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THE CRIMINALITY OF ABORTION IN KOREA

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To what extent can the criminal law serve as a means of social control? To what extent can the importation of a modern system of law by an underdeveloped country serve to modernize the behavior patterns of the country? And to what extent is a law observed when it is contrary to the mores of the people it is supposed to govern? In the following article, the authors examine these and related questions with specific concern for the attitudes of Koreans toward Korea's "imported" law relating to abortion.—EDITOR.

Korea, like many other Asian countries, has imported its legal system from Europe, as a part of its modernization program. It was thought that adoption of this system would permit the nation to modernize the behavior patterns of its people within a relatively short period of time. The desire of an underdeveloped country to move rapidly out of the static past into a modern era is so widely publicized that it is not necessary for us to go into a detailed explanation of it here. Suffice it to say that the law is considered by many to be an instrument well suited for modernization. The idea is that the state can prohibit that which is pre-modern and compel that which is modern.

Even in the United States, laws are being utilized for social control with increasing frequency.¹ Complaints have been made that Americans are "unduly hasty in creating new crimes by statute."² The reason for this increasing reliance on the law is said to be that the mores of the country have been too weak and inconsistent to serve as a means of social control.³ Since the behavior patterns of the Korean people cannot be modernized through nonexistent mores, Koreans are witnessing a galloping "inflation of laws." Penal sanctions seem always to appeal to the ruling segment of a nation. Penal sanctions are simple and effective, they believe. In short, they think they can legislate *out* the decrepit and legislate *in* the modern. But laws that do not have the support of a country's mores have consistently proved to be rather

ineffective.⁴ Many statutes are never enforced. Divergence between law in action and law in statutory books is a problem no lawyer may lightly ignore.⁵ As Pound pointed out, law in action is chiefly determined by public opinion.⁶

But it is said that a public opinion favorable to modernization may be created by legislation. It is said further that the law is one of the best instruments for educating the public. The moral sentiments of a community may be modified by the application of a penal code in the course of a few generations.⁷ And this educational role of the law is very important in an underdeveloped country, where the impetus for modernization has to come from the leading elite.

Although the preceding argument has definite merits, it is not persuasive. Within limits, a people may be educated by a statute. But, if a statute is too far removed from the mores of the people, thus lacking the support of public opinion, it can never be enforced effectively. Moreover, if a community has too many statutes that are never effectively enforced, the people will get the notion that not all laws have to be observed. If there are too many laws that are not "in action," disrespect, rather than respect, for the law becomes the rule. When this has happened, as in Korea, the laws themselves have taught the people to be lawless.

This situation has caused the present writers to

¹ The "blue laws" of the United States are a good example.

² This problem has been partially dealt with by one of the present writers in Hahm, *The Korean People and Their Property Rights*, 12 AM. J. COMP. L. 61 (1963).

³ POUND, *CRIMINAL JUSTICE IN AMERICA* 120 (1930).

⁴ OPPENHEIMER, *THE RATIONALE OF PUNISHMENT* 293-94 (1913).

¹ SUTHERLAND & CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 11 (1955).

² BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 77 (1955).

³ SUTHERLAND & CRESSEY, *op. cit. supra* note 1, at 11.

be particularly concerned about the effectiveness of various laws we have in Korea today. It may be safely said that the laws closely related to the safety of person tend to be enforced effectively, whereas the laws related to government operations, business, labor, and public morals tend to be enforced less effectively. The crime of abortion is usually classed as an offence against the person.⁸ But it also partakes of an offence against the public morals. Because the victim of the offence is not yet in being, the rights of the injured are liable to be brushed aside. What comes into focus is that aspect of abortion which is related to the sexual morality of the pregnant woman who resorts to this crime. This fact lends a certain degree of ambivalence to this crime. And yet, there can be no doubt that this crime is one of the most serious because it involves the destruction of a human life. In this sense, there should be no lack of willingness on the part of the state to enforce the law prohibiting abortion. Nor should there be any lack of popular support for the law. It seems, however, that the law proscribing abortion⁹ is neither

vigorously enforced nor supported by public opinion in Korea today. In order to understand this problem better the present study was undertaken.

THE STUDY

The crime of abortion has been described as a female crime.¹⁰ Abortion always involves a pregnant woman who either herself commits the crime or gives her consent to its commission, making herself an active participant. It is also a white-collar crime.¹¹ Physicians perform the operation. Pharmacists give out pharmaceutical preparations to pregnant women who then use them to obtain abortion. Therefore, in ascertaining the attitude of the Korean public toward abortion, attitudes of these two groups, along with the law-enforcement officers and the rest of the general public must be taken into account. This naturally calls for an attitude-study on a national scale. But, due to lack of financial resources, more than anything else, the study the result of which is here summarized has been confined to the white-collar aspect of the crime.

We have tried to find out the opinions and views of (1) physicians, (2) judges, (3) public prosecutors, and (4) practicing lawyers in Seoul and Pusan, the two largest cities in Korea. Korea has a national and unitary judicial system. All the prosecutors, judges, and practicing lawyers receive the same kind of training, having to pass one national examination to join the profession. The physicians too receive a standardized training, having finally to pass one national examination to be permitted to practice. Therefore, the men and women in these professions tend to be homogeneous in their views and opinions, irrespective of locality in which they are presently located.

It may be hypothesized that the physicians and the prosecutors will be diametrically opposed in their views, because the former are the ones who

⁸ TURNER, KENNY'S OUTLINES OF CRIMINAL LAW 178-79 (1958). The word "person" in this connection is usually understood to mean the person of foetus. Although the person of pregnant woman might be included, it cannot be the person to be protected under the law proscribing abortion. The reason is that the pregnant woman is the one who commits the offence and is punished under the law. The protection of her person may, however, be a consequence not wholly ignored by the policy of the law.

⁹ The crime of abortion is dealt with in articles 269 and 270 of the Criminal Code. The provisions of the two articles may be translated as follows.

Article 269.

- (1) A pregnant female who causes the destruction of her own foetus by abortion, by the use of drugs, or by any other means is punishable by imprisonment for not more than one year or by a fine of not more than 1,000 won.
- (2) A person who causes the destruction of a foetus at the request, or with the consent, of a pregnant female is punishable by imprisonment for not more than one year or by a fine of not more than 1,000 won.
- (3) A person who, in the course of committing the offence of (2) of this article, causes injury to a pregnant female is punishable by imprisonment for not more than three years; death of a pregnant female is punishable by imprisonment for not more than seven years.

Article 270.

- (1) A physician, a doctor of the Chinese school, a midwife, a pharmacist, or an apothecary who causes the destruction of a foetus by abortion at the request, or with the consent, of a pregnant female is punishable by imprisonment for not more than two years.
- (2) A physician, a doctor of the Chinese school, a midwife, a pharmacist, or an apothecary who

causes the destruction of a foetus by abortion without the consent of a pregnant female is punishable by imprisonment for not more than three years.

- (3) A physician, a doctor of the Chinese school, a midwife, a pharmacist, or an apothecary who, in the course of committing the offences of (1) and (2) of this article, causes injury to pregnant female is punishable by imprisonment for not more than five years; death to pregnant female is punishable by imprisonment for not more than ten years.

¹⁰ SUTHERLAND & CRESSEY, *op. cit. supra* note 1, at 111.

¹¹ BARNES & TEETERS, *op. cit. supra* note 2, at 16.

will be prosecuted if they commit the crime, whereas the latter are the ones who will be enforcing the law proscribing abortion. The practicing lawyers may be inclined to support the views of the physicians, for they are the ones who have to defend those accused of the crime. On the other hand, the judges will have much in common with the prosecutors, although they have to be impartial in their findings of actual guilt.

We sent our questionnaires to all the judges and prosecutors in Seoul and Pusan. Out of 78 judges, 42 responded, the rest making no response after a couple of follow-ups by mail. Out of 81 prosecutors, 48 responded, the rest making no response after two follow-ups by mail. 91 physicians and 62 practicing lawyers in the two cities were chosen by a regular-interval sampling method, using the most up-to-date directories issued by the medical and bar associations in the two cities.

The Attitudes Toward Birth Control and Abortion

First of all, in the questionnaire, each respondent was asked how many children he or she had. This question was designed to find out a correlation, if any, between the number of children a respondent had and his attitude toward birth control and abortion. 34.7 per cent had three or four children, those who had more than five children comprising 31.8 per cent of the total. 14.5 per cent said they had no children, and 19.0 per cent said they had one or two children. No definite correlation between the number of children a respondent had and his attitude toward birth control was discernible, except that five out of 77 who had more than five children considered birth control "immoral," while none of those who were not yet married or married but had no child so considered it. As to abortion, the fact that none of those who had more than five children said abortion was "convenient," while one out of 24 who were unmarried and one out of 11 who were married but had no children said the same, might be interpreted to indicate such a correlation. It seems, however, that these differences may not be wholly attributed to the number of children a respondent had. Since older people tend to have more children, simply because they have been married longer than younger people, age rather than number of children may account for their more strict views on birth control and abortion.

An overwhelming majority (86.5%) considered birth control "very necessary." Only 5.3 per cent

considered it "immoral" and 3.3 per cent considered it "unnecessary." It is interesting to note that no prosecutor considered birth control to be "immoral," while no physician considered it "unnecessary." 12.9 per cent of the practicing lawyers, 4.8 per cent of the judges, and 3.3 per cent of the physicians considered birth control "immoral." It should be noted here that in Korea both the judges and the prosecutors are generally younger than the practicing lawyers. Most of the judges and prosecutors pass their judicial examination in their twenties and, after an apprenticeship training of a year or two, are appointed to the bench or the Ministry of Justice. After ten or twenty years of judicial career, they "retire" from the public service and become practicing lawyers.

78.6 per cent thought that abortion was "sometimes necessary." And 2.5 per cent said abortion was "convenient." On the other hand, 18.1 per cent thought that "there should be no abortion." No judge thought that abortion was convenient. But three prosecutors, two physicians, and one practicing lawyer thought so.

67.5 per cent thought "many" abortions were being performed in Korea, and the remainder thought that "some" abortions were being performed. More physicians (83.5%) thought that abortion was prevalent than judges (64.3%), prosecutors (62.5%), or practicing lawyers (50.0%). Perhaps physicians are in the best position to know how prevalent the practice of abortion is in Korea today. One study conducted by the Graduate School of Public Health of Seoul National University shows that 32.4 per cent of the married women living in an area of Seoul had had more than one abortion. A more recent study by the same school shows a similar result (34.3%). In the latter study, one woman said that she had had 21 abortions so far.¹² Many physicians express the view that a far greater number of abortions are performed in the two cities than the results of these studies indicate.¹³ The standard fee charged

¹² CHA, SOCIOMEDICAL SURVEY ON THE ARTIFICIAL INTERRUPTION OF PREGNANCY (1961); YUN, THE SURVEY ON THE ARTIFICIAL INTERRUPTION OF PREGNANCY IN SEOUL AREA (1960). Both are published theses for master of public health degrees.

¹³ It has been estimated that seven hundred thousand to two million abortions are performed annually in the United States. BARNES & TEETERS, *op. cit. supra* note 2, at 16.

The prevalence of abortions here indicated, of course, does not apply in the case of rural areas. It may be safely said that the number of abortions performed in rural areas is much smaller than that in the cities. A study conducted by the Department of Preventive

per operation is 2,000 *won* (a little over \$15.38 at the official rate of exchange). To many Korean women this is no small amount of money, however. Many think that this relatively high cost of abortion is a more effective deterrent than the punishment provided by the law.

The Attitudes Toward the Crime of Abortion

Next, the respondents were asked to comment on the desirability of punishing those who commit the crime of abortion. Abortion is a criminal offence punishable under the existing law of Korea. 9.8 per cent thought it stands to reason that those who practice abortion should be punished. On the other hand, 7.8 per cent thought that, since punishing those who practice abortion is wrong, they ought not to be punished. The rest (81.4%) said that those who can show a justifiable cause should not be punished. Under the existing law, the only justification or "defence" allowed in the case of abortion is "necessity"—necessity of preserving the life of the pregnant woman. Therefore, strictly speaking, not everyone who practices abortion may be punished under the existing law. If a person can show the necessity of saving the life of the pregnant woman, he should not be punished. On the other hand, if a person cannot show such a justification, he should be punished. And yet, two judges, five prosecutors, three practicing lawyers, and nine physicians thought that abortion ought not to be a punishable crime.

Before going on to the question of various justifications for the crime, we asked the question, "Why is abortion bad?" 33.3 per cent thought that it was because abortion injures the health of pregnant women. 25.9 per cent said that it was because abortion has deleterious effect on the sexual morality of the community. 24.2 per cent said that it was because abortion destroys the life of a foetus. 2.0 per cent thought that it was because abortion diminishes the human resources of the nation. And the remainder could not quite make up their minds as to the reason why abortion was bad. In the case of judges and physicians, the most important consideration was the injurious effect on the health of woman. In the case of practicing

lawyers, the most important consideration was the destruction of a potential human life. In the case of prosecutors, the most important consideration was the harm to the public morality. It seems that these differences rather neatly illustrate the primary preoccupations of the occupational groups here represented.

It is the prevailing criminal law theory in Korea today that the primary reason for punishing the offence is to protect the life of the foetus. According to the results of the present study, only 23.1 per cent of the physicians, 21.4 per cent of the judges, 18.8 per cent of the prosecutors, and 33.9 per cent of the practicing lawyers agree with this view. If a method can be devised by which abortion can be safely practiced without any danger of injuring the health of pregnant women, quite a number of these professional people will not hesitate to support the abolition of the crime of abortion. Furthermore, in the days when the values concerning sexual morality are undergoing profound and rapid changes, the number of those who object to abortion on the ground of its deleterious effect on the sexual morality of the community will soon be drastically reduced.¹⁴ The conviction that abortion is very similar to infanticide, a specie of murder, seems to be rather weak among these professional people.¹⁵ It is not for the present writers, however, to pass a moral judgment on the attitudes of these people. What is important is an accurate understanding of the discrepancies existing between the policy behind the existing law and the mores of the community. Having achieved a correct understanding of the problem, it is necessary to find a way to remedy the situation.

We have seen that under the existing law of Korea the necessity of saving the life of a pregnant

¹⁴ Attitudes toward sex behavior are also rapidly changing in other parts of the world. As to the United States, see TAFT, *CRIMINOLOGY* 317-22 (1956).

¹⁵ Traditionally, even infanticide has not had the same criminal connotation in Korea. For example, when a woman gave birth to a pair of mixed twins, it was customary to put the female child on its stomach and face, letting it die of asphyxiation. The reason for this was that mixed twins often came to have incestuous attachments for one another as they grew up. Under the Confucian ethics, incest was one of the most atavistic crimes. Therefore, it was thought imperative for the parents to destroy one of the pair, removing once and for all any possibility of such a crime. Since a male child was always valued more than a female child, it was for the latter to die. It may also be added that the Koreans generally do not welcome the birth of more than one child in a single delivery. They consider multiparous birth somewhat abnormal.

Medicine and Public Health of Yonsei University Medical College showed that, of 1,700 families studied in a rural area near Seoul, 4.5% had abortions in the years 1961-1962. BANG & YANG, *A SURVEY OF FERTILITY AND ATTITUDE TOWARD FAMILY PLANNING IN RURAL KOREA* (1963). (A mimeographed preliminary report.)

woman is the only available defence. In contrast, legislation in Japan as well as in several European countries provides various other justifications for abortion. In 1948, Japan passed the Eugenic Protection Law, which specified several justifications in addition to the necessity of saving the life of the pregnant woman.¹⁶ Along the line suggested by the Japanese law, we asked the respondents to comment on the desirability of penal sanctions in certain specific situations.

If an abortion was performed because of the ill health of a pregnant woman, 90.1 per cent said that no one should be punished, and 7.8 per cent said that offender(s) should be punished but "lightly." One lawyer simply said that the offenders should be punished. 1.6 per cent wanted to be more specific, saying that the danger to the health of the pregnant woman must be really serious before one can justify abortion. It must be mentioned that, in order for the doctrine of necessity to operate under the present law, the danger to life must be imminent and critical. That the pregnancy may have a harmful effect in some indefinite future is not enough. And the danger must be such that there is no other way to save the life but to abort. The lawyer who insisted on unmitigated punishment even in this case especially emphasized the importance of strictly interpreting the only justification allowed under the present law.

When the possible birth of a deformed child due to hereditary or pharmaco-medical causes was given as a reason for abortion, 87.6 per cent said that no punishment should be meted out, and 7.8 per cent said that the offenders should be punished but "lightly." Two physicians and two judges, in addition to the lawyer who answered the same in the preceding question, said simply that there should be punishment. Strangely enough, one physician said that the offenders should be "more severely" punished in this case than the present law provides. This physician noted that there is

no way of knowing whether an unborn child will in fact be born deformed or not. Therefore, he thought this type of excuse might be a mere subterfuge and could not be a *bona fide* justification. It is interesting to note that no prosecutor insisted on untempered punishment, the overwhelming majority (87.7%) saying that no punishment should be meted out. It should be added here that in this and the preceding question about the same percentage of each occupational group chose the same answer.

A somewhat smaller majority (83.1%) than in the preceding two questions said that no one should be punished if the reason for an abortion was to abort a foetus conceived as a result of rape. 8.6 per cent said that the offenders should be punished but "lightly." 3.7 per cent simply said that they should be punished. One judge and one prosecutor said that they should be punished "more severely." These two men seem to feel that those women who get raped are not themselves entirely free from blame. Here again the possibility of subterfuge worried some physicians and lawyers. They seriously doubted the possibility of ascertaining whether a woman had been raped or not some months prior to abortion. Physicians, more than any other group, tended to doubt the *bona fide* of this justification. While 75.8 per cent of the physicians said "no punishment," 89.6 per cent of the prosecutors, 87.1 per cent of the practicing lawyers, and 85.7 per cent of the judges said the same.

The size of the majority (64.8%) opposing punishment sharply declines when the reason given for abortion is a large number of children. 23.6 per cent considered this a good enough reason for mitigating punishment, however. 9.0 per cent said simply that the offenders should be punished. Only one judge and one lawyer said they should be punished more severely. Five respondents made no answer to this question. As in the previous question, the physicians tended to be more strict about this matter (62.6% said "no punishment") than the prosecutors (79.2%) or the practicing lawyers (62.9%). This time, however, the judges were the strictest group (only 54.8%).

When extreme poverty was given as the reason for abortion, about the same number of the respondents (62.8%) as in the immediately preceding question opposed punishment. 29.3 per cent said that the punishment should be mitigated, and 6.2 per cent said simply that the offenders should be punished. Only one judge said that they should be

¹⁶ The law enumerates five kinds of justifications as follows.

- 1) When the pregnant female herself or her husband is afflicted with a mental or hereditary disease.
- 2) When a relative of the pregnant female herself or her husband, within the fourth degree of consanguinity, is afflicted with a mental or physical disease of hereditary nature.
- 3) When the pregnant female herself or her husband is a leper.
- 4) When continuation of pregnancy or delivery, for physical or economic reasons, threatens palpably to injure the health of the pregnant female.
- 5) When conception is caused by rape.

punished more severely. The strictest group again turned out to be the physicians. While 56.1 per cent of the physicians said "no punishment," 72.9 per cent of the prosecutors, 66.1 per cent of the practicing lawyers, and 59.5 per cent of the judges said the same. Simply on an *a priori* ground, one may think that the physicians would take the most lenient position among these groups. But it seems that the contrary is the case.

If an unmarried woman, or a woman who conceives as a result of illicit sexual relations, has an abortion, 32.2 per cent of the respondents thought that the offenders deserved punishment. And 11.2 per cent thought that a more severe punishment is called for in this case. 26.1 per cent thought that mitigation of punishment is called for even in this case. 27.3 per cent were still very sympathetic and said that no punishment was necessary. Seven respondents made no answer. Again the physicians were stricter (15.4% said "no punishment") than any other group (40.3% of the practicing lawyers, 29.2% of the prosecutors, and 28.6% of the judges). When we come to this "justification," the word becomes almost a misnomer. Abortion was resorted to simply because it was convenient. It is true that there is a necessity—necessity to preserve one's reputation or avoid shame. But this cannot be a necessity as the law means it. On the other hand, the criminality of abortion cannot be justified solely as a means for preserving public morality. The legal sanction is not very effective in protecting the morality of the community. And, even if penal sanctions were effective, the punishment of abortion is certainly not the most suitable means to be employed.

Then, the respondents were asked whether they thought the number of abortions would increase or not, if the crime of abortion were abolished. 49.4 per cent thought that the number of abortions would not increase, and 46.1 per cent thought that it would increase. The rest refused to make any predictions. The prophesies these people made of course have no factual validity. What is important is the fact that the physicians were more inclined to put their faith in the efficacy of penal sanctions than those in the legal profession. 51.6 per cent of the physicians believed that the abolition of the crime would increase the practice of abortion, whereas 35.8 per cent of the prosecutors, 38.1 per cent of the judges, and 50.0 per cent of the practicing lawyers believed the same. Those in actual charge of enforcing the law felt least sure about

the effectiveness of penal sanctions in preventing abortion.

There has been much talk lately in Korea about population explosion. The government is actively encouraging birth control. In fact, last year the rate of increase of population was greater than that of GNP.¹⁷ This means that the standard of living declined last year. We have asked the respondents whether they thought birth control (to decrease the rate of population increase) was necessary. 83.5 per cent said "yes," and 14.0 per cent said "no." The rest made no or conflicting answers. Next, they were asked to assume that birth control was necessary, and then, on that assumption, they were asked to say whether they thought abortion was a good means to be used for this purpose. 156 out of 243 (including six who had said birth control was not necessary in the immediately preceding question) saw no objection to the use of abortion as a means for birth control. 69 said that it was wrong to use abortion for that purpose, and the rest made no answer. That 64.2 per cent saw no objection to the use of abortion as a means for birth control is very significant. Here again, the physicians as a group tended to be the most reluctant to accept abortion as a means for birth control (54.9% said "no objection"). Though many will feel that too many physicians saw nothing wrong with the use of abortion as a means for birth control, it is only natural that physicians are reluctant to endorse it because of the injurious effects of abortion on the health of women. 77.1 per cent of the prosecutors, 66.7 per cent of the judges, and 66.1 per cent of the practicing lawyers saw no objection to the use of abortion as a means for birth control.

The Religious Influences Upon Attitudes

As the question of abortion involves one's moral and religious values as much as his legal concepts, each of the respondents was requested to give his religion. 2.0 per cent gave Roman Catholicism as their religion, and 20.7 per cent gave non-Catholic Christianity as their religion. 18.2 per cent were Buddhists, and 3.7 per cent said that they believed in some kind of religion other than the three listed.

¹⁷ The rate of increase in gross national product in 1960 was 2.1% and that in population was 2.9%. In 1961, GNP increased 2.8%, but population increased 2.9%. THE ECONOMIC PLANNING BOARD, REPUBLIC OF KOREA, KYUNGJAEPAIKSUH (The White Paper on the Economy) (1962). Only an unofficial estimate is available as to 1962. GNP is estimated to have increased 2.6%, population increased 2.88%.

The rest said they had no religion. It is generally estimated that about 7 per cent of the Koreans are Christians, including Roman Catholics;¹⁸ consequently, one is struck by the large proportion of Christians in the professional groups here represented. But since both medical and legal trainings are based on the study of modern or Western knowledges, it is a well-known fact that Christians tend to seek professional careers more actively than non-Christians. If we remind ourselves that the first medical college established in Korea is Severance Medical College, an American missionary institution, it is not surprising to find that 27.5 per cent of the physicians are non-Catholic Christians and 2.2 per cent Roman Catholic. This means that the respondents in this study have received more Westernizing or Christian influence than the majority of the Koreans.

It is not necessary, however, for us to elaborate here the Christian views on abortion. Instead, it may be more useful for us to briefly describe the traditional attitude of the Koreans toward abortion. The Koreans have traditionally considered a child to be under the absolute power of his parents. As a Roman *pater familias*, the Korean father had a right to kill or sell his child. This absolute power of parents had been very much mitigated during a few centuries preceding the importation of a Western European legal system in the last years of the nineteenth century. Thus, under the last penal code of the Yi Dynasty,¹⁹ it was provided that parents who kill their children will be subject to flagellation and penal servitude. The law, however, specifically states that the punishment is not in atonement for the lost life of the child, but is to punish an evil. Also the penal code had no provision for the crime of abortion. If anyone injured a pregnant woman, causing a miscarriage, the miscarriage was considered an aggravating element in the assault and battery. But it seems that it was not considered an independent crime.

Buddhism abhors any kind of destruction of life. Buddhism, however, has not had as pervasive an effect on the mores of the Korean people as the Confucian ethics. When the parents who gave a life to a foetus in the first place decide to take it

away, it is not for outsiders to interfere. If a pregnancy or a forthcoming birth of a child threatens to cause hardship to the parents, they have every right to prevent that hardship. The biggest obstacle in the way is not moral scruples or compunction, but the lack of knowledge of a safe method of abortion or the lack of money to pay for the operation.

With the advent of Christianity and the importation of a European legal system, the whole situation has undergone a profound change. The foetus has come to have an independent identity under the law. It became a crime even for the parents to destroy it. The Western values began to permeate the mores of the educated and the Christians, making them conscious of the sinfulness of destroying a foetus. Inasmuch as it is now a punishable crime to abort a foetus, more and more people who know the law have come to consider abortion "wrong." And, in this sense, Oppenheimer's thesis has proved valid.

But the problem is not that simple. Among the uneducated whose life is scarcely affected by the modern, rational, and Western legal institutions, the educative effect of the criminal law has been very slow to operate. Lacking a strong moral conviction, the law-enforcement officials, particularly those at the lower echelons, have been unenthusiastic in enforcing the law. The apprehension and prosecution of offenders have been sporadic.²⁰ There has been no public outcry that might have prompted a more vigorous enforcement of the law. In a few cases where an abortion results in the death of woman, the law-enforcement agencies institute criminal proceedings against the offenders. In the overwhelming majority of the cases, however, where abortions are successful, the law remains utterly unconcerned. The danger is that, before it has had enough time to exert its educative influence, the law may be rendered utterly impotent. In the result, a vicious circle develops. Because the law lacks the moral support of the community, it is ineffectively enforced. Because the law is ineffectively enforced, it fails to moralize the community. And because the law fails in its moral education, it lacks the moral support of the

¹⁸ MOFFET, *THE CHRISTIANS OF KOREA* 17 (1962).

¹⁹ Korea had relied on the Chinese penal code for its criminal justice. But a supplementary code, *Kyung-kooktaijon*, was compiled to make the law-enforcement more realistic in the light of the local differences and peculiarities in the early part of the Yi Dynasty. The last version of the supplementary code is known under the name of *Taijonhwaetong*.

²⁰ According to the statistics available at the Seoul District Prosecutors' Office, in 1961, out of 18 abortion cases reported to the Office, only six were formally prosecuted, the rest ending in *nolle prosequi*. In 1962, 19 abortion cases were reported to the Office. Out of the 19 cases, three were prosecuted, three remained undisposed of at the end of the year, and the remainder ended in *nolle prosequi*.

community. In the meantime, the community develops the habit of disregarding the law in general.

Haven't we in Korea reached this danger-point in the area of criminal abortion? We have seen the consistent failure on the part of these professional people, especially those in actual charge of enforcing the law, to condemn the practice of abortion as something intrinsically immoral. To the majority of the respondents, abortion still remains a *malum prohibitum*, not a *malum in se*. As we have seen, the respondents have had more Western education, and sometimes indoctrination, than most Koreans. The proportion of those who profess Christianity as their religion is several times greater in this group than the national average. It may safely be conjectured that the nation as a whole will be less inclined to condemn abortion as morally wrong than the respondents.²¹

In order to see a correlation between one's religion and his attitudes toward birth control and abortion, the responses to a few questions are here selected for analysis, according to the respondents' religious affiliations. When they were asked to choose one most important reason why they considered abortion bad, the reason the greatest number of non-Catholic Christians (40.0%) chose was the destruction of the life of a foetus. But the reason most frequently chosen by the Buddhists (40.9%), those who believed in a religion other than the three listed (44.4%), and those without any religion (33.8%) was the injury to the health of women. What is interesting is that out of five Roman Catholics, only one chose the destruction of foetus as his reason, while two chose the injury to the woman. On the other hand, no Roman Catholic considered it proper to use abortion as a means for birth control. But 48.0 per cent of the non-Catholic Christians considered it proper to use abortion as a means for birth control. 72.7 per cent of the Buddhists, 55.6 per cent of those with a religion other than the ones listed, and 71.4 per cent of those without any religion so considered. As to the question of birth control, the Roman Catholics were unanimous in admitting the need for birth control. All five of them said that they considered birth control "very necessary." What is important in this connection is that the question

did not refer to any particular form or method of birth control. Though the Roman Catholic Church bans birth control through artificial means, it does not prohibit birth control through the so-called "natural" means. On the other hand, 10 per cent of the non-Catholic Christians, 4.6 per cent of the Buddhists, and 4.5 per cent of those without any religious affiliation considered birth control "immoral." No Christian said birth control was unnecessary, whereas 4.6 per cent of the Buddhists and 4.5 per cent of those without any religion said so.

DISCUSSION AND PROGNOSIS

Many an Asian country has imported a legal system from the West, thus achieving the modernization of its laws at one fell swoop. Superficially, at least, this transplantation of a modern, scientific legal system has succeeded in modernizing the behavior patterns of these communities. This sort of forced modernization has been thought ineluctable by the leaders of these countries. It must be admitted that the transplantation has one merit that commends itself above all else. It is simple. And it is quick. In the face of urgent necessity for modernization of an underdeveloped country, the matter cannot be left entirely to the natural course of events. The less a country is developed, the greater is the need for strong leadership. When the mores of the community are not yet ready to produce a modern system of legal norms, it is incumbent upon the leaders to lead the moral sentiments of the community forward in the direction of modernization. In the process, it may be necessary to use compulsion, and the legal sanction is ideally suited for the purpose.

But the difficulty in imposing a legal system upon a community not yet ready for it is the use of force to change the mores of a people. However laudable and desirable the goal of modernization might be, we cannot employ "pre-modern" means to achieve modernization. Legal coercion in the form of punitive sanctions alone is not enough to achieve modernization. The means employed may very well defeat the end.

Another and more serious danger is the creation of a community state of mind conducive to disrespect for the law. When the people see too many laws unenforced or enforced but ineffectively, they soon come to feel that not all laws need be observed. From this, it is but a short step to the general disrespect for the law. We, the Koreans,

²¹ We are happy to note here that a study on a nation-wide scale is being conducted by the present writers with a financial assistance from the Asia Foundation. The results of that study will give us much information on this problem as well as on the attitudes of the Korean people in general toward the law.

already have enough to worry about in this respect. Our experience under despotic monarchs and a ruthless colonial master has taught us to be lawless. The lawlessness has already reached a point where it is almost habitual with the Koreans. Remembering this historical background, no one can remain complacent about the amount of dead-letter laws in our lawbooks. It is true that no society is entirely free from dead-letter laws. But ours are the modern, scientific kind, not the antiquated and decrepit. It is nothing to congratulate ourselves to be living under the laws of our grandfathers. But it is worse to be living under the laws of someone else's grandfathers. What is even worse is to try to live under the laws of one's posterity. In a hot pursuit of things modern and scientific, we may be reaching for a legal system that is too far removed from the realities of today.

Any community without ideals is dead. In the realm of legal norms, too, we must have ideals. But the law cannot merely be an idealistic manifesto. It has to be as much of a reality itself as the realities it is supposed to regulate. The divergence between the law in action and the law in books is thus a very serious and dangerous problem in Korea.

In dealing with the crime of abortion, the criminality of the offence itself must be examined carefully. It is dangerous simply to posit that a crime in Europe ought to be a crime in modern Korea. If the law prohibiting abortion lacks the moral support of the Korean people, it cannot be enforced effectively. Because the law does not have the support of the social, psychological convictions of the community, the law-enforcement officers tend to be lukewarm in their efforts to enforce the law. Since the law is not enforced vigorously, the public feels less constrained to observe it. The people

decide that the law does not mean what it says. The law has nuisance value, but nothing more.

What should we do with the law proscribing abortion? The most forthright and simple thing to do is to abolish it. This will be very difficult to do, however. It is rather quixotic to bring in the question of national "face" in discussing the merits of a legal provision, but one has seriously to consider what other peoples might say if Korea, alone among all the "civilized" nations, does not have a law punishing abortion. The Koreans certainly do not wish to appear "immoral" or "primitive." Moreover, there is always a vocal minority of religious variety who would fight to the end any effort to abolish the crime. They will not be satisfied until they see their religious and moral values imposed upon the entire nation through legal sanctions.

A more feasible approach will be to specifically enumerate more "justifications" in the law. This, of course, is the approach adopted by the Scandinavian countries, Poland, and Japan. The Korean government seems to be considering the enactment of such a special legislation at present. But the actual legislation does not appear likely in a foreseeable future.

The scope of the present study is too small for it to be used as a basis for generalization applicable to the entire nation. But a high percentage of Christians in the group and the amount of Western influence received in the course of a long professional training place the respondents far closer to the Western views on this matter as a group than the nation as a whole. From this, it may perhaps be conjectured that a study on a national scale would in general support the views here represented.²¹