

4. Case on the Crimes of Abortion

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[2017Hun-Ba127, April 11, 2019]

In this case, the Court held that both (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” in Article 270 Section 1 of the Criminal Act which penalizes a doctor who procures the miscarriage of a woman upon her request or with her consent are nonconforming 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 performing 69 abortions from November 1, 2013 to July 3, 2015, upon the request or with the consent of the pregnant women.

While her 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. As such motion was rejected, the Petitioner filed 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 of the Criminal Act (amended by Act No. 5057 on December 29, 1995) (hereinafter referred to as the “Self-Abortion Provision”) and (2) the part concerning “doctor” in Article 270 Section 1 of this Act (hereinafter referred to as the “Abortion by Doctor Provision”) 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. Summary of constitutional nonconformity opinion of four Justices

The first sentence of Article 10 of the Constitution provides for the protection of human dignity. The general right to personality is derived from human dignity protected by this provision, and the right of an individual to self-determination stems from the general right to personality. The right to self-determination includes the right of a pregnant woman to determine whether to continue her pregnancy and give birth.

With a few exceptions set forth in the Mother and Child Health Act, the Self-Abortion Provision imposes a complete and uniform ban on all abortions throughout pregnancy, regardless of the developmental stage or viability of the fetus and provides criminal punishment for violations of this ban, thereby compelling a pregnant woman to continue her pregnancy and give birth. Therefore, the Self-Abortion Provision restricts the pregnant woman's right to self-determination.

The Self-Abortion Provision serves the legitimate purpose of protecting the life of a fetus, and imposing criminal punishment for an abortion procured by a pregnant woman is an appropriate means to deter abortion

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and thus to accomplish this legislative purpose.

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

A fetus is considered to be viable at around 22 weeks of gestation when provided with the best medical technology and staff available at present. Moreover, we find that the State must guarantee a pregnant woman's right to self-determination by allowing the pregnant woman sufficient time to make and carry out a holistic decision whether to continue her pregnancy and give birth. Given these considerations, we conclude that, during a sufficient amount of time before the point of viability at around 22 weeks of gestation, during which the right to self-determination regarding whether to continue a pregnancy and give birth can be properly exercised (from the time of implantation to the end of this period will be hereinafter referred to as the "Determination Period"), the State's protection for fetal life may be different with respect to its level or means.

Considering that criminal sanctions have only a limited deterrent effect on the abortion decision of a pregnant woman facing the dilemma of abortion and that those who obtain an abortion are in reality rarely prosecuted, we conclude that the Self-Abortion Provision does not effectively protect the life of a fetus in situations in which pregnant women are caught in the dilemma of abortion.

Due to the Self-Abortion Provision, pregnant women cannot receive timely counseling or education regarding abortions, or sufficient information about abortions. Those who seek out an abortion have to pay a very high price for it, and legal remedies are often not available in cases of medical malpractice during an abortion. Further, the Self-Abortion Provision can be abused when a woman's ex-male partner uses it as a means to

retaliate against the woman, or to put pressure on her to settle a family dispute or other civil disputes.

Although the Mother and Child Health Act set forth the circumstances under which self-abortion is justified, such circumstances do not include various and wide-ranging socioeconomic circumstances that interfere with continuance of pregnancy and childbirth and thus create the abortion dilemma. Such various and wide-ranging socioeconomic circumstances include where pregnancy and child-rearing are likely to interfere with a woman's education, career, or public activities; where a woman has inadequate or stable income; where a woman lacks resources to care for another child; where a woman has no desire to continue a dating relationship or enter into a marital relationship with the fetus's biological father; where a woman has discovered her pregnancy at a point when the marriage has in effect broken down irretrievably; where a woman breaks up with the fetus's biological father; or where a woman is an unwed minor with an unwanted pregnancy.

With certain exceptions set forth in the Mother and Child Health Act, the Self-Abortion Provision completely and uniformly compels pregnant women who, during the Determination Period, face the abortion dilemma arising from various and wide-ranging socioeconomic circumstances to continue the pregnancies and give birth and criminally punishes those undergoing abortions.

The Self-Abortion Provision does not satisfy the least restrictive means test because it restricts a pregnant woman's right to self-determination to an extent going beyond the minimum extent necessary to achieve its legislative purpose. It also does not satisfy the balance of interests test because it gives unilateral and absolute priority to the public interest in protecting fetal life. Accordingly, it violates the rule against excessive restriction and a pregnant woman's right to self-determination.

By the same token, the Abortion by Doctor Provision, which penalizes a doctor who performs an abortion at the request or with the consent of a pregnant woman to achieve the same goal as the woman, violates the Constitution.

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The prohibition and criminal punishment of abortion to protect fetal life are not unconstitutional in themselves or in all cases. If we were to render decisions of simple unconstitutionality on the Self-Abortion Provision and the Abortion by Doctor Provision, we would be creating an unacceptable legal vacuum in which there is no punishment available for all abortions throughout pregnancy.

Moreover, it is within the discretion of the legislature to remove the unconstitutional elements from these Provisions and decide how abortion is to be regulated: the legislature has, within the limits that we have discussed earlier, the prerogative (1) to decide the length and end date of the Determination Period; (2) to determine how to combine time limitations with socioeconomic grounds, including deciding whether to set a specific time point during the Determination Period until which abortion on socioeconomic grounds is permitted without an assessment of those grounds, in optimally balancing the State's interest in protecting a fetus's life and a pregnant woman's right to self-determination; and (3) to decide whether to require certain procedures, such as the mandatory counseling or reflection period, before abortion.

For these reasons, we render, on the Self-Abortion Provision and the Abortion by Doctor Provision, decisions of nonconformity to the Constitution in lieu of decisions of simple unconstitutionality. We also order that these Provisions continue to be applied until the legislature amends them.

2. Summary of simple unconstitutionality opinion of three Justices

We concur with the constitutional nonconformity opinion that the Self-Abortion Provision and the Abortion by Doctor Provision (collectively, "Provisions at Issue") infringe a pregnant woman's right to self-determination (1) by completely and uniformly prohibiting abortion during the period and under the circumstances pointed out by the constitutional nonconformity opinion, and (2) by criminally punishing violations of the ban on abortion. Our opinion differs, however, from the

constitutional nonconformity opinion in two respects. First, we believe that abortion should be permitted without restriction as to reason and be left to the deliberation and judgment of the pregnant woman during the “first trimester of pregnancy” (about 14 weeks from the first day of the last menstrual period). Second, we believe that decisions of simple unconstitutionality should be rendered on the Provisions at Issue.

A pregnant woman’s holistic and dignity-based decision about whether to continue or terminate her pregnancy, in itself, amounts to the exercise of her right to self-determination and should be in principle allowed to be made throughout pregnancy. This decision may be restricted, however, for reasons including the developmental stage of a fetus and the high risk of harm that an abortion after the first trimester of pregnancy poses to a pregnant woman’s life or health.

If abortion is allowed during the period when it is safe for pregnant women and in exceptional cases, this will lead to permitting abortion only in dire and exceptional circumstances and thereby could result in virtually depriving a pregnant woman of her right to self-determination.

Therefore, the State should respect the right to self-determination of a pregnant woman as much as possible during the first trimester of pregnancy—when the fetus has not grown much; abortion is safe; and careful deliberation can be given to the decision whether to terminate a pregnancy—by allowing her to make a decision whether to continue the pregnancy after careful evaluation of her circumstances, based on her view of life and society which has roots in her dignity and autonomy.

The Provisions at Issue violate the rule against excessive restriction and infringe a pregnant woman’s right to self-determination by imposing a uniform and complete ban on abortion even during the first trimester of pregnancy, when abortion is safe.

If the Court were to simply declare a statute restricting rights of freedom nonconforming to the Constitution for the reason that the statute’s restrictions on fundamental rights go beyond the constitutionally permissible limits, this would eliminate the grounds for the existence of a rule that the Court must declare an unconstitutional law null and void,

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as well as the existence of the type of decision rendered based on this rule—a decision of simple unconstitutionality. Further, the repeal of the Provisions at Issue is unlikely to give rise to extreme social confusion or social costs because the Provisions at Issue have a limited effect on deterring abortion and do not function properly as penal clauses. On the other hand, rendering the decisions of nonconformity to the Constitution on the Provisions at Issue and later imposing punishment based on retrospective legislation run counter to the legislative intent to afford retrospective force to decisions of unconstitutionality and amount to forcing individuals to suffer the burdens associated with the deficiency in regulation. As stated above, the parts of the Provisions at Issue concerning penalties for abortions performed during the first trimester of gestation are unquestionably in violation of the Constitution. Therefore, the decisions of simple unconstitutionality should be rendered on the Provisions at Issue.

3. Conclusion

The three Justices' declaration of simple unconstitutionality of the Provisions at Issue and the four Justices' declaration of constitutional nonconformity of the Provisions at Issue satisfy the quorum requirement for an unconstitutionality decision under 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 that they continue to be applied until the legislature amends them.

Summary of Constitutionality Opinion of Two Justices

Both the fetus and the person born are considered to be undergoing a series of continuous developmental stages of life. Thus, there is no fundamental difference between a fetus and a newborn in relation to the degree of human dignity or the need for protection of life. Therefore, the fetus must also be regarded as the subject of the constitutional right to

life.

Given the Self-Abortion Provision is vital for the legislative purpose of protecting a fetus's right to life and given the peculiar nature of the infringement of the right to life, we recognize the necessity of strictly prohibiting abortion by criminal means.

We do not see that the importance of the public interest in protecting fetal life varies according to the stages of fetal development, nor do we see 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 concept and scope of the "socioeconomic grounds" cited by the majority opinion are very vague, and it is difficult to objectively verify whether a woman falls under any of those grounds. Allowing abortion on socioeconomic grounds could lead to the same result as fully legalizing abortion and could create a general disregard for human life.

It is true that the Self-Abortion Provision restricts a pregnant woman's right to self-determination to some extent, but the degree of such restriction is no more significant than the important public interests in protecting a fetus's life to be served by the Provision. Therefore, the Self-Abortion Provision does not violate the balance of interests test.

Since in reality pregnant women do not receive sufficient protection, the State should, in addition to imposing criminal penalties for abortion, dissuade women from having abortions by introducing legislative policies, such as placing more parental responsibility on men, including unwed fathers, through enactment of the "Parental Responsibility Act"; establishing social protection system for unwed mothers; and relieving women of the burdens of pregnancy, childbirth, and parenting through formulation of maternal protection policy.

Since the upper limit of the statutory penalty prescribed under the Abortion by Doctor Provision is not so high, and since the court may impose a deferred judgment or suspended sentence, the Abortion by Doctor Provision does not violate the principle of proportionality between criminal liability and punishment. Moreover, blameworthiness of healthcare

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professionals who deprive the life of a fetus by performing an abortion by trade is high because they should be engaged in the business of protecting fetuses' lives, and therefore, the Abortion by Doctor Provision, where the legislature did not set forth any monetary penalty like the one for abortion with the woman's consent provision (Article 269 Section 2 of the Criminal Act), does not hinder the balance in the system of penalties and thus does not violate the constitutional principle of equality.

Therefore, the Self-Abortion Provision and the Abortion by Doctor Provision do not violate the Constitution.