

Abortion and Spousal Consent in Japan

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On June 24, 2022, the US Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* (142 S. Ct. 2228) overruled *Roe v. Wade* (410 U.S. 113 (1973)), which guaranteed the right to abortion. This decision was widely reported in newspapers and on television worldwide, including in Japan. There has been a great deal of media concern about the situation in the U.S., but what about the situation surrounding abortion in Japan? This article discusses the legal situation surrounding abortion in Japan, with particular attention to the requirement of spousal consent. In essence, the legal system surrounding abortion in Japan lacks a women's, trans, or nonbinary people's "rights" perspective.

1. Maternal Health Act and Abortion

Japan was one of the first countries in the world to legalize abortion. Although the crime of abortion continues to exist in the penal code, the Eugenic Protection Act was enacted in 1948, opening the way for legal abortion. In 1996, the eugenic provisions of this Act were removed, and the Act was renamed the Maternal Health Act. However, it still retains abortion as a crime in the penal code, and the Act with a history of population policy makes abortion possible.

Article 14 of the Maternal Health Act provides that, with the consent of the spouse, a designated doctor may perform an abortion in cases where 1) the continuation of pregnancy or delivery may significantly damage the pregnant person's physical health due to bodily or economic reasons, or 2) a person was raped in a violent or threatening manner or at a time when the person could neither resist nor refuse and becomes pregnant. The term "abortion" as defined in the Act means artificially discharging a fetus and its appendages out of its pregnant person's body in a period when the fetus cannot survive outside the pregnant person's body, and the notice stipulates that the "time when life cannot be sustained outside the pregnant person's body" is up to 22 weeks of pregnancy. (March 20, 1990, Ministry of Health and Welfare, Health and Medical Service Bureau, Mental Health Division, Director of the Mental Health Division, to the

heads of prefectural health departments (bureaus): “Regarding Changes in the Standard of Time for Performing Abortions under the Eugenic Protection Act.”)

2. Spousal Consent

Article 14 of the Maternal Health Act stipulates that spousal consent is required to perform an abortion. Therefore, it can be pointed out that this requirement gives the spouse the right to veto the abortion and that the Act also protects “the interest of the spouse in the child to be born.” As was aptly stated in *Planned Parenthood v. Casey* (505 U.S. 833 (1992)), in which spousal notification was an issue, that “the analysis does not end with the one percent of women upon whom the statute operates,” the spousal consent requirement is critical for some pregnant persons, such as victims of domestic violence (DV). Nevertheless, the Maternal Health Act requires spousal consent for all abortions without exception.

In 2020, lawyers filed a request with the Japan Association of Obstetricians and Gynecologists (JAOG) to not require spousal consent for victims of sexual violence. In response, the JAOG made an inquiry to the Ministry of Health, Labor, and Welfare (MHLW), which responded that Article 14 of the Maternal Health Act does not require victims of sexual violence to obtain their perpetrator’s consent for abortion (August 24, 2020, notice from the Executive Director of the Japan Medical Association to the Director of the Maternal and Child Health Division, Child and Family Bureau, Ministry of Health, Labor and Welfare, “Regarding Questions about the Maternal Health Act (Inquiry)”; August 28, 2020, notice from the Director of the Maternal and Child Health Division, Child and Family Bureau, Ministry of Health, Labor and Welfare to the Director in charge of maternal and child health, Japan Medical Association, “Regarding Questions about the Maternal Health Act (Reply)”). As for victims of DV, the MHLW responded in 2021 to the effect that spousal consent is not required if the marriage has substantially broken down due to DV or other reasons (March 4, 2021, “Notice from the Executive Director of the Japan Medical Association to the Director of the Maternal and Child Health Division, Child and Family Bureau, Ministry of Health, Labor and Welfare: “Regarding Questions about the Maternal Health Act (Inquiry)”; March 10, 2021, “Notice from the Director of the Maternal and Child

Health Division, Child and Family Bureau, Ministry of Health, Labor and Welfare to the Director in charge of maternal and child health, Japan Medical Association: “Regarding Questions about the Maternal Health Act (Reply)”). Thus, in 2020 and 2021, some exceptions were made by interpretation. However, they are the only exceptions; in principle, the Maternal Health Act continues to require spousal consent. Note that if a married person becomes pregnant as a result of sexual violence by a person who is not her husband, her husband’s consent is required to have an abortion.

In addition, the Maternal Health Act only requires spousal consent if the pregnant person is married. However, research has shown that, in practice, the consent of the genetic potential father of the fetus may be required even if the pregnant person is not married. Strictly speaking, it is not necessary to have the genetic potential father’s consent. Because the doctor does not strictly test the fetus’ genes, pregnant people must simply present the document with the partner’s signature. In a survey conducted jointly by NHK (Japan Broadcasting Corporation) and a medical information website in 2022 (Yu Sato, “Abortion for unmarried people, 60% ‘may not seek’ their partner’s consent ◆Vol. 1,” m3.com, September 8, 2022, <https://www.m3.com/news/open/iryoishin/1076370>, Accessed December 20, 2022), 33% of doctors said they would seek their partner’s consent in any case if they were not married, and 62% of doctors said that they might not seek spousal consent under certain circumstances. It appears that the practice of seeking consent, even if not married, continues among some doctors for fear of trouble with the male partner.

Therefore, although efforts have been made in recent years by lawyers to clarify the interpretation of spousal consent in Article 14 of the Maternal Health Act and to make exceptions, the text of the Act itself has not changed, and Article 14 still requires spousal consent to obtain an abortion. The existence of this article has often resulted in pregnant people being required to obtain their partner’s consent in unmarried cases, where it would not be required by law.

3. Spousal Consent and Abortion Pill

The overruling of *Roe v. Wade* has brought abortion pills into the spotlight in the United States. Oral abortion pills are two drugs—Mifepristone and Misoprostol—which are taken in sequence to cause an

abortion. These abortion pills have been approved in more than 80 countries worldwide, and are the most commonly used abortion method in Europe. In Japan, however, abortion pills have not yet been approved and are currently under discussion and in the final stages of clinical trials.

In May 2022, the Diet clarified that abortion using oral abortion pills is also considered an abortion under the Maternal Health Act; therefore, the requirements of the Act must be observed, and spousal consent is required for the use of the drug (Statement by Yasuhiro Hashimoto, Director General, Child and Family Bureau, Ministry of Health, Labor and Welfare, May 17, 2022, House of Councilors Committee on Health, Labor and Welfare, 208th Diet Session, No. 14). Even if the oral abortion pill were approved as expected, the spouse would still have the right to refuse the abortion.

4. The View of the Academic Literature

Despite the continuing serious violation of a woman's right to self-determination in the form of spousal consent, abortion in Japan has not been squarely challenged as a constitutional issue in court. Most academic opinions state that the right to self-determination, based on Article 13 of the Japanese Constitution, includes the decision to have an abortion (Nobuyoshi Ashibe, *Constitution* [7th ed.] (Iwanami Shoten, 2019), p. 128; Yoichi Higuchi, *Constitution* [4th ed.] (Keiso Shobo, 2021), p. 297; Yasuo Hasebe, *Constitution* [7th ed.] (Shinseisha, 2018), p. 149, etc.). Although some older literature exists that mentions that the father's interests should also be considered (Setsu Kobayashi, "Constitutional Issues and Current Status in the Abortion Decision," *Jurist* No. 765, p. 26 (1982)), it is now understood that the right to self-determination is an individual right, and therefore, the spouse is not allowed to have the right to veto the decision for abortion. There is also the view that the "right to abortion" is based on equality between men and women under Article 24 of the Japanese Constitution (Shigenori Matsui, "On the Right to Self-Determination (II, Completion)," *Osaka Law Review*, vol. 45, p. 780 (1995)). From this standpoint, spousal consent would not be permissible, as a spouse who does not assume the physical and psychological burden of pregnancy and childbirth would have the right to force a woman to give birth.

5. Conclusion

In the “Abortion Care Guidelines” issued by WHO in 2022, it is recommended that spousal, parental, or hospital authority permission should not be a requirement (WHO, Abortion Care Guideline, 43 (2022)). The spousal consent requirement in Article 14 of the Maternal Health Act is not only impermissible under the Japanese Constitution, as it violates the right to self-determination or gender equality, at least in theory, but also violates international standards.

In addition to spousal consent, abortion in Japan is fraught with other problems. Although Japan’s health insurance system covers a wide range of areas, pregnancy, childbirth, and contraception are not covered by health insurance; therefore, abortion requires a co-payment of at least 100,000 yen. This large cost burden is also a major obstacle to abortion access. The large cost burden, like spousal consent, is also a greater barrier to abortion access for those who are on a more vulnerable social footing, such as minors or DV survivors.

The Maternal Health Act, which is the basis for abortion practice in Japan, originated from the Eugenic Protection Act, the Act of the state’s population and eugenic policy, and even today, the perspective of the “rights” of the pregnant person has not been introduced into Japanese abortion policy. In Japan, where there is no precedent that could be “overturned,” like *Roe v. Wade*, it is necessary to review abortion policy from the perspective of individual rights as soon as possible. One of the highest-priority improvements would be the elimination of the requirement of spousal consent.

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