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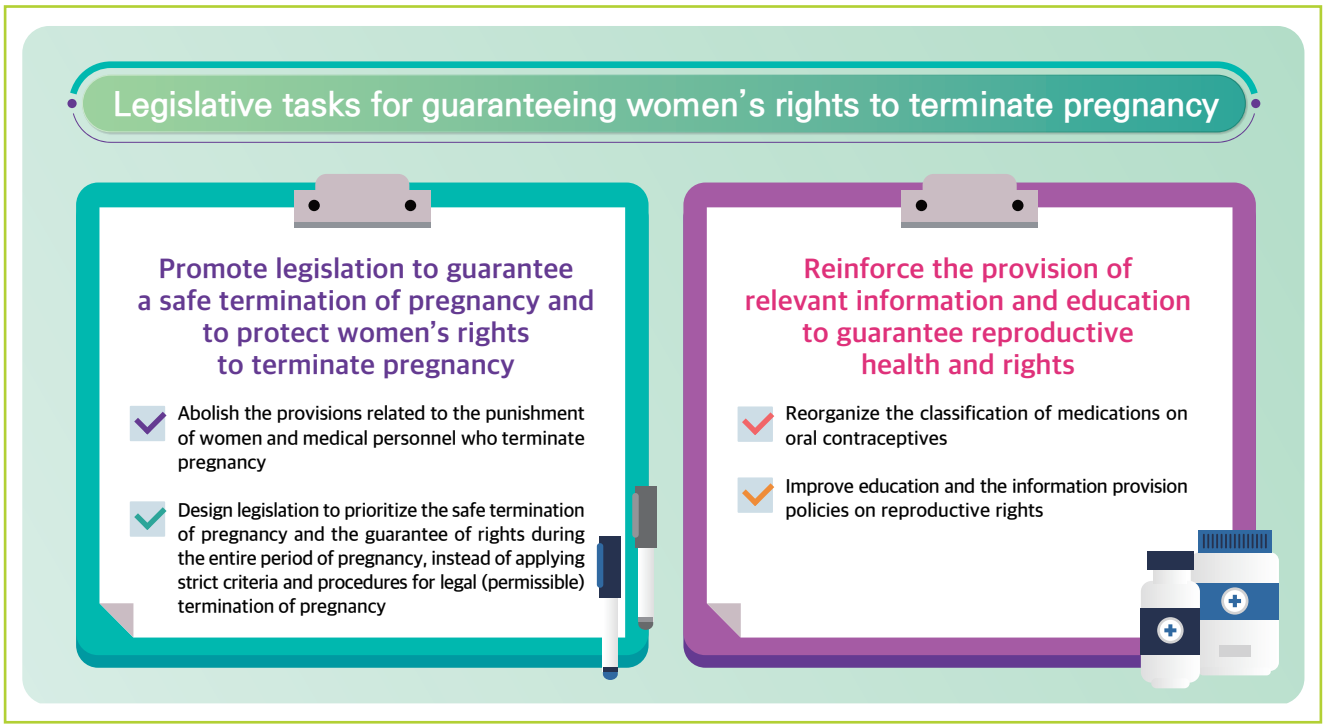
The Implications of the South Korean Constitutional Court's Ruling on the Abortion Ban as Unconstitutional, and the Legislative Issues and Tasks for Guaranteeing Women's Rights to Terminate Pregnancy

Abstract

- On April 11, 2019, the South Korean Constitutional Court ruled that the provisions stated in 'the crimes of abortion' within the Criminal Act, which requires women and medical staff to be punished for terminating a pregnancy, were unconstitutional and ordered the legislature to revise the relevant laws by the end of 2020.
- Such ruling was significant as it confirmed that the abortion ban violates women's fundamental rights, thereby rejecting the old view that there is a conflict between the fetal rights and maternal rights.
- Nevertheless, the Constitutional Court's decision contains contradictions, including the view that the abortion ban should be maintained in order to protect the fetuses' rights to life especially when they develop enough to survive independently after leaving mothers' bodies.
- Thus, the present study explored future policy directions, given that it is imperative to remove unconstitutional elements in the current laws and to start discussing new legislation and institutions so that pregnant women's exercise of rights to self-determination is no longer deemed a crime.



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1. Issues

- On April 11, 2019, the South Korean Constitutional Court ruled that the provisions stated in the 'crimes of abortion' within the Criminal Act, which requires women and medical staff to be punished for terminating a pregnancy, were unconstitutional, and ordered the National Assembly to revise relevant laws by December 31, 2020.

- While such ruling serves as an important turning point in ensuring women's rights to health and to terminate pregnancy, the decision also contains limitations, which may cause disputes during the future revision of relevant laws.

- Thus, this study presents policy directions to ensure that women's decisions to terminate pregnancy, which women carefully deliberate to exercise their rights to control their own bodies, are respected and their reproductive health and rights are guaranteed, during the legislative discussions that will ensue as a result of the Constitutional Court's declaration of the abortion law as unconstitutional.

2. Contents of the study

- The implications and limitations of the Constitutional Court's ruling on the abortion ban as unconstitutional

  ▶ Main contents of the Constitutional Court's ruling

  - On April 11, 2019, the Constitutional Court ruled that the crimes of self-induced termination of pregnancy and abortion by doctor were unconstitutional and ordered the legislature to revise the law by December 31, 2020.
  - The Constitutional Court rendered their decision based on whether pregnant women's rights to self-determination were infringed or not. The Constitutional Court declared that there was imbalance in the legal interests, acknowledging that while the legislative purpose of the anti-abortion provisions was justifiable and the means appropriate, the degree of restrictions on self-determination exceeded the minimum degree necessary to achieve the purpose, thereby violating the principles of least infringement. It was also admitted that there was an excessive degree of limitations on women's self-determination arising from punishing abortions performed within a certain frame of time considering social and economic factors, while little benefit or contribution was made to the general public by protecting the life of fetuses.

  ▶ The significance of the Constitutional Court's ruling on the abortion ban as unconstitutional

  - The Constitutional Court's decision was significant as it: addressed the effect of pregnancy on women; considered the maternal-fetal relationship not as a conflict but instead emphasized that mothers and fetuses share the same interests due to fetal dependency on mothers and mothers' responsibility to raise fetus after birth; acknowledged that the laws provide different legal protections depending on the

different stages of life; highlighted the need to allow termination of pregnancy for economic reasons by identifying various examples of social and economic reasons to terminate pregnancy; and admitted that abortion ban is ineffective in reducing the practice of abortion.

▶ The limitations of the Constitutional Court's ruling on abortion ban as unconstitutional

- The Constitutional Court simply addressed the right of self-determination among other women's rights violated by the anti-abortion laws, while mentioning other relevant rights in the decision but failing to list them. Also, it introduced a hypothetical standard of the fetuses' potential to 'independent survival' outside mothers' bodies and presented a vague notion of 'much closer to human condition,' thereby leaving the possibility of legally forcing women to maintain pregnancy and give birth.

Legislative issues in terms of the right to terminate pregnancy

▶ Why and when to permit the termination of pregnancy

- (Argument 1) The Constitutional Court's failed to rule the penalties on abortion as unconstitutional and instead highlighted the 22nd week of pregnancy as the time frame which enables fetuses to survive independently after leaving mother's body. Such decision should not be interpreted as the permission of abortion within that time frame. Rather, it is viewed as a request to set a time frame to avoid the punishment for abortion before the 22nd week of pregnancy. Also, since many reasons for termination of pregnancy involve socioeconomic factors, it is necessary to specify valid reasons for the circumstances or conditions that are deemed acceptable.
- (Argument 2) A pregnant woman's decision on whether or not to terminate her pregnancy should be interpreted broadly, as the woman bases her decision on comprehensive and deep considerations for her and her fetus' future in the knowledge that their lives may change completely. Also, although the 22nd week of pregnancy is considered to be the time that a fetus attains its ability to survive independently, this in itself cannot be seen as the time frame that ensures the independent survival of the fetus and its healthy life after birth, as the survival is only possible if appropriate measures are implemented by an active injection of financial resources and medical technology.

▶ Consultations and deliberation periods

- (Argument 1) Consultations and deliberation periods should be mandatory to help women to make responsible and conscientious decisions and to inform them of social support and protection they can access by maintaining pregnancy.
- (Argument 2) Consultations are necessary, but they should be based on objective information free of any distortion or bias, or any persuasion or coercion based on the ethical standards of particular religions or individuals. Also, the privacy of patients must be protected. In addition, appropriate information should be delivered to match patients' particular needs, and the language and materials should be easily understood. Imposing mandatory deliberation periods can put unnecessary pressures on women who want to terminate pregnancy and, above all, cause a delay in which women miss a time to terminate pregnancy safely.

▶ Refusal by faith

- (Argument 1) A medical person's rejection to terminate pregnancy should not be understood as

the refusal mentioned in the relevant provisions within the Medical Service Act, and an inevitable termination of pregnancy should not be punished. The right to refuse by faith should be guaranteed not only to individual medical personnel but also to the entire medical institutions.

- (Argument 2) Refusal based on religion or faith is included in the International Covenants on Human Rights, but the refusal should not contradict or harm patients' rights to health. Respecting patients'decisions and not refusing medical consultations are both ethical and legal responsibilities of medical personnel. The majority of medical organizations, including the International Federation of Gynecology and Obstetrics (FIGO) and the World Medical Association (WMA), confirm that doctors' duties on patients outweigh their rights to refuse.

▶ Designation of medical institutions that provide abortion services

- (Argument 1) The government should designate medical institutions that provide abortion services and hire medical personnel who desire to provide abortion services. Abortion services must be provided by the medical personnel/institutions willing to provide the services.
- (Argument 2) If a specific medical institution gets designated for the provision of abortion services, that institution may be labeled as an "abortion clinic," which may jeopardize the institution's management conditions. Also, women who live far away from the designated hospitals may experience difficulties accessing them.

▶ Safe zone

- (Argument 2) Even after the legalization of abortion following the revisions of relevant laws, social conflicts centering abortion will persist. Social threats, criticisms, and stigmas against women who want abortion are likely to remain. Therefore, a plan for abortion 'safe zone' should be included in the revised law.

▶ Consent from the guardians of minors

- (Argument 1) Minors have lower levels of understanding and knowledge about abortion. Therefore, even when they consult medical personnel, the consent from their guardians is essential to conclude their decision.
- (Argument 2) Argument 1 rather violates the right to self-determination of the minors and persons with disabilities to terminate pregnancy, and may prevent their access to relevant services. Therefore, consent from the guardians of minors should be not considered in the legislative process.

Analysis of major overseas cases guaranteeing the right to terminate pregnancy

▶ Canada

- Since the R. v. Morgentaler ruling in 1988 which declared the abortion law unconstitutional, Canada has not imposed any criminal penalties involving abortion. Induced abortion is one of the general medical services provided in Canada and is free of charge under the universal health care system. Despite the absence of relevant regulations, induced abortions are on the decline and are mostly operated in early pregnancy.
- Mifepristone became available in Canada in January 2017. Obstetricians and gynecologists, as well as

general practitioners (GPs) and nurse practitioners (NPs) can prescribe abortion pills, and women can determine where to take them.

- Women who experience unplanned pregnancies are entitled to receiving consultations that are open to counselling all aspects of decisions related to pregnancy and childbirth, such as the maintenance and termination of pregnancy, methods for induced abortions, and support for childbirth. Consultations are not mandatory. Women can access consultation services provided by hotline, hospitals, clinics, etc., where the state governments manage information on sexual health, etc. The government emphasizes that consultations should be non-judgemental, unbiased, and anonymous, and that women are entitled to make the final decision instead of being forced to wait for a certain time after consultations.
- The procedures for induced abortion differ by clinic, hospital, and region. Differences exist in the service delivery procedures, the options for prescriptions of abortion pills, the options for induced abortions, and the time frame in which the surgery or the prescription of abortion pills are possible. Such variability depends on the technical skills of medical staff in hospitals and clinics, medical facilities, and agreements within communities. Usually, women directly visit clinics or hospitals that perform induced abortions, or visit hospitals through referrals.
- No consent from third parties other than the woman herself is required for induced abortion. Age-related restrictions with regards to the decision-making ability of minors are not imposed in any state except for Quebec. As long as women are capable of understanding and giving consent on their own, they are left to make their own choices. The same rule applies to the people with intellectual disabilities. If, despite her ability to understand and make decisions on her own, a doctor notifies her guardian of her decision to terminate pregnancy, then such an act is considered as a breach of medical confidentiality.
- If a doctor does not wish to perform induced abortions, he or she is obliged to link the woman who wishes to terminate pregnancy to another doctor. This principle is governed by the self-regulation of medical associations. Also, nurses are required to notify the patient if they are unable to participate in the procedures pertaining to induced abortion and are required stay with the patient until other medical personnel become able to perform medical operations. In the case of Ontario, the College of Physicians and Surgeons of Ontario requests that patients be provided with 'effective referral' in case doctors refuse to provide medical services for conscience or religious reasons.

▶ United Kingdom (UK), the Isle of Man, and Ireland

- All three countries offer abortion services via medication and surgical procedures, with medication abortion being recommended in the early stages of pregnancy. However, in case women prefer the surgical method in consideration of their situations in early pregnancy, appropriate medical services are provided according to the women's decisions. Since August 2018, women have been able to gain access to relevant guidelines in case they wish to take Misoprostol, the drug prescribed at the second phase of medication abortion, at home instead of a hospital. There were several reasons for approving the intake of the medication at home instead of a hospital. Firstly, women needed to visit the medical institution again during the second phase of medication abortion after ingesting the first medication at the first phase of medication abortion. For women living in small cities or rural areas with poor medical service

infrastructure, visiting medical institutions again could incur financial burdens. Secondly, the long-distance trip home after taking the second-phase medication at the hospital increased the likelihood of a delay in proper response in case women experienced side effects, pain, or complications during the trip, and the lack of psychological and emotional stability increased the number of cases involving risks for unexpected accident. Highlighting that such issues could seriously violate women's reproductive health rights, the societies of obstetricians and gynecologists and related organizations issued a joint statement and persuaded lawmakers to allow women to take the second-phase medication at home. The societies of obstetricians and gynecologists and related organizations currently report that complications and other problems involving the second-phase medication are decreasing.

- In Ireland, consultations and three-day deliberation periods are mandatory before receiving the abortion service. In case a specific doctor who initially consulted a patient becomes unavailable when the patient returns to the medical institution after deliberation periods, the patient is required to seek another consultation. In case her pregnancy exceeds the 12 weeks-mark during this delay, a provision of abortion service may be deemed illegal and thus cannot be performed. Consultations are also mandatory in the Isle of Man, except for when a woman faces danger due to a delay in the termination of pregnancy. Deliberation periods are not mandatory. The provisions pertaining to consultations and deliberation periods were not specified when the UK enacted the Abortion Act in 1967. The medical field in the UK highlights the importance of providing information that women want and need, and stresses that imposing deliberation periods can be discouraging, thus disincentivizing women from exercising their rights to self-determination.
- Abortion services are only available in the state-designated (approved) medical institutions in the UK, the Isle of Man, and Ireland. In the UK and the Isle of Man, all medical services are provided through the National Health Service (NHS). However, no medical institution has voluntarily administered abortion services since the enactment of the Abortion Act, which prompted the UK government to establish and operate institutions that provide abortion services (BPAS, NUPAS, MSI, etc.). Similarly, in Ireland, which abolished its abortion ban by referendum, no medical institution voluntarily provided abortion services after the enactment of the new law. Thus, the country permits abortion services only through the medical institutions (medical personnel) that have contracted (approval) abortion services through the HSE, a government-affiliated institution. All other abortion services provided through other means are deemed illegal. All three countries provide abortion services exclusively through the state-designated medical institutions, and this is causing disputes over inter-regional service inequalities.

3. Legislative tasks for guaranteeing women's rights to terminate pregnancy

Promote legislation to guarantee a safe termination of pregnancy and to protect women's rights to terminate pregnancy

▶ Abolish the provisions related to the punishment of women and medical personnel who terminate pregnancy

▶ Design legislation to prioritize the safe termination of pregnancy and the guarantee of rights during the entire period of pregnancy, instead of applying strict criteria and procedures for legal (permissible) termination of pregnancy

- Establish a medical service delivery system that takes into account the number of weeks of pregnancy and the health status of pregnant women
- Provide a systematic training to enhance medical personnel's expertise and to offer standardized and safe abortion services
- Ensure the safety of early termination of pregnancy by introducing abortion pills
- Actively consider the measures to approve the home-use of abortion pills
- Avoid the mandatory imposition of consultations, deliberation periods, and approval procedures that hinder the timely and safe termination of pregnancy
- Avoid the designation and operation of medical institutions to enhance accessibility to abortion services, improve relevant financial support through the national health insurance, and utilize various medical entities
- Respect the right to self-determination among socially vulnerable groups, such as minors and the persons with disabilities, and guarantee their access to abortion
- Create a safe environment for abortion services by setting up safe zones
- Protect the privacy of women and medical personnel, and establish a strict system to manage their personal information
- Regularly evaluate the relevant laws and systems, and actively improve them in consideration of women's right to terminate pregnancy

Reinforce the provision of relevant information and education to guarantee reproductive health and rights

▶ Reorganize the classification of medications on oral contraceptives

▶ Improve education and the information provision policies on reproductive rights

- Introduce comprehensive sex education
- Consider information delivery and education provision from the reproductive health perspective
- Develop a customized education model for the target audience and diversify education methods
- Support the education and information provision on reproductive rights at the national level

Supervising ministry: Division of Childbirth Policy, Ministry of Health and Welfare

Relevant ministry: Women's Policy Division, Ministry of Gender Equality and Family