Abstract

Purpose: On April 11, 2019 (2017Hun-Ba127 decision), the Constitutional Court ruled that the “self-abortion” and “Abortion by Doctor” in the Criminal Act were nonconforming to the Constitution because they limit women’s right to self-determination. Abortion is one of the provisions of Article 10 of the Constitution, the right to self-determination derived from the dignity and value of human beings. On the other hand, the state also has an obligation to protect the life of the fetus. The purpose of this study is to examine foreign legislative cases related to abortion in order to harmoniously resolve the basic rights of the pregnant woman and the fetus in order to meet the request of the Constitutional Court, and to suggest a legislative direction to remove the unconstitutionality of the criminal abortion crime. In addition, we would like to examine the Maternal and Child Health Act for coherence of the legal system.

Method: Whether or not to punish abortion is one of the issues that have been controversial in society so far. If the punishment for the crime of abortion is completely banned, the right to life of the fetus may be neglected. To this end, first, I would like to review the contents of the Constitutional Court’s decision on the punishment for the crime of abortion. Second, the current state of punishment for abortion is reviewed by reviewing foreign comparative laws on the crime of abortion. Third, the legal, medical, moral, and religious perspectives on punishment for abortion are reviewed. Fourth, based on the discussion so far, I would like to suggest the direction of legislation for the punishment of abortion crimes.

Results: The punishment for abortion should not be viewed as a choice between a woman’s right to self-determination and the fetus’s right to life. Revision of the law should be made in the direction of recognizing and protecting the two legal interests. Article 15 of the current Enforcement Decree of the Maternal and Child Health Act stipulates that abortion is permitted within 24 weeks. However, it is reasonable to refer to the government’s legislation and decide whether to allow it based on the 22 weeks of pregnancy, which is the period when the fetus can survive independently, or based on the 3·3·3 principle or reasons for adaptation. In addition, economic and social factors and the period of deliberation should be considered.

Conclusion: Punishment for abortion is structured in a way that women’s right to self-determination and the basic right of the fetus to life are in conflict. In order to resolve these conflicts harmoniously and constitutionally, political, economic, social and cultural integration must be achieved by stipulating in detail the permissible scope of abortion, when it is permitted, the procedure and method of permissible abortion.

[Keywords] Abortion, Right for Self-Determination, Life of the Fetus, Social and Economic Reasons, Nonconforming to the Constitution

1. Introduction

The Constitutional Court ruled that the ‘self-abortion’ and ‘Abortion by Doctor’ were not un-
constitutional, but inconsistent with the Constitution. Although' nonconforming to the Constitution decision' reveals the unconstitutionality of the law, in order to prevent legal confusion resulting from the loss of the effect of the relevant provision from that day, the decision is a modification decision that temporarily recognizes the legal effect until the relevant law is amended. In other words, it is to suspend the effect or set a time limit until the legislative body revises or repeals the law, leaving the text as it is, to temporarily continue the provision of the law. This is done with the intention of providing a certain grace period to prevent social confusion that may arise if a decision is made to be completely unconstitutional and the legal effect is immediately suspended.

In order to make a decision unconstitutional, the consent of at least six the Constitutional Court judges is required. If a decision is unconstitutional, the National Assembly and the Executive must amend the relevant laws within the period suggested by the Constitutional Court. If the law is not amended by the deadline set by the Constitutional Court, the law becomes invalid. Therefore, the crime of abortion stands at a crossroads of choice. In other words, the question is whether to completely abolish or amend the crime of abortion.

First of all, if the abortion crime is abolished, the fetus' right to life cannot be protected and there is a risk of abuse. Therefore, after removing the unconstitutionality of the abortion crime, legislation through amendment of the provisions of the law should be implemented. When selecting a revision, the timing of permitting abortion, reasons for permitting abortion, procedures and methods of permitting abortion, etc. should be considered.

In Korea, the crime of abortion is one of the crimes that has long been debated about decriminalization. This is because crimes stipulated in the Criminal Act require the appropriateness and necessity of punishment, and the crime of abortion has been controversial in these requirements. As of January 2022, the National Assembly has not revised the abortion crime, so the current effect is lost (January 31, 2021). Therefore, it is intended to explain the points to be taken into account in the legislation of regulations related to abortion in the future, and to harmoniously resolve the conflict between a woman's right to self-determination and the fetus' right to life through a legal, medical, and ethical approach. This is because the fetus is a problem that is in line with the point of view of respect for life.

On April 11, 2019, the Constitutional Court ruled that In Articles 269 (1) and 270 (1) of the Criminal Act, the “doctor” part is not in conformity with the Constitution. as it limits a pregnant woman's right to self-determination. Considering all women’s right to self-determination, it was decided that the amendment legislation should be passed by December 31, 2020. However, the National Assembly has not yet passed the amendment bill.

Therefore, this study intends to propose a legislative proposal that reflects the rational and social conditions regarding the crime of abortion. In addition, ‘the Maternal and Child Health Act’ engraves the illegality of abortion when there is a certain reason, and it is necessary to consider this. The core of the discussion will be the timing of permitting abortion and the conditions for permitting abortion (whether social or economic reasons are added or not), since the complete abolition of the crime of abortion infringes on the fetus’s right to life. In addition, a lot of thought is needed in terms of legal, sociological, philosophical, and religious aspects related to abortion. In the past, abortion was a topic of decriminalization with drug crimes such as marijuana and adultery[1].

2. Current State of Abortion

Abortion is the number one cause of death worldwide for the second year in a row. In 2021 alone, about 42.6 million abortions were performed. This is three times more than the 13 million
deaths from infectious diseases (COVID 19 etc.), the second leading cause of death worldwide[2].

Currently, more than 61 countries fully allow abortion, but laws that respect life are still needed to prevent unnecessary abortion. According to Worldometer, an international statistics site, as of January 13, 2022, the number of abortions worldwide this year has surpassed 1.4 million. The World Health Organization (WHO) estimates that there are between 40 and 50 million abortions worldwide each year, equating to more than 125,000 abortions per day. If we check the status of abortion in the UN member states based on the World Health Organization (WHO) data, the number of countries that prohibit abortion accounts for two-thirds of the UN member states.

About 131 countries (67%) do not allow abortion at the request of pregnant women, and 122 countries (63%) do not allow abortion even for social and economic reasons. According to the Korea Statistical Office in 2019, the number of newborns in 2019 was about 303,100, and the number of abortions was 1.1 million a year, which is three times the number of newborns. The decriminalization of abortion is due to the weakening of the normative power of the criminal law[3]. This is the highest among OECD countries. In such a situation, the question of whether the punishment for the crime of abortion is maintained or not. Protection of the unborn child should be prevented through national and community action[4].

Table 1. Abortion laws around the world.

<table>
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<th>Abortion Law Status</th>
<th>Number of countries</th>
<th>Nation</th>
<th>World Population Percentage</th>
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<tr>
<td>Totally prohibited/allowed in case of risk to maternal life</td>
<td>66</td>
<td>Brazil, Tanzania,</td>
<td>25.5%</td>
</tr>
<tr>
<td>Permissible in case of maternal health risk</td>
<td>59</td>
<td>Korea, Zimbabwe, Monaco,</td>
<td>13.8%</td>
</tr>
<tr>
<td>Allowed considering the socioeconomic circumstances of pregnant women</td>
<td>13</td>
<td>UK, Japan, Finland,</td>
<td>21.3%</td>
</tr>
<tr>
<td>Fully allowed</td>
<td>61</td>
<td>USA, China, Germany, France</td>
<td>39.5%</td>
</tr>
</tbody>
</table>

Note: World Health Organization.

3. Responses to Abortion in Each Country

Before looking at the legislative direction of abortion crimes in Korea, it is necessary to look at the legislative examples of other countries. Laws vary from country to country according to the times and social environment[5].

First, it is necessary to understand the constitutional status of each country, the protection of life and women’s right to self-determination, etc. In addition, abortion laws and policies should also be looked at because a number of factors such as values, ideologies, culture, and the bio field related to assisted reproductive technology are intricately intertwined with abortion.

Also, in enacting Korea’s abortion-related legislation, it is very important to examine the United States’ Fetal Heart Rate Act, global statistics related to abortion, and the reasons for exceptions to the crime of abortion.
3.1. United States of America

In the United States, since 'the Roe v. Wade' decision in 1973, which legalized abortion, individual laws have been attempted on a state-by-state basis to overturn this ruling. Two states in 2013 and nine states in 2018-2020 enacted fetal heart rate laws, and many other states are attempting to enact this law. However, in the United States, unlike Korea, a case in a state can only be changed if it goes to the Supreme Court of the United States. As a result, even if it has not yet been implemented, a law is being prepared that can be implemented immediately if the Roe v. Wade change[6][7].

Currently, 41 out of 50 states in the US require only qualified doctors to perform an abortion, and 27 states require a certain period of contemplation (usually 24 hours, up to 72 hours) in case of an abortion. In 43 states, in principle, abortion is prohibited after the point at which it can be judged that the fetus has independent viability (between about 20 and 24 weeks), and in 19 states, it is the time when the fetus can be judged to have independent viability. From then on, it is stipulated that doctors other than the attending physician must participate in the treatment for abortion. Twenty states also ban so-called "partial-birth abortion" as a restriction on the method of abortion. The U.S. Supreme Court ruled that the prohibition of partial maternity abortion was unconstitutional in 2000 by infringing on women's right to abortion[8][9].

In the United States in 1973, Roe v. In the Wade judgment, the woman's right to abortion was widely recognized as an essential right, and the possibility of abortion was judged through the so-called 'three-month period division method'.

However, in 1992 Planned 'Parenthood v. In Casey's decision', by recognizing the possibility of independent survival of the fetus at an earlier stage due to medical advances, the right to abortion was put as a brake on women's right to abortion. In order to take the place of the constitutionality review of Since then, the unreasonable burden standard has played an important role as a review standard for the abortion control law. The criteria for reviewing unreasonable burden means that the Abortion Restriction Act becomes unconstitutional if the purpose of the legislation on restricting abortion or its effect causes any substantial obstacles to a pregnant woman who intends to undergo an abortion before the fetus's independent viability is recognized. It means you have to help it down[10][11].
3.2. United kingdom

The UK was the first country in Europe to legalize abortion. In the United Kingdom, Section 58 of the Offenses Against the Person Act 1861 states that a pregnant woman attempting a miscarriage unlawfully administers a toxic or other harmful substance or unlawfully uses a device or other means to have an abortion; It also stipulates that a person who intends to have a woman have an abortion is guilty of a felony if he unlawfully administers or aids in the administration of toxic or other harmful substances to a woman, or uses a device or other method with the intention of unlawfully to do so. In the case of a 14-year-old girl named Bouren, who was raped by five soldiers and gave birth to unwanted pregnancies, a prominent London obstetrician-gynecologist performed an abortion on the 6-week-old girl, which was enacted in the 1861 "The Offenses Against the Persons Act". An indictment was brought on the grounds that it was an illegal operation, an exception to Section 58 of the Person Act 1861. [12][13].

However, the court said, "If a doctor diagnoses that there is a risk of physical or mental destruction of a woman as a result of continuation of pregnancy with a reasonable and correct judgment, and an abortion is performed for the purpose of preserving a woman's life, it does not constitute an illegal abortion. It was acquitted. 'R v. The Bourne judgment' recognized abortions performed to protect women's lives. In 1990, the period allowed for abortion was reduced to 24 weeks of gestation, and the general attitude toward abortion was generous [14].

3.3. Germany

In Germany, on June 18, 1974, in the 5th amendment to the Criminal Act, "If a pregnant woman who is within 12 weeks of pregnancy voluntarily performs an abortion through a doctor, she must consult a doctor, and after consultation, an abortion performed by a doctor is not punishable. The reasons for allowing abortion were stipulated. However, Article 218a of the 1974 Criminal Act, which allowed abortion within 12 weeks in 1975, was judged unconstitutional on the grounds that it violated the provisions of the German Basic Law for the protection of human dignity and the right to life. After the decision to be unconstitutional, the German Bundestag adopted the adaptive solution method that, through the 15th amendment of the Criminal Code on May 18, 1975, penalized abortion in principle and allowed abortion in exceptional cases when there was a certain justifiable reason. In other words, abortion was permitted exceptionally for medical reasons, eugenic reasons, sexual offenses such as rape, and social and economic difficulties due to pregnancy [15][16].

However, on May 28, 1993, after receiving the advice, it was decided that Articles 218a and 219 of the Criminal Code, which stipulated that an abortion performed by a doctor within 12 weeks was not illegal, were unconstitutional. After this decision, the 'Pregnancy and Family Assistance Act' was amended on August 21, 1995, and it has been maintained to this day. In other words, in Article 218a (1) of the German Criminal Code, "The pregnant woman has requested an abortion, and after receiving a confirmation from the Kwanin counseling center, she must prove it to the doctor who will perform the operation 3 days before the operation. Pregnancy within 12 weeks does not fall under the elements of the crime of abortion."

In summary, the Germans judged the period resolution method that allowed abortion within 12 weeks of pregnancy to be unconstitutional, and adopted the adaptive resolution method that allowed abortion under certain circumstances while maintaining the illegality of abortion. In addition, a period resolution method that does not punish abortions performed by a doctor within 12 weeks of pregnancy was also adopted. This resolution method resolves the conflict between the fetus' right to life and the pregnant woman's right to self-determination in a harmonious manner [17][18].
3.4. Japan

In Japan, the crime of abortion has been stipulated since the enactment of the old Criminal Act in 1880, following the new Criminal Act in 1907. On the other hand, Japan enacted the Eugenic Protection Act in 1948 and widely allowed abortion when there is a certain justification, so the provisions on the crime of abortion in the Criminal Act were almost privatized. In 1996, the Eugenic Protection Act was amended to the Maternal Protection Act, and in the case of rape, abortion was permitted in cases where the continuation of pregnancy or childbirth would clearly harm the health of the mother due to physical or economic reasons. The requirement for a legal abortion is that a doctor designated by the Korean Medical Association must obtain the consent of the person and his or her spouse, and the period of permission for an abortion must be 22 weeks in advance[19][20].

4. Legislative Direction on the Crime of Abortion

Beccaria argued that punishment is not a means of retribution, but a means of preventing crime in society, and that it should be limited to the minimum necessary for the purpose of preventing crime. In addition, it was considered that the degree of punishment is sufficient to cause the offender to slightly exceed the loss he or she loses through the punishment rather than the profit gained by the crime. Emphasizing general prevention, he argued that crimes were prevented by the degree of speed, certainty, and severity of the punishment, as well as the amount of punishment[21].

The government’s amendments to the Criminal Act and Maternal and Child Health Act are as follows.

○ Until the 14th week of her pregnancy, a pregnant woman can decide whether or not to have an abortion at her own discretion without any cause or procedure. (Article 270-2 of the Criminal Act).

○ Abortions for social and economic reasons are permitted between the 15th and 24th weeks of pregnancy. However, 24 hours must pass after receiving the consultation specified by the Maternal and Child Health Act. (Article 270-2 of the Criminal Act)

○ Drug abortion is allowed. (Article 2 of the Maternal and Child Health Act)

○ For minors aged 16 and over, abortion is possible without parental consent only with a confirmation of the fact of counseling. (Article 14-2 of the Maternal and Child Health Act)

○ There are no qualifications for counselors dealing with important issues related to abortion. (Article 14-2 of the Maternal and Child Health Act)

Criticism of the amendment is that first, it does not faithfully protect the right to life of the fetus. In other words, the Opposition opposes allowing abortion for socio-economic reasons. It also opposes the decision on whether to allow abortion by period based on 14 weeks. Second, it poses a very serious threat to women’s health. This is because the Special Committee on Abortion Law, representing all obstetrics and gynecology in Korea, is of the opinion that unconditional abortion should not exceed 10 weeks. The increase in the number of weeks of abortion significantly increases the risk of death from various complications and excessive bleeding[22][23].

The gist of the amendment is to allow abortions up to 14 weeks of pregnancy, and to allow limited allowances until 24 weeks in cases of genetic diseases, sexual offenses, or social or economic reasons. In addition, although it is currently possible to perform artificial abortion (abortion) only with a doctor’s procedure or surgery, the legalization of the abortion drug 'Mipgene'
can be done using drugs. Currently, according to the Ministry of Health and Welfare and the Ministry of Food and Drug Safety, unauthorized abortion drugs are still illegal. If the law is revised, it will be possible to use it domestically, but there is a heated debate about the pros and cons of permitting it. Those who want to allow abortion argue for the legalization of Mifegene for reasons such as women’s happiness and self-determination, but oppose the introduction of Mifegene for reasons such as the fetus’s right to life and drug abuse.

4.1. When to allow abortion

The Constitutional Court prohibits abortion after this period in principle, based on the 22nd week of pregnancy, when the fetus can survive independently. It was judged that abortion could be permitted in very exceptional cases, such as cases. In addition, it was determined that abortion could be permitted without any restrictions until 14 weeks of pregnancy. Pregnant women are usually aware of the fact that they are pregnant before 8 weeks of pregnancy, and can have an abortion by drug until about 9 weeks of pregnancy. Therefore, comparing the opinions of the Constitutional Court and foreign legislative cases, it seems reasonable to set the total period of permissible abortion to 14 weeks of pregnancy. In addition, it is reasonable to allow abortion only when there are reasons for eugenic adaptation, ethical adaptation, medical adaptation, and socioeconomic adaptation based on the 22nd week of pregnancy, the time when the fetus can survive independently. Of course, the current Maternal and Child Health Act also needs to be revised from 24 weeks, when abortion is possible, to 22 weeks.

4.2. Abortion permissible range (including socio-economic reasons)

Korea’s Maternal and Child Health Act stipulates reasons for the disappearance of illegality in certain cases. Namely, eugenic adaptation, ethical adaptation, and medical adaptation. If the punishment for abortion is amended, the question is whether to allow abortion for socio-economic reasons. The reason the punishment for abortion did not fulfill its original function is that it does not allow abortion for socio-economic reasons, which account for most of the actual situation. According to a study by the Ministry of Health and Welfare, a high proportion of abortions are due to low income or unstable employment due to socioeconomic circumstances. As the birth and rearing of the fetus is the domain of control and responsibility of the pregnant woman, socio-economic requirements are very important. Eugenic adaptation, which is one of the reasons for the illegality of abortion in the Maternal and Child Health Act, also played a major role in reducing social costs and burdens on families due to future disabilities or diseases, and to alleviate the pain of the unborn baby. By the same logic, considering the social and economic situation, human dignity can be realized in terms of the pregnant woman’s right to self-determination and the fetus’s right to pursue happiness.

Of course, if social settlement reasons are introduced, abortion can be completely permitted in reality, and criticisms are raised that it is difficult to objectively judge because the concept of socioeconomic reason is unclear and ambiguous, and there is a lot of risk of arbitrary abuse. However, in order to guarantee women’s right to self-determination, it is appropriate to allow abortion for socio-economic reasons. In order to solve these problems, it is necessary to supplement it through counseling procedures and deliberation periods related to abortion. The government’s legislative proposal suggests that abortions for socio-economic reasons are discriminatory according to the gestation period (14 weeks or less / 14 weeks to 22 weeks / 22 weeks or more).

4.3. Abortion procedure and method (whether or not an abortion contemplation period is introduced)

Even when abortion is possible, it is necessary to institutionalize the consultation with doctors as in Germany. Pregnant women can obtain information about pregnancy, childbirth, and abortion through counseling, and get advice on rational solutions. The counselor must explain legal,
ethical and medical issues. In addition, it should be institutionalized so that abortions are performed in hospitals designated by the government, such as the preparation of an advance directive in the Life-sustaining Medical Act.

The Maternal and Child Health Act is permitted when all the reasons for the abortion are satisfied within 24 weeks of pregnancy, the consent of the spouse, etc., doctor, and justification. Detailed procedures and methods should be supplemented through legislation. And the Constitutional Court left it to the discretion of the legislator as to whether or not to introduce a deliberation period. In the Netherlands, it is stipulated that an abortion can only be performed at a hospital that has been licensed for abortion procedure after consulting a doctor and undergoing a 6-day deliberation period. With reference to this, it is necessary to stipulate in the law a five-day deliberation period after consulting a doctor for an abortion[29].

4.4. Resolving discrepancies with other laws

In Korea, regulations on punishment for abortion were stipulated in two ways: the Criminal Act or the Maternal and Child Health Act. However, it is desirable to unify the abortion-related regulations before the criminal code through amendment of the law. In other words, it is reasonable from the viewpoint of general prevention and legal uniformity of the general public to stipulate abortion punishment regulations, reasons for permitting abortion, period of permitting abortion, and procedural regulations before the Criminal Code. In addition, the Bioethics and Safety Act stipulates what medical institutions must comply with for the protection of human dignity and identity in the creation and research of embryos. related matters are strictly managed. Embryos and fetuses are classified according to whether they are implanted in the uterus, and differentiated standards should be applied to fetuses that should be legally protected more than embryos

5. Conclusion

Abortion is a historically hot, and arduous topic that sparks fierce debate around the world. Abortion is the artificial severance of living beings. A social atmosphere in which fetal life is respected is very important. A society that respects the life of the fetus should be established, and the law against abortion should be operated as a social law network that stably protects the society.

When fetus enters the 5th week of pregnancy, the fetus’s heart begins to beat, and at the 10th week of pregnancy, it changes into a human-like appearance. As the fetus is the weakest member of society, it is urgent to form a social atmosphere where they are respected as a person.

The law is the last bulwark to prevent unnecessary abortion, and legal discussion is needed to prevent the spread of unconditional abortion. Considering the specificity of the fetus, it is appropriate to vary the degree of protection or the means of protection according to the developmental stage of human life by limiting the range and time that can be allowed for abortion[30].

6. References

6.1. Journal articles

6.2. Books


6.3. Additional references


7. Appendix

7.1. Authors contribution

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<td>- Someone who can explain all aspects of the paper ✔</td>
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7.2. Funding agency

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