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"Not Illegal, but not either legal": The Grey Zone of Reproductive Rights in South Korea

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Abstract In 2019, April 11th, South Korean Constitutional Court ruled that the ban on abortion was unconstitutional and that legislative norms needed to be amended to permit practices connected to the interruption of pregnancy. The decision decriminalized abortion since 2021, January 1st. Nevertheless, no act has been adopted to regulate women's reproductive rights. The essay proposes to reconstruct women's positions, and the legislation on reproductive rights during the South Korean authoritarian regime and with the return of democracy, focusing on the impact of actual constitutional justice.

Keywords South Korea. Constitutional Court. Abortion Ban. Reproductive Rights. Women's rights.

Summary 1 Old-Style Ideas and Rights to Be Implemented: An Introduction. – 2 Women's Rights, Democracy, and Confucianism: The Background Context. – 3 The Contradictions of the Reproductive Issues between Abortion Ban and Family Program. – 4 The Role of the South Korean Constitutional Court Jurisprudence in Dismantling Laws. – 5 Legislative Blank Spaces and Traditional Approach in a Comparative Perspective.

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1 Old-Style Ideas and Rights to Be Implemented: An Introduction

As legal scholars said, questions of rights are often more connected to a problem of implementation than to a problem of integration, because they mirror the distance between old traditions and new positions of rights, particularly in societies in which the legal structure is influenced by traditional values and moral duties. In fact, problems of implementation create a clash between the ancient roots of a traditional legal structure, and the modern concepts of law and politics. The indeterminacy of legislative norms generally depends on this opposition, generating numerous contradictions within the legal doctrine, but also some blank spaces in the adoption of laws.

South Korea represents a peculiar case in these problems of implementation. Since its ancient history and the recent democratisation, South Korea lived a lot of events, influencing on its old legal and political system: it passed from the ancient Joseon to the Western modernization in a very brief period of time between nineteenth and twentieth centuries; then it was oppressed by the Japanese occupation, by a fratricide war and by a series of military regimes during the twentieth century, and, finally, it returned to democracy with the 1987 Constitution. Nevertheless, claiming for a proper original core of law and morality remains a common pattern in Korean history. In fact, Korean ancient culture was eradicated in traditions, because it was strongly connected to the Confucian patriarchal society, which was gender biased and particularly discriminating against women. For underlining the importance of the role of culture as a political instrument, we can think that during the authoritarian period governments referred to the ancient native culture to secure the dominion of institutions and grant the power above a subdued population. Perhaps, this attitude contributes to influence on the discriminatory policy against women, as considering the old female roles in a patriarchal society. For these reasons, no normative legislation can dismantle an enrooted structure till nowadays, and this condition provokes a continuous 'misconsideration' about female rights.

Nevertheless, recent transformations have had considerable consequences for women as well as for men, through the attention to equal rights, but also to questions as abortion, same sex marriage, and the struggle against gender-based discrimination in different environments (as in schools, and in work). The full participation of women in political and social life posed new issues about the capacity of law to shape society. Perhaps, to remould the old-style thought is always quite hard, particularly considering some issues of new generation as reproductive rights: generally, in comparative studies, the reproductive question is "a typical topic", since it is considered a good parameter to examine the legal development of a country and

to analyse "a society that is still enrolled in past traditions, but it has been stressing by the development of the State" (Yoon 2000, 432).

In fact, as happened in all the transitions to democracy, South Korean justices were vested with the important role of increasing the democratic parameter and supporting the development in law, policy, and society. For these reasons, justices have been focusing on the acts which were approved during the authoritarian regime, and they have been re-shaping legislative norms in the light of the new rights of the 1987 Constitution. This is the direction of the decisions of the Supreme Court as the highest level of justice, and of the Constitutional Court as the guarantor of the constitutional values and the real 'controller of democracy', with the power of disapplying legislations that are hypothetically in contrast with fundamental rights (or laws that can diminish the entity of fundamental rights). This improvement also deals with the cultural perspective of society, because, despite justices too consider ancient roots as the peculiar characteristic of the social structure of the State and rarely agree to be involved in amending legal norms which possibly affect the cultural core, their decisions have been reforming ancient traditions since 2010s (Guichard 2016, 202).

The essay aims to reconstruct the development of Korean women's rights, and then, the adoption of legislative acts, with a particular focus on reproductive rights. The research is enveloped in accordance with the legal comparative method. In fact, fist, women's and reproductive rights in South Korea are analysed in their diachronic perspective by following the historical, political, and legal paths which enforced women's rights in Korean legislation. Then, the actual situation of indeterminacy in law is deepened by analysing the problem of the so-called 'suspended' questions, the lack of application of rights, and the little protection accorded to the right to self-determination of women. According to a synchronic perspective, it deals with a problem that is common with the other States of the Asian region (and not only),[1] because it is connected to the ancient cultural roots of the country. Following the intersection between diachronic and synchronic perspectives, legal comparative method also needs the support of the instruments of the history of law, the history of institutions, and the political sciences, since all these disciplines intervene for completing and correctly clarifying all the facts and acts which influenced the actual and undefined protection of reproductive rights in the country.

Since the complexity of the issue consists in a multidisciplinary vision, aiming to connect the mere legal analysis of norms and judicial decisions (and their eventual amendments) with the slow

1 In fact, the same problem seemed to persist also in States geographically and culturally distanced.

transformation of society, the social and cultural background of female participation, and their requests about reproductive rights in South Korea are analysed by applying the parameter of other disciplines. In fact, since "within a given, single legal system there is no guarantee that the legal formants are in harmony, rather than in conflict" (Sacco 1991, 34), also culture is an important meta-formant in comparative doctrine, because national laws always tend to be the reflection of the attitude of the society (Sacco 2007). For these reasons, instruments of sociology (particularly the ones of sociology of gender and sociology of family), and cultural anthropology, in accordance with the female studies, are used under the lens of comparative law.

Also, statistical data deriving from other sciences (as the medical or demographical ones) are used as an interpretative parameter for deepening the situation with current cases. Nonetheless the actual attitude of Constitutional justices in improving the democratic rule of law and the protection of fundamental rights, values are considered as the real sources of an ancient legal system, and some legal scholars also interpret them as the basis of the fundamental rights parameter, as we know it.

The structure of the essay is comprehensive of this intent: paragraph 2 aims to focus on the historical and legal reconstruction of women's rights in South Korea and their connection with democratic development; paragraphs 3 and 4 deal with the core of the problem, since they analyse the reproductive question, reconstructing the legislative framework (§ 3), and the judicial decisions reforming the abortion ban (§ 4); finally, paragraph 5 aims to demonstrate that this apparent suspension on reproductive rights seems to be a common problem in different States, since it can be connected to the discourse about the so-called 'Asian values'.

2 Women's Rights, Democracy, and Confucianism: The Background Context

The story of women's rights in South Korea is strongly enforced by the creation of women's movements and their attempts to erase a male-centred society based on a culture of Confucian origins. It is also intertwined with the history of Korea's independence and democracy. In fact, the conquest of equal rights for women signifies the long path of Korea to establish its sovereignty upon national territory, and, in the last decades, to establish the return of the democratic rule of law of national institutions (Kim, Kim 2010, 189). For these reasons, social and legal studies scholars often define Korean women who are used to struggle for female rights as 'femocrats', a neologism created by the encounter of the word 'feminism' and the concept of 'democracy' (Suh 2011, 451).

Historically speaking, women's movements started in 1898 with the foundation of Chanyang-hoe (찬양회) literally translated in 'Promotion Society' or 'Praise and Encouragement Association', a national association founded by noblemen's widows with the purpose to erase the traditional discriminatory Confucian gender segregation, to restore women's education, and to free women from the traditional gender gaps imposed by society, in order to achieve the same freedom and the same equality as enjoyed by Western women (Yuh 2021, 271). The first goal of the association was to secure a superior education to girls and women of any age, by creating female schools and by spreading instruction among women in all the national territories. This project also found some support and sympathy by the Emperor Gojong, though without providing an economic budget because of the oppositions of ministers and because of the bad conditions of the national treasury. Nevertheless, the attempts of Chanyang-hoe were followed by the flourishing of a lot of schools for women and by the creation of other organizations for women's rights. It also included Yo-u-hoe (유회), literally translated in 'Association of Women Friends', an association fighting some discriminating Confucian practices, such as the gender segregation, female widows' conditions of reclusion after the dead of the husband, and the use of concubinage by noblemen (Tétreault 1994, 163-4).

When Korea lost its independence and was turned into a Japanese colony (1910), the slow openness towards women's rights seemed to be reduced in the intentions, since Japanese authorities did not consent the creation of women's schools and impeded the diffusion of education among Korean girls. All the minimum rights obtained in the past years were completely erased by a Japanese policy which aimed to cancel Korean culture and to create a unique Japanese-inspired culture. Despite the precarious conditions in which women's associations were condemned to dwell, women re-organized and enforced the struggle to obtain independence from Japan. Women largely engaged in the underground anti-Japanese resistance, such as the Geunwoohoe (근우회), a Christian Korean women's organization founded in June 1927 to promote women's status and national independence, but also the Yosong Aeguk Tongji-hoe (Patriotic Women's Society, 여성 애국 동지회) and the Taehan Aeguk Buin-hoe (대한애국 부인회), the Korean Patriotic Women's Society, which largely contributed to the armed resistance against Japan (Tétreault 1994, 164-5).

After the end of the Second World War and the declaration of independence from Japan (August 15, 1945), Korean Assembly approved the 1948 Constitution, which granted to Korean women all the typical rights of a democratic model of State, including the rights to vote, to drive, to own and inheritance, and the formal equality among women and men. Few years later, after the Korean War (1950-53), female associationism came back to claim its place in political participation

and raised its voice in decision-making processes, in accordance with the international legal scenario, influenced by the UN policy and impact upon women. Nevertheless, the real situation about gender discrimination persisted to be critical, since the disparities were deeply rooted in traditional culture and in the concept of Confucian family, headed by a patriarchal system. A peculiar instance of this refusal attitude to integrate gender equality may be seen in the 1957 Family Code, which is almost entirely based on cultural and traditional concepts deriving from Confucian theories. The Code was particularly discriminating towards women, because it did not consider their social roles in economy, policy, and work.

In 1959 women's movements were channelled into the Korean National Council of Women, an association which had been becoming important in pushing for a regulation of women's rights, and for claiming democracy against the authoritarian regime and the denial of liberties. In 1973, all the South Korean women's groups united in the Pan-Women's Society for the Revision of the Family Law to reform the discriminating 1957 Family Law. This intent has been remaining the main purpose of women's claim in the second part of the twentieth-century, despite all the oppositions led by the authoritarian government and the traditional society, which considered the Code as determinant in the development of economy. In fact, the typical family structure is a mirror of a system based on the traditional dichotomy of gender roles with the role of the head of the family played by the elder male and the role of housewife played by the female members. This traditional division of labour also allowed families to accumulate capitals more efficiently, thanks to the unpaid domestic work and childcare done by the women.

A new awareness was taken into consideration while people started to oppose to the authoritarian regime which denied the practices of all rights and liberties to citizens (Jonsson 2014; Jones 2016). An input in changing this perspective came from some transnational conventions in which South Korea adhered, such as the 1979 Convention on the Elimination of Discrimination against Women (CEDAW), which stated that discrimination against women opens a question about the equality of rights and the importance of human dignity. The Convention also pointed out that the constant violation by the state(s) of the principle of equality among genders could determine an obstacle to the participation in the economic, social, and cultural life of the country; for these reasons, every state must be responsible to take all the appropriate measures to eliminate discrimination against women.

In 1987, while Korean population began to take the streets against the authoritarian government, the Council organized the Pan-Women's Society Associations United (KWAU), a national umbrella organization representing progressive women's associations.

The organization aimed at a double strategy: at one hand, the struggle against the regime and the return to democracy; at the other hand, the continuous fight against patriarchy through an increasing involvement of the participation of women in social and political life (Suh 2011, 451; Resos 2014).

After the democratic transition, South Korea has been working on its way to implement gender equality by revising and changing any discriminative contents in its existing legislative acts (Lee 2019, 627; Kim 2016, 109).

In 1991, National Assembly passed a major reform of the discriminatory and contested Family Law, while in 1995 the *Framework Act on Women's Development* was enacted as a legal basis for Korean women's policy. In May 2014 the *Framework Act* was reformed and renamed as the *Framework Act on Gender Equality*, entering in force on July 1st, 2015, with the purpose to review the paradigm shift in Korean women's policy. The revision has shaken the understanding of terms such as 'gender' and 'women', 'gender equality' or 'gender-sensitive perspectives', repairing a pre-existing gap between the political terminology and the academic one. In addition, new research has been conducted to explore whether (and in which ways) the Framework Act can be reformed through the conceptual doctrine of 'intersectionality'[2] (Chang, Kim 2005; Bae 2016).

South Korean justices also welcomed a new approach, intended to amend and remodel the existing legislation for expanding the democratic parameter, and they intervened in few decisions during 2000s to deconstruct and completely reform the patriarchal soul of the State. This change of perspective provoked an increased recognition of the role of women and of their rights in Korean society and claimed for a deep revision of old legislation by the Assembly. In October 2004 (with a decision in force since 2005), South Korean Constitutional Court totally revised the traditional structure of family by dismissing the ancient system based on the role of the *hoju* or *hojuje* (호주 or 호주제), namely the elder male as the Master of the family, and by cancelling the privileges conferred by the 1958 Korean Civil Code which made him able to exercise specific powers upon other members of the family. According to the Constitutional justices, those privileges accorded only to the male members of the family are in

2 The term 'intersectionality' was coined by Kimberlé Crenshaw in 1989 to describe how interlocking systems of power affect those who are most marginalized in society. The term is used as a sociological analytical framework for understanding how groups and individuals' social and political identities result in unique combinations of discrimination and privilege (Crenshaw 1989, 139). Examples of these factors include gender, caste, sex, race, ethnicity, class, sexuality, religion, disability, height, age, and weight. In particular, the term has been largely implied by the feminist theories affecting in change legislation and policymaking (Deckha 2008; Carastathis 2014).

contrast with the democratic rule of law and violate the fundamental rights, as granted by the 1987 Constitution. The same decision also erased the duty of the paternal register in providing sanctions to all the members of the family, and granted a new liberty to women, that are not still considered subjected to the consent and the desire of their husbands/fathers (Yang 2013, 45).[3]

South Korean Constitutional Court also intervened in an adultery case, that is usually punished as a crime in accordance with Article 241 of the Criminal Law, modelled in a perfect correspondence with the Confucian traditional values about fidelity in marriage. Indeed, Constitutional justices stated that Criminal Law was in contrast with the fundamental rights protected by the Constitution, particularly considering the right to personality, to self-determination, and to the pursuit of happiness (Article 10, South Korean Constitution); for these reasons, they decided to suspend and disapply the discipline contained in Criminal Law[4] (Botelho, Kwon 2015).

Also, the South Korean Supreme Court's jurisprudence intervened to review and reshape the patriarchal system and to favour women's claims of right. Particularly, in 2013, Supreme Court justices recognized marital rape as a crime.[5] Reprising a similar guilty verdict decided in 1970 and in 2009, which, perhaps, only considered situations where the couple had already agreed to a divorce, the Court decided that the penalty for rape always ranges from a minimum of three years to life imprisonment, with a variation depending on various specific circumstances, and that the same penalty is imposed even in cases in which offender and victim are married each other. Providing that there is no specific statute in law that defines spousal harassment as illegal, the Court also invited the Assembly to adopt a specific law to protect women from sexual rapes of their husbands during the marriage.[6]

3 South Korean Constitutional Court, case 2004 Hon-Ma 554, 566, decision of 21 October, 2004. The text of the decision is available online at: https://isearch.ccourt.go.kr/view.do.

4 South Korean Constitutional Court, case 2009 Hun-Ba 17, decision of 26 February, 2015. The text of the decision is available online at: https://isearch.ccourt.go.kr/view.do.

5 South Korean Supreme Court, case 2012 Do 14788, decision of 16 May, 2013. The text of the decision is available online at: https://eng.scourt.go.kr/eng/supreme/decisions/NewDecisionsView.work?seq=810&mode=6.

6 For other decisions of the South Korean Constitutional Court about sexual harassment and gender-based violence against women, see also: Decision 2002 Do 51; Decision 2004 Do 3161; Decision 2005 Do 8130; Decision 2005 Du 6461; Decision 2005 Meu 1689; Decision 2005 Du 13414; Decision 2007 Du 22498; Decision 2008 Da 89712; Decision 2009 Do 2576; Decision 2009 Do 3580; Decision 2009 Da 19864; Decision 2012 Do 14788; Decision 2013 Do 4279; Decision 2014 Do 17346; Decision 2015 Do 6980.

3 The Contradictions of the Reproductive Issues between Abortion Ban and Family Program

Despite the struggle of Korean women to claim a role in the society against a patriarchal familism, abortion issues were rarely discussed in the years among women's associations and government till the mid-2000s, when they began to emerge in the social agenda.

According to the legislative framework, after the secession of the national territory and the Korean War, in 1953 South Korean assembly adopted a *Criminal Law Act* (namely as a *Criminal Code*), which contained a restrictive legislation about abortion and reproductive rights. In fact, considering that the traditional Korean family has been based on the relationship between a man and a woman under the supervision of the most adult male as the head of the family with little space for female self-determination, abortion was considered as a crime. Article 269 of *Criminal Code* charged a woman who decided to terminate her pregnancy with one-year jail and the payment of a consistent sum of money, while Article 270 punished the medical doctor(s) who adopted abortion practices with a double jail-sentence. According to the Confucian ethics, abortion was not only considered as a criminal and immoral conduct, since it also includes the social stigma of breaking a new life - stigma that was used to be extended even to interruption of pregnancy due to natural causes, with no consent for women to talk about their experiences in the field (Kim et al. 2019, 97).

Nevertheless, the strict prohibition about abortion contained in the *Criminal Code* went largely unenforced since 1960s, when the government introduced the Family Planning Program (Cho 2013). One of the major goals of the authoritarian governments consists in reducing the total fertility rate of the population in 20 years, to get economic aids by the International Monetary Fund for the development of the country. The Program prevented a series of anti-natalist policies, which included contraception, benefits to families with less than two children, campaigns of sterilization, and abortion practices. Despite the fact abortion was *de jure* illegal, women were invited to visit the so-called 'family clinics' where they were encouraged to interrupt their pregnancies and/or to undergo to sterilization procedures as a medical control upon 'menstrual regulation' (Ji 2019; Bae 2012). In many cases, some groups of women in not flourish economic, financial, and social conditions, and/or without families and partners, and/or with disabilities and illness were subjected to forced sterilization, experiencing a terrible destiny that is similar to the ones of many Native Americans, African Americans, and Puerto Rican Americans in USA (Silliman et al. 2004; Nocera 2020). This policy also followed a shared line with the contemporary eugenic control of the births in Japan (Hasunuma, Shin 2019).

South Korean Family Planning Program was evaluated as the most successful example of a population control project. The total fertility rate collapsed from 6.0 in the 1960s to 4.5 in the 1970s, and then to 2.8 in the 1980s and to 1.6 in the 1990s, when the low numbers of newborn children began to become a real issue[7] (Kim et al. 2019, 99). To better reduce fertility rate, in 1973 South Korean Parliament enacted the *Mother and Child Health Care Act*,[8] a law which included some legal exception to the abortion ban contained in the *Criminal Code*. Article 14 of the Act introduced a limited permission for inducing abortion, as a suspension of the prohibition to interrupt pregnancy in cases of rape, incest, as well as for eugenic reasons. Behind the formal intention to secure the health state and increase the protection level towards women and children,[9] the normative exception clearly justified the Family Planning Program and introduced the variable of socio-economic reasons to discriminate poor, alone, and disabled women, recommending them not to have children (Bae 2005).

Despite government(s) constantly recommended to decline the births, women who wanted to voluntary interrupt pregnancy still experienced barriers to access to abortion practices. Since the interruption of pregnancy remained illegal and did not get any economic aid from the state, women who chose for abortion were forced to undergo to surgeries in precarious sanitary and care conditions with high risks for their health. Furthermore, according to the normative

7 The reported data are a result of the research *Total Fertility Rates (1970-2016)*, conducted by the Korean Statistical Information Service (KOSIS) in 2018, and they are available online at the link: `http://kosis.kr/statHtml/statHtml.do?orgId=101&tblId=DT_1B81A21&vw_cd=MT_ZTITLE&list_id=A21_1&seqNo=&lang_mode=ko&language=kor&obj_var_id=&itm_id=&conn_path=E1`.

8 *Mother and Child Health Care Act* (*Mojaboghoenpoep* 모자보건법), no. 26362, February 8, 1973. The text of law is available (in double language, Korean and English) online at the link: `https://extranet.who.int/mindbank/item/4101#:~:text=The%20purpose%20of%20this%20Act,and%20parenting%20of%20healthy%20children`.

9 The Preamble of the Act declared: "The purpose of this Act is to contribute to the improvement of national health by protecting the lives and health of mothers and infants and by striving for the delivery and parenting of healthy children. This Act establishes rules for areas inclusive of, but not limited to, the establishment of mother and child health organizations; healthcare of pregnant or nursing women, infants, premature babies, etc.; support of intensive care facilities, etc. for newborn babies; establishment of breast-feeding facilities; projects to support overcoming fertility challenges; prevention and limited permission of induced abortion; and postnatal care business" (*i beob-eun moseong(moseong) mich yeong-yua(yeong-yua)ui saengmyeong-gwa geongang-eul bohohago geonjeonhan janyeoui chulsangwa yang-yug-eul domoham-eulosseo gugmin-bogeon hyangsang-e ibajiham-eul mogjeog-eulo handa. bon beob-ui johang-eun da-eum-ui jujedeul-eul pohamhanda: nan-imgeugbogjiwonsa-eob, sinsaeng-ajibjungchilyo, moyusuyusiseol-ui seolchi, imsanbu/yeong-yua/misug-a deung-ui geongang-gwanli, ingong-imsinjungjeol, sanhujolieob deung*, 이 법은 모성(母性) 및 영유아(영유아)의 생명과 건강을 보호하고 건전한 자녀의 출산과 양육을 도모함으로써 국민보건 향상에 이바지함을 목적으로 한다. 본 법의 조항은 다음의 주제들을 포함한다: 난임극복지원사업, 신생아집중치료, 모유수유시설의 설치, 임산부/영유아/미숙아 등의 건강관리, 인공임신중절, 산후조리업 등).

exception, they should ask for the permission from their male partners (and, in some cases, from the elder male as the master of the family) to correctly interrupt the pregnancy. Finally, in the perspective to reduce the fertility rate, abortions previously regarded female gender babies, since families preferred to give birth only to male gender babies (Choi, Hwan 2020).

The perduring situation can be summarised as follows: on one hand, the state encouraged anti-reproductive policies, but, at the same time, formally considered and punished abortion as an illegal practice; on the other hand, the society refused to accept women's talks about their own abortion experiences, but silently forced them to interrupt pregnancies if they are not in social, health, and economic conditions for carrying on an own family. This ambivalent attitude of the state and the society became a characteristic line of the Korean modern history, constituting one of the peculiarities for the actual economic development till 2000s (Kil, Moon 2001).

When in 2005 the fertility rate dropped to 1.08, and South Korea slipped to the last position in the world, government decided to invert the political path of the precedent decades and to finally give effect to the restrictive legislation contained in the *Criminal Code*. The *Framework Act on Law Birth Rate in an Aging Society*[10] revived the criminalization on abortion procedures and set up the so-called 'Master Plan for the Prevention of Illegal Abortion'[11] to discourage interruption of pregnancies and to increase country's birth rate (Kim et al. 2019, 99-100). In this radical change, government passed a series of policies involving pro-life associations in a great anti-abortion campaign and in an unprecedented dialect between pro-choice and pro-life opinions.[12] Perhaps, it did never consider the controversial past of Korean autocracy, and the eugenic planning program imposed to Korean women. While the criminalization of abortion practices became stricter with an increase of punishment versus medical doctors who proceeded to these practices, the existing prejudices against women with disabilities and poor women were reinforced by the belief that the only exceptions to the prohibition should be

10 The text of the *Framework Act on Low Birth Rate in an Aging Society* is available online at the link: https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=60081&type=sogan&key=10.

11 The text of the *Mother Plan for the Prevention of Illegal Abortion* is available online at the link: https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=33648&type=part&key=38.

12 In the dialogue among the Parties, a dominant role was vested by the Pro-Life Doctors' Association, which was formed in 2009 with the purpose to reduce the abortion practices. Their first contribution to the government's pro-life policy was to report all the obstetrics and gynaecology clinics performing abortion. In response of it, the Network for Women's Right to Decide Pregnancy and Delivery was created in 2010 as a natural counterpart of the dialect, vesting with a pro-decision role.

determined by the inadequacy of women's status.[13]

Restriction policy also prevented a full revision of the *Mother and Child Health Act* in 2009, in 2010, and in 2012 with the purpose to enact a strict regulation to the exceptions of abortion practices due to the protection of mother's and child's health and care from the birthdate,[14] and a deep amendment of the *Framework Act on Low Birth Rate in an Aging Society* in front of the actual low birth rate and the high percentages of elder population.[15] After in 2016 the Ministry of Health and Welfare passed an announcement in which the surgical abortion was defined as an "unethical medical practice", in 2018 the *Medical Service Act* was amended to increase punishment of medical doctors performing illegal abortion procedures (Shin 2016).

This further criminalization was the result of a policy which considered abortion issues as a woman's choice versus a potential human life, and consequently as a struggle between government and women, in a long tradition about ungranted protection of women's rights (Kim et al. 2019, 100).

13 Since women with disabilities have always suffered various types of discrimination by national institutions and society with the shared opinion they shouldn't have any reproductive right, a great enforcement for the discourse above abortion procedures and their legal framework was provided by the organization Women with Disabilities Empathy, which initiated the Planning Group to Make a New Paradigm for Reproductive Rights for Women with Disabilities, engaging activities of discussion and confrontation among women, sharing abortion and forced sterilization experiences.

14 Reform act to amend the *Mother and Child Health Act*: no. 9333 of 7 January, 2009; no. 9932 of 18 January, 2010; and no. 11441 of 23 May, 2012.

15 The Framework Act was strongly amended in the light of the actual low birth rate and high percentages of elder population by acts no. 8868, Feb. 29, 2008; no. 9932, Jan. 18, 2010; no. 11011, Aug. 4, 2011; no. 11444, May 23, 2012; no. 12449, Mar. 18, 2014; no. 18580, Dec. 14, 2021. According to new amendments, the term 'aging population' refers to the increasing proportion of elderly people in the entire population (Art. 3, par. 1, Framework Act).

4 The Role of the South Korean Constitutional Court Jurisprudence in Dismantling Laws

Abortion issues arrived at the top peak of challenges in 2010, when a midwife, who was condemned for having performed an interruption of pregnancy by request of a woman, appealed to the Constitutional Court. The appellant asked her punishment to be reconsidered on the basis that the legislation on abortion (referring to Articles 269 and 270 of the *Criminal Law Act*, but also to all the other acts regarding abortion practices) shall be revised, because possibly in contrast with fundamental right to self-determination of women, as granted and protected in the constitutional provisions (Art. 10, 34 no. 3, 36), in the international documents concerning human rights already ratified by South Korean Assembly (among the others, the UN Convention on the Elimination of Discrimination against Women – CEDAW, and the entire framework of the UN policy and impact upon women), and the national legislation concerning women's rights (such as the *Women's Development Act* passed by South Korean Assembly in 1995).

Two years after, in 2012, Constitutional Court pronounced about the case. However, the final decision traced a deep fracture between pro-life and pro-choice parties, increasing the climate of discontent among women. In fact, referring to a previous decision in which the foetus' rights were be recognized,[16] the Court decided that the abortion ban contained in Articles 269 and 270 of the *Criminal Law Act* was constitutional, since it did not violate fundamental rights of human beings. In an attempt of balancing constitutional rights, the Court stated that "the foetus' right to life is in the public interest", while "a woman's right to choose abortion is in an individual's interest", since "woman's rights cannot be more important than the foetus' rights".[17] In fact, since the adjective 'public' identified the interest of the Korean nation and the word 'individual¡ was referred only to the perception of a single citizen and/or of a limited group of citizens, every public interest must overpass any individual interest. (Kim et al. 2019, 99).

Indeed, the Court's decision justified the criminalization of the abortion procedures of the recent years for the sake of a new planning program about birthrate, following a similar intent of the past decades. Perhaps, while in 1960s-1980s one of the aims of national policy was to reduce the population, in 1990s-2010s the efforts of

16 South Korean Constitutional Court, case 2004 Hun-Ba 81, decision of 31 July, 2008. The text of the decision is available online at the link: https://english.ccourt.go.kr/site/eng/ex/bbs/View.do?cbIdx=1142&bcIdx=984885.

17 South Korean Constitutional Court, case 2010 Hun-Ba 402, decision of 23 August, 2012. The text of the decision is available online at the link: https://isearch.ccourt.go.kr/view.do.

government have been concentrating on increasing the number of youth/children to face an aging population. The decision was a clear result of a strict morality, embedded in ancient Confucian culture, and of a society who tends to discriminate women and to consider their rights and interests as positions of minor value, providing that a discourse about female self-determination is out of range in national policy, and, for these reasons, it is not included in any legislative paper (Kendall 2002).

Because of the Court's decision, and of the climate of fear among medical doctors, who were afraid to be punished for any abortion practices and procedures, in November 2012 a teenage girl suddenly died during a complicated and illegal abortion surgery, for not being transferred to the hospital and not being assisted with the medical cares she needed (Yonhap Press 2012). The fact gave evidence on the necessity to intervene with an act to regulate the abortion issues. While pro-life associations considered the fact as the evidence of a dangerous procedure and use it for preventing any abortion practice, pro-choice associations began to rise awareness on the anti-female policies behind the abortion ban.[18] These last ones also united with different associations for women's rights emphasising on social injustices women must face in all the aspects of life, from the denial to reproductive rights to the discrimination on the workplace, to the absence of a legislation regulating maternity, part-time jobs, alternative distance jobs, and parenthood care conditions.

In 2017 this background influenced the constitution of the Joint Action for Reproductive Justice,[19] which proposed to follow female waves that had been spread in different parts of the world to prompt a reproductive justice and to reestablish the self-determination of women. In fact, decriminalizing abortion meant also de-constitutionalizing some rights (West 2009, 1394-432; Sexual and Reproductive Rights Forum 2018).

After the online launch of an anonymous petition asking for a decriminalization of abortion practices, in September 2017 a medical doctor, who was prosecuted and condemned in accordance with Articles 269-270 of the *Criminal Law Act* and the *Medical Service Act* for performing an abortion, filed a lawsuit to the Constitutional Court claiming that the criminal codes incorporate not only a violation of human rights, as protected by the constitutional norms, but also an

18 The most significant efforts in this strategy were the ones of the Sexual and Reproductive Rights Forum, an umbrella organization which comprised the Women with Disabilities Empathy, the Network for Glocal Activism, the Centre for Health and Social Change, the Korean Lawyers for Public Interest and Human Rights, and some individual researchers and activists.

19 The official Korean name for the Joint Action for Reproductive Justice is Moduleul wihan nagtaejoe pyeji haengdong (모두를 위한 낙태죄 폐지 공동행동).

infringement of the public interest of the State. In fact, arguing that the risks for life and health of women are greater than the desire to protect a future-born life, the appellant underlined that "if abortion is a crime, the State is criminal" (Kim 2023). As public interest is invoked, Joint Action for Reproductive Justice lobbied parties, government ministries, and activist groups to submit memories and briefs to the Constitutional Court as *amicus curiae*. Ministry of Gender Equality and Family, National Human Rights Commission of Korea, the UN Working Group on the issue of all the forms of discrimination against women (WGDAW), some NGOs and associations for human rights (as Human Rights Watch and Global Doctors for Choice), and few political parties (as the Green Party of Korea) finally submitted their briefs, claiming that government should amend the current legislation on abortion, abolish the ban contained in criminal codes, and adopt acts in order to protect women's right to life, care, and health, including their right to self-determination in interrupting pregnancy. Meanwhile, on the Universal Periodic Review, the UN Human Rights Council sent South Korean government a recommendation regarding the abolition of the criminalization of abortion practices, the revision of the eugenic policies behind abortion ban, and the extension of reproductive rights to women (Kim et al. 2019, 102-3; Kim 2023).

The appellant's defence produced a memory of 171 pages for the public hearing of May 2018 in order to demonstrate the connection between the right to health and the right to safe abortion practices, and to claim that national institutions shall intervene with a proper legislation for restoring the dominion of constitutional rights, particularly the ones which have been violated, such as Articles 34 no. 3[20] and 36 nos. 2[21] and 3[22] of the Constitution (Lee 2018).

In October 2018, before the Court did its pronouncement, three constitutional justices above nine were replaced for their term-expired and substituted with three new nominees confirmed by National Assembly. As many commentors said at that time, this fact probably redefined the equilibrium within the Court (Shim 2018).

In April 2019, the Court decided that Articles 269 and 270 of the *Criminal Law Act* must be considered unconstitutional, because, when punishing women who recur to an interruption of pregnancy and the medical doctors who could eventually help them, they violate not only the personal rights of women (as the right to choice about their body

20 Article 34, no. 3, 1987 South Korean Constitution: "The State shall endeavour to promote the welfare and rights of women".

21 Article 36, no. 2, 1987 South Korean Constitution: "The State shall endeavour to protect mothers".

22 Article 36, no. 3, 1987 South Korean Constitution: "The health of all citizens shall be protected by the State".

and to self-determinate), but also the public interests of the State, forcing them to undergo to illegal practices in spare of their health.[23] The Court confirmed that "a woman's right to decide whether to have or not have a baby is a fundamental right" that must be guaranteed by the constitution and by the international legal framework upon human rights; thus, "it has an important effect on a woman's health and life". For these reasons, justices stated that, according to Article 36 no. 1 of the Constitution,[24] "self-determination includes a woman's right to autonomously form her own sphere of living on the basis of her dignity" and, consequently, her right to decide whether she will keep on her pregnancy or not. The emphasis of the Court's justices was particularly posed on the fact that "human beings should not be treated as a means for other values, purposes, or legal interests", considering the dramatic past about South Korean policies on population control as a black hole in the national history, also for the fact that they were connected to the long authoritarian period and to the denial of rights and democracy (Kim et al. 2019, 104).

In adjunct, the justices noted that a woman's decision to terminate a pregnancy "is deeply related to her social, economic, and family conditions", since for women, childrearing may require constant physical, mental, and emotional effort. They also face a diverse and wide array of social and economic situations that can affect their lives, because of a patriarchal culture that is gender biased. Putting a restrictive ban on the abortion practices will not reduce the numbers of interruptions of pregnancy and will not increase the fertility rate, but it will contribute to increase the so-called 'grey zone' of the clandestine abortion surgeries in medical clinics that do not respect women's health, with little sanitary conditions and with risking procedures for life. This attitude greatly compromises the right to health of pregnant women, as they are not included in the protection range of constitutional rights (Artt. 34, no. 3, and 36 nos. 2 and 3).

Nevertheless, since most of the Constitutional justices (six above nine) failed to vote for it, the decision of Court didn't include a complete unconstitutionality of the claimed acts, determining the immediate abolition of the legislation without any other adjustment. On the contrary, only three of the total justices pronounced for a full unconstitutionality, while two justices continued to evaluate the abortion ban of Articles 269-270 as constitutional, and four justices (the relative majority) deemed it is in constitutional discordance with the

23 South Korean Constitutional Court 2017 Hun-Ba 127, decided on April 11, 2019. The text of the decision is available online at: https://isearch.ccourt.go.kr/view.do.

24 Article 36, no. 1, 1987 South Korean Constitution: "Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal".

rights granted by the constitutional charter. Because of this decision of 'discordance', the law cannot be considered abolished by the Court's pronouncement and cannot be immediately disapplied by justices, as they deferred to duty of the National Assembly the adoption of a new law which could substitute the previous one. Thus, despite the declaration of unconstitutionality, the law has remained in effect until the National Assembly will adopt new dispositions on the matter within a designated timeframe, that the Court posed by December 31st, 2020. In case a new law wouldn't be approved within this date, Articles 269 and 270 of the *Criminal Law Act* and all the restrictive discipline above abortion and reproductive rights shall be disapplied in accordance with the Court's decision, because they are in contrast with the constitutional parameter of protection of human rights, including the international and the transnational norms in effect in South Korean territory.

During the intercurrent time between the Court's decision and the approval of a new legislation (and/or the immediate disapplication of the abortion ban, if a law won't be adopted in the designated timeframe), the abortion ban shall be considered suspended, with the contemporary suspension of all the prosecutions related to abortion cases before national justices.

The Court underlined the fact that the National Assembly's duty to adopt a new legislation for regulating reproductive rights and abortion practices has been particularly urgent. In fact, in addition to their comments, the justices reflected on the precarious situation of many mothers and pregnant women in South Korea. They remarked the point that "a more desirable and effective means to achieve the goal of protecting" women's life and human rights parameter would be for government "to implement" and "to provide social welfare assistance for pregnant women and their children" in order to solve difficulties impeding childbirth and childrearing, but also "to strengthen" sexual and gender education and counselling measures even for the younger ones (Kim et al. 2019, 104; Kim 2023).

The final decision of the Court determined a total reversal of the abortion discipline, distinguishing from the previous decision of the same Court in 2012. One of the significant differences between the two decisions is that the justices did not frame the abortion issue as a conflict between a pregnant woman and a foetus, and then between the importance of women's rights versus the one of the foetus' rights. While the 2012 decision ruled that the value of a foetus' life outweighs a woman's choice to have an abortion, the 2019 decision focused more on the responsibilities of the government to women's reproductive rights and to their way to conduct their lives in care and wealth (Kim et al. 2019, 104-5). Nonetheless, the 2019 decision follows the new critical wave of Korean jurisprudence in reforming the democratic rule of law of the State, with the purpose to cancel the

authoritarian violations to rights of the past decades (Jonsson 2014).

After the democratic transition – and with a particular increase in the last two decades –, South Korean Constitutional Court have been assuming a transformative function, since it is taking the role to 'constitutionalize' the debate on Confucianism and to mitigate the traditional core of legal ethics in an interpretative approach to culture. Nowadays, Court's efforts are attempting to maintain the democratic asset, to protect fundamental rights, also incorporating transnational inputs, and to interpret the sources of law not only in the light of the constitutional intent of the 1987 democratic legislator, but also in the continuous transformation of the society (Yang 1993, 4-6; Lim 2004). One of the most complicated duties of the Court is to intervene for censoring unconstitutional acts of institutions. In this sense, the Court has assumed the role of controller of the democratic values, vested with the South Korean people's desire for democracy and for restoring the dignity that years of authoritarian regimes had denied (Guichard 2016, 202). For this purpose, it has been playing a significant role in the process of democratization and of protection of fundamental rights in South Korea and it is now recognized as "the most important and influential" institution of its kind among its counterparts in the region (Yang 2000, 33; Ginsburg 2010, 145).

The emphasis of the 2019 justices on the word "dignity" referring to the capacity of women to self-determinate and self-express is a shared heritage of systems which had incurred into an authoritarian past.

5 Legislative Blank Spaces and Traditional Approach in a Comparative Perspective

What happened after the Constitutional Court's decision? In theory, the Parliament would have had the duty to adopt a new legislation for regulating admissible practices of abortion during the suspension of the ban. Perhaps, each attempt to draft an act to regulate abortion has continuously failed (Yoon 2022). While the Court decriminalized abortion, in 2020 the Parliament tried to pass a law allowing abortion until the 14th week. It also tried to reform the previous legislation to conditionally allow abortion until the 24th week for some selected cases concerning economic, social, and health patterns (such as rape, incest, and health conditions of the mother). Indeed, though abolishing the consent of the elder male of the family (father, husband, elder brother), this conditional permission would have been subjected to a mandatory counselling and to a 24-hours "consideration period". The proposed act would have represented an important reform of the restrictive abortion legislation, though it would be still incomplete, since the drafted bill would have denied many pregnant

women the right to make their own choices about whether to end or not a pregnancy (Woo 2020; Barr 2020).

Nevertheless, the discordances and the oppositions among political parties within the assembly and the desire not to provoke a complete fragmentation in the society did not consent to finally approve and adopt the bill in the designated timeframe – and even after the expire date. By January 2021, the current situation is the following: on one side, abortion ban must be considered abolished, since every court is legitimate to disapply it in cases concerning abortion, and abortion practices are not be judged as crimes; but, on the other side, any abortion procedures medical doctors can use may be considered as legal, since there isn't any act and any law legalizing the interruption of pregnancy and regulating procedures, times, and methods. Under these circumstances, South Korea presents a unique case in the world, without a ban on abortion, but, at the same time, without any law consenting and regulating it. This situation causes that medical doctors may refuse abortion surgeries, while South Korean women who decide to end their pregnancy do not have any legal protection, continuing to risk their lives by recurring to clandestine medical clinics.[25]

The South Korean case is also an index of the perception of modernization of law in some ancient and traditional systems, that refer to philosophical and political values for forming the society. Legal framework of Korea refers to Confucian sources of law, as the core of an ancient legal doctrine forming the actual legal system. As some Korean scholars affirm, 'constitutionalism' as the current concept of the rule of state is an idea already existing in the Confucian doctrine about politics and law, because the balance among rights and duties can be perceived as the fundamental equilibrium between people and institutions. For these reasons, though the transplant of models and elements deriving from Western legal framework, the actual legal system in Korea also hides a Confucian core, which can be evidenced in the attitude of the people not only towards themselves, but also towards the law and the society, and in a shared concept of self-recognition in some ancient values that must be respected, as filial piety, modesty, admission of defeat, respect for authority and hierarchy, the usage of titles and etiquettes, etc.

Apart of a deeper discourse on the role of traditional and cultural roots in the intertwining with legal transplants from other systems of Western origins, there is another critical point being relevant in

25 See also the *Report from the South Korean Civic Society on the Right to Sexual and Reproductive Health: Challanges and Possibilities during Covid-19*, a study conducted by People's Health Institute, SHARE. Centre for Sexual Rights and Reproductive Justice, Human Rights Action Centre for Woman in Prostitution (ELOOM), Korea Sexual Relief Violence Centre, Association of Physician for Humanism, Korea.

this lack of application. It deals with the debate about the so-called 'Asian values', that is common in all the Asian systems of law. The term is currently adopted by legal doctrine to trace a more complicated framework involving different ideas of State, rule of law, and human rights, distinguishing the concept of protection in Asian countries from the one proclaimed by Western countries (Ginsburg 2014; Baues, Ball 1999; Mahbrubani 2008). This concept appeared for the first time in 1977 during a discussion held in the Singaporean Parliament about the differences of rights and their protection between Asian and Western countries, recurring to a different lecture about the adoption of the 'rule of law' parameter. In fact, this lecture recognizes that there is an over-rated evaluation of the human rights doctrine applying at every legal system, in accordance with the Western liberal tradition, and this Western-based doctrine could almost cancel cultural rights, which are at the real core of Asian tradition, since they can also discuss about a different consideration of the State from the one imposed by liberal democracy and also distinguish a different but not less important protection of rights, even without a liberal form of State (e.g., the Singaporean regime itself can be qualified as an hybrid regime with oligarchic shades and not a liberal model, but it also prevents the protection of the human rights parameter). Particularly, the concept assumed the actual political and philosophical meaning only in the 1990s, when, after the collapse of the Soviet Communist Bloc and the end of the Cold War, Western and liberal ideas spread everywhere, transnationally imposing a sort of uniformity in protection of fundamental rights and in the diffusion of the 'rule of law' model-state. In order to distinguish themselves from the dominion of the 'Western culture' in the political and legal scenario, and to face a society in a continuously transformation, some legal scholars proposed the return to the purity of 'Asian values', as an ancient and shared thought based on the concepts of consensus, harmony, unity, and community, that are eradicated in an ancient and proper culture, which must not be choke by the forced inclusion of the Western values. This new approach also meant a re-discovery of traditional identity without any assimilation in which one's own culture could risk the disappearance (Hoon 2004, 154).

Perhaps, to talk about "Asian values and a rejection of culture wars today is just code for adopting the conservative and reactionary side in those culture wars" (Barr 2007). In fact, though in the very first moment – dated 1980s-1990s – Asian values were considered as an important element for the restoration of democracy (such as in South Korea), involving a "de-colonization" from the Western model in abolishing authoritarian regimes and discovering one own's culture, nowadays the evidence is that, for the sake of the harmony created by Asian values, national institutions risk not to enact a correct protection of self-determination, because they do not want to create

an infringement in the society and in the complex of cultural values. A tendency to restore conservative policies seems to be common in East Asian and Southeast countries (an instance is the already cited case of the oligarchic Singaporean city-state), as a construction of a proper 'morality' in contrast with the individualistic and human rights 'obsession' of Western democracies. This approach is particular evident in questions concerning civil rights (as the recognition of same-sex marriage and/or of rights of assistance and inheritance for homosexual couples), and in reproductive issues.

This attitude in saving Asian values and the Confucian harmony within society may be at the basis of this non-decisional nature of the Korean legislative, letting this tendency in creating blank spaces. But, according to what disserted about the inner conservative temper of Asian countries in distinguishing from Western tradition, the silence of South Korean legislators does not appear as an isolated case. In fact, some blank spaces remain also in Japan, where, despite being a democratic model of State without accepting any hybrid rule of law, abortion is legal only for eugenic tools, while society doesn't accept women's self-determination and free choice about their bodies. Then, spousal consent remains mandatory for women who want to interrupt their pregnancy for reasons concerning their health. Surgical abortion procedures are not really regulated by legislation, which preferred a loud absence for not intervening in arrange new norms of protection. Free access to these surgeries is not possible, since they are not covered by national health insurance, with high costs for women who choose to stop pregnancy. After an historical decision of the Supreme Court admitted the use of the abortion pills, in 2021 Japanese Minister for Health finally submitted the treatment to the approval of assembly, legalizing the use of the drug within 9 weeks of pregnancy (63 days). Perhaps, at the same time, the act prescribed a lot of limits and conditions to be followed in case women decide to recur to the use of medical and/or pharmacological abortion, such as the duty to provide a medical prescription to buy the medicine, because of the ban for pharmacies to sell emergency contraceptives without the doctor's consent, and any financial coverage by national health insurance.

A similar situation also remains in Thailand, which can be qualified as a hybrid system with democratic tendencies. Despite the shared conservative morality behind Asian legal system, Thailand seems to be more developed in recognizing and protecting civil rights than its counterparts in the region (e.g., it's the first Asian country to recognize same-sex marriage). Nevertheless, although abortion surgeries are legal without any juridical ban, medical abortions can't be performed in health facilities, forcing many women to recur to clandestine clinics with bad and risking health conditions. At the same time, there are no laws for regulating reproductive technologies and

practices, and no dispositions for helping women to access to better conditions for abortion surgeries. In the silence of national institutions, women's right to self-determination is negatively recognized, but it's not positively protected.

The situation is not so different if considering cases in which there is no democratic rule of law, but an authoritarian or not Western regime. An instance is represented by the Popular Republic of China, which is formally a Socialist republic, following a rule of law that mixed the socialist ideals with the cultural and multi-national basis of the Chinese culture and the traditional values of the Chinese people. Article 17 of China's *Population and Family Planning Law* states that: "Citizens have the right to reproduction as well as the obligation to practise family planning according to law". It seems that rights to self-determination and to have a choice in reproduction concur in a legal and political balance with the civil duty to create one own's family. Perhaps, the challenge does not appear equal, as reproductive rights have a personal and individualistic nature, while the obligation to family is not only an order by republican institutions, but it also hides an inner morality, characterised by the Confucian temper of the traditional culture or by the core of the so-called Asian values.

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