

〈특집: 아시아 민주주의 발전에서 헌법재판의 역할〉

## The Constitutional Decisions Concerning the Right of Self Determination of Sexual Intercourse\*

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### Abstract

The Constitutional Court has determined that the crime of adultery was consistent with the constitution for four times. Concerning the crime of sexual intercourse under pretence of marriage, the Court changed its prior position and invalidated the statute. Self determination of sexual intercourse not only lies within the private sphere of an individual's privacy, but it is also intertwined with the social culture of a community where the individual belong to. Hence, it lies within the grey area where personal values conflict with community values. Despite numerous constitutional decisions, the concept of self determination of sexual intercourse, and its protected scope have not been clearly defined. I would like to propose the following conclusion on the constitutional decision of the self determination of sexual intercourse

First, there is no need to recognize the self determination of sexual intercourse as one of Constitutional Law's basic natural rights. The right to engage in a sexual relationship and to choose one's own partner is already included in article 17 of the Constitution protecting one's freedom of privacy.

Second, the principle of balancing test is to be applied when deciding the standard of the constitutional review of the self determination of sexual intercourse, yet since the specifics of the evaluation is directly relevant to the individual's essentially protected freedom, applying at the same time a strict scrutiny of proportionality.

Third, even if a strict proportional judgment were said to be applied regarding the self determination of sexual intercourse relevant to the adultery act, this does

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not immediately result to the unconstitutionality of the relevant act. However, in light of the changing legal reality concerning the self determination of sexual intercourse, it is most appropriate to abolish the adultery act.

Fourth, even if the adultery act were to be abolished, and the crime of sexual intercourse under the pretense of marriage were to be invalidated, this would not mean that both acts are to be ethically nor legally permitted.

Keyword: self determination of sexual intercourse, crime of adultery, crime of sexual intercourse under pretence of marriage, freedom of privacy, principle of balancing test, strict scrutiny of proportionality

## 1. Introduction

The Constitutional Court, established in accordance with the amended 1987 Constitution, has recognized the binding nature of the Constitution through various decisions for the past 24 years. It has also acknowledged the right of self determination of sexual intercourse as a fundamental right under the constitution, thereby making meaningful determinations concerning the constitutionality of statutes which restrict it. The Constitutional Court has determined that the crime of adultery was consistent with the constitution for four times. Concerning the crime of sexual intercourse under pretence of marriage, the Court changed its prior position and invalidated the statute. The decision concerning adultery is the only crime whereby constitutionality is decided for four times, and in fact the constitutionality issue has reached the Court through various channels, such as the application from the related party, the request from another court, judiciary unilateral request, and the party's constitutional complaint following the denial of request by a court. This represents a lack of social consensus for constitutional interpretation, alteration and abolition with regard to adultery.

Self determination of sexual intercourse not only lies within the private sphere of an individual's privacy, but it is also intertwined with the social culture of a community where the individual belong to. Hence, it lies within the grey area where personal values conflict with community values. Despite numerous constitutional

decisions, the concept of self determination of sexual intercourse, and its protected scope have not been clearly defined. Moreover, whether any realistic enforcement measure exists is unclear. The means and limitations for any governmental enforcement policy remain controversial. In addition to that, some people confuse the constitutional review standards with the legislative policy issues concerning the crime of adultery and sexual intercourse under pretence of marriage. Such misunderstandings happen because some are unable to differentiate a legal provision which is unconstitutional, from a provision which is constitutional but is one which should be abolished. Such position is unable to distinguish a norm of act and a norm of control during the interpretation of the Constitution, thereby failing to precisely understand the legal nature of the Constitutional provision.

This article tries to suggest the appropriate constitutional review standard through an analysis of constitutional issues related to the right of self determination of sexual intercourse by reviewing the Constitutional Court's decisions related to adultery and sexual intercourse under pretence of marriage. Self determination of sexual intercourse is also related to abortion, and this issue is connected to a woman's right to terminate her pregnancy and the fetus's right to life. However, our object for analysis shall be limited to adultery and sexual intercourse under pretence of marriage.

## 2. A Summary on the Constitutional Decisions

### A. The Crime for Adultery

(1) 1990. 9. 10. 89 hunma 82 (1st case : constitutional)

The majority opinion (6 judges) of the Constitutional Court concluded that the crime for adultery was constitutional. 2 dissenting opinions (Judges, Han Byeong Chae and Lee Si Yoon) acknowledged the constitutionality of the crime for adultery, but decided that the criminal statute was unconstitutional because the statute only prescribed imprisonment without any lesser penalty, thus violating the principle of balancing test. 1 dissenting opinion (Judge, Kim Yang Kyun)

concluded that the crime for adultery itself was unconstitutional because it infringed upon the right to privacy, thus violating the principle of balancing test. Even if the statute can be considered constitutional, the fact that the statute only prescribes imprisonment for less than 2 years is a violation of the principle of balancing test.

(2) 1993. 3. 11. 90 hunka 70 (2nd case : constitutional)

This decision repeated the 1st decision, thereby determining that the crime for adultery constitutional. A newly appointed judge (Judge, Hwang Do Yeon) agreed with the majority opinion, and since there were no changes with the composition of judges, there was no separate voting on the issue.

(3) 2001. 10. 25. 2000 hunba 60 (3rd case : constitutional)

The majority opinion (8 judges) of this decision determined that the crime for adultery was constitutional, and requested the need for a serious approach for the abolition of crime for adultery. Meanwhile, one dissenting opinion (Judge, Kwon Seong) considered that the crime for adultery as unconstitutional since it deprived the right of self determination of sexual intercourse derived from article 10 of the Constitution.

(4) 2008. 10. 10. 30. 2007 hunka 17 · 21, 2008 hunka 7 · 26, 2008 hunka 21 · 47 (4th case : constitutional)

The majority opinion of this decision (4 judges) determined that the crime for adultery was constitutional. Among the majority opinion, a judge (Judge, Min Hyeong Ki) pointed out the problems of adultery and requested further efforts to make legislative improvements. Meanwhile, in the dissenting opinion, 3 judges (Judges, Kim Jong Dae, Lee Dong Hup and Mok Young Jun) held that the crime for adultery violated the principle of balancing test, and that the crime infringed upon the right of privacy and self-determination of sexual intercourse. A judge (Judge, Song Doo Hwan) decided that the crime for adultery in itself was constitutional, but the statute violated the balancing test between responsibility and

punishment by only prescribing imprisonment as the penalty, therefore making the law unconstitutional. Meanwhile, one dissenting opinion (by Judge Kim Hee Ok) determined that the statute was inconsistent with the Constitution because it violated the principle of balancing test by punishing both constitutional adulterous acts and unconstitutional adulterous acts. However, due to the need to punish unconstitutional adulterous acts, the judged decided to apply the statute provisionally.

#### B. The Crime of Sexual Intercourse under Pretence of Marriage

(1) 2002. 10. 31. 99 hunba 40, 2002 hunba 50 (1st case : constitutional)

The majority opinion (7 judges) determined that the crime of sexual intercourse under pretence of marriage was consistent with the Constitution, and noted that a serious approach was needed to decide whether the law should remain effective. Meanwhile, the dissenting opinion by two judges (Judges, Kwon Seong and Joo Seon Hye) decided that the crime of sexual intercourse under pretence of marriage violated the principle of balancing test. It impaired human dignity and infringed upon the right to pursue happiness protected under article 10 of the Constitution, thereby making the statute unconstitutional.

(2) 2009. 11. 26. 2008 hunba 58, 2009 hunba 191 (2nd case : unconstitutional)

The majority opinion (6 judges) adjudicated that the crime of sexual intercourse under pretence of marriage was unconstitutional because it violated the principle of balancing test with the infringement on men's right of self-determination of sexual intercourse and the right to privacy. Meanwhile, the dissenting opinion by three judges (Judges, Lee Kang Kuk, Jo Dae Hyeon and Song Doo Hwan) determined that the crime of sexual intercourse under pretence of marriage was constitutional, since the statute only penalizes acts beyond the internal limit of men's self-determination of sexual intercourse and the right to privacy under Article 17 of the Constitution. Therefore, it was decided that the statute was consistent with the Constitution since it did not impair fundamental rights.

### 3. Analysis and Evaluation

#### A. The Crime for Adultery

##### (1) Provision at Issue

With regard to the crime for adultery, the provision at issue is article 241 of Criminal Act which states that, “(1) A married person who commits adultery shall be punished by imprisonment for not more than two years. The same shall apply to the other participant. (2) The crime in the preceding paragraph shall be prosecuted only upon the complaint of the victimized spouse. If the victimized spouse condones or pardons the adultery, complaint can no longer be made.”

##### (2) The Standard of Unconstitutionality for Constitutional Provisions

A constitutional judgment is a judicial function which confirms a specific provision of a statute, and determines whether that particular provision violates the Constitution. During the constitutional judgment on the crime for adultery, the related articles of the Constitution must be specified since the judgment is a constitutional review for the provision at issue, which is article 241 of the Criminal Act. The Constitutional Court referred to Article 10 (human worth and dignity, and right to pursue happiness), Article 36 paragraph 1 (marriage and family institution), Article 11 paragraph 1 (right to equality), Article 17 (right to privacy), Paragraph 2 of Article 37 (principle of balancing test) as the related articles. Meanwhile, the court which requested the Constitutional Court for judicial review or the parties who filed the complaint argued that article 241 of the Criminal Act infringed the fundamental rights protected by the Constitution.

The Constitutional Court performs its judicial review not only from the legal point of view suggested by the subsidiary court which requested the constitutional review or the party who made such application, it also takes into consideration all the legal effect seen from the overall constitutional point of view.<sup>1)</sup> The Constitutional provisions pointed out by the Constitutional Court are based on the

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<sup>1)</sup> Constitutional decision 98 Hunka 16, April 27, 2000.

self-determination of sexual intercourse. Therefore, the constitutional review for the crime of adultery is a review to decide whether article 241 of the Criminal Act limits the self-determination of sexual intercourse and whether such limitation is constitutionally justified.

(3) The Legal Nature of the Right of Self Determination of Sexual Intercourse

The Constitutional Court, in its previous 1st, 2nd and 3rd decisions, pointed out that the fundamental right limited by article 241 of the Criminal Act, namely the self-determination of sexual intercourse was derived from article 10 of the Constitution. The Court also defined self-determination of sexual intercourse as a right to have sexual intercourse and a right to choose his or her partner. Namely, the majority opinion and the dissenting opinion both acknowledged that “Article 10 of the Constitution guarantees the right to protect individual personality and the right to pursue happiness, which are the essence of the human and individual values. The premise of the right to protect individual personality and the right to pursue happiness is the individual right to choose one’s destiny, and this right includes the right to determine whether to engage in sexual intercourse, and the partner the individual chooses to engage the sexual activities with. It is clear that the crime of adultery limits an individual’s right of self-determination of sexual intercourse.” According to this, the act of adultery lies within the boundary of self-determination of sexual intercourse which is derived from article 10 of the Constitution. Therefore, the standard for the constitutionality test is article 10 of the Constitution.

On the other hand, both the majority and the dissenting opinion in the 4th decision pointed out that not only the right of self determination of sexual intercourse under article 10 was limited by the statute, but the right to privacy under article 17 was seen as a relevant fundamental right. In the dissenting opinion of the 1st decision, Judge Kim Yang Gyun hold that the crime of adultery was unconstitutional, since it infringed upon the right to conceal one’s private life or it violated the principle of balancing test. The right to conceal one’s private life was interpreted to be a part of the right to privacy under article

17 of the Constitution. Thus, the Constitutional Court stated that the crime for adultery under article 241 of the Criminal Act was based on the moral value evaluation within an individual's private sphere, and that such evaluation lies within the protected realms of self-determination of sexual intercourse, and that such right can be seen as an independent fundamental right deduced from article 10 of the Constitution. In particular, the 4th decision distinguished the right to privacy under article 17 from the right of self-determination of sexual intercourse under article 10 of the Constitution. The act of adultery was seen as closely related to both of these two rights.

#### (4) The Standard of Constitutionality Test and its Determination

It is pivotal for the Court to confirm the notion of fundamental right and its protected scope since the standard of constitutionality test differs for different types of fundamental right.<sup>2)</sup> During the 1st, 2nd and 3rd decision, the Constitutional Court recognized an independent fundamental right of self determination of sexual intercourse under article 10, and it applied the same standard of constitutionality test for the personal right and the right to pursue happiness. The majority opinion of the 4th decision stated that the rights under article 10 and 17 were limited by the provision at issue, but made its decision based on a singular standard of constitutionality test. The dissenting opinion suggested using a strict scrutiny test of proportionality, and used such test on all the fundamental rights in the issue.

The Constitutional Court applied the principle of balancing test under article 37 paragraph 2 as a standard to test the constitutionality of the crime for adultery. The majority opinion declaring it as constitutional stated that the legislative purpose was justifiable because it protected good sexual morality, monogamous marriage, sexual sincerity between husband and wife, prevented social harm by such crime, sexual fidelity between a husband and a wife, prevented socially evil influence due to adultery, and maintained marriage and family based on individual

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<sup>2)</sup> Kim Kyong-Je, "The Constitutional Problems of Deciding the Constitutionality of Punishing the Crime for Adultery", *Constitutional Study Research*, vol. 15, no. 2, 2009, pp.141-143.



dignity and gender equality. On the appropriateness of the measure, it was decided that criminal penalty under the law was appropriate to achieve the legislative purpose. On the matter of minimizing the infringement of rights, the Court came to a conclusion that the concrete content of criminal penalty was within the legislative discretion, and that fundamental rights were not excessively violated since adulterous acts impair social order, and because the law was modified so as to prevent abuse of the legal system. In addition, the Court acknowledged that the law was able to sought a balance between legal interests, that is, while private legal interest was only slightly limited since article 241 of the Criminal Act did not penalize psychological interactions through sexual activities between special relations or accidental sexual conduct, the public legal interest to protect healthy sexual morality and to sustain marriage and family was substantially protected.

Meanwhile, the dissenting opinion which determined the crime for adultery as unconstitutional applied the same principle of balancing test, just like the majority opinion. The dissenting opinion recognized the legislative purpose of article 241 of the Criminal Act, but stated that the concept of sex amongst the citizens has changed significantly, and that the appropriateness, effectiveness and the preventive nature of the law no longer existed. On the contrary, the law could be abused. Therefore, it was decided that article 241 of the Criminal Act did not meet the criteria of appropriateness, effectiveness and minimum infringement. The dissenting opinion also refused to acknowledge the balance of interest since the provision infringed upon individual basic rights and the rights of their children. The dissenting opinion in the 4th decision, while applying the principle of balancing test, used the strict scrutiny of proportionality test. On the other hand, the opinion which decided that the law was incompatibility with the Constitution but accepted the provisional application of the law also used the principle of balancing test. This position noted that the form of adultery was very diverse, including both constitutional and unconstitutional ones. However, the fact that the criminal code uniformly punished adulterous activities without any differentiation was the reason why the law was seen unconstitutional. In other words, adulterous activities could be diverse according to intent and the family situation of the actor, the other

participant, the frequency and the manner in which the act was conducted and etc. Such diverse categories of adulterous activities differed in illegality. However, if the crime for adultery was nullified, then the constitutional punishment illegal adulterous acts could not be enforced, and hence, the law was to be provisionally applied until a new law was enacted.

The Constitutional Court mentioned that the principle of balancing test was not to be applied in the same manner in all the individual fundamental rights. It stated that the standard for determining the constitutionality should be different in accordance with the nature of each individual fundamental right. In other words, if a certain law restricted the fundamental scope of an individual's personal freedom, strict scrutiny would apply. However, if the law had larger social relevance, rational scrutiny would apply.<sup>3)</sup> Judging from this statement, the application of strict scrutiny when deciding that the unconstitutionality of the crime for adultery shows that an adulterous act falls within an individual's fundamental scope of freedom. To apply strict scrutiny of proportionality test just because "the law limits the a person's self determination of sexual intercourse and the right to privacy" does not sound persuasive.

## B. The Crime of Sexual Intercourse under Pretence of Marriage

### (1) Provision at issue

Article 304 of Criminal Act states that "A person who induces a female not habitually immoral to engage in sexual intercourse under pretence of marriage or through other fraudulent means, shall be punished by imprisonment for not more than two years or by a fine not exceeding five million won." The accused fact applied to the complainants is "sexual intercourse under pretence of marriage". Thus, the provision at issue is "A person who induces a female not habitually immoral to engage in sexual intercourse under pretence of marriage" part, excluding the part of "through other fraudulent means."

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<sup>3)</sup> Constitutional decision 89 Hunma 214, December 24, 1998; Constitutional decision 99 Hunba 76, October 31, 2002; Constitutional decision 2001 Hunba 71 February 24, 2005.

(2) The Standard of Unconstitutionality for Constitutional Provisions

The Constitutional Court, similar to the adultery decisions, referred Article 10 (human worth and dignity, and right to pursue happiness), Article 36 paragraph 1 (Marriage and family institution), Article 11 paragraph 1 (right to equality), Article 17 (right to privacy), Paragraph 2 of Article 37 (principle of balancing test) as the related articles. The constitutionality test concerning this crime is a decision on whether article 304 of the Criminal Act limits a man's self-determination of sexual intercourse and whether such limitation could be justified under the Constitution.

(3) The Legal Status of "Self Determination of Sexual Intercourse"

The Constitutional Court, in the 1st case deciding that the statute was constitutional, defined "self-determination of sexual intercourse" as the right to choose the other partner and to enter into a sexual relationship responsibly, following one's own sexual determination within his or her privacy, which is a sexual concept formed independently by an individual within the society based on one's own choice of lifestyle. "Such right is included under article 10 of the Constitution which protects personal rights and the right to pursue happiness, and article 17 of the Constitution which protects the freedom to privacy. Moreover, the crime of sexual intercourse under pretence of marriage not only limits men's self determination of sexual intercourse, it also infringes upon women's self-determination of sexual intercourse. Therefore, the law is not inconsistent with the principle of balancing test, since it infringes upon men's self determination of sexual intercourse to a minimum level, instead of the fundamental part. Therefore, it was determined that the law was not infringing upon the right to pursue happiness and the freedom to privacy. On the other hand, one dissenting opinion (Judge, Kwon Seong) stated that the right limited in the case was the self determination of sexual intercourse, and determined that the law violated article 10 of the Constitutional protecting the right to pursue happiness because it violated the principle of balancing test. One dissenting opinion (Judge, Joo Seon Hye) stated that "the self determination of sexual intercourse is part of personal rights, and personal rights is a foundation for both

the right to pursue happiness and the protection of human dignity under article 10 of the Constitution, as well as the right to privacy protected under article 17 of the Constitution... self determination of sexual intercourse is the right to engage in a sexual relationship responsibly under according to one's own decision.”

During the 2nd case where the law was seen unconstitutional, the majority opinion decided that the crime of sexual intercourse under pretense of marriage limited several fundamental rights : “the premise of personal rights and the right to pursue happiness is the right for an individual to choose one's own fate or destiny, and the right to choose one's own destiny includes self determination of sexual intercourse, including the decision whether to engage in a sexual relationship, and with whom he or she choose to have the relationship with. The provision at hand undoubtedly limits a man's self determination of sexual intercourse, and it also infringes upon the privacy of and individual, thereby violating article 17 of the Constitution.” On the other hand, 3 dissenting opinions (Judges, Lee Kang Kuk, Jo Dae Hyun and Song Doo Hwan) decided that “the sexual relationship between a man and a woman is protected under article 17 of the Constitution since it deals with the private life of an individual's life... The sexual relationship of a man and a woman is within the protected area if the man loves his partner. However, the act of having a sexual relationship under the pretense of marriage is an act no longer confined to oneself, but is an act that violates the legal interest of another individual. Hence, the latter act clearly deviates from the inner boundary of the right of self determination of sexual intercourse.”

Although the judges of the Constitutional Court stated that the crime of sexual intercourse under pretense of marriage limited the right of self determination of sexual intercourse, they have different opinions concerning the legal meaning of self determination of sexual intercourse. The majority opinion in the first and second decisions understood self determination of sexual intercourse as being included within article 10 and 17 of the Constitution. The dissenting opinion during the first decision (Judge, Joo Seon Hye) recognized self determination of sexual intercourse as party of personal rights, and finds its source from article 10 and article 17 of the Constitution. On the other hand, the one dissenting opinion

during the first decision (Judge, Kwon Seong) decided that the foundation of self determination of sexual intercourse was article 10, while 3 dissenting opinions (Judges, Lee Kang Kuk, Jo Dae Hyun and Song Doo Hwan) determined that article 17 of the Constitution gave rise to self determination of sexual intercourse.

#### (4) The Standard of Constitutionality Test and its Determination

During the first decision, the majority opinion decided that the means to punish crime of sexual intercourse under pretense of marriage was under the discretion of the legislative body. Therefore, it was determined that the law was constitutional since it passes the principle of balancing test under article 37 paragraph 2 of the Constitution. However, the court took a careful approach when deciding whether crime of sexual intercourse under pretense of marriage should be maintained by taking into account foreign legislation, and the effectiveness, side effects and the supplementary nature of the provision. The dissenting opinion also used the principle of balancing test. One dissenting opinion (Judge, Joo Seon Hye) stated that the principle of balancing test should be applied in a stricter manner when deciding the need to use criminal punishment in the private life of an individual. This dissenting opinion concluded that the objective of the law itself was not justifiable. On the other hand, the majority opinion of the second decision used the principle of balancing test when deciding the constitutionality of the law. It was noted that the limitation on self determination of sexual intercourse must be followed by a strict scrutiny of proportionality. When looking into the elements for justification, the majority opinion did not look into individual fundamental right, but considered all the fundamental rights at the same time. In other words, it changed its previous decision, determining that the law was unconstitutional since it lacked all the necessary elements, namely the justifiability of the purpose, appropriateness of the means, minimum infringement and the balance of legal interests. However, the dissenting opinion, while using the same principle of balancing test, came to a different conclusion.

During the judicial review of the crime of sexual intercourse under pretense of marriage, the principle of balancing test was applied. The majority opinion of the

second decision adopted the strict scrutiny test of proportionality used by the dissenting opinion during the 1st decision (Judge, Joo Seon Hye), thus changing its position and announcing that the law was unconstitutional. Similar to the crime for adultery, the crime of sexual intercourse under pretense of marriage infringes upon an individual's fundamental freedom. Hence, a strict scrutiny test of proportionality test was used. Furthermore, similar to the crime for adultery, the Constitutional Court stated that the rights limited in the case were the ones protected under articles 10 and 17 of the Constitution, and it applied the same test to determine the law's constitutionality.

### C. Constitutional Contentious Issues

#### (1) The Fundamental Right Nature of Self Determination of Sexual Intercourse

Through the judicial review of the crime for adultery and the crime of sexual intercourse under pretense of marriage, the Constitutional Court has recognized self determination of sexual intercourse as an independent fundamental right. However, the judges had different opinions as to the concept, legal nature and constitutional sources of such right. In other words, while an act of adultery and an act of sexual intercourse under pretense of marriage are recognized as being included within the protected area of self determination of sexual intercourse, opinions about the constitutional sources differ, including (1) personal rights and the right to pursue happiness under article 10, (2) both articles 10 and 17 of the Constitution (this position is again divided into two, including one that incorporates both articles 10 and 17, and one which sees an independent fundamental right from article 17), and (3) article 17 of the Constitution.

The crime for adultery under article 241 and the crime of sexual intercourse under pretense of marriage under article 304 of the Criminal Act are related to the moral value built on the foundation of individual personality. Thus, they are intertwined with the personal rights and the right to pursue happiness under article 10 of the Constitution. However, when considering the constitutionality of the provision on a concrete level, such as taking into account the structure and the conflict of the fundamental rights, it is more reasonable to include the act of

adultery and the act of sexual intercourse under pretense of marriage into the protection provided by article 17, namely the right and freedom to privacy.<sup>4)</sup> Both actions are not only closely related to article 17, the constitutional review standard is also the same as the one used by article 10. Therefore, there is no need to use article 10, which is a supplementary provision in nature.<sup>5)</sup> The Constitutional Court also stated that “the right to pursue happiness is supplementary in nature, and thus, as long as the right to be a civil servant exists and a determination on whether such right has been infringed takes place, there is no need to independently determine whether the right to pursue happiness has been infringed.”<sup>6)</sup> Therefore, it would be sufficient to determine whether article 17 has been violated when determining the constitutionality of the act of adultery and the act of sexual intercourse under pretense of marriage. Even when self-determination of sexual intercourse other than adultery and sexual intercourse under pretense of marriage should be recognized, it is reasonable to include the protective area outside article 17 (right and freedom to privacy) under the protection given by article 10 (personal rights and the right to pursue happiness).

(2) Evaluation on Whether Self Determination of Sexual Intercourse has been infringed

During the judicial review of self-determination of sexual intercourse, the principle of balancing test was used to determine whether self-determination of sexual intercourse has been violated. The constitutional basis for the position

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4) Lee Hee-Hoon, “A Constitutional Consideration of the Crime for Adultery and the Crime for Rape : Surrounding the Issue of the Violation of Self Determination of Sexual Intercourse”, *Jungang Law Journal*, vol. 13, no. 3, 2011, pp.59-60; Kim Il-Hwan, “A Critical Review on the Constitutional Grounds of the Self Determination of Sexual Intercourse”, *Constitutional Law Research*, vol. 12, no. 2, 2006, p.136; Kim Myung-Sik, “A Reconsideration on the Constitutional Grounds of the Self Determination of Sexual Intercourse”, *Sungkyunkwan Law Review*, vol. 15, no. 2, 2003, p.35; Kwon Hyung-Joon, “An Analysis on the Constitutional Cases Relating to the Self Determination of Sexual Intercourse”, *Law Review*, vol. 17, 2000, p.19.

5) Kim Kyong-Je, *supra* note 2, p.140.

6) Constitutional decision 99 Hunma 112, December 14, 2000.

stating that punishment on both crimes is unconstitutional is as follow :

First, the issue of self-determination of sexual intercourse is related to personal morality and ethics.<sup>7)</sup> As such, states should not be allowed to intervene in such matters. Concerning adultery or sexual intercourse under pretense of marriage, social criticism and sanctions which are based on morality and ethics is sufficiently enough, and there should not be any punishment by the government. In particular, the crime of sexual intercourse under pretense of marriage denies women's ability to determine their own sexual lives responsibly, and the requirement of "habitual offence" reflects a patriarchal ideology.<sup>8)</sup> However, whether an act should be dealt within the realms of morality and ethics, or whether it should be regulated by criminal penalty is an issue determined by the time, place, people's mentality and the relationship between citizen, society and the country. Furthermore, it is practically impossible to differentiate a legal question with a question related to ethics. A societal institution based on morality and ethics could also be elevated to a legal one. Therefore, the proposed argument here is not convincing enough to claim that the crime for adultery and the crime of sexual intercourse under pretense of marriage limiting self-determination of sexual intercourse as unconstitutional.<sup>9)</sup> However, the "habitual offense" as a requirement for the crime of sexual intercourse under pretense of marriage is not only vague, but is also unrelated to the limitation of self-determination of sexual intercourse. Thus, the act does not justify the legislative purpose, nor does it satisfy the appropriateness of means.<sup>10)</sup>

Second, even assuming that self-determination of sexual intercourse should be a

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7) Lee Hee-Hoon, *supra* note 4, p.68; Jun Kwang-Suk, *Constitutional Case Research* (Beopmunsa, 2000), p.226; Lee Jun-Il, "Constitutional Justice and the Crime for Adultery", *Human Rights and Justice*, vol. 353, 2006, pp.143-144; Lee Joo-Hee, "Criminal Punishment of the Crime for Adultery and the Constitutional Justification", *Law and Policy Research*, vol. 8, no. 2, 2008, p.337; Cho Kuk, "The Unconstitutionality of the Crime of Sexual Intercourse under Pretence of Marriage", *Criminal Law Research*, vol. 21, no. 3, 2009, pp.259-260.

8) Cho Kuk, *supra* note 7, pp.259-260.

9) Song Ki-Chun and Lee Jung-Won, "A Constitutional and Criminal Consideration concerning the Abolishment of the Crime for Adultery", *Constitutional Law Review*, vol. 10, no. 2, 2004, p.354.

10) Cho Kuk, *supra* note 7, p.263.



legal question, the exercise of self-determination of sexual intercourse lies within the boundary of private contracts. Thus, legal sanctions according civil law would be sufficient, while criminal law should not intervene in these kinds of issues. In other words, the premise of recognizing an adulterous act is the sexual fidelity between a husband and a wife, and adultery is merely a breach of obligation within the marriage contract, while criminal punishment is not needed for an act of sexual intercourse under pretense of marriage because social harm is not accompanied when a woman is seduced.<sup>11)</sup> Breach of sexual fidelity within the private contract of marriage is the fundamental matter in adulterous cases since the institution of marriage and family were established on a foundation of equality between men and women during the enactment of the criminal act.<sup>12)</sup> Whether an action constitutes a violation of rights, and therefore needs to be dealt with civil action, or whether that particular action constitutes a violation of a social system, and therefore needs to be met with criminal punishment, is in principle within the legislative discretion.<sup>13)</sup> Such discretion is not unlimited, and it must abide by the principle of proportionality or the principle of balance test, taking into account the crime and the protected rights.<sup>14)</sup> However, the principle of balance test is not applied since the determination of the use of civil or criminal sanctions is deferred to the legislative branch.<sup>15)</sup> Therefore, this argument is not sufficient to prove the unconstitutionality of the act, but the determination of constitutionality, particularly concerning the crime for adultery and the crime of sexual intercourse under pretense of marriage, can be done by applying the principle of balance test, taking into account the protected rights, legislative purpose and means, balance of legal interest and etc.<sup>16)</sup>

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11) Heo Tae-Il, "The Unconstitutionality of the Crime for Adultery", *Justice*, vol. 104, 2008, p.130; Lee Hee-Hoon, *supra* note 4, p.69; Jun Kwang-Suk, *supra* note 7, pp. 230-231; Lee Joo-Hee, *supra* note 7, pp.338-339.

12) Lee Joo-Hee, *supra* note 7, p.342.

13) Constitutional decision 91Hunba11, April 20, 1995.

14) Heo Tae-Il, *supra* note 11, pp.127-129.

15) Chung Jung-Sup, *The Principles of Constitutional Studies* (Parkyoungsa, 2011), pp. 379-380.

16) Some claim that the constitutional court's judgment holding that both the crime for

Third, it is stated that the specific content and meaning of self-determination of sexual intercourse could not be the standard to decide the constitutionality of the criminal punishment. This is because there has been a significant change in the society compared to the time when the law was enacted. According to this opinion, the act only received one half of votes in the legislative branch, barely passing the limit, showing the lack of consensus.<sup>17)</sup> Furthermore, the Ministry of Justice Criminal Act Amendment Committee has also in the past decided to abolish crime for adultery. All of the above show that the opinions concerning sexual activities have changed. Thus the said criminal punishments are no longer effective to protect marriage and family. The acts overly suppress the self determination of sexual intercourse, and bring side effects related to the abuse of the law.<sup>18)</sup> The legal effect and the effectiveness of the said act are also a matter of dispute even within the judges of the Constitutional Court, and such differences are linked with the content of the principle of balancing test, namely, appropriateness of measures, minimized infringement, balancing of interest.

Fourth, it is said that the constitutionality review concerning self-determination of sexual intercourse should apply strict scrutiny of proportionality. In the 1st decision of sexual intercourse under pretence of marriage, the dissenting opinion (Judge, Joo Seon Hye) commented that “when a law infringes upon one’s sexual life, which is considered a matter of fundamental privacy, the legislator has the burden of proof to persuade the Constitutional Court on matters such as the presence of concrete danger or public interest which became the legislative motive of the particular act, and the concrete causal link between the act and achieving

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adultery and the crime of sexual intercourse under pretence of marriage are constitutional is a result of the court’s wrong decision to adopt judicial restraint, when it should have adopted judicial activism for the protection of fundamental rights of the citizens in a pluralistic society (Lee Dong Hoon, “The Constitutional Appeal of the Self Determination of Sexual Intercourse : The Appeal to Declare Article 304 of the Criminal Act Unconstitutional”, Comparative Legal Research, vol. 2, 2003, pp.219-223).

<sup>17)</sup> The history, legislative process, legal comparative consideration concerning the crime for adultery can be found in Heo Tae-Il, *supra* note 11, pp.121-125; Song Ki-Chun and Lee Jung-Won, *supra* note 9, pp.335-346.

<sup>18)</sup> Lee Hee-Hoon, *supra* note 4, pp.69-70; Cho Kuk, *supra* note 7, pp.254-255.

the legislative purpose. The act needs to be reconsidered because it lacks careful consideration about the characteristics of the regulated life sphere, and it oversimplifies the problem by giving a huge discretion to the legislator on matters concerning the punishment of sexual activities conducted by an individual.” This position was reflected in the majority opinion of the 2nd decision. On the other hand, while the dissenting opinion in the 4th adultery decision stated that “the limitation on the right of self-determination of sexual intercourse and the right to privacy should be reviewed using a strict scrutiny since these rights are fundamental rights recognized by the Constitution”, the majority opinion recognized the legislative discretion, relied on the principle of balancing test, and concluded that the provision was constitutional. Such differences make a significant impact during judicial review because it affects the burden of proof. In particular, if legislative discretion is recognized, the complainant has to prove that the unconstitutionality of the provision. However, if strict scrutiny is applied, the legislator has the burden of proof.<sup>19)</sup>

### (3) An assessment of the Abolition Issue of the Adultery Law

Considering that the Constitutional Court’s function is to review the constitutionality of an act and not to propose the best interpretation of it, in case that one fails to prove that a certain provision is unconstitutional, the Constitutional Court cannot decide upon the constitutionality of the said provision. Therefore, even if the Constitutional Court has had proclaimed that adultery is perfectly constitutional, this decision simply reassures that adultery does not violate the Constitutional Law. Accordingly, the Court’s decision does not bind the legislators and thus the National Assembly can still repeal the law at any time. However, in case that the

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<sup>19)</sup> The standard of review for the principle of balancing test is as follow : when an act limits the fundamental freedom of an individual, the legislator has to prove the concrete causal link between the act and achieving the legislative purpose. However, when an act only limits the economic activities concerning the social relations with others, the legislator is given wide discretion, and therefore a lenient standard of review, namely “tangible limitation” is applied (Constitutional decision 99 Hunba 76, October 31, 2002).

punishment of adultery were to be unconstitutional, in accordance with the general effect of the Constitutional Court, the relevant provision on adultery is to be duly repealed, hence providing a meaningful evaluation to the issue of the adultery especially when punishing for adultery is still constitutional in the eyes of the Court.<sup>20)</sup>

The core reason for the abolition of adultery lies on the fact that the act lacks in regulatory power and effectiveness due to its failure to apply the regulation in par with the legal reality. Taking into account that back in the days when adultery was newly enacted, feudalistic traditions such as concubinage still existed. Thus, it was necessary to establish a family system within the community by punishing the parties involved in adultery. However, it should be noted that nowadays it is considered that the normative function of the adultery act is failing due to a sharp increase in divorce rate, changes in the court's view of sexuality, distinct standing of the female status, monogamy in the family system, compensation in the process of divorcing and others. Moreover, it is claimed that the relevant act overly restricts the individuals' self determination of sexual intercourse and thus brings about societal side effects in the application of the law.<sup>21)</sup>

In fact, although the majority opinion in the Constitutional Court has supported the constitutionality of adultery, they have shown to consent to the complete abolition of the act. The Court have ruled on the premise that one, it is unconstitutional to punish adultery that is only limited to jail time and two, that the presence of certain disagreements in the Court's final opinion reveal that all adultery acts are unconstitutional. The Court has decided on the first three cases regarding the adultery act itself that it was constitutional (8 : 1) just as in the fourth decision (6 : 3). However, setting aside the issue of the constitutionality of adultery, the Court has indirectly assured that it would be most appropriate to abolish the relevant law by requesting legislative efforts to review on whether the abolition of the

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<sup>20)</sup> The introduction relating to the maintenance and abolition of the crime for adultery in Lee Joo-Hee, *supra* note 7, pp.336-339; Song Ki-Chun and Lee Jung-Won, *supra* note 9, pp.353-362.

<sup>21)</sup> Lee Joo-Hee, *supra* note 7, pp.344-345; Song Ki-Chun and Lee Jung-Won, *supra* note 9, pp.360-362.

adultery provision is consistent with today's sexual activities and legal awareness and implementation. With this in light, it seems that with the ongoing changes in the interpretation of the Constitution's value and reality, the issue regarding the abolition of the adultery act will continue in the long run, and hence in light of today's legal reality, it seems to be most appropriate to abolish the adultery law even if the Constitutional Court have ruled it otherwise.<sup>22)</sup>

#### 4. Conclusion

Although the Constitutional Court have judged on the self determination of sexual intercourse during their review regarding the unconstitutionality of the adultery and the crime of sexual intercourse under the pretense of marriage, the Court has failed to clarify on the definition, character and the standard of what constitutes the self determination of sexual intercourse. As for the crime of sexual intercourse under the pretense of marriage, the court ruled that it was constitutional back in 2002, and soon switched its opinion and ruled it unconstitutional in 2009, precluding the abolition of the relevant law after 56 years of the legislation. I would like to propose the following conclusion on the constitutional decision of the self determination of sexual intercourse

First, there is no need to recognize the self determination of sexual intercourse as one of Constitutional Law's basic natural rights. The right to engage in a sexual relationship and to choose one's own partner is already included in article 17 of the Constitution protecting one's freedom of privacy. Moreover, in case that a part of the self determination of sexual intercourse were not to be protected by article 17, it is still possible to be protected by article 10 of the Constitutional Law of human dignity and the right to pursue happiness.

Second, the principle of balancing test is to be applied when deciding the standard of the constitutional review of the self determination of sexual intercourse,

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<sup>22)</sup> Song Ki-Chun and Lee Jung-Won, *supra* note 9, p.363.

yet since the specifics of the evaluation is directly relevant to the individual's essentially protected freedom, in case that it is decided to limit this freedom, the legislator is to prove the causal relationship, applying at the same time a strict scrutiny of proportionality. It is to note that different standards have been applied when reviewing the constitutionality of the adultery act and the crime of sexual intercourse under the pretense of marriage and thus the former was decided constitutional whereas as the latter unconstitutional.

Third, even if a strict proportional judgment were said to be applied regarding the self determination of sexual intercourse relevant to the adultery act, this does not immediately result to the unconstitutionality of the relevant act. This is because although adultery act and the crime of sexual intercourse under the pretense of marriage do share a common right of the self determination of sexual intercourse, the legislative purposes, elements and effects are clearly different from one another.<sup>23)</sup> In case of adultery, the unconstitutionality of the act have not been proven persuasive and thus ruled constitutional. However, in light of the changing legal reality concerning the self determination of sexual intercourse, it is most appropriate to abolish the adultery act.

Fourth, even if the adultery act were to be abolished, and the crime of sexual intercourse under the pretense of marriage were to be invalidated, this would not mean that both acts are to be ethically nor legally permitted. Hence, even if these two acts were no longer considered as criminally punishable, one cannot be exempted from ethical or civic responsibilities. Thus a person who has been

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<sup>23)</sup> Such difference for the crime for adultery and the crime of sexual intercourse under pretence of marriage is also reflected in the constitutional decisions. Judge Joo Seon Hye ruled the crime for adultery constitutional during the 3rd case, but decided that the crime of sexual intercourse under pretence of marriage was unconstitutional during the 1st case. Judges Lee Kong Hyun and Min Hyeong Ki, during the 4th case relating to the crime for adultery, rendered a constitutional decision, but decided that the crime of sexual intercourse under pretence of marriage was unconstitutional during the 2nd case. On the other hand, Judge Kim Hee Ok, in the 4th case concerning the crime for adultery, rendered that the law was incompatibility with the Constitution but accepted the provisional application of the law. However, Judge Kim decided that the crime of sexual intercourse under pretence of marriage was unconstitutional during the 2nd case.

involved in adultery or the crime of sexual intercourse under the pretense of marriage would still be accountable for its civic responsibilities and such acts would be grounds for divorce, separation of property or alimony compensation.