A Comparative Analysis of a Pregnant Woman's Rights to Abortion: Notes on Constitutional Courts' Decisions of Abortion Laws in Germany and the United States, and their Implications for Korean Abortion Laws

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Abstract

Contrasting the interesting decisions of two highest tribunals in Germany and the United States, this article suggests that two highest courts have dealt with the issue of abortion by applying a similar yardstick, namely, a balancing test. Both courts might have been under influences derived from each other, alluding that a pregnant woman has the right to abortion *qua* the right to privacy, which comes within the purview of the constitutional provisions, such as, Basic Law Article 2 (1) and the Fourteenth Amendment to the United States Constitution. The German Federal Constitutional Court's decisions and the United States Supreme Court's decisions are compared in order to find similar constitutional jurisprudence between the two highest tribunals on abortion, rather than the differences. However, the *Gonzales v. Carhart* case, handed down by the United States Supreme Court in April 18, 2007, which may seriously erode the *Roe-Casey* line of precedent vis-à-vis a woman's right to abortion, made the dissenting opinion voiced by Justice Ginsburg that the plurality opinion would chip away the core value of *Roe v. Wade* persuasive. Therefore, I am tempted to claim that the United States Supreme Court should remain with the distinctive traditions established by *Roe* and *Casey*, an effort to protect a pregnant woman's right to abortion notwithstanding *Gonzales v. Carhart*, and the Korean Constitutional Court would be better off if it takes into account the converging rationale and yardstick applied to the abortion cases of the two influential highest courts save *Gonzales v. Carhart* when deciding the constitutionality of a ban on abortion in Korea.

Key words

abortion, fetus' right to life, women's rights to choice, balancing test, trimester test/undue burden test

Introduction

Overview

The German Constitutional Court declared in 1975, inter alia, that section 218a[1] of the "Abortion Reform Act" (Ipsen, 2003, p. 246) was repugnant to Basic Law Article 2 (2) of the right to life of fetus[2] in conjunction with Article 1 (1) of human dignity[3] insofar as it exempts the termination of pregnancy from punishment in cases where no adequate reasons exist, apparently adopting a judicious balancing test between the right to life of the fetus and the right to self-determination of the pregnant woman (39 BVefGE 1, 1975). The Supreme Court of the United States held in 1973, two years before the German Constitutional Court's decision was handed down, that the Fourteenth Amendment's concept of personal liberty, namely, the right of privacy in matters concerning procreation and family, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," thus striking down a Texas statute interfering with a woman's right to secure an abortion within the first and second trimesters of pregnancy (*Roe v. Wade* 410 U.S. 113, 1973 and also, *Doe v. Bolton* 410 U.S. 179, 1973). Abortion cases from two countries provide an intriguing contrast. The Roe, a landmark cases of the Supreme Court of the United States, established that most laws against abortion violate a constitutional right to privacy under the liberty clause of the Fourteenth Amendment, thus overturned all state and federal laws outlawing or restricting abortion that were inconsistent with the decision (Chemerinsky, 2006, p. 819), and in *Casey* (*Planned Parenthood of Pennsylvania v. Casey* 505 U.S. 833, 1992) case as well, it was difficult to explain what makes the freedom to terminate pregnancy a special liberty deserving of special protection from the courts and to what extent the government can claim that it is protecting potential human life by

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[1] This code also is called as Reformation Act of Criminal Law (*Gesetz zur Reform des Strafrechts*) § 5 of 1974.

[2] The Basic Law Article 2, Section (2) (Right to Life), articulates that "[e]very one shall have the right to life and to inviolability of his person." The question whether the fetus is the holder of a right does not need to be answered, because it is enough to state that the life of a fetus is a legitimate limiting reason for the right to privacy of a pregnant woman.

[3] The Basic Law Article 1, Section (1) (Human Dignity), articulates that "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."

restricting abortions. In the German cases, the Constitutional Court was able to reach the firm conclusion that the criminal code of the Western Germany and new abortion reform statute of the Unified Germany permitting abortions within the first three months of pregnancy violated the constitutional rights of unborn children. These decisions provide a fascinating opportunity to reflect on one court's jurisprudential influence on the other's constitutional review of abortion laws, and vice versa. Thus, this article seeks to assess the reasoning of the German and American abortion cases and furthermore, to claim that they have a similar or convergent jurisprudential yardstick to review abortion laws, which suggests a possible implicit influence on the jurisprudence of the German Constitutional Court stemming from the Supreme Court of the United States, despite the fact that two highest tribunals reached different conclusions. Assumptions are made that there might well have been an interactive influence of constitutional values, interests and so forth between two highest courts, which would eventually result in their adopting a balancing process, weighing between an unborn child's right to life and a pregnant woman's right to abortion. The existing differences of their positions can be explained by the distinct traditions of constitutional societal backdrops in each country.

In addition, this article criticizes the United States Supreme Court's most recent decision on abortion handed down in April 18, 2007, for it may erode the constitutionally established right of a woman to the procurement of abortion. Finally, it discusses how the Korean Constitutional Court can take the foreign decisions into account in order to cope with the serious societal issues of abortion from the legal perspectives, considering the potential effects and influences of the above foreign abortion laws on the future decisions of the legislative and judicial authorities in Korea.

A Brief Outline of Abortion Laws Banning a Woman's Procurement of Abortion in Three Different Settings, namely, Germany, the United States, and Korea

Although Germany is a federal republic composed of sixteen states and free cities, the making of the abortion law falls under the jurisdiction of the federal government; thus, the German Criminal Code penalizing abortion is a federal law. Not unlike most American state laws, however, the German criminal code since the nineteenth century placed a ban on

abortion however and whenever performed, for the German states from the middle of the nineteenth century regarded abortion as an independent crime distinguishable from homicide (Eser, 1986, p. 369). Originally derived from the Prussian Penal Code of 1851, the old abortion statute, namely, section 218 of the Criminal Code (*Strafegesetzbuch*) included the following provisions (Horton, 1979, p. 288): (1) a woman who destroys her fetus or permits it to be destroyed by another shall be punished by imprisonment for up to five years; (2) any other person who destroys the fetus of a pregnant woman shall be similarly punished. In especially serious cases imprisonment will range from one to ten years (3) any attempt is punishable; (4) anybody who supplies a pregnant woman with a drug or object designed to destroy the fetus, shall be similarly punished by imprisonment (Kommers, 1977, p. 260).

Similarly, the United States has many state and federal laws outlawing or restricting abortion in one way or another. *Roe v. Wade* and *Doe v. Bolton* involved litigants in Texas and Georgia who challenged on federal constitutional grounds their respective state statutes limiting a woman's right to obtain a legal abortion. These statutes were typical for most state abortion laws, prohibiting abortion unless procured by medical advice for the purpose of saving the mother's life. When *Roe* and *Doe* were decided, the criminal abortion laws of the majority of states were similarly restrictive. For instance, Georgia's statute limited legal abortions to "situations where (1) a continuation of the pregnancy would endanger the life or seriously and permanently injure the health of the pregnant woman, (2) the fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect, or (3) the pregnancy would result from forcible or statutory rape" (Kommers, 1977, p. 256). In any case, prior to the Supreme Court's holding in these two cases, abortion was an unlawful offense in all the states.

In Korea, since 1953, the criminal law has prohibited abortion. The criminal law penalizes a pregnant woman who procures abortion or attempts to procure abortion. It also imposes sanctions on any other person who helps the pregnant woman to abort, such as doctors, pharmacists, etc. Also, the aids shall be punished more heavily in the case where they have no assent from the pregnant woman when helping her to procure abortion.[4] In other words, the Korea criminal law vis-à-vis

[4] See Section 269 and 270 of the Korean Criminal Law.

abortion is very similar to section 218 of the German criminal code. In spite of the criminal sanctions, abortion has been frequently procured in practice, for some women have no choices but to abort to continue with their basic life. Furthermore, the number of women who underwent abortion increased since 1962 due to the national family planning policy, which was designed to decrease the birth rate, not to increase the abortion rate. The disparity of the criminal law and the national policy at the time fueled the confusion of pregnant women. Abortion has increased tremendously since then. In addition, the Mother and Child Health Act was enacted in 1973 and tolerated abortion to some extent.[5] According to certain reports (Jeon, Hyo-suk & Seo, Hong-gwan, 2003, p. 136), pregnant women and physicians have sought abortion more than two million times each year in this decade. Ironically, the criminal law has not been able to protect neither pregnancy nor the fetus. Rather, it brings on at least two million crimes per year. As a result, controversial arguments on legitimacy of abortion laws have been raised. In spite of serious social problems as such, arguments on abortion have not been common yet. Here, I would like to discuss two other countries' abortion laws which will be of help to argue for Korean women's right to abortion.

Right to Life of Fetus v. Privacy Right of a Pregnant Woman

It is noteworthy that there are differences between the two tribunals, the German Federal Constitutional Court and the Supreme Court of the United States, in characterizing the human fetus. The question in the *Roe* case was whether the fetus is a person within the meaning of the Constitution of the United States. The Supreme Court of the United States concluded that since the fetus is categorically declared as a "nonperson," all other countervailing social values had to give way to the pregnant woman's right to privacy.

The personhood of the fetus, however, was not the nub of the issue

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[5] Section 8 of the Act allowed abortion when (1) the pregnant woman or her spouse would have a genetic psychological illness or physical defect, (2) either spouse would have a contagious disease, (3) the pregnancy would result from forcible or statutory rape, (4) the pregnancy would result from marriages between prohibited parties, such as direct relatives, close relatives, etc., or (5) a continuation of the pregnancy would endanger the life or seriously and permanently injure the health of the pregnant woman. According to Section 3, the Act allowed an abortion only within the 28th week of pregnancy.

for the German Constitutional Court. The German Constitutional Court did not have to decide whether the unborn child was a holder of rights. Rather, the German Constitutional Court described the fetus not as a person but rather as "gestating life," "unborn life," "incipient life" or some equivalent reference,[6] and characterized that life as a "legal value" of the utmost importance, thus meriting the state's protection (39 BVerfGE 1 88 BVerfGE 203). In other words, it was enough for the German Constitutional Court to conjecture that human life has significant value even if that life has not yet developed into a full person. Moreover, since the life of the fetus represents an important legal value, the German Constitutional Court was able to avoid the difficulties of treating abortion as a right of privacy. It appears that the very idea of fetal life as a public legal value is able to undercut the privacy argument. Still, one might well have argued that the public value conflicts with the privacy right of a pregnant woman, such that one of the two has to yield, which allegedly casts precisely the problem at issue.

One may also argue that the different approaches to constitutional interpretation by the German Constitutional Court and the Supreme Court of the United States might be understood in terms of the "underlying ethos" that drives constitutional doctrine. Namely, that ethos in the United States is "anti-statist individualism," which depicts the human person in the Constitution of the United States as an "autonomous moral agent" unconnected to the larger society in any meaningful sense. Along the same line, an image of a pregnant woman may be featured as isolated, independent, and bound just by self-interest. Thus, the pregnant woman's right to privacy might have been more than appreciated in this connection. By contrast, it could be said that along with the German communitarian tradition since the Feudal era, German constitutionalism has long been community-oriented, which tells the depiction of "human solidarity", a story that tries to "join public virtue to liberty, one that speaks of social integration and the wholeness life" (Kommers, 1977, p. 276).

When it comes to the question of constitutional interpretation, however, both countries' highest tribunals take similar or convergent

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[6] Since the German Constitutional Court declared that life in the sense of the development existence of a human individual begins even on the fourteenth day after conception, the protection of the right to the life under the Basic Law Article 2 (2) [1] can reach not only to the "completed" human being after birth but also to the independently viable fetus.

stance on that front. Although originalism or textualism is still necessary for the courts to interpret the text of the constitution, the flexible approaches to constitutional interpretation as necessary to preserving a "living constitution" is more often than not relied by the justices on the bench in both countries. Still, it is fair to say that despite the fact that there is a converging tendency toward the flexible position of the constitutional interpretation including many other factors of law between two highest tribunals, including history and tradition, logic, natural law, moral philosophy, political theory, and social theory, the "underlying ethos" seems to be a reason to explain persuasively the different positions of those tribunals on abortion (Alexy, 2002a, p. 74). In order to explain their differing doctrinal positions, in this connection, some considerations of the legal culture and constitutional values of the two countries should be discussed in greater detail. Here, legal culture means that "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught" (Kommers, 1977, p. 276). Since legal culture broadly reflects community feelings and values, constitutional interpretation also clearly reflects different legal orders and legal cultures between Germany and the United States. For instance, "whereas American constitutionalism emphasizes a rugged individualism in the exercise of personal freedom, German constitutionalism has a larger communitarian thrust with a corresponding limitation upon the exercise of political freedom" (Kommers, 1977, p. 280). That is why we would better look at the decisions of both the German Constitutional Court and the United States Supreme Court below.

Balancing Test of the German Constitutional Court

The Basic Law Article 2 and Abortion

The German Federal Constitutional Court handed down its first abortion decision on February 25, 1975, invalidating every section of the Abortion Reform Act. Basically, the Court did so under two clauses of the Basic Law. On one hand, the Court quoted the clause proclaiming

the inviolability of human dignity and charging the State with the duty to respect and protect it;[7] on the other hand, the Court was grounded by the clause declaring that "every one shall have the right to life and to the inviolability of his person" (Kommers, 1994, p. 7). Bearing the original history of these clauses in mind, which, to be sure, was especially emphasized with an eye to preventing the reoccurrence of the cruelty of the Nazis, the Court decided that the fetus is "life" within the meaning of the Basic Law and the state is obligated "to protect and foster this life" even against the wishes of the pregnant woman. Thus, the Court defined abortion as an "act of killing" (Kommers, 1994, p. 8).

In order to understand the core of the balancing test of the Court, we need to examine the discussion of an "objective order of values," which is laid down in the text of the Basic Law (Alexy, 2003, p. 135). According to the theory, given the assertion that the Constitution should be interpreted with an eye to guaranteeing public values as well as subjective rights, it is said that the Basic Law includes both subjective rights that can be asserted against the state and public values that, as an independent force or effect under the Basic Law, impose on the State an affirmative duty to ensure that objective order of values be realized in practice. Thus, subjective rights as individual rights in the Basic Law are to cope with restrictions on those rights imposed by the state. This is to say that, such claims vis-à-vis subjective rights seem to have the effect of preventing the State from infringing those rights or to redress the harm inflicted by the State, whereas public values are to be seen as an integral part of the Basic Law and they impose on the State a duty to maximize these values to the extent possible (Alexy, 2002). To that effect, the Federal Constitutional Court balances the right to life as a core value of human dignity, which is the Basic Law's supreme value, with the right to personality, which is to subordinate even this exalted right to a rank below that of human dignity in the hierarchical framework of basic values under the Basic Law.

Abortion Decision of 1975 (39 BVerfGE 1)

The strong endorsement of the right to life by the Federal Constitutional Court did not mean that the life of the fetus must always

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[7] See the Basic Law Article 20, Section (3), which declares that "legislation shall be subject to the constitutional order" and "the executive and judiciary shall be bound by law and justice."

prevail over claims of the pregnant woman. In this regard, the Court acknowledged that the Basic Law Article 2 Section (1)[8] embodying the principle of personal self-determination both imposes a duty and confers a right on a pregnant woman, and the Court may consider balancing the interests of the fetal right to life and the pregnant woman's right to choose termination of pregnancy when they conflict (Kommers, 1994, p. 7). In the Abortion Decision of 1975, the Court explicitly said that when ensuing "balancing process," both constitutional values, namely, the protection of the unborn life and the freedom of terminating pregnancy, must be perceived in their relation to human dignity as the center of the Constitution's value system. Furthermore, pursuant to the principle of balancing competing interests, the Court concluded that "the state must give the protection of the unborn child's life priority" (39 BVerfGE1, 4). In accordance with this balancing process, certain exceptions under the Basic Law are allowed, namely, an abortion performed by licensed physicians given serious and duly certified medical, genetic, or criminological indices would not be punished (39 BVerfGE1, 8). More specifically, a serious danger to the health or life of the expecting mother, the discovery of a seriously defective fetus, or an unwanted pregnancy resulting from rape or incest would impose on the pregnant woman a gross burden so that it would be "beyond reason" to expect the pregnant woman to maintain such a pregnancy and thus, under these circumstances the woman procuring an abortion would not be subject to sanctions (39 BVerfGE1, 8). In addition, there is another vivid balancing test, which focuses on the "social predicament" of a pregnant woman. The Constitutional Court instructed the Bundestag (the parliament) that in addition to allowing abortions for medical, eugenic, and indications, it might be also permitted to procure abortions in situations of women's extreme social hardship. To the same effect, in seeking to balance the right to life and the freedom of personality, the Constitutional Court declared that the pregnant woman need not be forced beyond reasonable expectations to sacrifice her life values for the purpose of fostering the unborn child. In order to justify an abortion for social reasons, the suffering of the pregnant woman would have to be harsh, imposing on the pregnant woman hardships exceeding those normally related to

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[8] The Basic Law Article 2 [Personal freedoms] Section (1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

pregnancy. In sum, according to the Federal Constitutional Court, when the two conflict, the right to choose the termination of pregnancy *qua* right to personality must yield to the right to life as the crux of human dignity (Kommers, 1994, p. 9). Consequently, a central question before the Federal Constitutional Court was whether the state should or could enforce its constitutional duty to protect the life of the fetus by criminalizing an abortion by legislation. The dissenters[9] in this abortion case conceded "the state's duty to protect fetal life, arguing only that criminal penalties were not an indispensable means to this end" (Currie, 1994, p. 312; Kommers, 1997, p. 346).

This case seems to be best understood in the light of other values of the Basic Law. The Constitutional Court has articulated a "view of human dignity and personhood" that binds the individual simultaneously to certain norms governing the whole society. Indeed, the Constitution in this case reminded us that "the legal order exists to instruct its citizens in the *moral content* of the Basic Law, and that includes substantive values pertaining to the nature of life, personhood, and family" (Kommers, 1997, p. 346). Another point is also in need of emphasis: that the Constitutional Court distinguished fetal life, which is an "independent legal value" worthy of protection under the Constitution, from person, allowing the "Constitutional Court to engage in a balancing process" (Kommers, 1997, p. 347). It seems arguable that this case provides a good reason for arguing that the Federal Constitutional Court was opted for the "moral reading"[10] of the constitution (Dworkin, 1996, p. 7).

Abortion and Unification

In West Germany, conforming to abortion decision of 1975, abortion was only permitted in the case where it would be performed by licensed physicians for specified medical, genetic, ethical, and social reasons duly certified by a panel of doctors and other counselors. Without these indications, abortion was a criminal offense when procured at any stage of

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[9] In more detail, the dissenting justices (Justices Rupp-von Brünneck & Simon) argued that the judicial re-criminalization of abortion during the first trimester of pregnancy exceeded the bound of judicial power since in their view the implementation of the Basic Law's objective values was fundamentally a legislative task (39 BVerfGE 68-95).

[10] According to the moral reading of the Constitution, "these clauses must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government's power."

pregnancy in West Germany, whereas abortion was permitted on demand within the first trimester of pregnancy in East Germany. East German women were, in fact, allowed to procure abortion without having restrictions. Thus, the two German states had many difficulties to compromise their different positions. Due to the deadlock, they agreed to retain their respective abortion policies until an all-German legislature could work out a satisfactory accord. The first unified German parliament of 1990 struggled to find a middle ground between the conflicting policies. After months of debates and negotiations, a compromising act, "the Pregnancy and Family Assistance Act," was reached by the fractured German parliament, which incorporated a time-phased solution with mandatory counseling. Most importantly, the new statute decriminalized abortion in the first trimester of pregnancy. That is to say, the interruption of pregnancy was not illegal (*nicht rechtswidrig*) in case of being performed by a licensed physician after compulsory counseling and a three-day waiting period (Kommers 1997, p. 347). This new abortion statute was faced with strong resistance from Christian Democratic members and Bavarian state government. The Christian Democratic Party and Bavarian state government petitioned the Federal Constitutional Court to enjoin the enforcement of the law, claiming that more than a few provisions of the statute were unconstitutional. Surprisingly, the Federal Constitutional Court reaffirmed the essential part of Abortion decision of 1975. The Court, however, modified its position to meet the needs of the post-unification Germany as follows (Kommers 1997, p. 349).

Abortion Decision of 1993 (88 BVerfGE 203)

The crux of this decision is that while abortion must remain illegal in the interest of preserving the value of unborn life, the State need not punish the illegal act in the case of abortion taking place within the first three months of pregnancy and after the State has an opportunity to try to change the mind of the pregnant woman.

The Court's opinion began with a review of the 1975 abortion case and affirmed the crux of its previous decision. In other words, as 1975 decision grounded itself on the right to life and human dignity under the Basic Law, 1993 decision of the Court declared that the right to life enjoyed by the unborn child emanates from the dignity of the human being, the validity of which is independent of any specific religious or

philosophical belief (88 BVerfGE 203, 252). The Court declared that human dignity attaches to the physical existence of every human being both before and after birth. Thus, unborn life is a constitutional value, which the state is obliged to protect. In this connection, the state, as declared in 1975 decision, cannot avoid this duty and responsibility.

Along the same line, finding unconstitutional the statutory language of the Reformed Criminal Code of 1992[11] in which the voluntary termination of pregnancy within the first three months is described as "not illegal (*nicht rechtswidrig*)," the German Federal Constitutional Court ruled that the statute must make clear that abortion is illegal as a matter of general principle and that the pregnant woman has a legal duty to carry an unborn child to full term (88 BVerfGE 203, 253).

Recognizing the premise that the pregnant woman's legal right to self-determination can, however, produce a situation where it is permissible not to impose a legal duty to carry the unborn child to full term, namely in an exceptional case where the presence of serious medical, genetic and criminological indices would justify an abortion, the Federal Constitutional Court ruled that the legislature was responsible for defining these exceptional circumstances and required that the legislature would have to balance the conflicting interests of the fetus and pregnant woman.[12] In addition, the Federal Constitutional Court mentioned that there may be situations other than the foregoing circumstances where an abortion would also be indicated as justified, which would include a condition of such social or psychological distress that a clear case of an unreasonable burden would thereby be demonstrated.

The Federal Constitutional Court nullified provisions of the Pregnancy and Family Assistance Act permitting non-hardship abortions to be paid from the state's medical insurance system, declaring that financially

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[11] The Pregnancy and Family Assistant Act of 1992, the full title of which is "Gesetz zum Schutz des vorgeburtlichen/werdenden Lebens, zur Förderung einer kinderfreundlicheren Gesellschaft, für Hilfen im Schwangerschaftskonflikt und zur Regelung des Schwangerschaftsabbruchs" [BGBL. I 398 (1992)], Article 13 amended section 218-19 of the German Criminal Law. The amended sections constitute the Reformed Criminal Code.

[12] Furthermore, the Court declared that "[t]he scope of the duty to protect the unborn is to be determined by weighing its importance and need for protection against the conflicting interests of other objects deserving of legal protection." Here, the Court articulated that "those interests with conflict with the unborn fetus's right to life include – starting with a woman's right to have her human dignity guaranteed by the Basic Law Article 2 Section (1) – most of all, a woman's right to life and physical integrity under the Basic Law Article 2 Section (2) and her right of personality under the Basic Law Article 2 Section (1).

supporting illegal abortions out of the national health insurance plan would make the State a participant in an unjustifiable act and convey the wrong message about the nature of abortion.

The Federal Constitutional Court, however, took the position that the state may not constitutionally deny welfare assistance to an indigent woman who is unable to afford a non-indicated abortion. In other words, if a pregnant woman is indigent and eligible for help under the Welfare Assistance Act, then the expense of the abortion must be covered out of state welfare funds. Symbolically, the distinction that the Court makes between welfare assistance and medical insurance is important in that, on one hand, denying medical coverage to a non-punishable but illegal abortion expresses the standpoint that such an abortion cannot officially be sanctioned under the German legal system, however, on the other hand, the state recognizes its responsibility that the state as a last resort will pay for the abortion in the interest of a pregnant woman's health and welfare, who faces financial emergency and when her predicament drives her to terminate her pregnancy even after required counseling (Kommers, 1994, p. 23).

In short, the Federal Constitutional Court, while reaffirming its position that abortion could not be made lawful, modified its position in one significant respect: Article 2 (2) of the Basic law "did not require that either a woman or her doctor be punished criminally for an abortion during the first twelve weeks of pregnancy if she adhered to her decision after counseling designed to change her mind" (Currie, 1994, p. 313),[13] which the Court declared, balancing conflicting interests, and thereby saying that "albeit the right of the unborn life is the higher value, it does not extend to the point of removing all of the woman's legal rights to self-determination," and therefore, "her rights can bring into being a situation where it is permissible in exceptional cases not to impose a legal duty to carry the child to term" (88 BVerfGE 203, 282). It is noteworthy here that the Federal Constitutional Court has established the standard of an "unreasonable burden"[14] as the basis for identifying such

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[13] Basically, the Constitutional Court's theory was that "the state's duty to protect the fetus could be fulfilled better by attempting to persuade the mother than by threatening her with criminal penalties.

[14] With respect to unreasonable burden, the Court further explicated that "given these pregnancy-related responsibilities and the psychic conflict that they may call to mind, it is possible that many women in the early stages of pregnancy may experience grave, even life-threatening

exceptions, and the similar terms, namely, "undue burden," have been used in the decisions vis-à-vis abortion laws handed down by the United States Supreme Court as follows.

Trimester Test and Undue Burden Test of the United States Supreme Court, and the Recent Deviation from the Court's Traditional Position

The Fourteenth Amendment and the Right to Abortion

Roe v. Wade (410 U.S. 113, 1973) is the key case recognizing a pregnant woman's constitutional right to abortion in the United States, which was a challenge to a Texas law that prohibited all abortions except those necessary to save the life of the mother. Also, *Doe v. Bolton* (410 U.S. 179, 1973) presented a challenge to a Georgia law that outlawed abortions except if a doctor determined that continuing the pregnancy would endanger a woman's life or health, if the fetus were likely to be born with a serious defect, or if the pregnancy was the result of rape. In the *Roe* case, Justice Blackmun, describing the development of medical technology to provide safe abortions, focused on a pregnant woman's the right to privacy. Justice Blackmun concluded that "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's conception of personal liberty and restrictions upon state actions, as we feel it is, or, ··· in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (*Planned Parenthood of Pennsylvania v. Casey* 505 U.S. 833, 1992).[15] Interestingly, the Supreme Court found privacy not in the penumbra of the Bill of Rights but instead as part of the liberty protected under the due process clause. However, concluding that prohibiting abortion infringes on a woman's right to privacy, it also observed that the right to abortion is not absolute but must be balanced against other considerations, such as the state's interest in protecting

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distress; in these circumstances, such urgent interests worthy of legal protection arise that the legal order cannot require the woman to consider an unborn being's right to life as being above all else."

[15] In *Planned Parenthood of Pennsylvania v. Casey*, the Supreme Court reaffirmed this aspect of *Roe*.

unborn life. The Court applied strict scrutiny, holding that a regulation limiting these rights could only be justified by a "compelling" state interest, and that legislative enactments must be narrowly drawn to express only legitimate state interests. In applying the test, the Court held that the right to an abortion was a fundamental right. In this connection, the Supreme Court rejected the state's claim that fetuses are persons and that there was a compelling interest in protecting potential life. The Supreme Court observed that there was no indication that the term "person" in the Constitution was ever meant to include fetuses. Furthermore, the Court declared that there was no consensus as to when human personhood begins; rather, there existed enormous disparity among various religions and philosophies. The Court also noted that in balancing the competing interests, the state had a "compelling interest" to protect maternal health after the first trimester, for abortions then became more dangerous than childbirth (Chemerinski, 2006, p. 821).

Roe v. Wade and Doe v. Bolton: Trimester Test

Roe v. Wade recognized pregnant women's constitutional rights to abortion in the United States. In Roe, Justice Blackmun, writing for the Court, observed that "maternity, or additional offspring, may force upon that woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child" (*Roe v. Wade* 410 U.S. 113, 153).In other words, forcing a woman to bear and continue a pregnancy against her will clearly imposes huge physical and psychological burdens. Hence, as noted above, Blackmun concluded that the right of privacy, regardless of its being founded in the Fourteenth Amendment's conception of personal liberty or in the Ninth Amendment's reservation of rights to the people, was "broad enough to encompass a woman's decision whether or not to continue her pregnancy" (Chemerinski, 2006, p. 820). The Supreme Court, however, did not believe that the right to abortion was absolute, and thus observed that such a right must be balanced against other considerations, such as the state's interest in protecting the life of the fetus. In balancing the competing interests, the Court decided that strict scrutiny was to be used in striking the balance because the right to abortion was a fundamental right, and that the state had a "compelling interest" in protecting

maternal health after the first trimester because it was then that abortions became more dangerous than childbirth. Eventually, the Court adopted the "trimester analysis": during the first trimester, the government could not prohibit abortions and could regulate abortions only as it regulated other medical procedures, such as by requiring a licensed physician; during the second, if the government choose to do so, it may regulate the abortion procedure in ways that are reasonably related to maternal health; lastly, for the stage subsequent to viability, government may prohibit abortions except if necessary to preserve the life or health of the mother. In *Doe v. Bolton*, the Court relied on its decision in Roe to invalidate Georgia's abortion law (Chemerinski, 2006, p. 822). Recognizing that women have a constitutional right to abortions prior to viability, the Court followed that a state law was unconstitutional if it prohibited abortion except when pregnancy endangered the mother's health, the fetus was seriously deformed, or the woman had been raped.[16]

Parenthood v. Casey: Undue Burden Test

In *Parenthood v. Casey*, the Supreme Court struck down part of Pennsylvania's abortion law, requiring that married women notify their husbands before having an abortion except in certain limited circumstances. Instead, the Court upheld the rest of the act, including an informed-consent provision requiring that physicians give women specific information about the fetus, a parental consent requirement for immature minors, a twenty-four hour waiting period, and a recordkeeping and reporting requirement for facilities performing abortions. The Court reaffirmed that states cannot prohibit abortion prior to viability, but the plurality opinion overruled the trimester distinctions of the Roe case and also the use of strict scrutiny for evaluating government regulation of abortions (*Planned Parenthood v. Casey* 505 U.S. 833, 845-46). In a nutshell, the Court rejected Roe's trimester framework and replaced it with a new "undue burden" test for analyzing the validity of all abortion

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[16] According to Ely, *Roe* was "the clearest example of noninterpretivist "reasoning" on the part of the Court. *See* John Hart Ely, *Democracy and Distrust – A Theory of Judicial Review*, (Cambridge, MA: Harvard University Press, 1980), at 2. According to him, "interpretivism is about the same thing as positivism, and natural law approaches are surely one form of noninterpretivism." In this regard, it is plausible to say that the Supreme Court took a position of noninterpretivist in *Roe*, which is similar to the German counter part that was told to follow "the moral reading of the Constitution" in the Abortion Case of 1975.

restrictions,[17] whereas the essential holding of Roe v. Wade was preserved by the *Casey* case.

In the *Casey* case, Justice Rehnquist, Byron R. White, Antonin Scalia, and Clarence Thomas voted to overrule *Roe* in its entirety and sustain all the challenged regulations, whereas Justices Blackmun adhered fully to *Roe* and opined that all the Pennsylvania restrictions are invalid. Justice Stevens also endorsed *Roe* and voted to invalidate most of the restrictions. Consequently, the outcome depended on the positions of Justices O'connor, Kennedy, Souter. They issued a joint opinion that staked out a middle stance between the complete overruling of *Roe* and the preservation of it. Interestingly, Justice Kenney, who had been quite critical of *Roe*, explained that the principle of *stare decisis* prevented them from abandoning *Roe* in its entirety. However, while the joint authors declared that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed," they "rejected the trimester framework, which they did not consider to be part of the essential holding of *Roe*." Since the joint authors believed that the trimester framework undervalues "the State's interest in the potential life within the woman," they considered it flawed. Moreover, they believed that "there is a substantial interest in potential life throughout pregnancy," which gave the state a far stronger ground for regulating abortion during the first and second trimesters, even if this interest becomes compelling only at "viability" (*Planned Parenthood v. Casey* 505 U.S. 833, 876). On the one hand, since the state now had a compelling reason for restricting abortion from the outset of pregnancy, this interest eliminated any reason for distinguishing the first and second trimesters. On the other, the joint authors were of opinion that part of "Roe's central holding was that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions" (*Planned Parenthood v. Casey* 505 U.S. 833, 860). In their opinion, a woman still had a fundamental right to choose an abortion, prior to viability even though it might not be necessary to preserve her health or her life.

What, then, was an undue burden on the right to abortion? The Court in *Casey* refused to apply the strict scrutiny approach normally used in fundamental right due process cases, besides abandoning the trimester

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[17] The Court articulated that government regulation of abortion prior to viability should be allowed unless there is an "undue burden" on access to abortion.

framework of Roe. The joint opinion formulated a new undue burden test for judging the constitutionality of abortion regulations (Chemerinski, 2006, pp. 829-830).[18] Under this test, a law that unduly burdened a woman's liberty interest in the abortion decision was automatically invalid, which meant that "an undue burden is an unconstitutional burden" (*Planned Parenthood v. Casey* 505 U.S. 833, 877). According to this test, a law would be found to impose an undue burden "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." Where the matter of the purpose element was concerned, if the state's purpose was "to persuade the woman to choose childbirth over abortion", whereas a law was considered to impose an undue burden if it was "calculated to… hinder" a woman's freedom of choice (*Planned Parenthood v. Casey* 505 U.S. 833, 878).Hence, the state was to "enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest" (*Planned Parenthood v. Casey* 505 U.S. 833, 886). Consequently, it was hard to hold any law to impose an undue burden on a woman's freedom of choice because of its purpose, for a state could always claim that its purpose was "to persuade" rather than "to hinder". In reality, the new undue burden test made it easier for the government to regulate abortion than it was under *Roe*.

Carhart v. Gonzales: Unexpected Conservative Bent and Criticism of *Gonzales*

With an eye to analyzing the bench's attitude towards the woman's right to choose, I am tempted to examine a recent decision of the United States Supreme Court. In *Gonzales v. Carhart* (127 S. Ct. 1610, 2007), the Supreme Court upheld most recently a federal ban of a "partial birth abortion."[19] Following *Stenberg v. Carhart* (530 U. S. 914, 2000) where the Supreme Court held that Nebraska's partial birth abortion statute violated the Federal Constitution, as interpreted in *Roe* and *Casey*, the Congress of the United States passed the "Partial-Birth Abortion Ban

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[18] Under the standard approach, a law that impinges on or unduly burdens a fundamental liberty will be upheld when it is the least burdensome means of achieving a compelling governmental interest; the fact the at the government has unduly burdened the right is not itself necessarily fatal.

[19] The medical community refers to this type of abortion as either dilation and extraction (D&E) or intact dilation and evacuation (intact D&E).

Act" of 2003 (hereinafter "the Act") to ban a particular method of ending fetal life in the later stages of pregnancy. Since Congress found that "it was not required to accept the District Court's factual findings, and that there was a moral, some and inhumane procedure that is never medically necessary and should be prohibited" (*Gonzales v. Carhart* 127 S. Ct. 1610, 2007), the Act prohibited "knowingly perform[ing] a partial-birth abortion ··· that is [not] necessary to save the life of a mother" [18 U. S. C. §1531(a)]. Abortion doctors and abortion advocacy groups challenged the Act's constitutionality on its face. The District Court found the Act unconstitutional on its face because it "unduly burdened a woman's ability to choose a second-trimester abortion," was too "vague," and "lacked a health exception as required by *Stenberg*." The Ninth Circuit agreed and affirmed (*Gonzales v. Carhart* 127 S. Ct. 1610, 2007).

The Supreme Court, however, found the Act constitutional because respondents had not demonstrated that the Act, as a facial matter, was void for vagueness, or that it imposed an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception. In deciding whether the Act furthers the Government's legitimate interest in protecting fetal life, the Court assumed, *inter alia*, that an undue burden on the previability abortion right existed if a regulation's "purpose or effect is to place a substantial obstacle in the woman's path," but that "[r]egulations which do no more than create a structural mechanism by which the State ··· may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose" (*Gonzales v. Carhart* 127 S. Ct. 1610, 2007). Specifically, the Court concluded that the Act, on its face, was not void for vagueness and does not impose an undue burden from any overbreadth. Since it provided doctors "of ordinary intelligence a reasonable opportunity to know what was prohibited," the Act did not violate the void-for-vagueness doctrine. The Act did not restrict abortions involving delivery of an expired fetus or those not involving vaginal delivery because the doctor must "vaginally deliver a living fetus" [§1531(b)(1)(A)].[20] In addition, since the doctor must perform an "overt act, other than completion of delivery, that killed the

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[20] The Act's text demonstrates that it regulates and proscribes performing the intact dilation and evacuation procedure.

partially delivered fetus" [§1531(b)(1)(B)], the "overt act" must be separate from delivery. Futhermore, it applied both previability and postviability because "a fetus is a living organism within the womb, whether or not it is viable outside the womb."

Also, since the Act's text disclosed that it prohibited a doctor from intentionally performing an intact dilation and evacuation, the Court rejected respondents' argument that the Act imposed an undue burden, as a facial matter, because of the overbreath of its restrictions on second-trimester abortion. The Court reasoned that it was clear on the text that the Act excluded most dilation and extractions in which the doctor intended to remove the fetus in pieces from the outset, thereby targeting extraction of an entire fetus rather than removal of fetal pieces. The Court has declared that the Act, measured by its text in this facial attack, did not impose a "substantial obstacle" to late-term because the Act's stated purposes were "protecting innocent human life from a brutal and inhumane procedure and protecting the medical community's ethics and reputation," and the government undoubtedly "has an interest in protecting the integrity and ethics of the medical profession" (*Gonzales v. Carhart* 127 S. Ct. 1610, 2007). The Court also pointed out that the Act's failure to allow the banned procedure's use where necessary, in appropriate medical judgment, for preservation of the pregnant woman's health did not have the effect of imposing an unconstitutional burden on the abortion right. It was because if intact dilation and evacuation is truly necessary in some circumstances, a "prior injection to kill the fetus allows a doctor to perform the procedure, given that the Act's prohibition only applies to the delivery of a living fetus" [18 U. S. C. §1531(b)(1)(A)]. For the foregoing reasons, the Court reversed the decision of the Eighth Circuit.

The only female on the Court right now, Justice Ruth Bader Ginsberg, argued for the dissenting opinion, voicing that this ruling "cannot be understood anything other than an effort to chip away a right declared again and again by the Court–and with increasing comprehension of centrality to women's lives" (*Gonzales v. Carhart* 127 S. Ct. 1610, 2007). The reason she wrote that was that Justice Kennedy's opinion very much invited the states to restrict abortion in other ways, perhaps to restrict abortion earlier in a pregnancy or to restrict more difference kinds of abortion procedures. Justice Kennedy's opinion very much gave the impression that the Court was going to let the state experiment with

narrowing the right to abortion.

In sum, this was the first time that the Supreme Court had ever considered a law that bans a particular kind of procedure, and particular kind of abortion in all 50 states and approved the ban. As examined above, almost the same law of the State of Nebraska came before the justices in 2000 when Justice O'Connor was on the Court. At the time the justices said that the Nebraska statute was unconstitutional because it violated the pregnant woman's right to choose (*Stenberg v. Carhart* 530 U. S. 914, 2000). Now, Justice Alito was in and Justice O'Connor was out, dealing with same issue, and the Court upheld the ban on abortion by a 5 to 4 vote. It just shows that the Supreme Court has moved in a more conservative direction. The future status of the pregnant woman's right to abortion in the American soil appears to hinge on whether *Roe v. Wade* is still the prevailing law. For now, there seems to be equilibrium with four justices supporting it, four justices clearly opposing it, and Justice Kennedy in the middle. But if any of those who support abortion right on the Court leaves, like Justice John Paul Stevens who is 87 years old, *Roe v. Wade* is likely to disappear. Since the dissenting opinion voiced by Justice Ginsburg sounds plausible to me, I would like to claim that the Court should remain with the distinctive traditions established by *Roe* and *Casey*, an effort to protect the pregnant woman's right to choose. In addition, I would like to point out that a swiping ban on the partial birth abortion seems to overly put restrictions on the pregnant woman's right to abortion, basing on the German Constitutional Court's balancing test that is briefly examined above. Thus, the *Carhart* Court should have more cautiously weighed two conflicted values between the governmental interests in protecting the fetus and the pregnant woman's interests in pursing her own decision.

Is the Balancing Test of German Constitutional Court Different from the Trimester Test of the United States Supreme Court?

On the one hand, as noted above, the Federal Constitutional Court in Germany modified its position in the 1993 Abortion case, namely, freeing the pregnant woman seeking and procuring an abortion during the first

twelve weeks of pregnancy from being penalized by the government. The United States Supreme Court in *Casey* preserved what it viewed as the essential holding of *Roe v. Wade*,[21] whereas it rejected *Roe*'s trimester framework and replaced it with a new undue burden test for analyzing the validity of all abortion restrictions. Hence, it appears that "the abortion situation in the two countries looks more and more the same," at the practical level (Currie, 1994, p. 313). In both countries, "the woman who wants an early abortion can effectively get one if she can afford it" (ibid.). On the other, at the theoretical level, their outcomes are "strikingly contrasting," for the decision of 1993 in Germany unanimously reaffirmed "the state's positive constitutional duty to protect the individual against harm from third parties,"[22] whereas the Supreme Court of the United States did not take the same stance as that of the Constitutional Court in Germany (Currie, 1994, pp. 313-314). Both decisions, however, *Roe* and *Casey*, and their German counterparts, are very similar in two respects: first, they are "prime examples of intrusive judicial review based on open-ended constitutional provisions" (Currie, 1994, p. 314); second, they seem to have employed the same yardstick to weigh and balance interests of two irreconcilable positions between pro-choice and pro-life.[23]

One[24] might argue that the German Constitutional Court clearly engaged in a balancing process when deciding abortion cases, whereas the Supreme Court of the United States did not opt for the balancing process when dealing with those seminal abortion cases of *Roe v. Wade* and *Doe v. Bolton* (Kommers, 1997, pp. 346-347). It is noteworthy, however, that

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[21] The crux of Roe v. Wade is that the Supreme Court invalidated prohibitions on abortion during the first and second trimesters, whereas the decision left room for states to regulate the procedures for obtaining abortions.

[22] Article 2 (2) has been "the most prolific source of decisions recognizing the affirmative duty of the state to protect the individual from harm inflicted by third parties" and the critical case, in this regard, was the Abortion case of 1975 in Germany.

[23] In pursuing balancing process, the German Constitutional Court held explicitly that "both constitutional values must be perceived in their relation to human dignity as the center of the Constitution's value system." (*Bei der deshalb erforderlichen Abwägung sind beide Verfassungswerte in ihrer Beziehung zur Menschenwürde als dem Mittelpunkt des Wertsystems der Verfassung zu sehen*). See 35 BVerfGE 202, at 225 and 39 BVerfGE, at 43.

[24] For instance, Kommers evaluate decisions on abortion in two nations to the same effect, saying that "[t]he German distinction between fetal life and persons is noteworthy in comparative perspective because it allowed the Constitutional Court to engage in a balancing process largely absent in the seminal American case of *Roe v. Wade*."

an important similarity between the German and American abortion decisions tends to be overlooked. *Roe* identified three justification in its opinion to explain the criminalization of abortion: first, women who could receive an abortion were more likely to engage in "illicit sexual conduct;" second, the medical procedure was extremely risky prior to the development of antibiotics and, even with modern medical techniques, was still risky in late states of pregnancy; and lastly, the state had an interest in protecting prenatal life. According to the Supreme Court, the second and third constitute valided state interests. Roe reiterated that "the state does have an important and legitimate interest in preserving and protecting the health of the pregnant woman…and that it has still another important and legitimate interest in protecting the potentiality of human life" (*Roe v. Wade* 410 U.S. 113, 163). Here, the Supreme Court alluded that valid state interests must be weighed against the constitutionally protected rights of individuals in order to determine whether a law is a constitutional exercise of power. Also, in *Gonzales v. Carhart*, even though the Supreme Court of the United States upheld a federal ban of the partial birth abortion, which was somewhat its conservative bent as explained above, the Court still seemed to adopt the balancing test as it inquires whether the federal act furthered the Government's legitimate interest in protecting fetal life and whether an undue burden was imposed on the previability abortion right as the Court did in the *Casey* case. Namely, it appeared that the Supreme Court already adopted a stance to weigh interests -a kind of balancing test. Specifically, each tribunal seems to have adopted a balancing process or its variant in terms of opting for a "compelling interest" and "narrow tailoring" analysis, a common analytical framework known as "proportionality" analysis in German and "strict scrutiny" test in the United States (Alexy, 2003, p. 135). Also, under the German Federal Constitutional Court's brand of "strict scrutiny review," it was decided that the Reformed Abortion Act of 1992 was not adequately "tailored to protect the state's compelling interest" in preserving prenatal life. Thus, each tribunal opted for the same analysis, yet reached different conclusions. Again, the difference, to be sure, was that the protection of the fetal life in Germany was found to lie within the rubric of a compelling state interest, which was indeed commanded by the Constitution itself, whereas in the first trimester in *Roe* there was no compelling interest for government to interfere with termination of

pregnancy in the United States. For the forgoing reasons, the German Federal Constitutional Court's balancing test can be described as an example that may suggest, in part, the existence of a jurisprudential influence on the trimester test or undue burden test of the United States Supreme Court. It may reasonably be expected that, even if the tradition, the social ethos, and constitutional history of both countries are different and those factors in part may bring about some different stances or views of the Courts on constitutional review of laws, the jurisprudential influence would still exist, for this influence will better legitimatize the courts'power of constitutional review regarding the construction of the pregnant woman's freedom of choice.

Conclusion

With an eye to claiming that two highest tribunals would adopt a balancing test weighing between unborn children's rights to life and pregnant women's rights to abortion, I compared the German Constitutional Court's abortion decisions with the United States Supreme Court's. In addition, I pointed out that two tribunals prudently alluded that a woman's right to abortion could be preferred over the fetus's right to life by the balancing test. Thus, the decisions of both tribunals can be regarded as an important implication how to cope with serious societal issue of abortion from the legal perspective in Korea. Namely, if the Korean Constitutional Court faces the constitutionality of abortion laws in the future, it should consider the balancing test that these foreign tribunals have adopted. In Korea, as examined at the outset, abortion is basically prohibited by the Criminal Law as an act of killing. Many people, however, are rather against the prosecution of abortion or criminalization of it, for they simply do not consider it as a crime. Certain people have voiced for the decriminalization of abortion, pointing out the statistics showing that about 4000 cases of abortions are sought everyday and almost no one ever gets prosecuted. In short, the relatively low criminal prosecution rates together with the empirical studies (Yim, Woong, 2005, pp. 371-391) show that the criminal law vis-à-vis abortion is not really working as intended by the legislature. They have also argued that the criminal law would have no effect on those seeking abortion in a variety of necessity reasons and indications, for they can

develop many exceptions or excuses by taking advantage of the provisions of the Mother and Child Health Act[25] (Yang, Hyunah, 2006, pp. 18-19). On the other hand, there has been a conservative move supporting the laws penalizing abortion, whose position prefers the value of life of the fetus over the right of a pregnant woman to termination of the pregnancy. The religious sectors in Korea give a strong support for the conservative move based on moral or ethical considerations (Yang, Hyunah, 2006, p. 20). The Korean Supreme Court also upheld the criminal law prohibiting abortion, saying that "since life begins when pregnant and the fetus has human dignity and value as a new being and fundamental of personality, the state must protect and keep the life of the fetus from being harmed…" (84 Do 1958, 1985). When balancing the related interests vis-à-vis abortion, the Korean Supreme Court alluded that the right of a pregnant woman to abortion should be subordinated to the value of life of the fetus, for it considered the abortion right of a pregnant woman as being related only to the matter of health for the pregnant woman and, thus, the value of health should be put in the second priority following the value of life (Yang, Hyunah, 2006, pp. 20-21). Hence, the ramifications of the Korean Supreme Court's balancing test, in part, seem to have provided the platform for the conservative position's rigid view on prohibition of abortion in Korea.

By way of conclusion, I am tempted to claim that when deciding the constitutionality of abortion laws in the future, notwithstanding the previous decision of the Korean Supreme Court, the Korean Constitutional Court should consider the distinctive traditions established by the foreign decisions on abortion laws, an effort to protect the pregnant woman's right. For the pregnant woman's right is not only related to her health, but also related to an enhanced or a fundamental privacy right. Also, I would like to urge legislative bodies and other judicial authorities to take into account the rationale of the balancing test discussed by two influential foreign highest courts and the arguments for decriminalization in order to change the current systems of penal laws prohibiting abortion, which may make it possible to fill the gap between legal norms and societal values, and thus to enhance legislative and judicial authorities' credibility and reliability in Korea.

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[25] Similarly, in Germany, eighty percent of all legal abortions fell in the category of "social hardship" after the revised version of the Abortion Reform Act had passed on May 18, 1976, which permitted abortions for medical, eugenic, ethical, and serous social reasons.

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