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Case on the Recognition of Fetuses as Entities with Fundamental Rights

Final decision : constitutional, dismissed Decision date : Jul 31, 2008

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A. Background of the Case

In this case, the Constitutional Court held that a fetus may be recognized as an entity with the right to life.

The petitioner was the father of a dead fetus, who brought an action for damages against the obstetrician in charge, arguing that the fetus may have the right to claim damages because the fetus' capacity for enjoyment of his or her rights is recognized, and that where the fetus is stillborn, the right to claim damages is inherited to parents who would have parental rights if the fetus had been born normally; however, the court dismissed the action. Thereupon, the petitioner filed a request for the constitutional review of Articles 3 and 762 of the Civil Act, arguing that the aforesaid articles which provide for the duration of the capacity for enjoyment of rights and the status of the fetus regarding the right to claim damages (hereinafter referred to as the "Provisions on the Status of the Fetus") violated the Constitution because the Provisions on the Status of the Fetus completely deny the

B. Summary of the Decision

The Constitutional Court ruled that the fetus is an entity with the right to life under the Constitution and that the state is obliged to protect the life of the fetus pursuant to Article 10 of the Constitution, because all human beings become entities who have the right to life under the Constitution and the fetus, which is at the stage of prenatal development, should be granted the right to life.

Provided, with regard to the Provisions on the Status of the Fetus, although the state is obliged to devise various protective measures for the fetus, the constitutional demand that the general capacity for enjoyment of rights under the Civil Act be recognized for the fetus from before he or she is born is not drawn from the duty of the state to protect fundamental rights, and as the legislature fully protects the direct risks of infringing on the life of the fetus in a normative manner through the relevant provisions of the Criminal Act, the Mother and Child Health Act, etc., the legislature shall not be criticized for failing to take the minimal protective measures to protect the life of the fetus required of the state because the Provisions on the Status of the Fetus do not grant the right to claim damages due to the illegal infringement on life to the fetus himself or herself. Thus, the Constitutional Court decided that the Provisions on the Status of the Fetus do not violate the duty of the state to protect the right to life.

With respect to this decision, Justice Cho Dae-Hyen argued that the interpretation that Article 762 of the Civil Act only applied to cases where the fetus was born alive violated Article 10 of the Constitution, and Justice Kim Jong-Dae argued that Article 762 of the Civil Act which provides that the right of the fetus to claim damages is recognized for a fetus born alive violated the Constitution because it infringed on the dignity, value and right of the fetus to life as a human being, in violation of Article 10 Section 2 of the Constitution which provides the duty to protect fundamental rights.

C. Significance of the Decision

This decision is meaningful in that the Constitutional Court recognized that the fetus, which is life at the stage of prenatal development, possesses a right to life, that is, the constitutional right of right to life.

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