

[20-2(A) KCCR 696, 2007Hun-Ka17·21, 2008Hun-Ka7·26, 2008Hun-Ba21·47 (consolidated), October 30, 2008]

In this case, the Constitutional Court decided that Article 241 of the Criminal Act, which imposes imprisonment as the only statutory sentence in the criminal punishment of adultery or fornication with a married person, does not contradict the Constitution.

Background of the Case

The Constitutional Court previously ruled the anti-adultery provision constitutional three times on September 10, 1990, March 11, 1993 and October 25, 2001, respectively (89Hun-Ma82, 90Hun-Ka70, 2000Hun-Ba60). While social controversy over the anti-adultery provision continued, the following cases were consolidated: two cases where the ordinary court hearing a trial on prosecution of adultery or fornication, *sua sponte*, requested for the constitutional review of the aforementioned provision (2007Hun-Ka21, 2008Hun-Ka26); two in which the ordinary court granted the defendant's motion to request for the constitutional review of the aforementioned provision and requested this constitutional review of statutes to the Constitutional Court (2007Hun-Ka17, 2008Hun-Ka7); and another where the other defendants filed a constitutional complaint him/herself pursuant to Article 68 Section 2 of the Constitutional Court Act as the ordinary court denied their motion to request for the constitutional review (2008Hun-Ba21·47).

Summary of Decision

The Constitutional Court, in an opinion of 4 to 5, falling short of the quorum of six votes required for the decision of unconstitutionality, ruled that the anti-adultery provision does not violate the Constitution for the following reasons:

1. Court Opinion

A. Opinion of Three Justices (Constitutional)

The contested provision in this case restricts adultery and fornication in order to protect marital relationship and preserve social order and acts as an appropriate means to serve the legitimate legislative purpose. Whether the restrictive regulation involving criminal punishment is excessive may be of issue, but this basically falls into the freedom of legislation. Given the Korean legal awareness that adultery harms social order and violates others' rights in addition to the strong demand for preemptive prevention of adultery, the legislature's judgment to criminally punish adultery is not arbitrary. Also, the private interest infringed by the provision in this case is as good as restriction on sexual acts in specific relationships and thus insignificant when compared to the resulting public interest, thereby achieving the balance of interests as well. In that sense, the provision in this case does not infringe on the individual right to sexual autonomy and privacy and, therefore, does not violate the rule against excessive

restriction. It is true that the provision imposes only imprisonment as statutory sentence, but this does not necessarily mean that the punishment is overly excessive.

B. Concurring Opinion of One Justice (Constitutional)

Punishing adultery through the Criminal Act is not in itself unconstitutional, but it is concerned that uniform imposition of criminal penalty on adultery without considering its specific modes in behaviors as prescribed by the provision in this case may cause unjustifiable consequences. Therefore, the legislators should make efforts for improvement in the relevant process of legislation through policymaking.

2. Dissenting Opinion of Five Justices

A. Opinion of Three Justices (Unconstitutional)

The provision at issue is unconstitutional in that it contradicts the principle prohibiting excessive restriction and thus restricts the individual right to sexual autonomy and privacy. Today, the public legal mind over the concept of sexual life is evolving, and it is not appropriate to bring criminal charges against the entire morally reprehensible acts. Furthermore, criminal punishment of adultery or fornication is actually not effective in the protection of monogamy and families, faithful fulfillment of sexual obligation between married couples, as well as women. With these factors taken into account, the provision at issue hardly meets the requirement for the appropriateness of means and the least restrictive means. Additionally, the provision at issue subjected the personally intimate domain of sexual activities to criminal punishment and therefore excessively restricted people's basic rights such the right to sexual autonomy, which consequently failed to balance the interests.

B. Opinion of One Justice (Incompatible with the Constitution)

The provision at issue imposes penalty even on trivial behaviors or acts which deserve not more than moral criticism or have no or little reason to be criticized, thereby going beyond the boundaries of a constitutional State to exercise State power over criminal punishment. The provision, therefore, is incompatible with the Constitution.

C. Opinion of One Justice (Unconstitutional)

Criminal punishment of adultery as prescribed by the provision at issue is not in itself a violation of the Constitution, but imposing imprisonment as the only statutory sentence excludes or restricts the possibility of considering the individuality and particularity of each case. This violates the principle of proportional punishment and, therefore, the Constitution.

3. Lack of Quorum for Decision of Unconstitutionality

Although the opinion of unconstitutionality is in the majority with four Justices stating opinions of constitutionality, four other Justices stating unconstitutionality opinions and one Justice stating an opinion of incompatibility with the Constitution, the provision at issue does not violate the Constitution since the quorum of six votes required for the holding of unconstitutionality is not met.

Parties

Requesting Courts

1. Seoul Northern District Court (2007Hun-Ka17)
2. Gyeongju Branch of Daegu District Court (2007Hun-Ka21)
3. Goyang Branch of Uijeongbu District Court (2008Hun-Ka7)
4. Yeongdong Branch of Cheongju District Court (2008Hun-Ka26)

Requesting Petitioner

Ok ○-kyung (2008Hun-Ka7)
Hong Ik Law Firm, Representative
Kim Young-kyun, et al., Attorney in charge

Petitioners

1. Yun ○-shim (2008Hun-Ba21)
Kang Moon-dae, Representative
2. Park ○-shik (2008Hun-Ba47)
Shim Han-joon, Representative

Underlying Cases

1. Seoul Northern District Court, Adultery Case, 2007Ko-Dan1516 (2007Hun-Ka17)
2. Gyeongju Branch of Daegu District Court, 2007Ko-Dan330, Adultery (2007Hun-Ka21)
3. Goyang Branch of Uijeongbu District Court, 2008Ko-Dan54, Adultery (2008Hun-Ka7)
4. Yeongdong Branch of Cheongju District Court, 2008Ko-Dan116, Adultery (2008Hun-Ka26)
5. Seongnam Branch of Suwon District Court, 2007Ko-Dan2069, Adultery (2008Hun-Ba21)
6. Seoul Central District Court, 2008No316, Adultery (2008Hun-Ba47)

Holding

Article 241 of the Criminal Act (revised by Act No. 293 on September 18, 1953) does not violate the Constitution.

Reasoning

1. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

(1) 2007Hun-Ka17

Ji ○-deok and Park ○-ho, prosecuted for adultery and fornication, respectively, were the defendants of the above entitled case at the Seoul Northern District Court, filed a motion to request for the constitutional review of the Article 241 of the Criminal Act to the Constitutional Court during the criminal lawsuit. The said District Court, granting the motion, requested for this constitutional review of the said provision to the Constitutional Court on July 16, 2007, arguing that the provision violates the Constitution.

(2) 2007Hun-Ka21

Kim ○-ku and Lee ○-chul, prosecuted for adultery and fornication, respectively, were the defendants of the above entitled case at Gyeongju Branch of Daegu District Court. This Gyeongju Branch Court requested, *sua sponte*, for the constitutional review of the Article 241 of the Criminal Act to the Constitutional Court on September 10, 2007.

(3) 2008Hun-Ka7

Ok ○-kyung and Chung ○-hoon, prosecuted for adultery and fornication, respectively, were the defendants of the above-entitled case at Goyang Branch of Uijeongbu District Court. This Goyang Branch Court requested, for this constitutional review of the Article 241 of the Criminal Act to the Constitutional Court based on Ok ○-kyung's motion to request for the constitutional review, granting the motion on February 27, 2008.

(4) 2008Hun-Ka26

Lim ○-hee and Chun ○-ho, prosecuted for adultery and fornication, respectively, were the defendants of the above-entitled case at Yeongdong Branch of Cheongju District Court. This Yeongdong Branch Court requested, *sua sponte*, for the constitutional review of the Article 241 of the Criminal Act to the Constitutional Court on October 6, 2008.

(5) 2008Hun-Ba21

Chu ○-eun and Yoon ○-shim, prosecuted for adultery and fornication, respectively, were the defendants of the above-entitled case at Seongnam Branch of Suwon District Court. Yoon ○-shim, during this criminal lawsuit, filed a motion to this Seongnam Branch Court to request for the constitutional review to the Constitutional Court. After the Seongnam Branch Court denied the motion, petitioner Yoon ○-shim filed a constitutional complaint to the Constitutional Court challenging the constitutionality of Article 241 of the Criminal Act on March 21, 2008.

(6) 2008Hun-Ba47

Yoo ○-bong and Park ○-sik, prosecuted for adultery and fornication, respectively, were the defendants of the above entitled case at the Seoul Central District Court. Petitioner Park appealed after the first

instance where he was convicted and filed a motion to request for the constitutional review of Article 241 Section 1 of the Criminal Act. After the appellate court denied the motion to request, filed constitutional complaint to the Constitutional Court challenging the constitutionality of Article 241 of the Criminal Act on May 23, 2008.

B. Subject Matter of Review

The requesting courts of cases 2007Hun-Ka17 and 2008Hun-Ka7-26 and the petitioner of case 2008Hun-Ba21 requested or filed for a constitutional review of the entire text of Article 241 of the Criminal Act. However, the requesting court of case 2007Hun-Ka21 and the petitioner of case 2008Hun-Ba47 requested on filed for a constitutional review of a more limited part – Article 241 Section 1 of the Criminal Act. Article 241 Section 2 of the Criminal Act provides that adultery crimes are indictable upon accusation and that filing accusation is impossible when the spouse encouraged or condoned adultery, which is inseparably related to Article 241 Section 1 of the Criminal Act. For this reason, the whole text of Article 241 of the Criminal Act (enacted as Act No.293, September 18, 1953) will be reviewed. The contents and relevant regulations are listed below.

[Provision Subject to Review (hereinafter the "Instant Provision")]

Criminal Act

Article 241 (Adultery) ① A married person who commits adultery shall be punished by imprisonment for not more than two years. The same shall apply to the other participant.

② The crime in the preceding section shall be prosecuted only upon the accusation of the victimized spouse. If the victimized spouse condones or pardons the adultery, accusation can no longer be made.

[Relevant provisions]

Criminal Procedure Act

Article 229 (Accusation by Spouse) ① Accusation mentioned in Article 241 of the Criminal Act shall not be made unless the marriage is void or divorce action is instituted. <revised by Act No.8496, June 1, 2007>

② In the case of the preceding section, the accusation shall be considered withdrawn if the accuser and the defendant are married again or the divorce action is withdrawn.

Article 230 (Period of Accusation) ① As for the offenses subject to prosecution on accusation, no accusation shall be made after the lapse of six months from the date on which the identity of the offender becomes known: Provided, that when there are unavoidable reasons preventing the filing of a accusation, the period shall be computed from the date on which such reasons have ceased to exist.

② In cases where a person who was kidnapped or enticed in accordance with Article 291 of the Criminal Act has married the abductor, the period of accusation mentioned in the preceding section shall begin

to run from the day when a court decision of voidance or revocation of marriage is finally binding.
<revised by Act No.8496, June 1, 2007>

Article 232 (Revocation of Accusation) ① A accusation may be withdrawn before the pronouncement of judgment in the first instance.

Article 327 (Judgment Dismissing Public Prosecution) Public prosecution shall be dismissed by judgment in the following cases:

(Item 1-4 *omitted*)

5. Where there is withdrawal of a accusation in the case which shall be prosecuted only upon accusation.

2. Reason for Request of Ordinary Requesting Courts and Arguments of Relevant Bodies

(intentionally omitted)

3. Review on Merits

A. Legislative history and legislation in other countries

(1) The general view is that punitive regulations against adultery existed since the Eight Prohibitions of the ancient Korean Kingdom Gojoseon, the first Korean law, and such penalties have remained in place despite some changes. The Penal Code promulgated on April 20, 1905 as Act No. 3 of the Greater Korean Empire, sentenced married women who committed adultery and the associated fornicators to a prison term between no less than six months and no more than two years (Article 265 of the same Act), and Article 183 of the former criminal law of Japan, which was adopted as Act No. 11 of the Criminal Code of Joseon Dynasty and implemented on April 1, 1912 under the Japanese colonial rule, imposed a prison term of no more than two years on the convicted married women and the relevant fornicators. When enacting the first criminal law since the establishment of the Korean government, a lot of controversy existed over whether to retain the ban on adultery. In voting at the National Assembly, the bill which allowed for the equal punishment principle in adultery cases under which male and female were equally penalized as is the current system and which stipulated that the adultery crime be indictable upon accusations was passed with the bare majority of 57 consenting votes out of the 110 members present.

(2) Observing from the perspective of comparative law, the adultery crime is punished under three principles: unequal punishment between men and women; equal punishment irrespective of sex; and non-punishment both for male and female. Examples of the first principle is witnessed in the pre-revised French criminal law or the ancient Italian criminal law, where punishment of adultery differs between husbands and wives, as well as in the Japanese former criminal law before its abolition in 1947 or the former Korean criminal law that adopted it, both of which only penalized the wives for adultery. The second principle is adopted in the current Korean criminal law and a few states of the United States.

The third and last principle of not imposing any criminal punishment on neither of the two offenders of adultery is adopted in Denmark, Sweden, Japan, Germany, France, Spain, Switzerland, Argentina and Austria, where regulations of adultery were removed in 1930, 1937, 1947, 1969, 1975, 1978, 1990, 1995 and 1996, respectively.

B. Precedents of the Constitutional Court

The Constitutional Court previously upheld the Instant Provision constitutional three times for the following reasoning.

(1) Decision of Case 89Hun–Ma82, September 10, 1990

The majority opinion upholding the Instant Provision constitutional ruled that, "The regulation of adultery restricts the right to sexual autonomy as part of right to self autonomy, which presupposes right to personality and pursuit of happiness as prescribed by Article 10 of the Constitution. However, such regulation is inevitable in ensuring continued good sexual morality and monogamy, guarantee of family life, protection of marital obligation for faithful sexual relationship and prevention of social harms caused by adultery. In addition, sentencing adultery offenders up to two years is a required minimum restriction on sexual autonomy and is not an infringement on the essence of freedom and rights".

There were other opinions in this regard: i) concurring opinions of two Justices that adultery is still an anti-social crime despite changes in social situation and people's awareness resulting in slackened normative power, ii) dissenting opinions of two Justices that abolition of the adultery ban itself is a matter of legislative policy but that criminal regulation of adultery under which imprisonment is the only punishment is incompatible with the Constitution, and iii) a dissenting opinion of one Justice that criminal punishment of adultery violates the Constitution as it is hardly conceived to be worthwhile to sacrifice privacy rights for the sake of maintaining sexual order or preventing crimes and as side effects occur from its abuse outside the system, and that imposition of imprisonment breaks the rule against excessive restriction although incrimination of adultery could be constitutional.

(2) Decision of Case 90Hun–Ka70, March 11, 1993

The judgment of the aforementioned case 89Hun–Ma82 remained unchanged, and concurring opinions were joined by one Justice took office after the decision of case 89Hun–Ma82 took place.

(3) Decision of Case 2000Hun–Ba60, October 25, 2001

While maintaining the abovementioned judgment of case 89Hun–Ma82, the majority opinion called for serious approach by legislators over retention or abolition of the ban on adultery.

In this case, one Justice filed a dissenting opinion that criminal punishment of adultery violates Article 10 of the Constitution that guarantees human dignity. This opinion was based on his perspective that committing adultery is a breach of contract that violates the duty for faithful sexual relationship and

therefore should be punished in accordance with general principles of the contract law, and that adultery is not a matter of criminal punishment although it may be subject to ethical censure and moral repentance.

C. Overview of the Instant Provision

The purpose of the Instant Provision is to protect good sexual customs, monogamous families or marriage as the foundation for families, and the duty for faithful sexual relationship between husband and wife.

The Civil Act adopts de jure marriage (Article 812, Civil Act), so the spouse of a "married person", or the offender of an adultery crime, means a lawful spouse, including those who do not live together. Acts of "adultery" and "fornication" imply consensual sexual intercourse, in which case the adulterer should recognize that he/she has a spouse and is engaged in sexual intercourse with a person other than his/her spouse while the fornicator should be aware that he/she is in a sexual relationship with a married person. An act of adultery and fornication constitutes one crime at every sexual intercourse, and adultery over a long term in cohabitation does not make an inclusive offense.

Meanwhile, an adultery crime shall be prosecuted only upon the accusation of the victimized spouse, and the accusation can no longer be made if the victimized spouse condones or pardons the adultery (Article 241 Section 2, Criminal Act). Accordingly, no accusation can be filed if there is prior consent or encouragement that sexual intercourse with other partner will be approved or tolerated, such as when there is an agreement in divorce, or when there is post forgiveness or condonation expressing intentions not to hold accountable in order to maintain marriage. Even in cases where an accusation can be filed, it shall not be valid unless the marriage becomes void or a divorce action is instituted, and the accusation shall be considered withdrawn if the accuser and the defendant are married again or the divorce action is withdrawn (Article 229, Criminal Procedure Act). An accusation may be withdrawn before the pronouncement of judgment in the first instance, and a person who has withdrawn an accusation shall not file an accusation again (Article 232, Criminal Procedure Act).

D. Constitutional Opinion of Justice Lee Kang-kook, Justice Lee Kong-hyun, Justice Cho Dae-hyen

(1) Basic rights restricted by the Instant Provision

Article 10 of the Constitution provides that, "All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals", thereby guaranteeing people's personal rights and the right to pursue happiness. In fact, the right to self autonomy is presupposed by personal rights and the right to pursue happiness and also includes the right to sexual autonomy for whether or not and with whom to engage in sexual intercourse it is undoubted that regulation of adultery restricts the right to sexual autonomy (2 KCCR 306, 321-322, 89Hun-Ma82, September 10, 1990). Furthermore, as the Instant Provision regulates individual sexual life in the private domain, it also appears to restrict the

privacy rights under Article 17 of the Constitution (2 KCCR 306, 321–322, 89Hun–Ma82, September 10, 1990).

However, the aforementioned basic rights are not always unlimitedly guaranteed either and, if necessary, are subject to restriction by law for the purpose of ensuring national safety, public order and welfare insofar as their essence is not violated pursuant to Article 37 Section 2 of the Constitution (2 KCCR 306, 310, 89Hun–Ma82, September 10, 1990).

(2) Whether the Instant Provision violates rule against excessive restriction

Marital relationships, the cornerstone of family life that serves as the foundation for the state and society, require more than individual intention or desire for their formation and function as a valuable social system based on tradition and culture. In this context, a married person who commits adultery violates the obligation to remain sexually faithful, a duty stemming from marriage that one opted for based on his/her free will, and such an act not only violates a marital contract but also breaks the fundamental trust between spouses. Adultery and fornication cause marriage breakdowns, and even if the consequence is not as severe, they become a major threat to monogamy that buttresses the modern marriage system and cause social problems, such as abandonment of one's spouse and family members. It is needless to say that adultery and fornication go against the sound sexual morality called for in our society.

In light of the State's duty to maintain social order and ensure sustainable marriage and family life based on individual dignity and gender equality (Article 36 Section 1, Constitution), the abovementioned necessity for regulation of adultery and fornication is fully acceptable. In this regard, the legitimacy of the legislative purpose is acknowledged.

Although adultery and fornication are determined by sexual autonomy and fall into the domain of intimate privacy, they are not simply an issue of ethics and morality immune from legal intervention or regulation in case sexual desire or loving emotions are not held within but externally expressed and thus have a disastrous effect on marriage. Therefore, going beyond calling for autonomous awareness on ethics and opting to ban certain acts through criminal punishment is an appropriate means to serve the legislative purpose.

It can still be problematic as to whether applying criminal punishment instead of non-criminal punishment or family law regulations is excessive, but whether the State should regulate certain acts by exercising its power to impose criminal punishment for illegality and law violation varies in time and space depending on human to human or human to society relations. In the end, this issue will be determined by situation of the times and awareness of society members, etc., as well as legislators' will, or legislative policies, and liberty of legislation (See 13–2 KCCR 480, 486, 2000Hun–Ba60, October 25, 2001).

Despite great changes in social structure and national awareness, the idea of chastity inherent in the Korean society, in particular that between husband and wife, is inherited traditional ethics that is still

rooted in the society. Because sustaining monogamy and the obligation to remain sexually faithful is established as part of our moral standards, it is still our legal awareness that adultery undermines social order and infringes on others' rights (13-2 KCCR 480, 486, 2000Hun-Ba60, October 25, 2001)

In other words, our legal awareness tells us that adulterous acts are inappropriate in terms of social morality if it is admitted that the adulterer purposefully engaged in a sexual intercourse although there seems to be no objectives or tendencies to harm one's spouse or break marriage and family life in light of the adulterer's personal circumstances of his/her family, background story leading to adultery and fornication, and intentions, and that the acts of the fornicator who joined in the adultery are also subject to similar censure. Furthermore, adultery and fornication, regardless of their specific modes of acts, are highly likely to or actually does dismantle marriage and family life, and it is therefore difficult to deny that there is a strong demand for prevention.

For this reason, considering such legal awareness and strong social demand for prevention of adultery and fornication, it is difficult to say that, regardless of whether it be one-time event derived from simple sexual desire or from emotion of love, the legislator was markedly arbitrary in judging that there is a need to impose strict responsibility unless there should be exceptional circumstances, such as prior mutual consent on divorce intentions or post agreement to sustain marriage and family life. Also, legislators set forth termination of marriage or filing of divorce suits as requirements for spouses' filing accusations, thereby confining the application of legal regulation only to cases where marriage and family life have reached a de-facto breakdown and thus minimizing the scope of freedom restriction by the Instant Provision. The legislators also prevent abuse of the right to file accusations by, for instance, restricting the right in case of encouragement or condonation (Article 241 Section 2, Criminal Act), considering certain divorce actions withdrawn (Article 229, Criminal Procedure Act), and prohibiting a person who has withdrawn a accusation from filing a accusation again (Article 232, Criminal Procedure Act). Therefore, it is difficult to see that regulation of sexual autonomy, etc. is excessive.

Such judgment continues to apply, since it is hardly the case that, despite the global legislative trend of non-punishment of adulterers and fornicators and the fact that adultery can be grounds for divorce and payment of compensation for grief, change in legal relations of family law makes adultery non-disruptive of normal social standards and thus eliminates the need for criminal punishment. It is also because factors such as the situation of the times, people's values such as sexual awareness, and the existence of equality-based family law system vary greatly across countries.

Moreover, regulation of acts by the Instant Provision is a restriction on sexual behaviors in specific relationships – no adultery is allowed while de jure marriage is valid and fornication is prohibited when being aware that the partner is lawfully married. This implies, for the adulterer, no more than evident obligation and responsibility accompanied by marital relationship forged on one's free will and, for the fornicator, a ban on actively joining adultery with the knowledge of others' violation of legal and moral obligations. Because this does not mean a prohibition of even the mental sympathy between the two sexes and slight sexual contact that can incidentally occur, so the private interest infringed on by the

Instant Provision is generally very insignificant. On the other hand, the public interest served by the Instant Provision includes protection of good sexual morality as well as marriage and the family system, which is of great importance. Therefore, the Instant Provision also strikes a balance between interests. Ultimately, it is hardly perceived that the Instant Provision violates the rule against excessive restriction and thus infringes on people's rights to sexual autonomy and privacy.

(3) Whether the Instant Provision violates Article 36 Section 1 of the Constitution

Article 36 Section 1 of the Constitution, which provides that "Marriage and family life shall be established and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal", stipulates that human dignity and gender equality be guaranteed even in family life and that institutions for marriage and family life be protected (See 14-1 KCCR 159, 165, 2000Hun-Ba53, March 28, 2002).

As seen earlier, punishment of adultery and fornication by the Instant Provision is not considered an excessive restriction on individual right to sexual autonomy, etc. Also, gender equality is at no risk of being undermined as the Instant Provision takes the principle of equal punishment for men and women. Rather, the Instant Provision fulfills the obligation to maintain and guarantee marriage and family life by ensuring monogamy and protecting, pursuant to the Criminal Act, sound sexual morality (2 KCCR 306, 312, 89Hun-Ma82, September 10, 1990)

(4) Whether the Instant Provision violates principle of proportionality

The issue of selecting the type and scope of statutory sentence should be left to the decision of legislators, who should take into account various factors, including the Korean history and culture, the situation at time of legislation, values or legal awareness of the general public, and criminal policy considerations for crime prevention. In this context, such decision is one that requires legislative discretion or liberty of legislation (4 KCCR 225, 229, 90Hun-Ba24, April 28, 1992; 7-1 KCCR 478, 487, 91Hun-Ba11, April 20, 1995)

The Instant Provision stipulates only imprisonment as punishment, but the maximum sentence of two years is not heavy and the sentence can go down to suspension of sentencing for relatively low degree of adultery crimes. Therefore, it is not true that the Instant Provision imposes overly excessive criminal punishment that does not allow for proportional punishment.

Further, adultery and fornication, once prosecuted, result in different invasion of interests than other crimes concerning sexual customs in that they cause social problems inevitably stemming from family breakdown regardless of modes of acts. Also, light fines are not likely to have deterrence effect on adulterers who desire to avoid the responsibility of support or damage compensation coming from the existing marriage. In that sense, legislators' non-enactment of fines in the Instant Provision unlike other sexual custom-related crimes under the Criminal Act run counter to balancing of the criminal punishment system.

(5) Sub-conclusion

Therefore, the Instant Provision does not violate the Constitution.

E. Concurring Opinion (Constitutional) of Justice Min Hyeong-ki

As explicated by above mentioned constitutional opinions, sexual autonomy or privacy rights are also subject to regulation in accordance with general principles of restriction on basic rights under the Constitution, so the punishment of adultery under the Criminal Act on its own does not overstep the permitted scope of legislative discretion and therefore is a violation of the Constitution. Yet, since the Instant Provision entails some problems related to modes of acts, resolving the problems will require legislative remedies based on public consensus, which leads to the following opinion.

As the opinion holding the Instant Provision incompatible with the Constitution in G. below appropriately points out, adultery is very extensive and diverse in its modes of acts and thus varies greatly by cases of different levels of anti-social elements or censure. Nevertheless, criminally punishing the adulterers or fornicators uniformly based on a fixed concept of adultery without considering specificities or individualities of specific modes of acts can, in fact, be deemed unjust or out of the norm.

Admittedly, much of the issue could be resolved through law interpretation or sentencing in proceedings, but this will not fully clear the doubts on legitimacy of the Instant Provision.

As such, in case legitimacy of a written regulation is dubious due to social problems or legal observations derived from practical reasons not prearranged or intended, resolving the situation falls under the domain of legislative discretion. This issue is, in principle, a duty of the legislative body that represents the people and legislates public will in real politics, not one that requires the Constitutional Court as the judicial body to actively intervene in the judgment on the constitutionality.

As accounted for in the opinion of constitutional incompatibility of the Instant Provision concerning modes of acts to follow, punishing even the ones that involve little anti-social factors may, in practice or in terms of policy-making, cause unreasonable consequences. Therefore, it is to be noted that, as regards the aforementioned problems, the legislators should make policy efforts to make remedies to relevant legislation based on positive and comprehensive consideration of the customs, social consensus, public legal awareness, etc.

F. Dissenting Opinion (Unconstitutional) of Justice Kim Jong-dae, Justice Lee Dong-heub, Justice Mok Young-joon

We believe that Article 241 of the Criminal Act, which imposes criminal punishment on adultery and thereby restricting the right to sexual autonomy and privacy, violating the rule against excessive restriction and is therefore unconstitutional. Hence the following opinion:

(1) Debate on revision of the Instant Provision

Criminal Act Revision Subcommittee of the Ministry of Justice, by a vote of 8 to 2, decided to abolish the adultery ban in January 1989. The Justice Ministry decided to accept the opinion and abolish it in the Criminal Act Revision Summary. After the Constitutional Court's decision upholding the Instant Provision (89Hun-Ma82, September 10, 1990), the Justice Ministry turned its position to retain the adultery ban, but add supplement fines to the punitive regulation that only imposes imprisonment.

However, the adultery crime had been removed from the revised draft of the Criminal Act preannounced on April 8, 1992. The Ministry of Justice cited reasons for this: first, adultery crimes are ones that involve ethical issues between individuals and are on the course of being abolished worldwide; second, it is inappropriate for the State to intervene in individual sexual life, an intimate domain of privacy; third, it is in many times taken advantage of as threats or means to receive compensation for grief; fourth, the significance of incrimination has weakened as a means of State punishment as accusations are mostly canceled in the trial procedures; fifth, there is little deterrence or re-socialization effect as intended for criminal policy purposes; sixth, the effectiveness of protecting families or women is also in doubt.

On May 27, 1992 after preannouncement of legislation, the Ministry of Justice finalized the Criminal Act Revision composed of 405 articles. Then, the statutory punishment of two year or less prison term for adultery was lowered to a year or less, with an option of fines worth five million Won or less. The reason why the ban on adultery was reinstated as such appears to be an effort to reach compromise between the retentionist and abolitionist views as people from every walk of life started citing prematurity of abolishing the adultery ban.

However, the abovementioned revision was not incorporated and legislated into Criminal Act revised by Act No. 5057 on December 29, 1995, and the existing regulation on adultery prohibition was consequently retained without any changes.

(2) Whether the Instant Provision violated rule against excessive restriction

(A) Standard of review

The right to sexual autonomy and privacy is basic rights guaranteed under the Constitution, so whether the restriction thereof is constitutional or not should undergo a strict review of the principle of proportionality.

(B) Legitimacy of purpose

If the legislative purpose of the Instant Provision is to protect the marital system based on monogamy and the obligation to remain sexually faithful between husband and wife, criminal punishment of offenders to that end will serve the legitimate purpose.

(C) Appropriateness of means and least restrictive means

However, it is not easy to concur as stated below whether the means is appropriate and the restriction of basic rights is executed to the necessary minimum in criminally punishing adultery in order to achieve the stated legislative purpose.

1) Change in public's legal awareness

In recent years, the growing awareness of the Korean society, along with rapid spread of individualism and liberal views on sexual life, is that sexual life and love is a private matter not subjected to legal control. Also, the society is changing into one where the private interest of sexual autonomy is put before the social interest of sexual morality and families. Increase in liberal view on sexual life is an unavoidable social shift that should be accepted.

Although it is difficult to affirm that the foundation for adultery ban has totally crumbled down with such change in social environment, it is hard to deny that the sustaining foundation is being shaken to its roots to an extent that is no longer sustainable.

2) Appropriateness of criminal punishment

A) Scope and limitation of the legislature on criminal punishment

Whether to regulate certain acts for being illegal and constituting a crime by exercising the State's authority over criminal punishment or simply rely on moral law is a matter that inevitably varies by time and space depending on mutual relationship between individuals and individuals and society. In the end, the issue will be determined by the situation of the times and mindset of society members (KCCR 2000Hun-Ba60, October 25, 2001).

Some in our domain of life should be left to moral law although others are to be directly regulated by law. As law is called the minimum morals, law and regulations must not arbitrarily transgress the domain that is subject to moral law, a higher level regulation. If law invades the domain of morality, the society would fall prey to the idea of almighty law and not be able to induce quality development.

Unfilial piety, malignant default, begging, suicide, squandering are all immoral and anti-social acts, but not all can be punished as crimes. A society where all morally reprehensible acts are subjected to criminal punishment is not necessarily fair and just, and the State's attempt to make remedies to people's moral solely through criminal punishment is neither easy to succeed nor desirable.

B) Criminal punishment of sexual life

What kind of sexual acts or love the two consenting adults are engaged in is a matter of personal freedom, except when it is exposed outside and consequently harms sound sexual customs of the society, which is only when legal regulation is required. The State interfering with sexual life, a private and intimate domain whose order should be maintained on its own autonomously by sexual morality, through criminal punishment is an infringement on privacy rights by the State and an excessive

restriction on the sexual autonomy that involves whether to have and with whom one engages in sexual acts.

In addition, in view of our legislative system, it is against the balance of legislative system to penalize only adultery with criminal punishment, when there are no separate punitive regulations for acts that further harm good customs and are more immoral and reprehensible than adultery such as incest, bestiality, and group sex.

C) Trends of legislation and precedents

The recent tendency of modern criminal law directs that the State should not exercise authority in case the act, although in contradiction to sexual morals, is in essence personal privacy and is not socially harmful or in evident violation of legal interests. It is also a global trend to abolish adultery crimes, and most of the countries around the world in fact abolished the ban on adultery before the 1970s.

Punishment of adultery by prosecutors and courts has also been weakened greatly compared to the past. The existing practice according to which the accused is in principle arrested and sentenced to imprisonment unless the adultery accusation is cancelled is shifting towards sentences of non-restraint and suspension of execution. Also, the Supreme Court recently stated, "If the parties no longer have the intention of maintaining marital relationship and there is an evident agreement on divorce, it should be viewed that the agreement contains prior consent to the spouse's adultery, or encouraging intentions (Supreme Court, 2008Do3599, July 10k 2008)", which exhibits a tendency towards modified punishment of adultery.

3) Effectiveness of criminal punishment

A) Protection of monogamy and family order

It has been stated earlier in the opinion upholding the Instant Provision that the interest to be protected by the Instant Provision is the marital system based on monogamy.

Yet, the Instant Provision by no means can help maintain marriage life once the act of adultery occurs. Under the Criminal Act, adultery is prosecuted only upon the accusation of the victimized spouse (Article 241, Section 2, Criminal Act), and an adultery accusation shall not be made unless the marriage is void or divorce action is instituted (Article 229, Section 1, Criminal Procedure Act). For this reason, existing families face breakdown with the invoking of the right to file a accusation, and, even after cancellation of the accusation, it is difficult to hope for recovery of the emotion between spouses. Therefore, the adultery crime can no longer contribute to protecting the marital system or family order. Furthermore, a criminal record in our society leads to social ruin, so there is little possibility that a person who was punished for adultery would remarry the spouse who had made an accusation against himself/herself. It is neither possible to protect harmonious family order because children's scar may grow larger with intensified conflict between spouses in the process of criminal punishment of adultery.

Rather, one may suspect or be assured about his/her spouse's adultery and attempt to run a careful and secret investigation and collect evidence in order to secure evidence although no actual adultery act took place. As a result, the mutual mistrust that occurs in such a process frequently leads to a family breakdown.

All considered, protecting marital system through criminal punishment is nothing more than preventing a married person from committing adultery beforehand for fear of criminal punishment. However, it is doubted whether such psychological deterrence is effective, and preserving marriage and families should be left to one's free will and affection instead of being coerced by force through criminal punishment. Therefore, the Instant Provision is not an appropriate and effective means to achieve the purpose of protecting monogamy and family order.

B) Protection of obligation to remain faithful between husband and wife

Husband and wife shall live together, and shall support, and aid each other (former portion of Article 826 Section 1, Civil Act), which naturally leads to a duty not to engage in unfaithful or adulterous acts. Therefore, if either husband or wife commits an act of adultery, this can be a cause for divorce (Article 840 Item 1, Civil Act), and the negligent party shall be liable for damages from mental anguish as well as property damages (Article 843 and 806, Civil Act). Also, the court shall consider children's welfare related to fostering and restriction or exclusion of visitation rights (Article 843, Article 837 Section 3, 4, Article 837-2 Section 2, Civil Act), allowing for disadvantaging the married person having engaged in unfaithful acts.

Admittedly, there can be no objection to the fact that violation of a married person's duty to remain sexually faithful is unethical. Still, it is doubted whether the duty to remain sexually faithful between husband and wife can be preserved through criminal punishment, in addition to being held accountable for civil law violations as mentioned above. This is because the obligation to remain faithful must be observed autonomously based on social ethics as well as affection and faith between husband and wife, and coercive measures for encouragement and preservation of the duty through criminal punishment would not be effective at all. As filial piety forced by criminal punishment is not one in its true sense of the term, chastity forced by criminal punishment is not true chastity, either.

C) Protection of women

It is true that the existence of adultery crimes in the past Korean society served to protect women. In other words, women were socially and economically underprivileged, and acts of adultery were mainly committed by men. Therefore, the existence of an adultery crime acted as psychological adultery deterrence for men, and, furthermore, enabled female spouses to receive payment of compensation for grief or divided assets from the male spouse on the condition of cancelling the adultery accusation.

However, the legal, social, and economic changes of our times led to considerable loss in the above stated *raison d'être* of adultery.

Above all, as women's earning power and economic capabilities have improved with more active social and economic activities, the premise that women are the economically disadvantaged does not apply to all married couples. Additionally, as the Civil Act was revised on January 13, 1990, both husband and wife have become entitled to claim for division of assets in case of divorce, and the parental authority is equally guaranteed to men and women without discrimination. In other words, the wife's right to claim property division is now recognized under the Civil Act, and family chores of housewives are recognized as contribution to asset formation. This has established a system that provides women with living foundation after divorce, the right to claim damages through receipt of compensation for grief in case of divorce, and the feasibility of raising children through claim for fostering expenses.

Indeed, there is a need for an effective plan to execute the decision ordering the payment of compensation for grief or division of property to women in case the male spouse changes the title of assets to third person, but this is a matter to be supplemented by legislation, not a cause for retention of the adultery prohibition.

Even though it is assumed that the economic status of married women is inferior to that of married men, existence of an adultery crime does not necessarily protect the female spouse. Divorce is a prerequisite for filing accusations for adultery, so married women without economic and earning abilities may rather be reluctant to filing accusations. The number of male and female accusers of adultery cases in the year 2006 was almost the same, but it is to be noted that, when considering the huge gap between men and women in terms of frequency of adultery acts, prohibition of adultery is in practice relatively unfavorable to women.

As such, the female protective function of the adultery ban has weakened greatly.

D) Sub-conclusion

Finally, today's prohibition of adultery has come to punish only a very small number of adulterers, so it only mass produces potential criminals and restricts their basic rights but has become ineffective in protecting the marital system and duty to remain sexually faithful.

4) Preventive function of criminal punishment

The type of adultery can be classified into one arising from affection and the other that does not. In case the act of adultery arises from affection, it is difficult to control as the crime is based on confidence or conscience. On the other hand, when the act is committed without affection, it is hard to anticipate a deterrence effect for adultery from criminal punishment since the adulterers have no big crime awareness in reality as exhibited in men's prevalent purchase of sex in all kinds.

Meanwhile, the rate of detecting and punishing adultery has been greatly reduced compared to the past. Considering that the number of cases that go criminal is merely 3,000 to 4,000 a year, most of the adultery acts were in fact not discovered or not sued despite discovery by the spouse. Less than 10 percent of the accusations filed proceed to confinement and prosecution, and a considerable number of

cases end up with cancellation of accusations and thus, even after filing of a accusation, exempt from or rejection of prosecution in the process of investigation or trials. As a result, the adultery ban has greatly lost its punitive function as criminal punishment.

Some express concern that abolition of the adultery crime may bring loose sexual morality or more frequent divorce from adultery, but there is no statistics that is evidentiary of such in many countries that removed the ban on adultery.

In the end, the prohibition of adultery is losing its function as a regulative norm and has become difficult either to attain the general or specific prevention effects in criminal measures.

5) Side effects of criminal punishment

It cannot be excluded that the adultery crime can be exploited for other purpose than to protect wholesome marital system and obligation to remain sexually faithful between spouses. It is only the spouse of the adulterer who can file or cancel accusations against the adulterer and fornicator, and the adultery crime is indictable upon a accusation. This means that whether the prosecutors will prosecute the case and the court will reject the indictment depends on whether or not the accusation is cancelled. As a result, filing adultery accusations or cancellation thereof is a means to facilitate divorce between spouses who are in effect facing breakdown as well as to blackmail socially prominent figures or temporarily delinquent housewives. This, in consequence, frequently leads to abuse of swindling money out of fornicators.

6) Sub-conclusion

As abovementioned, criminally punishing adultery acts does not satisfy the suitability of means and the least restrictive means.

(D) Balance of interests

As stated above, it is difficult to see that the Instant Provision can any longer serve the public interest of protecting the monogamy-based marriage system and the obligation to remain sexually faithful between spouses. Since the Instant Provision excessively restricts people's sexual autonomy and privacy rights by criminally punishing the private and intimate domain of sexual life, the Instant Provision can be said to have lost the balance of interests.

(E) Sub-conclusion

The Instant Provision ultimately failed to achieve the balance of legal interests as well as suitability of means and the least restrictive means. This, therefore, violates the rule against excessive restriction defined in Article 37 Section 2 of the Constitution and infringes on people's sexual autonomy and privacy. Therefore, the Instant Provision contradicts the Constitution.

G. Dissenting Opinion (Incompatibility with the Constitution) of Justice Kim Hee-ok

I believe that the Instant Provision allows over-exercise of State punishment by imposing criminal punishment even on acts that do not satisfy the conditions set forth to that end, such as those that require simply no more than moral reprehension or ones that are not or barely subject to reprehension, and thus non-conforms to the Constitution. I hereby state the following opinion.

(1) Basis and limitations of state punishment

Criminal punishment of individuals causes serious restriction of his/her liberty guaranteed by the Constitution. Criminal punishment in principle is inflicted on anybody without exception who commits acts of crime as defined by the State irrespective of one's social status, fame, contribution to society, etc. However esteemed and famed a figure may be in the society, he/she will be irrecoverably disgraced and shamed from the moment he/she is criminally sanctioned.

"What is the basis for State punishment", "what is the just punishment for crime", and "what should the State define as crime and provide for conditions to protect legal interests and peaceful community life" are issues that have been diversely and extensively discussed and legislated depending on different societies and countries. Yet, this is a very tricky issue that cannot be uniformly established.

As regards justification of the State punishment, the issue as to what kind of acts should be defined as crimes and prohibited using the criminal punishment is associated with the judgment on to what extent the scope of criminal punishment must be established.

Considering the issue which acts are to be defined as crimes and criminally punished consists of two steps: first, judgment on the justification of public sanction against the act; second, judgment regarding whether the public sanction should necessarily be criminal punishment.

First, justification of public sanction is determined by whether the act should be subjected to public sanction regardless of what kind – whether the act should be punished. The criterion for justification judgment is "anti-social" characteristics. In other words, the basic condition for a certain act to be subjected to criminal punishment is whether the act is anti-social and harmful. The criterion is a requirement for punishment, but it cannot be concluded that meeting the requirement immediately leads to criminal punishment.

Second, if the act is justly punishable by fulfilling such sanction requirements, it has to be decided whether the sanction should be criminal punishment. Protection of legal interests is not achieved not only through criminal punishment but also through other means as well. The fact that legal interests are violated is a necessary condition for criminal punishment, but not a sufficient condition. This is because although there was a violation of legal interests, criminal punishment is not required if the interests can be protected by civil, administrative, and socio-legal sanctions.

In general, the acts of violating legal interests subject to criminal punishment are those that involve "serious violation of legal interests", or acts "deemed extremely harmful to the society", and this should serve as the boundary for elements of crime. Criminal punishment should be imposed limited to cases

where other sanctions against punishable acts can by no means be as effective as criminal punishment. The law must prescribe only the punishments that are strictly and evidently necessary (Article 8, Declaration of the Rights of Man and Citizen). The State should not punish acts that do not satisfy the requirement for punishment. This directly relates to constitutional principles, such as the rule of law and 'Nulla Poena Sine Lege' (no penalty without a law).

The Constitution sets forth as its basic idea the realization of a true constitutional State in which people's basic rights are protected from abuse of State power. Therefore, the legislators' right to legislation regarding which to define as crimes and what punishment will be imposed thereon cannot be unlimitedly recognized (16-2(B) KCCR 446, 457, 2003Hun-Ka12, December 16, 2004).

Legislators have the primary authority to decide, in consideration of culture, social values, etc., on which acts meet the requirements for public sanction and criminal punishment and thus are subject to State punishment. However, cautious care is required in regulating the subjected act as clearly and in detail as permitted by legislative techniques in order to protect human dignity and value from the threat of unnecessary or excessive criminal punishment.

(2) State criminal punishment according to diverse modes of adultery acts and non punishable acts

The interests protected by prohibition of adultery are marriage as the basis of families and sexual morality as the good customs on sexual life. The basic rights regulated by the Instant Provision appear to be sexual autonomy and privacy rights derived from personal rights and the right to pursue happiness.

However, the modes of adultery acts as prescribed by Article 241 of the Criminal Act are very extensive and diverse, so not all of the adultery acts can be decided constitutional or unconstitutional for restricting the stated basic rights. In other words, the acts of adultery and fornication prohibited by the Instant Provision includes the following: adultery despite legal and de facto marital relationship and family members' dissuasion, while discarding one's obligation or loyalty to remain sexually faithful; adultery with a new lover without having legally divorced although the marriage has in fact faced a breakdown; a de facto polygamic adultery similar to the anti cultural concubine system by committing the act continuously with one same person; one time adultery committed temporarily while desiring to maintain the legal marriage of monogamy; adultery with married persons; adultery with unmarried persons. As such, adultery acts vary greatly by intention of offenders, status of family life, the partner, frequency and method of acts, and whether and how much the act is anti social and morally reprehensible differs greatly according the type of individual acts.

Of the types of adultery and fornication, there are matters that are difficult to be simply addressed with other forms of sanctions, such as moral law or civil sanctions, in light of the cause of maintaining monogamous marriage system as the basis for decent sexual morality and family, guaranteeing family life, and protecting the obligation to remain sexually faithful between spouses. Punishment in this regard should fall under the boundary of legislative discretion on exercise of State punishment. However,

adultery committed in a situation where marriage is broken actually and the duty to remain sexually faithful between spouses no longer exists when, for instance, the couple has not lived together for a long time or one that is simply an one time act neither harm monogamous marriage system and family life nor contradict decent sexual morality. In this sense, penalizing even the least anti-social adultery acts is unnecessary or excessive and an excessive exercise of State punishment, thus leading to the State's excessive intervention in individual sexual autonomy and privacy. In this case, the requirement for punishment does not apply to such adultery acts, which are in fact fully punishable with other means such as civil sanctions.

The Instant Provision provides that all modes of adultery and fornication acts shall be uniformly punished without any consideration of the possibility of singularities and specificities, in order to achieve the goal of imposing criminal punishment. This, however, allows the State to overstep its boundary of role in a constitutional State and execute criminal punishment. In this context, the Instant Provision does not conform to the Constitution.

(3) Incompatibility with the Constitution ordering temporary application

The unconstitutionality of the Instant Provision does not lie with the fact that it defines the punishment of adultery acts, but with the fact that it subjects to State punishment even the acts that are barely anti social and thus require not as harsh penalty as criminal punishment. Since it is appropriate for the legislator to determine the range and scope of acts that are not or barely liable to legal censure and thus sufficiently punishable by other means such as civil sanctions, in consideration of the change of the times and public legal awareness, etc., the incompatibility decision would be appropriate. However, if application of the Instant Provision is suspended, the sanction for punishable adultery acts also becomes impossible. This, in return, may rather cause a legal status to be more discrepant from the constitutional order compared to when retaining the Instant Provision as it is. Therefore, there is a need to temporarily apply the Instant Provision until a revision compatible with the Constitution is legislated for replacement.

H. Dissenting Opinion (Unconstitutional) of Justice Song Doo-hwan

I concur in the opinion upholding the Instant Provision in reviewing the constitutionality of the criminal punishment system itself, but the only statutory sentence being imprisonment does not conform to the principle of proportionality and, therefore, violates the Constitution. In this context, I unfold my dissenting opinion as the following.

(1) Prohibition of adultery and constitutionality of criminal punishment

(A) As to whether the Instant Provision is constitutional for banning adultery and imposing specific criminal punishment for that matter, I concur in the opinion upholding the Instant Provision.

(B) However, as the opinion upholding the Instant Provision maintains, I will express doubt on citing the main restricted basic right as sexual autonomy and, based on this premise, reviewing whether the Instant Provision violates the rule against excessive restriction.

The personal right and the right to pursue happiness as prescribed by Article 10 of the Constitution involves the right to self autonomy, which undoubtedly includes sexual autonomy in deciding whether to or with whom to have sexual acts (2 KCCR 306, 310, 89Hun–Ma82, September 10, 1990). However, it is dubious as to whether the sexual autonomy includes the protection of adultery acts committed by married persons and fornication acts of their partners.

The right to self autonomy does not mean indefinite liberty in the sense that anything you want can be done anytime. Autonomous decisions which determine one's relationship with others or deny coexistence with others in case of having influence on the society oversteps the scope of protection for self autonomy required for the free development of personality.

The same applies to the right to sexual autonomy. When a person who made an autonomous decision to live in a social system of monogamous marriage with the view to realizing the purpose and value of community life, including sexual life, breaks his/her duty to remain sexually faithful and commits adultery or engages in fornication aware of the circumstances, he/she is defying coexistence with others in his/her relationship with the community that protects the spouse of the fornicator and marriage as a social and legal system. In this case, sexual autonomy cannot be protected.

Therefore, the concept of sexual autonomy will be crucial in sexual assaults, sexual harassment and other issues that concern the idea that unilateral sexual relationship cannot be accepted between spouses either. However, it is hardly appropriate to consider sexual autonomy as the major basic right that is violated by punishing adultery on the condition of the spouse's accusation.

(C) Meanwhile, as the opinion holding the Instant Provision unconstitutional points out, the following needs to be rightfully noticed with care: punishment of adultery is abused as a means to blackmail or obtain compensation for grief in many cases; the punitive function of punishing adultery as State punishment has weakened; deterrence as criminal punishment and effectiveness of family protection have almost vanished; and it is a global tendency to abolish the adultery ban.

However, actual incidents of abusing the adultery punishment are nothing but practical and consequential side effects resulting from abuse of the Instant Provision outside the system, not an issue arising from normative flaws of the Instant Provision. The remaining issues are merely circumstances that should be considered in deciding whether the adultery ban is appropriate in terms of legislative policy purposes or in resolving issues through legislation and are not factors that immediately determine the constitutionality of the Instant Provision.

Indeed, if the seemingly ongoing change of sexual morality continues further to alter the social significance of marriage system and thus isolates the Instant Provision substantially from the general

legal awareness, we need not wait for legislators' abolition but declare the Instant Provision unconstitutional. However, it does not appear that we have reached such a situation as of yet.

(D) In other words, the Instant Provision is a product of legislators' efforts to harmoniously organize the legal system that, on the one hand protects and guarantees the marriage system and duty to remain sexually faithful, and, on the other hand prohibits personal revenge while adopting the punitive idea for adulterers and fornicators. In this context, the Instant Provision did transgress the boundary of legislation rights and is greatly arbitrary.

(2) Constitutionality of statutory punishment

As abovementioned, I am in agreement with the opinion upholding the Instant Provision in that the Instant Provision imposes certain punishment for acts of adultery in case of violation. However, a separate constitutional review is required regarding the exclusive sentence of restricting physical freedom as prescribed by the Instant Provision that, "A married person who commits adultery shall be punished by imprisonment for not more than two years".

(A) The concept of a constitutional State involves the idea of a substantially constitutional State that requires an appropriate relationship of proportionality between gravity of the crime and responsibility of the offender (4 KCCR 225, 230, 90Hun-Ba24, April 8, 1992.). Therefore, the right to legislation of legislators over what kind of acts will be defined as crimes and what kind of criminal punishment will be imposed cannot be unlimited. Human dignity and value must be respected and protected from the threat of criminal punishment as prescribed by Article 10 of the Constitution; principles for a substantially constitutional State should be realized by designating the scope of statutory sentence in which customized punishments can be applied in accordance with the rule against excessive restriction; and the principle of proportionality must be observed so that the punishment corresponds to responsibility and gravity of the crime.

(B) The Instant Provision exclusively imposes imprisonment as statutory sentence and thereby sets the minimum sentence relatively high.

In order to justify the tough minimum sentence, it has to be rationally predictable that the offender, in practice, will not be sentenced to criminal punishment beyond his responsibility although the act subject to punishment is serious in gravity of crime and illegality and thus the minimum sentence is set heavy.

(C) However, a vast majority of adultery and fornication cases exist where gravity of crime varies significantly according to modes of acts. For instance, it could either be an incidental one time or momentary affair or a continuous and repetitive offense that involves abandonment of one's spouse for a considerable period of time. Also, the legal accountability differ between the person who committed

adultery while maintaining de-jure or de-facto marital relationship and the unmarried offender who committed fornication under the belief that his/her partner's marriage was in fact facing a breakdown. As such, it is fully predictable in general that the accountability widely vary case from case.

The Instant Provision nevertheless imposes prison term as an exclusive punishment of adultery and fornication acts, which excessively exaggerates the punitive aspect granted to criminal punishment. For this reason, it is hard to match the corresponding punishment with the offender's responsibility, which lacks sense of balance.

(D) The statutory sentence confined to imprisonment as prescribed by the Instant Provision makes it difficult to administer law appropriately according to specific cases in the process of investigation and trials. This also restricts judges' sentencing discretion in announcing the ruling.

It also appears that it is the imprisonment – only sentence that greatly encourages abuse outside the original purpose of the system – the means to blackmailing or demanding excessive payment of compensation for grief by taking advantage of fear for detainment.

(E) Indeed, it is possible to have the necessity for heavy punishment of some types of crimes irrespective of modes of acts. However, given the reality where the debate over the adultery ban from the criminal policy and legislative perspectives continues, it is difficult to say that acts of adultery and fornication imply major illegality or that the need for crime prevention is desperate and the acts must be severely punished without exception. Therefore, it is not legitimate for the Instant Provision to adopt an exclusive punishment restricting physical freedom.

(F) In the end, the portion of the Instant Provision concerning statutory sentence excludes or restricts the possibility to consider singularities and specificities of specific cases, which violates the principle of proportionality.

(3) Conclusion

The Instant Provision banning adultery and imposing certain criminal punishment thereof itself does not violate the Constitution but contradicts the principle of proportionality as regards the portion concerning statutory sentence, which therefore violates the Constitution

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4. Conclusion

On the Instant Provision, four Justices voted for constitutional, other four unconstitutional, and the remaining one incompatible with the Constitution. Although this makes the opinion holding the Instant Provision unconstitutional a majority, it is decided that the Instant Provision does not violate the Constitution as the quorum falls short of six persons required for a decision of unconstitutionality in the Constitution. Therefore, the decision is as set forth in the Holding.

Justices Lee Kang-kook (Presiding Justice), Lee Kong-hyun, Cho Dae-hyen, Kim Hee-ok, Kim Jong-dae, Ming Hyeong-ki, Lee Dong-heub, Mok Young-joon, Song Doo-hwan