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## **Mandate of the Working Group on the issue of discrimination against women in law and in practice**

### **Submission to the Honorable Justices of the Constitutional Court of the Republic of Korea**

**Ref: Review of the constitutionality of the country's criminal law on abortion (case 2017Hun-Ba127)**

**March 2019**

## Introduction

1. The Working Group on the issue of discrimination against women in law and in practice (WGDAW) makes this submission in relation to the review by the Constitutional Court of the Republic of Korea on the constitutionality of the criminal law on abortion (case 2017Hun-Ba127). This brief is provided on a voluntary basis for the Court's consideration without prejudice to, and should not be considered as a waiver, express or implied of, the privileges and immunities of the United Nations, its officials, and experts on missions, which include the experts of the WGDAW,<sup>1</sup> pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.
2. The WGDAW is an independent expert mechanism, known as Special Procedures, of the United Nations Human Rights Council (HRC), which is an inter-governmental body of the United Nations responsible for strengthening the promotion and protection of human rights globally. The HRC established the mandate of the WGDAW in October 2010 in recognition of the fact that discrimination against women persists, despite progress made over the years in integrating women's human rights fully into domestic law through constitutional and legal reforms in many countries. This persistent discrimination transcends national, cultural and religious boundaries and is often fuelled by patriarchal stereotyping and power imbalances which are mirrored in laws, policies and practice. The WGDAW is tasked with developing a dialogue with States and other actors on laws and practices that discriminate against women or have a discriminatory impact on women.
3. To fulfil its mandate, the WGDAW conducts country visits at the invitation of the Government;<sup>2</sup> addresses communications to Governments on allegations of human rights

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<sup>1</sup> Current members are: Ms. Elizabeth BRODERICK (Australia), Ms. Alda FACIO (Costa Rica), Ms. Ivana RADAČIĆ (Croatia), Ms. Meskerem Geset TECHANE (Ethiopia), Ms. Melissa UPRETI (Nepal).

<sup>2</sup> The purpose of country visits is to examine the situation of discrimination against women in law and in practice at the national level, identify good practices in the elimination of such discrimination and make

violations falling within its mandate;<sup>3</sup> and submits an annual thematic report to the HRC.<sup>4</sup> Its thematic report on the elimination of discrimination against women with regard to health and safety tackled the issue of women's sexual and reproductive health and rights, including the discriminatory use of criminal law, punitive sanctions and legal restrictions to regulate women's control over their own bodies.<sup>5</sup> In its most recent annual report to the HRC on reasserting equality and countering rollback, the WGDAW, on the basis of its work in the first six years of the mandate, observed that in the context of many obstacles to gender equality that women face throughout their life cycle, it is in the area of sexual and reproductive rights, along with family and culture, that most significant challenges and backlashes against gains in women's equality exist. The WGDAW further underlined the interdependence of human rights, noting that persistent discrimination in family, cultural and sexual and reproductive rights have a debilitating impact on women's capacity to claim equal standing in all aspects of life. It stressed that without eliminating discrimination in family, cultural and sexual and reproductive rights, there will be no lasting progress in the other fields.<sup>6</sup>

4. Through the submission of this brief, the WGDAW wishes to highlight the international human rights norms and standards relevant to termination of pregnancy and the obligations of the State to respect, protect and fulfil women's human rights.

## Abortion laws and practice in the Republic of Korea

5. According to the Criminal Code of 1953 both the pregnant woman and medical personnel face punishment of imprisonment or fine for procuring and performing abortions. The medical personnel also face "the suspension of qualifications" for up to seven years.<sup>7</sup>
6. Under the Mother and Child Health Act of 1986, induced abortion is permitted in a few restricted cases: when a pregnant woman or her partner suffer from health problems prescribed by Presidential Decrees; when pregnancy is a result of rape or incest; when

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recommendations to the Government to improve the protection of women's human rights. Sixteen such visits have been conducted. For further information, visit the webpage:

<https://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/CountryVisits.aspx>

<sup>3</sup> Allegations are related to laws, policies or practices that discriminate against women and girls in general and on cases involving individual or a particular group of women and girls. More than 300 such communications have been issued. For further information, visit the webpage:

<https://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/Communications.aspx>

<sup>4</sup> Six reports have been submitted to the HRC on the elimination of discrimination against women in the following areas: political and public life with a focus on political transition; economic and social life with a focus on economic crisis; cultural and family life, with a focus on the family as a cultural space; health and safety, with a focus on the instrumentalization of women's bodies; a compendium of good practices; and a stocktaking report on reasserting equality, countering rollbacks. For further information, visit the webpage:

<https://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/Annualreports.aspx>

<sup>5</sup> A/HRC/32/44 [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/32/44](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/44)

<sup>6</sup> A/HRC/38/46 [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/38/46](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/46)

<sup>7</sup> Articles 269 and 270

pregnancy constitutes threat to health of the pregnant woman. The consents of a pregnant woman and her partner are required.<sup>8</sup>

7. The Mother and Child Health Act also contains a provision on “Projects to Prevent Induced Abortion, etc.”, stating that the State and local governments may implement projects to prevent induced abortion and other projects necessary to protect women’s health and create an atmosphere of respecting human life.<sup>9</sup>
8. Despite the criminalization of abortion in circumstances not provided by law, abortion has been prevalent in the country. In the context of a change in the population policy in 2006 to address the country’s low birth rate, anti-abortion groups were formed and encouraged the reporting of illegal abortions. In the period from 2006 to 2009 probation or suspended sentences were mostly issued for illegal abortions. Since 2010, there has allegedly been an increase in indictment, conviction, and fines. The intention to tackle the low birth rate is reportedly behind the reinforcement of the punishment.<sup>10</sup> In August 2012, the Constitutional Court ruled that the provisions concerning abortion in the Criminal Code were not unconstitutional.<sup>11</sup> In 2016 the Government attempted to further toughen the punishment of doctors who perform abortions.<sup>12</sup> Consequently, due to the ‘chilling effect’ of criminal provisions, some medical personnel started refusing to perform abortions or charging a high fee to do it, and the black market for abortion pills appeared. Some women allegedly also experienced harassment and control by their spouses or partners,<sup>13</sup> whose consent is required by the Mother and Health Act.

## International human rights norms and standards

### *Guiding principles of equality, dignity and non-discrimination and women’s reproductive rights*

9. As a State party to nearly all the core human rights treaties,<sup>14</sup> the Republic of Korea has a legal obligation to respect, protect and fulfil the human rights of everyone under its

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<sup>8</sup> In exceptional circumstances, such as disappearance of the partner, woman’s consent will be sufficient. If a woman or her partner are unable to manifest their will, due to health issues, the person in parental authority or a guardian may give a consent on their behalf (Article 14).

<sup>9</sup> Article 12

<sup>10</sup> Report submitted to the Committee on the Elimination of Discrimination against Women (CEDAW Committee) by the National Human Rights Commission of Korea, January 2018.

<sup>11</sup> In the case [24-2(A) KCCR 471, 2010Hun - Ba402, August 23, 2012], in a vote of four (constitutional) to four (unconstitutional as applied), the Constitutional Court held that the Article 269 Section 1 of the Criminal Code, which punishes a pregnant woman for procurement of her own miscarriage through the use of drugs or other means, and the Article 270 Section 1 of the Criminal Code, which punishes a midwife procuring the miscarriage of a female upon her request or with her consent only by imprisonment, are not against the Constitution.

<http://english.court.go.kr/cckhome/eng/decisions/casesearch/caseSearch.do#none>

<sup>12</sup> Submission to the CEDAW Committee for the Adoption of the List of Issues, Korea Women’s Association United, July 2017.

<sup>13</sup> Information provided to the WGDAW from women’s organizations.

<sup>14</sup> International Convention on the Elimination of Racial Discrimination (ICERD, 1978), Convention on the Elimination of all forms of Discrimination against Women (CEDAW, 1984), International Covenant on Economic, Social and Cultural Rights (ICESCR, 1990), International Covenant on Civil and Political Rights (ICCPR, 1990), Convention on the Rights of the Child (CRC, 1991) and Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (2004), Optional Protocol to the CRC on the involvement

jurisdiction. The Constitution of the Republic of Korea also recognizes that the generally recognized rules of international law have the same effect as the domestic laws of the country.<sup>15</sup>

10. The principles of equality, dignity, and non-discrimination are proclaimed in the Charter of the United Nations and are at the core of all the international human rights instruments. The Universal Declaration on Human Rights stipulates in Article 1 that “All human beings are born free and equal in dignity and rights”. The two international covenants (International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights), are also founded on inherent dignity and the equal and inalienable rights of all.<sup>16</sup> The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) prohibits discrimination against women in all spheres of life. Specifically, it prohibits discrimination in the field of health care, including that related to family planning (Article 12). In addition, CEDAW specifically guarantees women the right to reproductive self-determination: the right to freely and responsibly choose on the number and spacing of their children and to have access to the information, education and means to enable them to do so (Article 16).
11. Reproductive rights (the right to reproductive self-determination and the right to reproductive health) are also implied in a number of rights guaranteed by international human rights treaties (such as the right to privacy, freedom from inhuman treatment, the right to health, the right to non-discrimination), as specifically emphasised by the International Conference on Population and Development Programme of Action<sup>17</sup> and elaborated by the treaty monitoring bodies.<sup>18</sup> Reproductive rights standards, including on termination of pregnancy, are also elaborated by the special procedures mechanisms of the Human Rights Council.<sup>19</sup>

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of children in armed conflict (2004), Convention against Torture (CAT, 1995), Convention on the Rights of Persons with Disability (CRPD, 2008)

<sup>15</sup> Article 6

<sup>16</sup> Article 3 ICCPR and Article 3 ICESCR.

<sup>17</sup> According to the ICPD Programme of Action, reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.

<sup>18</sup> General Comments 14 and 22, Committee on Economic, Social and Cultural Rights (CESCR); General Comment 36, Human Rights Committee; General Recommendations 24 and 35, Committee on the Elimination of Discrimination against Women (CEDAW Committee); General Comment 20, Committee on the Rights of the Child (CRC Committee).

<sup>19</sup> WGDRAW report A/HRC/32/44 and position paper “Women’s Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends” (WGDRAW position paper): <https://www.ohchr.org/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf>; Special Rapporteur on the right to the highest attainable standard of physical and mental health (SR on the right to health) reports A/66/254 and A/HRC/32/32; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (SR on torture) report A/HRC/31/57; Special Rapporteur on extrajudicial, summary, or arbitrary executions (SR on summary executions) report A/HRC/35/23; Statements

12. Both the Committee on the Elimination of all forms of Discrimination against Women (CEDAW Committee) and the WGDAW have repeatedly pointed out that the right to safe termination of pregnancy is an equality right for women (including girls).<sup>20</sup> The right of a woman to make autonomous decisions about her own body and reproductive functions, concerning intimate matters of physical and psychological integrity, is at the very core of woman's fundamental rights to equality and privacy, guaranteed under international human rights law.<sup>21</sup> Further, the right to equality in the highest available standard of health and healthcare services includes access to sexual and reproductive health without discrimination.<sup>22</sup>
13. Equality principle requires that women's distinctly different biological and reproductive functions must be taken into account to ensure that they enjoy the highest achievable standard of health services. The right to equality implies that women have access, without discrimination, to a range of services and care, including access to safe termination of pregnancy. The principle of equality also requires health policy to be based solely on women's health needs and not to be influenced by instrumentalization and politicization.<sup>23</sup>

***Criminalization of termination of pregnancy – instrumentalization and discrimination***

14. In its report on health and safety, the WGDAW noted that States have often treated women instrumentally as tools with which to implement population programmes and policies, including through criminal sanctions. This is often done under the guise of protecting women's health and safety or on the grounds of cultural or religious justifications. Much of discrimination in access to health services and the resulting preventable ill health of women, including maternal mortality and morbidity, can be attributed to the instrumentalization of women's bodies for political, cultural, religious and economic purposes. Criminalization of termination of pregnancy is one of the most damaging ways of instrumentalizing and politicizing women's bodies and lives, subjecting them to risks to their lives or health and depriving them of autonomy in decision-making about their own bodies.<sup>24</sup> Women's access to reproductive and sexual health care must not be conditioned on the consent of a third party, causing withholding or delay of treatment, curtailment of women's autonomy and denial of respect for privacy. Patriarchal negation of women's autonomy in decision-making leads to violation of women's rights to reproductive and sexual self-determination, the right to health, the right to privacy, physical integrity and even to life.<sup>25</sup>

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on International Safe Abortion Day and on the 2030 Agenda for Sustainable Development by international and regional human rights experts.

<sup>20</sup> CEDAW Article 12; CEDAW Committee General Recommendation No. 24, WGDAW on health and safety A/HRC/32/44; WGDAW position paper.

<sup>21</sup> Articles of ICCPR

<sup>22</sup> Articles 3 and 12 ICESCR.

<sup>23</sup> Report on health and safety A/HRC/32/44, WGDAW

<sup>24</sup> Ibid, para 79.

<sup>25</sup> General Comment No. 22 (2016) on the Right to sexual and reproductive health United Nations Committee on Economic, Social and Cultural Rights; General Recommendation No. 24: Article 12: Women and health. United Nations Committee on the Elimination of Discrimination against Women; 1999. (A/54/38/Rev.1, Chapter I)

15. Criminalization of behaviour that is attributed only to women, such as termination of pregnancy, is discriminatory per se and generates and perpetuates stigma. It is the criminalization of termination of pregnancy as such that deters health officials from carrying out safe termination of pregnancy, even where it is legal. Ultimately, criminalization does grave harm to women's human rights by stigmatizing a safe and needed medical procedure.<sup>26</sup> Evidence shows that criminalization of abortion does not reduce the incidence of abortion nor increase birth rate. Rather, it results in women resorting to other solutions, including illegal and unsafe procedures or traveling abroad, with a particularly discriminatory effect on women living in poverty and women living in rural areas.<sup>27</sup> By criminalizing or denying women's access to health services that only they require, the State fails its obligation to respect, protect and fulfil women's rights, including the right to equal access to health-care services and to eliminate all forms of discrimination against women, including with regard to their health and safety.<sup>28</sup>

### *Decriminalizing and legalizing termination of pregnancy*

16. International and regional human rights mechanisms and entities have repeatedly called for decriminalization of termination of pregnancy and liberalization of laws and policies in order to guarantee women's and girls' access to safe services. Women should never be criminalized for termination of pregnancy. International human rights mechanisms have requested States to review national legislation with a view to decriminalization of abortion through their jurisprudence, their general comments/recommendations, their concluding observations, and their reports to the HRC.<sup>29</sup> Specifically, the Republic of Korea has been requested by treaty monitoring bodies to decriminalize abortion, remove punitive measures for women who undergo abortion and provide women with access to high-quality post-abortion care.<sup>30</sup>

17. International human rights mechanisms have called for the legalization of termination of pregnancy on certain grounds, especially in cases where pregnancy constitutes a risk to the life or health, including the mental health, of a pregnant woman; where pregnancy results from rape, incest and other forms of sexual violence; and in cases of severe foetal impairment. They have reasoned that, in some situations, failure to provide women access to legal and safe abortion may amount to cruel, inhuman or degrading treatment or punishment or torture, or a violation of their right to life.<sup>31</sup> When it comes to adolescent

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<sup>26</sup> Report on health and safety, A/HRC/32/44, WGDAW.

<sup>27</sup> The World Health Organization (WHO) Safe abortion: technical and policy guidance for health systems. There are approximately 22 million unsafe terminations of pregnancy annually, resulting in 47,000 deaths.

<sup>28</sup> General Recommendation No. 24, CEDAW Committee; General Comment No. 13, CRC Committee.

<sup>29</sup> CEDAW Committee No. 22/2009, *L.C. v. Peru*, (4 November 2011), CEDAW/ C/50/D/22/2009; European Court of Human Rights, *TYSIAC v. POLAND*, Application no. 5410/03 (2007); Inter-American Commission on Human Rights. (2007) *Paulina del Carmen Ramirez Jacinto, Mexico, Friendly Settlement*, Report No. 21/07, Petition 161-01, 9 March 2007; CEDAW Committee, "Concluding Observations: New Zealand" (2012), CEDAW/C/NZL/CO/7; General Comment No. 14, CESCR; General Comment 36, Human Rights Committee; WGDAW report on health and safety A/HRC/32/44; SR on the right to health A/66/254 and A/HRC/32/32

<sup>30</sup> CEDAW/C/KOR/CO/8; E/C.12/KOR/CO/4;

<sup>31</sup> Numerous concluding observations and decisions and views by the Committee against Torture, the Human Rights Committee; General Recommendation 35, CEDAW Committee; General Comment 36, Human Rights Committee; SR on torture report A/HRC/31/57; SR on summary executions report A/HRC/35/23; and

girls, they have unambiguously called for legalizing the termination of pregnancy on request as a measure of the protection of equality and health.<sup>32</sup>

18. The decision as to whether to continue a pregnancy or terminate it is fundamentally and primarily the woman's decision, as it shapes her whole future life and has a crucial impact on women's enjoyment of other human rights. Following the good practice of many countries, the WGDAW in its report to the HRC on women's health and safety called for allowing women to terminate a pregnancy on request during the first trimester or later in certain circumstances. International human rights mechanisms have established these circumstances as where there is a threat to her life or health, or where the pregnancy is the result of rape or incest, or where the foetus is severely impaired.
19. Furthermore, the WGDAW has pointed out that it would be impossible to list a priori all the situations in which women may be forced to seek termination of pregnancy, as there are many compelling legal, cultural, social or economic reasons which may force women to seek termination of pregnancy, including for examples pregnancies in situations of domestic violence, poverty, and stigma related to being unmarried. In addition to taking efforts to remove the causes which might force women to seek abortion, the States should at the very least decriminalize the termination of pregnancy, as per the recommendations of various human rights mechanisms.<sup>33</sup>

*Primacy of women's human rights*

20. Countries where women have the right to termination of pregnancy and are provided with access to information and to all methods of contraception, have the lowest rates of termination of pregnancy. Almost all economically more developed countries have liberalized their abortion laws for reasons of women's human rights, including equality, health and safety.<sup>34</sup> This liberalization reflects the understanding that personhood is not established until birth. Under international human rights law, human rights are accorded to those who have been born. "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."<sup>35</sup> There is not a symmetrical balance between the rights of the woman and the interests of the foetus. Intervention to promote any societal interest that there may be in the process of gestation of a possible future person must stop short of violating the human rights of the pregnant woman in whose body the gestation is to take place.<sup>36</sup>

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numerous case law including from the Human Rights Committee: *KL v. Peru*, *Amanda Jane Mellet v. Ireland*, *LMR v. Argentina*.

<sup>32</sup> CRC General Comment 20; WGDAW report on health and safety A/HRC/32/44; SR on the right to health A/HRC/32/32.

<sup>33</sup> WGDAW's submission to the Human Rights Committee on its draft general comment on the right to life: [https://www.ohchr.org/Documents/Issues/Women/WG/WGDAW\\_HRC\\_GC36\\_submission.pdf](https://www.ohchr.org/Documents/Issues/Women/WG/WGDAW_HRC_GC36_submission.pdf)

<sup>34</sup> There were no abortion laws in existence prior to the beginning of the 19th century. As a result of the influence of the Church, laws of many countries were changed to prohibit any termination of pregnancy and in some cases contraception. WGDAW position paper.

<sup>35</sup> Article 1 of the Universal Declaration of Human Rights.

<sup>36</sup> WGDAW position paper.



## Conclusions

21. The WGDAW submits that women's access to safe legal termination of pregnancy is a matter of women's human rights, including the rights to equality, to dignity, autonomy, bodily integrity and respect for private life and the highest attainable standard of health, including sexual and reproductive health, without discrimination. Under international human rights law, the State has a legal obligation to take appropriate measures to ensure the respect, protection and fulfilment of these rights.
22. Criminalization of behaviour that is attributed only to women is discriminatory per se and generates and perpetuates stigma. The State has an immediate obligation to repeal laws and reverse policies which discriminate against women.<sup>37</sup> This includes laws that restrict, prohibit or criminalize termination of pregnancy and procedural barriers that restrict access to safe health services. The elimination of discrimination against women in the area of reproductive and sexual health and rights is essential for their enjoyment of rights in other fields. The primacy of women's right to equality should apply in all areas of life and prevail over other considerations.

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<sup>37</sup> Article 2, g CEDAW.