Choi, GYNOB Spokesperson (Jan. 20, 2010), available at http://www.prolife-dr.org/eng_free/13165.

⁵³ E-mail Interview by Michael Cook with Dr. San-Duk Shim, GYNOB Spokesperson (Dec. 13, 2009), available at <http://www.prolife-dr.org/12576>.

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to report clinics that perform illegal abortions and plans to report practitioners of illegal abortions to the police.⁵⁴

As of January, 2010, around 680 obstetricians had joined GYNOB.⁵⁵ Another anti-abortion group, called the Korean Pro-life Doctors Association, was formed in December 2009 that includes both medical and non-medical professionals. As of January 2010 it had 120 members. The Korean Association of Obstetrics and Gynecologists has opposed GYNOB's call for a crackdown because it believes that a crackdown on abortions will lead to an increase in health problems from unsafe abortions as the operations are forced deeper underground, as well as an increase in abandoned children.⁵⁶ While it is too early to conclude whether Korean doctors' growing reluctance to provide abortions is affecting the availability of the operation within Korea, the Director of the Korea Sexual Violence Relief Center reports there has been an increase in the number of women denied abortions (even in one case of rape) who have approached the Center for counseling.⁵⁷

III. CRACKING DOWN ON ABORTIONS AND HUMAN RIGHTS

Given the renewed discussion of *de facto* criminalization, as opposed to the *de jure* criminalization that exists today, it is worth examining what would be the human rights consequences of such a policy. To date, human rights treaties have, with one exception, not directly mentioned abortion, a fact that should not be particularly surprising given the wide diversity of views on the subject around the world.⁵⁸ Various "soft law" documents, such as declarations from international conferences, have come closer to explicitly embracing reproductive rights and decriminalization of abortion *per se*, but these pronouncements do not reach the level of binding international law.⁵⁹

⁵⁴ Kim, *supra* note 48.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ E-mail Interview by Sungmin Koh with Eun Sang Lee, Director, Korea Sexual Violence Relief Center (Jan. 26, 2010).

⁵⁸ The exception is the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), which states that:

Parties shall take all appropriate measures to... protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

Maputo Protocol, art. 14(2)(c), July 11, 2003.

⁵⁹ For example, the 1995 Fourth World Conference on Women addressed abortion criminalization by urging governments to "consider reviewing laws containing punitive measures against women

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Nevertheless, while human rights treaties do not directly address the issue of whether criminalizing abortion violates a party's treaty obligations, one can make strong arguments from the texts that criminalization of abortion would be a human rights violation. The United Nations (U.N.) treaty bodies have issued comments highlighting the negative human rights implications of such laws. Policy pronouncements of U.N. treaty bodies, in the form of General Comments or Recommendations, are not considered binding international law, but are helpful interpretations of the treaty at issue from recognized authorities, which can guide national policies in a rights-affirming direction.⁶⁰

There are five types of rights most commonly invoked in the debate over abortion prohibitions: right to life; right to be free from cruel, inhuman and degrading treatment; right to privacy; right to health; and right to equal treatment for women and men.⁶¹ This section will examine each of these rights in turn, looking in particular at international treaties to which Korea is a party.⁶² These treaties include, most notably, the International Covenant on Civil and Political Rights ("ICCPR"),⁶³ the International Covenant on Economic, Social, and Cultural Rights ("ICESCR")⁶⁴ and the Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW").⁶⁵ It will also review the application of the non-retrogression principle to Korean abortion laws.

A. Right to Life

The Right to Life is protected in Article 6 of the ICCPR,⁶⁶ as well as in

who have undergone illegal abortions." Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, ¶ 106(k), Oct. 17, 1995, UN Doc. A/CONF.177/20.

⁶⁰ See Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905, 924 (2009).

⁶¹ A number of other human rights have been implicated to a greater or lesser extent in relation to abortion jurisprudence; these will not be reviewed in this article, but for good overview see Center for Reproductive Rights, *Twelve Human Rights Key to Reproductive Rights* (2009), available at <http://reproductiverights.org/en/document/twelve-human-rights-key-to-reproductive-rights>.

⁶² It should be noted, however, that the human rights discussed in this article are generally protected by customary international law, in addition to existing treaties. See, Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1995-96).

⁶³ CEDAW, G.A.res 34/180, 34 U.N. GAOR (No.46) at 193, U.N. DOC. A/34/46, entered into force Sept. 2, 1981.

⁶⁴ ICCPR, G.A.res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976 (accession by Korea on Apr. 10, 1990).

⁶⁵ CEDAW, G.A. res. 34/180, 34 UN G.A.O.R. Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 U.N.T.S. 13, entered into force Sept. 3, 1981 (ratification by Korea on Dec. 27, 1984).

⁶⁶ ICCPR, *supra* note 64, U.N. Doc. A/6316 at art. 6.1 ("Every human being has the inherent right

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the Universal Declaration of Human Rights (“UDHR”)⁶⁷ and many regional human rights treaties.⁶⁸ According to the Committee (of the ICCPR), the right to life is “the supreme right” and should “not be interpreted narrowly.”⁶⁹ As Hipólito Solari Yrigoyen, of the Human Rights Committee stated, “it is not only taking a person’s life that violates article 6 of the Covenant but also placing a person’s life in grave danger.”⁷⁰

The evidence that criminalizing abortion negatively affects women’s right to life is fairly convincing. Essentially, the argument is that if abortions are illegal, they will be less safe and lead to more women’s deaths.⁷¹ This causal connection has been shown in scientific studies⁷² and is perhaps illustrated most vividly by the data from Romania, where abortion was criminalized between 1966 and 1990 as a method of increasing population growth.⁷³ There, the rate of abortion-related maternal deaths per 100,000 live births rose from under 20 in 1965 to over 120 in 1989, more than ten times that of any other European country. The year after abortion was legalized, the abortion-related maternal mortality rate dropped in half.⁷⁴

The U.N. treaty bodies have repeatedly recognized the negative effect of criminalizing abortion on the right to life. For example, the Human Rights Committee has expressed deep concern about abortion laws in Poland (which contain exceptions where the mother’s health is in danger among other circumstances) because they “incite women to seek unsafe, illegal abortions, with attendant risks to their life and health.”⁷⁵ In many other instances, the

to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”).

⁶⁷ Universal Declaration of Human Rights (UDHR), G.A. Res. 217A, art. 3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (“Everyone has the right to life, liberty and security of person.”)

⁶⁸ See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention], art. 2, 213 U.N.T.S. 221, entered into force Sept. 3, 1953.

⁶⁹ Human Rights Committee, General Comment 6, art.6 (16th session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, 6 (1994).

⁷⁰ Karen Noelia Llantoy Huamán v. Peru, Communication No. 1153/2003, appendix, U.N. Doc. CCPR/C/85/D/1153/2003 (2005) (separate dissenting opinion of Mr. Solari Yrigoyen).

⁷¹ According to the World Health Organization, there are 67,000 deaths annually due to unsafe abortions. See World Health Organization, *Preventing Unsafe Abortion*, available at http://www.who.int/reproductivehealth/topics/unsafe_abortion/hrpwork/en/index.html.

⁷² See Alan Guttmacher Institute, *Abortion in Context: United States and Worldwide*, (May 1999), available at http://www.guttmacher.org/pubs/ib_0599.html.

⁷³ Rebecca J. Cook & Bernard M. Dickens, *Human Rights Dynamics of Abortion Law Reform*, 25 HUM. RTS. Q. 1, 20 (2003).

⁷⁴ *Id.*

⁷⁵ Covenant on Civil and Political Rights (CCPR), *Concluding Observations: Poland*, ¶ 8, Dec. 2,

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Human Rights Committee has emphasized the fact that clandestine or illegal abortions put women's lives at risk and instructed countries to liberalize their abortion laws.⁷⁶ The Committee also stated in General Comment No. 28 that State Parties, when reporting on the right to life, should "give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undertake life-threatening clandestine abortions."⁷⁷ However, the Human Rights Committee has not directly stated that general criminalization of abortion violates the right to life if exceptions exist that would allow abortions when the mother's life is in danger.

The CEDAW and ICESCR do not explicitly protect the right to life, but both the CEDAW and ICESCR Committees have also highlighted the fact that criminalizing abortion can lead to large numbers of women's deaths. For example, in its 2006 concluding report on Mexico, the CEDAW Committee noted that unsafe abortions were a leading cause of maternal deaths, despite the existence of exceptions for therapeutic abortions.⁷⁸ In 2001, the ICESCR Committee criticized Nepal's total abortion ban, in part for leading to a high maternal mortality rate due to unsafe illegal abortions.⁷⁹ In 2008, the CEDAW Committee concluded that Nigeria should "assess the impact of its abortion law on the maternal mortality rate and to give consideration to its reform or modification" because of the high mortality rate from unsafe abortions, which are illegal with certain exceptions for therapeutic abortions.⁸⁰

The right to life has also been used by some to justify the criminalization of abortion because as the argument goes, allowing abortions violates the unborn child's right to life. This argument is dependent on the assumption that criminalizing abortion will reduce the actual abortion rate, instead of simply pushing abortion providers underground. In the Korean context, representatives of the Catholic Church have made this claim most prominently, with Cardinal Nicolas Cheong Jin-Suk stating in 2007 that

2004, U.N. Doc. CCPR/CO/82/POL.

⁷⁶ See, e.g., CCPR, *Concluding Observations: Chile*, at ¶ 8, May 18, 2007, U.N. Doc. CCPR/C/CHL/CO/5; CCPR, *Concluding Observations: El Salvador*, ¶ 14, Aug. 22, 2003, U.N. Doc. CCPR/CO/78/SLV.

⁷⁷ Human Rights Committee, General Comment No. 28: art. 3 (The Equality of Rights Between Men and Women), ¶ 10, Mar. 29, 2000, U.N. Doc. CCPR/C/21/Rev.1/Add.10.

⁷⁸ CEDAW, *Concluding Observations: Mexico*, ¶ 32, Aug. 25, 2006, U.N. Doc. CEDAW/C/MEX/6. Therapeutic abortion is defined as an abortion "induced because of the mother's physical or mental health, or to prevent birth of a deformed child or a child resulting from rape." PDR MEDICAL DICTIONARY 4 (Marjory Spraycar ed., 1995).

⁷⁹ CESCR, *Concluding Observations: Nepal*, ¶ ¶ 548, 549, 571, Sep. 24, 2001, U.N. Doc. E/2002/22 (2001).

⁸⁰ CEDAW, *Concluding Observations: Nigeria*, ¶ 34, July 8, 2008, CEDAW/C/NGA/CO/6.

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abortion is the most serious human rights violation issue in Korea.⁸¹ Without wading into discussions on the question of “when life starts,” the fact remains that international human rights law, as currently constituted, does not grant the fetus’ right to life.⁸² In the preparatory discussions to the ICCPR, an amendment was proposed to extend the scope of the ICCPR to include unborn children, but this suggestion was rejected.⁸³ More recently, the Human Rights Committee has repeatedly urged the liberalization of abortion laws.⁸⁴ National courts in France and Austria have concluded that liberal abortion laws do not violate the right to life provisions of the European Convention on Human Rights.⁸⁵

The only exception to the rule that human rights protections do not extend to the unborn child is found in the American Convention for Human Rights, which was influenced by the prominence of the Catholic Church in Latin America. It states that the right to have one’s life respected “shall be protected by law and, in general, from the moment of conception.”⁸⁶ However, this provision has been quite controversial and has not been cited by the Inter-American Commission or Court to mandate states prohibit abortions. Rather, it directs that the rights of the fetus be measured against the rights of the pregnant woman.

B. Right to Health

The negative health consequences of unsafe abortions have long been evident. According to a 1997 World Health Organization report, 5.3 million women are temporarily or permanently disabled each year from unsafe abortions.⁸⁷ The most common adverse health consequences of unsafe abortions include severe bleeding, tearing of the uterus, internal infection and blood poisoning conditions, which can often lead to an impairment of future child-bearing capacity. These adverse health consequences have long been

⁸¹ Press Release, *supra* note 4.

⁸² See Cristina Zampas & Jaime Gher, *Abortion as a Human Right: International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 262-68 (2008).

⁸³ See Rebecca J. Cook, *International Protection of Women’s Productive Rights*, 24 N.Y.U. J. INT’L L. & POL. 645, 690-1 (1992).

⁸⁴ Zampas & Gher, *supra* note 82, at 256-58.

⁸⁵ See Berta E. Hernandez, *To Bear or not to Bear: Reproductive Freedom as a Human Right*, 17 BROOK. J. INT’L L. 309, 332-33 (1991).

⁸⁶ American Convention on Human Rights, O.A.S. Treaty Series No. 36, art. 4, Nov. 22, 1969, 1144 U.N.T.S. 123, *entered into force* July 18, 1978.

⁸⁷ Jocelyn E. Getgen, *Reproductive Injustice: An Analysis of Nicaragua’s Complete Abortion Ban*, 41 CORNELL INT’L L.J. 143, 147 (2008).

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recognized by the world community. For example, at the 1994 International Conference on Population and Development (ICPD), governments agreed to “deal with the health impact of unsafe abortion as a major public health concern.”⁸⁸

As discussed in the previous section, it is generally recognized that the adverse health consequences of abortion stem in large part from its clandestine nature in countries where abortion is illegal. While abortion laws are generally not currently enforced in Korea, there are reports of adverse health consequences for women because the illegal nature of the procedure forces them to visit unlicensed or “underground” doctors, putting them at risk of post-operative infections and other negative health outcomes.⁸⁹ There can be little doubt that unsafe abortions will increase if the abortion laws are actively enforced and the operations are pushed further underground.

From a human rights standpoint, the right to health is one of the most important rights protected by Article 25 of the UDHR⁹⁰ and Article 12 of the ICESCR, which recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”⁹¹ According to the ICESCR Committee, in General Comment 14, this includes the “right to control one’s health and body, including sexual and reproductive freedoms.”⁹² General Comment 14 also asserts that “[t]he realization of women’s right to health requires the removal of all barriers interfering with access to health services.”⁹³

The CEDAW and ICCPR treaty bodies have also commented on the adverse health consequences of restrictive abortion laws. For example, the

⁸⁸ *Programme of Action of the International Conference on Population and Development*, Cairo, Egypt, Sept. 5-13, 1994, ¶ 8.25, U.N. Doc. A/CONF.171/13/Rev.1 (1995).

⁸⁹ See John Glionna, *In South Korea, Abortion Foes Gain Ground*, LA TIMES, Nov. 29, 2009, available at

[http://www.latimes.com/news/nation-and-world/la-fg-korea-abortion29-](http://www.latimes.com/news/nation-and-world/la-fg-korea-abortion29-2009nov29,0,5103901,full.story)

2009nov29,0,5103901,full.story; Bae Ji-Sook, *Move Underway to Legalize Abortion*, KOREA TIMES, Dec. 4, 2007, available at

http://www.koreatimes.co.kr/www/news/nation/2007/12/113_14935.html;

Equality Now, *Cameroon. Submission to the United Nations Human Rights Committee*, 67th session, Oct. 1999, 3 (“Equality Now also submits that the relatively high level of maternal mortality is attributable to unsafe, illegal abortions which threaten a women’s right to life guaranteed by Article 6 of the Covenant”).

⁹⁰ UDHR, *supra* note 67, U.N. Doc. A/810 (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . medical care and necessary social services . . . Motherhood [is] entitled to special care and assistance”).

⁹¹ ICCPR, *supra* note 64, U.N. Doc. A/6316 at art. 12.

⁹² ICESCR, *General Comment No. 14 on ICESCR Article 12 (The Right to the Highest Attainable Standard of Health)*, 22d Sess., ¶ 8, April 25- May 12, 2000, U.N. Doc. E/C.12/2000/4.

⁹³ *Id.* at ¶ 21.

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CEDAW Committee noted that particularly restrictive abortion laws can violate the right to health⁹⁴ and the Human Rights Committee has observed that illegal abortions have harmful consequences for women's health, even in the context of States that have exceptions allowing therapeutic abortions.⁹⁵

C. Discrimination

One of the basic principles of international human rights law is that women have the right to be free of discrimination against them by the State. This is reflected in the UDHR,⁹⁶ the ICCPR,⁹⁷ the ICESCR,⁹⁸ the CEDAW⁹⁹ and other treaties. Gender discrimination is a particularly sensitive issue in Korea, which has generally passed advanced laws against discrimination. These laws are widely seen as ineffective in practice due to long-held patriarchal traditions.¹⁰⁰

It is now well-accepted in international human rights instruments that a law can be discriminatory in effect, even if it appears gender-neutral on its face. Thus, even if the criminalization of abortion might not seem to apply solely to women, it is self-evident that in the real world women bear the brunt of such

⁹⁴ See, e.g., CEDAW, *Concluding Observations; Belize*, ¶ 56, June 7-25, 1999, U.N. Doc. A/54/38; CEDAW, *Concluding Observations; Chile*, ¶ 228, July 9, 1999, U.N. Doc. A/54/38; CEDAW, *Concluding Observations; Dominican Republic*, ¶ 337, May 14, 1998, U.N. Doc. A/53/38; CEDAW, *Concluding Observations; Paraguay*, ¶ 131, May 9, 1996, U.N. Doc. A/51/38.

⁹⁵ See CCPR, *Concluding Observations: Mali*, ¶ 14, April 16, 2003, CCPR/CO/77/MLI; and CCPR, *supra* note 76 at ¶ 8. .

⁹⁶ See UDHR, *supra* note 67, U.N. Doc. A/810 at art. 7 ("All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination").

⁹⁷ See ICCPR, *supra* note 64, U.N. Doc. A/34/46 at art. 26 ("...the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status").

⁹⁸ See *id.* at art. 2.2 ("The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".)

⁹⁹ CEDAW, *supra* note 65, U.N. Doc. A/34/46 at art. 2(f) ("States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake ... To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women").

¹⁰⁰ See Gina Kong, *Are Women-Only Trade Unions Necessary in South Korea? A Study of Women Workers' Struggles in Korea's Labor Market*, 29 NW. J. INT'L L. & BUS. 217, 235-36 (2009).

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laws. It can also be argued that denying women the ability to have abortions leads to discriminatory outcomes in many other areas of life, by “reinforcing women’s traditional roles in childbearing and childbearing, continuing their dependency on men or on the state, and effectively foreclosing their economic development.”¹⁰¹

The anti-discrimination principle has been applied specifically to reproductive health by Article 12 of CEDAW, which holds that state parties must “take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”¹⁰² Article 12 was expanded to include abortion and other procedures in General Recommendation 24 of the CEDAW Committee, which states that

[t]he obligation to respect rights requires States parties to refrain from obstructing action taken by women in pursuit of their health care goals . . . Other barriers to women’s access to . . . care, including laws that criminalize medical procedures only needed by women and that punish women who undergo these procedures.¹⁰³

The Recommendation also affirms that states must “put in place a system that ensures effective judicial action. Failure to do so will constitute a violation of article 12.” The Human Rights Committee has made similar statements. For example, General Comment 28 on the Equality of Rights between Men and Women asserts that States “should ensure that women do not have to undertake life-threatening clandestine abortions.”¹⁰⁴ This implies the necessity of decriminalization in order to avoid clandestine abortions from becoming common.

D. Right to be Free from Cruel and Inhuman Treatment

It is possible to assert that forcing a woman to bear a child against her will constitutes torture or cruel and inhuman treatment, as prohibited by the Convention Against Torture¹⁰⁵ and Article 7 of the ICCPR, which states that no

¹⁰¹ Hernandez, *supra* note 85, at 343.

¹⁰² CEDAW, *supra* note 65, U.N. Doc. A/34/46 at art. 12.

¹⁰³ CEDAW, *General Recommendation 24: Women and Health*, ¶ 14, Jan. 19- Feb. 5, 1999, U.N. Doc. A/54/38/Rev.1.

¹⁰⁴ The Equality of Rights Between Men and Women, *supra* note 77, at ¶ 10.

¹⁰⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, G.A. Res. 46,

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one “shall be subjected to torture or to cruel, inhuman or degrading treatment.”¹⁰⁶ The Torture Committee recently condemned Nicaragua’s draconian anti-abortion laws, which do not allow for therapeutic abortion, for violating the right to be free from cruel and inhuman treatment.¹⁰⁷

This argument has also been used to condemn Peru’s anti-abortion laws. The Human Rights Committee has cited Article 7, both in its concluding observations¹⁰⁸ and in response to an individual complaint in *Llantoy Huaman v. Peru*.¹⁰⁹ The Committee, using this article, along with Article 17, discussed below, found that the failure of the Peruvian government to ensure the complainant’s access to an abortion amounted to a breach of her civil and political rights. The complainant was a pregnant woman who was not permitted to abort an anencephalic fetus.¹¹⁰ She claimed that she experienced mental suffering from the stress of knowing she would give birth to an anencephalic baby, saw its deformities, and breast-fed the baby for four days. The Human Rights Committee accepted her argument and found the State’s failure to allow a therapeutic abortion caused the suffering, in violation of Article 7 of the ICCPR.

This represents the first time a treaty body addressed a complaint against a government for failing to allow an abortion and held the State responsible for violating the woman’s human rights.¹¹¹ However, it should be noted that the Peruvian and Nicaraguan situations involved the denial of therapeutic abortions. It is unclear whether, in the future, the Human Rights Committee will take a broad reading of *Llantoy Huaman* and extend abortion rights to women who experience mental suffering from unplanned pregnancies, absent fetal deformity.

E. Right to Privacy

For many years, there has been a growing realization that abortion and reproductive choices belong to the sphere of personal decisions best left to

annex, U.N. GAOR, 39th Sess., 93d plen. mtg., Supp. No. 51, at 197; U.N. Doc. A/39/51 (1984); 1465 U.N.T.S. 85 (1987), *entered into force* June 26, 1987 (accession by Korea on Jan. 9, 1995).

¹⁰⁶ ICCPR, *supra* note 64, U.N. Doc. A/6316 at art. 7.

¹⁰⁷ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Concluding Observations: Nicaragua*, ¶ 16, June 10, 2009, U.N. Doc. CAT/C/NIC/CO/1.

¹⁰⁸ See CCPR, *Concluding Observations: Peru*, ¶ 20, Nov. 15, 2000, U.N. Doc. CCPR/CO/70/PER.

¹⁰⁹ *Karen Noelia Llantoy Huamán v. Peru*, U.N. Doc. CCPR/C/85/D/1153/2003.

¹¹⁰ Anencephalic babies are born without much of their brains, and invariably die soon after birth.

¹¹¹ Individual complaints can be submitted to the Human Rights Committee pursuant to the First Optional Protocol to the ICCPR, to which Korea is a Party.

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women without the interference of governmental authorities. This principle was recognized as early as the 1968 International Conference on Human Rights in Tehran, where the Final Act stated that “parents have a basic human right to determine freely and responsibly the number and spacing of their children.”¹¹² The right to privacy is protected in general terms by the Universal Declaration of Human Rights¹¹³ and various human rights treaties. Most notably, Article 17 of the ICCPR states

[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.¹¹⁴

While the jurisprudence surrounding abortion rights in the United States has focused on the right to privacy¹¹⁵ at the international level, human rights bodies have been somewhat more likely to condemn anti-abortion laws on right to life and health or anti-discrimination grounds than on privacy grounds. One exception was the aforementioned *Llantoy Huaman* complaint, where the Human Rights Committee stated that Peru had violated the complainant’s Article 17 privacy rights by refusing to allow her to get an abortion.¹¹⁶ The Committee agreed with the complainant’s claim that Peru had interfered arbitrarily in her private life by “taking on her behalf a decision relating to her life and reproductive health which obliged her to carry a pregnancy to term.”¹¹⁷

F. Principle of Non-Retrogression

Non-retrogression is an important principle of human rights law, which proposes that countries should progressively develop towards a state of greater human rights observance and avoid “backsliding” or withdrawing previously assured human rights.¹¹⁸ This principle is often derived from Article 2.1 of the ICESCR, which requires States to “take steps” to achieve “progressively the full

¹¹² *Final Act of the International Conference on Human Rights*, ¶ 16, U.N. Doc. A/CONF.32/41 (1968). Proclamation of Teheran, *Final Act of the International Conference on Human Rights*, Teheran, ¶ 16, April 22 to May 13 1968, U.N. Doc. A/CONF. 32/41 at 3.

¹¹³ See UDHR, *supra* note 67, U.N. Doc. A/810 at art. 12.

¹¹⁴ ICCPR, *supra* note 64, U.N. A/6316 at art. 17.1-2.

¹¹⁵ See *Roe v. Wade*, 410 US 113 (1973).

¹¹⁶ *Karen Noelia Llantoy Huamán v. Peru*, U.N. Doc. CCPR/C/85/D/1153/2003 at ¶ 6.4.

¹¹⁷ *Id.* at ¶ 3.6.

¹¹⁸ Cook, *supra* note 83, at 668.

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realization of the rights recognized in the present Covenant,” thus implying that retrogression to a less rights-protective society would not be consistent with a country’s treaty obligations. Specifically, General Comment No. 3 of the ICESCR Committee notes that any deliberate retrogressive measures would require the most careful consideration by the Committee. As such, a government trying to justify retrogressive measures must be mindful of all the rights in the Covenant and of its obligation to fully use the maximum available resources to achieve social, economic and cultural rights.¹¹⁹ While the principle of non-retrogression is most commonly cited with reference to the ICESCR, it has been applied more generally by the U.N. and commentators to condemn backsliding in other contexts, including women’s rights and the right to development.¹²⁰

The significance of the non-retrogression principle in the context of the Korean abortion debate is clear. Enforcing the abortion laws would reduce the rights of women to privacy, health, life and freedom from discrimination and cruel or inhuman treatment. Thus, while other States may or may not be required to liberalize abortion laws, the question of whether Korea can legitimately crack down on abortion is conceptually different. If one takes the non-retrogression principle seriously, backsliding would be prohibited.

IV. CONCLUSION

As discussed in this article, abortion in Korea has not – until very recently – been a topic of robust public debate. Human rights perspectives were seldom applied to issues of reproductive freedom, with the partial exception of ongoing debates on sex-selection in abortion and the over-use of abortion in Korea. When debate recently erupted over enforcement of the existing anti-

¹¹⁹ See CESCR, *General Comment No. 3* (The Nature of States Parties Obligations), U.N. Doc. E/1991/23, Annex III (1991).

¹²⁰ See Cook, *supra* note 83, at 668-69 (“the principle of non-retrogression precludes states which are parties to human rights treaties, such as the Women’s Convention, from enacting laws, health regulations or policies more restrictive of reproductive rights than had previously existed”); HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 153 (1968); Office of the High Commission of Human Rights, *Human Rights and Poverty Reduction: A Conceptual Framework* at 25 (2004), available at <http://www2.ohchr.org/english/issues/poverty/docs/povertyE.pdf> (“no right can be deliberately allowed to suffer an absolute decline in its level of realization”); DIANE ELSON, *BUDGETING FOR WOMEN’S RIGHTS: MONITORING GOVERNMENT BUDGETS FOR COMPLIANCE WITH CEDAW* 111 (2006) (“principle of non-retrogression means that dutybearers should at least protect the human rights gains already made, when factors beyond their control prevent these gains to grow further”).

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abortion laws, there were relatively few objections from the human rights community.

This relative silence, however, should not be taken to imply that there are no human rights implications to punishing women who undergo abortions. In reality, such a course of action would be detrimental from the perspective of a number of internationally protected human rights, including the right to life, right to health, right to privacy, right to be free from discrimination and right to be free from cruel and inhumane treatment. These rights are protected by binding international treaties, such as the ICCPR, ICESCR and CEDAW, all of which have been ratified by the Korean government. While the treaties themselves are silent about reproductive rights, U.N. treaty bodies have not hesitated to stress the negative human rights implications of criminalizing abortion, and have generally emphasized the principle of non-retrogression from existing rights protections. Of course, regardless of the actual treaty terms and holdings of the treaty bodies, if one takes a step back from the positivist conception of human rights law and defines human rights norms as the rights that all human beings have just because they are human, even if those rights are not yet protected in domestic or international legal systems, then it is even easier to develop a convincing argument for the existence of a woman's human right to choose whether or not to end a pregnancy.¹²¹

Thus, the human rights implications of abortion should not be ignored by the Korean government nor by those Korean institutions charged with protecting and promoting human rights. One would hope to see mainstream human rights non-government organizations play a more active role in protecting a woman's right to choose. Likewise, the National Human Rights Commission, whose mandate requires it to "[a]nalyz[e] laws, policies, and practices from a human rights perspective,"¹²² should speak out in order to ensure that whatever policies are put in place to raise the birth rate in Korea are not harmful to the human rights of women. There are many policies being considered by the government that would both promote human rights and encourage larger families: these include providing subsidies to low-income mothers, mandating that employers provide all parents with generous parental leave benefits, and reducing spiraling education costs. The Korean government should expedite the consideration and adoption of these and other similarly human rights-beneficial policies, rather than opening up a potentially divisive

¹²¹ For ethical arguments for reproductive rights, see, HADLEY ARKES, *NATURAL RIGHTS & THE RIGHT TO CHOOSE* (2002); Elisabeth Porter, *Abortion Ethics: Rights & Responsibilities*, 9(3) *HYPATIA* 66 (1994).

¹²² National Human Rights Commission of Korea, *Mandate & Function*, available at http://www.humanrights.go.kr/english/about_nhrck/mandate_01.jsp.

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and distractive debate on whether to criminally punish women receiving and doctors performing abortions.