I. Full Opinions

1. Case on the Crimes of Abortion

[2017Hun-Ba127, April 11, 2019]

Case

Constitutional Complaint against Article 269 Section 1 of the Criminal Act, etc.
Case No. 2017Hun-Ba127

Petitioner

Jeong ___-Won
Legal representatives listed in Appendix

Original Case

Gwangju District Court, 2016GoDan3266
Violations of the Medical Act, etc.

Decided

April 11, 2019

Holding

Both Article 269 Section 1 and the part concerning "doctor" in Article 270 Section 1 of the Criminal Act (amended by Act No. 5057 on December 29, 1995) are nonconforming to the Constitution. These provisions are to be applied until the legislature amends them by December 31, 2020.

Reasoning

I. Overview of the Case

The Petitioner is an obstetrician-gynecologist who obtained her medical license on March 31, 1994. The Petitioner 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 (abortion by the medical profession with the woman's consent) (Gwangju District Court 2016 GoDan3266). While her case was still pending before the trial court, the Petitioner filed a motion to request the trial court to refer the case to the Constitutional Court for constitutional review, advancing (1) a primary argument that Article 269 Section 1 and Article 270 Section 1 of the Criminal Act were unconstitutional and (2) a secondary argument that it would be unconstitutional to interpret the object of an abortion in these provisions as including that of a fetus within the first three months (Gwangju District Court 2016ChoGi1322). As such motion was rejected on January 25, 2017, the Petitioner filed this constitutional complaint against the above provisions on February 8, 2017 based on the same grounds.

II. Subject Matter of Review

The Petitioner's primary argument is that Article 269 Section 1 and Article 270 Section 1 of the Criminal Act are unconstitutional. As a secondary argument, the Petitioner asserts that it is unconstitutional to interpret the object of an abortion in these provisions as including that of a fetus within the first three months. However, since this secondary argument is merely a qualitative partial argument of the primary argument, it does not constitute a separate subject matter of review; but it will be addressed when the Court considers the constitutionality of above provisions (*see* 2015Hun-Ba176, May 26, 2016; 2016Hun-Ma47, September 29, 2016, etc.).

Meanwhile, although the Petitioner seeks to challenge the constitutionality of the whole text of Article 270 Section 1 of the Criminal Act, the Court will limit the scope of the review to the part concerning "doctor" therein, since this is the part that applies to the Petitioner.

Thus, 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.

A. 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.

B. Related Provisions

Mother and Child Health Act (amended by Act No. 9333 on January 7, 2009)

Article 14 (Limited Permission for Induced Abortion Operations)

(1) A medical doctor may perform an induced abortion operation with the consent of the pregnant woman herself and her spouse (including persons in a *de facto* marital relationship; hereinafter the same shall apply) only in the following cases:

1. Where she or her spouse suffers from any eugenic or genetic mental disability or physical disease prescribed by Presidential Decree;
2. Where she or her spouse suffers from any contagious disease prescribed by Presidential Decree;
3. Where she is impregnated by rape or quasi-rape;

4. Where pregnancy is taken place between relatives by blood or by marriage who are legally unable to marry;
5. Where the maintenance of pregnancy severely injures or is likely to injure the health of the pregnant woman for health or medical reasons.

Article 28 (Exemption from Application of the Criminal Act)

No person who undergoes or performs an induced abortion operation under this Act shall be punished, notwithstanding Articles 269 (1) and (2) and 270 (1) of the Criminal Act.

Enforcement Decree of the Mother and Child Health Act (amended by Presidential Decree No. 21618 on July 7, 2009)

Article 15 (Limited Permission for Induced Abortion Operations)

(1) Only those who have been pregnant for not more than 24 weeks may undergo an induced abortion operation under Article 14 of the Act.

III. Petitioner's Arguments and the Trial Court's Reason for Rejecting the Petitioner's Motion to Request for Constitutional Review

A. Petitioner's Arguments

1. Self-Abortion Provision

The Self-Abortion Provision restricts (1) a woman's right to determine her own destiny by abridging the freedom to decide whether and when to become pregnant and give birth, (2) a pregnant woman's right to health by limiting her access to a safe abortion procedure at an early stage of pregnancy, (3) a pregnant woman's right to bodily integrity and right to protection of motherhood by forcing her to maintain the unwanted pregnancy and to give birth and thus impairing her biological and psychological health, and (4) a woman's right to equality by imposing the burdens of unwanted pregnancy and childbirth on her alone.

A fetus does not have the same level of existence as its mother and is not a being distinct from her, because it is completely dependent on her for its life and growth. Thus, the fetus is not entitled to right to life. Moreover, the Self-Abortion Provision is not an appropriate means of protecting the life of the fetus and the life and body of the pregnant woman, because the imposition of punishment for an abortion does not influence a decision to terminate pregnancy, and because abortion is rarely penalized under this Provision in practice. Additionally, with only a few exceptions referred to in the Mother and Child Act, the Self-Abortion Provision imposes indiscriminately uniform punishment on all abortions procured by pregnant women; as a result, it violates the rule against excessive restriction, as well as a pregnant woman's right to self-determination, right to health, right to bodily integrity, right to protection of motherhood, and right to equality.

2. Abortion by Doctor Provision

An abortion procured by a non-medical professional is more dangerous and greater in its illegality than one performed by a doctor. However, the Abortion by Doctor Provision stipulates only imprisonment for the doctor who procures an abortion, while the abortion with the woman's consent provision (Article 269 Section 2 of the Criminal Act) provides a fine or imprisonment. As a result, the Abortion by Doctor Provision violates the principle of equality and infringes the freedom of occupation of a doctor.

B. Trial Court's Reason for Rejecting the Petitioner's Motion to Request for Constitutional Review

The Constitutional Court has already held that Article 270 Section 1 of the Criminal Act does not violate the Constitution based on the conclusion that the Self-Abortion Provision is constitutional. Further, we see no change in circumstances sufficient to warrant reconsideration of the constitutionality of these provisions.

IV. Review

A. Crimes of Abortion: General

1. Meaning of "Abortion"

"Abortion" means the artificial expulsion of a fetus from the mother's body before the due date, or the killing of the fetus inside the mother's body. Such an act constitutes the crimes of abortion, and whether the fetus is dead or alive as a result of that act is not material to the establishment of the crimes of abortion (*see* Supreme Court Decision 2003Do2780, April 15, 2005). "Abortion" has a wider meaning than "induced abortion operation" referred to in the Mother and Child Health Act, because it includes the artificial expulsion of the fetus from the mother's body at the point of viability.

2. History of the Crimes of Abortion

(a) History of the Criminal Act

Article 269 Section 1 of the Criminal Act was enacted by Act No. 293 on September 18, 1953. It punished abortions procured by pregnant women by providing that "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 ten thousand hwan." Section 2 of the same Article provided the same penalties as Section 1 thereof for a person who procured the miscarriage of a woman upon her request or with her consent, and Section 3 of the same Article imposed aggravated punishment on a person who in consequence of the commission of the crime as referred to in Section 2, caused the injury or death of a woman. Article 270 Section 1 of the same Act criminalized abortions performed by doctors or other medical professionals by stipulating that "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." Section 2 of the same Article penalized a person who procured the miscarriage of a woman without her request or consent, and Section 3 of the same Article imposed aggravated punishment on a person who in consequence of the commission of the crimes as referred to in Section 1 or 2, caused the injury or death of a woman. All the above provisions did not provide exceptions under which an abortion is not criminalized.

On December 29, 1995, the Criminal Act was amended by Act No. 5057 to make minor revisions to Articles 269 and 270, including replacement of the phrase "a fine not exceeding ten thousand hwan" in Article 269 Section 1 with "a fine not exceeding two million won" and the term "accoucheuse" in Article 270 Section 1 with "midwife." However, that amendment did not alter the substantive content of Articles 269 and 270, and the content has remained unmodified to the present day.

(b) History of the Mother and Child Health Act

The Mother and Child Health Act was enacted by Act No. 2514 on February 8, 1973. It granted limited permission for induced abortion operations. Article 2 Item 4 of the above Act defined the term "induced abortion operation" as "an operation to artificially remove an embryo and any of its appendages from a mother's body at a time when the embryo is deemed unable to survive outside the mother's body," and Article 8 Section 1 of the same Act provided that "A doctor may conduct an induced abortion operation with the consent of the pregnant woman herself and her spouse (including a person having a de facto marital relation) only in cases (1) where she or her spouse suffers from any eugenic or genetic mental disability or physical disease prescribed by Presidential Decree; (2) where she or her spouse suffers from any contagious disease prescribed by Presidential Decree; (3) where she is impregnated by rape or quasi-rape; (4) where pregnancy is taken place between relatives by blood or by marriage who are legally unable to marry; and (5) where the maintenance of pregnancy severely injures or is likely to injure the health of the pregnant woman for health or medical

reasons." Article 12 of the same Act prescribed that "No person who undergoes or performs an induced abortion operation under this Act shall be punished, notwithstanding Article 269 Sections 1 and 2 and Article 270 Section 1 of the Criminal Act." Article 3 Section 1 of the Enforcement Decree of the same Act prescribed that "Only those who are within 28 weeks from the date of conception may undergo an induced abortion operation under Article 8."

The Mother and Child Health Act was wholly amended by Act No. 3824 on May 10, 1986 by moving the above provision on limited permission for induced abortion operations in Article 8 Section 1 to Article 14 Section 1 and making only minor changes in its style and wording. And on January 7, 2009, Article 14 Section 1 of the same Act was amended by Act No. 9333 to make minor revisions, including replacement of the phrase "severely injures or is likely to injure the health of the pregnant woman" in Item 5 of the same Article with "severely injures or is likely to injure the health of the pregnant woman." The substantive content of the amended provision has remained unmodified to the present day.

The amendment to Article 15 of the Enforcement Decree of the Mother and Child Health Act by Presidential Decree No. 21618 on July 7, 2009, changed the legal time limit for induced abortion operations from 28 to 24 weeks. The amendment also slightly narrowed the scope of permissible induced abortion operations by deleting diseases considered as curable or lacking a medical basis for their existence from the list of eugenic or genetic mental disabilities, physical diseases, and infectious diseases.

3. Crimes of Abortion under Current Law

(a) While Chapter 27 "Crimes of Abortion" of the Criminal Act imposes a complete ban on abortions, the Mother and Child Act permits abortions in several cases where a person undergoes or performs an induced abortion operation for certain medical, eugenic, or moral indications by exempting those cases from the abortion ban under the

Criminal Act. In other words, our legal system regulating abortions operates as a dualized system: the Criminal Act, which sets forth the crimes of abortion, and the Mother and Child Health Act, which enumerates several justifications by which abortions are legally permitted.

(b) The crime of self-abortion (Article 269 Section 1 of the Criminal Act) penalizes the procurement of an abortion by a pregnant woman herself. The commission of this crime constitutes the basic element of abortion offenses, and the crime of abortion with the consent of a pregnant woman (Article 269 Section 2 of the Criminal Act) is established when a person procures the miscarriage of the pregnant woman upon her request or with her consent. The crime of abortion by a health professional with the consent of a pregnant woman (Article 270 Section 1 of the Criminal Act) is established when a doctor, herb doctor, midwife, pharmacist, or druggist procures the miscarriage of the pregnant woman upon her request or with her consent, and the commission of this offense is an aggravating element of the crime of abortion with the consent of a pregnant woman because these abortion providers bear increased culpability based on their professions. The crime of abortion by a health professional with the consent of a pregnant woman and the crime of self-abortion are classified as "two-way criminality," a theoretical concept involving two or more perpetrators who approach the same goal—the commission of an abortion—by fulfilling constituent elements of the crime from different directions (*see* 2010Hun-Ba402, August 23, 2012). The commission of the crime of abortion without the consent of a pregnant woman (Article 270 Section 2 of the Criminal Act) aggravates the unlawfulness of the crime of self-abortion, and the crime of abortion causing injury or death of a pregnant woman (Article 269 Section 3 and Article 270 Section 3 of the Criminal Act) severely penalizes the consequently aggravated crime of abortion with the consent of a pregnant woman, the crime of abortion by a health professional with the consent of a pregnant woman, and the crime of abortion without the consent of a pregnant woman.

As this shows, the Self-Abortion Provision provides punishment for an

abortion procured by a pregnant woman who desires it, and other forms of abortion, including one performed without the consent of a pregnant woman, are punishable under provisions other than the Self-Abortion Provision. Therefore, hereinafter, the term "abortion" used in relation to the Self-Abortion Provision will mean an abortion procured by a pregnant woman who desires it.

(c) Article 14 Section 1 of the Mother and Child Health Act allows exceptions to the ban on abortions only under the following five cases: A doctor may conduct an induced abortion operation with the consent of the pregnant woman herself and her spouse only (1) where the pregnant woman and her spouse suffers from any eugenic or genetic mental disability or physical disease; (2) where she and her spouse suffers from any contagious disease; (3) where she is impregnated by rape or quasi-rape; (4) where pregnancy is taken place between relatives by blood or by marriage who are legally unable to marry; and (5) where the maintenance of pregnancy severely injures or is likely to injure the health of the pregnant woman for health or medical reasons. Only those who have been pregnant for not more than 24 weeks may undergo an induced abortion operation in these cases (Article 15 Section 1 of the Enforcement Decree of the Mother and Child Health Act), and they shall not be punished notwithstanding Article 269 Sections 1 and 2 and Article 270 Section 1 of the Criminal Act (Article 28 of the Mother and Child Health Act).

B. Precedent

On August 23, 2012, the Court, by a vote of four constitutional and four unconstitutional, declared the Self-Abortion Provision and the part of Article 270 Section 1 of the Criminal Act relating to "midwife"—one that provides punishment of imprisonment for not more than two years for a midwife who procures the miscarriage of a woman upon her request or with her consent—constitutional, because it determined that (1) the former did not infringe the right to self-determination of a pregnant

woman; and (2) the latter did not violate the principle of proportionality between criminal culpability and punishment, or the principle of equality (2010Hun-Ba402, on August 23, 2012).

Four Justices dissented from that decision on the grounds that (1) the Self-Abortion Provision was unconstitutional because it infringed the right to self-determination of a pregnant woman by imposing a complete and uniform ban on abortions, even those procured in the early stages of pregnancy; and that (2) the part of Article 270 Section 1 of the Criminal Act relating to "midwife" was unconstitutional for the same reason that the Self-Abortion Provision was unconstitutional. One Justice wrote a separate concurring opinion to the dissenting opinion by noting an additional view that abortions should be legal in the early stages of pregnancy and this legalization must be accompanied by legislation (1) requiring a pregnant woman to make an abortion decision after careful consideration and (2) ensuring the pregnant woman's access to a medically safe abortion procedure.

C. Constitutional Nonconformity Opinion of Justice Yoo Namseok, Justice Seo Ki-Seog, Justice Lee Seon-ae, and Justice Lee Youngjin

1. Opinion on the Self-Abortion Provision

(a) Fundamental rights restricted

The first sentence of Article 10 of the Constitution provides that "All citizens shall be assured of human worth and dignity and have the right to pursuit of happiness." The general right to personality is derived from human dignity protected by this provision (*see* 89Hun-Ma160, April 1, 1991; 2002Hun-Ka14, June 26, 2003). The general right to personality provides extensive protection to the basic conditions for free development of personality which is closely related to human dignity, and the right of an individual to self-determination is derived from such general right to personality (*see* 2009Hun-Ba17, etc., February 26, 2015; 2010Hun-Ba402, August 23, 2012; 2012Hun-Ma940, November 26, 2015). All citizens are

entitled to the right to freely create their own private sphere of life based on their dignified right to personality (*see* 95Hun-Ka14, etc., March 27, 1997).

The right to self-determination is a means of realizing human dignity and is the right of humans to freely make fundamental decisions regarding the development of their personality and their mode of life within their own private sphere of life. The concept of human dignity, which serves as both the basis and purpose of the right to self-determination, imposes a duty on the State to respect and protect human dignity. Human beings must never be treated as a means to enhance some values, attain other purposes, or promote legal interests but must be respected as ultimate ends and values of themselves.

It is evident that this right to self-determination and the "relationship between human beings and the State" should be applied equally to men and women. This is particularly evident given the fact that women, unlike men, can become pregnant and give birth to a child and their decisions regarding pregnancy and childbirth have a profound impact on their lives.

Therefore, the right to self-determination includes the right of a woman to freely create her own private sphere of life based on her own dignified right to personality, and the right of a pregnant woman to determine whether to continue her pregnancy and give birth is included in such right as well (*see* 2010Hun-Ba402, August 23, 2012).

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. In other words, it compels a pregnant woman to continue her pregnancy and give birth by relying on the criminal sanctions and their deterrent effect. Therefore, it restricts the pregnant woman's right to self-determination.

(b) Whether a pregnant woman's right to self-determination is infringed

The debate over the legalization of abortion closely concerns ultimate

issues relating to developing or unborn human life. Thus, this debate contains extensive discussions of ethical, religious, scientific, medical, sociological, and other diverse aspects of abortion. Such extensive discussions are affected by various factors, including one's sense of values, one's experiences, one's attitude toward human life, one's ethical standards, and historical and social realities. One's opinion and conclusion regarding the abortion must be respected in themselves, as one's own belief, and whether they are right or wrong cannot be decided easily. In this case, the Court will decide only "whether the Self-Abortion Provision violates the Constitution by infringing a pregnant woman's right to self-determination," in accordance with its role conferred by the Constitution.

1) Premises of review

a) A fetus's right to life and the State's obligation to protect human life

Human life is invaluable; it is the source of dignified human existence, which cannot be replaced by anything else in this world. Although the right to life is not expressly stipulated in the text of the Constitution, it is a natural right that transcends times and places, rooted in the human instinct to survive and the purpose of human existence. It is unquestionably clear that the right to life is the most fundamental right and the foundation of all rights provided under the Constitution (*see* 92Hun-Ba1, November 28, 1996).

Every human being has the constitutional right to life. A fetus, in the stage of development to become a human, must have this right as well. Although the fetus has to rely upon the mother to maintain its life, it is a living being that has an existence separate from the mother and is likely to become a human being unless special circumstances exist. Therefore, the fetus is entitled to the right to life, and the State is obligated to protect the life of the fetus in accordance with the second sentence of Article 10 of the Constitution (*see* 2004Hun-Ba81, July 31, 2008; 2004Hun-Ma1010, etc., July 31, 2008; 2005Hun-Ma346, May 27, 2010; 2010Hun-Ba402, August 23, 2012).

b) Related legislation of other countries

Most European civil law countries have decriminalized abortions under certain conditions and regulate abortions through a combination of two models: the "periodic model" and "indications model." The periodic model usually exempts from criminal punishment abortions within 14 weeks from the first date of the last menstrual period when they are performed under certain conditions. In the United Kingdom, abortions within the 24 weeks from the first date of the last menstrual period are excluded from criminal punishment under certain conditions. In the United States, each state has different laws and regulations regarding abortion, including those that provide no criminal penalties for abortions performed before fetal viability and under certain circumstances in accordance with the holding in *Roe v. Wade*.

According to the United Nations, as of 2013, the proportion of countries in the "more developed regions," which comprised all regions of Europe plus Northern America, Australia, New Zealand, and Japan, that allow abortion on legal grounds was as follows: to save a pregnant woman's life (96%); to protect a pregnant woman's physical health (88%); to preserve a pregnant woman's mental health (86%); in case of rape or incest (86%); because of fetal impairment (86%); for economic or social reasons (82%); and upon pregnant woman's request (71%). In 2013, compared with 1996, the proportion of these countries that permitted abortion increased in all these categories except the category "to protect a pregnant woman's physical health," which remained the same. Between these periods, the proportion of countries in the "less developed regions" that allow abortion rose in all these categories as well, except the category "to save a pregnant woman's life," which declined slightly.

2) Standard of review

This case concerns whether the Self-Abortion Provision, a definitive provision enacted by the State for the protection of the life of a fetus, violates the rule against excessive restriction by abridging a pregnant

woman's right to self-determination. In this case, we will not address a direct conflict between a pregnant woman's right to self-determination and a fetus's right to life, based on disregard of the existence and role of the Self-Abortion Provision.

The Court will below examine whether the Self-Abortion Provision—which, with a few exceptions set forth in the Mother and Child Health Act, imposes a complete and uniform ban on all abortions throughout pregnancy regardless of the developmental stage or viability of a fetus, and thus limits a pregnant woman's right to self-determination—satisfies the tests of legitimacy of legislative purposes; appropriateness of the means to achieve those legislative purposes; least restrictive means; and balance of interests between a public interest to be served by the means and the harm it causes to a private interest.

3) Legitimacy of legislative purposes and appropriateness of means

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

4) Least restrictive means and balance of interests

a) Complete and uniform ban on all abortions throughout pregnancy

Life is the source of dignified human existence, which cannot be replaced by anything else in this world. Thus, there are important public interests in protecting the life of a fetus that is developing into a human. The State has chosen the Self-Abortion Provision as a means for preserving the life of a fetus.

The Self-Abortion Provision, with certain exceptions set forth in the Mother and Child Health Act, imposes a complete and uniform ban on all abortions throughout pregnancy regardless of the developmental stage or viability of the fetus. In doing so, it compels a pregnant woman to continue her pregnancy and give birth, and criminally punishes those

who violate the ban. In other words, by relying on criminal sanctions and their deterrent effect, the State forces the pregnant woman to bear the physical and emotional burdens of her pregnancy, face a physical or life-threatening risk inherent in childbirth, and establish a mother-child relationship with the child as a result of giving birth to him or her.

b) Nature of a pregnant woman's decision of terminating pregnancy based on her right to self-determination

A woman undergoes dramatic physical and emotional changes during about ten months of pregnancy. In the process of giving birth, she suffers a great deal of pain and, in extreme cases, even faces a risk of death. She must endure such physical burdens, as well as anxieties, pains of childbirth, and a risk of death as long as she remains pregnant. Under our legal system, a mother-child relationship is established by childbirth, which is an objective and positive fact (*see* 98Hun-Ba9, May 31, 2001). By giving birth, she establishes the legal relationship of mother and child. Accordingly she takes the parental responsibilities as a biological mother.

Parenting requires almost 20 years of continuous physical, psychological, and emotional efforts of a mother. In addition, it may impose on her a considerable financial burden, as well as difficulties in maintaining a professional or public life and in continuing with education, depending on her various and wide-ranging socioeconomic circumstances. Such burdens of parenting are further compounded by social problems such as a custom of gender discrimination, a patriarchal culture, and adverse child-rearing conditions. In our society, women still suffer substantial socioeconomic disadvantage by virtue of becoming pregnant or giving birth; they also shoulder more of the parental burden than men in many cases. As a result, they frequently encounter considerable difficulties in reconciling work and family life. When faced with those difficulties, some women quit their jobs and thus are excluded from socioeconomic life. According to the Statistics Korea, as of 2018, the percentage of married women in employment who experienced a career interruption due to marriage, pregnancy and childbirth, childrearing, child education,

or family care by age was as follows: 15-29 (2.9%), 30-39 (26.5%), 40-49 (46.7%), and 50-54 (23.9%).

In light of the above, we note that pregnancy, childbirth, and parenting are among the most important matters that may fundamentally and decisively affect the life of a woman. Thus, a pregnant woman's decision of whether to continue her pregnancy and give birth, one concerning the right to freely create one's private sphere of life, has its roots in her human dignity and autonomy. Further, we note that pregnant women experience physical, psychological, social, and economic consequences resulting from this decision—consequences that are complicated and varied by the women's physical, psychological, social, and economic circumstances. For these reasons, we conclude 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, based on her own chosen view on life and society—a holistic decision central to her personal dignity.

c) Appropriate means or level of legal protection for life when considering the developmental stages of life and the exercise of the right to self-determination

The State has the duty to protect fetal life; however, that duty does not require the State to always afford uniform legal protection to a fetus at every stage of development. Under our legal order, it is not impossible for the State to divide the fetus's continuous process of development into certain stages and give different legal protection to the fetus depending on its developmental stage. For instance, under the Criminal Act, a fetus, during most of its development, is the object of an abortion crime but is considered a human being and turns into the object of a murder crime after the onset of labor. This example demonstrates that this Act provides a different level of punishment for violation of life depending on the developmental stage of the fetus. Further, because human life after implantation in the uterus of a woman is regarded as the object of an

abortion crime under this Act, human life before that point, or within around seven days of fertilization, is not given any protection under this Act. As these examples illustrate, our legal order does not always afford uniform legal protection to the fetus at every stage of development. Therefore, the State's legislation for the protection of fetal life with respect to its level or means may be different depending on the developmental stage of the fetus (*see* 2004Hun-Ba81, July 31, 2008; dissenting opinion in 2010Hun-Ba402, August 23, 2012).

The fetus becomes viable, or can survive independently outside the mother's body, after a certain period of time. Although that period varies according to the level of advancement of medical technology, the World Health Organization (WHO) considers it to be 22 weeks of gestation (here and hereinafter a period of gestation, such as "22 weeks of gestation," is measured from the first day of a woman's last menstrual period). Likewise, academic field of obstetrics and gynecology considers that the fetus becomes viable at around 22 weeks of gestation when provided with the best medical technology and staff available at present. We believe that a viable fetus after around 22 weeks is considerably more human than a non-viable one before this period.

Moreover, in light of the importance and nature of a pregnant woman's right to self-determination, we find that the State must guarantee this right by allowing the pregnant woman sufficient time to make and carry out a holistic decision whether to continue her pregnancy and give birth. Specifically, the pregnant woman must be given sufficient time to discover her pregnancy; to examine the socioeconomic circumstances surrounding her and see whether they are subject to change; to gather information concerning national policies supporting pregnancy, childbirth, and parenting; to receive counseling and advice from people near her; and to give careful consideration to her decision, and if she decides to abort her pregnancy, she must also be allowed enough time to find a clinic or hospital providing abortion services, to undergo a pregnancy test, and to actually obtain an abortion.

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.

d) Appropriate protection for life when considering a special relationship between a pregnant woman and her fetus

If the State imposes a complete ban on abortions, a fetus retains its right to life, while a pregnant woman is completely deprived of her right to self-determination. Conversely, if the State fully legalizes abortions, the pregnant woman retains her right to self-determination, while the fetus is completely deprived of its right to life. Therefore, it could be inferred that these rights are, in this respect, in an adversarial relationship, which is being formed by the State's legislation.

However, this adversarial relationship is not simple because there is a special relationship between the pregnant woman and her fetus. Although the fetus is clearly a living being that has an existence separate from its mother, it is, at the same time, closely intertwined with its mother's body. It shares a special bond with her and is completely dependent on her for life and growth. The relationship between the pregnant woman and her fetus is very peculiar in that it is both independent and interdependent. The pregnant woman carries the burden of parenting her child after birth unless special circumstances such as adoption exist. Absent special and exceptional circumstances, the safety of the pregnant woman corresponds to the safety of her fetus, and their interests do not pull in different directions but they coincide.

The nature of this relationship often manifests itself even in the dilemma of abortion as well. In certain cases, pregnant women facing the abortion dilemma decide to abort and execute their decisions based on the conclusion that they cannot bear the burdens of pregnancy, childbirth, and parenting, considering their socioeconomic circumstances, and that

their child, as well as they themselves, will become miserable after birth. The fact that pregnant women make decisions of abortion based on such conclusions implies that viewing the maternal-fetal relationship as a "perpetrator-victim" relationship will rarely provide an ideal solution for protecting fetal life, regardless of whether such conclusions are right or wrong. This calls on the State to optimize two fundamental rights in accord with the principle of practical concordance, rather than abstractly comparing the two and abandoning one for the sake of the other.

The State imposes a complete and uniform ban on abortions and uses criminal sanctions and their deterrent effect to enforce the ban, while failing to make active efforts to remedy the social and institutional frameworks for protecting the life of the fetus.

Given that the safety of the pregnant woman bears a close relationship to the safety of the fetus and that the pregnant woman's cooperation is necessary for the protection of the life of the fetus, we find that this protection gains true significance when it includes the physical and social protection of the pregnant woman. This protection can be effectively served by proactive and retroactive measures aimed at, e.g., creating a social and institutional environment preventing unwanted pregnancies and reducing abortions (*see* dissenting opinion in 2010Hun-Ba402, August 23, 2012). In addition, the life of the fetus can be truly safeguarded if, during the Determination Period, the pregnant woman is able to make a carefully considered decision regarding whether to continue her pregnancy after consultation with professionals providing emotional support and adequate information about abortion; and if the State actively makes the effort to address the socioeconomic conditions that pose obstacles to pregnancy, childbirth, and parenting.

e) Effectiveness of the Self-Abortion Provision

Whether the Self-Abortion Provision serves the purpose of protecting the life of a fetus by adequately and effectively reducing the number of abortions will be examined below.

From a historical perspective, women have procured their own abortions

throughout numerous time periods and societies representing various ethical views. They have thereby terminated unwanted pregnancies, despite the threat of criminal punishment and even despite the risks to their health or lives. In cases where pregnant women seriously pondered on whether to have an abortion then decided to have one, we have to admit that the criminal sanction and its deterrent effect is limited in forcing the pregnant women to continue their pregnancies and give birth. We believe that this is because their decisions to terminate their pregnancies have been made after a careful evaluation of various factors, including the ethical problem of depriving a fetus of life, their own socioeconomic circumstances and their own physical, psychological, and ethical burdens of parenting, as well as the future life of the child to be born.

In 2011, the Korean Institute of Criminology conducted a survey among 1,000 South Korean women aged 16 or more. That survey elicited information from those who had considered having an abortion on (1) the factors that had negatively affected their consideration of abortion; and (2) the reasons that had actually led some of them to give birth. In relation to (1), "moral burden" and "physical burden" were the most cited factors; however, those factors played a minor role in actually deterring the respondents from having an abortion. In relation to (2), the most common reasons were practical reasons such as "change of mind to have and raise a baby after reconsideration," "male partner's desire to have the baby," and "fears about the effect of an abortion on subsequent pregnancies." It turned out that the illegality of abortion was not a significant factor in the consideration of abortion or in the decision to give birth.

The effectiveness of the Self-Abortion Provision is questionable considering the reality of prosecution for the crime of self-abortion as well. According to the 2011 National Survey on Trends in Incidence Rates of Induced Abortion Operations, conducted by Yonsei University and commissioned by the Ministry of Health and Welfare, with a representative sample size of 4,000 women of reproductive age (aged 15-44), it is estimated that around 170,000 abortions took place in Korea in 2010.

Meanwhile, the Supreme Prosecutors' Office reports that from 2006 to 2013, no more than 10 women were prosecuted annually for having an abortion. In light of these realities, it is no exaggeration to say that the Self-Abortion Provision is virtually a dead letter.

Although studies show that the estimated number or rate of abortions has steadily declined for years in our society, we cannot find evidence that this trend is attributable to the Self-Abortion Provision. Instead, we find that this trend is the result of a combination of various other factors, including the increased use of contraceptives, decline of son preference, and improvement of economic conditions.

In sum, 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.

f) Limitations and problems of criminal sanctions and their deterrent effect

As long as the Self-Abortion Provision exists to impose a complete and uniform ban on all abortions with certain exceptions set forth in the Mother and Child Health Act, the State can at any time expand a crackdown on abortions to investigate and punish them. Indeed, several years ago, the Ministry of Health and Welfare established a policy to receive reports on "clinics performing or advertising illegally induced abortion operations." However, before that time, the State turned a blind eye to abortions when it implemented a national population control policy. These examples show that the Self-Abortion Provision has been inconsistently enforced based on the State's population policy.

Moreover, the deterrent effect of criminal sanctions poses some problems. For one thing, pregnant women who face the dilemma of abortion are unlikely to have any necessary discussion or communication with society concerning a decision on whether to terminate a pregnancy. For another,

these pregnant women tend to be in need of emotional support as well as ample information, and tend to undergo an unsafe abortion. Since all abortions are completely and uniformly banned and criminalized with certain exceptions set forth in the Mother and Child Act, these pregnant women often cannot receive timely counseling or education regarding abortions, nor sufficient information about abortions. Further, they may have no choice but to seek out a clandestine abortion, thus paying a very high price for an illegal operation or even travelling abroad for an abortion. Legal remedies are often not available in cases of medical malpractice during an abortion or where the abortion causes complications, and proper medical services, counseling, or care are also not readily available before and after the abortion. Those who want to have an illegal abortion but are unable to afford one, namely underage or impecunious females, would probably not have one within the proper time. Where they fail to secure an abortion and end up giving birth, some of them even commit infanticide or abandon a baby.

The Self-Abortion Provision can be abused unrelated to its original purpose of protecting the life of a fetus when a woman's ex-male partner uses it as a means to retaliate against or harass the woman, or to put pressure on her to settle a family dispute or other civil disputes; for instance, a man might threaten his ex-female partner to sue her for the crime of self-abortion under the Self-Abortion Provision if she refuses to see him after having an abortion at a hospital; or a man may bring his ex-female partner to court for abortion in order to defend against a property settlement or a claim for alimony.

g) Seriousness of the abortion dilemma arising from socioeconomic circumstances

The Mother and Child Health Act set forth the circumstances under which self-abortion is justified as follows: (1) where the pregnant woman or her spouse suffers from any eugenic or genetic mental disability or physical disease; (2) where she or her spouse suffers from any contagious disease; (3) where she is impregnated by rape or quasi-rape; (4) where

pregnancy is taken place between relatives by blood or by marriage who are legally unable to marry; (5) where the maintenance of pregnancy severely injures or is likely to injure the health of the pregnant woman for health or medical reasons.

Some view that these circumstances are so limited and narrow that, under these circumstances, one may even raise the justification defense of necessity under Article 22 of the Criminal Act, the justification defense of justifiable act under Article 20 thereof, or an excuse defense based on the fact that there is no possibility of continuing a pregnancy and giving birth. We find that these circumstances do not include "various and wide-ranging socioeconomic circumstances that interfere with continuance of pregnancy and childbirth and thus create the abortion dilemma." Therefore, we conclude that the Mother and Child Health Act does not properly guarantee a pregnant woman's right to self-determination.

The Self-Abortion Provision compels, under threat of criminal sanctions, a pregnant woman to continue her pregnancy and give birth even if she faces the abortion dilemma arising from various and wide-ranging socioeconomic circumstances, such as where pregnancy and child-rearing are likely to interfere with her education, career, or public activities; where she has inadequate or unstable income; where she lacks resources to care for another child; where she or her spouse cannot stay home to care for the child and both of them have to work, out of necessity; where she has no desire to continue a dating relationship or enter into a marital relationship with the fetus's biological father; where the fetus's biological father or the pregnant woman's male partner does not want her to give birth and insists on an abortion, or overtly refuses to assume the parental responsibilities; where she is pregnant by a man who is married to another woman; where she has discovered her pregnancy at a point when the marriage has in effect been broken irretrievably; where she breaks up with the fetus's biological father; or where she is an unwed minor with an unwanted pregnancy.

Because the Self-Abortion Provision does not recognize such various and wide-ranging socioeconomic circumstances as exceptions to imposing

criminal sanctions, a pregnant woman is compelled to endure not only the physical and psychological burdens of continuing pregnancy, as well as the physical pain and risks of childbirth, but also the hardships that such socioeconomic circumstances create, such as financial burdens of pregnancy and childcare, difficulties in maintaining a professional and public life, disruption to education, and interruption of a career.

h) Sub-conclusion

Considering the above factors, namely the nature of a pregnant woman's pregnancy termination decision based on her right to self-determination; appropriate means or level of legal protection for life when considering the developmental stages of life and the exercise of the right to self-determination; appropriate protection for life when considering a special relationship between a pregnant woman and her fetus; effectiveness of the Self-Abortion Provision; limitations and problems of criminal sanctions and their deterrent effect; seriousness of the abortion dilemma arising from socioeconomic circumstances, we conclude that the Self-Abortion Provision restricts a pregnant woman's right to self-determination to an extent going beyond the minimum necessary to achieve its legislative purpose by, with certain exceptions set forth in the Mother and Child Health Act, completely and uniformly compelling 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 punishing those undergoing abortions. Thus, the Self-Abortion Provision does not use the least restrictive means to achieve its legislative purpose.

Indeed, as stated above, the Self-Abortion aims to serve a significant public interest in protecting the life of a fetus. Nevertheless, it cannot be said that prohibiting pregnant women from undergoing abortions even if they face, during the Determination Period, the abortion dilemma arising from various and wide-ranging socioeconomic circumstances, and criminally punishing abortion effectively or adequately serve the public interest in protecting the life of a fetus. On the other hand, as noted earlier, criminally

penalizing pregnant women in accordance with the Self-Abortion Provision substantially restricts their right to self-determination.

Therefore, we conclude that the legislature, in enacting the Self-Abortion Provision, failed to harmonize and balance the public interest in protecting a fetus's life and the private interest in safeguarding a pregnant woman's right to self-determination and gave unilateral and absolute priority to the public interest in protecting fetal life. Accordingly, it failed to strike a proper balance between the public and private interests.

5) Conclusion

The Self-Abortion Provision restricts a pregnant woman's right to self-determination to an extent going beyond the minimum necessary to achieve its legislative purpose. Thus, it satisfies neither the least restrictive means test nor the balance of interests test. Accordingly, it violates the rule against excessive restriction and a pregnant woman's right to self-determination.

(c) Opinion on other claims

The Petitioner also claims that the Self-Abortion Provision violates a woman's right to health, right to equality, right to bodily integrity, and right to protection of motherhood. However, since we hold that the Self-Abortion Provision infringes a pregnant woman's right to self-determination, we will not further review these claims.

2. Opinion on the Abortion by Doctor Provision

As noted above, the crime of abortion by a health professional with the consent of a pregnant woman and the crime of self-abortion are classified as two-way criminality. Thus, if it is unconstitutional to punish a pregnant woman who procures her own abortion, then surely it is unconstitutional to criminally punish a doctor who performs an abortion at the request or with the consent of a pregnant woman.

The Self-Abortion Provision violates the Constitution by, with certain

exceptions set forth in the Mother and Child Health Act, compelling a pregnant woman to continue her pregnancy and give birth even if she faces the abortion dilemma arising from various and wide-ranging socioeconomic circumstances and by criminally punishing abortions procured in violation of the ban on abortion. 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 hers, violates the Constitution.

3. Reasons for Decisions of Nonconformity to the Constitution and Orders for Temporary Application

As stated earlier, the Self-Abortion Provision and the Abortion by Doctor Provision are unconstitutional in that they unduly infringe a pregnant woman's right to self-determination by, with certain exceptions set forth in the Mother and Child Health Act, completely and uniformly compelling every pregnant woman to continue her pregnancy and give birth even if she faces, during the Determination Period, the abortion dilemma arising from various and wide-ranging socioeconomic circumstances and by criminally punishing abortions procured in violation of the ban on abortion. 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 these Provisions, 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. The legislature shall amend these Provisions as early as possible, by December 31, 2020, at the latest, and if no amendment is made by then, these Provisions will be null and void as of January 1, 2021.

D. Simple Unconstitutionality Opinion of Justice Lee Seok-tae, Justice Lee Eunae, and Justice Kim Kiyoung

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 a sufficient amount of time before the point of viability at around 22 weeks of gestation, during which the right to self-determination regarding a decision whether to continue a pregnancy and give birth can be properly exercised, even in cases where a pregnant woman faces the abortion dilemma arising from various and wide-ranging socioeconomic circumstances, 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. Therefore, we deliver the following opinion.

1. Pregnant Woman's Right to Self-Determination during the First Trimester of Pregnancy

(a) Meaning of a pregnant woman's right to self-determination

1) The Court previously stated that the image of a human posited by the Constitution is a citizen with the right to self-determination, as well as with creativity and maturity, and this citizen is a democratic citizen who, based on his or her own chosen view on life and society, responsibly determines and forms his or her life in society (*see* 96Hun-Ka5, May 28, 1998; 2004Hun-Ba80, February 23, 2006). The Court also stated that the right to self-determination or the general freedom of action, deriving from the right to pursue happiness under Article 10 of the Constitution, respects the determination or choice made by a reasonable and responsible person regarding his or her own destiny but presupposes that this person assumes the responsibility for such determination or choice (2008Hun-Ba146, etc., October 29, 2009). We find that the essence of this constitutional right to self-determination lies in a person's self-evaluation and self-determination of the meaning and implications of his or her action.

2) A "pregnant woman's right to self-determination" at issue in this case is no different from this right to self-determination in general. That a pregnant woman is guaranteed the right to self-determination means that she is also entitled to make a decision about whether to continue her pregnancy after careful evaluation of her circumstances, based on her view of life and society which has roots in her dignity and autonomy. In other words, a pregnant woman being guaranteed the right to self-determination means that she is entitled to make a decision about whether to continue her pregnancy and give birth, on her own and at any time during her pregnancy.

(b) Peculiarity of a pregnant woman's right to self-determination

1) As pointed out in the constitutional nonconformity opinion, a woman undergoes dramatic physical and emotional changes during approximately

ten months of pregnancy. In the process of giving birth, she suffers a great deal of pain and, in extreme cases, even faces a risk of death. She must endure by herself such anxieties, physical constraints, and pains as long as she remains pregnant. By giving birth, she establishes a mother-child relationship with her child and thereafter assumes parental responsibilities, which require almost 20 years of continuous physical, psychological, and emotional efforts and impose on her a financial burden and various other hardships, including difficulties in maintaining a professional and public life or in continuing with education. Such burdens of parenting are further compounded by social problems such as a custom of gender discrimination, a patriarchal culture, and adverse child-rearing conditions.

2) In light of the above, we note that pregnancy, childbirth, and parenting are crucial matters that have a fundamental and decisive impact on the life of a woman. Thus, the decision whether to continue a pregnancy is one of the most vital elements of a woman's right to self-determination.

Moreover, the decision whether to continue a pregnancy is not made in a vacuum. It carries different weight depending on the environment and circumstances of a pregnant woman. Therefore, if the option of terminating a pregnancy is not present, this may cause devastation in the life of a pregnant woman, as well as harm to her dignity.

In sum, a pregnant woman's right to self-determination regarding the decision whether to continue a pregnancy concerns her right to determine on her own matter that has a fundamental and decisive impact on her life, and is one of the most vital elements of a woman's right of personality.

(c) Full protection of a pregnant woman's right to self-determination

1) As pointed out in the constitutional nonconformity opinion, a pregnant woman's decision whether to continue or terminate her pregnancy amounts to her holistic and dignity-based decision which is made after careful evaluation of all her physical, psychological, social, and

economic conditions, based on her own chosen view of life and society. However, the Self-Abortion Provision restricts a pregnant woman's right to self-determination by, with certain exceptions set forth in the Mother and Child Health Act, imposing a complete and uniform ban on all abortions throughout pregnancy and by criminally punishing violations of this ban.

2) Abortion legislation that bans, in principle, abortion throughout pregnancy and specifies grounds for exceptions to this ban neither affords nor guarantees a pregnant woman the right to self-determination. Such legislation merely exempts a pregnant woman from liability for abortion if she falls within those exceptions by according her the status of "a person who has no other choice but to abort." The pregnant woman is never granted, throughout pregnancy, the status of a person entitled to freely and on her own choose and decide whether to continue a pregnancy; as a result, she is never guaranteed the fundamental right to self-determination. In effect, such legislation denies or deprives the pregnant woman of the right to self-determination, rather than guaranteeing her that right as it purports to do.

3) That a pregnant woman is guaranteed the right to self-determination means she, as a holder of this right, is, in principle, allowed to exercise it based on her own will. Thus, 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 the reasons below.

(d) Restrictions on a pregnant woman's right to self-determination

1) Restrictions based on the stage in the continuous process of life development

a) Despite its reliance upon its mother, a fetus is still a living being that has an existence separate from its mother. Since it gradually grows into a human being in the mother's uterus and becomes one at birth, it

constitutes a stage in the continuous process of human life development.

Whether this living fetus is a human being with fundamental rights has been the subject of many discussions around the world. Some judicial institutions and commissions have denied, in their respective judgments and opinions, a fetus the status of a human being with fundamental rights; however, they have not denied that fetal life is valuable and merits protection. In our opinion, regardless of whether the fetus qualifies as a holder of fundamental rights, the fetus itself amounts to life that has the potential to gradually develop into a human being. Thus, it is self-evident that the State should pursue the significant public interest in safeguarding fetal life in accordance with the Constitution's normative, objective value system respecting life and with Article 10 of the Constitution which proclaims human dignity and worth.

b) Therefore, we note that the State may restrict a pregnant woman's right to self-determination to protect the life of a fetus, which has the potential to gradually develop into a human being. This does not mean, however, that the State should, in pursuing the public interest in safeguarding fetal life, always afford uniform legal protection to the fetus at every stage of development. Under our legal order, it is not impossible for the State to divide the fetus's continuous process of development into certain stages and give different legal protection to the fetus depending on its developmental stage. Therefore, the State's legislation for the protection of fetal life with respect to its level or means may be different depending on the developmental stage of the fetus (*see* 2004Hun-Ba81, July 31, 2008).

c) As pregnancy progresses, the fetus gradually develops into a human being and becomes viable after a certain period of time. Although that period varies according to the level of advancement of medical technology, WHO considers it to be 22 weeks of gestation. Likewise, academia in the field of obstetrics and gynecology consider that the fetus becomes viable at around 22 weeks of gestation when provided with the best medical technology and staff currently available. Since we believe that a viable fetus after around 22 weeks of gestation is considerably more human than

the previously non-viable one before this period, we find that the State may impose general restrictions on abortions after this period and permit abortions only in very exceptional cases where a pregnant woman is unlikely to continue her pregnancy.

2) Restrictions for the safety of a woman's life and body

a) Abortion is an invasive procedure, posing a risk of harm to a woman's body and life. Thus, even if a pregnant woman's right to self-determination is guaranteed, reducing the abortion-related risk factors for pregnant women's lives and bodies by ensuring access to safe abortion is another substantial and important task involved in the matter of abortion. In relation to this, WHO opined that regulatory, policy and programmatic barriers that hinder access to and timely provision of safe abortion care should be removed.

b) Factors influencing the safety of abortion include fetuses' developmental stages (period of gestation), competence of medical practitioners, a medical environment, post-abortion care, and availability of information about abortion. The cost of abortion is also one of such factors, because women with no or low income hesitate to seek an abortion and fail to obtain a timely one if this cost is high.

As a general rule, a pregnant woman's risk of death from abortion increases with gestational age. The rate of maternal complications or mortality from abortion is extremely low during the first nine weeks of gestation, when a medical abortion is available, and at 12 to 13 weeks of gestation, when an abortion is a relatively simple surgical procedure. The International Federation of Gynecology and Obstetrics (FIGO) Committee for the Study of Ethical Aspects of Human Reproduction and Women's Health stated that "Abortions for non-medical reasons when properly performed, particularly during the first trimester ... are in fact safer than full-term deliveries." After eight weeks of gestation, however, the relative risk of maternal mortality from abortion increases by two times for every two weeks, according to medical societies.

Therefore, in order to ensure access to safe abortion, it is significant that women have access to first trimester abortions performed by trained medical professionals and to adequate pre- and post-abortion care. Additionally, abortion education or counseling needs to be facilitated so that information about abortion can be made available in a timely manner.

c) Abortions after the first trimester of pregnancy, even before fetal viability, use a more complicated method of abortion and are more likely to produce complications or side effects than abortions before this stage, resulting in a higher risk of harm to a pregnant woman's life or health. Thus, with respect to abortions after the first trimester of pregnancy, the public interests in protecting a fetus's life and the pregnant woman's life and health may take precedence over private interests.

3) Necessary periodic restrictions on a pregnant woman's right to self-determination

a) Most pregnant women discover their pregnancies between four and six weeks of gestation, by around eight weeks of gestation at the latest. From that discovery, it takes some time until they, after careful deliberation over an abortion decision, find a medical institution that provides abortion services. (The 2011 National Survey on Trends in Incidence Rates of Induced Abortion Operations, commissioned by the Ministry of Health and Welfare, found that about 94% of induced abortion operations are performed during the first three months of pregnancy.) Therefore, setting a short time frame for legal abortion would, in effect, preclude pregnant women from having abortions, or lead them to make rash decisions to terminate pregnancies.

b) On the other hand, because the sex or disability of a fetus can be detected at some point during the second trimester (from the end of the first trimester to 28 weeks of gestation), we cannot exclude the possibility that allowing abortion on request after that point might lead to selective abortions based on the sex or disability of the fetus.

c) For these reasons, the time frame within which abortion on request

is legal should be long enough to ensure that a pregnant woman makes a decision whether to terminate her pregnancy after serious and careful evaluation of all her physical, psychological, social, and economic conditions, based on her own chosen view of life and society; but, at the same time, that time frame should be limited in order to prevent a pregnant woman's deliberation on abortion from resulting in wrong decisions, such as decisions to have selective abortions.

2. Whether the Provisions at Issue Infringe a Pregnant Woman's Right to Self-Determination

With the above in mind, we examine whether the Self-Abortion Provision and the Abortion by Doctor Provision violate the rule against excessive restriction and thus infringe a pregnant woman's right to self-determination.

(a) As pointed out in the constitutional nonconformity opinion, criminal sanctions have only a limited deterrent effect on a pregnant woman's decision whether to terminate a pregnancy, and pregnant women undergoing unlawful abortions are, in practice, rarely subjected to criminal punishment. Therefore, the Self-Abortion Provision does not significantly serve the public interest in protecting fetal life. As a matter of fact, the Self-Abortion Provision has been inconsistently enforced based on the State's population policy. Further, it does not serve its original purpose of protecting fetal life; rather, it is abused by a woman's ex-male partner or by those close to her as a means to retaliate against or harass the woman, or it drives pregnant women to obtain an unsafe abortion by preventing them from having any necessary discussion or communication with society concerning the decision whether to terminate a pregnancy. Given this reality, we find that banning abortion and imposing criminal sanctions against violations of this ban have not significantly furthered the purpose of protecting fetal life. In our opinion, this purpose can be significantly advanced by other more desirable and

effective means, such as promotion of sex education and counseling; provision of social welfare benefits and other kinds of State assistance for pregnancy, childbirth, and parenting; and removal of a series of institutional and sociostructural obstacles that interfere with childbirth and parenting (*see* dissenting opinion in 2010Hun-Ba402, August 23, 2012).

(b) A complete and uniform ban on abortion places barriers between women who seek abortions and their access to accurate information about abortion. This ban also leaves them no choice but to resort to a clandestine abortion, which is costly and rarely provides them with proper medical services or care. Further, medical professionals, including obstetrician-gynecologists, lack adequate training in abortion procedures, because medical training programs do not provide sufficient abortion training on the ground that abortion is illegal; thus, this leads to the increased risk of medical malpractice or the resulting complications in clandestine abortions. For these reasons, we find that the complete and uniform ban on abortion fails to sufficiently protect a pregnant woman's life and health.

(c) As discussed above, abortion legislation that bans, in principle, abortion throughout pregnancy and specifies grounds for exceptions to this ban simply gives precedence to the protection of a fetus's life over the protection of a pregnant woman's right to self-determination. In effect, such legislation denies or deprives the pregnant woman of her right to self-determination.

In relation to abortion, the legislature should decide how to protect pregnant women's right to self-determination while reducing abortions and protecting the lives of fetuses, instead of simply deciding which interest prevails.

If abortion is allowed during the period when it is safe for pregnant women and in exceptional cases, this will lead to allowing abortion for those pregnant women who have justifiable grounds to terminate their pregnancies. This type of abortion regulation could pose the same problem as the one permitting abortion only for certain grounds, virtually depriving a pregnant woman of her right to self-determination by permitting

abortion only in dire and exceptional circumstances.

(d) For the above reasons, we conclude that 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. Additionally, during this stage of pregnancy, the State can serve the public interests that are equally or more important than the pregnant woman's right to self-determination by means that are less restrictive of this right, such as the provision of opportunities for the pregnant woman to collect sufficient information or receive counseling services regarding the meaning, process, consequences, and risks of abortion.

In consideration of the foregoing, we find that the Self-Abortion Provision violates the least restrictive means test. The Abortion by Doctor Provision, which is based on the Self-Abortion Provision, violates the least restrictive means test as well.

(e) It is self-evident that there is a vital public interest in protecting the life of a fetus. However, as noted earlier, the Self-Abortion Provision does not effectively serve the public interest in protecting the fetus's life. Rather, in effect, it totally deprives a pregnant woman of the right to self-determination by imposing a complete and uniform ban on abortion even during the first trimester of pregnancy, when abortion is safe. Further, it even forces the pregnant woman to continue the pregnancy, give birth, and suffer the consequences of these actions. For these reasons, the private interest restricted by the Self-Abortion Provision is no less significant than the public interest served by this Provision. The Self-Abortion Provision and the Abortion by Doctor Provision violate the balance of interests test.

(f) In consideration of the foregoing, we find that 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.

3. Legitimate Necessity of a Decision of Simple Unconstitutionality

(a) The constitutional nonconformity opinion has issued a decision of nonconformity to the Constitution and an order for continued application, in lieu of a decision of simple unconstitutionality, for reasons (1) that the Provisions at Issue, without exceptions, completely and uniformly prohibits every pregnant woman who faces the abortion dilemma arising from various and wide-ranging socioeconomic circumstances from having an abortion during a sufficient amount of time before the point of viability, during which the deliberation regarding, and the actual exercise of the right to self-determination regarding whether to continue a pregnancy and give birth take place; that the Provisions at Issue criminally punish violations of the ban on abortion; and that the prohibition and punishment of abortion to protect fetal life are not unconstitutional in themselves or in all cases; (2) that the rendition of a decision of simple unconstitutionality would lead to creating an unacceptable legal vacuum fully permitting all abortions; and (3) that the legislature must exercise its discretion in deciding the details of abortion legislation, such as when and on what grounds abortion should be permitted; how to combine the periodic model with the indications model; and whether to require the mandatory counseling or reflection period before abortion.

The reasons (1) and (2) are linked to the problems caused by rendering a simple unconstitutionality decision: the absence of regulation of acts warranting criminal punishments, and the provision of a remedy as a result of a retrial, against constitutionally permissible imposition of punishment.

(b) We will first examine whether a decision of nonconformity to the Constitution can be rendered in this case for the reason that the prohibition and punishment of abortion to protect fetal life are not unconstitutional in

themselves or in all cases. Generally, statutes that restrict fundamental rights contain both constitutional and unconstitutional parts. This is particularly true of statutes restricting rights of freedom, and the decisions on these statutes are normally issued based on the Court's assessment of whether the restrictions imposed by them are so severe as to violate the Constitution. Thus, if the Court were to simply declare a statute nonconforming to the Constitution for the reason that the statute's restrictions on a fundamental right 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, as well as the existence of the type of decision rendered based on this rule—a decision of simple unconstitutionality.

Moreover, a decision of nonconformity to the Constitution limits the temporal effect of a decision of simple unconstitutionality and allows the court, until a certain time point, to find a person convicted under a blatantly unconstitutional penal provision guilty although that person should be judged not guilty. In this regard, the a decision of nonconformity to the Constitution runs counter to the spirit of our institutional framework recognizing the retrospective effect of the decision of simple unconstitutionality on a penal provision. We are of the opinion that, where a penal provision is so broad in scope that the unconstitutional part cannot be separated from it, the Court should deliver the decision of simple unconstitutionality on that penal provision, thereby imposing the burdens associated with invalidating the constitutional part of that penal provision on the State. Only where the decision of simple unconstitutionality is likely to create a legal vacuum and cause serious confusion, as well as harm to a public interest, the decision of nonconformity to the Constitution may be issued on a penal provision, even though this means that the part of the penal provision which forms the basis for the State's abuse of authority to enforce criminal sanctions remains effective.

(c) Thus, we will next examine whether the decision of simple unconstitutionality creates an unacceptable legal vacuum in this case. Where it is clearly expected that the absence of an existing unconstitutional

statute will be more inimical to the constitutional order than its presence, it is more conducive to the maintenance of the general legal order to maintain the unconstitutional statute until its amendment is made than to abrogate it instantly. This does not mean, however, that the decision of nonconformity to the Constitution may be easily rendered based solely on the simple weighing of the social costs of confusion to be caused by a legal vacuum against the constitutional rights to be restored by instant repeal of an unconstitutional law, when the former outweighs the latter. Because criminal punishment, regardless of its form, puts its recipient at a greater disadvantage than any other punishment, requiring the State to bear the harm caused by a legal vacuum following an instant repeal of an unconstitutional law is more compatible with the spirit of the Constitution than leaving individuals to suffer from that unconstitutional law, even if that instant repeal creates a significant legal vacuum. We believe that, even in case of a request for the continuation of the constitutional order, the State should first and foremost seek to provide a remedy for those individuals who are subject to an unconstitutional law unless refusing to grant that request causes extreme social confusion that cannot be resolved by existing personal and material resources.

(d) More specifically, as noted in the constitutional nonconformity opinion, most pregnant women make decisions whether to terminate a pregnancy after careful evaluation of various factors, including affection for the fetus and the ethical problem of depriving the fetus of life, along with the social, economic, physical, and emotional burdens of parenting, as well as the future life of the fetus. Their decisions are made based on comprehensive and in-depth reflection on the future life of themselves and their fetus and based on recognition of the profound impact of their decisions on the life of themselves and their fetus. Given the weight of those decisions, we observe that the possibility of criminal punishment has a limited effect on those decisions. Further, there is little solid evidence that imposing no punishment for abortion will lead to an increase of abortions, but there is substantial empirical evidence that the rate of abortions in countries that impose no punishment for abortion is

relatively lower than that in countries that impose punishment for abortion. Additionally, the penal provisions for abortion have not served their original legislative purpose of protecting fetal life. For instance, as stated in the constitutional nonconformity opinion, the Self-Abortion Provision has been abused by a woman's ex-male partner as a means to retaliate against or harass the woman, or to put pressure on her to settle a family dispute or other civil disputes. Considering that most of the women who have been prosecuted and received criminal penalties for self-abortion were reported by their ex-male partner with such malicious intent, and that self-abortion crimes have been very rarely prosecuted, which means the Self-Abortion Provision has become virtually a dead letter, we find that the Provisions at Issue have a limited effect on deterring abortion. Further, given that there have been very few cases in which criminal punishment has been imposed under the Provisions at Issue, and that most of these cases have been occasioned by women's ex-male partners with malicious intent to abuse the Provisions at Issue in such a way that is inconsistent with the original legislative intent thereof, we find that the Provisions at Issue do not function properly as penal clauses. For these reasons, we conclude that the repeal of the Provisions at Issue is unlikely to give rise to extreme social confusion or social costs.

On the other hand, even if it is difficult to draw the line between unconstitutional and constitutional parts of a penal provision, instituting prosecution based on this penal provision, which includes an unconstitutional part, and later imposing punishment based on retrospective legislation containing the constitutional part of this penal provision run counter to the legislative intent to afford retrospective force to decisions of unconstitutionality as discussed above, and, at the same time, demonstrate the fact that this penal provision before its amendment was vague. Further, we find that applying this vague provision to individuals is harsh, because this amounts to forcing them to suffer the burdens associated with the deficiency in regulation.

(e) Next, as clearly noted in the constitutional nonconformity opinion,

the Provisions at Issue violate the rule against excessive restriction and thus infringe the right to self-determination of a pregnant woman (1) by, without exceptions, completely and uniformly prohibiting every pregnant woman who faces the abortion dilemma arising from various and wide-ranging socioeconomic circumstances from having an abortion during a sufficient amount of time before the point of viability, during which the deliberation regarding and the actual exercise of the right to self-determination regarding whether to continue a pregnancy and give birth take place; and (2) by criminally punishing violations of the ban on abortion. We believe that a decision of simple unconstitutionality rendered based on this clear rationale will provide the basis for the National Assembly's amendment of the Provisions at Issue, producing the same result as the rendition of a decision of nonconformity to the Constitution. Therefore, the rendition of the decision of simple unconstitutionality is unlikely to give rise to extreme legal confusion or social costs.

(f) Moreover, as stated above, we find that the Provisions at Issue violate the Constitution, because they prohibit a pregnant woman from having an abortion during the first trimester of pregnancy, although abortion should be permitted without restriction as to reason and be left to the deliberation and judgment of the pregnant woman during this period. Since 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, and since the legislature has no discretion to decide whether to impose punishment for abortions performed during the first trimester of gestation, we do not find it necessary or essential to issue decisions of nonconformity to the Constitution on the Provisions at Issue.

(g) Therefore, because the Provisions at Issue contravene the rule against excessive restriction and thus infringe the right to self-determination of a pregnant woman, we declare that the Provisions at Issue violate the Constitution.

V. 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 not later than December 31, 2020. If amendment is not made by that date, the Provisions at Issue will become null and void as of January 1, 2021.

In addition, the Court modifies the August 23, 2012 decision in 2010Hun-Ba402, in which it was held that the Self-Abortion Provision and the part concerning "midwife" in Article 270 Section 1 of the Criminal Act (amended by Act No. 5057 on December 29, 1995) did not violate the Constitution, to the extent that it conflicts with the Court's decision in this case.

Dissenting from this decision, Justice Cho Yong-Ho and Justice Lee Jongseok deliver the following constitutionality opinion in Ⅵ.

VI. Constitutionality Opinion of Justice Cho Yong-Ho and Justice Lee Jongseok

For the following reasons, we are of the opinion that the Provisions at Issue do not violate the Constitution.

A. Opinion on the Self-Abortion Provision

Being born from a mothers' womb without being aborted enables us to debate the constitutionality of the Self-Abortion Provision in this case. This means that we were once all fetuses.

1. Case on the Crimes of Abortion

1. Human Dignity, Fetal Life, and the State's Protection Duty

(a) All citizens shall be assured of human worth and dignity (Article 10 of the Constitution). In previous cases, the Court opined that the ideal human image posited by our constitutional order was "that of a mature democratic citizen who decides on and shapes each one's life under his or her responsibility within the social community on the basis of his or her view on life and society" (*see* 96Hun-Ka5, May 28, 1998; 98Hun-Ka16, etc., April 27, 2000); or "that of a human being with a personality who is neither a subjective individual isolated from society nor a mere member of a community, but who is associated with, and tied to the community and, at the same time, remains intact from its intrusion of his or her intrinsic value and strikes a balance between maintaining a personal life and a community life" (*see* 2002Hun-Ma518, October 30, 2003). Nevertheless, this does not mean that individual and specific humans who present human images different from the above ones possess no dignity.

Our Constitution requests that all human beings have dignity simply by virtue of being human. Human life is invaluable; it is the source of dignified human existence, which cannot be replaced by anything else in this world. Although the right to life is not enshrined in the Constitution, it is a natural right, transcending time and space, rooted in the human instinct to survive and the purpose of human existence. It is unquestionably clear that the right to life is the most fundamental right and the foundation of all rights provided under the Constitution (*see* 92Hun-Ba1, November 28, 1996). Wherever human life exists, it should be accorded human dignity; it is not significant whether the bearer of life is conscious of this dignity and capable of safeguarding the life of his or her own. The potential abilities of the earliest human being would be sufficient to justify this dignity (BVerGE, 39, 1, 41).

(b) The nature of a maternal-fetal relationship is very unique. The pregnant woman can view her fetus both as herself and as a separate individual at the same time. It is neither possible to identify the fetus and

its mother as one person nor two, and they build a special association where they cannot oppose each other despite the possibilities of them violating each other's interests. They both deserve respect based on human dignity.

The fetus possesses the internal value of life as it develops into a complete human being. This is not just because the fetus is part of the human species with the same genetic makeup, but rather it is because the fetus has the potential to grow naturally to develop into a unique human being that cannot be replaced by anyone else. The fetus receives nutrients and oxygen from the mother, but its cell division and growth occur independently. It has a separate immune system from the mother and can move independently by its own will while being able to feel pain after a certain period. Thus, as an independent living organism, the fetus grows to be a dignified human in the future unless there is an unfortunate case of natural miscarriage. Although the fetus depends on the mother for survival, it can survive independently before natural birth if more than a certain period of time (about 22 weeks of pregnancy with current medical technology) has elapsed. Considering that the fetus develops more and more human features before childbirth and is recognized as a real human after childbirth, 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.

The question is at what point life should receive constitutional protection as a dignified being. Although it is impossible for experts in medicine, philosophy, and theology to reach a consensus on this matter, if life before birth is excluded from the protection of the right to life by the Constitution, the protection of the right to life should be regarded as incomplete, as the fetus must also be regarded as the subject of the constitutional right to life (*see* 2004Hun-Ba81, July 31, 2008; 2010Hun-Ba402, August 23, 2012). Because the development of the embryo has been an ongoing process since the implantation of the embryo, the exact stage of development cannot be established, and while the developmental

process of the embryo, especially the mental aspect, is still lacking, it can be predicted that the time for the fetus to survive independently from the mother is advanced. We also cannot rule out the possibility that someday the embryo might grow from the beginning in an artificial uterus. Thus, when we are doubtful, we have no choice but to choose the interpretation method that maximizes the protection of right to life. Therefore, at least when embryos are implanted in the uterus, the embryo, until birth, should be able to enjoy human dignity as a life with intrinsic human value regardless of the gestational period.

(c) We have fundamental doubts about whether the freedom of abortion, which may terminate the physical existence and life of a fetus, can possibly be protected by the right to self-determination. Even if we accept the premise that the fetus is a part of its mother's body, we do not see that a woman's right to self-determination includes the positive freedom to terminate a fetus's life, because the fetus itself possesses at least the internal value of life. In principle, a pregnant woman is a dignified human being and is clearly entitled to the right not to be used as a means to sustain and develop the life of a fetus (right of personality) and the right not to have her bodily integrity interfered with (freedom of bodily integrity).

On the other hand, the right to abortion is written nowhere in the Constitution, and the citizens who were vested with the constituent power did not intend to endow women with that right as well. It is fair to say that a fetus's right to life and a woman's right to self-determination cannot be weighed against each other. Abortion is not a matter of free choice, but a matter of unethical act of taking the life of a living being. Our legal order neither requires nor allows anyone to sacrifice another's life for the sake of one's own freedom of bodily integrity. In general, a pregnant woman's exercise of the right to self-determination is limited to the extent that it does not infringe another being's freedom or right. Therefore, a pregnant woman's right to self-determination does not include the right to terminate the internal value of a life, which means to take the life of a fetus.

However, the Court found in a previous case (2010Hun-Ba402, August 23, 2012) that a pregnant woman's right to self-determination includes her right to decide whether to continue or terminate her pregnancy, and the majority opinion in this case reached its conclusion based on this finding. Although we are doubtful, as noted above, of the validity of this finding, we proceed to determine the merits of this case based on the premise, which has been adopted in the above precedent and majority opinion in this case, that the Self-Abortion Provision restricts a pregnant woman's right to self-determination, namely the freedom of abortion.

(d) Human dignity is a supreme constitutional value and a normative goal sought by the State. It binds all government institutions, and the State is entrusted with the duty and task to realize human dignity. Since Article 10 of the Constitution stipulates that "It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals," the State has the duty to protect a fetus's right to life, which is a fundamental and inviolable human right (*see* 2004Hun-Ba81, July 31, 2008).

The most important duty of the State is to protect the life, safety, and interests of all members of the community. This is especially true with respect to the members who are not capable of protecting themselves. A fetus has no means to defend itself, and because it is developing into a human life, it is vulnerable to external threats. Since life cannot be restored once lost, and since it is impossible to impose limited restrictions on life, a fetus's life cannot be protected unless there is a ban on depriving fetuses of life. Thus, the State may impose a ban on abortion, which can deprive fetuses of life, in order to perform its task to realize human dignity.

Pursuant to its duty and task to realize human dignity, the State holds the duty to protect life, and this duty prohibits not only the State from posing a direct harm to a fetus but also a third party from endangering the fetus's life as well, which is the source of human dignity (*see* 2006Hun-Ma788, August 30, 2011). Because abortion is intentional destruction of life, the State should enforce its life protection duty to

safeguard fetuses carried by pregnant women. Although it is apparent that the fetus and the pregnant woman stand in a very special relationship with each other, yet the fetus is a living being that has an existence separate from its mother, and therefore we find that there is a need to protect the fetus's life where its mother takes its life by obtaining self-abortion, just as in cases involving other third parties endangering the fetus's life. The fetus should be guaranteed the right to life by the legal order solely based on its existence, not based on its mother's approval for that right.

Yet, it is also the duty and task of the State to protect the fundamental rights of a pregnant woman who is forced to continue her pregnancy and give birth. Thus, the issue of whether the pregnant woman's fundamental rights are unduly infringed by the Self-Abortion Provision may be determined by the Court.

(e) In view of the above, we conclude that the Self-Abortion Provision serves the legitimate legislative purposes of deterring pregnant women from having abortions and thus of protecting fetuses' right to life. Further, because it prohibits, with exceptions, pregnant women from obtaining abortions and criminally punishes violations of this prohibition, it also is an appropriate means of achieving the above purposes.

2. Criminal Punishment and Least Restrictiveness of Means

(a) Since a fetus possesses human dignity, the State has the duty to protect its life and also should afford the fetus legal protection even from its mother. The legislature has no alternative but to resort to criminal means if other means cannot provide fetal protection as demanded by the Constitution. Fetal life can be protected by the imposition of a general ban on abortion and by the imposition of criminal punishment on violations of this ban, and this protection is afforded by the Self-Abortion Provision.

As a general rule, in determining whether a law infringes a fundamental right, the Court uses the "least restrictive means" test to decide whether

a less restrictive alternative means could equally achieve the same legislative purpose. However, this test is of less importance in relation to a prohibition of abortion. What is of more importance is to determine whether the use of criminal punishment is necessary to enforce the prohibition of abortion.

Imposing a general ban on abortion and criminally punishing violations of this ban are the most feasible and effective means of protecting fetal life among the options available to the legislature. Because criminal penalties are the most potent and feasible means of achieving a legislative purpose, we have doubts about whether other means would equally be effective in deterring abortion. Admittedly, the State needs to refrain from deploying criminal sanctions due to their strong legal effect and their effect of restricting fundamental right(s)—the extent of the effect of which is incomparably powerful in comparison to other legal means; therefore, the legislature must pursue means other than criminal punishment, if possible (*see* 2008Hun-Ka22, etc., August, 30, 2011). Nonetheless, 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. Further, considering that abortion is widely performed in practice despite the Self-Abortion Provision regulating it by criminal penalties, we cannot rule out the possibility that, if abortion is not punished at all or is punished by sanctions lighter than criminal penalties, this may result in more abortions—in failure to achieve the Self-Abortion Provision's legislative purpose of protecting a fetus's right to life, nor do we see that abortion can be effectively deterred by other means such as promotion of sex education or contraceptive-related education; provision of abortion-related counseling; and implementation of national and community-level safeguards for motherhood. For these reasons, we cannot postulate the existence of alternative means less restrictive of the woman's right to self-determination than, but equally effective in protecting fetal life as, the imposition of a general abortion ban and criminal punishment for violations of this ban.

(b) The majority opinion asserts that the Self-Abortion Provision as a criminal penalty provision does not have the practical effect of serving the legislative purpose of protecting fetal life on the ground, among others, that the numbers of prosecutions for abortion have been much lower than the estimated numbers of abortions. However, it is widely accepted that criminal punishment, by its very existence, has a measurable deterrent effect on criminal behavior. Because the pregnant woman who procures an abortion and the doctor who performs it are both punished for their actions, the procedure is conducted very secretly and is thus rarely reported; therefore, the fact that there have been few prosecutions for abortion does not directly support a conclusion that the provisions on crimes of abortion do not have any practical effect. It is true that a number of studies indicate that the estimated numbers of abortions and the rates of induced abortion operations in our society have been in steady decline. Admittedly, this trend is in part the result of a combination of various factors, including the increased use of contraception, decline of son preference, and improvement of economic conditions. However, it cannot be denied that the prohibition of abortion by criminal means is also one of such factors.

The majority opinion also asserts that abortion should not be punished by criminal means, on the grounds, among others, that the Self-Abortion Provision has in effect become a dead letter; it does not have a deterrent effect on pregnant women who are desperate to have an abortion; it disregards the health risks and harm that abortion poses to pregnant women; it is used by a biological father of a fetus, who does not want an abortion, as a means of threatening pregnant women; or it is used as a means of putting pressure on pregnant women to settle a family dispute or other civil disputes. However, the existence of such an abuse does not lead to the conclusion that the Self-Abortion Provision fails to serve the purpose of protecting fetal life; instead, the existence thereof leads to the conclusion that we require measures that prevent such an abuse of the Self-Abortion Provision. Although the Self-Abortion Provision has in effect become a dead letter, its existence would be justified if it can save

the life of only one fetus. The assertion that abortion poses health risks and harm to pregnant women is based on the premise that abortion is permitted, and thus is not relevant to this case, which addresses the issue of whether abortion should be allowed. Further, the grounds for allowing abortion, number of abortions, or rate of abortions in each country are influenced by a combination of various social and cultural factors as well as tradition and custom of their own and thus cannot be compared with other countries' grounds in a facile manner.

(c) We find it hard to believe that there are alternative means less restrictive of a pregnant woman's right to self-determination than, but equally effective in protecting a fetus's life as, the imposition of a general ban on abortion and criminal punishment for violations of this ban. As a result, the balance of interests test, which weighs the public interests to be achieved by the Self-Abortion Provision against the private interests to be infringed by it, lies at the crux of determining the constitutionality of the Self-Abortion Provision.

3. Balance of Interests

(a) Conflict between a fetus's right to life and a pregnant woman's right to self-determination

Life is the source of dignified human existence, which cannot be replaced by anything else in this world. Thus, there is a vital and imperative public interest in protecting the life of a fetus. Further, the right to life, because of its nature, cannot be partly restricted; any restriction of this right means a complete deprivation thereof, and an aborted fetus forever loses the opportunity to grow into a human being. Given the importance of protecting a fetus's life and given the peculiar nature of the infringement of the right to life, we find that the legislature should make its utmost effort to protect the fetus's life and prevent infringement of its right to life.

A fetus's right to life and a pregnant woman's right to self-determination

are in an adversarial relationship. It is impossible to reconcile these two rights in any situation. Therefore, deciding when and which right should prevail is a very difficult philosophical, ethical, normative, medical, and sociological question.

The legislature has the discretion to specifically determine how and to what extent the State should protect the fetus where the fetus's right to life and the pregnant woman's right to self-determination are in conflict with each other. We note, however, that the fetus will not receive the same level of protection as the pregnant woman if the legislature determines to sacrifice the fetus's right to life in order to afford the pregnant woman the freedom of bodily integrity or the right to self-determination.

The Self-Abortion Provision bans abortion and allows exceptions only for emergencies, set forth in the Mother and Child Health Act. These emergencies include, *inter alia*, the need to protect the life and health of the pregnant woman, or pregnancy as a result of a crime. This legislation provides broad protection for the life of a fetus and thereby basically intended to give precedence to a fetus's right to life over a woman's right to self-determination. This determination of the legislature to prioritize the fetus's right to life over the pregnant woman's right to self-determination should be honored.

(b) Relationship between the State and its duty of protection

The Self-Abortion Provision serves the public interest in protecting a fetus's life and thus in defending the constitutional value system deriving from human dignity. The State has a legitimate public interest in protecting the fetus, which is valuable by virtue of its potential to grow into a human being. That the Self-Abortion Provision prohibits a pregnant woman from having an abortion is not because it regards her as a means for sustaining and developing the life of the fetus. It is because our constitutional order does not allow the pregnant mother to sacrifice the life of the fetus, which is in a unique communal relationship with her and has an inherent value of a human being, and because our constitutional

order cannot but pursue a normative goal of protecting the unborn life, which does not have any means to defend itself.

All legislative, executive, and judicial institutions of the State have the duty to protect a fetus, and must establish a legal order protecting the fetus and inducing its birth. Indeed, the Court is one of these institutions. Thus, the Court should not recklessly disregard the legislature's determination to protect the life of the fetus through the Self-Abortion Provision. A decision on whether and when to allow abortion should be made by the legislature, an institution of representative democracy, after majority public opinion is aroused through serious and extensive public debate.

(c) Regarding the developmental stage of a fetus

The Self-Abortion Provision bans abortion in principle and thereby gives, regardless of a fetus's developmental stage, precedence to a pregnant woman's right to self-determination over a fetus's right to life throughout pregnancy.

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. As noted above, the Constitution protects the life of a fetus because it is a dignified living being that is expected to become human, not because it has the ability to survive independently, or has the mental capacity, *inter alia*, for thought or self-awareness. Every human being is equally entitled to the protection of his or her life, regardless of his or her physical condition or developmental status, and by the same token, a fetus as a subject of the right to life is entitled to that protection as well, regardless of its developmental stage (*see* 2010Hun-Ba402, August 23, 2012).

In particular, given that there is an increasing probability of the fetus's survival outside the mother's womb due to the rapid advancement of medicine, and given that each fetus has a different speed of development,

there is no justification for affording a varying degree of protection to the life of a fetus depending on its developmental stage, viability, or on the period of "safe abortion."

The development of life is a set of continuous process. It cannot be distinctly separated into stages according to gestational age. Therefore, we have doubts about setting a certain time point—for instance, 12 weeks of gestation—after which abortion is banned and punished, because we do not observe that a 12-week fetus and a 13-week fetus have any fundamental difference requiring a different degree of protection. We also have concerns about banning and punishing abortion after viability, because the same rationale may be applied to patients in a vegetative state and others who are lying in intensive care units of hospitals. As the majority opinion noted, different legal protection is conferred to fetuses at different developmental stages under the Criminal Act; however, we believe that this rule cannot be extended to cases concerning the constitutional protection of fetal life, because this rule is based on the categorization of crimes unique to the Criminal Act which classifies crimes by the type of legally protected interest that they invade. If, as suggested by the majority opinion, abortion is allowed during the Determination Period or the first trimester of gestation, such allowance will create a vacuum in protecting a fetus's right to life during either of these periods, leading to the State's failure to fulfill its duty to protect fundamental rights. We therefore find that the Self-Abortion Provision has reasonable grounds for banning and punishing abortion not depending on the fetus's developmental stage, viability, or on the period of safe abortion.

(d) Regarding socioeconomic indications

The majority opinion argues that the Self-Abortion Provision unduly restricts a pregnant woman's right to self-determination by not allowing abortion on socioeconomic grounds. The socioeconomic grounds cited by the majority opinion include career interruption; parenting; reproductive

rights; interference with education, career, or public activities; financial burden; premarital or out-of-wedlock pregnancy; divorce, separation, or termination of relationship. However, the concept and scope of socioeconomic grounds are very vague, and it is difficult to objectively verify whether a woman falls under any of those grounds. Allowing abortion on socioeconomic grounds is equivalent to allowing abortion depending on the convenience of pregnant women, and such allowance leads to the same result as fully legalizing abortion. If abortion is permitted based on the notion that one can remove inconveniences from one's life at any time, there will be no reason to deter abortion, and, moreover, such permission may be a general disregard for human life. Simply put, permitting abortion on socioeconomic grounds establishes the right to take human life based on "convenience." The preamble to the Constitution declares that "To help each person discharge those duties and responsibilities concomitant to freedoms and rights." In keeping with this spirit of the Constitution, a woman who chooses to have sexual intercourse must bear the responsibility for pregnancy and childbirth, which are the effects of the cause chosen by herself. A pregnant woman must find happiness not by terminating the pregnancy, but by saving the fetus. The image of such a woman corresponds to the above-mentioned ideal human image posited by our Constitution. If our generation legalizes abortion by jumping on the bandwagon of the current zeitgeist and ideological orthodoxy characterized by the removal of relative inconveniences in life, even we may someday be an inconvenience for the next generation and be eliminated in the name of euthanasia or *goryeojang*.

The socioeconomic grounds advanced by the majority are related to social problems that have existed from the outset and have not arisen as the result of prohibition and punishment of abortion. Even if those social problems faced by pregnant women are in some respects caused by not allowing abortion, the focus should be on resolving their root structural causes, namely, the lack of support for and negative perception of unwed mothers; an unfavorable environment for parenting; and sexually

discriminative and patriarchal cultures at home and in the workplace.

A question may arise as to whether the Self-Abortion Provision violates a woman's reproductive rights, which include the right to make decisions about family planning, namely, the number, spacing, and timing of children, and the right to have the information and means to do so. We believe that violations of such reproductive rights can be substantially prevented by the use of contraceptives instead of abortion. There is an obvious and important difference between destroying life by *abortion* and preventing life by *contraception*; this difference is the most compelling public reason why abortion, and not contraception, is prohibited. The State cannot but choose the Self-Abortion Provision in order to provide more protection to a fetus's right to life than to a woman's reproductive rights.

Therefore, we find that the socioeconomic grounds advanced by the majority opinion do not provide a compelling reason for us to hold that the Self-Abortion Provision unduly restricts a woman's right to self-determination.

(e) Regarding the grounds for legal abortion

The prohibition of abortion may result in infringing not only a pregnant woman's right to self-determination but also her right to personality, human dignity and worth, or right to health in some cases, depending on her circumstances. If no exceptions are made to the prohibition and punishment of abortion in these cases, this could be contrary to the spirit and value of the Constitution. Generally recognized grounds for legal abortion (induced abortion operation) include medical, eugenic, or ethical: where it is patently unreasonable to expect in light of social norms that the mother can continue the pregnancy, such as in cases of a serious risk to her life and health, or pregnancy as a result of a crime.

Likewise, the Mother and Child Health Act provides that a doctor may perform an induced abortion operation within 24 weeks with the consent

of the pregnant woman herself and her spouse in the following cases: (1) where she or her spouse suffers from any eugenic or genetic mental disability or physical disease; (2) where she or her spouse suffers from any contagious disease; (3) where she is impregnated by rape or quasi-rape; (4) where pregnancy is taken place between relatives by blood or by marriage who are legally unable to marry; or (5) where the maintenance of pregnancy severely injures or is likely to injure the health of the pregnant woman for health or medical reasons. Further, under this Act, the doctor and the pregnant woman in these cases are not punished (Articles 14 and 28 of the Mother and Child Health Act and Article 15 of the Enforcement Decree of the Mother and Child Health Act). Therefore, we find that this Act shows consideration for women by preventing the Self-Abortion Provision from violating their human dignity and worth, right to life, and other values.

The Petitioner asserts that Article 14 Section 1 of the Mother and Child Health Act recognizes very narrow exceptions to the abortion ban and violates the void-for-vagueness doctrine by not setting out the standard and process of review in determining whether the pregnant woman is impregnated by rape or quasi-rape. The Petitioner also contends that the part of this statutory provision concerning requiring the consent of the pregnant woman's spouse discriminates against pregnant women on account of their gender or marriage status and thus violates their right to equality and right to self-determination. However, we do not proceed to these arguments, because they center around the unconstitutionality of Article 14 Section 1 of the Mother and Child Health Act, and not of the subject matter of review in this case.

(f) Regarding gender-based discriminatory effect

The Petitioner's claim of indirect discrimination that the Self-Abortion Provision has a *gender-based discriminatory effect* because only women can become pregnant is incorrect in that, in reality, gender-based discriminatory harm occurs not due to the Self-Abortion Provision;

unwed, underage, or socioeconomically vulnerable pregnant women are disadvantaged, not on account of the absence of the freedom of abortion, but on account of gender-based discrimination; prejudice against individual circumstances of a pregnant woman; insufficient safeguards for motherhood; and other factors in our society.

Contrary to the Petitioner's claim, we observe that the legalization of abortion could have a gender-based discriminatory effect in reality. Currently, recommendation of or incitement to abortion cannot be easily or legally made in a public manner by the man who desires to relieve himself from the duty to care for the child or from the responsibility of the biological father, or by the pregnant woman's family and friends who are concerned about the social prejudice and financial constraints that she may face. If abortion becomes a mere matter of choice, recommendation of or incitement to abortion will be made without hesitation and this will have disadvantageous consequences for the pregnant woman. This is the same reason given by early feminists as to why they were opposed to abortion.

The Self-Abortion Provision punishes the man and woman involved in the performance of, incitement to, and complicity in abortion, but it does not have any effect on non-pregnant women. Thus, it amounts to gender-neutral regulation and does not discriminate against anyone. The Self-Abortion Provision is an inevitable measure to protect the life of a fetus; there is no hidden intention to discriminate against women behind this Provision. On the other hand, allowing abortion on the basis of the pregnant woman and her family's preference for a child of a particular gender clearly causes a gender-based discriminatory effect.

(g) Sub-conclusion

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 this Provision. Although this

Provision does not make a substantial contribution to eradicating abortion, we find that it serves a compelling public interest, considering the deterrent effect resulting from it and the disregard for human life that may result from its absence (*see* 2010Hun-Ba402, August 23, 2012).

Therefore, the Self-Abortion Provision does not violate the balance of interests test.

4. The Legislature's Deliberation and the Necessity of the Protection of Motherhood

In 1973, the Supreme Court of the United States rendered a decision in *Roe v. Wade* in which it overturned state laws regulating abortion. Has a social consensus on abortion been reached and controversy over it been resolved in the Unites States since that decision? On the contrary, as we have seen throughout history, the controversy over abortion has continued unabated. Even the plaintiff in the above case, Norma McCorvey, later became an activist in the anti-abortion movement, and the regulation of and disputes over abortion still continue to exist in many American states. Further, after the above decision and other relevant court decisions, groups supporting and opposing each decision have become organized and politically powerful with more solidarity, resulting in the subsequent change of the political landscape in the United States, even influencing the composition of its Supreme Court.

In order to determine what actions the State should take in fulfilling its duty to protect the life of a fetus, constitutionality of the exercise of governmental powers can be reviewed and such review is necessary, because the State should not be subject to either the common sense of justice shared by citizens or the will of a majority but should be subject to the constitutional order of values. As the primary guardian of the constitutional order of values, the legislature should actively and carefully deliberate on the regulation of deeply divisive issues, such as abortion, requiring an analysis of the essence of human dignity. However, disengagement from the political process and reliance on judicial review

cannot be the ultimate solution to all problems.

Our Constitution provides in Article 36 Section 2 that “The State shall endeavor to protect mothers.” Yet, pregnant women do not receive sufficient protection from the State. In reality, not every woman can share parenting with the father of the child, nor can every dual-income household receive enough support from family or the social system in raising a child. Some women may find themselves fortunate enough not to face discrimination and bias based on pregnancy. If this social environment does not change, those who claim that the rights to deny abortion and to take the life of a fetus are necessary to raise the social status of women will not refrain from voicing their opinions.

The State has the duty to improve through legislation the reality that may threaten human dignity. In addition to imposing criminal penalties for abortion, it should 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” since pregnancy concerns not only women but also men; establishing social protection system for unwed mothers; relieving women of the burdens of pregnancy, childbirth, and parenting through formulation of maternity protection policy; providing sufficient support for expectant, married couples; and increasing childcare facilities. Only women can give birth, however, government, society, and men can and should shoulder the financial burden of parenting. Such efforts to enact legislation and to improve the institutional framework will effectively guarantee a fetus the right to life and, at the same time, protect a woman’s right to self-determination.

5. Conclusion

As seen above, the fact that the Self-Abortion Provision does not allow abortion in the early stages of pregnancy or for socioeconomic reasons is not contrary to the rule against excessive restriction. Thus, the Self-Abortion Provision does not unduly restrict a pregnant woman’s

right to self-determination.

The Court already decided on August 23, 2012, that the Self-Abortion Provision was constitutional. Now, less than seven years after that decision, we see no change in circumstances sufficient to warrant its reversal. This is also why we conclude that the declaration of constitutionality of the Self-Abortion Provision must be affirmed.

B. Opinion on the Abortion by Doctor Provision

"I will maintain the utmost respect for human life from the time of conception, even under threat; I will not use my medical knowledge contrary to the laws of humanity." (Declaration of Geneva based on the Hippocratic Oath)

Aside from the claim regarding the constitutionality of the Self-Abortion Provision, the Petitioner raises a separate claim that the Abortion by Doctor Provision (Article 270 Section 1 of the Criminal Act) imposes excessive punishment of not more than two years of imprisonment on a doctor who performs an abortion with the woman's consent. Hence, we will discuss below whether (1) the Abortion by Doctor Provision violates the principle of proportionality between criminal liability and punishment by providing that a doctor who performs the abortion upon the request or with the consent of the pregnant woman, shall be punished by imprisonment for not more than two years; and whether (2) it upsets the balance in the system of penalties and thus contravene the constitutional principle of equality by not setting forth any monetary penalty like the one for abortion with the woman's consent provision in Article 269 Section 2 of the Criminal Act.

1. Whether the Principle of Proportionality Between Criminal Liability and Punishment Is Violated

Defining what act constitutes a crime and affixing the penalty for it are matters of the State's legislative policy. The Court must recognize the

fact that the legislature is vested with broad legislative discretion, or freedom to make law, in relation to those matters because it needs, in principle, to consider a variety of factors, including our history and culture; contemporary conditions; citizens' common values or common sense of justice; the reality and nature of crimes; interests to be protected; and crime prevention effect. Moreover, the Court should not readily conclude that a statutory penalty for a crime is unconstitutional unless that penalty clearly violates the constitutional principles of equality and proportionality —for instance, unless it is grossly disproportionate to the nature of the crime and to the criminal liability of the perpetrator by upsetting the balance in the system of penalties, or unless it goes beyond the degree necessary to serve its original purpose and function (*see* 2009Hun-Ba29, February 24, 2011).

We find that the legislature concluded that a doctor who performed an abortion had a higher degree of criminal liability than a non-medical professional, because the performance of the abortion was contrary to a doctor's duty to provide medical care and advice in order to sustain and protect life and in order to recover and promote health; and that it feared that a doctor would abuse his or her ability to perform an abortion operation and his or her professional medical knowledge in order to make profits for himself or herself. These findings explain why the legislature intended to protect the life of a fetus by prescribing only imprisonment for an abortion by a doctor. That legislative intent is legitimate, and the imposition of imprisonment for the abortion by the doctor is an appropriate means to achieve it.

The Abortion by Doctor Provision provides that a doctor shall be punished only by imprisonment when the doctor performs an abortion upon the request or with the consent of a pregnant woman. However, we cannot find that the Abortion by Doctor Provision prescribes an excessive punishment: the upper limit is not so high because the statutory penalty should not exceed two year imprisonment; and, as for the crime of abortion that is not so serious, the court may impose a deferred judgment or suspended sentence even if it does not reduce the sentence or make

a statutory sentence reduction.

For these reasons, we cannot find that the Abortion by Doctor Provision does not comply with the principle of proportionality between criminal liability and punishment (*see* 2010Hun-Ba402, August 23, 2012).

2. Whether the Principle of Equality Is Violated

We find that an abortion is likely to result in the deprivation of the life of a fetus, regardless of the types of abortion; that most abortions are carried out by healthcare professionals who have knowledge about abortion, because it is difficult for a lay person to perform an abortion; so blameworthiness of healthcare 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 that a small fine has little deterrent effect on a doctor who abuses his or her ability to perform an abortion and his or her professional medical knowledge in order to make profits for himself or herself.

Given these findings, we conclude that 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 (*see* 2010Hun-Ba402, August 23, 2012).

3. Sub-Conclusion

The Abortion by Doctor Provision does not violate the principle of proportionality between criminal liability and punishment. It also does not upset the balance in the system of penalties and thus does not contravene the constitutional principle of equality.

The Petitioner claims that the Abortion by Doctor Provision infringes the freedom of occupation. However, because she fails to provide specific information to establish that claim and merely alleges that the freedom of

occupation is infringed as a result of violations of other fundamental rights, we do not review that claim.

C. Conclusion

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

Justices Yoo Namseok (Presiding Justice), Seo Ki-Seog, Cho Yong-Ho, Lee Seon-ae, Lee Seok-tae, Lee Eunae, Lee Jongseok, Lee Youngjin, and Kim Kiyoung

[Appendix]

List of Legal Representatives

(Omitted)