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Case on the Prohibition of Revealing the Sex of a Fetus

Final decision : nonconforming to the Constitution Decision date : Jul 31, 2008

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A. Background of the Case

In this case, the Constitutional Court decided that the provision of the Medical Service Act, which prohibits the communication of the sex of a fetus, did not conform to the Constitution.

The complainants were the father of a fetus, who requested an obstetrician to communicate the sex of the fetus to him, and whose request was refused, and an obstetrician who received a disposition suspending his or her medical license on the grounds that he or she communicated the sex of a fetus. The complainants filed a constitutional complaint against Article 19-2 Section 2 of the former Medical Service Act (amended by Act No. 3948 on November 28, 1987, and before being wholly amended by Act No. 8366 on April 11, 2007) which prohibited the communication of the sex of the fetus (hereinafter referred to as the "Provision on Prohibition of Gender Prediction").

B. Summary of the Decision

The Constitutional Court held that the purpose of the legislation of the Provision on Prohibition of Gender Prediction, which prohibits the communication of the sex of the fetus,

the latter half of a pregnancy, during which it is impossible to conduct abortions, violated the Constitution because the prohibition thereof infringes on freedom of medical professionals to perform a job and the right of parents of the fetus not to be disturbed in gaining access to information on the sex of the fetus. The Constitutional Court also held that Article 20 Section 2 of the Medical Service Act (wholly amended by Act No. 8366 on April 11, 2007), amended to the same content as the Provision on Prohibition of Gender Prediction, also violated the Constitution on the same grounds by including the abovementioned provision in the provisions subject to adjudication.

Provided, since a legal vacuum is likely to occur if the Provision on Prohibition of Gender Prediction is declared simply unconstitutional, as the provision which prohibits the communication of the sex of the fetus disappears, the Court decided that the Provision on Prohibition of Gender Prediction was unconformable to the Constitution. However, Justices Lee Gong-Hyeon, Cho Dae-Hyen and Kim Jong-Dae delivered an opinion in which they argued that the Constitutional Court should decide that the Provision on Prohibition of Gender Prediction was unconstitutional because the prohibition of the communication of the sex of the fetus on the grounds that the Provision on Prohibition of Gender Prediction protects the life of a fetus is not legitimate in the purpose of the legislation thereof, since the crime of abortion is already punished under the Criminal Act for the same purpose. Justice Lee Dong-Heub argued that the case on which the father of the fetus filed a constitutional complaint should be rejected because there was no possibility of infringing fundamental rights, and that in the case on which the obstetrician filed a constitutional complaint, the Provision on Prohibition of Gender Prediction did not violate the Constitution because it was necessary to prohibit the communication of the sex of the fetus during the entire period of pregnancy to protect the life of the fetus and to resolve gender imbalance, as the possibility of abortion still exists on the grounds of the sex of the fetus even in the latter half of pregnancy.

C. Significance of the Decision and Aftermath of the Case

This decision is significant in that it recognized the state's obligation to protect the life of a fetus, by allowing the prohibition of communication of the sex of the fetus to be lifted only after when it became impossible to conduct an abortion.

By this decision, Article 20 Section 2 of the Medical Service Act was amended by Act No. 9906 on December 31, 2009, to prohibit the communication of the sex of the fetus only until 32 weeks into a pregnancy.

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