Legalization of the Birth Control Pill in Japan Will Reduce Reliance on Abortion as the Primary Method of Birth Control

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LEGALIZATION OF THE BIRTH CONTROL PILL IN JAPAN WILL REDUCE RELIANCE ON ABORTION AS THE PRIMARY METHOD OF BIRTH CONTROL

Evy F. McElmeel

Abstract: The United Nations has decreed that access to a variety of methods of birth control is a basic human right, that prevention of pregnancy, not termination, is the goal of birth control, and that abortion is an unacceptable method of birth control. Until recently, condoms and the rhythm method were the only legal forms of contraception in Japan. The high failure rates of these methods, coupled with access to abortion on demand, made abortion the de facto primary method of birth control in Japan. The Japanese government's recent decision to end the ban on oral contraceptives will reduce the number of abortions in Japan.

I. INTRODUCTION

Thousands of small stone statues wearing bright red bibs and child-sized sweaters and caps cover terraced hillsides behind Buddhist temples throughout Japan. These tiny, bald, stone images, festooned with inexpensive jewelry and adorned with small toys and brightly colored pinwheels, are called mizuko-jizo. They are erected by parents to honor miscarried, stillborn and, most often, aborted babies. Honoring the spirit of the aborted fetus placates the spirit and protects the parents from revenge (tayari). It is a ritual that is common across Japan, where one out of every four pregnancies ends in abortion.

Until June 1999, Japan was the only member nation of the United Nations to prohibit the use of the low-dose oral contraceptive ("the Pill"), which is used safely by ninety million women throughout the world. The

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3 LA FLEUR, supra note 1, at 5.
6 Here Comes the Pill and an Uphill Pull for Marketers, AM. CHAMBER COM. JAPAN J., Apr. 1, 1998, at 1 [hereinafter Here Comes the Pill].
7 Sonni Efron, Japan OKs Birth Control Pill After Decades of Delay, L.A. TIMES, June 3, 1999, at A1. Initially, the drugs contained large doses of estrogen and progesterin that resulted in effective birth control but caused severe side effects including blood clotting (called thromboembolic disorders). These blood clots caused strokes and heart attacks. Id. Reduction of estrogen and progesterone to the present levels prevented ovulation but produced no serious side effects. Life/Community/Group Promotes Choices
outstanding benefit of the Pill is that it prevents unplanned pregnancy with a high degree of effectiveness, convenience, and reversibility. Used consistently and on schedule, the Pill is ninety-nine percent effective at preventing pregnancy.

Before legalization of the Pill, the primary methods of birth control were abortion, the condom, and the calendar method (Ogino). Condoms traditionally have accounted for seventy percent of all contraceptive use in Japan. Failure rates for the condom and Ogino, however, range from twelve to twenty percent. Women without access to effective and acceptable contraception frequently turn to abortion to control their fertility. Until June 1999, Japan outlawed effective contraception and permitted abortion on demand. By restricting birth control to ineffective methods with significant failure rates and permitting abortion on demand, the Japanese government essentially promoted abortion as a primary method of birth control.

Japan’s policy violated basic human rights and international law. The United Nations has condemned the use of abortion for birth control and has declared that prevention of pregnancy should be the goal of birth control. It admonishes all governments to provide women with access to a full range of birth control methods in accordance with human rights standards.

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12 Watts, *supra* note 5. Several reasons have been advanced to explain the high rate of condom use in Japan: condoms are more accessible than are other forms of birth control; Japan’s male dominated society lends itself to a male-controlled method of birth control; and the Pill was unavailable until 1999. Ogawa & Retherford, *supra* note 11, at 378.
15 Efron, *supra* note 7. Thirty-four years after the contraceptive was first submitted for approval, the Japanese Central Pharmaceutical Affairs Council (“CPAC”) recommended approval of the Pill, the female condom, and one type of copper intrauterine device. Id.
16 In 1997, the Ministry of Health reported 337,800 abortions, which represented about 22.1% of all pregnancies in that year. Mina Hasegawa, *Japan Ends Holdout on Birth Control Pill*, NIKKEI WKLY., June 7, 1999, at 19.
BIRTH CONTROL PILL IN JAPAN

Now that Japan has finally legalized the Pill, the number of abortions performed in Japan should decrease significantly. This would bring Japan into compliance with the United Nations directive to avoid using abortion as a birth control method. However, government conditions attached to prescriptions for the Pill could limit its attractiveness and/or availability to Japanese women. This may again effectively limit access to the full range of birth control methods required by the United Nations.

This Comment discusses the history of abortion and birth control policy in Japan and examines the ramifications of legalization of the Pill. Part II describes the history of abortion in Japan. Part III explores the decades-long ban on the Pill and the reasons for its ultimate legalization. Part IV considers the possibility that legalization of the Pill will decrease the use of abortion as the primary method of birth control in Japan, thereby bringing Japan in compliance with international human rights standards. Part V discusses possible barriers to the effective use of the Pill in Japan.

II. THE JAPANESE GOVERNMENT HISTORICALLY REGULATED ABORTION TO ACHIEVE NATIONAL GOALS

For centuries, the Japanese government has manipulated its abortion laws to further its economic policies. It has regulated abortion laws to raise tax revenues, increase or reduce the population, and supply the military and work force. When the government needed a larger tax base during the seventeenth century, it issued the first official decree criminalizing abortion. When the government required additional agricultural workers in the late nineteenth century, it encouraged family growth. In the early twentieth century, loss of life from war and disease intensified government efforts to encourage procreation. However, the strain on resources in the post-World War II period resulted in poverty, starvation, and a lack of basic necessities, which forced the government to decriminalize abortion under certain circumstances.

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19 Maruyama et al., supra note 13, at 579.
20 Wardle, supra note 2, at 212.
21 Id.
23 Id.
24 LAFLEUR, supra note 1, at 122.
25 Walsh, supra note 22, at 202.
A. Abortion in Pre-Modern Japan (Prior to 1867)

The first Japanese laws related to abortion were not enacted until the mid-seventeenth century. The practice of abortion in Japan, however, has existed since at least the eighth century, when the term mizuko, the Japanese word for abortion, originated. Numerous references in the folklore and poetry of the Heian period (A.D. 794-1185) indicate that abortion was openly practiced, publicly acknowledged, and therefore probably legal. Before the Tokugawa period (A.D. 1568-1868), abortions were performed sporadically in conjunction with natural disasters such as famine and drought.

Extreme poverty and rampant sexual promiscuity during the eighteenth and early nineteenth centuries caused the practice of abortion as birth control to become commonplace. The poverty of the Tokugawa period was severe, and the small stipends of rice received by warriors and peasants effectively limited the number of children a family could support. Extensive abortion and infanticide resulted from the profound poverty of this period and subsequently reduced the number of children available to become farmers. This in turn reduced agricultural activity and diminished tax revenues. The government responded by attempting to restrict abortion through moral exhortations, economic subsidies, and penal provisions.

B. Abortion Regulation in Modern Japan (1867-1945)

During the Meiji period (A.D. 1867-1912), Japan adopted a penal code that for the first time contained a prohibition on abortion. During this era of prosperity and modernization, family sizes increased and the number

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26 Id. at 189.
27 Id. The lives of newborn children and those not yet born are viewed as being “liquid.” Mizuko, the Japanese word for abortion, means water child or child of the waters. Id. The idea that fetal lives are liquid is based on the Japanese belief that the lives of aborted fetuses are in flux while waiting to be born again. Id. at 188-89.
28 Wardle, supra note 2, at 187.
29 Id. at 187-88.
30 Fornication and adultery were strictly proscribed but were not punished as long as they were not publicly exhibited. A breach made public, such as the birth of a child out of wedlock, resulted in severe consequences. As a result, abortion and infanticide were widely practiced to preserve appearances and reputations. Id. at 189.
31 Id.
32 Id.
33 Id. at 190.
34 Id. at 193.
of abortions decreased.\textsuperscript{35} When Emperor Meiji died in 1912, however, economic and political confidence plummeted, and the number of abortions increased. The government responded by actively enforcing its prohibition on abortion.\textsuperscript{36}

In the pre-World War II era, population growth became a major objective of the government. In order to provide the nation with soldiers and agricultural workers, the Japanese government launched national campaigns through which it exhorted the populace to "bear children and swell the population" (\textit{umeyo fusaeyo}).\textsuperscript{37} To encourage people to marry and have large families, the government placed a tax on single individuals, provided free education for families with more than ten children, restricted employment for women of marriageable age, and provided loans for engaged couples.\textsuperscript{38} Attempts to regulate family size were regarded as threats to population growth and were treated with hostility.\textsuperscript{39}

In 1940, at the same time Japan attempted to increase its population, the Diet (the Japanese legislative body) adopted a National Eugenic Law ("NEL").\textsuperscript{40} This law, patterned on legislation in Nazi Germany,\textsuperscript{41} permitted abortions in limited situations to preserve the purity of the race and to avoid burdening the nation with "defective" children.\textsuperscript{42} Women undergoing abortions in these circumstances were required to obtain prior approval from two physicians, and these physicians were responsible for reporting the abortion to the government.\textsuperscript{43}

C. Abortion Regulations in Post-Modern Japan (1946-Present)

By the end of World War II, Japan’s economic situation forced the government to liberalize the abortion laws. Many leaders feared that a post-war baby boom would thwart efforts at economic recovery.\textsuperscript{44} Ironically, as soldiers returned home after the war, Japan finally experienced the

\textsuperscript{35} Id. at 192-93.
\textsuperscript{36} Id. at 193.
\textsuperscript{37} Id. at 194 (quoting \textit{Family Planning}, in 2 KODANSHA ENCYCLOPEDIA OF JAPAN 246 (1983)).
\textsuperscript{38} Walsh, supra note 22, at 202.
\textsuperscript{39} LAFLEUR, supra note 1, at 122. When Margaret Sanger, the American leader of the birth control movement, visited Japan in 1921, the police monitored her activities, confiscated her pamphlets, and cancelled large portions of her lecture tour. Id.
\textsuperscript{40} Wardle, supra note 2, at 195 n.65 (quoting Law No. 156 of 1948, art. 14, \textit{reprinted in} Ministry of Health and Welfare, Institute of Population Problems, Tokyo, Pub. No. 68, Japan Eugenic Protection Law in Japan 10 (1969)).
\textsuperscript{41} Id. at 193.
\textsuperscript{42} Id. at 193-94.
\textsuperscript{43} Id. at 194.
\textsuperscript{44} Id. at 194-95.
population boom that earlier government incentive programs failed to produce. By then, however, the ravages of war had depleted Japan’s agricultural output, and resources were scarce. For the first time in its history, Japan imported rice to feed its people. This shortage of the most basic item of the Japanese diet, coupled with the war-related devastation of other resources, demoralized the people. The lack of basic necessities resulted in an increased rate of illegal abortion and infanticide.

The tremendous number of illegal abortions in the post-World War II period, along with fears that a population boom would impede economic recovery, resulted in the liberalization of Japan’s existing abortion laws. In 1948, the Diet passed a new law, the Eugenic Protection Law ("EPL"), which was based on the old NEL. This law permitted abortions for medical reasons. In 1949, the Diet added a provision that permitted abortions "for economic hardship." An amendment in 1952 allowed physicians to perform abortions without government authorization. Thus, in a period of less than four years, Japan transformed itself from a nation in which most abortions were illegal to one in which abortions were available on demand.

Because of a lack of birth control alternatives, abortion became one of the primary methods of birth control in Japan, even as other contraceptive methods became available throughout the rest of the world. As the number of abortions in Japan increased, the number of births there dropped. From 1948 to 1955, more than one million abortions were performed each year.

Although Japanese abortion rates are among the highest in the world, the government routinely underestimates abortion rates, reporting only about one-half million abortions annually. During the 1970s, the actual number of abortions performed was two to four times higher than the

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45 Walsh, supra note 22, at 202.
46 Id. at 202-03.
47 Id.
48 Id. at 203.
49 Wardle, supra note 2, at 195.
50 Jitsukawa & Djerassi, supra note 10.
51 Id.
52 Wardle, supra note 2, at 196.
53 Id. The current Eugenic Protection Law ("EPL") allows unrestricted abortions up to the twenty-second week of pregnancy for physical and economic reasons. See Walsh, supra note 22, at 188.
54 Jitsukawa & Djerassi, supra note 10.
55 Id.
57 Here Comes the Pill, supra note 6.
officially reported number. Currently, official figures understate the abortion rate by an estimated 100 to 300%.

Because of the restrictions on effective methods of birth control, the profile of Japanese women seeking abortions differs dramatically from that of women in Western countries, where abortion rates decrease in the segment of the female populace over the age of twenty. In Japan the abortion rate is highest among older, married women who already have children but, until recently, have lacked an effective form of contraception or sterilization.

III. THE JAPANESE BAN ON THE BIRTH CONTROL PILL AROSE OUT OF GOVERNMENT POLICIES UNRELATED TO CONTRACEPTION

For decades, the Japanese government resisted legalization of the Pill and justified its position with a number of propositions that were unrelated to birth control. The Japanese government asserted (1) that legalization would facilitate the spread of AIDS; (2) that the use of the Pill would increase promiscuity; and (3) that the use of the Pill would contribute to environmental pollution. Other important factors that influenced the continued ban on the Pill included Japan's declining population and the personal wealth generated by physicians performing thousands of abortions annually. Finally, repercussions from the AIDS epidemic in Japan's hemophiliac community may have influenced Japan's resistance to the Pill. In the end, however, it was not the resolution of any of these concerns that caused the government to relax its position on legalization of the Pill—the government’s continued failure to approve the Pill became untenable after it approved the anti-impotence drug Viagra.

A. A History of the Legalization of the Pill in Japan

The introduction of the birth control pill in the 1960s provided women throughout the world with access to a reliable, inexpensive way to

59 Maruyama et al., supra note 13, at 579.
60 Id.
61 Kulczycki et al., supra note 14, at 1664. Women under 25 years of age obtain 56% of all abortions in England and Wales and 61% of all abortions in the United States. Id.
62 Id.
64 Chisato Nagata et al., Unapproved Use of High-Dose Combined Pills in Japan, 26 PREVENTATIVE MED. 565, 565 (1997).
avoid unwanted pregnancies.\textsuperscript{65} The original birth control pill, which contained significantly higher doses of estrogen and progestin than the modern Pill (the low-dose pill), sometimes produced severe side effects.\textsuperscript{66} The Pill, by contrast, is extremely safe, as demonstrated by studies on millions of women throughout the world.\textsuperscript{67}

The Japanese government systematically denied women access to any modern method of birth control, including the Pill,\textsuperscript{68} until 1999. In 1992, Japan was one of only two developed nations in the world to be included in the "poor" or "very poor" categories for access to family planning.\textsuperscript{69} Despite the strong stance of the international community against the use of abortion as a method of family planning\textsuperscript{70} and a United Nations declaration that nations are responsible for providing a wide choice of safe and effective forms of contraception,\textsuperscript{71} Japan continued to deny its citizens access to effective birth control. As a result of these restrictions, abortion became one of the primary methods of birth control in Japan.\textsuperscript{72}

For over thirty years, Japan's drug regulatory agency denied approval of the Pill on the grounds that insufficient information was available on side effects,\textsuperscript{73} despite the fact that oral contraceptives have been studied more intensively than any drug in history.\textsuperscript{74} Thousands of worldwide clinical studies have demonstrated the safety and efficacy of the Pill.\textsuperscript{75}

The sale and distribution of pharmaceuticals in Japan is primarily controlled by the Pharmaceutical Affairs Law,\textsuperscript{76} which is enforced by the Ministry of Health ("MOH").\textsuperscript{77} The MOH regulates the approval and licensing of drugs through the Pharmaceutical Affairs Bureau, which in turn delegates the task of investigating new drugs to the Central

\textsuperscript{65} Recent Trends in Birth Control, supra note 9.
\textsuperscript{66} Id.
\textsuperscript{67} Jitsukawa & Djerassi, supra note 10.
\textsuperscript{68} Birth Control in Japan: A Bitter Pill to Swallow, ASAHI SHIMBUN, Jan. 19, 1999.
\textsuperscript{70} Beijing 1995, supra note 17.
\textsuperscript{71} Cairo 1994, supra note 18.
\textsuperscript{72} LAFLEUR, supra note 1, at 136.
\textsuperscript{73} Maruyama et al., supra note 13, at 579.
\textsuperscript{74} Skegg, supra note 8; see also Jitsukawa & Djerassi, supra note 10, at 1051 n.24.
\textsuperscript{75} Maruyama et al., supra note 13, at 579.
\textsuperscript{76} PHARMACEUTICAL ADMINISTRATION IN JAPAN 27 (5th ed. 1991) [hereinafter PHARMACEUTICAL ADMINISTRATION].
\textsuperscript{77} Rosemarie Kanusky, Pharmaceutical Harmonization: Standardizing Regulations Among the United States, the European Community, and Japan, 16 HOUS. J. INT'L L. 665, 683 (1994). The MOH is the equivalent of the U.S. Department of Health and Human Services. Id.
Before granting approval for the manufacture or importation of drugs in Japan, the CPAC examines each product and makes recommendations for the approval or denial of the drugs in question. The approval process is supposed to take only eighteen months, but regularly takes two and a half to three years. Approval for use of the Pill as a contraceptive took almost forty years.

For decades, the Japanese government blocked approval of the Pill for reasons unrelated to the safety and effectiveness of the drug as a contraceptive. In 1965, fear that use of the Pill would lead to the corruption of sexual mores prompted the MOH to deny approval. In 1986, the government sponsored a medical study that examined the feasibility of legalizing the Pill. Five thousand Japanese women took the Pill with the same results as women in the international studies. The low-dose oral contraceptive effectively prevented pregnancy and caused no serious complications during more than two years of use. At the conclusion of the study, the CPAC recommended legalization of the Pill, but the MOH failed to follow the CPAC’s recommendation.

In 1992, the CPAC again recommended approval of the Pill. Again, politicians backed away from legalizing it because of media assertions that approval would lead to a lower rate of condom use and would facilitate the spread of HIV. Publicity surrounding studies on blood clotting disorders and the use of oral contraceptives dashed hopes for approval in late 1995. In 1997, concerns about Japan’s declining...
population, continued fear of promiscuity, and the increased risk of sexually transmitted diseases ("STDs") precluded legalization.  

Ironically, the final time that the MOH announced its refusal to legalize the Pill was on Girls’ Day in March 1999. Only weeks before, the MOH had approved the new drug Viagra in record-breaking time. Viagra offers relief to males suffering from impotence. The rapid approval for this male-oriented drug proved to be the turning point for legalization of the Pill. The irony of approving a drug that increases a male’s ability to engage in sexual intercourse, while steadfastly refusing to allow approval for a drug that decreases the possibility of unwanted pregnancy, was not overlooked by the international media. Concerns regarding morality, sexually transmitted diseases, and health risks, the same concerns that had prevented legalization of the Pill, applied equally to Viagra.

B. AIDS Prevention as a Primary Consideration for Japan’s Refusal to Legalize the Pill

Fear of AIDS was a powerful force in the continued ban on the Pill. In 1992, despite studies that proved the safety of the Pill, the government postponed approval because statistics for 1991 indicated an increase in the number of HIV-positive cases in Japan. In 1997, the CPAC concluded that although low-dose birth control pills were “effective and safe as a medicine,” approval would depend on public health

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92 Id. Girls’ Day is a Japanese holiday on which women display dolls and eat a festive, celebratory family meal. Id.
94 Alicia Ault, First Pill for Male Impotence Approved in USA, 351 LANCET 1037, 1037 (1998). Sildenafil citrate (Viagra) was originally developed to treat angina. Asaba, supra note 93. When the pills proved to be ineffective at controlling angina, the study was cancelled. However, the patients taking Viagra were reluctant to return their medication. Id. Scientists discovered that those patients who were taking Viagra were having more frequent erections as a side effect of the medication. The name Viagra is a combination of vigor and Niagara. Id.
95 See discussion infra Part III.E.
97 Watts, supra note 5, at 819.
98 Birth Control Pill Approved in Gov’t Report, YOMIURI SHIMBUN, June 17, 1997.
99 Jitsukawa & Djerassi, supra note 10.
implications and the incidence of AIDS. The Japanese government concluded that there was no evidence linking birth control pills to an increase in the incidence of AIDS, but still refused to legalize the Pill.

Japan has relied on the use of condoms to prevent the spread of AIDS. The government is concerned that use of the Pill will discourage condom use and lead to an AIDS epidemic. Although the Pill is a much more effective contraceptive than the condom, it is ineffective against AIDS and other STDs. Condoms provide protection from both AIDS and STDs. There is evidence that young women who are sexually active and have multiple partners use condoms less frequently if they are using the Pill for contraception. Contraception use is a distinct issue from AIDS prevention, however, and a single approach to both issues is not effective. The World Health Organization ("WHO") recommends separating contraceptive policies from AIDS-prevention policies and encourages the use of both condoms and effective contraceptives.

Instead of relying on condoms to prevent the spread of AIDS, Japan should increase education efforts. The mere availability of condoms does not ensure protection from AIDS or STDs. Although condoms are readily available in Japan, many Japanese men do not use them in a way that effectively prevents the spread of STDs. Education appears to diminish the risk of AIDS in those who are sexually active, however. A recent American study demonstrated that when sexually active teenagers received AIDS education, their use of condoms in conjunction with oral contraceptives increased.

Japan's restriction of the Pill did not prevent the introduction of the AIDS virus into Japan. AIDS cases have not risen to epidemic

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100 Birth Control Pill Approved in Gov't Report, supra note 98.
102 Ogawa & Retherford, supra note 11.
103 Nagata et al., supra note 64, at 568.
105 Id. at 104.
106 Noni E. MacDonald et al., High Risk STD/HIV Behavior Among College Students, 263 JAMA 3155, 3157 (1990). MacDonald studied Canadian college students. Id. at 3155.
107 Jitsukawa & Djerassi, supra note 10, at 1049.
108 Id. at 1048. A Japanese WHO/Partner Relation Survey showed that 13% of respondents in stable relationships had outside affairs with an average of 2.4 people in the year preceding the survey. Only 25% used condoms regularly and 40% never used them at all. Id.
109 Stanton et al., supra note 104.
110 By the end of 1997, there were 1,684 AIDS patients and 3,357 HIV carriers in Japan. Japan Reports Record Number of AIDS Patients, MED. INDUSTRY TODAY, Jan. 28, 1998. Recent trends indicate a
proportions because the society in general is highly educated and because the government and private sector have acted in concert to increase the level of AIDS awareness and the availability of accurate information. Prevention of the spread of HIV is accomplished by (1) providing information and educational programs in order to influence behavior; (2) encouraging health and social service agencies to promote and strengthen behavior change; and (3) creating a sympathetic social environment and public support for those who do contract the disease. Japan must encourage its citizens to protect themselves from HIV and must separate this issue from that of birth control. Decisions about pregnancy should remain separate from the prevention of AIDS.

C. The AIDS Epidemic in the Hemophiliac Community May Have Influenced Japan's Decisions About the Pill

The MOH's reluctance to introduce a drug even remotely capable of increasing the risk of AIDS may have been a product of an MOH mistake that involved the treatment of blood products. Japan's failure to recognize the need for heat treatment of blood products and its continued importation and use of untreated blood products until July 1985 led to an outbreak of AIDS in the Japanese hemophiliac community. In addition to infecting the hemophiliac community, the error resulted in loss of face and placed a substantial financial burden on the government. During litigation over the HIV-tainted blood, a Japanese court found that the Health and
Welfare Minister should have known that hemophiliacs in Japan were at risk of contracting AIDS through blood products, and that the MOH officials failed to take any meaningful measures to prevent the transmission of HIV to hemophiliacs. Based on these findings, the court found the government partially liable for the "terrible injuries" caused by the transmission of HIV-tainted blood.

The government sought a resolution to the tainted blood scandal in which it would appear to take responsibility without establishing a potentially dangerous precedent with respect to state liability for the approval of pharmaceuticals. The court reminded the government that one of its duties when authorizing the manufacture of a pharmaceutical product is to review the side effects of the product. This admonition may have played a role in the MOH’s reluctance to authorize the use of the Pill; the MOH may have feared that it would be held responsible if approval of the Pill led to an increase in the incidence of HIV.

D. Fear of Population Decline Influenced Government Attitudes Toward the Pill.

Another reason for the government’s reluctance to approve the Pill was Japan’s declining birthrate. Japan’s birthrate has decreased so precipitously that those over the age of sixty-five now outnumber those under fifteen. This dramatic decline concerns politicians and leaders of business and industry, who question how the diminishing number of young people will support the aging population.

Following World War II, the total fertility rate ("TFR") in Japan fell from 4.54 to 2.04 children per woman. The birthrate stabilized for a time, but the decline resumed in the 1970s. Recent attempts by the MOH to address the decline in Japan’s birthrate have included plans to encourage women to bear and raise children, plans to welcome new babies, and the passage of the

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119 Id. at 594.
120 Id.
121 Salzberg, supra note 114, at 268.
122 Takehisa, supra note 117, at 592.
124 Miyaji & Lock, supra note 56, at 106.
125 Total fertility rate is the average number of children a woman is expected to produce during her reproductive period. Id. A TFR of 2.1 will sustain a population. Shirk, supra note 87.
126 Ogawa & Retherford, supra note 11.
127 Jitsukawa & Djerassi, supra note 10, at 1051 n.10. In 1992, government and business supported the “Welcome Baby” campaign. In 1994, the MOH budget included an allocation for an “Angel Plan
1992 Child Care Leave Act. Nevertheless, the decline has persisted.\textsuperscript{128} Currently, the TFR is well below replacement levels,\textsuperscript{129} and the Japanese population of 125 million is expected to go into absolute decline in the year 2007.\textsuperscript{130}

Postponement of marriage is considered by some to be a cause of the continued decline in the birthrate.\textsuperscript{131} The percentage of unmarried women in their late twenties increased from twenty to forty percent between 1975 and 1990.\textsuperscript{132} The Japanese press has reported accusations that women are being selfish and hedonistic for choosing not to have children, and has called the diminishing birthrate the "childbirth strike" (\textit{shusssan sutoraiki}).\textsuperscript{133}

Japan’s fear of a continued population decline contributed to the government’s reluctance to approve the Pill. In suppressing the Pill, the Japanese government hoped for an increase in the number of unwanted pregnancies and, in turn, an increase in the population.\textsuperscript{134} However, the effect of limiting access to birth control has been to promote abortion, not to stimulate population growth.\textsuperscript{135} Economic and sociologic factors, not the quality and use of contraceptives, control the birthrate.\textsuperscript{136}

\textbf{E. Environmental Estrogens Provided a New Stumbling Block for Approval of the Pill}

Although legalization of the Pill seemed inevitable in 1998, the Japanese government further delayed approval after speculating about the possible connection between environmental pollution and the estrogen-rich urine of women taking the Pill. Relying on a 1980s British study that observed signs of feminization of fish in rivers near sewage plants, the government again deferred legalization of the Pill.\textsuperscript{137} The study hypothesized that hormonal reactions in the fish were caused by contamination from synthetic estrogen found in birth control pills or from

\begin{footnotes}
\footnote{Prelude” to prepare for the 1995 “Angel Plan.” \textit{Id.} The goal was to include other ministries and improve social conditions, thereby encouraging women to bear and raise children. \textit{Id.}}
\footnote{\textit{Dyer, supra} note 123.}
\footnote{\textit{Miyaji & Lock, supra} note 56, at 107. The TFR, which was 1.54 in 1990, dropped to 1.45 by 1993. \textit{Id.}}
\footnote{\textit{Dyer, supra} note 123.}
\footnote{\textit{Miyaji & Lock, supra} note 56, at 107.}
\footnote{\textit{Id.}}
\footnote{\textit{Id.}}
\footnote{\textit{Id.}}
\footnote{\textit{Jitsukawa & Djerassi, supra} note 10.}
\footnote{\textit{Dyer, supra} note 123.}
\footnote{Italy and Spain, the countries with the lowest birth control standards in Europe, also have the lowest TFRs in the world. Maruyama et al., \textit{supra} note 13, at 579.}
\footnote{\textit{Furuta, supra} note 101.}
\end{footnotes}
other industrial chemicals.\textsuperscript{138} Japan’s reaction to this study was unique; no other country limited its use of the Pill based on concerns over environmental estrogens,\textsuperscript{139} but the MOH used it as another reason for delaying approval of the Pill.\textsuperscript{140}

“Environmental estrogens” is a term coined in the 1970s to describe the presence of estrogen-mimicking chemicals in the environment.\textsuperscript{141} When these chemicals enter an organism, they can cause an increase or decrease in total estrogens, depending on whether the extrinsic chemical blocks or enhances the estrogens that occur naturally in the organism.\textsuperscript{142} While it is possible that oral contraceptives contribute to environmental estrogens, they are by no means the only, or the most significant, source of such estrogens. The amount of estrogen in the urine of women taking the Pill is roughly equivalent to that of women not taking the Pill.\textsuperscript{143} In contrast, the urine of pregnant women contains one to two thousand times more estrogen than that of women taking the Pill.\textsuperscript{144} Environmental estrogens are also found in a number of products, including pesticides, hair-coloring products, toiletries, spermicides, alcoholic beverages, and plastics.\textsuperscript{145}

\textbf{F. Legalization of the Birth Control Pill Will Significantly Affect Physician Income}

Physicians in Japan earn 400 million U.S. dollars annually from performing abortions.\textsuperscript{146} Given the high failure rate of condoms, many Japanese women become pregnant unintentionally and resort to abortion.\textsuperscript{147} Because abortions are not covered by national health insurance, the price is

\textsuperscript{138} There is speculation in the scientific community that estrogen from billions of birth control pills, excreted in the urine of the women who take them, exists in trace amounts in American water supplies. Peter Landesman, \textit{Missing Children}, MEN’S HEALTH, Sept. 1, 1998, \textit{available in} 1998 WL 12871184. Male walleyed pike in a Mississippi River channel near a sewage treatment plant showed depressed testosterone, while female walleyes had five times the normal levels of estrogen in their blood. The urine of women taking birth control pills or synthetic chemicals that mimic estrogen such as nonyl phenol, a compound found in household detergents, could be sources of the estrogen. Tom Meersman, \textit{Toxins May Affect Mississippi River Walleye Breeding}, STAR TRIB. (Minneapolis-St. Paul), Apr. 18, 1998, at 01A, \textit{available in} 1998 WL 6347139.

\textsuperscript{139} Furuta, \textit{supra} note 101.

\textsuperscript{140} \textit{Id.}


\textsuperscript{142} \textit{Id.} at 39.

\textsuperscript{143} Furuta, \textit{supra} note 101.

\textsuperscript{144} \textit{Id.}

\textsuperscript{145} \textit{Id.} at 40.

\textsuperscript{146} Maruyama et al., \textit{supra} note 13, at 579.

\textsuperscript{147} See discussion \textit{supra} Part II.C.
Physicians will generate considerably less income from prescribing the Pill than they do from performing abortions.

The Japan Medical Association has taken no position on legalization of the Pill, suggesting that support for legalization is not uniform among physicians. Many think that Japanese physicians did not advocate for the legalization of oral contraceptives because effective birth control would reduce profits in the highly profitable abortion business.

G. Public Outcry over the Legalization of Viagra is Probably the Underlying Factor Which Led to the Legalization of the Pill

Viagra is a new medication that allows impotent males to achieve and maintain an erection, enabling them to engage in sexual intercourse. The drug was approved for use in the United States in 1998 and immediately encountered stunning success in the consumer market.

The MOH granted the pharmaceutical company's application for approval of Viagra in Japan in an unprecedented six months. Health officials in Japan argued that Viagra had to be approved quickly to avoid growing health risks posed by unsupervised, illegal imports. Women, however, had risked the dangers of unwanted pregnancy and abortion and had waited nearly forty years for approval of the Pill. MOH officials justified their actions by stating that Viagra is used to treat a medical problem, while the Pill is intended for healthy women. Embarrassment over the furor raised by the approval of Viagra, accompanied by charges of sexism, pushed the MOH to finally recommend approval of the Pill just six months after it had approved Viagra.

148 Maruyama et al., supra note 13, at 579. The average cost of an abortion in Japan is 1000 U.S. dollars. The Pill in Japan, supra note 90.
149 Ogawa & Retherford, supra note 11, at 383 n.2.
150 Zielenziger, supra note 91.
151 Ault, supra note 94.
152 Watts, supra note 5.
155 Id. Viagra had been associated with 130 deaths worldwide by this time and at least one man in Japan died while using Viagra. Id.
156 Zielenziger, supra note 91. A MOH official, Toshiki Hirai, told a news conference that the nine-year evaluation period for judging the Pill was "an appropriate length of time." Id.
157 Id.
158 Watts, supra note 5.
IV. LEGALIZATION OF THE BIRTH CONTROL PILL COMPORTS WITH HUMAN RIGHTS DOCTRINES ON CONTRACEPTION AND ABORTION

By refusing to approve the Pill, Japan violated the United Nations human rights standards on abortion and birth control. By denying approval of the Pill and other forms of birth control, the Japanese government restricted access to birth control and ultimately caused abortion to become the major method of birth control in Japan. Japan’s restrictions on access to birth control violated the declaration of the United Nations International Conference on Population and Development (“ICPD”), which was held in Cairo in 1994. The use of abortion as a primary method of birth control also violated the declaration of the Fourth World Conference on Women, which was held in Beijing in 1995 (“Beijing Conference”).

A. Reliable Contraception Reduces the Number of Abortions

A common aim of all industrialized countries, including Japan, should be to reduce reliance on abortion as a means of birth control. The most effective way to reduce the number of unplanned pregnancies and abortions is to improve the effectiveness of contraception.

The goal of birth control, according to the ICDP, is to prevent, not terminate, unwanted pregnancies. The Beijing Conference strongly condemned the use of abortion as a method of family planning. According to the Beijing Conference declaration, “In no case should abortion be promoted as a method of family planning. Prevention of unwanted pregnancies must always be given the highest priority and every attempt should be made to eliminate the need for abortion.”

Japan’s abortion rate should significantly decline with the legalization of the Pill. Expanded and improved family planning services decrease reliance on abortion for birth control. In two societies sharing the same birthrate, the society with greater use of contraceptives will have fewer abortions. Rates of abortion decline most in countries that offer a full

160 Maruyama et al., supra note 13, at 579. See also Kulczycki et al., supra note 14.
162 Cairo 1994, supra note 18, ¶ 8.25.
163 Beijing 1995, supra note 17, at 426.
164 Gutierrez & Netley, supra note 81.
165 Fathalla, supra note 69, at 1188.
166 Kulczycki et al., supra note 14, at 1663-68.
range of contraceptive options free of charge or at low cost.\textsuperscript{167} It is estimated that with the introduction of the Pill, there will be 300,000 fewer abortions a year in Japan.\textsuperscript{168}

B. Access to Effective Birth Control is a Basic Human Right

According to the United Nations\textsuperscript{169} and customary international law,\textsuperscript{170} access to adequate means of birth control is a basic human right. Over the past thirty years, numerous declarations, statements, and conventions of the U.N. have recognized the human right of couples and individuals to control their reproduction freely and responsibly. The right to family planning was first affirmed by the World Health Assembly in 1965 and by the United Nations General Assembly in 1967.\textsuperscript{171} Reproductive choice was first characterized as a basic human right at the United Nations International Human Rights Conference in Teheran in 1968.\textsuperscript{172} The 1979 Convention on the Elimination of All Forms of Discrimination Against Women clearly states that women’s rights include the right to adequate access to birth control.\textsuperscript{173} Finally, in 1994, the ICPD recognized that the right of couples to choose birth control and to have the means to do so is a human right.\textsuperscript{174}

The ICDP addressed the issue of access to family planning.\textsuperscript{175} According to its Programme for Action (“Programme”), nations must ensure that all women have access to information and services relating to family planning\textsuperscript{176} and must allow them to choose the most suitable contraceptive method.\textsuperscript{177} The Programme recommended that family planning programs offer a wide choice of safe and effective forms of contraception.\textsuperscript{178} It also

\begin{footnotes}
\item[167] Id.
\item[168] Maruyama et al., supra note 13.
\item[169] Freedman & Isaacs, supra note 159, at 28 n.1.
\item[171] Freedman & Isaacs, supra note 159, at 23.
\item[172] Id.
\item[173] Id.
\item[174] Id.
\item[175] Cairo 1994, supra note 18.
\item[176] Id. ¶ 7.16.
\item[178] Reed Boland, The Cairo Conference and Programme of Action: An Innovative Approach to Population Policy or Old Wine in a New Bottle?, ST. LOUIS-WARSAW TRANSATLANTIC L.J. 23, 41 (1995). Traditionally, prolonged breast-feeding was the only effective biological method for postponing pregnancy. Throughout the ages, however, women in almost every culture have tried various methods to regulate and
\end{footnotes}
proposed that by the year 2015, all countries should "seek to provide universal access to a full range of safe and reliable family planning methods."\(^{179}\)

The Programme implies that countries can be held accountable to the world community for policies that violate reproductive rights.\(^{180}\) Japan, a signatory to the declaration of the ICPD, twice rejected approval of the Pill after the conference.\(^{181}\) International criticism of Japan following the ICPD\(^{182}\) may have influenced Japan's decision to legalize the Pill.\(^{183}\) By legalizing the Pill in 1999, Japan has begun to comply with the U.N. recommendations.

V. POSSIBLE BARRIERS TO EFFECTIVE USE OF THE PILL BY JAPANESE WOMEN

Although the Japanese government has legalized the Pill for contraceptive use, there are reasons to presume that it will not be maximally utilized nor freely available to women. Japanese women are concerned about the side effects of the Pill and may not distinguish between the old, high-dose Pill and the modern version. Speculation exists that the government will impose requirements for special testing on those taking the Pill and that the Pill will not be covered by national health insurance.

control their fertility. Egyptian papyri dating from 1850 B.C. refer to plugs of honey, gum acacia, and crocodile dung that were used by women as a contraceptive paste. Fathalla, supra note 69, at 1181.

 Cairo 1994, supra note 18, ¶ 7.16.


See discussion supra Part III.A.

Birth Control in Japan: A Bitter Pill to Swallow, supra note 68. In 1998, the U.N. Population Fund's White Paper criticized Japan's inaction in legalizing the Pill. The White Paper emphasized the high number of unwanted pregnancies in Japan and the physical risks associated with the high-dose pills that were available in Japan. Id.

Although Toshiki Hirai of the MOH told reporters that he could not guarantee CPAC approval of the Pill at the June meeting, the government-owned NHK television clearly stated that the "sale and use" of the Pill would be allowed after the CPAC's next meeting in June 1999. Zielenziger, supra note 91. The June projection for legalization corresponded with the retirement of several conservative members of the MOH who had opposed the legalization of the Pill. Those government officials who opposed the Pill argued that permitting Japanese women to use contraceptives would accelerate the spread of sexually transmitted diseases. Sakae Inouye, surveillance director at the National Institute of Infectious Diseases, whose opinion had been most influential in preventing the introduction of the Pill, based his opposition to the Pill on what he predicted would be a decline in the use of condoms and a corresponding increase in the number of AIDS cases, and noted that "[t]oo much freedom is a pity . . . ." Michael Lev, Japan Quick to OK Viagra; Women Still Await the Pill, CHI. TRIB., Feb. 1, 1999.
A. Confusion About Side Effects of the Pill

Until 1999, only the high-dose oral contraceptive was legal in Japan. Use of this pill was permitted exclusively for the treatment of menstrual irregularities and not for use as a contraceptive. High-dose oral contraceptives increase the risk of heart attacks and strokes, especially among women aged thirty-five and older. During the years that the government refused to legalize the Pill (the low-dose pill), an estimated 500,000 to 800,000 women used the high-dose pills for contraception in spite of the risks of serious side effects.

Information about health benefits associated with Pill has not been available to Japanese women. The Ministry of Education (Monbusho) blocked scientific information about the Pill because it was reluctant to promote sex education, which is of notoriously poor quality in Japan. Physicians were not allowed to disseminate information to the public because the Pill was not officially approved.

The interest of Japanese women in taking the Pill has declined over the years. Presently, only about one percent of Japanese women use birth control pills for contraception. By contrast, thirty percent of those using contraception in Western Europe, Australia, and New Zealand use the Pill. Many Japanese women fear the side effects associated with taking hormones. They do not know that the Pill, which is used by the rest of the

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184 Gutierrez & Netley, supra note 81.
185 Jitsukawa & Djerassi, supra note 10.
186 Nagata et al., supra note 64. In the population for this study, 1.3% of Japanese women aged 35 to 49 were using high-dose contraceptive pills for birth control and another 7.3% had used them in the past. Id.
187 Jitsukawa & Djerassi, supra note 10.
188 Id. at 1049.
189 Recent studies have found that the Pill decreases the risk of a range of diseases, including pelvic inflammatory disease, some forms of arthritis, ectopic pregnancy, acne, and premenstrual cramping. The Pill increases bone density and reduces the risk of ovarian cysts and benign breast cancer. Ovarian cancer is reduced by 40% to 80% for those women taking the Pill. Group Promotes Choices for Women, ASAHI SHIMBUN, Jan. 24, 1998, at 2, available in 1998 WL 7719710.
190 Jitsukawa & Djerassi, supra note 10, at 1049.
191 Maruyama et al., supra note 13, at 579.
192 Jitsukawa & Djerassi, supra note 10, at 1049.
193 According to a Japanese Family Planning Survey of Japanese women, the percentage of respondents with a positive attitude toward legalization declined from 35.4% in 1986 to 22.7% in 1992, whereas ambivalent responses rose from 48% to 54.2%. Id. The percentage of respondents interested in taking the Pill declined from 12.9% in 1986 to 6.9% in 1992. Id.
194 Ogawa & Retherford, supra note 11.
195 Jitsukawa & Djerassi, supra note 10, at 1049. Some women are concerned that the synthetic pill artificially regulates the natural hormonal cycle and violates bodily harmony. Id. Japan had the second highest number of thalidomide victims (over 1,000) during the 1960s. Here Comes the Pill, supra note 6.
world, contains significantly lower doses of hormones than the high-dose pills historically available in Japan,\textsuperscript{196} and that users of the Pill are not plagued by the side effects associated with the high-dose oral contraceptives.\textsuperscript{197}

The Japanese Family Planning Association estimates that with legalization of the Pill, a minimum of 2.5 million women will begin to use it for birth control.\textsuperscript{198} The government must make a concerted effort to educate Japanese women about the benefits of taking the Pill so that their decisions about contraception will be based on accurate facts rather than outdated information that was meant to discourage the use of the Pill.

\section*{B. Mandatory Testing for STDs or HIV}

Although there is no evidence that oral contraceptives increase the risk of sexually transmitted diseases\textsuperscript{199} the Japanese government is thought to be developing guidelines that will require manufacturers to prepare special documentation both for users of the Pill and for physicians.\textsuperscript{200} Such documentation will warn users of the Pill that they will not be protected from HIV and other STDs.\textsuperscript{201} Additionally, those who take the Pill may be screened for STDs as often as every three months.\textsuperscript{202} Women will avoid seeking medical care if they fear testing.\textsuperscript{203} Studies show that requiring HIV testing causes pregnant women to avoid medical care because they do not want to submit to such testing.\textsuperscript{204}

The Japanese government has a precedent for compulsory testing for venereal diseases in the 1948 Venereal Disease Law ("VD Law").\textsuperscript{205} The VD Law allows the government to order a suspected prostitute to undergo examination and to order treatment for and/or quarantine a patient in a

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\textsuperscript{196} Group Promotes Choices for Women, supra note 189. The Pill has 50 micrograms or less of estrogen, while the high-dose pill has 100 to 150 micrograms of estrogen. The progesterone dose has been decreased from 10 milligrams to between 0.15 and 2.5 milligrams. \textit{Id.}
\textsuperscript{197} Nagata et al., supra note 64.
\textsuperscript{199} Jitsukawa & Djerassi, supra note 10, at 1049.
\textsuperscript{201} \textit{Id.}
\textsuperscript{203} Gruskin, supra note 112, at 1198.
\textsuperscript{204} \textit{Id.}
\textsuperscript{205} Salzberg, supra note 114, at 264.
\end{flushright}
hospital until the danger of contagion has passed. Those who violate the proscriptions against exposing others to sexually transmitted diseases are subject to harsh sanctions.

Measures to test or screen those taking the Pill will have the effect of restricting access to the Pill. Testing users of the Pill for STDs and AIDS likens them to prostitutes and will have a chilling effect on the marketing of the Pill. Additionally, few will want to take the Pill if it means that they will have to visit a clinic frequently or incur additional costs. Because the Pill causes neither STDs nor AIDS, testing for these diseases, at additional cost and time to the patient, discriminates against those who wish to utilize this method of birth control.

C. Expenses Associated with the Pill

In Japan, health care insurance is mandatory and covers the cost of "ethical" pharmaceuticals. It is reported, however, that health insurance will cover neither the cost of the Pill, nor the costs incurred for mandatory testing for STDs. These additional, non-reimbursable expenses are a burden on those who wish to use this method of birth control.

VI. CONCLUSION

The Japanese policy of forbidding oral contraceptives for family planning led to a high number of unintended pregnancies, which in turn led to a high number of abortions. Providing Japanese women with safe and effective methods of birth control should decrease the number of unwanted pregnancies and, consequently, the number of abortions in Japan.

Legalization of the Pill is a momentous step toward bringing Japan into compliance with U.N. declarations that the prevention of pregnancy, rather than its termination, is the goal of birth control. The immediate effect

\[^{206}\text{Id. at 277.}\]
\[^{207}\text{Id. Anyone with venereal disease who engages in prostitution is subject to up to two years in prison and fines of up to ¥10,000. The VD Law prohibits those infected with a venereal disease from engaging in acts posing a clear danger of spreading the infection, such as sexual intercourse or breast-feeding. Violators are subject to up to one year in prison and a fine of ¥5,000. Id.}\]
\[^{208}\text{The Survey, supra note 80, at i. Ethical pharmaceuticals are those that are available with a physician's prescription. Id.}\]
\[^{209}\text{Suvendrini Kakuchi, Japan—Rights: Finally, Gov't Lifts Legal Barrier to the Pill, INTER PRESS SERVICE, June 3, 1999, available in LEXIS, News Group File. Experts estimate that testing for STDs could cost $5,000 annually. Id.}\]
\[^{210}\text{Oddens & Lolkema, supra note 58, at 16-17.}\]
\[^{211}\text{Kulczycki et al., supra note 14, at 1664.}\]
of legalization of the Pill will be to lower the high abortion rate in Japan and to decrease reliance on abortion as a birth control method.

Over the decades, the government has justified its refusal to legalize the Pill on concerns about the spread of AIDS and a desire to encourage population growth. While AIDS prevention and population expansion are laudable goals, Japan must find less restrictive ways to achieve them than by depriving women of effective birth control.

Government efforts to prevent AIDS and promote population growth must focus on information and education schemes. Education is an effective tool for AIDS prevention. In Japan, the per capita use of condoms increased during the period after January 1987, when the first heterosexual AIDS case in Japan received front-page publicity.\textsuperscript{212} This supports the premise that teaching and awareness promotes the use of AIDS precautions.

Once the Pill is available to women, the MOH must not place unnecessary restrictions on its use. There is no correlation between taking oral contraceptives and contracting STDs or AIDS. Testing women taking the Pill for those diseases is unwarranted and may discourage women from taking the Pill. The Japanese government must not undermine use of the Pill by making its use too onerous or expensive.

Economics, politics, religion, and social attitudes have influenced Japanese abortion law and population policies over the centuries.\textsuperscript{213} The Japanese government, having ended its singular prohibition on effective birth control by legalizing oral contraceptives, must now promote the use of these contraceptives and provide its citizens with birth control alternatives outside of abortion.

\textsuperscript{212} Salzberg, \textit{supra} note 114, at 256-57. The increase in condom use was in response to a 1987 front-page newspaper story about a Japanese woman, A-ko san, who was dying of AIDS and who was thought to be involved in prostitution in the Kobe area. The announcement triggered a panic. In Tokyo, 24-hour AIDS hotlines were activated months before they were actually scheduled to begin operation. In the first week after the report of A-ko san's death, the hotlines received as many as 170,000 calls per day. \textit{Id.} at 247-48.

\textsuperscript{213} Walsh, \textit{supra} note 22.