2008Hun-Ka23-1 (2010)

Capital Punishment

February 25, 2010 Constitutional Court

Judgment Parties Requesting Court Gwangju High Court Petitioner Oh O-keun Representatives: 1. Attorney in Charge: Lee Sang-kap and six others 2. Dukso Law Firm Attorney in Charge: Kim Hyung-tae and two others 3. Dongseonambuk Law Firm Attorney in Charge: Jang You-shik 4. Saramkwasaram Law Firm Attorney in Charge: Nam Seung-han 5. Shimin Law Firm Attorney in Charge: Lee Young-jik 6. Jipyong & Jisung Law Firm Attorney in Charge: Cho Byung-gyu 7. Hangang Law Firm Attorney in Charge: Choi Jae-cheon 8. Hanul Law Firm Attorney in Charge: Lee Kyung-u

Underlying Case Gwangju High Court 2008Noh71 Violation of the Special Act on Punishment of Sex Crimes and Victim Protection (Rape and murder etc.) Holding 1. Each instant provision at issue, the Criminal Act (enacted by Act No.293 on September 18, 1953), Article 41 Item 1, each part of 'life imprisonment' of Article 41 Item 2 and Article 42, the part of 'life imprisonment' of Article 72 Section 1, the part stating "shall be punished by death, or imprisonment for life" of Article 250 Section 1, and SCPVA (enacted by Act No. 5343 on August 22, 1997 and revised by Act No. 9110 on June 13, 2008), the part stating "shall be punished by death, or imprisonment for life" of Article 10 Section 1, is compatible with the Constitution. 2. The request for constitutional review of the part on 'life imprisonment' of Article 72 Section 1 of the Criminal Act (enacted by Act No.293 on September 18. 1953) is denied. Reasoning I. Introduction of the Case and Subject Matter of Review A. Introduction of the Case 1. Petitioner, the defendant in the underlying case, requesting for the constitutional review in this instance case was charged with murder, on two separate occasions, of four people including sexual molestation of three women and thereafter sentenced to death by the first instance court, the Suncheon Branch Court of Gwangju District Court (2007Gohap143), in accordance with Article 250 Section 1 of the Criminal Act and Article 10 Section 1 of SCPVA. In response to the sentence to death, the petitioner appealed the case to the Gwangju High Court.

2. While his appeal is pending, the petitioner filed a motion to the appellate court to ask this Court to have a Constitutional review on Article 250 Section 1 and Article 41 Item 1 of the Criminal Act and the appellate court, the Gwangju High Court, on September 17, 2008, granted the motion and decided to request this case with this Court. The ground on which such decision was made was that the following provisions at issue respectively has substantial reason to doubt their unconstitutionality: the Criminal Act (enacted by Act No.293 on September 18, 1953), Article 41 (regarding Item 1 death penalty and Item 2 life imprisonment), Article 42 (except imprisonment for a limited term, and life imprisonment without forced labor), the part of 'life imprisonment' of Article 72 Section 1(except imprisonment for a limited term, and life imprisonment without forced labor), the part stating "shall be punished by death, or imprisonment for life" of Article 250 Section 1; and SCPVA (revised by Act No. 5343 on August 22, 1997, before revised by Act No. 9110 on June 13, 2008), the part stating "shall be punished by death, or imprisonment for life" of Article 10 Section 1. B. Subject Matter of Review The contested provisions are Article 41 Item 1, each part of 'life imprisonment' of Article 41 Item 2 and Article 42, the part of 'life imprisonment' of Article 72 Section 1, and the part stating "shall be punished by death, or imprisonment for life" of Article 250 Section 1 of the Criminal Act (enacted by Act No.293 on September 18, 1953) and the part stating "shall be punished by death, or imprisonment for life" of Article 10 Section 1 of the SCPVA (revised by Act No. 5343 on August 22, 1997, before revised by Act No. 9110 on June 13, 2008). The text of these provisions is as follows; [The Instant Provisions] The Criminal Act (enacted by Act No. 293 on September 18, 1953) Article 41 (Kinds of Punishment) 1. Death Penalty; 2. Imprisonment; Article 42 (Term of Penal Servitude and Imprisonment without Forced Labor) Imprisonment with or without forced labor shall be either for life or for a limited term, and the limited term shall be from one month to fifteen years. Provided, however, that it may be extended up to twenty-five years in case where the aggravating factors exist. Article 72 (Requisites for Parole) ① A person under imprisonment with forced labor or imprisonment without forced labor who has behaved himself/herself well and has

shown sincere repentance may be provisionally released by administrative disposition, provided that the person to be released on parole has served for the terms as follows: ten years in case of a life sentence or one-third of the sentenced term in case of imprisonment sentence with a definite term. Article 250 (Murder, Killing Ascendant) ① A person who kills another shall be either sentenced to death, or sentenced to life imprisonment or sentenced to imprisonment for not less than five years. Former Special Act on Punishment of Sex Crimes and Victim Protection (revised by Act No. 5343 on August 22, 1997 before revised by Act No. 9110 on June 13, 2008) Article 10 (Murder and Rape) ① If a person who has committed the crime as prescribed in Articles 5 through 8, 8-2 and 12 (limited to attempted crimes listed in Articles 5 through 8 and 8-2) or Articles 297 (rape) through 300 (attempt) of the Criminal Act, kills a person, he or she shall be punished by either capital punishment or imprisonment for life. [Relevant Provisions] (Intentionally Omitted) II. Arguments of Petitioner and Relevant Authorities (Intentionally Omitted) III. Review on the Relevance to the Original Case A. Regarding 'life imprisonment' of Article 72 Section 1 of the Criminal Act The Constitutional Court, in its case law, has recognized that when a court requests a constitutional review, "the requesting court's legal opinion on whether a statute as a whole or a statutory provision at issue satisfies the prerequisite of relevance to the underlying case should be respected." (B-2 KCCR 308, 321, 96Hun-Ka6, October 4, 1996; 11-2 KCCR 228,235, 98Hun-Ka6, September, 16, 1999; 19-1 KCCR 783, 792, 2006Hun-Ka14, June 28, 2007). The Court, however, can examine the issue of the relevance to the underlying case on its own discretion when the requesting court's legal opinion on the relevance to the original case is not persuasive at all (5-1 KCCR 226, 239, 92Hun-Ka10, May 13, 1993; 11-2 KCCR 245, 252, 99Hun-Ka1, September, 16, 1999). The request may be dismissed thereafter if the Court concludes that there is no relevance to the underlying case. The part stating 'life imprisonment' of Article 72 Section 1 of the Criminal Act stipulates that a person under imprisonment, who has behaved well and shown sincere repentance, may provisionally be released by the administrative disposition when ten years of a life sentence has been served. The

process of implementing such part is set out in Article 119 through Article 122 of 'the Act on the Execution of Sentences and the Treatment of Inmates.' The parole system is a system where the government discharges an inmate who has been already sentenced a penalty corresponding to his or her criminal conduct and proportionate responsibility by the court where the judge has to recognize the facts on the criminal conduct and consider other mitigating and aggravating factors for sentencing. Thus, the provision on parole prerequisite is only relevant at the phase of the sentence implementation following the court's sentencing rather than at the phase of the original sentencing as in this case. Moreover, we cannot find any other evidence requiring Article 72 Section 1 of the Criminal Act to be applied. For the foregoing reasons, the outcome of the underlying case or legal significance of the court's ruling and its effects will not be affected even if the Court concludes the provision mentioned above unconstitutional. Therefore, the part of 'life imprisonment' of Article 72 Section 1 of the Criminal Act, one of the provisions requested for the Court's constitutionality review, is dismissed due to lack of its relevance to the underlying case. B. Other provisions at issue In the instance when the petitioner, the defendant appellant of the original case, is found guilty in the underlying case, he is probably more likely to be sentenced Capital Punishment, to death or sentenced to life imprisonment in light of the gravity of crimes committed in accordance with Article 250 Section 1 of the Criminal Act and Article 10 Section 1 of the SCPVA. Thus, these provisions and other related parts of the provisions at issue, the part of 'the death penalty and life imprisonment' of Articles 41 and 42 of the Criminal Act, can pass the relevance test for the constitutional review because each of those provisions can clearly change the conclusion and outcome of the underlying case. IV. Review on the merit A. Whether the part of 'capital punishment' of Article 41 Item 1 of the Criminal Act is unconstitutional 1. Main reasons for retention of capital punishment and its current situations While Article 41 of the Criminal Act recognizes capital punishment as a type of penalty, the capital punishment is the most severe punishment because it destroys an offender as a social being by depriving his or her life. Capital punishment has been opposed on humanitarian

ground and criticized as an undesirable national criminal policy. On the contrary, capital punishment, one of the oldest penalties, has been acknowledged as a basic retribution to the criminals and the most effective means of crime prevention. In our country, the death penalty has its long history from ancient times when the 'Kija 8 Jokeumbeop,' ancient Gija Dynasty's 8 prohibitive laws, had a provision stating that a murderer shall be sentenced to death, to these days when the Criminal Act and other criminal laws recognize the death penalty. The present Criminal Act and other criminal laws have provisions recognizing capital punishment as a statutory penalty. Twenty-one provisions of the Criminal Act prescribe death penalty as a statutory penalty. Among the provisions of the Criminal Act, only one of them, Article 93 of the Criminal Act, which is a provision that punishes treason by levying war against nation or adhering to nation's enemies, is classified into the 'absolute statutory penalty,' penalty determined only by law not allowing a judge's discretion in sentencing at all, while other provisions that define capital punishment as a statutory penalty allow a judge's discretion in determining the terms of sentence. In addition, about 20 criminal laws have provisions that include death penalty as a statutory penalty and some of them are the 'absolute statutory penalties.' On the other hand, as of 2008, 105 countries including the United States, Japan, Taiwan and India still have the death penalty and ten countries among them abolished it in general crime cases excluding war crimes. Thirty-six countries of them have not carried out executions over ten years so far. Worldwide, the number of countries where capital punishment has been abolished for all of the crimes is 92, including Germany, France, Sweden and the Philippines. Whereas no execution has been carried out in our country since December 30, 1997, the courts have continuously sentenced the death penalty, and this Court, in 95HunBa1 case on November 28, 1996, made a decision that Article 41 Item 1 (Capital punishment), which recognizes the death penalty as a kind of punishment, and Article 250 Section 1 of the Criminal Act, which categorized the death penalty as a statutory penalty, are constitutional. 2. Importance of the right to life and the disputed issues under this Court's review on constitutionality of capital punishment Human life is the basis

for human existence which is precious and irreplaceable with any other things in the world. Even though it is not expressly enumerated in the Constitution, the right to life, derived from intuitive and natural law based on human instinct for survival and purposes of human existence, is the most fundamental right and precondition to all the basic rights set forth in the Constitution (See, 8-2 KCCR 537, 545, 95 Hun-Ba1, November 28, 1996). Therefore, the right to life has to be respected as highly as possible and any statute depriving a person's life without any reasonable reason that the Constitution permits must not be enacted. Moreover, the government has a duty to protect the people's right to life as much as possible by making legislative actions and other measures in order to prevent a person from committing crimes of killing its citizens. Since the imposition of capital punishment means deprivation of a person's life, it would be an unconstitutional penalty in light of constitutional interpretation if that imposition is found to be excessive beyond the level necessary to achieve the purposes of the punishment. (See, 8-2 KCCR 537, 545, 95 Hun-Ba1, November 28, 1996). However, we must make a distinction between the issue of whether capital punishment is constitutional or not and that of whether we are willing to retain the death penalty statutes in consideration of criminal policies. In other words, while the final decision on the constitutionality of capital punishment rests with the Constitutional Court which makes decision based on the constitutional norms derived from sources of constitutional adjudication including the Constitution, the decision whether to maintain or abolish the statutes recognizing the capital punishment rests with the legislature which, with democratic legitimacy, can decide based on assessment of the necessity, usefulness or desirability. This decision is not a matter for the Constitutional Court's review but a matter of legislative policy. In this regard, the fact that the most countries including the European developed countries have abolished the death penalty not by the courts' constitutional interpretation on capital punishment but rather by either the amendment of the constitutions or enactment of the statutes has great implication to us. Additionally, we have to also draw a line between the review on constitutionality of the death penalty itself and the one on the constitutionality of

the individual provisions of punishment. In other words, if we were to decide capital punishment is unconstitutional per se, all the death sentences imposed on the offenders, even who committed the most atrocious crimes among the ones of depriving other's life such as a serial killer or terrorist who took many lives, a person who took the lead in the massacre, and a person who committed premeditated murder, would have to be found unconstitutional. On the other hand, if we find any of the heinous crimes can be sentenced to death without violation of the Constitution, capital punishment itself can not be considered to be unconstitutional. In such case where a death sentence is allowed by the Constitution, only the extent of the crimes which can be subject to the death sentence would be an issue, and that issue will be decided through this Court's review on the constitutionality of individual provisions. Accordingly, based on foregoing distinctions, we will examine the following issues: whether our Constitution expressly recognizes capital punishment; whether the right to life can be subject to the general statutory constraint under Article 37 Section 2 of the Constitution; whether the death penalty is incompatible with the principle of proportionality in its restraint on the right to life; and whether capital punishment is inconsistent with Article 10 of the Constitution which guarantees human dignity and worth. 3. Whether our Constitution expressly recognizes capital punishment Our Constitution does not directly prescribe the prohibition or permission of capital punishment. However, Article 12 Section 1 of the Constitution states that "[n]o person shall be punished, placed under preventive restrictions or subject to involuntary labor except as provided by Act and through the due process of law," and Article 110 Section 4 of the Constitution states "military trials under an extraordinary martial law may not be appealed in case of crimes of soldiers and employees of the military; military espionage; and crimes as defined by Act in regard to sentinels, sentry post, supply of harmful foods and beverages, and prisoners of war, except in the case of a death sentence." These provisions are based on the premise that capital punishment, if prescribed by law, can be recognized as a punishment, which in turn can be applied in sentencing. In this context, Article 110 Section 4 guarantees the right to appeal of the offender

who is sentenced to death even in case of military trial under an extraordinary martial law. Therefore, in light of the textual interpretation, we conclude that the Constitution, although indirectly, recognizes capital punishment.(See, 8-2 KCCR 537, 544-545, 95Hun-Ba1, November 28, 1996) Whether the right to life is subject to the general statutory restriction under Article 37 Section 2 of the Constitution It is disputed whether the right to life is an absolute right which shall never be restricted under Article 37 Section 2 of the Constitution because social scientific or legal assessment on human life must not be allowed except limited circumstances, and to each individual, the value of life is absolute. However, our Constitution does not explicitly recognize absolute fundamental rights and Article 37 Section 2 of the Constitution prescribes that any kind of people's freedom and right may be restricted by Act to the extent that it is necessary to protect national security, public order, or public welfare. It indicates that notwithstanding its absolute value in an ideal sense, human life may be subject to legal assessment on exceptional cases where protection of an individual's life directly requires restriction on another's life, or restriction on a particular person's life is compelled to protect the lives of the general public or a public interest of such great importance. The right to life, like any other rights, may be subject to the general statutory reservation under Article 37 Section 2 of the Constitution. The government may conduct a legal assessment and take measures to restrict on a particular person's right to life in very exceptional circumstances where, for example, restricting the aggressor's life was required in self-defense to avoid unlawful, present and imminent threat to a life; sacrificing a fetus is required in order to save the mother's life; the government's conducting a war is justified out of necessity to defend against invasion of foreign enemy who makes present and imminent threat on people's lives; or imposing the most extreme penalty is unavoidable due to the necessity to prevent heinous crimes which take away others' life for no justifiable reason or violate a public interest of similarly great importance. Even when freedom or right is restricted, Article 37 Section 2 of the Constitution prescribes that no essential aspect of the freedom or right shall be violated. Because of its nature distinctive from other rights that the right to life

can never be partially taken away, however, any restriction on the right to life always and inevitably means its total deprivation. Accordingly, if we deem any constraint on the right to life goes beyond the permissible limit on the restriction on the basic right because it violates the essential aspect of individual's right to life, it would mean that we recognize the right to life as an absolute right which cannot be restricted at all. The right to life is a basic right that may be justifiably restricted under the Constitution in exceptional cases and which carries a special nature in its restriction. Thus, its deprivation should not be automatically deemed as an infringement on the essential aspect of basic right. As long as the death penalty is imposed in rare and exceptional cases where others' life of equivalent value or other public interest of such great importance necessitates such restriction, the infliction of capital punishment may be justified under the principle of proportionality. In such cases, the fact that the punishment deprives the right to life does not render it a violation of essential part of the basic right. 5. Whether capital punishment in its restriction on the right to life violates the principle of proportionality (A) As we mentioned above, the right to life can be subject to the general statutory restriction under Article 37 Section 2 of the Constitution. We will now examine whether capital punishment in its restriction on the right to life is in violation of the principle of proportionality to determine its unconstitutionality. (B) Legitimacy of the legislative purposes and propriety of the measures The death penalty is intended to serve several legislative purposes including preventing crimes by making a psychological warning to the people, realizing justice through a fair retribution against the perpetrator, and protecting society by permanently blocking recidivism of the criminal. These legislative purposes are legitimate as they pursue public interests. Furthermore, the imposition of capital punishment is a proper means to achieve the general crime deterrence because it is the harshest and ultimate penalty that makes use of the people's instinctive fear of death. As for the most heinous crime such as killing of many people by cruel means, the degree of infringement on the victims' legal interest and the offender's responsibility on that crime are so enormous that it goes beyond what we can measure. Considering the indescribable sorrow, pain,

and anger of the victim's family and the apprehension, fear, and resentment that the general public feels because of the heinous crimes, the imposition of a strong punishment corresponding to the extent of illegality and responsibility that the constitutional order allows is necessary in order to bring justice. Thus, for those crimes, the strongest penalty, the death sentence, is deemed a proper means to achieve justice through just retribution. (C) The least restriction on the right to life 1) In normal situation where there exists proportionality between a specific crime and statutory penalty for that crime, the more severe penalty the offender is imposed, the more likely it is that he or she gives up the plan to commit the crime because, in his or her view, the disadvantage from taking that penalty is more than the advantage from committing the crime. Thus, it is reasonable to infer that, in our criminal law system, the penalty of imprisonment rather than monetary penalty, the penalty of long term imprisonment rather than that of short term one, the penalty of life sentence rather than that of limited one are more effective in deterring crimes. In particular, a life sentence without the possibility of parole, which could arguably substitute for capital punishment, preserves the criminal's own basic rights including the right to personality within the limitation that it serves the purpose of separating the person from the society. To the contrary, a death sentence, by taking away his life, completely deprives the criminal of his freedom and rights that require survival as a prerequisite for their enjoyment. In this respect, a death sentence, which deprives a person of life, the most precious thing for a human being, more severely infringe on the criminal's legal interest than life sentence without possibility of parole. In addition, considering people's instinct for survival and their fundamental fear of death, capital punishment shall be deemed to be a form of penalty having the strongest crime deterrent effect because it threatens all the general public including prospective criminals much more than the penalty of life imprisonment or life sentence without the possibility of parole does. Accordingly, when the legislature decide that capital punishment should be recognized as a kind of penalty by considering its nature and relations to the crime, penalty, and human instinct, the decision must be respected. Also, in the absence of clear evidence, we are not persuaded that the penalty of life

imprisonment or life sentence without possibility of parole has rather the same or better effect in deterring crimes than capital punishment. As the death penalty is generally more effective in crime prevention than the penalty of life imprisonment or life sentence without possibility of parole, it follows that the death penalty is more likely to prevent heinous crimes such as murder than imprisonment penalties such as life imprisonment. This means that capital punishment may decrease the number of innocent murder victims; in other words, it can save some innocent lives. Even assuming that the number of innocent lives saved by adopting the death penalty over life imprisonment is not substantially great because their deterrence effects between capital punishment and life imprisonment are not materially different, we shall never abandon protecting innocent victims, however big or small the number may be. 2) In case of the most atrocious crimes such as killing of many people by cruel means, the mere imposition of life imprisonment or life sentence without possibility of parole does not strike the balance between the crime and punishment, because the criminal's legal interest infringed by the punishment does not raise to the level of legal interest infringed by the crime and the criminal's responsibility. Nor does such punishment accord with the sense of justice for the victim's family or the public. In this respect, it cannot be ascertained that there exists any other penalty which has the same effect as capital punishment in accomplishing the legislative purposes. 3) The issue whether a sentence of death violates the principle of the least restrictiveness is raised, because the remedy for misjudgment in death sentence cases does not exist. Once the death penalty, a penalty that takes life away, is executed, no means can recover the restriction on the basic right. In light of the fact that all humans are fallible and no judicial system is perfect, the possibility of making a misjudgment in criminal trial, the court's wrong decision on death sentence cases must be regarded not to be a problem of the death penalty system itself, but to be only one of the problems inherent in the judicial system. Accordingly, the possibility of misjudgment in sentence of death and its harm should be alleviated through institutional devices including the judicial tier system or appealing process where defendant's right to defend is secured, the conviction

is made based on a strict process of evidence examination, and a lower court's judgment or final judgment can be corrected. Therefore, capital punishment itself does not violate the principle of the least restrictiveness. 4) As discussed above, the imposition of capital punishment is not in violation of the principle of the least restrictiveness because compared with less strict penalties like the penalty of life imprisonment or life sentence without possibility of parole, it is a more effective means to accomplish the purposes of preventing crimes and bringing justice through just retribution, and because we have not found yet that there clearly exists other penalty which infringes on the criminal's legal interest less than death sentence, while having the same effect as the death penalty. (D) Whether the principle of proportionality is violated Although it can be said that every human's life has the same value, to fulfill the duty to protect the life of the citizens, the government can provide a standard based on which it decides whose life or legal interest should be protected in situations where many people's lives are at stake along with their conflicting interests or where it is necessary to protect a public interest whose value is of great importance comparable to life. Capital punishment may be legitimate when it is imposed limitedly only as a punishment for the crimes that deny human's life, because it is a 'necessary evil' that is inevitably chosen based on our instinct fear of death and our desire for retribution against the crimes, and also because it is still functioning. (See, 8-2 KCCR 537, 547-548, 95Hun-Ba1, November 28, 1996) The private interest infringed by death sentence is deprivation of life of the criminal who committed an atrocious crime such as killing of others. Such infringement is an effect of punishment that derives from the theory that criminals must take responsibility for their own crimes. Moreover, the deprivation of life occurs only after the strict and careful criminal justice procedures are duly applied. In this regard, the stake involved in deprivation of the right to life of innocent ordinary people by heinous crimes cannot be same as that of death penalty. The protection of the innocent ordinary people's lives shall take priority over that of the criminal's life when those two rights to life conflict with each other. Therefore, the imposition of capital punishment is not in violation of the principle of proportionality because the law strikes the appropriate

balance between the concerned legal interests. The important public interests in protecting innocent ordinary people's lives, accomplishing social justice and maintaining public safety through crime prevention by means of death penalty are to be valued not less than the perpetrator's personal interest in preserving his or her life. Moreover, because the death penalty in its practice has been limitedly imposed only for the most serious crimes such as vicious killings of many people, it cannot be considered excessive or disproportionate when compared with the seriousness of the crime. (E) Consequently, we conclude that, as long as its imposition is limited only to heinous crimes, capital punishment in itself is not in violation of the principle of proportionality as to its restriction on the right to life because the legislative purposes are legitimate, the means to achieve the purposes are proper, the practice of capital punishment is the least restrictive means, and thus it strikes the balance between the interests concerned. 6. Whether capital punishment is inconsistent with the norm of human dignity and worth prescribed in Article 10 of the Constitution Article 10 of the Constitution sets forth human dignity and worth to be the ultimate goal and fundamental ideology for all basic rights, as it states that "all citizens shall be assured of human dignity and worth 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." This provision of human dignity and worth is one of the core norm of our Constitution and the declaration of the basic principle of our Constitution that the government shall protect not only the respective rights enumerated in the Constitution but also other freedom and rights not prescribed in the Constitution in order to respect and secure individual citizens' dignity and worth. (See, 13-2 KCCR 103, 111-111, 2000Hun-Ma546, July 19, 2001; 98 KCCG 1187, 1193-1194, 2002 Hun-Ma328, October 28, 2004) We now consider whether the death penalty, as a penalty that takes the criminal's life, violates Article 10 of the Constitution that provides human dignity and value. As discussed above, capital punishment is at least implicitly recognized under the Constitution as is inferred from the text of the Constitution. Moreover, in so far as its imposition is limited only to heinous crimes, we do not see that it violates the principle of proportionality required by

the Constitution. Because capital punishment does not exceed the scope of the constitutional restraint set out in Article 37 Section 2 of the Constitution, we conclude that the mere fact that the death penalty takes the criminal's right to life does not automatically make it a violation of human dignity and value prescribed in Article 10 of the Constitution. In addition, the death penalty as a criminal penalty, if imposed to the offender who ignored the warning posed by the criminal penalty and committed a cruel and heinous crime anyway, must not be considered to go beyond the limit of the restriction on the right to life set by the Constitution. The death penalty, which is imposed after the courts' consideration of the degree of illegality and the offender's responsibility, is a consequence of the heinous crime committed by the offender on his or her own decision. In this regard, the argument that a sentence of death infringes on human dignity and worth by treating the offender as a mere instrument for securing public interest in public safety does not convince the Court to find it unconstitutional. Meanwhile, judges or prison guards, as a human being, may feel guilty when they impose or execute capital punishment. However, this is not the goal capital punishment is pursuing but just an incidental result which we need to find some measures to minimize. A judge or a prison guard, who is supposed to secure the public interests, has the duty to impose or execute capital punishment just the same as other penalties so far as the capital punishment does not go over the limit set by the Constitution, because it is to protect an extremely important public interest such as to protect innocent people's lives. Therefore, we should not conclude that capital punishment is unconstitutional for infringing on the human dignity and worth of judges or prison officers just because the judges or prison officers may feel guilty when they impose or execute the penalty. 7. Sub-Conclusion As discussed above, capital punishment per se, as a criminal penalty prescribed under Article 41 Item 1 of the Criminal Act, does not violate the Constitution, because our Constitution itself recognizes it as a kind of criminal punishment, the death penalty does not exceed the permissible restriction on the right to life, and it is not inconsistent with Article 10 of the Constitution which states human dignity and worth. The State is sometimes confronted with the situation where it has no choice but to give

up a precious value in order to protect a more precious one. Likewise, the death penalty is an unavoidable choice for the State; it has to deprive the life of person who committed a cruel crime in order to secure the public interests in protecting innocent people's lives and other equivalently important values. Nevertheless, in light of the fact that the death penalty is the most severe punishment depriving a person's life, every criminal statute that provides the death penalty as a statutory punishment must have a proper proportionality between the criminal conduct and the corresponding penalty. Furthermore, even where the death penalty is proper as a statutory penalty, particularly careful consideration is required in sentencing a death penalty. B. Whether the part on 'life imprisonment' of Article 41, Item 2 and Article 42 of the Criminal Act is unconstitutional. Article 42 of the Criminal Act stipulates the penalty of life sentence (the life imprisonment with or without forced labor), the most severe penalty next to capital punishment (See, Article 50 Section 1 and Article 41 of the Criminal Act), by stating that 'imprisonment with or without forced labor shall be either for life or for a limited term.' Imprisonment without limited term, the so-called life sentence, deprives an inmate of his/her freedom until he/ she dies of natural causes. It can be divided into 'the absolute life sentence,' a life sentence without possibility of parole, and 'the nonabsolute life sentence,' life sentence with possibility of mitigation or parole. Even a person under life sentence may be provisionally released after serving ten years of sentence, subject to the same condition as a person under imprisonment for a limited term (Article 72 Section 1 of the Criminal Act), and can be given an amnesty or a reduced sentence in accordance with the Amnesty Act (See, Article 3 of the Amnesty Act). Article 1 of the Act on the Execution of Sentence and the Treatment of Detainees and Prisoners does not presume that every person in life sentence will never be given parole; it explicitly states that 'this Act is pursuing the correction and rehabilitation of inmates....' As such, the law in our country does not separately set forth 'a life sentence without the possibility of parole,' though it recognizes in practice 'a life sentence with possibility of parole.' 2. Even though 'the absolute life sentence' can be regarded humanitarian in a way because the inmate's life is preserved unlike the death sentence, it is as much

severe as capital punishment in that it makes the inmates imprisoned until they die of natural causes. Further, it would be difficult to avoid criticism that 'the absolute life sentence' permanently cuts off the tie between the inmate and his/her community. Considering the reasons above, we find that the legislature, which has a general policy-making power in determining the kinds of criminal penalties to be respected, should not be blamed for not adopting 'the absolute life sentence' and questioned about its constitutional legitimacy. 3. While only the life sentence with possibility of parole, 'the nonabsolute life sentence,' is prescribed under the Criminal Act, the actual practice of carrying out the sentences is more focused on the 'absolute life sentence.' The law neither requires a parole to every inmate sentenced to life when he or she has served 10 years in prison nor permits him or her to have the right to request a parole. Thus, if the life sentence is not working fitting for the expression of the 'life,' it is a practical problem that arises in carrying out the sentence, which can be resolved by changing the parole conditions. Moreover, adoption of the absolute life sentence system would still mean that release or sentence reduction is possible. Under the current life sentence system, it seems improper to raise an issue as to the possibility of parole. 4. Further, we cannot say 'the absolute life sentence' must be adopted in our current criminal penalty system when capital punishment is not unconstitutional for the reasons discussed above. This gives another reason that we cannot find the current life sentence system unconstitutional. 5. As such, the adoption of 'absolute life sentence', life sentence without possibility of parole, may raise another debate on its unconstitutionality, while both the purpose of 'absolute life sentence' to permanently isolate the offender from society and the purpose of 'nonabsolute life sentence' can be attained by operating the parole system under the current criminal laws. In that regard, there is no urgent need to have the 'absolute life sentence,' as a more severe penalty than 'the nonabsolute life sentence.' Nor is there objective data showing that the adoption of 'absolute life sentence' would completely solve the fairness issue among inmates under life sentence, or between inmates under life sentence and those under limited-term imprisonment. Furthermore, considering the nature of the life imprisonment that

embraces the wide difference among the offences, we do not believe that we should have ‘the absolute life sentence’ system to be consistent with the principle of equality. Therefore, this Court cannot jump to a conclusion that the current criminal code not having ‘absolute life sentence’ fails to be legitimate or balanced and thus is incompatible with the principle of equality prescribed by Article 11 of the Constitution. Nor does it violate the principle of proportionate responsibility, which requires penalties to be proportionate to the seriousness of the crime. Accordingly, this Court does not find that the current life sentence system is unconstitutional. C. Whether the part of ‘sentence to death or life sentence shall be imposed’ of Article 250 Section 1 of the Criminal Act is unconstitutional We will examine whether Article 250 Section 1 of the Criminal Act, as a statutory penalty is excessive or incompatible with the principle of equality. Even though the imposition of capital punishment or life sentence in itself is not unconstitutional, Article 250 Section 1 of the Criminal Act may be found unconstitutional if the imposition of capital punishment or life sentence for murder under the provision is so disproportionate to the seriousness of criminal conduct at issue and the offender’s corresponding responsibility that it amounts to a violation of the principle of proportionate responsibility. Murder crime, defined by Article 250 Section 1 of the Criminal Act, is a typical criminal act of denying human life and may include heinous and atrocious killing of a person that amounts to an offence against human dignity in terms of its nature or the severity of the consequences. Accordingly, the statute setting forth the death penalty and life sentence in addition to imprisonment of 5 years or more should be regarded as a necessary means to protect the life of other person or people that is as valuable as the offender’s. Therefore, we do not find the provision is unconstitutional, because it does not violate the principle of proportionality or the principle of equality. D. Whether the part of ‘shall be punished by death or imprisonment for life’ of Article 10 Section 1 of the SCPVA is unconstitutional The provision of Article 10 Section 1 of the SCPVA was included when the SCPVA was first enacted by the Act No. 4702 on January 5, 1994. It prescribes the elements of consolidated crime of murder and sexual assault. The statutory penalty for such

crime has always been ‘the death penalty or life sentence’ since the enactment of the Act, and when the SCPVA has been partially revised by the Act No. 5343 on August 22, 1997, the statute was amended to cover certain attempted sex offenders who committed a murder. The SCPVA provides special codes for the part ‘death or injury resulting from rape’ of Article 301-2 of the Criminal Act, which states that ‘if a person who commits the crime as prescribed in Articles 297 through 300 murders another person, that person shall be punished by death or imprisonment for life.’ The statute intends to regulate the various sex crimes including rape, indecent act by compulsion, quasi-rape, quasi-indecent act by compulsion, attempted sex crimes or other equivalent conducts which infringing on another person’s right to sexual autonomy as defined under Articles 297 through 300 of the Criminal Act. The purposes of the SCPVA are not only to achieve uniformity and consistency in regulating murder in the course of committing sex crimes but also, by aggravating the penalty, to prevent the occurrence of sex crimes and the possibilities of infringing on people’s legal rights. In other words, while the statutory penalty for a simple murder under Article 250 Section 1 of the Criminal Act is ‘a sentence of death, imprisonment for life or for not less than five years,’ Article 10 Section 1 of the SCPVA removes the penalty of imprisonment for not less than five years from its penalty options and leaves only the two penalties, death penalty and life sentence, for murder in committed the course of sex crimes. The intention behind the penalty aggravation was to give consideration to the infringement on the right to sexual autonomy in addition to the right to life. Murder is a typical crime denying human life and may include the most heinous crime that amounts to a crime against human dignity in light of its patterns or the gravity of consequences. When we weigh the severity of the legal interests infringed by sex crimes such as rape and indecent act by compulsion, and the irreparableness of the interests once infringed, we find that the provision, which permits capital punishment or life sentence to be imposed to an offender who commits murder in the course of a sex crime, is a necessary means to protect not only the life of one or more persons the value of which is same as that of the sex offender but also their right to sexual

autonomy, so far as the death penalty or life sentence, as a kind of punishment, is not against the Constitution. Furthermore, it is not in violation of the principle of proportionality or the principle of equality when the legislature excluded the imprisonment for not less than five years for murder in the course of committing sex crimes, unlike the statutory penalty options for general murder, because of the additional legal interest in the right to sexual autonomy infringed by sex crimes. Therefore, Article 10 Section 1 of the SCPVA is not against the Constitution. V. Conclusion For the reasons above, the Court holds that the part of 'life sentence' of Article 72 Section 1 of the Criminal Act is dismissed for lack of its relevance to the underlying case and that the other provisions at issue are not against the Constitution. The Justices agree to this opinion of the Court, except for the following separate opinions: Justice Lee Kang-kook's concurring opinion on Article 41 Item 1 of the Criminal Act; Justice Min Hyeong-ki's concurring opinion on Article 41 Item 1 of the Criminal Act; Justice Cho Daehyun's opinion (partial unconstitutionality) on Article 41 Item 1 of the Criminal Act; Justice Kim Hee-ok's dissenting opinion on Article 41 Item 1 of the Criminal Act; Justice Kim Jong-dae's dissenting opinion on Article 41 Item 1 of the Criminal Act; Justice Mok Youngjoon's dissenting opinion on Article 41 Items 1 and 2, and Article 42 (with respect to unlimited imprisonment) of the Criminal Act. VI. Justice Lee Kang-kook's Concurring Opinion A. Introduction Even though our Constitution does not explicitly enumerate whether it permits capital punishment or not, it is my view that the imposition of capital punishment is not against the Constitution, because our Constitution recognizes capital punishment when Article 110 Section 4 of the Constitution provides a defendant with the right to appeal in a military trial 'in case of a death sentence.' My view is based on the following reasons. B. The interpretation of the 'Constitution' in constitutionality review of statutes 1. The constitutional review of statutes is a procedure for norm control where the Court reviews whether the statute violates the Constitution, which is the highest norm of the nation. This obviously requires the interpretation of the Constitution and the statutes at issue. In such procedure, the Constitution functions as a norm of control, rather than a norm of recognition, and works as the standard for

review. Thus, an arbitrary expansion or reduction of the constitutional norm, i.e. the controlling standard, shall not be allowed because it will become a de facto amendment or distortion, rather than an interpretation, of the Constitution. In this regard, it is natural that the constitutional interpretation is different from statutory interpretation. 2. In interpreting the constitutional norm itself, we first need to interpret the norm at issue, figure out the applicable range of the norm, and test, evaluate, and select the proper view for resolving the specific problems based on a certain standard. Such standard must attach great importance on the principle of uniformity and the principle of consistency in practice. Under the uniformity principle of the Constitution, an individual constitutional norm must be interpreted in relation to the entire constitutional norms in order to avoid inconsistencies among the constitutional norms. The principle of consistency in practice, on the other hand, means that if several constitutionally protected legal interests conflict each other, the Court has to construe the Constitution in a way to best satisfy all the interests concerned, rather than sacrificing one over the other by prematurely weighing the legal interests or abstractly comparing their interests. C. The interpretation of Article 110 Section 4 of the Constitution and its exception clause Article 110 Section 4 of the Constitution states that 'military trials under an extraordinary martial law may not be appealed in case of crimes of soldiers and employees of the military; military espionage; and crimes as defined by Act in regard to sentinels, sentry posts, supply of harmful foods and beverages, and prisoners of war, except in the case of a death sentence.' This text of Article 110 Section 4 of the Constitution was first adopted at the time of the fifth amendment of the Constitution in 1962 and has been effective till today, while the last part of that article, the exception clause, was newly included at the time of amendment of 1987. The reason of the insertion of that exception clause was that the right to appeal of the defendant shall be guaranteed in light of the severe human right violation and no remedy available in case of misjudgment of capital punishment even though a single tier trial is allowed in an emergency or extraordinary circumstances of military trial under an extraordinary martial law. Even though the intent of providing the exception was mainly focused on the protection of the

right to appeal of the dependant in a death row, a sentence of death became a statutory penalty defined by the Constitution itself when the exception clause was created, because by including the clause, people of the State, who have the power to amend the Constitution, adopted the assumption that a death penalty can be imposed in a military trial under an extraordinary martial law. Thus, this Court now cannot construe that capital punishment is against the Constitution at least in a military trial under an extraordinary martial law. D. Whether the exception clause of Article 110 Section 4 of the Constitution is limitedly applicable only to a military trial under an extraordinary martial law In our overall legal system including the past and present Constitutions, Criminal Acts, and Military Acts, it has never been stipulated or interpreted that capital punishment applies only in military trials under an extraordinary martial law and excludes non-military trials. Nor do we have any legal basis for such interpretation that a sentence of death can be imposed only for a certain type of court proceedings (It is the same as for other penalties such as life sentence). Moreover, citizens having the authority to make a revision of the Constitution newly added the exception into Article 110 Section 4 of the Constitution based on their assumption that a death penalty can be imposed regardless of whether it is a military trial under an extraordinary martial law or a non-military trial. In other words, the exception clause of Article 110 Section 4 of the Constitution was merely added to ensure the protection of the right to appeal of the defendant in a death row, based on this pre-understanding on capital punishment. Thus, if the Constitution recognizes a death sentence in military trials under an extraordinary martial law, this Court has to interpret that the same applies in a non-military trial. E. The relationship between Article 10 and the exception clause of Article 110 Section 4 of the Constitution 1. Because human dignity and worth guaranteed in Article 10 of the Constitution is the spiritual and ideological basis of basic rights in our country and the core value of all basic rights, it is generally interpreted that the right to life, which is currently in dispute over capital punishment, comes from human dignity and worth. Therefore, in light of the supremacy of Article 10 of the Constitution, it is disputable whether the imposition of capital punishment is acceptable in our Constitution. In my view, it

would be more desirable for us to understand that the relation between Article10 of the Constitution and the exception clause of Article 110 Section 4 of the Constitution is not a sort of conflicts among basic rights but a competence between the right to life (the supreme basic right protected by the Constitution) and capital punishment (a punishment indirectly recognized by the Constitution).

2. Our Constitution does not acknowledge any basic right to be absolute; therefore, even the supreme basic right such as the right to life can be restricted. While our Constitution declares the right to life to be a supreme basic right as a basis of other basic rights by prescribing human dignity and worth under Article 10, it also recognizes, though indirectly, capital punishment under the exception clause of Article 110 Section 4. Accordingly, in interpreting the Constitution, it is important to read the Constitution to be consistent with the principle of uniformity and the principle of consistency so that those two legal interests can be accomplished in harmony and balance. Thus, it is not desirable for us to choose one over the other; we should not uphold the right to life, while giving up or sacrificing the other legal interest and rendering the content of the exception clause meaningless by prematurely weighing the legal interests or abstractly comparing their values. A hierarchy, of course, may be established among the provisions or the basic rights of the Constitution. However, the exception clause is not a statutory but a constitutional provision that is the norm of supremacy and control. In construing the Constitution, therefore, the purpose and content of the exception clause of Article 110 Section 4 shall neither be simply devaluated nor ignored as if there is no provision of capital punishment at all under the Constitution. The right to life is a non-absolute basic right that may be restricted by the statutes, even though the State has to protect the right to life as much as possible and sufficiently as it is the supreme basic right. On the other hand, the death penalty, as is expressed in the exception clause, should be respected and recognized as a constitutional order. When comparing and weighing the legal interests concerned under the principle of uniformity and the principle of consistency in practice, therefore, the death penalty should be imposed only when it is necessary in light of the justice and fairness and in compliance with the

principle of proportionality and the principle of the least restrictiveness because the normative range of capital punishment, although recognized under the Constitution, must be significantly reduced considering the conflicting but highly respected value of the right to life. Within the limited range, capital punishment is compatible with Article 10 of the Constitution and has its value. Therefore, a simple conclusion of capital punishment as unconstitutional by relying only on the supremacy of the right to life as a fundamental right would go far beyond the scope of interpretation of the Constitution and effectively result in amendment or distortion of the Constitution. F. Conclusion Therefore, it should be the interpretation of the Constitution that capital punishment is not against the Constitution because the present Constitution, although indirectly, recognizes capital punishment. VII. Justice Min Hyeong-ki's Concurring Opinion A. The need for capital punishment and its limitations The right to life is 'the most basic right' and the basis of all basic right, while capital punishment, as an extreme and severe punishment permanently depriving human life itself, is one of the most exceptional punishments which a civilized country with a reasonable legal system could impose. However, the justification of the existence of capital punishment itself and the need for it under the present Constitution can be recognized at least on the ground that the right to life, even though it is the right about human life, may not be an absolute right which has to be always given priority over all of the other norms or the other people's basic rights; in fact, capital punishment appears to have a general crime deterrent effect as a minimum safety measures to protect society from the cruel crimes against human dignity and secure public interests. In imposing capital punishment, however, it is necessary to minimize the scope and the types of crimes subject to capital punishment in order to remove potential misuse or abuse of the death penalty and its undesirable consequences, considering the historical experience in all ages and countries that capital punishment was used as a means to remove or persecute religious or political dissenters, and to avoid the criticism that the sentence of death is cruel and irrational such that it amounts to violation of human dignity and the principle of responsibility, or excessive such that it goes beyond what is necessary to achieve

the penal purposes. B. Review of the crimes subject to capital punishment 1. Under the present criminal code system, the crimes subject to the statutory penalty of capital punishment are set forth in about 160 crimes in 110 provisions and of 20 statutes and the details of those crimes can be categorized by their types and consequences as the followings: 1) capital punishment only for intentional killing, murder, is defined in Article 250 (Murder, Killing Ascendant) of the Criminal Act, Article 10 Section 1(Murder in the course of rape etc.) of the SCPVA and Section 5-2 Section 2 Item 2 (Aggravated Punishment of Kidnapping and Inducement) of the Act on the Aggravated punishment, etc., of Specific Crimes; 2) capital punishment as aggravated punishment for the crime which consequently results in an infringement on people's lives is defined in Article 164 Section 2 (Arson, Malicious Burning of a Dwelling of Another) of the Criminal Act, Article 52 Section 1(Assault and Battery of Superiors of Causing Death) of the Military Criminal Act, Article 39 Section 2 (Unlawful Recover or Transplant Organs, etc. of Causing Death), the later part of Article 47 Section 4 (Unlawful Relocation of Nuclear Materials of Causing Death) of the Act on Measures for the Protection of Nuclear Facilities, etc. and Prevention of Radiation Disasters, and Article 5-3 Section 2 Item 1 (Aggravated Punishment for Driver of Hit and Run Vehicle) of the Act on the Aggravated Punishment, etc. of Specific Crimes; 3) capital punishment for the crimes related to the outcome of the battle or national security in the face of the enemy even without any deprivation of life, injury to the person, aggressive arson, destruction, or assault and battery is defined in Article 27 Item 1 (Commanding Officer's Absent Without Leave of Place of Guard at the Border) of the Military Criminal Act and the exception part of Article 9 Section 5 (Bodily Injury for the Purpose of Evasion of Military Duty) of the Establishment of Riot Police Unit Act; 4) capital punishment imposed for the crimes causing bodily harm such as a bodily injury or rape is defined in Article 42 Section 2 (Providing of Harmful Foods with results of Bodily Injury) of the Military Criminal Act, Article 2 Section 1 Item 3 (Punishment for Making illegal Foods, etc.) of the Act on Special Measures for the Control of Public Health Crimes and Article 5 Section 2 (Special Robbery, Rape) of the SCPVA; 5) capital

punishment imposed for the crimes of aggressive violence such as assault and battery causing dangers on the national security or the public safety even without any bodily harm, deprivation of life, or a crime of committing in the face of enemy is defined in Article 119 (Use of Explosive) of the Criminal Act, Article 6 (Capture of Military Equipment for the Purpose of Mutiny) of the Military Criminal Act and Article 39 Section 1 (Crime of Causing Damage to Aircraft) of the Aviation Safety and Security Act; 6) capital punishment imposed for crimes such as rebellion, connivance with the enemy or espionage, incurring a danger on the national security or the public safety even without any bodily harm, deprivation of life or not a crime of committing in the face of enemy is defined in Article 87 (Rebellion) of the Criminal Act, Article 5 (Insurrection) of the Military Criminal Act and Article 3 Section 1 (Constitution of Anti-Government Organization) of the National Security Act; 7) capital punishment imposed for crimes infringing on the national or social legal interest without incurring any danger on the national security, the public safety, any bodily harm, or deprivation of life is defined in Article 75 Section 1 (Aggravation of Punishment for Crimes related on Military Equipments) of the Military Criminal Act, Article 10 (Aggravated Punishment for Currency Forgery) of the Act on the Aggravated Punishment, etc. for Specific Crimes and Article 4 Section 1 Item 1 (Formation of Organization and Activities) of the Act on Punishment of Violent Crimes.

2. Among the crimes mentioned in the paragraph above, I think the death penalty can be allowed as a statutory penalty for those crimes described in 1), 2) and 3): the crimes intentionally depriving human life; the crimes with substantial probabilities of depriving life; the heinous crimes causing death; and, the crimes committed at the time of national crisis or emergencies which may affect outcome of the war or national security in which case an aggressive criminal conduct such as the deprivation of life or bodily harm may not be involved. However, as for the crimes mentioned in 4), 5), 6), and 7), the imposition of capital punishment would be in principle an excessive punishment in following cases: even though the crime is considered a felony or has a strong probability of incurring a danger on society, the crime causes only bodily harm without deprivation of life; and even though

the crime is an aggressive criminal conduct such as arson, destruction or assault and battery and can incur a danger in the national security or the public safety, the crime causes neither deprivation of life nor bodily harm. Therefore, we should give careful consideration in imposing capital punishment for those crimes. In addition, most codes on crimes that are subject to capital punishment also punish attempts, and we cannot completely exclude the possibility that those attempted criminals are sentenced to death. Thus, attempts shall not be included in the types of crimes to be subject to capital punishment because the infliction of death penalty against those criminals is hardly in consistent with the principle of proportionality or the principle of responsibility. 4. Meanwhile, among the 21 crime elements subject to capital crimes under the Criminal Act described above, only 7 elements are related to individual interests and the other 14 elements are related to social or national interests. In this regard, it is likely to be criticized that those crimes subject to capital punishment lean too much towards the social or national interest and that this is no better than the outdated criminal justice system which was established by bearing national emergencies such as war or the invasion of enemy in mind. As for the statutes on special crimes, the substantial number of the aggravated punishments, which were temporarily created for political or policy purposes, also include death penalty as a statutory punishment. Such practice of increasing the number of the crimes subject to capital punishment destroys the balance of the Criminal Act in relation to the whole criminal justice system and the principle of appropriate responsibility, and makes the public become insensitive to the severity of the punishment, thereby failing the original intent of the legislature. In this case, there is even a concern that the damage to the authority of the law or the confusion in law and order might be followed instead of crime prevention or the maintenance of law and order. C. Unconstitutionality v. statutory abolition of capital punishment 1. Making a sweeping decision on its unconstitutionality is inappropriate if that decision is made without any concrete review on the individual issues when many issues can be raised as to whether it is proper to retain capital punishment as a statutory penalty for the various types of crimes. Unless it is held that the death penalty

stipulated in a substantial number of criminal provisions as a statutory punishment violates the principle of proper responsibility or the principle of proportionality, it is still early to conclude that the present capital punishment should not be allowed under our Constitution. 2. In my view, the task of the Constitutional Court is only to make a normative decision or judicial review on whether capital punishment itself or an individual statutory provision of capital punishment is against the constitutional orders and norms. On the contrary, it is an international trend that the final determination on retention or abolition of death penalty has been made by the legislature because such determination, which should be distinguished from that of this Court, tends to be made in consideration of all the matters including public opinion and values of the times. As I mentioned before, there are many problems in the capital punishment system although it is recognized in our Constitution. Thus, rather than making an extreme choice such as total abolition or retention of the death penalty, the legislature has to make continuing efforts to consult the examples of other countries which have been making a gradual improvement in the criminal justice system while the death penalty is retained, by reducing the number of crimes subject to capital punishment that is incompatible with the criminal justice system and removing the causes of the problems in capital punishment as much as possible. The legislature shall spare no efforts in correcting overall problems of the present capital punishment system based on national consensus to cope with the changes of the times and repeal laws or provisions as necessary. VIII. Justice Song Doo-hwan's Concurring Opinion I would like to provide a separate concurring opinion to clarify the reasons to join the majority that the provisions of capital punishment at issue in the instant case are not against the Constitution even though I deeply agree with the various grounds for the abolition of capital punishment related to the long debate on retention or abolition of the death penalty. A. It becomes an issue whether capital punishment is against 'human dignity and worth' declared by Article 10 of the Constitution because the imposition of capital punishment is an extreme punishment depriving a life which forms the basis for a human being. Any statute including the provisions for criminal punishment must not be incompatible with

human dignity and worth because it is supreme value to be protected by the Constitution and also the ideological foundation of every basic right. In light of historical experience in our society, it is undeniable that the heinous and cruel crimes that destroy and disdain human dignity such that it can never be considered to be an act of a human being with dignity and that make the people feel shock, dismay and anger, have occasionally occurred. And we cannot affirm as of yet that there is no chance that such flagrant or more cruel crimes would occur. Therefore, in advocating only human dignity or the right of the criminals to life, if we say that tolerance and rehabilitation for a period of time would be sufficient even for such cruel crimes, it would be ignoring and insulting human dignity and the noble right to life not only of the victims but also of people in general, which goes against human dignity and worth. Considering these circumstances, there may be exceptional cases where the deprivation of life of the person who destroys human dignity and life would be paradoxically necessary in order to bring people's attention to such value of human dignity and life. In this instant case, Article 41 Section 1 of the Criminal Act must be deemed to define the death penalty as a type of punishment among many others imposed only in extremely limited and exceptional cases where a crime that infringes human dignity occurs. The other provisions at issue also include death penalty as a statutory punishment for such cases. For the foregoing reasons, I conclude that the provisions at issue in the instant case are not against the Constitution under the condition that the intents and the crimes subject to the penalty are limitedly interpreted as discussed above. B. We have another issue whether the provisions at issue violates the later part of "no essential aspect of the freedom or right shall be violated" of Article 37 Section 2 of the Constitution. That later part of Article 37 Section 2 of the Constitution is generally regarded as a provision stipulating 'the limitation on the restriction on basic rights' or 'the basic principle to be complied by the legislature when it enacts a statute restricting people's basic rights.' In addition, the background of its introduction or the original intent of that later part of that Section was 'to prevent nullification of basic rights by the legislature.' Considering these, it is hard for us to reach a conclusion that 'the

right to life, although constitutionally recognized, became almost void and nothing remained of the right to life by the legislative act' merely because the legislature included the death penalty as a type of criminal punishment on the condition that a sentence of death is imposed only in extremely limited and exceptional cases where the crime seriously damages human dignity, or because the legislature included the death penalty among the statutory punishments for a crime of the same type as the instant case. Thus, in my view, the provisions at issue do not violate Article 37 Section 2 of the Constitution. C. In relation to the principle of proportionality, specifically the principle of the least restrictiveness, some argue that the death penalty shall be replaced by 'the absolute life sentence,' which never allows any reduction of sentence, amnesty or parole. However, in my view, absolute life sentence cannot be the same measure as death penalty when looked from the general sense of justice or the purpose for crime prevention. Moreover, it might be that the absolute life sentence is an equally cruel or even crueler punishment than the death penalty that we cannot use the former as the one replacing the latter. D. The fundamental issue is to find a way to remove the possibility of abuse or misuse of capital punishment. The harmful effect of retention of capital punishment has been controversial because the past authoritarian government had imposed and executed capital punishment in several political cases, which later turned out to be politically motivated judicial murder. While total abolition of capital punishment might be considered to be a fundamental solution to its harmful effect, we have to find other appropriate alternatives because tolerance or rehabilitation for a certain period of time cannot be a proper means to deal with such heinous and cruel crimes mentioned above that violate humanity. In other words, to resolve the problems of misuse or abuse of capital punishment, we must fully re-examine the individual criminal provisions, which include death penalty as a statutory punishment, and drastically cut back on the crimes subject to the death sentence. More specifically, the types of crimes subject to capital punishment shall be limited to the most cruel and heinous crimes that harm the life of another in violation of human dignity. If this is not the case, or if the crime only concerns social or national interests, the death

penalty shall be removed from the list of the statutory punishments. It is because the only basis to find the appropriateness and necessity of the legislatively chosen death penalty despite the nature that goes against human dignity ironically is protecting and ensuring the right to life of others, the general people who are holders of the basic rights. Furthermore, every judicial procedure, including judicial review and conviction, selection of the types of punishment, and sentencing, must be administered strictly and cautiously in accordance with the due process of law. All the criminal procedures, including investigation, trial, and execution of penalty, must be carefully reviewed, refined and improved. Such procedure must be carried out seriously and solemnly, so that it prevents the execution of the penalty from constituting a 'cruel or unusual punishment,' or a punishment that ignores or invades human dignity. E. The decision on the retention or abolition of capital punishment, I must add, has to be made by the legislature's enactment or repeal of statutes, rather than by this Court's constitutional review of statutes. While this Court determines whether the Constitution recognizes a statute that the legislators, people's representatives, have made, it is the people's choice and determination expressed through the legislature based on public discussions and debates that decide enactment or repeal of the statute. IX. Partial Unconstitutionality Opinion by Justice Cho, Dae-hyen In my view, the provisions at issue prescribing capital punishment as a criminal punishment might be not against the Constitution so far as those provisions are applied in the cases of Article 110 Section 4 of the Constitution, while the provisions would be against the Constitution if they are applied in the cases other than those cases of Article 110 Section 4 of the Constitution. Human life has the most fundamental, sacred and noble value and therefore everyone has a right to maintain such life, a right not to be threatened with his or her life and a right to require the government to protect the security of his or her life. It is uncontested that the right to life is protected as a basic right under our Constitution. The State not only must not infringe on people's right to life or threats the security of their life, but also has a duty to protect the security of their lives. Human life in itself has its inherent purpose of existence and the supreme

value, and thus cannot be used as a means to achieve other purposes. However, I believe that the right to life like any other basic rights may also be restricted by Article 37 Section 2 of the Constitution so far as the right to life is deemed to be a basic right under the constitutional order. In addition, the level of protection or restriction on the rights to maintenance and security of life may vary even within the range protected by the right to life. Thus, a soldier can be ordered to conduct the battle, risking his or her life for the national security, and police officers can be ordered to rescue people's lives in a disaster risking their own lives. Moreover, the court, in the instance where a person kills someone to save the life of another, may not find that killing illegal after considering the balance between the protected and the infringed legal interests. Because the right to life has supreme value, however, the grounds for the restriction on the right to life must also be to protect or rescue human life of such supreme value. Executing the criminals as a punishment is a mere retribution for their infringement on others' legal rights that is already committed, and executing the murderer cannot protect or save the victim's life. As such, capital punishment does not intend to protect or save human life, and thus the necessity of capital punishment does not justify deprivation of life of supreme value. Additionally, it has not been proven yet that the execution of serious criminals prevents other felony crimes in general. The imposition of the death sentence is effective in preventing recidivism of the person executed. However, that deterrent effect can be also obtained by life sentence and therefore capital punishment is not necessary for the effect. Consequently, capital punishment fails to satisfy the conditions that are required by Article 37 Section 2 of the Constitution to justify the deprivation of human life. Moreover, capital punishment constitutes an infringement on the essential part of the right to life because it deprives a human being of his or her life. Therefore, it violates the later part of Article 37 Section 2 of the Constitution that prohibits infringement on the essential part of basic right. On the order hand, considering that the exception clause of Article 110 Section 4 of the Constitution recognizes the imposition of capital punishment in military court proceedings, we cannot but accept that our Constitution itself permits the imposition of capital

punishment in an exceptional situation of military court proceedings under an emergency martial law. The exception clause of Article 110 Section 4 of the Constitution is a provision allowing an exception to the principle of Article 37 Section 2 of the Constitution with respect to the right to trial and the death penalty. All of the provisions at issue, which prescribe the death penalty as a type of criminal punishment, are interpreted to be applicable in all the cases, whether or not it falls under the exception clause of Article 110 Section 4 of the Constitution. Thus, in my view, the provisions cannot be said constitutional or unconstitutional in all cases. Instead, the provisions at issue are not against the Constitution when they are applied in cases that fall under the exception clause of Article 110 Section 4 of the Constitution; on the contrary, if they are applied in cases that fall outside the exception clause, the provisions are against the Constitution because in such cases the essential part of the right to life will be infringed without legitimate reasons, violating Article 37 Section 2 of the Constitution. X. Unconstitutionality Opinion by Justice Kim, Hee-ok A. Whether capital punishment is unconstitutional Capital punishment which is stipulated as a type of punishment in Article 41 Item 1 of the Criminal Act is a penalty that deprives a person's life, the basis of human being, and destroys his or her social existence. The death penalty, as one of the oldest penalty in human history, has been recognized to be a basic means of retribution for crimes and the most effective means for general crime deterrence. However, in determining the procedure and the way of imposing and executing capital punishment, human dignity has been carefully considered to comply with the principle of prohibition of cruel punishment and the due process of law. The number of crimes subject to the death penalty has also been decreased. Further, in light of the fact that capital punishment has a nature as an institutional killing of people by using the governmental power, the serious debates over the abolition of the death penalty have continued worldwide until today. The issue whether capital punishment is against the Constitution is not an issue of determining whether to abolish it in consideration of criminal policies or for a better criminal law system that promotes human right; rather, it is an issue of determining its incompatibility with

the provisions and spirit of the Constitution. In other words, it is a question of whether there exists a provision of the Constitution which expressly recognizes or denies capital punishment; whether capital punishment infringes on the right to life, or on essential part of the right to life, of the criminals in violation of the principle of proportionality, considering the fact that capital punishment, as an institutionalized form of punishment, restricts the criminal's basic right by depriving his or her life; and whether capital punishment is inconsistent with human dignity and worth, which is a fundamental spirit of the Constitution. B. Whether any provision of the Constitution recognizes capital punishment Except for Article 12 Section 1 of the Constitution, which reserves the types of penalty to be decided by statute, our Constitution does not have any provision that expressly recognizes or denies capital punishment system in which the government deprives individual people's life as a criminal penalty. Article 110 Section 4 of the Constitution, however, states that "military trials under an extraordinary martial law may not be appealed in case of crimes of soldiers and employees of the military, military espionage, and crimes as defined by the statutes in regard to sentinels, sentry posts, supply of harmful foods and beverages, and prisoners of war, except in the case of a death sentence." This provision raises the issue of whether it, although indirectly, indicates that the Constitution recognizes the existence of capital punishment. The text of Article 110 Section 4 of the Constitution was introduced in the fifth Amendment of the Constitution for the purpose of prompt punishment for specific crimes including: the crimes of soldiers and military employees in an exigent and particular circumstances of military court proceeding under an extraordinary martial law proclaimed in time of national emergencies and wartime; military espionage; and other crimes defined by statutes with respect to sentinels, sentry posts, supply of harmful foods and beverages and prisoners of war. The exception clause of the provision, which was added in the present Constitution amended in 1987, was to guarantee the least protection for the right to appeal in death penalty cases in consideration of the serious human rights violation caused by the death penalty. Considering the background and the context of introducing the exception clause of Article 110

Section 4 of the Constitution, I do not believe that it is a valid interpretation that the exception clause provides a constitutional ground to uphold capital punishment; in fact, that provision was drafted to respect at least the minimum of human rights by restricting capital punishment prescribed in the statutes. Consistency and uniformity shall be maintained in the interpretation of constitutional provisions even when those provisions appear to conflict with each other. Moreover, in such cases, more fundamental constitutional norms must not be violated. In this regard, Article 10 of our Constitution sets forth human dignity and worth as a fundamental norm in our constitutional scheme of protecting basic rights. Provided that capital punishment as a statutory punishment is found to be clearly incompatible with human dignity and worth, the exception clause of Article 110 Section 4 should have the limited meaning that there is no exception to the right of appeal in death sentence cases. Otherwise, if we give too much meaning to that exception clause of Article 110 Section 4 of the Constitution and interpret it as a constitutional ground to recognize capital punishment, the significance of Article 10 of the Constitution that prescribes the fundamental value of human dignity and worth will be diminished. In short, the exception clause of Article 110 Section 4 of the Constitution cannot be a constitutional ground, not even indirectly, that supports constitutional recognition of capital punishment. Because there is no explicit provision on whether capital punishment is recognized in our Constitution, the decision should be based on the interpretation and examination of the right to life protected under the Constitution, the purposes of the criminal punishment system, and human dignity and value. C. Whether the death penalty infringes on the right to life of the offender who is sentenced to death 1. The right to life protected by the Constitution Life, as opposed to death, is a genuine natural concept that in itself means existence of a human being. Because it is the fundamental ground for human existence, the right to life is a kind of transcendental right granted by the law of nature and a basic right to be a ground for all other basic rights. While there is no express provision of the right to life in our Constitution, human dignity and worth stipulated in Article 10 of the Constitution cannot be considered separately from the dignity of

human life. Moreover, the right to bodily freedom defined by Article 12 Section 1 of the Constitution presupposes that the person is alive, and Article 37 Section 1 of the Constitution provides that freedoms and rights of citizens shall not be ignored on the ground that they are not enumerated in the Constitution. In this regard, there is no doubt that the right to life is a basic right recognized by our Constitution. The right to life means defending a person's life against all types of governmental intrusion, and therefore the government in principle can neither make a judgment on the life nor make use of such life as a means to achieve governmental purposes. Furthermore, the government has a duty to protect the right to life, and the individual citizen has a positive right to request the government to take measures for the protection and maintenance of his or her life. A social scientific or legal decision on human life shall not be made carelessly. In other words, everyone's life has an absolute value and is equally important to everyone. Because the restriction on the life means its deprivation, an issue arises whether the right to life is an absolute basic right that cannot be restricted by the Constitution. No absolute basic right is expressly enumerated in our Constitution, and all the freedom and rights of citizens may be restricted by the statutes only when necessary for national security, public order or public welfare. In this respect, the right to life is no exception. The notion that the right to life may be constitutionally restricted can also be derived from the nature of the right itself. In other words, there are cases where the protection of a person requires restriction on the life of another, or the restraint on a specific person's life has to be allowed for the significant public interest in avoiding the imminent danger of loosing many people's lives. In such very exceptional cases, the government unavoidably makes a legal assessment on the value of life, and the right to life can be subject to the restrictions under Article 37 Section 2 of the Constitution. In such case, we cannot say that the deprivation of life is automatically deemed to be an infringement on the essential part of the right to life. However, the principle of proportionality as the standard of review must be strictly applied, and the legislature's broad discretion in making statutes should not be allowed. It is because such restriction is only permitted in urgent and exceptional circumstances

where a person's right of life conflicts either with the right of another or with a very significant public interest, thus requiring a legal assessment on the right. To the contrary, if the restriction on the right to life is imposed without any exceptional circumstances, it would be unconstitutional because such restriction is a deprivation of life, a legal assessment of which is not allowed. The Court's decision on whether capital punishment, which deprives the life of the offender who committed grave crimes of denying other persons' life and their human rights, infringes on the offender's right to life, shall be made by applying the principle of proportionality and the principle of non-infringement on essential part of basic rights under Article 37 Section 2 of the Constitution. 2. Whether the principle of proportionality is violated (A) Legitimacy of the legislative purpose The death penalty is a kind of statutory legal punishment, and its legislative purpose is not different from other criminal punishment in general. Criminal punishment, which is retribution for crimes carried out by the State and society, has purposes of special deterrence and general deterrence: the former intends to prevent recidivism by restricting the offender's certain basic right; the latter intends to deter others in the community from committing the same or a similar crime. Thus, we can say that the death penalty as a kind of criminal punishment has the legislative purposes of retribution, special deterrence, and general deterrence against grave and heinous crimes that deny others' lives, infringe on human dignity, or directly violate public interest of such significance. There are massive criminal policy disputes over whether the purpose of the modern criminal punishment is retribution for crimes, special deterrence, or general deterrence, but these legislative purposes are all justified under the Constitution. Even so, if capital punishment is abused over to, for example, political crimes as it had been in the past, the legislative purpose will lose legitimacy. Nevertheless, this issue does not need further review at this point in determining the constitutionality of capital punishment itself. (B) Appropriateness of the means adopted Because the deprivation of a criminal' life excludes the possibilities to transform and rehabilitate the person, it can never contribute to achieving the purpose of special deterrence. In addition, as for the general deterrent effect of capital punishment

that the death penalty would, by its threatening effect, contribute to preventing ordinary people from committing the same or similar crimes, there has been no clear evidence showing that capital punishment has such general deterrent effect against heinous crimes. Instead, there are only conflicting assertions: some argue that there is no empirical evidence on such threatening effect; and others argue that there is no evidence showing absence of such threatening effect. Moreover, unlike the past practice, most countries including us that retain capital punishment currently do not carry out execution in public and try to minimize the pain. These changes are desirable in light of humanity. These facts indicate that capital punishment is imposed just to comply with the criminal statutes that require capital punishment for certain crimes, rather than to achieve a realistic and direct threatening effect through the execution. Further, exercising retribution through criminal punishment does not require the same harm to the criminal; rather, it is based on the premise that a private retaliation should be prohibited and replaced by righteous public indignation. If we take the premise, the argument that the perpetrator's right to life must be restricted for a punishment that corresponds to the crimes of infringing on other people's lives or equivalently significant legal interest has no logical basis. Rather, the government's practice of depriving an offender's life in deliberation and premeditation is contrary to the underlying idea of the Criminal Act that prohibits homicide and defines murder as a crime. Thus, I cannot consider that capital punishment conforms to the spirit of fair retribution. After all, capital punishment is unlikely to make manifest contribution in achieving any of the purposes among retribution, special deterrence or general deterrence for grave crimes. It is uncertain how much general deterrence effect it would have on the offenders who would commit such a grave cruel and heinous crime. In my view, the only effect of capital punishment which can be clearly recognized is the complete eradication of recidivism by the offender. When the government restricts by statute a basic right whose value is constitutionally significant to protect human dignity and worth and the right to life guaranteed under the Constitution, the means used for the restriction can be proper only when it evidently contributes to the legislative purposes. As for capital punishment,

however, while the restricted basic right is the right to life which is the source of human existence and precondition of all basic rights, there is no clear evidence that its deprivation as a criminal punishment contributes to the purposes of punishment, namely retribution, special deterrence, or general deterrence of heinous crimes. Therefore, capital punishment cannot be a proper means to achieve its legislative purposes in our constitutional system where human dignity and worth is upheld and the right to life is protected. (C) The least restrictiveness It is certain that the deprivation of a serious criminal' life completely prevents the chance of recidivism by permanently remove him or her from the society, and it is obviously an expression of retributive idea. Even assuming we acknowledge the general preventive function of capital punishment by relying on people's instinctive fear of death rather than scientific evidence, that function can also be obtained by imprisonment such as life sentence without possibility of parole and do not require the criminal's life to be taken. It is also true that, even if a court's decision is made through a careful and due process by a competent judge, there are always the possibilities of misjudgment when it is made by a human being. Moreover, a punishment depriving a life does not leave any means to alleviate or remedy the harm on the basic right resulted from such misjudgment, and the gravity of the infringement is extreme and full-scale. Because this would mean giving up the realization of justice which should be obtained in the criminal justice system by affording effective correction of any misjudgment, it is incompatible with the rule of law that is to protect human rights and justice. In this regard, capital punishment violates the principle of the least restrictiveness in that it is an excessive punishment depriving the criminal of his or her right to life completely and ultimately, when in fact there may be other means such as life sentence without possibility of parole, that may likewise fulfill the function of the death penalty as a punishment for serious crimes. (D) Balance of legal interests concerned The private interest concerned in death penalty cases is the loss of an ultimate and fundamental basic right of the offender. The public interest concerned, on the contrary, is the prevention and the public safety against the crimes of infringing on other people's lives or equivalently significant legal

interests. Here, the imposition of the death penalty is always a premeditated and deliberate deprivation of the life of an individual who, after completion of the crime at issue, has already gone through investigation, trial, sentencing, and imprisonment. On the other hand, other people's lives or the equivalently significant legal interests to be protected by the imposition of capital punishment have been already infringed. Therefore, there is no urgent or necessary need to deprive that criminal's life. In addition, it is uncertain how effective the capital punishment is for the public safety and crime prevention. Consequently, the imposition of sentence to death does not strike the balance between the legal interests, because the private interest infringed here is much greater than the public interest concerned. 3. Whether the essential part of the right to life is violated The restriction on the right to life means a deprivation of life. Therefore, this Court's determination on whether it violates the essential part of that right shall be made after considering whether there is an imminent and exceptional circumstance where the defendant's right to life conflicts with other people's right to life or its equivalently important public interest that necessarily requires a legal assessment on life. However, as we examined above, the imposition of capital punishment means the government's deprivation of life, through its official process, of the defendant who was arrested and has been incarcerated in prison so long after the completion of the grave crime he or she had committed that there should be no imminent threat against the life of another or public interest of similar importance. Thus, such case does not fall under the exceptional circumstances where the legal assessment on life is necessary. Accordingly, the capital punishment through which the government deprives the defendant's life based on a legal assessment on life infringes on the essential part of the right to life, violating Article 37 Section 2 of the Constitution. The deprivation of life also means a deprivation of personal liberty and therefore shall be deemed to violate the essential part of that personal liberty prescribed in Article 12 Section 1 of the Constitution. D. Whether capital punishment is incompatible with human dignity and worth Article 10 of the Constitution declares that "all citizens shall be assured of human dignity and worth." Human dignity and worth is supreme value

protected by the Constitution, an ideological basis of all basic rights, the guideline for the interpretation of other basic rights provisions, and the limit of restriction for other basic rights. In addition, human dignity and worth declared by the Constitution implies that the purpose of every governmental function must be to protect human dignity, and a citizen must not be degraded into a means for other goals. This respect and protection of human dignity is required to be a leading principle in every aspect of criminal statute legislation and its applications and implementations. So far as Article 10 of the Constitution describes a person having human dignity and worth to be "every citizen," this value of human dignity and worth as a superior constitutional norm exists prior to the needs for the criminal punishment of a vicious felon. Our penal system focuses on criminal conducts and the corresponding responsibility, based on the premise that a human being shall not be treated merely as an instrument for achieving other purposes, and thus excludes the view that treats the offender merely as an object to be used for the public interest of social safety. Therefore, despite the fact that he or she committed the heinous crime and infringed on the victim's life and human rights, the offender also retains human dignity and worth and must not be treated simply as an obstacle that threatens public safety. Capital punishment, on the contrary, considers the offender only as an instrument to completely close off of the possibilities of recidivism for the benefit of the entire society, to deter other crimes, or just as a subject for retribution. The death penalty also does not leave the offender any minimum moral liberty to self-reflect and rehabilitate him or herself under his or her own responsibility. For the foregoing reasons, the death penalty violates human dignity and worth declared by Article 10 of the Constitution. Furthermore, by coercing the judges and jail officers, who have to be involved in the administration of the death penalty system due to their occupations, to participate in the planned process of depriving people's life regardless of their own conscience as a human being, capital punishment degrades those judges and jail officers to a mere instrument for the governmental interest. In this regard, capital punishment infringes on their right to human dignity and worth. Therefore, the death penalty contradicts with human dignity and worth

prescribed in Article 10 of the Constitution. E. Sub-conclusion As examined above, even though the right to life protected under Article 10, Article 12 Section 1, and Article 37 Section 1 of the Constitution may not be an absolute basic right which can never be restricted, the death penalty, as a punishment depriving the life of offenders who committed serious crimes, infringes on those offenders' rights to life by violating the principle of proportionality and the principle of non-violation of essential part of basic rights. Moreover, capital punishment does not comply with human dignity and worth declared by Article 10 of the Constitution. Article 110 Section 4 of the Constitution cannot be a provision that provides, even indirectly, a basis for capital punishment; rather, the exception clause of Article 110 Section 4 of the Constitution has to be interpreted only to mean that, even in an extraordinary situation such as a military tribunal, the criminal who is sentenced to death must be granted his or her right to appeal. XI. Unconstitutionality Opinion by Justice Kim, Jong-dae A. The relationship between the right to life and Article 37 Section 2 of the Constitution 1. The meaning of Article 37 Section 2 of the Constitution While the first part of Article 37 Section 2 of the Constitution prescribes that the freedoms and rights of citizens may be restricted only when necessary for the national security, public order or public welfare, the second part of that provision sets forth the limitation by stating that "even when such restriction is imposed, no essential aspect of the freedom or right shall be violated." Here, the essential part of freedom and right means the substantive or fundamental element in its core (See, 1 KCCR 357, 373, 88Hun-Ka13, December 22, 1989), the restriction of which would render the freedom or right meaningless (See, 7-1 KCCR 499, 509, 92Hun-Ka29, April 20, 1995). When we examine Article 37 Section 2 of the Constitution, we can find that the provision is double layered and therefore divides the content of basic rights into two parts, the core element which cannot be restricted and the other element which can be restricted: The first part allows the restraint on every basic rights as long as it is a proper means to achieve the aims pursued in consistent with the principle of proportionality, whereas the second part defines the limitation of the restraint not to be a restriction on the essential part of those basic rights. That the

first part of the provision allows the restriction on basic rights means that such restriction can be legitimized by other constitutional values. So far as it is necessary for the national security, public order or public welfare, the restriction on basic rights is constitutionally justified, not violating the Constitution even though those basic rights are to be protected by the Constitution. The second part, on the contrary, says that the essential part of basic rights, the core element of the rights, can never be restricted in any circumstances and the restriction on that essential part would never be constitutionally justified because it has already been denied by the Constitution. The relationship between the nature of life and Article 37 Section 2 of the Constitution (A) There is no middle or gray area between life and death. The restriction on life means the deprivation of life because life disappears immediately when it is restricted. Thus, the right to life is single-layered and cannot be divided into two, the essential part and the non-essential one, and therefore the restraint on life always ends up being an infringement on the essential part of life. Due to this nature of life, it is difficult to apply Article 37 Section 2 of the Constitution to the restriction on the right to life. Because the first part of that provision prescribes that "all" freedom and rights, without exception, including the right to life, can be restricted, it follows that the right to life can also be restricted; then, only the issue of whether such restriction is constitutionally justified remains. On the contrary, because the second part of the provision states that the essential part of such freedom and rights must not be infringed, it follows that the essential part of the right to life cannot be infringed. Here, because any restriction on life would infringe its essential part due to the nature of life itself, the right to life can never be restricted. While the first part of Article 37 Section 2 of the Constitution allows the restriction on the right to life, the second part of the same provision makes such restriction impossible. In my view, this contradiction shall be resolved through constitutional interpretations: should the restriction on the right to life be considered to be impossible at all by asserting the second part of Article 37 Section 2 of the Constitution? Or, should we interpret that the second part of that provision is not to be applied with respect to the right to life for the reason that it can be restricted under the first part of the provision? (B) If

we take the view that the second part of Article 37 Section 2 of the Constitution which requires the essential part of freedom and rights not to be infringed must be strictly complied as to the right to life, any restrictions on the right to life cannot be allowed. A life, from an ethical or religious viewpoint, has of course such precious and irreplaceable value that its deprivation of life can never be tolerated in any circumstances. Looking from the perspective of the Constitution which is a legal norm, however, because every basic right is recognized only upon the existence of the State and its Constitution, the restriction on the right to life can be constitutionally justified for the purpose of preserving and realizing other important constitutional value. For instance, if we say deprivation of life is not constitutionally justifiable even in a case where it is inevitable for the protection of the nation and the citizens from imminent threats to their existence and survival, protecting the right to life of individuals in such case would mean a denial of all the other constitutional values. Therefore, we have to admit that restrictions on the right to life might also be constitutionally justified because the Constitution expressly allows restrictions on every basic right without any explicit prohibition about restriction on the right to life. (C) On the other hand, there can be an assertion that the second part of Article 37 Section 2 of the Constitution, in addition to the first part, has to be applied, and that if the principle of proportionality is met under the first part of the provision, the restriction on the right to life is justified under the second part of the provision as well, because the essential part of the life is deemed not to be violated in that case. Such interpretation, however, would make the second part of the provision, which prescribes the ultimate limit of the basic right restriction, completely futile and lead to a logical contradiction that the restriction reached the essential part of the right but is not an infringement on the essential part. (D) For the reasons above, the second part of Article 37 Section 2 of the Constitution must be deemed to be a provision for restrictions on the general basic rights that consist of double-layered parts, the essential one and the non-essential one, and it should not be applied to those rights like the right to life which in its nature cannot be divided into essential and non-essential part. Thus, in my view, the restriction on the right to

life may be available under the first part of Article 37 Section 2 of the Constitution, and the issue on its constitutionality can be decided by the principle of proportionality. B. Whether capital punishment infringes on the right to life Other than the reasoning below, I would like to join the dissenting opinion of Justice Kim, Hee-ok on the issue of whether capital punishment infringes on the right to life in violation of the principle of proportionality. 1. Legitimacy of legislative purpose of capital punishment The ultimate reason for the existence of the Constitution is to ensure that members of society can lead their lives preserving their dignity and worth as a human being. If that Constitution, however, allows the government to deprive a person of his or her life, which is the basis of human existence, it would be like that the Constitution itself denies its own existence. Thus, the only circumstances where the life deprivation is constitutionally allowed would be the cases where the interest in saving an individual's life is in conflict with the one in securing the existence of the State or when the interests in saving lives are in conflict with one another and thereby an individual's life has to be taken away for the sake of the existence of the State or other people's lives. The death penalty, as a punishment for crimes, is the government's deprivation of an offender's life. Because a punishment is imposed through trial after the commission of crime, it rests on the premise that the State exists and functions normally. By the time the death penalty is sentenced, moreover, the situation where the existence of the State or the victim's life is in conflict with the offender's life has already disappeared because the death penalty is imposed for the crime that was already committed. For instance, the State's failure to protect the victim from a diabolical killer is a tragic reality, but the imposition and execution of capital punishment on a diabolical killer does not revive the victim. The government's deprivation of the offender's life through the death penalty, which is executed at the time when the protection of victim's life is impossible, has only the function of retribution to condemn the crime. However, governmental deprivation of a person's life as retribution for crime cannot be justified. 2. Appropriateness of the means used On the other hand, even though the purpose of the death penalty is to protect a person's life and public safety from

the crimes which may be committed by the same offender, i.e. special deterrence purpose, the death penalty would not be justified because we can adopt less restrictive means to fully achieve that purpose. The death penalty, by depriving the offender's life, completely removes every danger that may be caused by that offender to other people and society. However, those dangers can also be removed by keeping the offender completely isolated from the society. In other words, the purpose to protect individuals and society would be equally achieved so long as the government continuously maintains the offender in prison. As explained above, it is an excessive constraint on freedom and rights if the government, which has a more moderate means to use, nonetheless imposes death penalty and deprives the offender's life. 3. General deterrence effect of capital punishment In my view, a sentence of death is not necessary for the deterrent effect for the general public rather than for the offender him or herself, i.e. general deterrent effect, either. The deprivation of life for the general deterrence effect would mean, among other things, sacrificing a person's life for a criminal policy to prevent the general public from committing crimes. This use of life as a means of crime deterrence directly contradicts human dignity and worth. In light of the principle of least restrictiveness and the principle of balance of legal interests, a deprivation of a person's life is difficult to be constitutionally justified even though the deprivation may be assumed to be compatible with the policy purpose of general crime deterrence. For capital punishment to be recognized as a necessary means to achieve the policy purpose, there must not be a substitute means that can achieve the same effect as capital punishment. In addition, there must be empirical evidence showing that the retention of capital punishment is far more effective on general crime deterrence than the abolition of capital punishment. The general crime deterrence effect, or the concept of preventing crimes of the ordinary people, however, is so vague and abstract that its true nature cannot be concretely identified or measured. Moreover, no one can precisely predict or affirm whether the deterrent effect is greater with capital punishment than without, or if so, whether the difference in the effects is great enough to justify deprivation of a person's life. Even though our country has not

executed any death sentence since one was executed on December 30, 1997, we cannot conclude that our society and individuals became more vulnerable to the threat of danger by crimes. Rather, it has been proven that our society has well-maintained law and order no less than the times when the death penalty was actually executed. In this regard the assertion of constitutionality of capital punishment based on its general deterrence effect cannot prevail. Besides, even we assume that there are some instances that crime rates increase after the abolition of capital punishment, it would be difficult to prove the causal relationship between the two, because increase in crime is influenced by complex, multi-layered social, economic and cultural factors. Therefore, retaining capital punishment for general crime deterrence cannot be justified because it uses a person's life as a means to accomplish the vague and uncertain benefit the existence and extent of which cannot be identified or measured. 4. Abolition of capital punishment and introduction of new maximum sentence As mentioned above, capital punishment infringes on the right to life and therefore is unconstitutional. However, we might face a problem in our national and public safety mechanism to protect the individuals' lives and society from crimes if capital punishment is simply abolished, while a maximum punishment having equivalent effect to that of the death penalty is not implemented. In our present penal system, a punishment having an effect next to that of capital punishment has not yet been provided. The life sentence under the current criminal law, for instance, could be imposed as a maximum punishment when capital punishment is declared to be unconstitutional and thereby voided; however, under the current criminal law, a parole after 10 years of service in prison, as well as a pardon or a reduction of the life sentence, is available. Therefore, the life sentence alone does not substitute the effect of capital punishment as the maximum punishment to its entirety. The imposition of death penalty has an effect of permanent separation of the offender from society, and this effect is necessary for the protection of individuals and society. For the reasons above, unless there is an objective and clear certainty that public safety is secured from the offender, a punishment that ensures permanent separation of the offender from society, that is, a maximum

imprisonment that limits the possibility of parole or pardon is necessary. On the condition that such new system is introduced, capital punishment should be abolished for its unconstitutionality. XII. Unconstitutionality Opinion by Justice Mok, Youngjoon A. Whether capital punishment is unconstitutional Capital punishment set forth as a type of punishment in Article 41 Item 1 of the Criminal Act is a penalty that deprives a person's life, which is the basis of a human being and destroys his or her social existence. The death penalty, as one of the oldest penalty in human history, has been recognized to be a basic means of retribution for crimes and the most effective means for general crime deterrence. However, in determining the procedure and the way of imposing and executing capital punishment, human dignity has been carefully considered to comply with the principle of prohibition of cruel punishment and the due process of law. The crimes subject to the sentence of death have also been reduced. Further, in light of the fact that capital punishment has a nature as an institutional killing of people by using the governmental power, the serious debates over the abolition of the death penalty have continued worldwide until today. The issue whether capital punishment is against the Constitution is, however, not an issue of determining whether to abolish it in consideration of criminal policies or protection of human right; rather, it is an issue of determining its incompatibility with the provisions and spirit of the Constitution. In other words, it is a question of whether there exists a provision of the Constitution which expressly recognizes or denies capital punishment; whether the right to life can be recognized as a basic right under the Constitution; whether capital punishment infringes on the essential part of the right to life of the criminals; whether the infringement on the right to life is excessive in violation of the principle of proportionality; and whether capital punishment is inconsistent with human dignity and worth, which is a fundamental spirit of the Constitution. B. Constitutional provisions in our Constitution 1. Article 12 Section 1 of the Constitution Except that Article 12 Section 1 of the Constitution reserves the types of punishment to be decided by statute, stating that "no person shall be punished,... except as provided by Act and through the due process of law," our Constitution does not have any provision that expressly

permits or prohibits capital punishment. 2. Article 110 Section 4 of the Constitution Article 110 Section 4 of the Constitution, a provision on military court's trial under an extraordinary martial law, however, states that "military trials under an extraordinary martial law may not be appealed in case of crimes of soldiers and employees of the military, military espionage, and crimes as defined by the statutes in regard to sentinels, sentry posts, supply of harmful foods and beverages, and prisoners of war, except in the case of a death sentence." The majority opinion of this Court contends that this provision recognizes the existence of capital punishment under our Constitution. The President may proclaim martial law under the conditions as prescribed by statutes when necessary for a mobilization of the military forces in time of war, armed conflict or similar national emergency in order to secure the military needs or the public safety or public order (Article 77 Section 1 of the Constitution). Under that martial law, a special restriction on the power of the courts may be imposed in compliance with the statutes (Article 77 Section 3 of the Constitution) and Article 110 Section 4 of the Constitution states "military trials under an extraordinary martial law may not be appealed in case of crimes of soldiers and employees of the military; military espionage; and crimes as defined by Act in regard to sentinels, sentry post, supply of harmful foods and beverages, and prisoners of war." Article 110 Section 4 of the Constitution was introduced at the time of the 5th Amendment of the Constitution in 1962 to promptly and effectively deal with certain crimes committed in the imminent, special and exceptional circumstances of national emergency. The present Constitution amended in 1987, however, considering the gravity of human rights violations and irreversible and irreparable character of the death penalty, introduced the exception clause, stating "except in the case of a death sentence," into Article 110 Section 4 of the Constitution to guarantee the right of appeal in death penalty cases even during such emergency. Given the background of the introduction, as well as the textual context, the exception clause of Article 110 Section 4 of the Constitution is rather a provision that highlights the seriousness of capital punishment, because it intends to limit the imposition of the statutorily provided death penalty by allowing the offender

to always have the right to appeal regardless of the circumstances. In addition, even when they appear to be in conflict with one another, the provisions of the Constitution shall be interpreted in a way to maintain the consistency and uniformity and not to be inconsistent with more fundamental constitutional norms. Article 10 of our Constitution stipulates human dignity and worth, which has the meaning as a fundamental norm in the constitutional scheme of protecting basic right, and the statutory death penalty, as discussed below, is clearly against the human dignity and worth. Therefore, the exception clause of Article 110 Section 4 of the Constitution merely declares the principle that the right to appeal must be protected in death penalty cases without exception and cannot be construed that it permits capital punishment. In conclusion, in my view, the exception clause of Article 110 Section 4 of the Constitution cannot be deemed that it provides the basis to even indirectly recognize capital punishment in our Constitution. 3. Right to life Life, as opposed to death, is a genuine natural concept that in itself means the existence of human being and the fundamental ground for human existence. Thus, a careless social scientific or legal assessment on human life must not be made. In other words, everyone's life has an absolute value and is equally important to everyone. Therefore, the right to life is a kind of transcendental right granted by the law of nature and a basic right to be a ground for all other basic rights. While there is no express provision on the right to life in our Constitution, human right and worth provided by Article 10 Section 1 of the Constitution cannot be considered separately from the dignity of human life. Moreover, the right to bodily freedom defined by Article 12 Section 1 of the Constitution presupposes that the person is alive, and Article 37 Section 1 of the Constitution provides that freedoms and rights of citizens shall not be ignored on the ground that they are not enumerated in the Constitution. Thus, it follows that the right to life is the most important basic right among the basic rights recognized by our Constitution. The right to life also means the right to defend life against all types of governmental intrusion, and therefore the government in principle can neither make a decision on the life nor make use of such life as a means to achieve governmental purposes. Furthermore, the government has a duty

to protect the right to life and the individual citizen has a positive right to request the government to take measures for the protection and maintenance of his or her life. 4. Article 37 Section 2 of the Constitution Article 37 Section 2 of the Constitution stipulates that “freedoms and rights of citizens may be restricted by statutes only when necessary for national security, the maintenance of law and order or for public welfare.” At the same time, however, it also prescribes that “even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.” C. Capital punishment and right to life 1. Essential aspect of the right to life As mentioned above, Article 37 Section 2 of the Constitution states that the essential aspect of freedom and right must not be violated in any circumstances and the right to life has such an absolute meaning to individuals that it, conceptually or substantively, cannot be divided into two parts of essential part and nonessential part. Because the restriction on the right to life consequently would mean deprivation of the entire life, the right to life should necessarily be an absolute basic right that can never be constitutionally restricted. Moreover, a deprivation of life means a deprivation of the person’s body, and thus capital punishment constitutes an infringement on the essential aspect of physical freedom defined in Article 12 Section 1 of the Constitution. Because capital punishment violates the essential aspect of the right to life and the physical freedom, therefore, it shall not be constitutionally permitted. 2. The principle of proportionality Even assuming that the governmental restriction on its citizen’s right to life is not an infringement on the essential aspect of his or her right to life in very exceptional and inevitable circumstances, such as the one that requires the national defense against foreign invasions threatening the lives of the people, or the protection of the people’s lives and human rights against heinous organizational crimes, a strict standard of review should be applied for the decision on whether the deprivation of the right to life is incompatible with the principle against excessive restriction. (A) Legitimacy of the legislative purpose The legislative purpose of capital punishment is legitimate because it intends to protect society from offenders who committed grave and heinous crimes of denying other’s life, degrading human dignity, or directly damaging public

interest, by taking away their life and thereby permanently separating them from society. (B) Appropriateness of the means adopted The majority opines that the death penalty is a proper means to achieve the legislative purpose of general deterrent effect, because the death penalty, as a necessary evil, is an inevitably chosen punishment that is designed in consideration of people's instinctive fear of death and the desire to revenge for the crime. Therefore, it is presumed to have more effective deterrence effect than other penalties. However, the death penalty can never contribute to achieving the purpose of creating special deterrence, since it deprives the offender's life and thereby eliminates any chance for his or her rehabilitation. Additionally, as to the issue of whether capital punishment triggers the fear of death and contributes to deterrence from grave crimes by threatening potential criminals, i.e. general deterrence effect of capital punishment, it is practically difficult to have any scientific evidence based on empirical data such as statistics on crime rates according to retention or abolition of capital punishment. In the current situation, an argument such that the retention of death penalty still functions as deterrence to serious crimes, or that the crime rate has risen after the abolition of capital punishment cannot be confirmed. The retribution by criminal punishment, moreover, does not means an eye for an eye revenge but is based on the premise that a private retaliation should be prohibited and replaced by righteous public indignation. If we take this premise, then it is not necessary to deprive the penetrator's life in order to retaliate for his or her infringement on other people's lives or equivalently significant legal interest. Consequently, the only clearly recognizable effect of capital punishment is that it permanently separates the offender from society so that any possibility of retaliation against the victims or recidivism can be rooted out. However, this effect or purpose of death penalty can be achieved considerably by other means such as 'absolute life sentence.' In depriving the right to life, which is the basis for every life, in accordance with the relevant statutes, the means chosen by the government can be deemed to be proper only when it is clear that such means contributes to the legislative purposes. Capital punishment, however, is not a proper means to achieve the legislative purposes because, except for the

permanent separation of the criminals from society, it is not evident how the death penalty serves the goals of the punishment. Moreover, the death penalty must be enforceable to gain its threatening effect that the majority suggests in the Court's opinion. Our country, however, is now classified by Amnesty International as abolitionist in practice because no execution has been carried out for 12 years since the latest execution was taken place on December 30, 1997. Thus, capital punishment in our country has lost its enforceability and thus cannot be regarded to be a proper means for achieving the legislative purposes. (C) The least restrictiveness Besides the closing off of the possibility of recidivism by permanently separating the offender from society, we may also recognize that capital punishment has general deterrence function by virtue of threatening the public. However, it is hard for us to jump to a conclusion that there is no means less restrictive than depriving the offender's life. First of all, the fact finding in a criminal court proceeding must be based on evidence (Article 307 of the Criminal Procedure Act) and the probative value of that evidence must be left to the judges' discretion (Article 308 of the Criminal Procedure Act). There is always a chance of misjudgment in the criminal justice system. Here, because the harm caused by a misjudgment in delivering a sentence of death, that is, a deprivation of life, is so ultimate and outright, we could never find a plausible measure to remedy that misjudgment. On the contrary, we cannot say that there are no other means of punishment which can accomplish the same legislative goals that capital punishment tries to achieve. In other words, it is a violation of the principle of the least restrictiveness when a system of ultimate and full-scale deprivation of the basic right to life is maintained even though a sentence of death can be replaced by other means of penalty including: setting forth an absolute life sentence without possibility of parole, pardon or reduction of prison term; adding up prison terms in aggregating punishments for consolidated crimes; or removing or increasing the maximum prison term. (D) Balance of legal interests related The private interest infringed by the death penalty, the deprivation of a person's life and body, means the loss of the person's absolute and fundamental basic right. And the public interests that the death penalty intends to achieve include social

protection against the crimes that infringe on other people's lives or equivalently significant legal interest and general deterrence of such crimes. Because the public interests to be gained by capital punishment can also be gained by other alternative penalties to the considerable extent, no balance is achieved between the private interest and the public interest. 3. Sub-conclusion Because the right to life, as an essential substance of basic rights, should not be infringed under Article 37 Section 2 of the Constitution, capital punishment cannot be allowed in our Constitution. Furthermore, even though the right to life may be restricted, the death penalty infringes on the right to life in violation of the principle of proportionality and, therefore, is against the Constitution. D. Whether capital punishment is incompatible with human dignity and worth Article 10 of the Constitution declares that "all citizens shall be assured of human dignity and worth." Human dignity and worth is supreme value protected by the Constitution, an ideological basis of all basic rights, the guideline for the interpretation of other basic rights provisions, and the limit of restriction for other basic rights. In addition, human dignity and worth declared by the Constitution implies that the purpose of every governmental function must be the protection of human dignity and a citizen must not be degraded into a means of accomplishing other goals. This respect and protection of human dignity is required to be a leading principle in every aspect of criminal statute legislation and its applications and implementations. So far as Article 10 of the Constitution defines a person having human dignity and worth to be "every citizen," a cruel and vicious criminal also has human dignity and worth, despite the fact that he or she committed the heinous crimes and killed other people and infringed on their human rights. We, of course, may need to make the offender permanently separated from society for the benefit of entire society, for the reason that the offender is extremely vicious and threatens the whole society. Capital punishment, however, is an intentional and premeditated deprivation of the life of the offender who has been investigated, tried, sentenced and imprisoned for over a quite a long period of time after the completion of the crime. Considering that most people have good and evil together, the criminal who showed his or her extreme evil at the time of

committing the crime stands a good chance of feeling remorse and grief as restoring even a part of humanity as time goes by. The offender may also show very close attachment to his or her own life and fear for death as he or she gains emotional stabilities from the temperate living in prison. This means that the death penalty is carried out against an inmate not in the state of violent excitement but in the state of emotional stability, who regained some portion of his or her reason. Therefore, the execution must be regarded as a violation of human dignity and worth. Furthermore, for the death penalty to be executed, besides the judge's sentencing of death penalty, an order of the Minister of Justice and the attendance of the public prosecutor, secretary of the public prosecutor's office, the warden, or his representative, of the prison or the detention house, as well as the executioner, are required (Article 463 and 467 of the Criminal Procedure Act). In this regard, by coercing those people who have to be involved in the administration of the death penalty system due to their occupations to participate in the planned process of depriving people's life regardless of their own conscience as a human being, capital punishment infringes on their rights to human dignity and value. Therefore, the death penalty contradicts with human dignity and worth, a leading principle applied in criminal jurisprudence that is set forth in Article 10 of the Constitution. E. Instances of capital punishment legislation and their effectiveness This Court, in the judgment of 95 Hun-Ba 1 delivered on November 28, 1996, held that capital punishment set forth in Article 41 Section of the Criminal Act could be justified because it was inevitably chosen as a necessary evil and still functioning, and thus it was neither in violation of the constitutional principle of proportionality nor against the constitutional order. The Court of 95 Hun-Ba 1, however, added that "in instance where, for example, a peaceful and stable society is realized as the culture and knowledge advances, because of the changes in time and circumstances, the necessity for crime deterrence by threat of death penalty may almost disappear or the people's legal mind may require its abolition. In such circumstances, capital punishment shall be abolished; if it nevertheless continues to exist, then it shall be considered to be unconstitutional." Unfortunately, it is hard to expect that such changing time and circumstances will

arrive; due to the extreme competition for survival in the modern society, the old social values have been destroyed and people suffer mental exhaustion so much that crimes have become more terrifying and sophisticated and even grotesque crimes committed by psychopaths have been occurring. As a result, the needs for crime deterrence have increased and people's legal mind against heinous crimes became more negative. Thus, we must devise a criminal punishment system that provides our society with strong protection and at the same time preserves at least the minimum of human dignity and worth. As we observe the instances of legislations around the world, as of the end of 2008, 92 countries abolished capital punishment altogether, 10 did so for all offences except for war crimes, and 36 including our country have not used it for at least 10 years or were under a moratorium. The other 59 countries retained the death penalty in active use (the number of execution by 5 countries among the 59 countries reaches 93% of the total number of executions in the world). In order to achieve the legislative purpose by use of the threatening effect of capital punishment, its enforceability must be recognized by the people. According to the Criminal Procedure Act, the order for an execution must be given within six months from the date of final judgment (Article 465 Section 1 of the Criminal Procedure Act) and, in the event of delivery of that order, the execution must be carried out within five days from that delivery (Article 466 Section 1 of the Criminal Procedure Act). In our country, the number of death row inmates is 59 as of the end of 2008 (all of them are so-called felons and no political offender has been executed since 1989),,and no one has been executed for 12 years since December 30, 1997. For this reason, our country is now classified by Amnesty International as abolitionist in practice. As we observed above, in our country, death penalty as a criminal punishment appears to be merely nominal, having no effect since the executions have not been carried out for a long time although the death sentence may have been imposed by the statute. F. Reform of penal system It is one of the government's duties to its citizens that it protects the society and the people in the country from cruel and heinous crimes. And it is no wonder that the government imposes a severe penalty against cruel and heinous criminals in order to reduce the retaliation and

recidivism and deter crimes by potential offenders. Thus, even though capital punishment should be abolished because of its unconstitutionality and loss of enforcement power, a practical measure in replacement of death penalty must be taken for a permanent separation of such criminals from society. 1. Introduction of absolute life sentence The penalty of life sentence, as a criminal punishment, is stipulated either by the part of 'imprisonment' of Article 41 Section 2 of the Criminal Act or by Article 41 of the Criminal Act stating "imprisonment shall be either for life or for a limited term." Article 72 Section 1 of the Criminal Act, on the other hand, makes an inmate under life sentence eligible for parole, which may be granted by an administrative action after 10 years of service in prison. In addition, if an amnesty is granted to an inmate under life sentence, it results in invalidation of the sentence or exemption from the implementation of the sentence. If a sentence reduction is granted, it results in modification of the sentence or reduction in implementation of the sentence (Article 5 Section 1 through 4 of the Amnesty Act). Thus, according to the present Criminal Act and the Amnesty Act, every inmate under life sentence retains the possibility of being released by parole, amnesty or reduction of the prison term. To accomplish the legislative purposes of capital punishment while abolishing it, we must leave no room for the cruelest criminal to return to society under any circumstances. Consequently, unlike the general life sentence, neither exemption from life sentence nor reduction of prison term by grant of parole, amnesty or reduction of prison term should be allowed; in other words, an 'absolute life sentence' should be introduced. There might be, of course, a counterargument that such 'absolute life sentence' would be still incompatible with human dignity and worth. However, the 'absolute life sentence' can serve as a temporary alternative to capital punishment. 2. Revision of provision on the penalty aggravation for multiple crimes and change in the maximum prison term for limited-term imprisonment. Article 42 of the Criminal Act states that "imprisonment with prison labor for a limited term shall be from one month up to fifteen years: provided, that it may be extended up to twenty-five years in case of the aggravation of punishment." Article 38 Section 1 of the Criminal Act also states

that “in the event when the punishment specified for the most severe crime is a death penalty or life sentence with or without prison labor, the punishment provided for the most severe crime shall be imposed (Item 1), in the event when the punishments specified for each crime are of the same kind, other than a death penalty or life sentence with or without prison labor, the maximum term or maximum amount for the most severe crime shall be increased by one half thereof, but shall not exceed the total of the maximum term or maximum amount of the punishments specified...(Item 2)”. Thus, if a judge chooses life sentence, the problems indicated in the previous section would occur even though the defendant repeatedly committed the most serious crime, unless an ‘absolute life sentence’ explained above is introduced. Even if the judge chooses a sentence of limited-term imprisonment in order to avoid the problems, the result is that only a prison term not exceeding 25 years is imposed. Still, an inmate under a limited-term imprisonment may be granted a parole after serving one-third of the term (Article 72 Section 1 of the Criminal Act). Thus, in an extreme instance, an inmate sentenced to a 25 years of imprisonment may be granted a parole only after serving 8 years of the prison term (however, in practice, a parole may be granted after 15 years, because the parole period cannot exceed 10 years under Article 73-2 Section 1 of the Criminal Act). Consequently, with the limited-term imprisonment, the legislative purposes of capital punishment, which include deterrence of serious crimes and permanent separation of criminals, cannot be achieved. Moreover, we need a penal system where a judge can impose a strict limitedterm imprisonment that makes the offender practically separated from society. For this, the part of “the maximum term or maximum amount (of punishment) for the most severe crime shall be increased by one half thereof” of Article 38 Section 1 Item 2 of the Criminal Act should be amended into “the terms or the amounts for the crimes shall be separately sentenced and added up” (for instance, in the United States, each crime committed by the same offender is individually sentenced and added up together). In addition, the present maximum limit of prison term, ‘25 years,’ has to be significantly increased (most countries having the limited-term imprisonment penalty have higher maximum limits than

that of our country). There may be, of course, a counterargument that we do not have to spend citizens' tax money for the offenders who committed heinous crimes. However, in my view, the alternatives suggested above can be adopted to satisfy both the need for public safety and the respect of the right to life. G. Sub-Conclusion The right to life is a basic right of people recognized by Article 10, Article 12 Section 1 and Article 37 Section 1 of our Constitution and the right to life in itself constitutes such an undivided essential part that must not be deprived for any reasons. Even though the right to life may be restricted under the principle of proportionality of Article 37 Section 2 of the Constitution, the death penalty depriving human life in violation of the principle against excessive restriction must be deemed to be an excessive infringement on individual's right to life, intruding upon human dignity and worth declared by Article 10 of the Constitution. However, it is needless to say that the government ought to protect the citizens and the whole society against cruel and heinous crimes, and thus 'absolute life sentence,' which can permanently separate the ruthless criminals from society, must be introduced. Otherwise, we need to revise the provisions of penalty aggravation in sentencing for multiple crimes committed by the same offender, as well as the provisions on the maximum limit of prison term for imprisonment to ensure the most cruel criminals be separated from society for a long time and prevent their retaliation against the victims and their recidivism. For the foregoing reasons, I conclude that Article 41 Item 1 of the Criminal Act, which stipulates death penalty as a kind of punishment, is unconstitutional. At the same time, Article 41 Item 2 of the Criminal Act that does not define 'absolute life sentence' as a separate punishment, the exception part of Article 42 of the Criminal Act that sets forth the maximum limit of imprisonment, Article 38 Section 1 Item 2 of the same Act that stipulates penalty aggravation for multiple crimes, and Article 72 Section 1 of the same Act that allows a parole for every punishment of imprisonment are incompatible with the Constitution.