
J.Y. Interpretation No. 666 (November 6, 2009)*

Sexual Transaction Punishment Case

Issue

Is Article 80, Paragraph 1, Subparagraph 1 of the Social Order Maintenance Act, which imposes a fine on those who provide sexual services for financial gain, unconstitutional?

Holding

Article 80, Paragraph 1, Subparagraph 1 of the Social Order Maintenance Act, which stipulates that the action of any individual who engages in sexual transactions or cohabitation for financial gain is punishable by detention for no more than three days or by a fine of up to TWD 30,000, violates the principle of equality prescribed in Article 7 of the Constitution, and shall become null and void not later than two years from the date of announcement of this Interpretation.

Reasoning

[1] The principle of equality prescribed in Article 7 of the Constitution does not refer to a concept of absolute and mechanical equality in form. Rather, it guarantees substantive equality in legal status for all people, which requires matters that are the same in nature to be treated the same and not be subject to arbitrary different treatment without justification. When a law imposes administrative penalties to carry out certain legislative purposes so that the choice of target for punishment results in different treatment, such different treatment

* Translation and Note by Li-Ju LEE

needs to have substantive nexus with the very legislative purpose in order to avoid violating the principle of equality.

[2] Article 80, Paragraph 1, Subparagraph 1 of the Social Order Maintenance Act (hereinafter "the provision at issue") provides that the action of any individual who engages in sexual transactions or cohabitation with intent for financial gain is punishable by detention for no more than three days or by a fine up to TWD 30,000. Its legislative purpose is to protect public health and maintain social morality (*see* the Legislative Yuan Gazette 80 (22):107). According to this provision, for those who engage in sexual transactions, only the party with intent for financial gain is subject to penalties, but not the other party who provides the consideration.

[3] How to regulate sexual transactions and whether any penalty is warranted are matters of legislative discretion. The Social Order Maintenance Act employs administrative penalties as the regulatory means. The provision at issue explicitly prohibits sexual transactions and punishes only the party with intent for financial gain, but not the other party who provides the consideration. With the subjective intent for financial gain as the standard to impose penalties, the provision at issue has subjected parties in a sexual transaction to different treatments. Considering that the legislative purpose of the provision at issue is to protect public health and maintain social morality, and that sexual transactions can only be consummated through joint actions between one party with intent for financial gain and another party providing consideration, even though the former is more likely to be a repeated actor with wide-ranging and uncertain sex partners, such a difference in facts and experiences does not alter the nature of sexual transactions as joint actions, and is thus not sufficient to justify different treatments. The two parties should be assessed equivalently in law. Moreover, the provision at issue does not hold the party providing consideration culpable and yet punishes the party with intent for financial gain in sexual transactions. In light of the fact that those who

provide sexual services are mostly women, the provision in practice is tantamount to punishing only women participating in sexual transactions, in particular the socially and economically disadvantaged ones being compelled to engage in sexual transactions, who after being thus punished would have their hardship further exacerbated. The provision at issue, adopting subjective intent for financial gain as the standard for different treatment in the imposition of penalties, does not have an apparent substantive nexus with the legislative purpose stated above and therefore violates the principle of equality prescribed in Article 7 of the Constitution.

[4] In order to achieve the legislative purpose of protecting public health and maintaining social morality, government agencies may implement various kinds of management or counseling measures for those who engage in sexual transactions with intent for financial gain, such as physical examination or safe sex awareness campaigns; or provide job training, career counseling or other educational measures to enhance their ability to work and economic conditions so they do not have to depend on sexual transactions to make a living; or adopt other effective management measures. In addition to providing all possible assistance to socially and economically disadvantaged people, in order to prevent sexual transactions from having a negative impact on rights and interests of third parties or infringing on other important public interests, the State may, when legal restrictions on sexual transactions are necessary, enact statutes or authorize administrative regulations to provide reasonable and precise regulatory or punishment rules. Since this requires substantial time for careful planning, the provision at issue shall become null and void not later than two years from the date of announcement of this Interpretation.

Background Note by the Translator

In 2009, Yi-Lan Summary Court Judge Jun-Ting LIN, the presiding judge

over seven sexual transaction cases involving the Social Order Maintenance Act, issued preliminary decisions to halt the proceedings and filed a petition to the Constitutional Court arguing that Article 80, Paragraph 1, Subparagraph 1 of the Social Order Maintenance Act, which stipulates that any individual who engages in sexual transactions or cohabitation with intent for financial gain is punishable by detention for no more than three days or by a fine up to TWD 30,000, violated Articles 7 and 23 of the Constitution. Another petition making the same claim was filed by Judge Yang Kun-Chao, who was the presiding judge over two sexual transaction cases involving the Social Order Maintenance Act in Lotung Summary Court.

J.Y. Interpretation No. 666 adds a new dimension to the Constitutional Court's jurisprudence on gender equality. Unlike the statutes previously struck down for their explicit discrimination against women, the Social Order Maintenance Act does not single out a specific sex for punishment. Rather, it imposes penalties on those who provide sexual services for profit, but not those who pay for them. The Court nevertheless recognizes the fact that in practice it is mostly women, especially socially and economically disadvantaged ones, who are punished, as the petitioners' cases demonstrate.

Although the Court recognizes gender discrimination in practice or in effect in this case, it is not clear if the constitutional principle of equality would be extended to protect people against so-called "*de facto* discrimination" or "indirect discrimination" in other contexts involving gender or other protected characteristics such as race, religion, class or party affiliation. J.Y. Interpretation No. 666 represents an important first step toward acknowledging various types of discrimination manifested in the interaction between law and society, and materializing the principle of "substantive equality" championed by the Court.