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## Major Decisions

**[Rights of Freedom] Case on the Crime of Abortion**

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*Case on the Crime of Abortion*

[2017Hun-Ba127, April 11, 2019] \* First Draft

In this case, the Court held that (1) Article 269 Section 1 of the Criminal Act which penalizes a pregnant woman who procures her own miscarriage and (2) the part concerning “doctor” of Article 270 Section 1 of the Criminal Act which penalizes a doctor who procures the miscarriage of a woman upon her request or her consent did not conform to the Constitution, and ordered temporary application of these provisions until the legislature amends them by December 31, 2020.

### Background of the Case

The petitioner is an obstetrician-gynecologist who was indicted for procuring 69 miscarriages of women from November 1, 2013, to July 3, 2015, upon their request or with their consent.

While the case was pending before the trial court, the petitioner filed a motion to request the trial court to refer the case to the Court for constitutional review of Article 269 Section 1 and Article 270 Section 1 of the Criminal Act. Upon denial of the motion, the petitioner moved to file this constitutional complaint against the above provisions on February 8, 2017.

### Subject Matter of Review

The subject matter of review in this case is whether (1) Article 269 Section 1 (hereinafter referred to as the “Self-Abortion Provision”) and (2) the part concerning “doctor” of Article 270

Section 1 (hereinafter referred to as the “Abortion by Doctor Provision”) of the Criminal Act (amended by Act No. 5057 on December 29, 1995) violate the Constitution. The Provisions at Issue read as follows:

### **Provisions at Issue**

Criminal Act (amended by Act No. 5057 on December 29, 1995)

Article 269 (Abortion)

(1) A woman who procures her own miscarriage through the use of drugs or other means shall be punished by imprisonment for not more than one year or by a fine not exceeding two million won.

Article 270 (Abortion by Doctor, etc., Abortion without Consent)

(1) A doctor, herb doctor, midwife, pharmacist, or druggist who procures the miscarriage of a woman upon her request or with her consent, shall be punished by imprisonment for not more than two years.

### **Summary of the Decision**

#### **1. Opinion of Nonconformity to the Constitution by Four Justices**

The general right of personality is guaranteed by the first sentence of Article 10 of the Constitution which provides for the protection of human dignity, and this is where the right to self-determination derives from. The right to self-determination encompasses a pregnant woman’s right to decide whether to continue her pregnancy and bring the baby to term.

Other than the exceptions referred to in the Mother and Child Health Act, the Self-Abortion Provision completely and indiscriminately bans all abortions throughout all stages of gestation, and it forces a pregnant woman to continue her pregnancy by imposing criminal punishment on the woman who violates the ban. The Self-Abortion Provision thereby impinges on a pregnant woman’s right to self-determination.

The Self-Abortion Provision has the legitimate purpose of protecting the life of a fetus, and imposing criminal punishment on a pregnant woman for procuring an abortion is appropriate means to deter abortion and thus accomplish the legislative purpose of the Provision.

Pregnancy, childbirth, and parenting are among the most important matters that may crucially and fundamentally affect the life of a woman. Therefore, we believe that a pregnant woman's decision whether to continue or terminate her pregnancy amounts to a decision that reflects profound consideration of all her physical, psychological, social, and economic conditions based on her own views on life and society—a holistic decision central to her personal dignity.

At present, a fetus is considered to be viable (able to survive outside the womb) at around 22 weeks of gestation when provided with the best medical care available. Meanwhile, we find that the State should allow a pregnant woman to have sufficient time to contemplate and execute the holistic decision regarding continuing or terminating her pregnancy, in order to guarantee her right to self-determination. Given these considerations, we opine that it is reasonable for the State to draft legislation that is different from the current legislation in terms of the scope and means of protection on fetal life for the abortion that is to be procured before 22 weeks of gestation, which is the time when the fetus has viability, and at the same time, by when a pregnant woman is allowed to have sufficient time to exercise her right to self-determination in relation to abortion (hereinafter, the period from the time of implantation to such point shall be referred to as “Permissible Period for Determination”).

During the conflict of determining the abortion, the threat of criminal punishment has only a limited effect on a pregnant woman's decision whether to terminate her pregnancy. In addition, there have been very few cases in which a woman has been punished criminally for procuring an abortion. In light of these circumstances, we find that the Self-Abortion Provision does not effectively protect the life of a fetus during the conflict of determining the abortion.

The Self-Abortion Provision also places a substantial burden on a woman who seeks or has undergone an abortion by limiting her access to counseling, education, and information regarding abortions. Also, it forces her to seek out expensive procedures to procure an abortion, making it difficult for her to seek relief in the event of medical malpractice during an abortion, and rendering her vulnerable to retaliatory harassment that could be committed by her ex-boyfriend or civil lawsuits involving domestic matters that could be filed by her ex-partner.

Although the Mother and Child Health Act sets out several exceptions to the State's complete ban on all abortions, it does not consider the conflict of determining the abortion based on the social and economic determinants, e.g., concerns about difficulty in continuing jobs, studies, or other social activities; low or unstable income; lack of resources to care for another child; no desire to continue a dating relationship or enter into a marital relationship with the partner; discovery of pregnancy at a point when the marriage has in effect broken down irretrievably, break-up of a dating relationship with the partner; unwanted pregnancy of an unmarried minor woman; etc.

Under the Self-Abortion Provision, a pregnant woman who does not fall under the exceptions referred to in the Mother and Child Health Act is forced to continue her pregnancy completely and indiscriminately, with no exceptions, even if she has social and economic reasons for seeking an abortion, and is subject to criminal punishment if she procures an abortion by violating such provision.

Accordingly, we find that the Self-Abortion Provision restricts a pregnant woman's right to self-determination beyond the minimum extent necessary to achieve its legislative purpose. Thus, the Self-Abortion Provision does not satisfy the principle of least restrictive means. Moreover, the Self-Abortion Provision tilts the balance of interests heavily in favor of the public interest in protecting fetal life by awarding absolute and unilateral superiority to it. Thus, it violates the principle of balance of interests. For these reasons, the Self-Abortion Provision violates the principle of proportionality and infringes the right to self-determination of a pregnant woman. Accordingly, the Self-Abortion Provision is in violation of the Constitution.

The Abortion by Doctor Provision punishing a doctor who procures the miscarriage of a woman upon her request or with her consent was enacted for the same purpose as the Self-Abortion Provision. Therefore, it is unconstitutional for the same reason that the Self-Abortion Provision is unconstitutional.

Considering the fact that banning and criminalizing abortions to protect the life of fetus are not in themselves unconstitutional for all cases, delivering a decision of simple unconstitutionality for the Provisions at Issue would create a legal vacuum in which no one is punished for abortion.

Moreover, it is within the legislative discretion to eliminate the unconstitutional elements from the Provisions at Issue and decide how abortion will be regulated. The legislature has, within the limits that we have noted above, the discretion to decide, e.g., the length and end date of the

Permissible Period for Determination; whether to set a specific time period during the Permissible Period for Determination in which a woman is permitted to undergo an abortion without evaluating social and economic justifications, one that needs to be determined to strike an optimal balance between the protection of fetal life and the right to self-determination of women; whether to prescribe additional procedural requirements such as counseling or deliberation period before an abortion could take place; and so forth.

Therefore, we render a decision of nonconformity to the Constitution in lieu of a simple unconstitutionality decision for the Self-Abortion Provision and the Abortion by Doctor Provision and orders their temporary application until the legislature amends them.

## **2. Opinion of Simple Unconstitutionality by Three Justices**

We concur with the above four justices' opinion of nonconformity to the Constitution that the State's complete and indiscriminate ban on, and criminalization of, abortion during the above-mentioned periods and circumstances violate a pregnant woman's right to self-determination. However, we differ from the nonconformity opinion for we believe that pregnant women must be permitted, regardless of their reasons for abortion, with the careful consideration of their situations to decide to have an abortion during the first trimester of pregnancy (up to 14 weeks of gestation since the first day of the last menstrual period), and thus we deliver a decision of simple unconstitutionality for the Self-Abortion Provision and the Abortion by Doctor Provision (the "Provisions at Issue").

A pregnant woman has the right to self-determination and must be, in principle, permitted to determine whether to continue or terminate her pregnancy, a holistic decision central to her personal dignity. Exceptions may be allowed in cases where, for instance, the fetus has become viable, or if the abortion takes place after the end of the first trimester of pregnancy and it thereby puts her life or health at risk, etc.

Meanwhile, we note that if abortion should be allowed during the period when the procedures can be performed safely and on permissible grounds only, this would eventually lead to permitting abortions in extremely limited cases and would, deprive a pregnant woman of her right to self-determination, in effect.

For the above reasons, we opine that the State should respect a pregnant woman's right to self-determination during the first trimester of pregnancy—a period when a fetus has not yet developed to the stage of viability, abortion is safe, and careful consideration can be given to the determination whether to terminate pregnancy—and should ensure that she makes her own decision whether to abort after carefully evaluating her situations based on her own views of life and society which have roots in her internal dignity and autonomy.

The Provisions at Issue violate the principle of proportionality by imposing a complete and indiscriminative ban on all abortions including safe ones during the first trimester. Therefore, they infringe the right to self-determination of pregnant women.

If the Court delivers a decision of nonconformity to the Constitution for a law restricting a right of freedom even when the restriction in itself is constitutional but the degree of restriction is too excessive, it will eliminate the grounds of existence for a rule that the Court must declare an unconstitutional law invalid as well as the grounds of existence for the type of decision that is rendered based on this rule—a decision of unconstitutionality. Further, we do not see that striking down the Provisions at Issue would cause immense legal confusion or impose social costs, because these provisions have had only a limited effect on deterring abortions and have not functioned properly as penalty provisions. Meanwhile, solving the problem with *ex post facto* legislation after rendering the decision of nonconformity to the Constitution is against the purpose of the legislator allowing retroactive effects for the unconstitutional criminal law, but also it is too severe to impose all the burdens of vacuum in law to each individual. In addition, as stated above, the parts of the Provisions at Issue concerning criminalizing abortion during the first trimester of pregnancy clearly violate the Constitution, so the scope of punishment is not uncertain. Therefore, we are of the opinion that the Court should deliver a decision of simple unconstitutionality for the Provisions at Issue.

### **3. Conclusion**

Combining the opinion of simple unconstitutionality rendered by three Justices and the opinion of nonconformity to the Constitution rendered by four Justices, the Court finds that this number satisfies the quorum required for holding that a provision is in violation of the Constitution based on the proviso of Article 23 Section 2 Item 1 of the Constitutional Court Act.

Therefore, the Court declares the Provisions at Issue nonconforming to the Constitution and orders their temporary application until the legislature amends them.

### **Summary of Opinion of Constitutionality by Two Justices**

Since a fetus and a person born alive are at sequential stages of human development, we hardly see any essential difference between the two, in terms of the level of human dignity and need for life protection. As such, we find that a fetus has a constitutional right to life as well.

The legislative purpose of the Self-Abortion Provision is the protection of the life of a fetus. Given the considerable significance of this legislative purpose and the peculiar nature of the infringement of the right to life, we recognize the need for a strict ban on abortion with means of criminal punishment.

We do not see that the importance of the public interest in protecting fetal life varies according to the stages of fetal development and that a pregnant woman's right to dignity or right to self-determination prevails at certain stages of pregnancy and is outweighed by a fetus's right to life at later stages.

The majority opinion suggests that "social and economic determinants" should be recognized as permissible grounds for abortion; however, the concept and scope of such reasons are very vague, and it would be difficult to objectively ascertain whether a woman's social and economic situations qualify as permissible reasons justifying abortion. We are concerned that legalization of abortion on social and economic grounds would produce the same result as the complete legalization of abortion—the widespread disrespect for human life in our society.

Although it is true that the Self-Abortion Provision restricts a right to self-determination of a pregnant woman to some extent, yet such restriction does not outweigh the substantial public interest in protecting fetal life to be served by the Self-Abortion Provision. Thus, the Self-Abortion Provision does not violate the balance of interests.

At the same time, considering that the motherhood is not properly protected in reality, the State should, in addition to criminalizing abortions, enact legislation that encourages women not to obtain an abortion, such as the "Parental Responsibility Act" that imposes more parental responsibility on unwed fathers, legislation to establish social protection system for unwed

mothers, maternity protection policy that relieves women of the burden of pregnancy, childbirth, parenting, and so forth.

The statutory maximum sentence for performing abortion prescribed in the Abortion by Doctor Provision is not excessive, and the court may sentence the offender to a suspended sentence or probation. Thus, the Abortion by Doctor Provision does not violate the principle of proportionality between responsibility and punishment. Further, doctors, as professionals engaged in the business of protecting the life of a fetus, are highly likely to be criticized for performing procedures depriving a fetus of life. Therefore, we find that the Abortion by Doctor Provision where the legislature did not set forth any monetary penalty like the one for abortion with consent provision (Article 269 Section 2 of the Criminal Act) does not violate the balance in criminal punishment, and thus is not against the principle of equality.

Therefore, the Provisions at Issue do not violate the Constitution.

\* This translation is provisional and subject to revision.