D. ITALY

CARMOSINA ET AL.

Corte costituzionale, Decision of February 18, 1975, No. 27
[1975] 20 Giur. Const. 117; [1975] 43 Rac. uff. corte cost. 201
[1975] 98 Foro It. I, 515

[FACTS: In the course of a criminal abortion proceeding, the examining judge of the *Tribunale* of Milan raised the constitutionality of art. 546 of the penal code. That provision appears to prohibit all abortions. Article 54 of the penal code, however, qualifies art. 546 by permitting the defense of strict "necessity." According to the *ordinanza,* the constitutional problem arises because therapeutic abortions are permitted, under the necessity defense, only when grave harm is inevitable, or there is great danger of such harm. Thus, therapeutic abortions to spare the woman aggravation of preexisting physical problems remain a crime. The *ordinanza* suggests conflict with art. 31, second paragraph of the Constitution, which "protects motherhood, infancy and youth, favoring the institutions necessary for this purpose"; and with art. 32, first paragraph, which "protects health as a fundamental right of the individual and a fundamental interest of society."]

[OPINION:]

The *ordinanza* by the examining judge of the *Tribunale* of Milan raises a serious problem which is the subject of debate and legislative activity in many nations.

This is not the place to retell the legislative history of voluntary abortion as a crime, a history which is linked with the development of religious thought and with the evolution of moral philosophy as well as social, legal, political and demographic doctrines. Not punished in certain epochs, punished in others sometimes lightly, sometimes very severely, voluntary abortion was considered violative of disparate values, such as life, family order, common morality, and the growth of the population.

In the present penal code voluntary abortion is termed "crime against the integrity of the progeny" (book II, title X of the penal code). According to the background materials and the report to the King which accompanied the [1931] code, the value protected is "the demographic interest of the State." The preceding [pre-facist] code, on the other hand, considered abortion among the "crimes against the person," seemingly a fairer and more correct way of putting it.

The product of conception was from time to time held to be simply a part of the woman's body, the hope of a person, and a thing alive from the beginning, or after a more or less long period of gestation.

The Court holds that the protection of conception — which already figures prominently in the law (articles 320, 339, 687 of the civil code) — has constitutional foundation. Article 31, 2nd paragraph,

of the Constitution, expressly imposes the "protection of motherhood" and, more generally, article 2 of the Constitution recognizes and guarantees the inviolable rights of man, among which must be placed, although with the particular characteristics unique to it, the legal situation of the foetus.

What has just been said — which in itself justifies legislative intervention resulting in penal sanctions — must however be accompanied by the further consideration that the constitutionally protected interest of the foetus may conflict with other values which are themselves constitutionally protected. Consequently, the law cannot place a total and absolute priority on the first interest, denying adequate protection to the others. Herein lies the reason why, in the opinion of the Court, the present criminal legislation concerning abortion is unconstitutional.

The *ordinanza* under consideration specifically challenges only that part of article 546 of the penal code, in reference to articles 31 and 32 of the Constitution, which prescribes punishment both for anyone who performs an abortion for a consenting woman, and for the woman herself, "even when it has been ascertained that there are pregnancy dangers to the physical well-being and to the psychological equilibrium of the pregnant woman, but without the occurrence of all the elements of 'necessity' prescribed in article 54 of the penal code."

Within this scope, the question is well-founded. The condition of the pregnant woman is particular in every way and does not receive adequate protection in a law of general character like article 54 [of the penal code], which requires not only the gravity and the absolute inevitability of harm or of danger, but also its imminence, whereas injury or danger resulting from continuation of a pregnancy may be foreseen, but is not always imminent.

Moreover, the exemption contained in article 54 [of the penal code] is based on the presupposed equivalence of the infringed value to another value which this very infringement was meant to safeguard. Yet, there is no equivalence between the right not only to life but also to health of one who — like the pregnant woman — is already a person, and the safeguard of an embryo which has yet to become a person.

The legislature appropriately prescribed that in some particular cases, in addition to the general cause of exemption from the criminal sanction foreseen by article 54 of the criminal code, other kinds of "necessity" may exempt from the criminal sanction (article 384 of the penal code). Not less worthy of consideration is the unique state of necessity of the pregnant woman in grave danger of compromising her health.

Therefore, it seems inevitable that part of article 546 of the penal code must be declared unconstitutional.

It should be added, however, that the exemption from any punishment of anyone who, in the situation described above, procures the abortion, and of the woman who consents, does not at all exclude the requirement, already under present law, that the operation should be performed in such a way as to save, when possible, the life of the foetus. But this Court also holds that it is the legislators' obligation to set up the necessary legislative safeguards intended to forbid the procuring of an abortion without careful ascertainment of the reality and gravity of injury or danger which might happen to the mother as the result of the continuation of pregnancy: therefore the lawfulness of abortion must be anchored to a preceding evaluation of the existence of the conditions which justify it. For these reasons the Constitutional Court declares the unconstitutionality of that part of article 546 of the penal code which does not recognize that pregnancy may be interrupted when further development of the gestation could imply injury or danger which is grave, medically ascertained in the manner indicated above, and not otherwise avoidable, for the health of the mother.

NOTES AND QUESTIONS

1. One obvious similarity of the decisions of *Carmosina* and *Roe* v. *Wade* is in their immediate results — the invalidation of restrictive abortion laws. There is another striking similarity. In the United States, women's groups consider the validity of restrictive abortion laws to be a central issue of the rights of women. (In Germany, the abortion decision was followed by a bombing of the Federal Constitutional Court. A revolutionary women's group claimed responsibility for the act. Jann, *supra,* at 130.) *Roe* v. *Wade* conspicuously avoids treating the issue as a women's rights issue. So, too, does the Italian Constitutional Court.

The United States Supreme Court has decided that laws which discriminate against women on the basis of outmoded sexual stereotypes violate the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Craig* v. *Boren,* 429 U.S. 190 (1976). Would that rationale have provided a viable alternative starting point for decision in both *Carmosina* and *Roe* v. *Wade*? Would it have blunted the criticism of *Roe* v. *Wade* as a case where the judges read their own values into the Due Process Clause?

Interestingly, other cases which have involved the issue of pregnancy in the United States have been analyzed as not involving discrimination against women. *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974) struck down a mandatory maternity leave requirement under the Due Process Clause of the Fourteenth Amendment, reasoning that the requirement was not rationally related to the school's asserted interest of maintaining continuity of instruction. The Court's opinion had no reference to the issue of discrimination against women, and did not refer to previous cases involving discrimination against women. More significant was *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), which held that it was constitutional to exclude the expenses of normal pregnancy from a state disability insurance program. The Court's opinion reasoned that a distinction between pregnancy-related disabilities and other medical and accidental disabilities involved no distinction between the sexes. The distinction drawn was not between men and women, but between pregnant persons (all women) and nonpregnant persons (many of whom were women). Is that reasoning persuasive?

Can the moral and constitutional issues which surround the subject of abortion be resolved without considering the impact of those laws on women as opposed to men?

2. Is the Italian Constitutional Court's decision closer in its reasoning to that of the German Constitutional Court than to that of the United States Supreme Court? What is the Court's view on the issue of when life begins? What would be the decision of the Italian Court if a law similar to that struck down in Germany had been enacted in Italy? What was the immediate impact of the Italian decision? Was abortion no longer a crime, or could non-therapeutic abortions continue to be prosecuted?

After the decision of the *Corte Costituzionale* in *Carmosina,* a bill on abortion was introduced which, while formally affirming that abortion was not to be used as a method of birth control, and was to be used only to protect the woman's physical or mental health, was claimed by critics to be unconstitutional since it, in fact, permitted "free abortions." The bill passed the Italian Chamber of Deputies. The Senate, however, voted by a 2 vote majority not to take the bill up. As this is written, a similar bill is again pending in the Chamber of Deputies. Many observers conclude that any legislation which is enacted will be subjected to a national referendum.

3. The Italian decision brings to three the number of decisions with which you are familiar where a court has entered the thicket of vetoing legislative choices on the abortion issue on the basis of vague constitutional values. Do the three decisions, read together, enlighten your views on the perennial debate over judicial activism and restraint?

E. AUSTRIA

DECISION OF OCTOBER 11, 1974

Verfassungsgerichtshof*

[1974] ERKLAERUNGEN DES VERFASSUNGSGERICHTSHOFS 221

The application by the Salzburg provincial government to delete paragraph 97 (1) (1) of the Federal Law of 28 January 1974, BGBl.

* Constitutional Court of Austria.