抄 本

發文方式：電子交換（第一類，不加密）

檔　　號：
保存年限：

司法院秘書長　函

地址：10048台北市重慶南路1段124號
承辦人：涂人蓉
電話：(02)2361-8577轉196

受文者：內政部
發文日期：中華民國105年8月12日
發文字號：秘台大二字第1050021231號
速別：普通件
密等及解密條件或保密期限：
附件：

主旨：本院大法官為審理會台字第12664號臺灣苗栗地方法院苗栗簡易庭快股法官聲請解釋案，請於函到15日內，協助如說明二事項，俾供審理之參考。

說明：

一、依司法院大法官審理案件法第13條第1項規定辦理。

二、請惠予提供90年至104年間國人離婚，其離婚原因為配偶之一方有通姦前科者之離婚率。

正本：內政部
副本：

電子交換：內政部

檔 號
保存年限

內政部 函

地址：10017臺北市中正區徐州路5號
聯絡人：陳璧瑄
聯絡電話：02-23976700
傳真：02-23566474
電子信箱：moi1648@moi.gov.tw

受文者：司法院秘書長

發文日期：中華民國105年8月23日
發文字號：台內戶字第1050431371號
速別：普通件
密等及解密條件或保密期限：
附件：

主旨：有關函請提供90年至104年間國人離婚，其離婚原因為配偶一方有通姦前科者之離婚率1案，復請查照。

說明：

一、復貴秘書長105年8月12日秘台大二字第1050021231號函。

二、經查現行大院並未將裁判離婚文件通報至本部，另雖自98年6月底起，將調解、和解離婚筆錄之電子檔通報至本部，惟考量雙方中文碼不同、造字問題及避免資料遭竄改，爰大院係以PDF格式傳送本部，尚無法使用系統比對是否有「通姦」2字，又現行離婚登記申請書中，並無記載離婚原因，爰礙難提供旨揭離婚率。

正本：司法院秘書長
副本：2016-08-23 09:25:00

以稿代簽

檔　號：
保存年限：

司法院大法官書記處　函（稿）

地址：10048台北市重慶南路1段124號
承辦人：涂人蓉
電話：(02)2361-8577轉196

受文者：如正本欄

發文日期：中華民國105年1月23日
發文字號：處大二字第1050000976號
速別：普通件
密等及解密條件或保密期限：
附件：

裝

主旨：本院大法官為審理會台字第12664號臺灣苗栗地方法院苗栗簡易庭快股法官聲請解釋案，請於函到7日內，提供102年度因犯刑法第239條通姦罪而判刑確定者之身分證字號，俾供審理之參考，請查照辦理。

說明：

訂

一、依司法院大法官審理案件法第13條第1項規定辦理。

二、旨揭之身分證字號係為函請內政部提供102年度因犯刑法第239條通姦罪而判刑確定者之婚姻是否繼續存續之統計資料（下稱系爭統計資料，依該統計資料無從識別特定當事人）。

三、個人資料保護法第9條規定：「公務機關或非公務機關依第15條或第19條規定蒐集非由當事人提供之個人資料，應於處理或利用前，向當事人告知個人資料來源及前條第1項第1款至第5款所列事項。有下列情形之一者，得免為前項之告知：……四、基於公共利益為統計或學術研究之目的而有必要，且該資料須經提供者處理後或蒐集者依其揭露方式，無從識別特定當事人者為限。……。」第15條規定：「公務機關對個人資料之蒐集或處理，除第6條第1項所規定資料外，應有特定目的，並符合下列情形之一者：一、執行法定職務必要

線

範圍內。……。」第16條規定：「公務機關對個人資料之利用，除第6條第1項所規定資料外，應於執行法定職務必要範圍內為之，並與蒐集之特定目的相符。但有下列情形之一者，得為特定目的外之利用：……五、公務機關或學術研究機構基於公共利益為統計或學術研究而有必要，且資料經過提供者處理後或經蒐集者依其揭露方式無從識別特定之當事人。……。」本院大法官為審理案件請內政部提供系爭統計資料，係基於法定職務而蒐集、利用資料，符合個人資料保護法第15條、第16條之規定；本院係於公共利益（審理案件）為統計必要而蒐集個人資料，且請內政部提供者係為統計數字，而非個別被告之婚姻狀態，無從識別特定當事人，亦與個人資料保護法第9條規定相符。特予說明。

正本：本院統計處
副本：

（處條戳）

第三層決行
承辦單位　　決行

大法官書記處 薦任書記官 涂人蓉 105.09.22
大法官書記處 書記官兼科長 雷超智 105.9.22
大法官書記處 副處長 林吉輝 09.22
大法官書記處 處長 李玉卿
電子文

正　本

發文方式：紙本遞送

檔　　號

保存年限

司法院統計處　書函

地址：10048台北市中正區重慶南路1段124號
承辦人：謝佩玲
電話：(02)2361-8577轉374

受文者：本院大法官書記處

發文日期：中華民國105年9月26日
發文字號：處統一字第1050000755號
速別：普通件
密等及解密條件或保密期限：
附件：

裝

主旨：檢送高地院刑事第一、二審違反刑法第239條且宣判有罪案件之被告清單，請卓參。

說明：

一、復貴處105年9月23日處大二字第1050000976號函。

二、依刑事訴訟法第456條及第457條規定，刑事裁判確定案件之執行原則上由檢察官指揮之，各法院蒐集之案件資料，係自收案起至裁判止；另刑法第239條係屬刑事訴訟法第376條第1款規定，不得上訴第三審之案件範圍，最高法院並無因刑法第239條而宣判有罪之被告，爰僅提供旨揭清單，合先敍明。

訂

三、按個人資料保護法第16條第1項本文及但書第5款規定，公務機關對個人資料之利用，應於執行法定職務必要範圍內為之，並與蒐集之特定目的相符。旨揭清單僅供審理會台字第12664號聲請解釋案函請內政部協助之用。

線

四、為保護個案當事人隱私，旨揭清單以光碟隨函檢送。

正本：本院大法官書記處
副本：本院統計處第一科

處長 陳昌雄

抄 本

檔　　號：
保存年限：

司法院秘書長　函

地址：10048台北市重慶南路1段124號
承辦人：涂人蓉
電話：(02)2361-8577轉196

受文者：內政部
發文日期：中華民國105年10月11日
發文字號：秘台大二字第1050025867號
速別：普通件
密等及解密條件或保密期限：
附件：如文

裝

主旨：本院大法官為審理會台字第12664號臺灣苗栗地方法院苗栗簡易庭快股法官聲請解釋案，請於函到10日內，提供說明二所列事項，俾供審理之參考，請查照。

說明：

一、依司法院大法官審理案件法第13條第1項規定辦理。

訂

二、請提供列於附件光碟所載之身分證字號清單中於102年時有配偶者，截至目前為止之婚姻狀態仍存續之統計數字，及已離婚之比例（請勿提供個別之婚姻狀態）。

三、附件清單僅為審理旨揭聲請解釋案而請貴部提供統計之用，不得移作他用。貴部使用附件清單時請遵守個人資料保護相關規定。

線

正本：內政部
副本：

郵　　寄：內政部

119

檔　3
保存年限

內政部　函

地址：10017臺北市中正區徐州路5號
聯絡人：陳毅塹
聯絡電話：02-23565111
傳真：02-23566474
電子信箱：moi1511@moi.gov.tw

受文者：司法院秘書長

發文日期：中華民國105年11月7日
發文字號：台內戶字第1050073517號
速別：普通件
密等及解密條件或保密期限：
附件：如說明二(500000000FUX00000_301000000A105007351700-1.xlsx)

主旨：有關貴院大法官為審理會台字第12664號臺灣苗栗地方法院苗栗簡易庭快股法官聲請解釋案，請本部提供相關統計資料一案，復請查照。

說明：

一、復貴秘書長105年10月11日秘台大二字第1050025867號函。

二、旨揭資料經檢視共計318筆（內容為102年之當事人國民身分證統一編號及姓名，其中11筆國民身分證統一編號錯漏或為居留證號，無法比對），按該資料所列國民身分證統一編號，透過本部戶役政資訊系統比對及人工檢核，以102年12月31日為基準日，其婚姻狀況為有偶者計100人，截至105年10月16日，其婚姻狀況仍為有偶者81人，離婚者19人，離婚之比率為19%，詳如附件，惟105年10月16日比對之婚姻狀況，是否為再婚配偶不在比對之列。

正本：司法院秘書長
副本：電子公文交換 2016/11/07 13:50:21

附件

102年有偶者截至105年婚姻狀況統計

單位：人；%

性別	總計(102年有偶者)	102年有偶者截至105年婚姻狀況				
		有偶		離婚		喪偶
		人數	比率	人數	比率	人數
總計	100	81	81.00	19	19.00	0
男	63	53	84.13	10	15.87	0
女	37	28	75.68	9	24.32	0

備註: 1. 依據司法院秘書長105年10月11日秘台大二字第1050025867號函，提供本部102年之國民身分證及姓名清冊共318筆，經本部戶役政資訊系統比對及人工檢核後，以102年12月31日為基準日，其婚姻狀況為有偶者，計100人。

2. 105年資料時間為105年10月16日。

抄 本

發文方式：電子交換（第一類，不加密）

檔　　號：
保存年限：

司法院秘書長　函

地址：10048臺北市中正區重慶南路1段124號
承辦人：楊靜芳
電話：(02)2361-8577轉737

受文者：內政部

發文日期：中華民國105年11月30日
發文字號：秘台大二字第1050029955號
速別：普通件
密等及解密條件或保密期限：
附件：無

主旨：本院大法官為審理會台字第12664號臺灣苗栗地方法院苗栗簡易庭快股法官聲請解釋案，請於函到10日內，提供說明二所列事項，俾供審理之參考，請查照。

說明：

一、依司法院大法官審理案件法第13條第1項規定辦理。

二、貴部105年11月7日台內戶字第1050073517號復函，所提供之比對基準日為102年12月31日。本院大法官為審理需要，請以97年12月31日為比對基準日，提供本院105年10月11日秘台大二字第1050025867號函所附身分證字號清單中，於97年12月31日有配偶者，截至目前為止之婚姻狀態仍存續及已離婚之比例（請勿提供個別之離婚狀態）。

正本：內政部
副本：

電子交換：內政部

檔 [illegible]
保存年[illegible]

內政部　函

地址：10017臺北市中正區徐州路5號
聯絡人：陳毅鑾
聯絡電話：02-23565111
傳真：02-23566474
電子信箱：moi1511@moi.gov.tw

受文者：司法院秘書長

發文日期：中華民國105年12月15日
發文字號：台內戶字第1050445726號
速別：普通件
密等及解密條件或保密期限：
附件：如說明二(500000000FUX00000_301000000A105044572600-1.xlsx)

主旨：有關貴院大法官為審理會台字第12664號臺灣苗栗地方法院苗栗簡易庭快股法官聲請解釋案，請本部提供相關統計資料一案，復請查照。

說明：

一、復貴秘書長105年11月30日秘台大二字第1050029955號函。

二、旨揭資料經檢視共計318筆（內容為102年之當事人國民身分證統一編號及姓名，其中11筆國民身分證統一編號錯漏或為居留證號，無法比對），按該資料所列國民身分證統一編號，透過本部戶役政資訊系統比對及人工檢核，以97年12月31日為基準日，是日婚姻狀況為有偶者計140人，截至105年12月6日，扣除2名死亡當事人，賸餘138人其婚姻狀況仍為有偶66人，離婚68人，喪偶4人，離婚之比率為49.28%（詳如附件）惟105年12月6日比對之婚姻狀況，是否為再婚配偶不在比對之列。

正本：司法院秘書長
副本：電2016/12/15文 09:44:13章

附件

97年底有偶者截至105年婚姻狀況統計

單位：人；%

性別	總計(97年底有偶者)	當事人已死亡	105年婚姻狀況					
			計	有偶		離婚		喪偶
				人數	比率	人數	比率	人數
總計	140	2	138	66	47.83	68	49.28	4
男	77	1	76	46	60.53	30	39.47	0
女	63	1	62	20	32.26	38	61.29	4

備註: 1. 經本部戶役政資訊系統比對及人工檢核後，以97年12月31日為基準日，其婚姻狀況為有偶者，計140人。

2. 105年資料時間為105年12月6日。

抄 本

發文方式：電子交換（第一類，不加密）

檔　　號：
保存年限：

司法院大法官書記處　函

地址：10048臺北市中正區重慶南路1段124號
承辦人：楊靜芳
電話：(02)2361-8577轉737

受文者：本院統計處
發文日期：中華民國109年3月26日
發文字號：處大二字第1090000336號
速別：最速件
密等及解密條件或保密期限：
附件：無

主旨：本院大法官為審理會台字第12664號臺灣苗栗地方法院苗栗簡易庭快股法官聲請解釋案，請於文到5日內，提供103年度至108年度因犯刑法第239條通姦罪而判刑確定者之身分證字號，俾供審理之參考，請查照辦理。

說明：

一、依司法院大法官審理案件法第13條第1項規定辦理。

二、旨揭之身分證字號係為發函請內政部提供103年度至108年度因犯刑法第239條通姦罪而判刑確定者之婚姻是否繼續存續之統計資料（下稱系爭統計資料，依該統計資料無從識別特定當事人）。

三、按個人資料保護法第9條規定：「公務機關或非公務機關依第15條或第19條規定蒐集非由當事人提供之個人資料，應於處理或利用前，向當事人告知個人資料來源及前條第一項第一款至第五款所列事項。有下列情形之一者，得免為前項之告知：……四、基於公共利益為統計或學術研究之目的而有必要，且該資料須經提供者處理後或蒐集者依其揭露方式，無從識別特定當事人者為限。……。」第15條規定：「公務機關對個人資料之蒐集或處理，除第6條第1項所規定資料外，應有特定目的，並符合下列情形之一者：一、執行法定職務

必要範圍內。……。」第16條規定：「公務機關對個人資料之利用，除第6條第1項所規定資料外，應於執行法定職務必要範圍內為之，並與蒐集之特定目的相符。但有下列情形之一者，得為特定目的外之利用：……五、公務機關或學術研究機構基於公共利益為統計或學術研究而有必要，且資料經過提供者處理後或經蒐集者依其揭露方式無從識別特定之當事人。……。」本院大法官為審理案件請內政部提供系爭統計資料，係基於法定職務而蒐集、利用資料，符合個人資料保護法第15條、第16條之規定；本院係於公共利益（審理案件）為統計必要而蒐集個人資料，且請內政部提供者係為統計數字，而非個別被告之婚姻狀態，無從識別特定當事人，亦與個人資料保護法第9條規定相符。併予說明。

正本：本院統計處
副本：

電子傳遞：本院統計處

正 本

發文方式：紙本遞送

檔　　號：
保存年限：

司法院統計處　書函

地址：10048臺北市中正區重慶南路1段124號
承辦人：陳哲偉
電話：(02)2361-8577轉373
電子信箱：jwey@judicial.gov.tw

100
臺北市中正區重慶南路1段124號

受文者：本院大法官書記處

發文日期：中華民國109年3月31日
發文字號：處統一字第1090000250號
速別：普通件
密等及解密條件或保密期限：
附件：如說明四

主旨：檢送103年度至108年度地方法院第一審、高等法院第二審及最高法院第三審刑事訴訟終結案件中因違反刑法第239條判決有罪之被告清單，請卓參。

說明：

一、復貴處109年3月26日處大二字第1090000336號函。

二、依刑事訴訟法第456條及第457條規定，刑事裁判確定案件之執行原則上由檢察官指揮之，各法院蒐集之案件資料，係自收案起至裁判止，爰僅提供旨揭清單。另刑法第239條係屬刑事訴訟法第376條規定，不得上訴第三審之案件，惟該法於106年11月修正後，第一審法院所為無罪、免訴、不受理或管轄錯誤之判決，經第二審法院撤銷並諭知有罪之判決者，得提起上訴至第三審，合先敘明。

三、按個人資料保護法第16條第1項本文及但書第5款規定，公務機關對個人資料之利用，應於執行法定職務必要範圍內為之，並與蒐集之特定目的相符。旨揭清單僅供審理會台字第12664號聲請解釋案函請內政部協助之用。

四、為保護個案當事人隱私，旨揭清單以光碟隨函檢送。

正本：本院大法官書記處
副本：本處第一科

司法院統計處

言詞辯論意旨狀

聲請人：臺灣花蓮地方法院刑事第三庭溫股法官何効鋼

為聲請司法院大法官解釋事，爰提出言詞辯論意旨如下：

一、　聲請標的及聲請事實

聲請人為臺灣花蓮地方法院106年度易字第589號、106年度易字第600號、107年度花原易字第5號、107 年度花原易字第20號案件受命法官，上開案件均係經檢察官提起公訴，認案件被告涉犯刑法第239條前段或後段之通姦罪或相姦罪。本院於審判中，認各該案件應適用之刑法第239條違反比例原則侵害人民憲法第8條人身自由、第22條性自主決定權，爰裁定停止審判，聲請司法院大法官解釋。

二、　刑法第239條規定侵害憲法性自主決定權及人身自由之保障

刑法第239條（下稱系爭條文）在基本權的干預上可以分為兩個部分，首先是其作為「行為規範」，一般性的課與人民「不得通姦、相姦」之義務，此種單純的禁止本身已屬獨立的基本權干預；其次是其規範如違反上開誡命之人，需科處1年以下有期徒刑之刑罰，即係作為「制裁規範」干預人民之人身自由。而在基本權干預的違憲審查上，系爭條文規定作為行為規範與制裁規範，均須通過憲法的檢驗。故除作為行為規範限制人民權利需有正當之目的及合乎比例原則之限制手段外，其課與之制裁效果亦須通過比例原則之檢驗。蓋違反行為規範之制裁並非必然是刑罰，立法者亦可採用其他手段，如行政罰、民事賠償或其他民事制度上課與不利益的方式作為制裁。故其刑罰手段的選用，本身亦必須符合比例原則的檢視。

而系爭條文作為行為規範干涉人民憲法第22條性自主決定權，作為制裁規範干涉人民憲法第8條之人身自由權。其中作為行為規範干涉憲法第22條性自主決定權部分，業經鈞院以司法院大法官釋字第554號解釋肯認刑法第239條規定確實限制有配偶之人與第三人間之性行為自由（鈞院大法官釋字第554號解釋解釋理由書第3段），應無疑義。又刑罰作為制裁規範，如以有期徒刑之自由刑作為其效果，本身即構成對於憲法第8條保障人身自由之剝奪，此迭經鈞院解釋在案（鈞院大法官釋字第476號解釋、第544號解釋、第551號解釋、第594號解釋、第646號解釋、第669號解釋、第777號解釋參照），刑法第239條規定法定刑為1年以下有期徒刑，並無選科拘役、罰金刑之可能，顯然構成對於人身自由之干涉，釋字第554號解釋並未提及，應有疏漏。

三、　審查基準部分

（一） 就行為規範部分，應至少適用中度審查基準

1. 系爭規範干預性自主決定權

憲法對於性自主決定權之保障，乃係因性行為自由與個人之人格有不可分離之關係，得自主決定是否及與何人發生性行為（鈞院大法官釋字第554號解釋解釋理由書第1段參照）。故性行為自由係人格權保障之一環，而受憲法第22條之保障，應屬至明。而依據憲法第23條之規定，國家對於人格權並非不得干涉，然其審查基準自須考量所涉及人格權之領域是否涉及人格自主決定的核心內容而定。

2. 系爭規範以廣泛禁止的方式干預性自主決定權，現實上造成積極要求人民與特定人為性行為或全面禁止性行為之效果，應至少採取中度審查。

性行為自由依第554號解釋，其內涵係包含「是否」及「與何人」發生性行為。性行為係屬個人私密領域，亦屬個人對於親密關係之社會連結的重要決定，如國家強制人民「積極」與他人進行性行為，或「強制他人必須與特定人」進行性行為，此種積極性的干涉對於個人自我決定之權利甚鉅，危害個人自主人格發展程度甚高，自應為嚴格之審查乃至於完全禁止。然而若係消極的禁止人民在特定的時間、空間為性行為，或禁止人民與特定的對象進行性行為，則對於人民之性自主決定權侵害程度即屬較低。蓋此種禁止依然容許人民得於其他的時間、地點與其他對象自主決定是否及與何人進行性行為，並未完全剝奪其性自主決定之自由。故此種規範僅需有憲法上正當之目的，並以合乎比例原則的方式進行限制，自非法所不許，現實上我國也存有諸多類似規定，如刑法第227條規定禁止人民與未滿一定年齡之人為性交行為、刑法第230條規定禁止人民與一定親等內之血親性交、刑法第234條規定禁止人民意圖供人觀覽而公然為猥褻之行為，另社會秩序維護法、兒童及少年性剝削防制條例亦有關於性交易禁止之規定。然而上開規定均僅係禁止人民在特定的場合（公然），或禁止與特定對象（年齡、親等），或禁止以特定的交易模式（性交易）進行性行為的消極規定。在此範圍之外，人民仍得享有性行為自由。

刑法第239條形式雖然與上開規定類似，都是禁止人民與特定對象發生性交行為，然而僅需稍加注意即可發現，刑法第239條的禁止範圍，依照現行穩定的實務見解，係禁止人民「除與配偶以外之一切異性為性器接合之性交行為」。此種禁止形式上是消極的禁止，但其禁止的範圍包含除了配偶以外的一切異性，已經近乎達到使人民僅得與配偶進行性行為之程度（此應亦是立法之本旨）。故此種消極禁止，已達到使人民僅能選擇不進行性行為，或與特定人（即配偶）進行性行為之程度。如此的消極禁止，高度可能已經達到因「量變造成質變」，而發生類似於積極干涉的程度的效果。此種禁止既然造成類似於積極干涉之效果，自不應仍以第554號解釋所使用之寬鬆之審查基準進行審查，其對於人民性自主決定權的干涉遠高於上開刑法第227條、第230條及性交易規定之程度，至少應以中度審查基準進行檢驗。

3. 保障婚姻家庭為系爭規範之目的，並非降低審查基準之理由

至於554號解釋似乎以國家對於婚姻、家庭維繫的保護義務做為降低審查基準之理由，此種論述方式並不合理。現實上多數刑罰規範都可以藉由其保護的法益，連結至一般人民的基本權利維護，如鈞院大法官釋字第669號解釋中也提到槍砲彈藥刀械管制條例的規範，其目的在於保護人民的生命、身體、自由與財產安全（鈞院大法官釋字第669號解釋解釋理由書第2段參照）。此等目的的審查，應係決定審查基準後在規範目的部分確認規範所追求的目的是否合乎審查基準之要求，而非反過來以規範目的影響審查之基準。況且如果依據這樣的論述框架，第669號解釋中槍砲彈藥刀械管制條例所欲保護的人民生命、身體法益，其重要性顯然相較於抽象的婚姻家庭維繫更為重要與迫切，然而第669號解釋中，此等法益的保護義務卻沒有成為降低審查基準的理由，第669號解釋依然維持嚴格審查的基準，僅將上開對於人民生命、身體的保護義務做為規範之正當目的。聲請人認為，鈞院於第554號解釋所使用的架構顯有雙重評價而混淆審查次序之疑義。國家對於婚姻、家庭維繫的保護義務僅係規範之目的，而非降低審查基準之理由，第554號解釋應予變更。

（二） 制裁規範部分，依鈞院過往關於刑罰制裁規範之審查先例，應適用嚴格審查基準

限制人身自由之刑罰，嚴重限制人民之基本權利，係屬不得已之最後手段。立法機關如為保護合乎憲法價值之特定重要法益，並認施以刑罰有助於目的之達成，又別無其他相同有效達成目的而侵害較小之手段可資運用，雖得以刑罰規範限制人民身體之自由，惟刑罰對人身自由之限制與其所欲維護之法益，仍須合乎比例之關係，尤其法定刑度之高低應與行為所生之危害、行為人責任之輕重相符，始符合罪刑相當原則，而與憲法第23條比例原則無違。此迭經鈞院大法官以釋字第544號解釋、第646號解釋、第669號解釋、第777號解釋說明甚詳，此為鈞院近年對於自由刑之刑罰規範一致之審查基準，本案關於制裁規範部分，自應遵循鈞院以上開解釋先例建立之嚴格審查基準進行審查。且釋字第544號解釋對於自由刑使用之相當性更有精準的闡釋，認為自由刑既涉及對於人民身體自由之嚴重限制，除非必須對其採取強制隔離施以矯治，方能維護社會秩序時，其科處始屬正當合理（鈞院大法官釋字第544號解釋解釋理由書第2段參照）。而第646號解釋雖承認立法機關基於其功能、組織與決定程序，有相當之決定空間，但亦認為立法機關必須提出合乎事理且具可支持性的預測，方能通過司法違憲審查（鈞院大法官釋字第646號解釋解釋理由書第1段參照），可見在關於系爭刑罰規範是否符合上開審查基準之舉證責任，應由立法者負擔。苟若立法者未能提出合乎事理且具可支持性的證據說明系爭規範的適當性、必要性與相當性，則應為對立法者不利之認定。

本件刑法第239條規定，其法定本刑為1年以下有期徒刑，自屬上開所稱限制人民人身自由之自由刑，而應適用上開鈞院之解釋先例所建立之嚴格審查基

準。亦即，系爭規範所追求之目的必須是「保護合乎憲法價值之特定重要法益」，其手段必須有助於目的達成，且無其他相同有效達成目的而侵害較小手段可諮運用。其手段與目的間須合乎比例之關係，且必須系爭規範對人民採取強制隔離施以矯治，方能維護社會秩序時，其手段方屬合理正當。對於上開要求是否達成，應由立法者負擔舉證責任，立法者須提出合乎事理且具可支持性的證據證明其達成上開要求。

四、　系爭規範並非保障合乎憲法價值之特定重要法益

系爭規範之目的在於維持作為社會形成與發展基礎之婚姻與家庭制度，考量婚姻制度植基於人格自由，具有維護人倫秩序、男女平等、養育子女等社會性功能，不僅使夫妻在精神上、物質上互相扶持依存，並延伸為家庭與社會之基礎，故由國家制定相關規範約束夫妻雙方互負忠誠義務（鈞院大法官釋字第554 號解釋理由書第1 段、第2 段參照）。於釋字第554 號解釋作成時，鈞院大法官認為立法機關就「當時」對夫妻忠誠義務所為評價無違社會一般人通念，而人民遵守此項義務規範亦非不可期待，而認可上開之立法目的具有正當性（鈞院大法官釋字第554 號解釋理由書第3 段參照）。

然而上開解釋作成於民國91年12月27日，距今已逾17年，上開大法官對於「當時」社會通念之社會事實認定，已經發生重大變化。社會上對於個人之情感與性自主權意識逐漸建立，對於多元之情感模式之尊重亦成通念，鈞院大法官亦於106 年5 月24日作成釋字第748 號解釋，認定民法未保障同性婚姻之結婚自由牴觸憲法之規定，足見我國之社會與法秩序對於婚姻及家庭之認知已經有大幅度的變動，上開釋字第554 號解釋之社會事實基礎已經不復存在。婚姻從所謂維繫社會、繁衍之基本單位此等承載高度社會義務意義之觀念，逐漸成為攸關維護人格健全發展與人性尊嚴之個人結婚自由。固然婚姻之忠貞性仍然是被普遍肯認之道德規範，但性行為畢竟是高度私人領域之事務，是否適宜以刑罰作為道德規範的確保，即非必然。如上所述，現今社會已經廣泛接納高度個人主義之個人性自主權之意識，社會上是否依然存在將「婚外性行為刑罰化」之共識、通念，實非無疑。而如果「婚外性行為刑罰化」是一個具有高度爭議性的道德觀念議題，則以部分社會成員（不論成員是多數或少數）之道德價值觀念一般性的刑罰化，以刑罰的方式強迫全體社會成員一體遵行，是否能認為屬於正當之立法目的，即顯有疑義。

與我國社會風俗、文化觀念高度相近，同為東亞文化圈之韓國，其憲法法院亦於2015年2 月26日以 2009Hun-Ba17 號判決認定該國之通姦罪牴觸該國憲法（參見附件一）。其於判決理由即載明：「性行為及愛情是私人的事務，不應該受刑罰之管制，雖然通姦行為是不道德的，並違反婚姻忠貞，依然不應該以刑事法律處罰。」因其認為韓國社會已經改變成為個人性自主利益高於性道德和家庭的社會利益的社會，而因社會對於社會結構、婚姻、性和性自主的認同改變，社會上已經不存在將通姦罪刑罰化的共識。而個人的性生活本質上屬於私

密的私人領域，應該由其自主決定，避免國家的介入與管制。刑罰應作為最後的手段。是以成年人間的合意性關係，應屬於自由的個人領域。如果國家介入且處罰應屬於性道德與社會秩序領域的私人性行為時，即會構成對性自主決定權的侵害（參見附件一，V.A.(3).①、②）。我國之社會風俗與文化觀念均與韓國社會有其相似性，上開韓國憲法法院對韓國社會變遷的理解，亦與我國社會近年的變遷相符，實屬東亞社會文化的共同變遷途徑。是在現今社會不存在通姦刑罰化的通念或共識之社會事實之情形下，以此社會部分成員之道德觀念作為刑罰之立法目的，應難認為符合「合乎憲法價值之特定重要法益」之要求。

五、 系爭規範所採用之手段無法通過憲法第23條之檢驗

（一） 系爭規範無助於其立法目的之達成

1. 通姦罪對已經發生破綻之婚姻並無維繫之積極功能

本件既係涉及刑罰規範，而構成對於人民人身自由之侵害，自應適用鈞院於過往解釋所建立之嚴格審查基準，已如前述。且對於規範有無助於目的之達成，立法者並不享有推定之利益，而應由立法者積極舉證證明系爭規範確實有助於目的之達成，提出合乎事理且具可支持性的證據說明系爭規範的適當性、必要性與相當性，合先敘明。

而系爭規範對於已經發生之通姦行為，沒有任何維繫婚姻存續之功能。因通姦罪在我國刑法典為告訴乃論之犯罪，必以他方已經發現並提起告訴始有適用之可能，而當雙方的婚姻關係已經發生其中一方與他人通姦之行為，且為他方所得知並提起告訴時，雙方的婚姻關係即早已經產生嚴重的破綻。此時系爭規範對於雙方已經發生破綻之修補，並無任何積極的功能，相反地，系爭規範只是提供婚姻親密關係中受損害之一方一個報復他方或索取賠償之武器。在提起告訴前之蒐證階段，婚姻關係中的他方即有可能使用如未得同意之錄音、錄影、以可能提起訴訟向通姦人或相姦人索取賠償、閱覽他方之通訊或跟監等其他手段進行蒐證，姑且不論上開蒐證行為之適法性，此等行為均僅會造成婚姻破綻進一步的擴大。於告訴提起後，在訴訟上的攻防與對抗，亦對於婚姻的維繫難有幫助，反而使雙方修補婚姻破綻之可能性更為降低。對於已經發生破綻的婚姻是否要修補或維持，均是個人之自主選擇，並無良窳之別，但系爭規範既然目的在於維繫婚姻及家庭制度，則自不能使其功能在於報復與作為請求損害賠償之武器，而無任何積極之維繫婚姻家庭功能。至少就已經發生之通姦行為，系爭規範並不具備達成其立法目的所需要的功能。

2. 通姦罪作為一般預防的嚇阻效果並無統計上之依據

是以系爭規範作為目的在於維繫婚姻與家庭制度之刑罰規範，其唯一的功能僅在於一般預防之事前嚇阻效果。但此種嚇阻效果究竟是否確實存在，亦是高度可疑的。韓國憲法法院在此議題上將通姦行為區分為有感情基礎與無感情基礎之通姦行為進行討論，其認為在有感情基礎的通姦行為，建基於情感與信任之婚姻關係顯然已經受到破壞，此時是否有以對於處罰的恐懼來維持已經受

到破壞的婚姻之必要性已有可疑，而也難以認為刑事處罰對此種通姦行為有何嚇阻效果，行為人高度可能依然進行通姦行為。而在無感情之通姦行為，自社會中廣泛存在的性交易觀察，顯然也難以證明通姦罪有何嚇阻效果（見附件一，V.A.(3).③）。故以刑罰來嚇阻通姦行為，其效用是可疑的，而且我們也欠缺相關的實證研究基礎證明。且在廢除通姦罪的各國中，也沒有任何統計顯示廢除通姦罪會導致性道德秩序敗壞或離婚率上升（見附件一，V.A.(3).③第5段）。

3. 韓國廢除通姦罪後，對於該國離婚率並無任何顯著影響，更可證明通姦罪對於婚姻家庭維繫並無實證上之關聯性。

現實上我們也可以從韓國於2015年廢除通姦罪的例子來觀察，韓國自2015年廢除通姦罪，時間距今不遠，考量韓國與我國同處於東亞文化圈，其社會對於通姦罪廢除的真實狀況，顯然高度可以作為我國對於廢除通姦罪效果預測的參考。而自韓國統計廳關於離婚率的統計資料看出，所謂通姦罪可以維繫婚姻、家庭制度，完全沒有任何統計上的證明。依據附件二所示的韓國統計廳對於2010年以來離婚率的統計資料，可發現**2015年通姦罪廢除的決定，對於韓國離婚率並沒有產生任何顯著的影響。整體而言，離婚率自2015年以來尚且下降。韓國自2010年至2014年之離婚率均為2.3%，2015年至2018年之離婚率均為2.1%，足見2015年通姦罪之廢除，並未造成對於韓國婚姻家庭制度可見之影響**。所以所謂「通姦罪具一般預防功能，於信守夫妻忠誠義務使之成為社會生活之基本規範，進而增強人民對婚姻尊重之法意識，及維護婚姻與家庭制度之倫理價值，仍有其一定功效」的預測，顯然與客觀的統計事實相悖，流於直觀想像，欠缺客觀證據可以支持，立法者顯然不能單以這種直觀而欠缺佐證的臆測作為其設立刑罰的基礎。應認立法者並未提出合乎事理且具可支持性的論據，系爭規範無法達成其所追求的目的，應屬昭然。

4. 通姦罪無助於維繫婚姻家庭之立法目的

綜上所述，系爭規範顯然欠缺規範人民行為之功能之積極效果。其實婚姻情感信賴基礎的破壞，往往發生於通姦行為之前，通常是夫妻雙方情感基礎已經出現破綻，才會進而發生與配偶外之人的感情或進一步的通姦行為。通姦行為往往是婚姻情感信賴基礎破壞的結果，而非原因。系爭規範無法協助當事人維持情感與信賴的基礎，而在透過嚇阻的方式讓當事人出於恐懼維持已經發生破綻的婚姻部分，韓國廢除通姦罪後的離婚率統計亦顯示其並無任何效果。最終通姦罪僅在通姦行為發生後，授予他方攻擊通姦人與相姦人之武器。而這樣的規範結果，顯然完全無助於婚姻家庭的維持。是以刑罰處罰通姦或許是直觀的反應，但系爭規範藉由處罰來表彰的社會道德意義，其實遠遠大於「維繫婚姻家庭」的功能，統計上亦無任何實際的效果，故系爭規範實欠缺對於其立法目的之適當性。

（二） 系爭規範之功能亦能藉由民事管道達成，並非最小侵害手段

1. 通姦行為在我國民事、家事事件上本即有課予高度之不利益

按因故意或過失，不法侵害他人之權利者，負損害賠償責任。故意以背於善良風俗之方法，加損害於他人者亦同。不法侵害他人基於父、母、子、女或配偶關係之身分法益而情節重大，被害人雖非財產上之損害，亦得請求賠償相當之金額，此為我國民法第184條第1項及第195條第3項所明定。而通姦、相姦之足以破壞夫妻間之共同生活而非法之所許，此從公序良俗之觀點可得斷言，對於配偶之他方應構成共同侵權行為。婚姻係以夫妻之共同生活為其目的，配偶應互相協力保持其共同生活之圓滿安全及幸福，而夫妻互守誠實，係為確保其共同生活之圓滿安全及幸福之必要條件，故應解為配偶因婚姻契約而互負誠實之義務，配偶之一方行為不誠實，破壞共同生活之圓滿安全及幸福者，即為因違反婚姻契約之義務而侵害他方之權利。與夫妻之一方相姦，足以破壞夫妻間共同生活之圓滿與家庭之幸福，而非法之所許，因此對於配偶之他方自屬故意以違背善良風俗之方法，加損害於人，為相姦之第三人，對該另一方之配偶構成侵權行為，其受害一方之配偶精神上自受有痛苦，得請求非財產上之損害賠償，此為最高法院55年台上字第2053號民事判決著有明文，亦為我國民事實務穩定之見解。又民法第1052條第1項明定：「夫妻之一方，有下列情形之一者，他方得向法院請求離婚：...二、與配偶以外之人合意性交。」第2項亦明定：「有前項以外之重大事由，難以維持婚姻者，夫妻之一方得請求離婚。但其事由應由夫妻之一方負責者，僅他方得請求離婚。」是以通姦之一方將承擔他方得取得向法院訴請離婚之形成訴權之危險，並在主張民法第1052條第2項離婚事由時，可能因其對於婚姻破綻有較高度之可歸責性，而不能主張離婚。是以通姦或相姦之行為人，在財產法上可能承擔高額的慰撫金損害賠償請求；在身分法上，通姦之行為人將在離婚訴訟中立於不利之地位，除他方可能可以取得訴請離婚之形成訴權外，通姦之一方欲主動請求離婚時亦可能受限於其較可歸責之地位而無法主張。

2. 通姦罪近年在我國實務上近乎全部均得易科罰金，與民事賠償管道之嚇阻效果高度重疊

而系爭規範為法定最重本刑1年以下有期徒刑之輕罪，在我國刑事實務上絕大多數均判處得易科罰金之刑度，而我國自101年以後全國地方法院之通姦罪及相姦罪，僅1件判處不得易科罰金之刑度（臺灣臺南地方法院105年度簡上字第59號判決），且該判決經上訴二審後改判得易科罰金之刑度（臺灣高等法院臺南分院106年度上易字第104號判決）。而全國高等法院僅有臺灣高等法院高雄分院曾以102年度上易字第545號判決不得易科罰金之刑度確定。是全國自101年以來各級法院之通姦罪及相姦罪案件，僅有1件判決不得易科罰金之罪確定之案例；自103年迄今已逾5年，未曾有不得易科罰金之通姦罪或相姦罪判決確定，此有本院統計室提供之統計資料及相關判決可資參照（見附件三）。是以在刑事實務之操作上，通姦、相姦罪之處罰有高度可能得以罰金替代之。如此相當於財產上不利益之嚇阻效果，與前述民事救濟管道造成之嚇阻效果，似未能有顯著之區別。

3. 通姦行為本身即伴有高度社會連結的破壞之不利益，通姦刑罰並非阻止通姦行為之主要阻力

又得易科罰金之自由刑並非絕無一般預防之嚇阻效果，亦非所有類型的易刑處分均可以由民事賠償達到類似的嚇阻效果。必須在當事人從事法所禁止行為被查獲時，除國家給予的刑事處罰外，不會因其從事禁止行為而有行為以外之明顯立即的不利益。如竊盜、傷害、酒駕等有可以易科罰金刑罰規定之犯罪，若國家不對該等行為施以處罰，行為人上開行為縱然經公權力機關查獲，亦不會單純因被查獲而有任何之社會生活上直接的不利益，此時處罰的一般預防嚇阻效果即屬必要；而民事賠償若無法使其行為的損害可能大於行為利益，民事賠償亦不能有取代刑事處罰之功能，如竊盜等財產犯罪中，在完全填補損害的民事法原則下，當事人為財產犯罪的利益期望值顯然為正值，因縱然遭查獲，其亦僅係回歸無利得亦無損害之狀態。故民事賠償在該等類型的犯罪中，並無替代刑罰的嚇阻效果。

然而通姦與上開狀況並不相同，在通姦行為遭查獲的同時，近乎必然伴隨著行為人原有婚姻關係的重大破毀，行為人原有的婚姻家庭社會連結將發生巨大的衝擊與改變。此種不利益的存在本身就是行為人在進行通姦行為前最主要的阻力，而此種婚姻家庭維繫的成本並不會因為通姦罪的存否而有任何改變。亦即，縱然通姦罪不復存在，亦不會發生「通姦行為不會有任何不利益」的行為誘因。縱無通姦罪的刑罰規範，行為人在通姦行為曝光時，依然必須承受婚姻家庭社會連結衝擊的重大不利益，故行為人對於維繫其原有婚姻、家庭的社會連結的意願，才是主要避免通姦行為的動力，而非刑罰的嚇阻。

又通姦行為在我國民事賠償實務上，法院酌定之慰撫金金額高出刑罰易科罰金的金額，所在多有，故通姦現實上的主要成本，早已經在於民事的賠償與離婚請求的不利益上，而非刑事訴訟的處罰。故在沒有任何實證研究可以證明通姦罪之存在能在民事損害賠償與離婚制度以外產生任何嚇阻效果，而前述民事管道能與系爭規範達到同等效果之情形下，難認系爭規範以刑罰作為嚇阻人民從事通姦、相姦行為之手段，為侵害最小之手段。

（三） 系爭規範並非緊密剪裁之規範，未排除已經別居或婚姻有重大破綻之配偶，而有含蓋過廣之疑義

現行通姦罪處罰之範圍係所有有配偶之人與第三人為性器接合之性交行為，均為法律所處罰之範圍。此種規範模式，並未排除現實上已經長期別居而並未共同經營生活之情形。但在夫妻雙方已經因現實上無可回復之婚姻破綻而別居時，因我國民法關於離婚係採「消極破綻主義」，亦即可能存在婚姻已經發生無可回復之破綻，但因不可歸責或較不可歸責的一方無意離婚，而使雙方婚姻關係必須繼續存在的情形。當此種情形發生時，夫妻雙方因婚姻破綻現實上並無性行為之可能，則國家在此等情形下，實質係以刑法第239條規範，完全禁止行為人從事性交行為，而此等狀態在我國民法離婚規定下，亦可能永無解消之

日。

刑法第239條規定係以維繫婚姻、家庭制度為目的，但其對於已經發生破綻之婚姻並無任何修補婚姻破綻之效果，已如前述。然而刑法第239條依然並未排除現實上已經別居或婚姻關係存有重大破綻之配偶，而造成在已經發生破綻的婚姻關係中，有意離婚之一方因無法脫離婚姻關係，現實上完全遭剝奪其性自主權。刑法第239條在此所扮演的角色，並無任何積極維護婚姻家庭的功能，而僅是不合比例的完全剝奪已無意維繫婚姻一方的性自主權作為現實上的處罰。此種永無期限、全面性的剝奪性自主權，且無任何維繫婚姻家庭功能的刑罰設計，顯然絕非侵害最小之手段。故系爭規範未在要件上排除別居或婚姻關係有重大破綻之配偶，顯然已有含蓋過廣之嫌，而牴觸憲法第23條之規定至明。

（四） 系爭處罰效果與其保護之目的不相當

最後，縱或鈞院依然認刑法第239條係侵害最小之維護婚姻家庭之手段，其自由刑之處罰方式選擇，依然無法通過狹義比例原則的檢視。誠如鈞院在第544號解釋所揭櫫的標準，認為自由刑因涉及對人民身體自由之嚴重限制，除非必須對其採強制隔離施以矯治，方能維護社會秩序時，其科處始屬正當合理。然而通姦行為縱然在道德上可受非難，但其終究僅係個人道德的展現及夫妻雙方私法忠誠義務的履行與否。此等行為是否已經達到鈞院所揭櫫「必須採強制隔離施以矯治，方能維護社會秩序」的自由刑罰標準，殊值可疑。然而於5年內全國所有的通姦、相姦案件中，均無任何不得易科罰金之判決確定，已如前述。故在近年我國司法實務現場，顯然司法機關在近5年所有的通姦、相姦個案中，均不認為通姦行為有受強制隔離施以矯治之必要。故刑法第239條之自由刑處罰規定，顯然已經超越其所維護目的所需，而無法通過狹義比例原則的檢視。

六、 結論

綜上所述，在近10餘年之現代社會對於家庭之結構、性自主意識之觀念變遷後，社會上對於「通姦刑罰化」並不存在統一的共識或通念，在有爭議的道德議題上將部分人民道德觀刑罰化而適用於全體，並非保障合乎憲法價值之特定重要法益。系爭規範無助於維繫婚姻家庭制度此一目的之達成，亦無實證支持其較諸民事損害賠償制度、離婚制度有何更有效之嚇阻效果，並非最小侵害之手段。是刑法第239 條規定違反比例原則的侵害人民之人身自由與性自主決定權，應屬違憲。鈞院大法官釋字第554 號解釋，並未審酌系爭規範對於憲法第8條所保障人身自由之侵害，且對於憲法第22條保障之性自主權亦未採取如同鈞院上開對於刑罰規範的審查標準，且第554號解釋所依據之社會事實已經發生重大變更，實有補充或變更之必要，爰聲請解釋。

此　致

司法院大法官

中　華　民　國　109　年　3　月　23　日

聲請人 何知鈞

2009Hun-Ba17

Adultery Case

Decision.date: Feb 26,2015

Final decision: Unconstitutional

Adultery Case

[27-1(A) KCCR 20, 2009Hun-Ba17 · 205, 2010Hun-Ba194, 2011Hun-Ba4, 2012Hun-Ba57 · 255 · 411, 2013Hun-Ba139 · 161 · 267 · 276 · 342 · 365, 2014Hun-Ba53 · 464, 2011Hun-Ka31, 2014Hun-Ka4(consolidated), February 26, 2015]

Requesting Courts: 1. Uijeongbu District Court (2011Hun-Ka31)2. Suwon District Court (2014Hun-Ka4)

Requesting Petitioner: Park O-Mi (2014Hun-Ka4)

Petitioners: Park O-Soon, et al.

Underlying Cases: listed in the Appendix

Decided: February 26, 2015

Holding

Article 241 of the Criminal Act (enacted as Act No. 293 on September 18, 1953) violates the Constitution.

Reasoning

I. Introduction of the Case

The petitioners, who were prosecuted on a charge of adultery or fornication, filed the motion to request for the constitutional review on Article 241 of the Criminal Act, alleging the unconstitutionality of the aforementioned provision. After the motion was denied, the petitioners filed the constitutional complaint. The defendant of case 2011Hun-Ka31 was prosecuted for and was convicted of adultery at the trial court. Upon the appeal of the defendant, Uijeongbu District Court requested, *sua sponte*, for the constitutional review of Article 241 of the Criminal Act for reasonable doubts on the unconstitutionality of the aforementioned provision on August 26, 2011. The requesting petitioner of case 2014Hun-Ka4 was also prosecuted for and convicted of adultery at the trial court. The requesting petitioner appealed against the decision and filed a motion to request for the constitutional review of Article 241 Section 1 of the Criminal Act. Suwon District Court, the requesting court of this case, granted the motion and requested for the constitutional review on the aforementioned provision on March 13, 2014.

II. Subject Matter of Review

The petitioners of 2012Hun-Ba255 and 2013Hun-Ba161 and the requesting court of 2014Hun-Ka4 filed the constitutional complaints or requested the constitutional review on Article 241 Section 1 of the Criminal Act. Nonetheless, Article 241 Section 2 of the Criminal Act is inseparable from Article 241 Section 1 of the Criminal Act in that Section 2 of the provision

provides that adultery is a crime subject to victim's complaint and a spouse who condones or pardons the adultery cannot accuse his/her spouse of adultery. Accordingly, the subject matter of review is the constitutionality of Article 241 of the Criminal Act (enacted as Act No. 293 on September 18, 1953) and its contents are listed below:

Provision at Issue

Criminal Act (enacted as Act No. 293 on September 18, 1953)

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

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

III. Arguments of Petitioners and Reasoning of Request of Constitutional Review of the Requesting Courts

A. Arguments of Petitioners

The Provision at Issue restricts the right to sexual self-determination and privacy, violating the principle against excessive restriction. It is also against the principle of proportionality between responsibility and punishment to stipulate the punishment by imprisonment as the only statutory punishment. In addition, it violates Article 36 Section 1 of the Constitution in that the accusation of adultery assumes divorce, which results in the failure of family. The nature as a crime prosecutable upon a complaint would lead to the discrimination by violators' economic status; a violator whose spouse condones or pardons the affair would not be punished; and a spouse who filed a divorce suit is vested with the accusation of adultery, suggesting the violation of the principle of equality.

B. Reasoning of Request for Constitutional Review of the Requesting Court

The Provision at Issue has legitimate purposes that are the protection of good sexual culture and practice and the promotion of marital fidelity between spouses. Nonetheless, it fails to achieve the appropriateness of means and least restrictiveness for considering the reality where the public recognition has changed along with the propagation of individualism and sexual liberalism; the nature of sexual life which should not be subject to criminal punishment, but subject to sexual morality for self-governing of society; and little efficiency of criminal punishment against adultery. While the Provision at Issue hardly serves the public interests of protecting marriages and spousal obligation of faithfulness, it excessively restricts the right to sexual self-determination and to privacy through the punishment on the private sexual life, thereby loosing the balance of interests and violating the Constitution.

IV. Comparative Law and Precedents

A. Comparative Law

The global trend with regard to adultery is decriminalization. The crime of adultery was abolished in Denmark, Sweden, Japan, Germany, France, Spain, Switzerland, Argentina and Austria in 1930, 1937, 1947, 1969, 1975, 1978, 1990, 1995 and 1996, respectively.

B. Discussion for Revision

The Ministry of Justice suggested the abolishment of adultery crime in its revision draft of the Criminal Act preannounced on April 8, 1992, reflecting the global trend of decriminalization of adultery, the inappropriateness for law to intervene the individual sexual life belonging to the intimate domain of private life, the possibilities of misusing the accusation of adultery for threatening and alimony, the weakened effects as a means of criminal punishment as accusations are mostly canceled in the investigation or trial proceeding, little efficiency for deterrence or re-socialization, or the protection for family and women. Afterwards, the Minister of Justice finalized the Criminal Act Revision composed of 405 articles on May 27, 1992, embracing the opinion that it is premature to abolish the adultery crime. Instead, it suggested to reduce the statutory punishment by lowering the terms of imprisonment to 1 year or less and by adding fines less than 5,000,000 Won. Nevertheless, this final revision was not legislated.

C. Precedents

The Constitutional Court has decided that the Provision at Issue was not unconstitutional in the Decision of Case 89Hun-Ma82, September 10, 1990, with the dissenting opinion of Justice Han Byong-Chae and Justice Lee Si-Yoon (Incompatibility with the Constitution) and the dissenting opinion of Justice Kim Yang-Kyoon (Unconstitutional). The Decision of Case 90Hun-Ka70, March 11, 1993 followed the 89Hun-Ma82. Afterwards, the court opinion of the Decision of Case 2000Hun-Ba60, October 25, 2001 also maintained the decision of the 89Hun-Ma82, pointing out that the Legislature should consider the abolishment of adultery crime, with the dissenting opinion of Justice Kyon Sung. In the Decision of Case 2007Hun-Ka17, et al., October 30, 2008, the majority, consisting of the opinion of Justice Kim Jong-Dae, Justice Lee Dong-Heub, Justice Mok Young-Joon, and Justice Song Doo-Hwan (Unconstitutional) and the opinion of Justice Kim Hee-Ok (Incompatibility with the Constitution) found the unconstitutionality of the Provision at Issue. Nonetheless, it was decided that the Provision at Issue was constitutional as the quorum fell short of six persons required for a decision of unconstitutionality in the Constitution.

V. Judgment

A. *Opinion of Justice Park Han-Chul, Justice Lee Jin-Sung, Justice Kim Chang-Jong, Justice Seo Ki-Seog and Justice Cho Yong-Ho (Unconstitutional)*

(1) Article 10 of the Constitution promotes the right to personality and right to pursue happiness, assuming the right to self-determination. The right to self-determination connotes the right to sexual self-determination that is the freedom to choose sexual activities and partners, implying that the Provision at Issue restricts the right to sexual self-determination of individuals. In addition, the Provision at Issue also restricts the right to privacy protected under

Article 17 of the Constitution in that it restricts activities arising out of sexual life belonging to the intimate private domain.

(2) Legitimacy of Legislative Purpose

The Provision at Issue, which intends to promote the marriage system based on good sexual culture and practice and monogamy and to preserve marital fidelity between spouses, has a legitimate legislative purpose.

(3) Appropriateness of Means and Least Restrictiveness

① Change in Public's Legal Awareness

The marital fidelity of married people has been established by our traditional ethics as monogamy and marital fidelity between spouses have also been respected as ethical standards. Nonetheless, in recent years, the growing perception of the Korean society has changed in the area of marriage and sex with the changes of the traditional family system and family members' role and position, along with rapid spread of individualism and liberal views on sexual life. Sexual life and love is a private matter, which should not be subject to the control of criminal punishment. Despite it is unethical to violate the marital fidelity, it should not be punished by criminal law. Also, the society is changing into one where the private interest of sexual autonomy is put before the social interest of sexual morality and families from the perspective of dignity and happiness of individuals.

Accordingly, there is no longer any public consensus regarding the appropriateness of criminalization of adultery, which means the criminal punishment against sexual activities with a person except his/her spouse, along with the change of public recognition on social structure, marriage, and sex and the spread of an idea to value sexual self-determination.

② Appropriateness of Criminal Punishment

Whether to regulate certain acts for being illegal and constituting a crime by exercising the State' authority over criminal punishment or simply rely on moral law is a matter that inevitably varies by time and consensus depending on the Society and its members. Some in our domain of life should be left to morality although others are to be directly regulated by law. It is hardly possible to punish all unethical actions by criminal punishment.

Individuals' sexual life belonging to the intimate domain of privacy should be subject to the individual's self-determination, refraining from State's intervening and regulation, for its nature. The exercise of criminal punishment should be the last resort for the clear danger against substantial legal interests and should be limited at least. It belongs to a free domain of individuals for an adult to have voluntary sexual relationships, but it may be regulated by law when it is expressed and it is against the good sexual culture and practice. It would infringe on the right to sexual self-determination and to privacy for a State to intervene and punish sexual life which should be subject to sexual morality and social orders.

The tendency of modern criminal law directs that the State should not exercise its authority in case an act, in essence, belongs to personal privacy and is not socially harmful or in evident

violation of legal interests, despite the act is in contradiction to morality. According to this tendency, it is a global trend to abolish adultery crimes.

③ Effectiveness of Criminal Punishment

The interest to be protected by the Provision at Issue is the marital system based on monogamy. Yet, the Provision at Issue by no means can help maintain marriage life once the act of adultery occurs. Under the Criminal Act, adultery is prosecuted only upon the accusation of the victimized spouse, and an adultery accusation shall not be made unless the marriage is void or divorce action is instituted. For this reason, existing families face breakdown with the invoking of the right to file an accusation. Even after cancellation of the accusation, it is difficult to hope for emotional recovery between spouses. Therefore, the adultery crime can no longer contribute to protecting the marital system or family order. Furthermore, there is little possibility that a person who was punished for adultery would remarry the spouse who had made an accusation against himself/herself. It is neither possible to protect harmonious family order because of the intensified conflict between spouses in the process of criminal punishment of adultery.

All considered, protecting marital system through criminal punishment on adultery is nothing more than preventing a married person from committing adultery beforehand for fear of criminal punishment. However, it is doubted whether such psychological deterrence is effective.

The motivation of adultery may be classified into two cases: the case arising out of affection or the case not arising out of affection. In the former case, the marriage relationship based on the affection and trust between spouses would have been broken, implying the question in terms of necessity of maintaining the broken marriage by fear through punishment. For this case, the efficiency of deterrence of adultery would be hardly recognized because they would commit adultery despite of criminal punishment. Even the latter case hardly expects the deterrence effects of criminal punishment in adultery for the various types of prostitution and its public recognition. We do not have the empirical evidence to prove the general deterrence effect for adultery through the empirical analysis of law and practice, neither.

The rate of punishing adultery has been dramatically decreased. The statistic suggest that the filing and accusation of adultery have been decreased, indicating that the rate of prosecution in custody is less than 10% of prosecution for adultery and most cases are concluded with no power to prosecute or dismissal of prosecution because of cancellation of accusation during investigation or trial. It implies that the punishment rarely functions.

There is a view to concern the disorder in sexual morality or increase of divorce due to adultery in case of abolition of adultery. Nonetheless, any statistics to support the disorder of sexual morality or the increase of divorce after the abolition of adultery is not found in countries where adultery is repealed. Rather, the degree of social condemnation for adultery has been reduced due to the social trend to value the right to sexual self-determination and the changed

recognition on sex, despite of the punishment of adultery. Accordingly, it is hard to anticipate a general and special deterrence effect for adultery from the perspective of criminal policy as it loses the function of regulating behavior.

On the other hand, the adultery of a spouse would conform to a ground of judicial divorce (Article 840 Item 1 of the Civil Act), and a person who committed adultery has a duty to compensate the victimized spouse for the property and psychological damages (Article 843, 806 of the Civil Act). The Court may give a person who committed adultery disadvantages in deciding custody and the restriction or exclusion of visitation rights.

It is doubtful whether the criminal punishment can protect the faithfulness between spouses, besides the civil compensation as stated above. The protection of the obligation to remain faithful between spouses would be effectively achieved by ethics of individuals and society, and affection and trust between spouses, instead of criminal punishment.

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

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

Even though it is assumed that the economic status of married women is inferior to that of married men, the existence of an adultery crime does not necessarily protect the female spouse. Divorce is a prerequisite for filing accusations for adultery, so married women without economic and earning abilities may rather be reluctant to filing accusations. As such, the female protective function of the adultery ban has weakened greatly.

Today's prohibition of adultery has come to punish only a very small number of adulterers, so it only massively produces potential criminals and restricts their basic rights but has become ineffective in protecting the marital system and duty to remain sexually faithful. The maintenance of marriage and family should depend on the free will and affection of individuals,

which should not be controlled by criminal punishment. Therefore, the Provision at Issue would be not an effective means to achieve the purpose to protect the marriage system based on monogamy and family orders.

④ Side Effects of Criminal Punishment

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

⑤ Sub-Conclusion

With the comprehensive considerations, the Provision at Issue, which punishes adultery for the good sexual culture and practice, the marriage system based on monogamy, and the marital fidelity between spouses, fails to achieve the appropriateness of means and least restrictiveness

(4) Balance of Interests

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

(5) Conclusion

Therefore, the Provision at Issue violates the Constitution for infringing on the right to sexual self-discrimination and secrecy and freedom of privacy under the principle against excessive restriction by failing the appropriateness of means and least restrictiveness and losing the balance of interests.

B. Opinion of Justice Kim Yi-Su (Unconstitutional)

I am of the opinion that the Provision at Issue is unconstitutional as the conclusion of the majority opinion, but with different reasons, as stated below:

(1) Case of a Person Who Committed Adultery

(A) A married couple shall endeavor to achieve the common purpose and value of life through cooperation and consideration within the community in terms of psychological, physical and economical combination. Marriage is a social system to establish, maintain and develop the marriage community.

We adopt the marriage system based on monogamy. Under monogamy, the essential nature of marriage would be the married couple's will to maintain their sexual cohabitation exclusively and sustainably. Married couples would enjoy the freedom of sexual cohabitation as self-realization with the burden of sexual fidelity for spouses, after the choice of marriage based on free and true will.

The essence of adultery is the intentional breach of sexual faith between spouses by a person who chose marriage based on his/her free will. Adultery committed by a married person would result in or threat marriage as it is against the nature of exclusiveness and continuity of sexual cohabitation.

The Provision at Issue intends to protect the marriage system based on monogamy through the promotion of sexual faith between spouses.

(B) The Provision at Issue restricts the right to sexual self-determination.

Nonetheless, the right to sexual self-determination of a married person, restricted by the Provision at Issue, has an inherent limitation that it should be exercised with the consideration of the exclusiveness and continuity of sexual cohabitation established by the self-determination to choose marriage. Adultery can be hardly justified by the right to sexual self-determination in that it is unethical beyond its inherent limitation.

Law can contribute to the effectiveness of the least morality to maintain social orders. Despite the various modes of immoral sexual deviation, including adultery, bestiality, promiscuity or incest, criminal law focuses on adultery for its punishment. It assumes adultery as the unethical deviation to destroy the marriage system based on monogamy and, further, harm peaceful orders of coexistence of the law community. In this sense, it coerces the prohibition of adultery for the promotion of the least morality.

(C) The legal interests protected by the criminal law include the most fundamental value for the existence of human beings as well as the specific and practical value which is necessary for social life. Therefore it would depend on the trend of entire legal orders and empirical perception of members of our society to decide whether certain behaviors should be regulated by the State's criminal punishment as the infringement of legal interests or should be regulated by moral rules, being subject to moral condemnation, reprimand, wrath or repentance.

The criminalization of adultery has been controversial since the Criminal Act was enacted. Since then, there have been arguments to abolish or repeal the adultery crime. The Constitutional Court has produced four precedents confirming its constitutionality. Nonetheless, there were always dissenting opinions to support its unconstitutionality. Especially in the fourth precedent, five Justices presented the opinion of unconstitutionality, including the opinion of incompatibility with the Constitution. Most criminal law scholars support the abolishment of adultery crime.

The modes of adultery can be roughly classified into three cases: a liable spouse to have extramarital intercourse merely for sexual pleasure despite his/her spouse (mode 1), a spouse

falling in love with a person more attractive than his/her spouse, being skeptical about his/her current marriage (mode 2), and a sexual relationship with new love under circumstances where the existing marriage is *de facto* dissolved, such as separation for a long time, despite the existing marriage has not been dissolved actually or a law suit/complaint for divorce has not been filed (mode 3).

In the case of mode 1 and 2, the adultery would be substantially criticized, compared to mode 3, and the existing marriage should be protected. For these cases, most people would agree that criminal punishment is still necessary.

Also, the general deterrence effects would be still recognized in mode 1 and 2 for the authority of criminal punishment based on the leaning effects of the punishment against adultery for a long time, the burden during the criminal procedure, including investigation and trial, for providing imprisonment as a sole statutory punishment, or concerns for the loss of job.

Further, adultery crime may be effective in leading the sincere regret or self reflection of a person who committed adultery. If a violator presented such regret or reflection, the accusation could be cancelled or nullified, recovering the broken marriage.

The criminalization of adultery can be useful in protecting a victim as the economically underprivileged even if the marriage would be dissolved. An economically underprivileged husband or wife may secure the means for life after dissolving the marriage by filing a claim for division of property or claim for alimony under the Civil Act with a claim for divorce. Nonetheless, the current system and practice under civil laws do not suffice in protecting the underprivileged. The justification of criminalization of adultery can still be found in protecting the economically underprivileged.

On the contrary, mode 3 of adultery is rarely reproachable or anti-social. In this case, the punishment of adultery would not contribute to the recovery or maintenance of marriage. It would be the excessive restriction on the right to self-determination to coerce *de facto* failed marriage couples into the nominal sexual faith by the authority of criminal punishment, despite little appropriateness or effectiveness.

The common legal sense of our society would consider that it is not appropriate to punish mode 3 of adultery as other modes just because the specious marriage legally exists.

In this regard, the Supreme Court recently held that the marital cohabitation, the essence of marriage, would not be retained if it is impossible to recover the marital cohabitation despite the marriage has not ended in divorce yet. Accordingly, it would not constitute torts to have affairs with a married person as it does not infringe on the marital cohabitation, interrupt the maintenance of cohabitation, or cause damages to infringe on the rights relating to marriage cohabitation (Supreme Court 2011Meu2997 en banc decision, November 20, 2014). It reflects the common legal sense, presenting that the State should not intervene the mode 3 of adultery for not being reproachable or anti-social as the mode 3 of adultery would not expect the sexual fidelity for the lack of the marriage cohabitation which is essential in marriage.

(D) Therefore, the criminal punishment against the mode 1 and 2 of adultery would not be the excessive restriction against the right to sexual self-determination as it is justified by the appropriateness and effectiveness of the punishment and the proper purpose to protect the fundamental orders of social ethics, including the marriage system based on the marital fidelity between spouses at the least degree.

On the contrary, the criminal punishment of mode 3 of adultery, which lacks condemnation and anti-sociality, should not be granted as an excessive punishment in that the extramarital affairs would not infringe on the marital fidelity or interrupt the marriage system in the case that the marriage is *de fact* dissolved.

(2) Case of a Participant of Adultery

Adultery requires a joint action of two persons: a married person who has a spouse and a participant. In punishing this type of crime, our criminal law may punish the two persons equally (in case of adultery), punish the persons under the different statutory punishment (in case of bribery), or punish just one person (in case of distribution, sale or lease of obscene materials). From the perspective of comparative law, a group of states of the U.S. punish a married person only, excluding a participant who does not have a spouse from punishment, among the states of the U.S. where adultery is criminalized, despite the punishment is nominal. Considering the attitude of our criminal law and the comparative law, it is not necessary to punish a married person who committed adultery and a participant, together, under the equal statutory punishment.

If a participant is married, the essence of the act would be indifferent from adultery in terms of violation of fidelity between spouses, except that the legal position of a person who committed adultery depends on the accusation which is the requisite to maintain the prosecution. As stated in case of a person who committed adultery, it would be unauthorized excessive punishment for the Provision at Issue to punish fornication of a participant whose marriage is *de facto* dissolved.

The entire structure of our criminal law indicates that the state does not regulate sexual activities between unmarried people, reaching at a certain age, based on free will, whereas criminalizing adultery. Our criminal law also states adultery in the chapter of 'crime regarding sexual culture and practice', which relates to social interests, whereas it indicates adultery for an offense subject to accusation and it allows the substantial disposition of legal interests through connivance or pardon.

The essence of adultery is the intentional breach of sexual faith between spouses by a person who chose marriage based on his/her free will.

Considering the essence of adultery, an unmarried person who fornicated with a married person (including unmarried, divorced, or separated by death) would not assume the existence and violation of sexual fidelity between spouses and the duty regarding such fidelity with regard to a person who committed adultery and his/her victimized spouse. Therefore, the State should

refrain from the control and regulation over the exercise of the right to sexual self-determination regarding whom and how to have sexual activities of an unmarried participant of adultery for the nature of the right and freedom. The right to sexual self-determination of an unmarried participant of adultery should be protected more broadly, compared to a married person who committed adultery.

It results in the conclusion that the exercise of criminal punishment of the State should be refrained with regard to fornication of an unmarried participant of adultery. It would be sufficiently effective and enough to inquire into appropriate liability corresponding to the action through ethical or moral criticism or civil tort liability. The criminalization of adultery only means that the State settles the revenge against a spouse who committed adultery. It would be the unauthorized excessive punishment as it excessively restricts the right to sexual self-determination of an unmarried participant of adultery.

Provided, an unmarried participant who fornicated with a married person leads to fornication by active provocation or temptation, beyond the mere knowledge of adultery of a person who committed adultery, it would be justifiable to exercise the State's authority for criminal punishment for its significant reprehensibility and anti-sociality, in that it threatens the other's marriage by malicious and intentional harm. In this case, the exercise of criminal punishment against adultery would be constitutionally granted in that the significance of public interests to be achieved by criminal punishment of fornication, exceptionally, overweighs the disadvantaged private interests to restrict the right to sexual self-determination of an unmarried participant of adultery.

(3) Conclusion

Adultery or fornication where a person who committed adultery and a married participant of adultery do not assume the sexual fidelity for spouses due to the de facto dissolution of marriage, and fornication of an unmarried participant of adultery, except a case of active provocation or temptation, should be subject to ethical or moral criticism for its lack of reprehensibility or anti-sociality.

The Provision at Issue provides that all modes of adultery and fornication shall be uniformly punished without any consideration of singularities and specificities, according to the types of a person who committed adultery or fornication and specific styles of action. It would violate the Constitution for excessive exercise of State's criminal punishment authority in that it excessively restricts the right to sexual self-determination, overstepping its limited role in achieving the purpose and function of criminal punishment.

C. Opinion of Justice Kang Il-Won (Unconstitutional)

I consent to the conclusion of the majority opinion and the opinion of Justice Kim Yi-Su. Nonetheless, my opinion is supported by different reasons as stated below:

(1) Constitutionality of Prohibition and Criminalization of Adultery

Adultery of a married person becomes a major threat to monogamy and causes social problems including an abandonment of his/her spouse and family members. It justifies legal regulation despite adultery or fornication falls into the domain of intimate privacy according to the self-determination of individuals, if it destructively affects the marital relationship, beyond the level of ethics and morality.

It has been more than 60 years since the Provision at Issue was enacted. The general perception of sexual morality has dramatically changed according to the rapid change of our society, affecting the social meaning of the marriage system. There have been many cases where the criminal punishment of adultery has been misused to obtain financial benefits. Since adultery presumes the dissolution of marriage as it is an offense subject to accusation, it does not properly serve the legislative purpose to protect family. Most adultery cases are concluded by the cancellation of accusation during investigation or trial, implying the punishment function or deterrence effect has been significantly reduced. The global trend to abolish adultery crime reflects such reality.

Nonetheless, it is not confirmed that the Provision at Issue punishing adultery is significantly separated from the general perception of our society. The misuse of adultery in practices would be led by the side effects in that only imprisonment is provided for a statutory punishment. The issues surrounding the Provision at Issue, including the insufficiency to achieve the purpose to protect family and the decreased deterrence effect, would be resolved though the revision of the legislation. Such problems may be resolved by abolition of adultery crime as found in the comparative law study. Nonetheless, the Legislature should decide the legislative policy to resolve the problems.

A certain type of adultery or fornication may become a major threat to cause or likely cause the dissolution of marriage and family life. Accordingly, it would be agreeable that legal means is desirable for preventing adultery in advance. It would not be unconstitutional for the Legislature to adopt criminal punishment as sanction, in addition to sanctions other than criminal sanctions or regulation under civil laws, against adultery or fornication.

(2) Principle of Clarity

The elements of crime should be clearly stated in a provision of the Statute, which is the formal law. If a provision stating elements of crime is excessively abstract or vague and it is excessively broad or ambiguous in terms of substances and application, the principle of clarity is violated in that arbitral exercise of criminal punishment of the State would not guarantee the freedom and right of the people (2011Hun-Ba75, February 26, 2004). The circumstances precluding wrongfulness and prosecution conditions as well as the elements of crime shall be clearly stated in terms of meanings and requirements under the principle of clarity, providing the ground that the people subject to laws can predict the scope and limitation of the exercise of state authority.

Article 241 Section 2 of the Criminal Act provides that "if the victimized spouse condones or pardons the adultery, accusation can no longer be made" in the provision for the nature of an offense subject to accusation. The term of 'condone' implies the *ex ante* consent to adultery in that it means suggestion or inducement. The terms of 'pardon' implies the *ex post* consent to adultery in that it means forgiveness. If the victimized spouse condones or pardons the adultery, the adultery action is not subject to the criminal punishment. However, it is not clear whether the adultery is condoned or pardoned. It would not be easy to prove or admit the inner mind of the accuser, which is against the accusation, with regard to whether the person who accused his/her spouse for adultery condones prior to adultery or pardons after adultery.

The Supreme Court held that if the consent to divorce is clearly presented during the proceedings of the divorce suit or divorce by agreement, it would amount to the 'condone' because the will to maintain the marriage relationship is not found (Supreme Court 90Do1188, March 22, 1991; Supreme Court 2008Do3599, July 10, 2008, etc.). On the contrary, if a temporary and provisional decision for divorce is presented with conditions the other spouse is liable for the dissolution of marriage, despite a divorce suit is filed by a spouse or both spouses, it would not amount to the term of 'condone' (Supreme Court 89Do501, September 12, 1989; Supreme Court 2008Do984, July 9, 2009, etc.). If a civil tort suit is filed against a spouse and a partner of adultery, any illegality would not be constituted in a case where the marriage relationship is *de facto* dissolved and the third party has a sexual relationship with a spouse of the dissolved marriage. The legal relationship would be also applicable for a case that a divorce suit is not filed yet (Supreme Court 2011Meu2997 en banc decision, November 20, 2014).

With the comprehensive understandings of the cases, the clear consent to divorce would amount to the term of 'condone', whereas the provisional or conditional consent to divorce would not amount to the term of 'condone'. Nonetheless, it is still unclear whether there is a clear consent to divorce or provisional or conditional express for divorce. It is also ambiguous whether adultery is committed whereas illegality is not founded, in that *de facto* breakdown of marriage would not assume the illegality of affair of a spouse and his/her partner of affair. If adultery is not founded, it would be uncertain how to interpret the precedents, providing that the clear consent to divorce only amounts to the term of 'condone', harmoniously. If adultery is not founded where the cohabitation of the married couples is irreparably dissolved, the citizens who are not experts in law could not predict the level of irreparable dissolution of marriage.

On the other hand, the Supreme Court, expressing that exterior express of forgiveness or mere promise for forgiveness would not be admitted to the term of 'pardon' of adultery, explains the reasons as below: The term of 'pardon' of adultery means a unilateral expression to indicate that a spouse would not call his/her spouse who committed adultery responsible for adultery, presuming the maintenance of marriage, while he/she knows that his/her spouse

committed adultery, as the post-forgiveness stated in Article 841 of the Civil Act. The term of 'pardon' can be expressed implicitly, without any restriction in expressing, while it should be expressed to show the true mind to maintain the marital relationship while certainly knowing that adultery is committed, in a clear and reliable way (Supreme Court 91Do2049, November 26, 1991; Supreme Court 2007Do4977, November 27, 2008).

Nonetheless, it is not possible to understand the degree of assurance that adultery was committed by a partner spouse. It is also difficult to figure out how the will to maintain the marital relationship can be expressed in a clear and reliable way. Accordingly, the citizens would not be able to predict whether the adultery is pardoned or not, before the court decides each case.

Whereas the elements of adultery are clearly stated, the term of 'condone' or 'pardon', which can nullify prosecution, is vague, suggesting that the people subject to the law cannot predict the scope and limits of governmental power. Therefore, the Provision at Issue infringes on the principle of clarity.

(3) Principle of Proportionality between Responsibility and Criminal Punishment

The types and scope of statutory punishment should be decided by the Legislature within the legislative discretion, with the comprehensive considerations of the nature and public interest of crime, history and culture of our society, circumstances at the time of enactment, general value or legal sense of the people, and criminal policy for crime prevention (90Hun-Ba24, April 28, 1992). The concept of a constitutional State involves the idea of a substantially constitutional State that requires an appropriate relationship of proportionality between gravity of the crime and responsibility of the offender. Therefore, the right to legislation of legislators cannot be unlimited. Human dignity and value must be respected and protected; a scope of statutory sentence should be designed, in which customized punishments can be applied in accordance with the rule against excessive restriction under Article 37 Section 2 of the Constitution; and the principle of proportionality must be observed so that the punishment corresponds to responsibility and gravity of the crime (2002Hun-Ba24, November 27, 2003).

The Provision at Issue exclusively imposes imprisonment as statutory sentence. In order to justify the imprisonment as a sole statutory punishment, the gravity and illegality should be substantial so that pecuniary punishment, lighter than imprisonment, is not appropriate and it has to be rationally predictable that the offender, in practice, will not be sentenced to criminal punishment beyond his responsibility in individual cases. Among the offenses regarding sexual culture and practice, only the adultery provision states imprisonment as statutory punishment exclusively. It suggests that the Legislature presumed that illegality of adultery is substantial and the types of adultery are not various, thereby adultery should be punished by imprisonment exclusively.

However, a vast majority of adultery and fornication cases exist, where the gravity of crime varies significantly according to the mode of act. It could be an intentional offense breaking the

marital fidelity, or it could be the result of building a new family while the marital relationship was *de facto* dissolved. It could be either an intentional and continuous offense, or an incidental one time affair. Also, the legal accountability differs between the person who committed adultery while maintaining *de jure* or *de facto* marital relationship and the unmarried offender who committed fornication under the belief that his/her partner's marriage was in fact facing a breakdown. As such, it is fully predictable in general that the accountability widely varies from case to case.

The Provision at Issue nevertheless imposes imprisonment as an exclusive punishment of adultery and fornication acts, which excessively exaggerates the punitive aspect granted to criminal punishment, losing the balance between punishments. The statutory sentence confined to imprisonment as prescribed by the Provision at Issue makes it difficult to apply the law appropriately according to specific cases in the process of investigation and trials. This also restricts judges' sentencing discretion in announcing the ruling. It also appears that it is the imprisonment - the only sentence that greatly encourages abuse outside the original purpose of the system - the means to blackmailing or demanding excessive payment of compensation for grief by taking advantage of fear for detainment. The statutory imprisonment prescribed as the sole punishment causes the above mentioned abuse cases, which are against the nature of the system.

Indeed, it is possible to have the necessity for heavy punishment of some types of crimes irrespective of the mode of act. Nonetheless, it would lose the balance between the crime and punishment to impose imprisonment exclusively for the various types of adultery. Adultery is a ground for claim of judicial divorce as well as a ground for claim of liability as it constitutes torts. It does not correspond to the modern legal sense to punish adultery by imprisonment, in addition to civil restrictions. Given the reality where the debate over the adultery ban from the criminal policy and legislative perspectives continues and many countries have abolished adultery crime, it was proven that the legal awareness of adultery has substantially changed, compared to the time of the enactment of the Provision at Issue.

In addition, the Provision at Issue states the maximum term of imprisonment as 2 years. Accordingly, a person who was convicted for adultery would serve a short-term imprisonment in most cases, if he/she is not sentenced with probation or suspended sentence. However, a short-term imprisonment has been criticized for abolishment or revision in that it presents several problems including labeling effects and infection during enforcement, while the deterrence effects are not expected. Accordingly, Australia provides a choice for daily fine instead of short-term imprisonment and the U.K. introduced community service or probation as an alternative to short-term imprisonment. Our court practice, also, would announce probation, instead of actual imprisonment, in order to prevent the side effects of short-term imprisonment in most cases, weakening the effects of punishment.

As a result, the Provision at Issue providing a short-term imprisonment exclusively for various

types of adultery, whose gravity of illegality is different, is against the principle of rule of law by losing the balance between crime and punishment. Also, it does not correspond to the legal sense of the people as well as the global trend of legislation. Therefore, the Provision at Issue violates the principle of proportionality between responsibility and punishment in that it excludes or restricts the possibility to consider the individuality and distinctiveness of individual cases by providing all adultery and fornication shall be punished by imprisonment less than 2 years.

VI. Conclusion

Despite the differences in reasoning, seven Justices agreed that the provision at issue is unconstitutional as set forth in the holding. The decision was also made with the dissenting opinion of Justice Lee Jung-Mi and Justice Ahn Chang-Ho as set forth in VII. and the concurring opinion to the majority opinion of Justice Lee Jin-Sung as set forth in VIII.

VII. Dissenting Opinion of Justice Lee Jung-Mi and Justice Ahn Chang-Ho

We are of the opinion that the Provision at Issue does not violate the Constitution, contrary to the majority opinion, as follows:

A. The Right of Sexual Self-Determination Protected by the Constitution

(1) Article 10 of the Constitution provides that, "All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals", thereby guaranteeing people's personal rights and the right to pursue happiness. The right to self-determination is presupposed by personal rights and the right to pursue happiness and also includes the right to sexual self-determination for whether or not and with whom to engage in sexual intercourse. It is undoubted that regulation of adultery restricts the right to sexual self-determination.

The right to self-determination protected under our Constitution means the personal autonomy to decide one's matter by his/her own will in order to develop his/her personality, presuming a person is reasonable and reliable. A married couple should bear duties and responsibilities in making a family life of marriage that is developed and co-developed by the free will of two persons. A family relationship based on marriage composes cohabitation for preserving and protection of basic life of the family's members including the spouse, and delivering and raising of new family members, all under the presumption of marital fidelity and faith. A family community is also a fundamental ground to realize the right to personality and the right to pursue happiness of his/her own as well as a spouse and as a family member.

Nonetheless, the act of adultery committed by a married person is not included in the realm of the protected individual right to sexual self-determination, because such an act would violate the marital fidelity despite he/she chose marriage as a social system and thereby damages the social and legal system, which is marriage based on monogamy, having a destructive impact on the family community. It would be hardly agreeable to protect such an act under the right to

sexual self-determination, as the majority opinion does. The right to sexual self-determination would protect love and sexual activities with the opposite sex. Nevertheless, an act of adultery or fornication that infringes on the legal interests of others or community, beyond his/her own boundary, would depart from the inherent limitation of the right to sexual self-determination.

(2) Family is the most fundamental community of human beings. It implies that family, which is the basis of the nation and society should be established and maintained. Considering that the marital relationship through marriage is the basic essence of family community, the marital relationship through marriage should be legally protected and respected for the sound existence of the nation and society.

Article 36 Section 1 of the Constitution, which provides that "Marriage and family life shall be established and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal", stipulates that human dignity and gender equality shall be guaranteed even in family life and that institutions for marriage and family life shall be protected (*See* 2000Hun-Ba53, March 28, 2002). It suggests that the dignity of individuals and gender equality are the constitutional value in enacting law regarding marriage and family life. The marriage system based on dignity of individuals prohibits bigamy, while asking for monogamy. Adultery or fornication would be a major threat to monogamy as a fundamental of the marriage system as well as cause social problems including abandoning a spouse or family member.

The Provision at Issue intends to promote the marriage system and family life based on monogamy and marital fidelity between spouses, performing the duty to promote and protect marriage and family life based on individual dignity and gender equality under Article 36 Section 1 of the Constitution. From this perspective, a strong doubt would arise whether it is appropriate to admit an act infringing the social system of marriage based on monogamy and giving destructive effects on the promotion of family community, which is a fundamental ground for 'the right of personality and right to pursue happiness of his/her own, his/her spouse and family' under the scope of the right to sexual self-determination of individuals.

B. Criminal Punishment of Adultery and Legislative Discretion

A question may arise whether it is excessive to provide criminal punishment, instead of civil regulations or family regulations, against adultery or fornication. The issue of exercising criminal punishment or regulating by moral rules should be decided according to the correlation between people and society, time and space by circumstances at time or legal perception of the general public. Therefore, the issue whether adultery should be punished by criminal punishment in addition to civil regulations should be, in principle, decided according to the legislative policy within the legislative discretion (*see* 2000Hun-Ba60, October 25, 2001).

The Provision at Issue has been criticized in that it intervenes and enforces the issue of ethics or morality of individuals. Nonetheless, it is beyond the mere issue of ethics and morality in that

adultery or fornication committed by a married person and his/her participant is a major threat to the dissolution of marriage and family life, deviating from the reasonable social ethics.

It is well known that the global trend is to repeal adultery crimes; the general perception of the citizens regarding sex has substantially changed according to the rapid acceptance of individualism and sexual liberty; and the normative power of the Provision at issue has been relieved. Nonetheless, despite of the significant changes in the structure and general perception of the society, the ideal of chastity inherent in the Korean society, in particular that between husband and wife, is inherited from traditional ethics that is still rooted in the society. Because sustaining monogamy and the obligation to remain sexually faithful is established as a part of our moral standards, it is still our legal awareness that adultery undermines social order and infringes on others' rights (*see* 2007Hun-Ka17, October 30, 2008, etc.). The Constitutional Court had decided that adultery crimes were not unconstitutional, confirming the above ideas for several times, in a series of precedents from its foundation to 2008. We should be prudent in deciding whether there is a change of circumstances to alter established precedents.

The majority opinion suggests that the legal perception of the general public has changed. Nonetheless, there is no empirical evidence to prove the change of the legal perception of the general public. A survey conducted by the Korea Legal Aid Center for Family Relations with regard to the abolition of adultery in 2005 presented that 7,721 people (about 60% of the poll) agreed the retention of adultery crimes among 12,516 people. A survey conducted by a public opinion survey institution in 2009 showed that 64.1% of the poll agreed the retention of adultery crimes among 1,000 people aged 19 and above with regard to the abolition of adultery crimes. A survey conducted by the Korean Women's Development Institute in 2014 also indicated that 60.4% of the poll agreed the retention of adultery crimes among 2,000 people aged 19 and above. It clearly suggests that the general public, including women who are economically and socially underprivileged, still supports the idea that the nation should protect family by criminally punishing adulterous acts. In these terms, our criminal law has aggravated punishment provision for injury or murder of ascendants in that it serves the protection of the least ethical morality of our society, instead of the enforcement of the filial duty or morality by law.

We cannot deny the role of criminal punishment in maintaining the good sexual morality of the society. Korea has prohibited adultery and punished a person who committed adultery or fornication since the law prohibiting 8 conducts in the era of *Kojoson*. Thenceforth, a perception that adultery is prohibited by law and adulterous acts are punished by criminal punishment is deeply rooted in our society. A provision to punish adulterous acts has had a general deterrence effect to prevent the general public from committing adultery. It also has served the protective function for the sound sexual morality of the society as well as the marital relationship and precious family. The abolition of adultery might lower the sexual morality of our

society by demolishing a threshold of 'the least sexual morality'; cause disorder of sexual morality of our society by repealing the criminal awareness against adultery; and stimulate, accordingly, dissolution of marriage and family community. It implies that the fundamental system of community of human beings, which is 'family-society-nation' stated by the German philosopher George Wilhelm Friedrich Hegel, could be infringed. It suggests that the legislature's judgment to criminally punish adultery, in addition to the autonomous reflection of ethical principles of individuals and the society, would not be arbitrary.

It would be certainly debatable whether the criminal punishment on adultery, where marriage is irreparably broken, including a case of long-term separation, and the spousal obligation of faithfulness no longer exists, is beyond the reasonable scope to achieve the legislative purpose.

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It would be certainly debatable whether the criminal punishment on adultery, where marriage is irreparably broken, including a case of long-term separation, and the spousal obligation of faithfulness no longer exists, is beyond the reasonable scope to achieve the legislative purpose.

Nevertheless, it might be possible to consider that an adulterous act which lacks condemnation of the society does not violate the social rule and to deny the valid establishment of adultery by supplementing the concept of the term of 'condone' and 'pardon'. In this regard, the Supreme Court has held that if a marriage is irreparably dissolved despite the couple is not divorced yet, a sexual activity between a spouse and his/her fornication partner would not infringe on the marital cohabitation and cause any damage regarding rights to the marital cohabitation, implying that it does not compose any illegal acts (Supreme Court 2011Meu2997, November 20, 2014, en banc decision). Despite this Supreme Court decision concerning the civil liability, it implies that, where the marital cohabitation is *de fact* dissolved, an adulterous act would not be regarded as an act which violates social rules under the social ethics or social perception, for the lack of illegality.

The issue of how to punish a crime, which relates a choice of a type and scope of statutory punishment, should be decided by the legislature within the legislative discretion under the comprehensive considerations of our history, culture, circumstances at the time of enactment, values or legal perception of the general public, and criminal policy for crime prevention.

The Provision at Issue stipulates only imprisonment as punishment, but the maximum sentence of two years would not be heavy and the sentence shall be mitigated to suspension of sentence for adultery crime whose gravity of crime is not substantial. Therefore, it should not be regarded that the Provision at Issue imposes overly excessive criminal punishment that is not allowed for proportional punishment. Further, adultery and fornication, once prosecuted, result in different invasion of interests than other crimes concerning sexual culture and practice in that they cause social problems inevitably stemming from family breakdown regardless of modes of acts. Also, light fines would not be likely to have deterrence effects on adulterers who desire to avoid the responsibility of support or tort liability coming from the existing marriage. In that sense, the legislator's non-enactment of fines in the Provision at Issue, unlike other sexual custom-related crimes under the Criminal Act, would not violate the balance of criminal punishment (*see* 2007Hun-Ka17, etc., October 30, 2008).

C. Implication of Retention of Adultery

The divorce rate of Korea has dramatically increased since the 1980s, reaching at around 40% after 2000s. Currently, Korea is the country where shows the highest divorce rate among Asian countries. From 2000 through 2006, a misconduct of a spouse is the biggest reason of a claim for judicial divorce, forming 47.1% among the reasons of claim. The majority opinion suggests that the protection of a spouse, whose spouse committed adultery, can be achieved by a claim for damage of property and mental harm. Nonetheless, division of property is rarely effective and the amount of alimony is nominal for a housewife, who does not experience social activities and is economically and socially underprivileged in family. The current civil system and judicial practice do not suffice in protecting the economically and socially underprivileged in that various systems to protect the underprivileged, including a claim for division of property

during marriage, restriction on the arbitrary disposition of a spouse with regard to a residential building, the right to cancel a fraudulent transaction to reserve the right of division or property or protection of shares of inheritance according to divorce, are not arranged.

The juvenile delinquency which arises as a serious social problem, recently, also presents a point. Family takes charge of a significant role to educate children to be a sound member of society by providing stable resources and opportunities in life as well as internalizing social rules approved by society and preventing delinquency, as a social institute to be in charge of birth and nurture, socialization, social-regulation of children. Therefore, the dissolution of family community due to adultery may exercise a harmful influence on children. Several researches with regard to the causation of juvenile delinquency indicate that the rate of delinquency of children coming from broken families, including a case of divorce or separation, is higher than ones coming from parents families.

The current systems and practices of the Civil Act do not offer sufficient protection for the socially and economically underprivileged in case of divorce. If adultery crime is abolished without providing the social safety-net for custodial responsibility and broken family upon divorce, it is concerned that several family communities would be dissolved and human rights and welfares of the underprivileged and young children would be infringed, for placing one's right to sexual self-determination and privacy before the responsibility of marriage and preciousness of family.

As seen above, punishment of adultery is still meaningful in our society. Whereas the Provision at Issue protects the sound sexual morality and marriage and family life, the regulation of acts by the Provision at Issue is a restriction on sexual behavior in specific relations that adulterous acts are forbidden during the *de jure* marriage and fornication is prohibited, if one of partners is legally married. The duty and responsibility naturally concurs with the marital relationship which is formed based on free will, in case of a person who committed adultery. It would be also reasonable for an unmarried person, who is a partner of fornication, to be responsible for not participating in fornication, knowing the violation of legal and moral duties. Therefore, the public interests achieved by the Provision at Issue and the side effects arising out of the Provision at Issue would not infringe on the reasonable proportionality.

D. Sub-Conclusion

The Provision at Issue would not violate the Constitution in that it does not restrict the right to sexual self-determination as it does not infringe on the principle against excessive restriction.

VIII. Concurring Opinion to Majority Opinion of Justice Lee Jin-Sung

I write additionally to the majority opinion to point out why stipulating the punishment by imprisonment as the only statutory punishment for an offense of adultery is against the principle of proportionality between responsibility and punishment and whether expanding classes of the statutory punishment for the offense can avoid declaration of unconstitutionality.

Determining how to punish a criminal offense, in other words, deciding the classes and sentence of statutory punishment, involves consideration of the nature of crime, interests protected by law, and punishment. The determination should be made by comprehensively considering historical, cultural and current circumstances, people's values or legal sentiments, and a criminal policy on prevention of crimes.

As was pointed out earlier in this decision, acts of adultery may be carried out in various forms. Thus, it is highly probable that stipulating imprisonment as the only statutory punishment for acts of adultery may offend the balance between responsibility and punishment. However, a fine which is a lesser degree of punishment than imprisonment, has been recognized as compensation or wergild that has the nature of personal compensation, and historically it functioned as an adequate punishment for an offense of taking the profit of others and has had strong significance as a means of redeeming profits acquired by a criminal out of a crime in reality. As adultery is an immoral crime committed by violating the duty of marital fidelity, bringing disorder in the marriage system, and not a crime taking the profit of others, a fine is not an appropriate means to punish adultery in the light of the nature of the crime.

The reason why imposing criminal punishment on adultery is expected to have no actual and fundamental preventive effect is that marital fidelity is not what can be regulated through coercion by law; failure to specify a fine as statutory punishment for adultery is not the reason. Imposing a minor fine against acts of adultery will hardly have a deterrent effect on a person committed adultery, who desires to avoid responsibility to support the family and pay monetary compensation incurred by dissolution of a marital relationship (*see* 2007Hun-Ka17, October 30, 2008). Also, it may result in offering a way out of what he or she had done, if the person is financially well-off. On the other hand, while one of the consequences of imposing a heavy fine is to diminish one's property, under the current system in which property owned by husband and wife is assumed to be common property unless it is the separate property owned by one spouse, a heavy fine imposed on a single spouse may result in disturbing the property of both spouses.

The qualification punishment, a form of honor punishment adopted by the Criminal Act, that deprives or restricts diverse qualifications in the public law relations, and other qualifications including a government official's right to vote, run for an election, or become a director of a company, is an adequate form of punishment for a government official's crimes related to official duties or the Public Official Election Act. The qualification punishment has recently become a subject to controversy over whether the punishment should be maintained as one of major criminal punishments. Therefore, given the nature of the qualification punishment, the punishment is not different from a fine that it is also not an appropriate means of punishment for adultery involving a violation of the marital fidelity.

As examined above, a fine or qualification punishment cannot serve as an appropriate means of punishment for adultery. Given this, maintaining the offense of adultery and including a fine

or qualification punishment as statutory punishment for adultery in order to pursue the principle of proportionality between responsibility and punishment are not in the best interest of protecting a good-faith spouse and children.

The crime of adultery, once prosecution begins and unless a charge is dropped, inevitably causes social problems generated by a breakup of family regardless of the type of acts of adultery. The dissenting opinion asserts retention of the crime of adultery for the reason that no proper protection measures for women and children who are economically disadvantaged in the process of dissolution of family are yet in place. However, I do not believe that resolution of civil and family lawsuits generated by misconduct of a single spouse should resort to criminal proceedings by maintaining the crime of adultery.

In the end, abolishing the crime of adultery which has shown no actual deterrent effect, and reforming trial practice relating to a damage claim for tortious act, a claim for division of property, and custody and visitation of a child as well as coming up with systems to protect welfare of a deserted spouse and children will be the right path to pursue.

Justices Park Han-Chul (Presiding Justice), Lee Jung-Mi, Kim Yi-Su, Lee Jin-Sung, Kim Chang-Jong, Ahn Chang-Ho, Kang Il-Won, Seo Ki-Seog and Cho Yong-Ho

[Appendix]

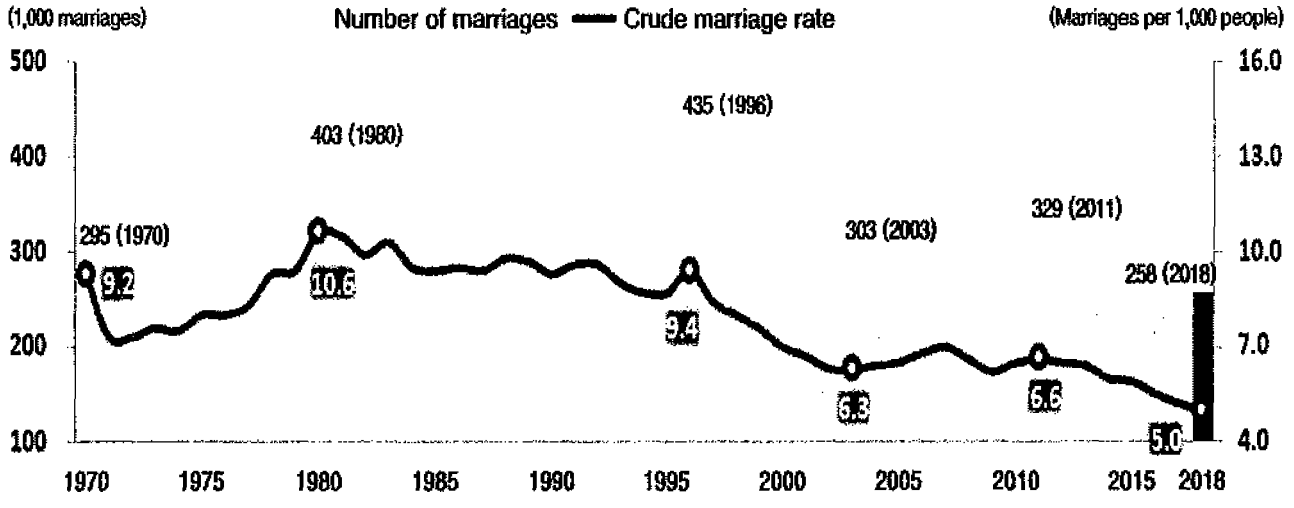
(*intentionally omitted*)

附件二

Marriage and Divorce Statistics in 2018

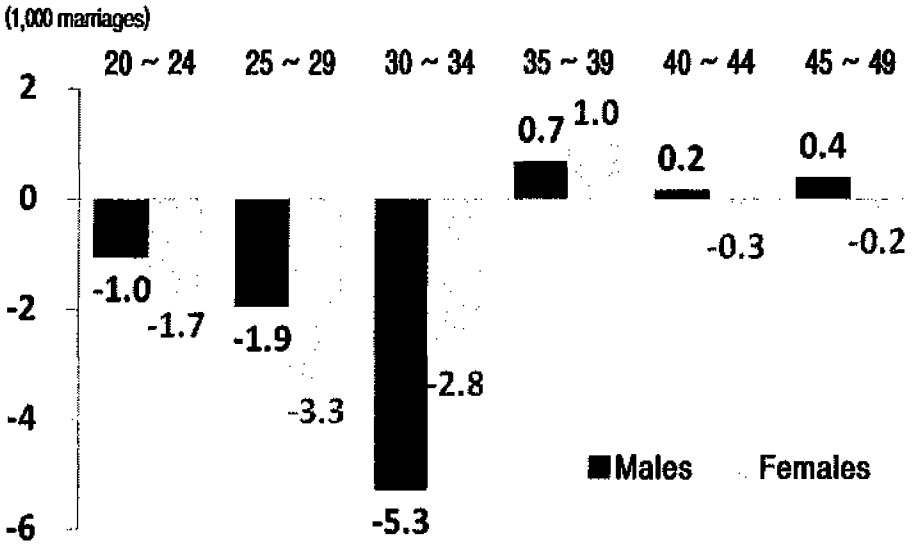
In 2018, the number of marriages was 257.6 thousand, which decreased by 2.6% (-6.8 thousand) from 2017.

○ (Crude marriage rate) (the number of marriages per 1,000 people)
The crude marriage rate stood at 5.0 in 2018, which dropped 0.2 from 2017.

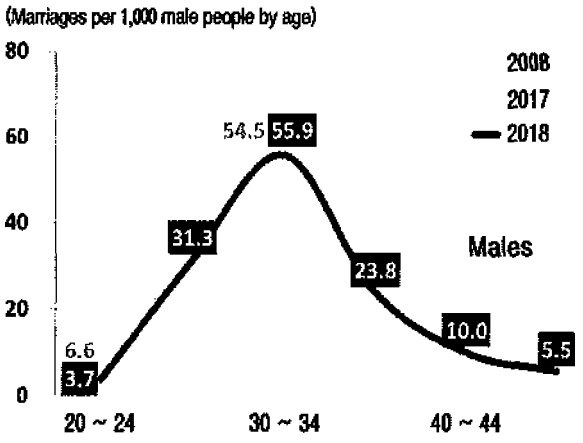


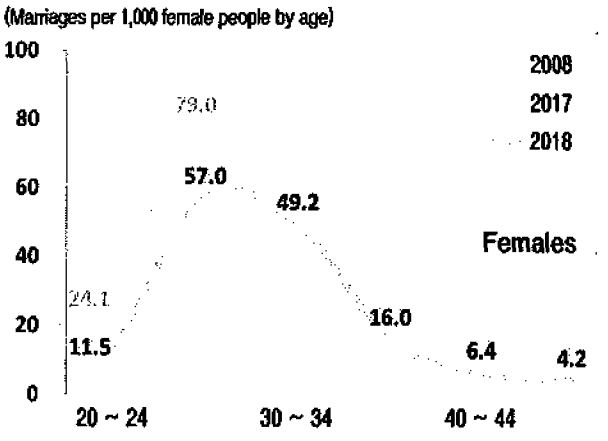
○ (Number of marriages by age)
Compared to 2017, the marriages of males aged 30 to 34 showed the highest decrease. The marriages of females aged 25 to 29 showed the highest decrease.

- The marriage of males aged 30 to 34 dropped by 5.3 thousand (-5.4%) from 2017. The marriage of females aged 25 to 29 dropped by 3.3 thousand (-3.5%) from 2017.

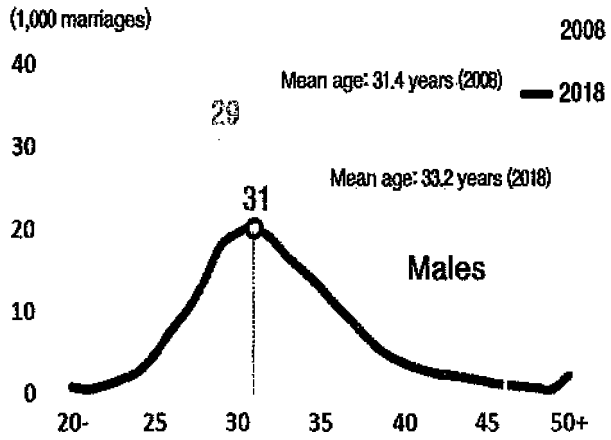


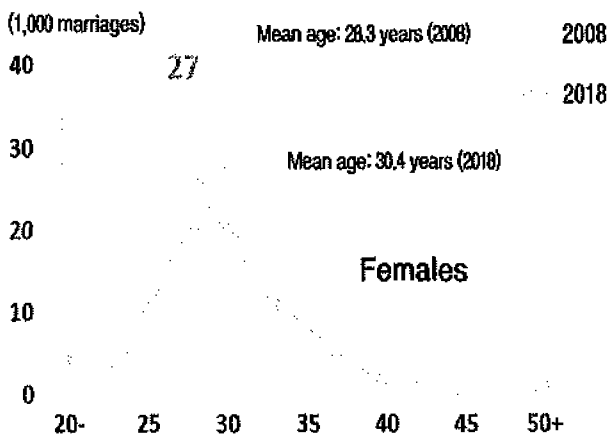
○ (Marriage rate by age) (the number of marriages per 1,000 people in a given age)
As for the marriage rate by age, males aged 30 to 34 showed the highest figure of 55.9 marriages per 1,000 people. Females aged 25 to 29 showed the highest figure of 57.0 marriages per 1,000 people.





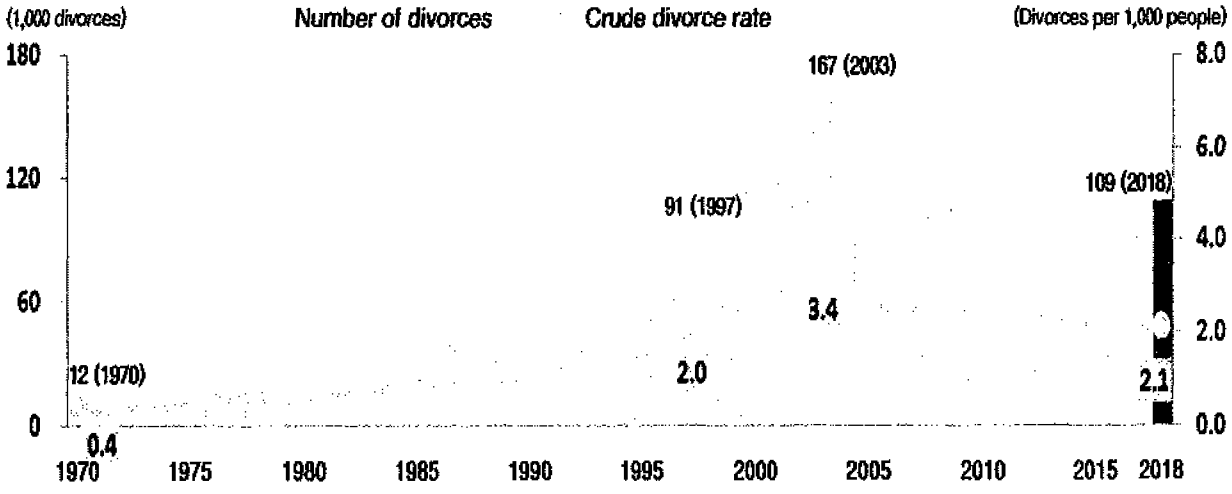
○ (Mean age at first marriage)
The mean age at first marriage for males was 33.2 years in 2018, up 0.2 year from 2017. The mean age at first marriage for females was 30.4 years in 2018, up 0.2 year from 2017.



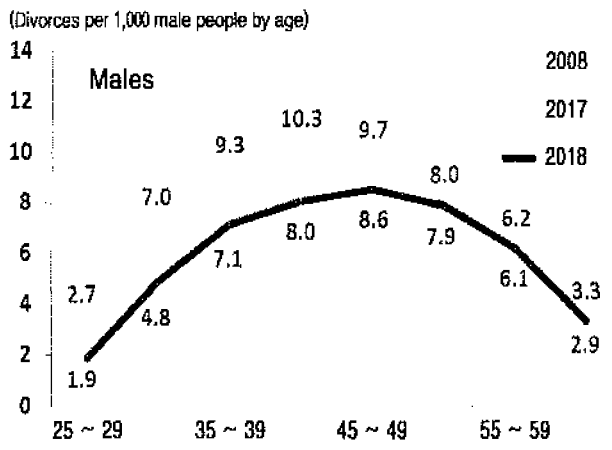


In 2018, the number of divorces was 108.7 thousand, which increased by 2.5% (2.7 thousand) from 2017.

○ (Crude divorce rate) (the number of divorces per 1,000 people)
The crude divorce rate stood at 2.1 in 2018, which remained the same as 2017.



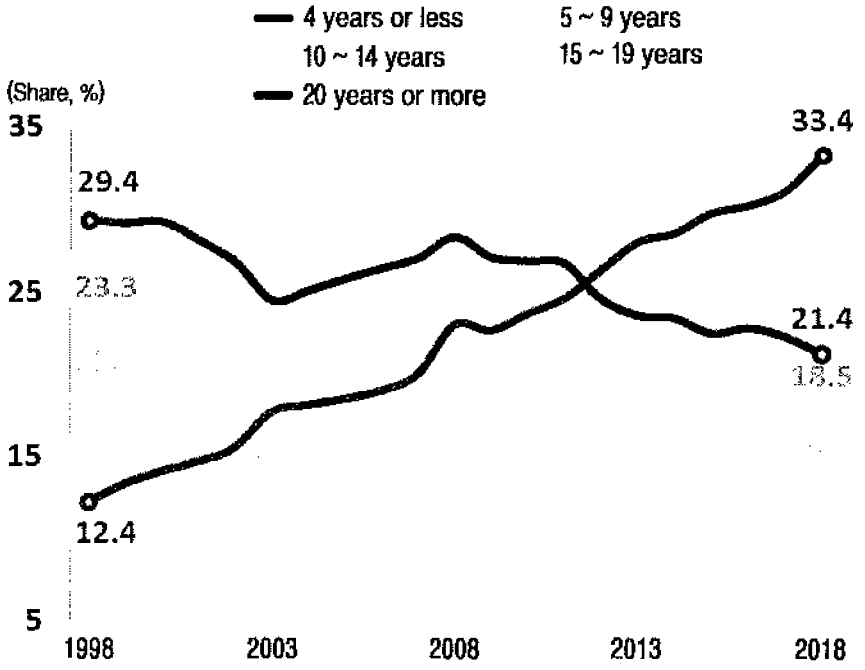
○ Divorce rate by age) (the number of divorces per 1,000 people in a given age)
As for the divorce rate by age, males aged 45 to 49 showed the highest figure of 8.6 divorces per 1,000 people. Females aged 40 to 44 showed the highest figure of 8.8 divorces per 1,000 people.



○ (Duration of marriage)

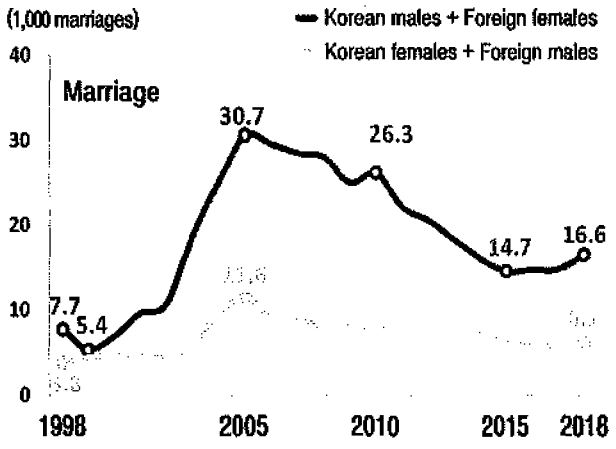
The duration of '20 years or more' of marriage before getting divorced occupied the highest share at 33.4% of the total divorces, which was followed by the duration of '4 years or less' (21.4%).

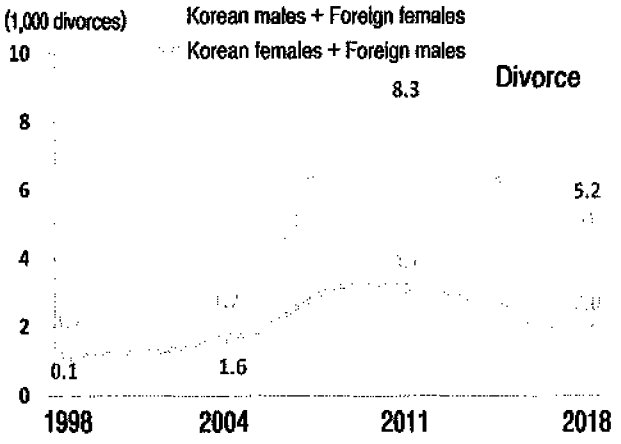
- The average duration of marriage before getting divorced recorded 15.6 years, rising by 0.6 year from 2017.



The number of marriages with foreign spouses increased by 8.9% from 2017. The number of divorces with foreign spouses increased by 0.1% from 2017.

○ The number of marriages with foreign spouses increased by 1.9 thousand (8.9%) to 22.7 thousand in 2018. The number of divorces with foreign spouses increased by 0.1% to 7.1 thousand in 2018.





Marriage and Divorce Statistics in 2017

In 2017, the number of marriages was 264.5 thousand, which decreased by 6.1 percent (-17.2 thousand) from 2016.

○ The crude marriage rate (the number of marriages per 1000 people) stood at 5.2 in 2017, which recorded the lowest figure since the statistical production in 1970.

○ Compared to 2016, the marriages of males aged 30 to 34 showed the highest decrease (-11.3 thousand, -10.3%). The marriages of females aged 30 to 34 showed the highest decrease (-7.9 thousand, -9.0%).

○ Compared to 2016, the couples of 'males at first marriage and females at first marriage' showed the highest drop (-6.8%, -15 thousand), which was followed by the couples of 'males at remarriage and females at remarriage' (-3.2%, -1 thousand).

○ As for the marriage rate by age(the number of marriages per 1000 people in a given age), males aged 30 to 34 showed the highest figure of 56.4 marriages per 1000 people. Females aged 25 to 29 showed the highest figure of 60.6 marriages per 1000 people.

○ The mean age at first marriage for males was 32.9 years in 2017, up 0.2 year from 2016. The mean age at first marriage for females was 30.2 years in 2017, up 0.1 year from 2016.

○ The number of marriages with foreign spouses increased by 1.2 percent (0.2 thousand) to 20.8 thousand in 2017.

○ As for the crude marriage rate by province, Sejong recorded the highest figure of 6.6 per 1000 people, which was followed by Jeju (5.7) and Seoul (5.5).

In 2017, the number of divorces was 106 thousand, which decreased by 1.2 percent (-1.3 thousand) from 2016.

○ The crude divorce rate (the number of divorces per 1000 people) stood at 2.1 in 2017, which marked the lowest figure after recording 2.0 in 1997.

○ The divorce rate of married people (the number of divorces per 1000 married people) stood at 4.4 in 2017, which remained the same as 2016.

○ As for the divorce rate by age (the number of divorces per 1000 people in a given age), males aged 45 to 49 showed the highest figure of 8.6 divorces per 1000 people. Females aged 40 to 44 showed the highest figure of 8.9 divorces per 1000 people.

○ The mean age at divorce for males was 47.6 years in 2017, up 0.4 from 2016. The mean age at divorce for females was 44.0 years in 2017, up 0.4 from 2016.

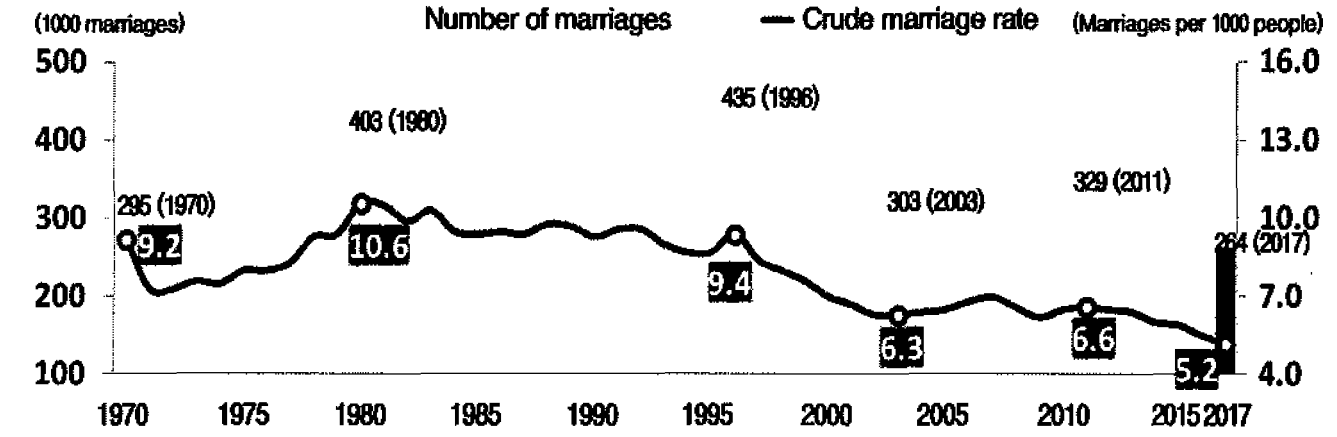
○ The duration of '20 years or more' of marriage before getting divorced occupied the highest share at 31.2 percent of the total divorces, which was followed by the duration of 'less than 5 years' (22.4 percent).

○ The number of divorces with foreign spouses fell by 7.0 percent (-0.5 thousand) to 7.1 thousand in 2017.

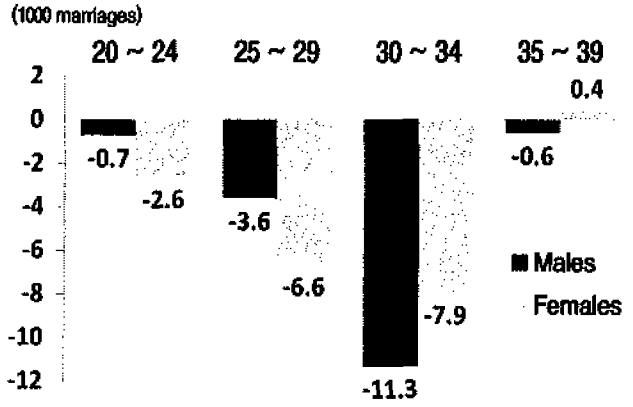
○ As for the crude divorce rate by province, Incheon and Jeju marked the highest figures of 2.4, which was followed by Chungnam (2.3). Seoul, Daegu, Gwangju and Sejong marked the lowest figures of 1.8.

[Marriage Statistics in 2017]

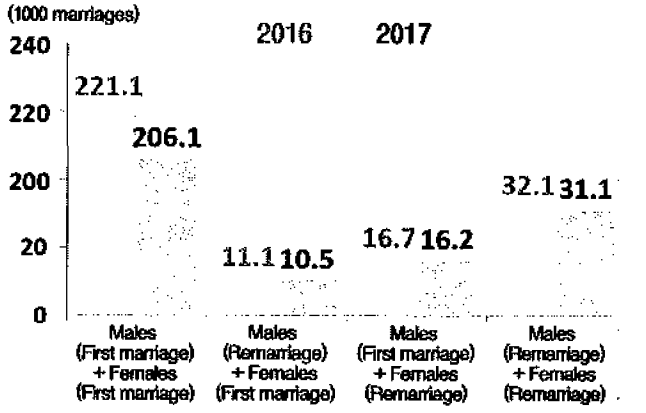
Number of marriages and crude marriage rate (1970-2017)



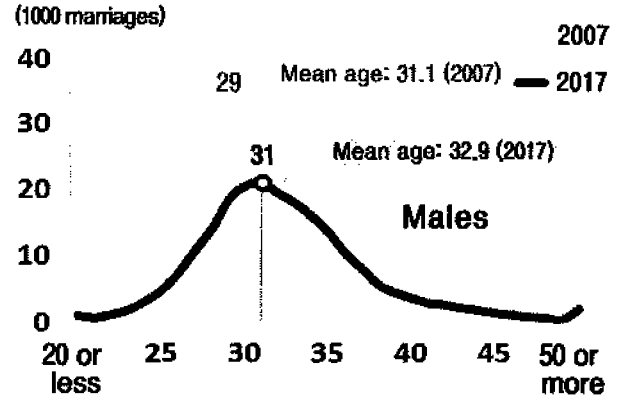
Change in the number of marriages by age (2017)

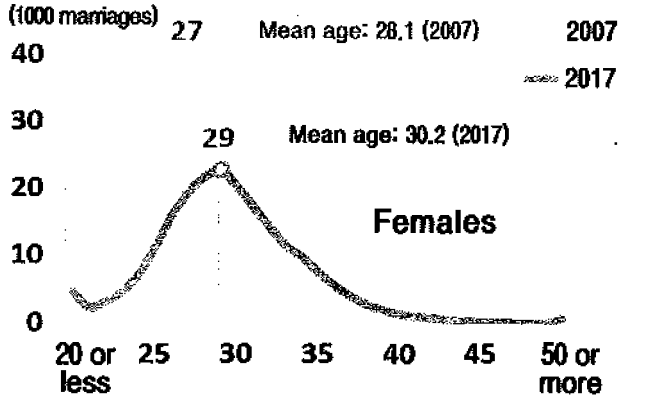


Number of marriages by marriage type (2016, 2017)

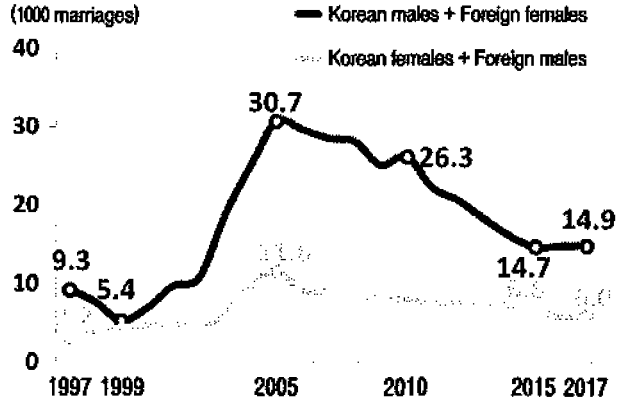


Number of marriages by age at first marriage and mean age at first marriage (2007, 2017)

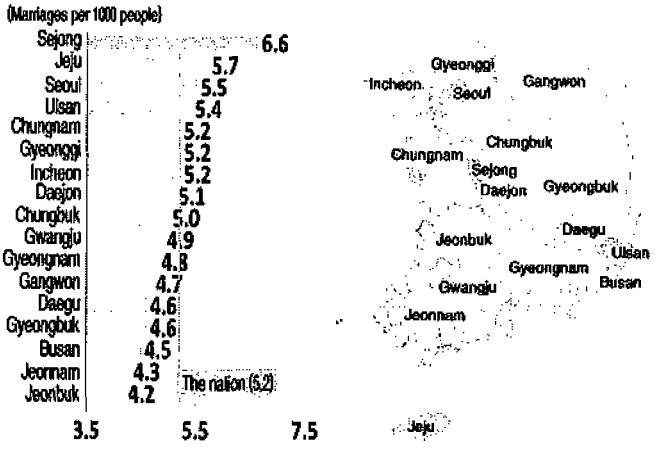




Number of marriages with a foreign spouse (1997-2017)

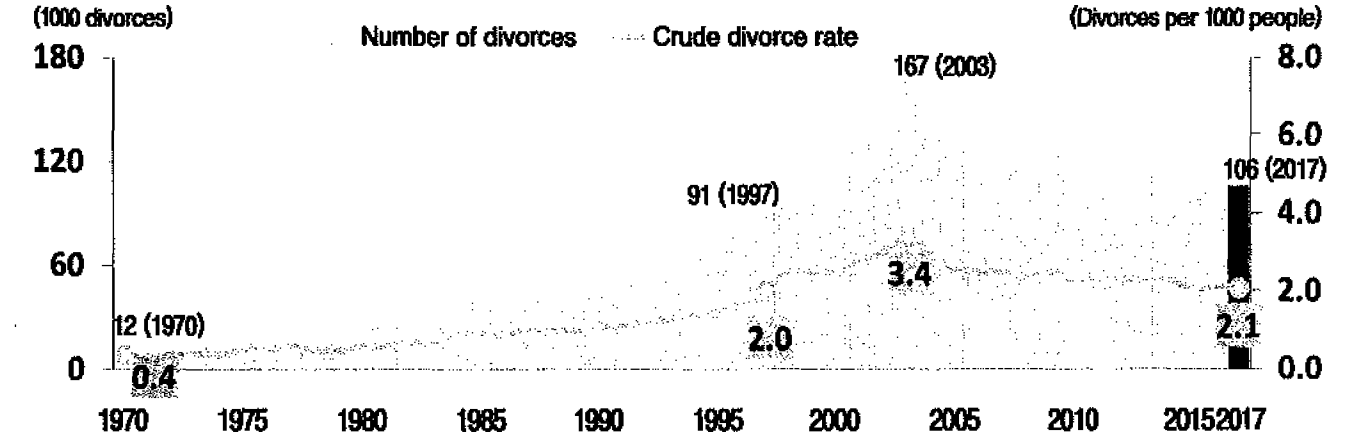


Crude marriage rate by province (2017)

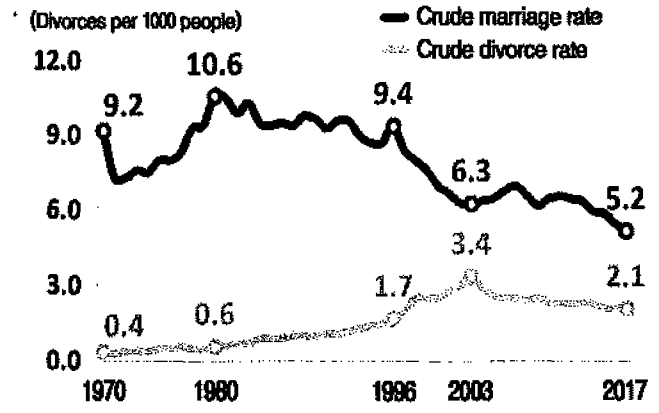


[Divorce Statistics in 2017]

Number of divorces and crude divorce rate (1970-2017)

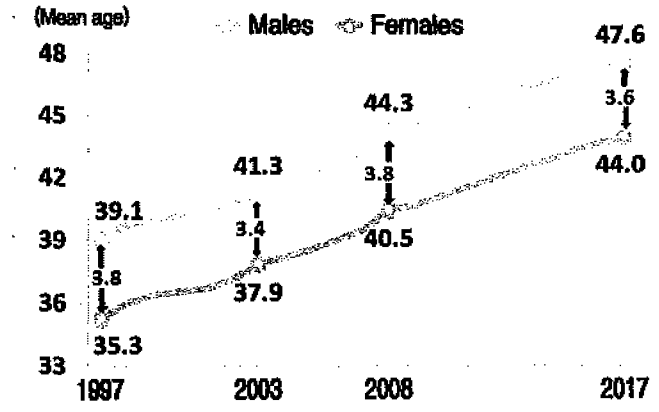


Crude marriage rate and crude divorce rate (1970-2017)

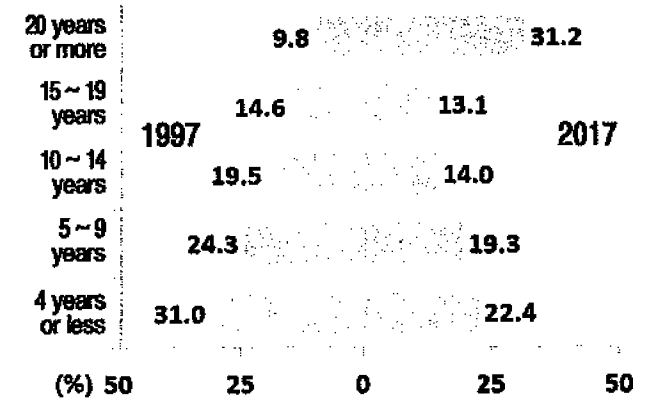


Divorce rate by age of husband (2007, 2016, 2017)

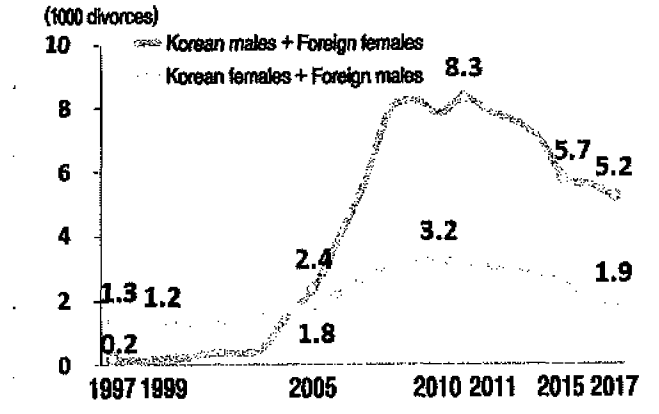
Mean age at divorce (1997-2017)



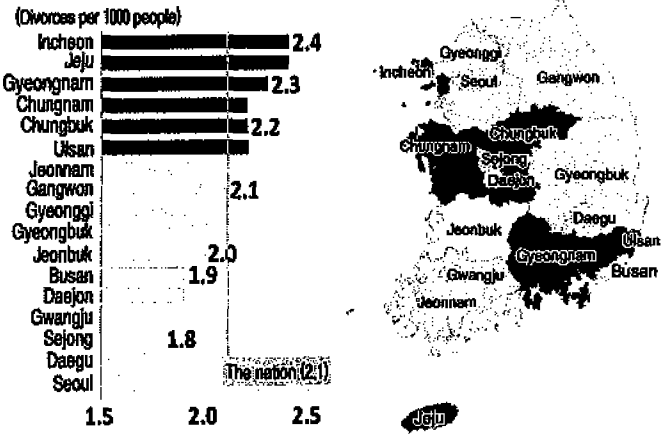
Distribution of divorces by duration of marriage (1997, 2017)



Number of divorces with a foreign spouse (1997-2017)



Crude divorce rate by province (2017)



Marriage and Divorce Statistics in 2016

The number of marriages went down by 7.0 percent (21.2 thousand cases) to 281.6 thousand cases in 2016.

○ The crude marriage rate (the number of marriages per 1,000 population) stood at 5.5 cases in 2016, which recorded the lowest figure after the statistical production in 1970.

[Table] Number of marriages and crude marriage rate (2006-2016)

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	**2016**
Number of marriages (thousand cases)	330.6	343.6	327.7	309.8	326.1	329.1	327.1	322.8	305.5	302.8	**281.6**
Change (thousand cases)	16.3	12.9	-15.8	-18.0	16.3	3.0	-2.0	-4.3	-17.3	-2.7	**-21.2**
Percent change (%)	5.2	3.9	-4.6	-5.5	5.3	0.9	-0.6	-1.3	-5.4	-0.9	**-7.0**
Crude marriage rate*	6.8	7.0	6.6	6.2	6.5	6.6	6.5	6.4	6.0	5.9	**5.5**

* The number of marriages per 1,000 population

○ Compared to 2015, the marriages of males aged 30 to 34 showed the highest decrease (11.8 thousand cases, -9.7%). The marriages of females aged 25 to 29 showed the highest decrease (9 thousand cases, -8.2%).

○ As for the marriage rate by age group (the number of marriages per 1,000 population in a given age group), males aged 25 to 29 showed the highest decrease (10.7%, -4.4 cases) from the previous year. Females aged 25 to 29 showed the highest decrease (8.8%, -6.4 cases) from the previous year.

○ The mean age at first marriage for males was 32.8 years in 2016, up 0.2 year from 2015. The mean age at first marriage for females was 30.1 years in 2016, up 0.1 year from 2015.

[Table] Mean age at first marriage and remarriage (2006-2016)

(Unit: year)

		2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	**2016**	**Change* From 2015**	**Change* From 2006**
First marriage	Males	31.0	31.1	31.4	31.6	31.8	31.9	32.1	32.2	32.4	32.6	**32.8**	**0.2**	**1.8**
	Females	27.8	28.1	28.3	28.7	28.9	29.1	29.4	29.6	29.8	30.0	**30.1**	**0.1**	**2.3**
Remarriage	Males	44.4	44.8	45.0	45.7	46.1	46.3	46.6	46.8	47.1	47.6	**48.2**	**0.6**	**3.8**
	Females	39.7	40.1	40.3	41.1	41.6	41.9	42.3	42.5	43.0	43.5	**44.0**	**0.5**	**4.3**

* Rounded to 2 decimal places

○ The couples of 'males at first marriage and females at first marriage' occupied 78.5 percent of the total marriages. The couples of 'males at remarriage and females at remarriage' occupied 11.4 percent of the total marriages.

[Table] Number of marriages by marriage type (2006-2016)

(Unit: thousand cases, %)

		2006	2007	2008	2009	2010	2011	2012
Total*		330.6	343.6	327.7	309.8	326.1	329.1	327.1
Males	First marriage	273.7	285.4	270.2	255.8	273.0	277.4	275.9
	Remarriage	55.6	57.1	57.2	53.8	53.0	51.6	51.1
Females	First marriage	269.3	280.7	264.5	250.7	268.5	272.6	270.5
	Remarriage	59.7	61.9	62.8	58.8	57.5	56.4	56.5
Males (first marriage) + Females (first marriage)		255.2	265.5	249.4	236.7	254.6	258.6	257.0
Males (remarriage) + Females (first marriage)		14.0	14.9	15.0	13.9	13.9	13.9	13.5
Males (first marriage) + Females (remarriage)		18.2	19.6	20.6	19.0	18.3	18.7	18.9
Males (remarriage) + Females (remarriage)		41.3	41.9	42.1	39.8	39.1	37.7	37.6

		2013	2014	2015	**2016**	**Percent**	**Year-on-year Change**	**Year-on-year Percent change**
Total*		322.8	305.5	302.8	**281.6**	**100.0**	**-21.2**	**-7.0**
Males	First marriage	273.8	257.9	256.4	**238.1**	**84.5**	**-18.3**	**-7.1**
	Remarriage	48.9	47.5	46.4	**43.3**	**15.4**	**-3.1**	**-6.7**
Females	First marriage	268.4	251.5	250.0	**232.4**	**82.5**	**-17.5**	**-7.0**
	Remarriage	54.3	53.9	52.7	**48.9**	**17.4**	**-3.8**	**-7.3**
Males (first marriage) + Females (first marriage)		255.6	239.4	238.3	**221.1**	**78.5**	**-17.1**	**-7.2**
Males (remarriage) + Females (first marriage)		12.8	12.0	11.7	**11.1**	**3.9**	**-0.6**	**-4.8**
Males (first marriage) + Females (remarriage)		18.2	18.4	18.0	**16.7**	**5.9**	**-1.3**	**-7.3**
Males (remarriage) + Females (remarriage)		36.1	35.5	34.7	**32.1**	**11.4**	**-2.6**	**-7.5**

* Including 'unidentified'

○ The number of marriages with foreign spouses declined by 3.2 percent (0.7 thousand cases) to 20.6 thousand cases in 2016.

[Table] Marriage with a foreign spouse (2006-2016)

(Unit: thousand cases, %)

	2006	2007	2008	2009	2010	2011	2012
Number of marriages	330.6	343.6	327.7	309.8	326.1	329.1	327.1
Marriage with a foreign spouse	38.8	37.6	36.2	33.3	34.2	29.8	28.3
Korean males and foreign females	29.7	28.6	28.2	25.1	26.3	22.3	20.6
Korean females and foreign males	9.1	9.0	8.0	8.2	8.0	7.5	7.7

	2013	2014	2015	**2016**	**Percent**	**Year-on-year percent change**
Number of marriages	322.8	305.5	302.8	**281.6**	**100.0**	**-7.0**
Marriage with a foreign spouse	26.0	23.3	21.3	**20.6**	**7.3**	**-3.2**
Korean males and foreign females	18.3	16.2	14.7	**14.8**	**5.3**	**1.0**
Korean females and foreign males	7.7	7.2	6.6	**5.8**	**2.0**	**-12.6**

○ As for the crude marriage rate by province, Sejong recorded the highest figure of 7.1 cases, which was followed by Ulsan (6.0 cases), Jeju (5.9 cases) and Seoul (5.9 cases).

[Table] Number of marriages and crude marriage rate by province (2015-2016)

(Unit: case, %, per 1,000 population)

	Number of marriages						Crude marriage rate		
	2015	Percent	**2016**	**Percent**	**Year-on-year Change**	**Year-on-year Percent change**	2015	**2016**	**Year-on-year change**
The nation*	302,828	100.0	**281,635**	**100.0**	**-21,193**	**-7.0**	5.9	**5.5**	**-0.4**
Seoul	64,193	21.2	**57,643**	**20.5**	**-6,550**	**-10.2**	6.5	**5.9**	**-0.6**
Busan	18,553	6.1	**17,113**	**6.1**	**-1,440**	**-7.8**	5.3	**4.9**	**-0.4**
Daegu	12,545	4.1	**12,216**	**4.3**	**-329**	**-2.6**	5.1	**5.0**	**-0.1**
Incheon	17,118	5.7	**16,092**	**5.7**	**-1,026**	**-6.0**	5.9	**5.5**	**-0.4**
Gwangju	7,945	2.6	**7,468**	**2.7**	**-477**	**-6.0**	5.4	**5.1**	**-0.3**
Daejeon	8,805	2.9	**8,325**	**3.0**	**-480**	**-5.5**	5.8	**5.5**	**-0.3**
Ulsan	7,483	2.5	**7,006**	**2.5**	**-477**	**-6.4**	6.4	**6.0**	**-0.4**
Sejong	1,498	0.5	**1,612**	**0.6**	**114**	**7.6**	8.2	**7.1**	**-1.1**
Gyeonggi	73,950	24.4	**70,052**	**24.9**	**-3,898**	**-5.3**	6.0	**5.6**	**-0.4**
Gangwon	7,876	2.6	**7,468**	**2.7**	**-408**	**-5.2**	5.1	**4.9**	**-0.2**
Chungbuk	8,872	2.9	**8,334**	**3.0**	**-538**	**-6.1**	5.6	**5.3**	**-0.3**
Chungnam	12,331	4.1	**11,792**	**4.2**	**-539**	**-4.4**	6.0	**5.7**	**-0.3**
Jeonbuk	9,060	3.0	**8,216**	**2.9**	**-844**	**-9.3**	4.9	**4.4**	**-0.5**
Jeonnam	9,275	3.1	**8,554**	**3.0**	**-721**	**-7.8**	4.9	**4.5**	**-0.4**
Gyeongbuk	14,273	4.7	**13,363**	**4.7**	**-910**	**-6.4**	5.3	**5.0**	**-0.3**
Gyeongnam	18,671	6.2	**17,580**	**6.2**	**-1,091**	**-5.8**	5.6	**5.3**	**-0.3**
Jeju	3,676	1.2	**3,705**	**1.3**	**29**	**0.8**	6.0	**5.9**	**-0.1**

* Including overseas marriages

The number of divorces went down by 1.7 percent (1.8 thousand cases) to 107.3 thousand cases in 2016.

○ The crude divorce rate (the number of divorces per 1,000 population) stood at 2.1 cases in 2016, which marked the lowest figure after recording 2.0 cases in 1997.

○ The divorce rate of married people (the number of divorces per 1,000 married population) stood at 4.3 cases in 2016, which dropped by 0.1 case from 2015.

[Table] Number of divorces, crude divorce rate and divorce rate of married people (2006-2016)

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	**2016**
Number of divorces (thousand cases)	124.5	124.1	116.5	124.0	116.9	114.3	114.3	115.3	115.5	109.2	**107.3**
Change (thousand cases)	-3.5	-0.5	-7.5	7.5	-7.1	-2.6	0.0	1.0	0.2	-6.4	**-1.8**
Percent change (%)	-2.7	-0.4	-6.1	6.4	-5.8	-2.2	0.0	0.9	0.2	-5.5	**-1.7**
Crude divorce rate*	2.5	2.5	2.4	2.5	2.3	2.3	2.3	2.3	2.3	2.1	**2.1**
Divorce rate of married people**	5.3	5.2	4.9	5.2	4.8	4.7	4.7	4.7	4.7	4.4	**4.3**

* Per 1,000 population

** Per 1,000 married population aged 15 or more

○ As for the divorce rate by age group (the number of divorces per 1,000 population in a given age group), males aged 35 to 39 showed the highest decrease (35.9%, -4.1 cases) compared to 10 years ago. Females aged 30 to 34 showed the highest decrease (35.3%, -4.2 cases) compared to 10 years ago.

○ The duration of '20 years or more' of marriage before getting divorced occupied the highest share at 30.4 percent of the total divorces, which was followed by the duration of 'less than 5 years' (22.9 percent).

○ The mean age at divorce for males was 47.2 years in 2016, up 0.3 from 2015. The mean age at divorce for females was 43.6 years in 2016, up 0.3 from 2015.

[Table] Mean age at divorce (2006-2016)

(Unit: year)

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	**2016**	**Change***	
												From 2015	**From 2006**
Males	42.6	43.2	44.3	44.5	45.0	45.4	45.9	46.2	46.5	46.9	**47.2**	**0.3**	**4.6**
Females	39.0	39.5	40.5	40.7	41.1	41.5	42.0	42.4	42.8	43.3	**43.6**	**0.3**	**4.6**
Gender gap*	3.6	3.7	3.8	3.8	3.9	3.9	3.9	3.8	3.7	3.6	**3.6**	**-**	**-**

* Rounded to 2 decimal places

○ The number of divorces with foreign spouses fell by 6.9 percent (0.6 thousand cases) to 7.7 thousand cases in 2016.

[Table] Divorce with a foreign spouse (2006-2016)

(Unit: thousand cases, %)

	2006	2007	2008	2009	2010	2011	2012
Number of divorces	124.5	124.1	116.5	124.0	116.9	114.3	114.3
Divorce with a foreign spouse	6.1	8.3	11.0	11.5	11.1	11.5	10.9
Korean males and foreign females	3.9	5.6	7.9	8.2	7.9	8.3	7.9
Korean females and foreign males	2.2	2.7	3.1	3.2	3.2	3.1	3.0

	2013	2014	2015	**2016**		**Year-on-year percent change**
					Percent	
Number of divorces	115.3	115.5	109.2	**107.3**	**100.0**	**-1.7**
Divorce with a foreign spouse	10.5	9.8	8.2	**7.7**	**7.1**	**-6.9**
Korean males and foreign females	7.6	7.0	5.7	**5.6**	**5.2**	**-2.3**
Korean females and foreign males	2.9	2.8	2.5	**2.1**	**1.9**	**-17.6**

○ As for the crude divorce rate by province, Jeju recorded the highest figure of 2.5 cases, which was followed by Incheon (2.4 cases), Gangwon (2.3 cases) and Chungnam (2.3 cases).

[Table] Number of divorces and crude divorce rate by province (2015-2016)

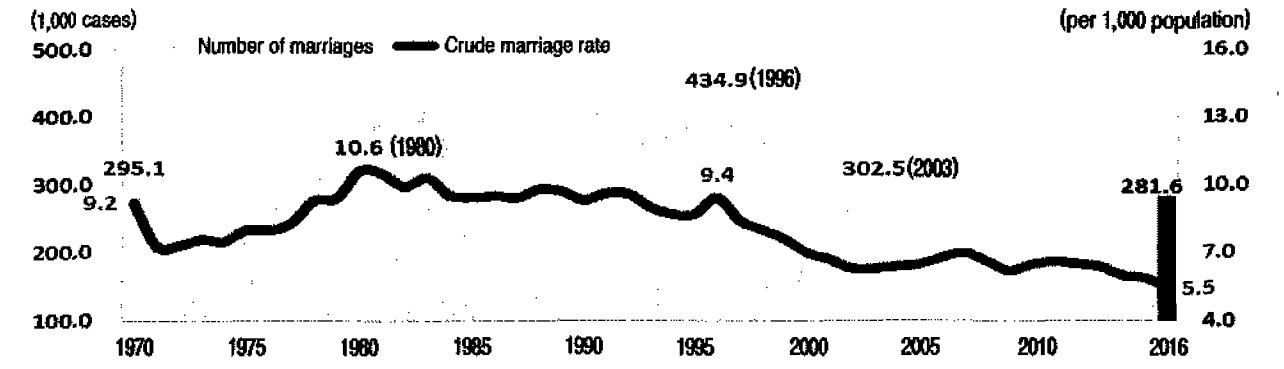
(Unit: case, %, per 1,000 population)

	Number of divorces						Crude divorce rate		
					Year-on-year				
	2015	Percent	2016	Percent	Change	Percent change	2015	2016	Year-on-year change
The nation*	109,153	100.0	**107,328**	**100.0**	**-1,825**	**-1.7**	2.1	**2.1**	**0.0**
Seoul	18,176	16.7	**17,777**	**16.6**	**-399**	**-2.2**	1.8	**1.8**	**0.0**
Busan	6,649	6.1	**6,859**	**6.4**	**210**	**3.2**	1.9	**2.0**	**0.1**
Daegu	4,497	4.1	**4,383**	**4.1**	**-114**	**-2.5**	1.8	**1.8**	**0.0**
Incheon	7,116	6.5	**7,097**	**6.6**	**-19**	**-0.3**	2.5	**2.4**	**-0.1**
Gwangju	2,842	2.6	**2,817**	**2.6**	**-25**	**-0.9**	1.9	**1.9**	**0.0**
Daejeon	2,999	2.7	**2,890**	**2.7**	**-109**	**-3.6**	2.0	**1.9**	**-0.1**
Ulsan	2,406	2.2	**2,520**	**2.3**	**114**	**4.7**	2.1	**2.2**	**0.1**
Sejong	324	0.3	**343**	**0.3**	**19**	**5.9**	1.8	**1.5**	**-0.3**
Gyeonggi	27,688	25.4	**26,723**	**24.9**	**-965**	**-3.5**	2.2	**2.1**	**-0.1**
Gangwon	3,484	3.2	**3,482**	**3.2**	**-2**	**-0.1**	2.3	**2.3**	**0.0**
Chungbuk	3,486	3.2	**3,446**	**3.2**	**-40**	**-1.1**	2.2	**2.2**	**0.0**
Chungnam	4,724	4.3	**4,682**	**4.4**	**-42**	**-0.9**	2.3	**2.3**	**0.0**
Jeonbuk	3,755	3.4	**3,979**	**3.7**	**224**	**6.0**	2.0	**2.1**	**0.1**
Jeonnam	4,033	3.7	**3,965**	**3.7**	**-68**	**-1.7**	2.1	**2.1**	**0.0**
Gyeongbuk	5,348	4.9	**5,375**	**5.0**	**27**	**0.5**	2.0	**2.0**	**0.0**
Gyeongnam	7,368	6.8	**7,486**	**7.0**	**118**	**1.6**	2.2	**2.2**	**0.0**
Jeju	1,447	1.3	**1,552**	**1.4**	**105**	**7.3**	2.4	**2.5**	**0.1**

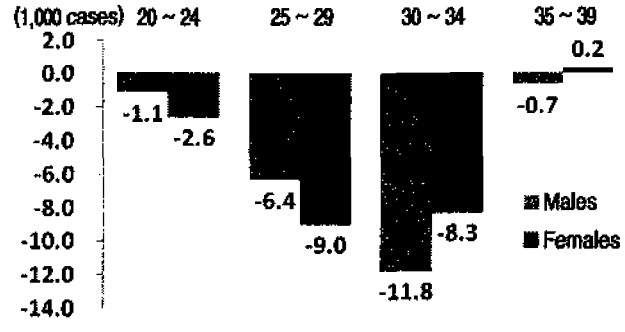
* Including overseas divorces

[Marriage Statistics in 2016]

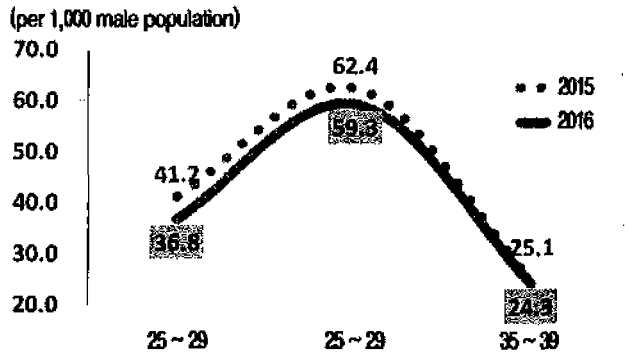
Number of marriages and crude marriage rate (1970-2016)



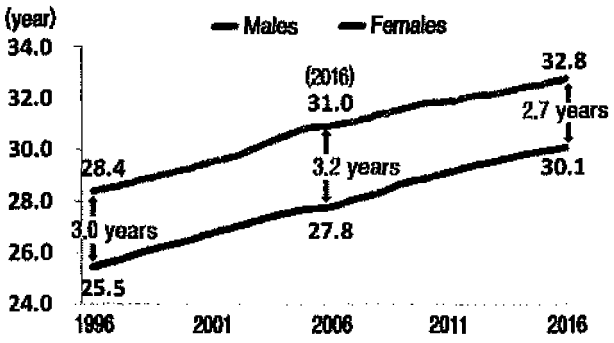
Change in the number of marriages by age group (2016)



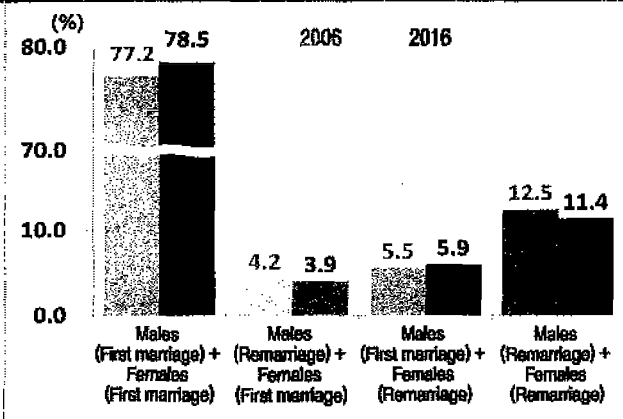
Marriage rate by age group of males (2016)



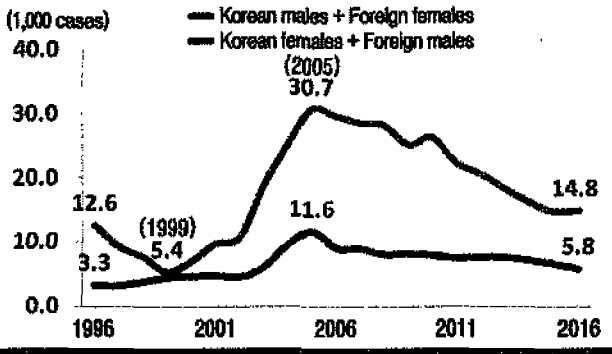
Mean age at first marriage (1996-2016)



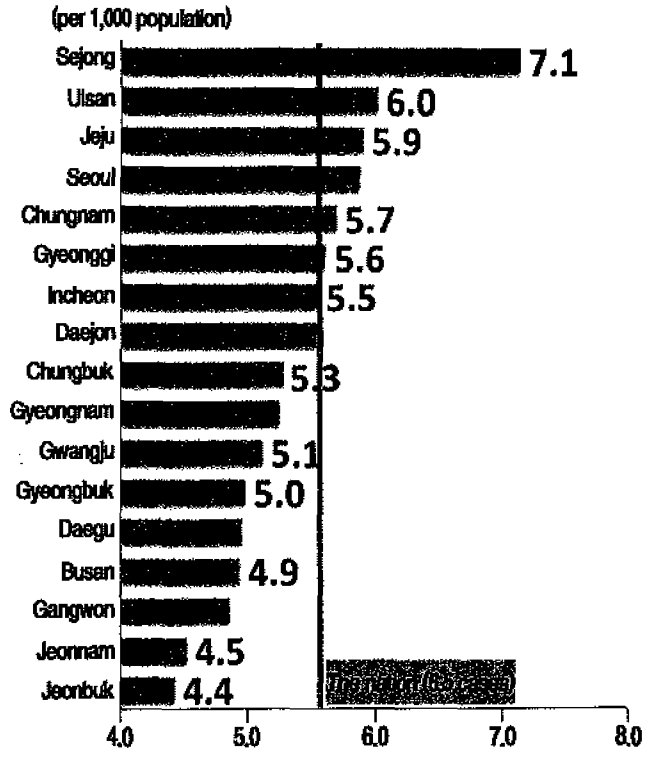
Composition by marriage type (2006, 2016)

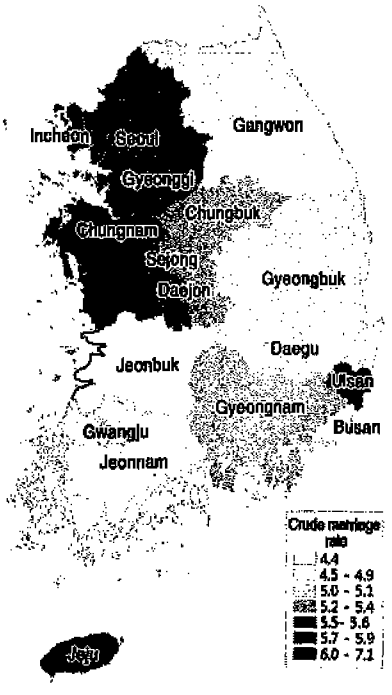


Number of marriages with a foreign spouse (1996-2016)



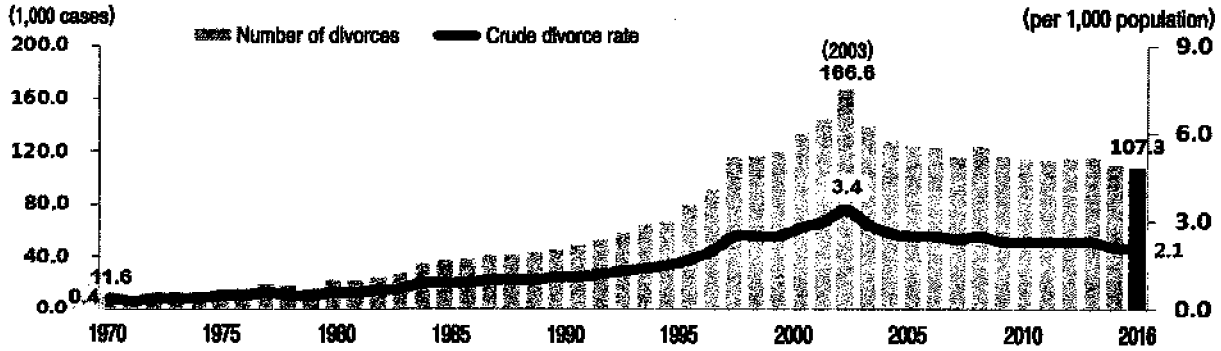
Crude marriage rate by province (2016)



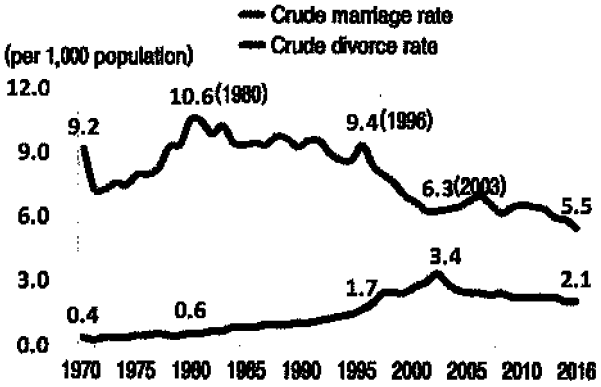


[Divorce Statistics in 2016]

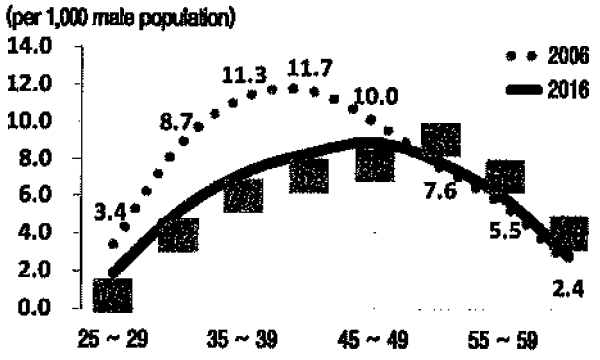
Number of divorces and crude divorce rate (1970-2016)



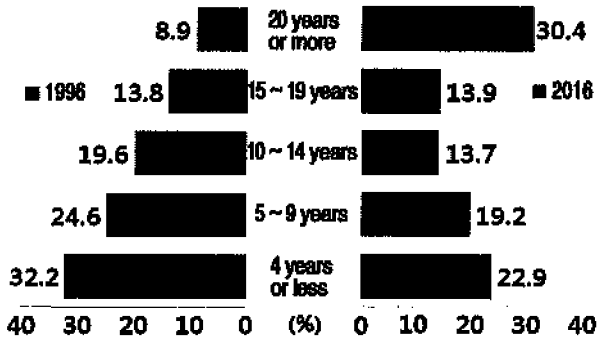
Crude marriage rate and crude divorce rate (1970-2016)



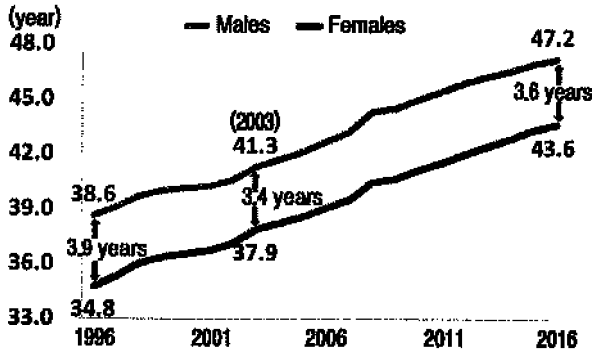
Divorce rate by age group of males (2006, 2016)



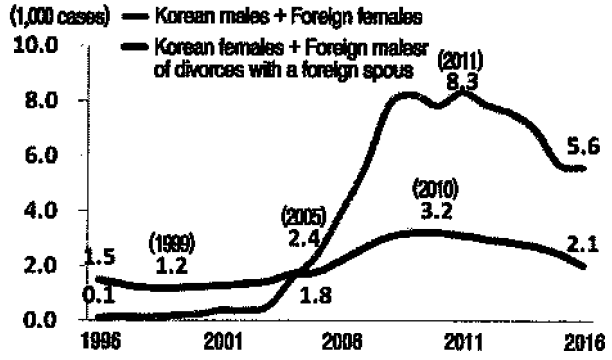
Composition of divorces by mean duration of marriage (1996, 2016)



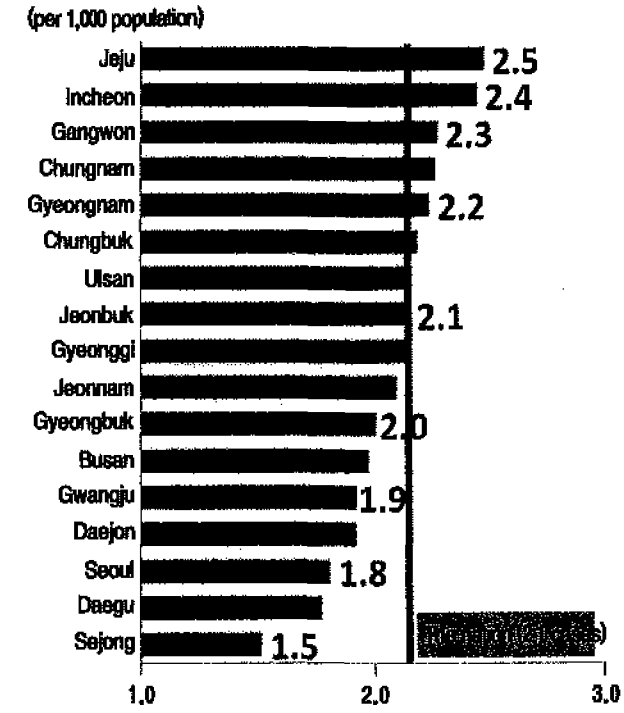
Mean age at divorce (1996-2016)

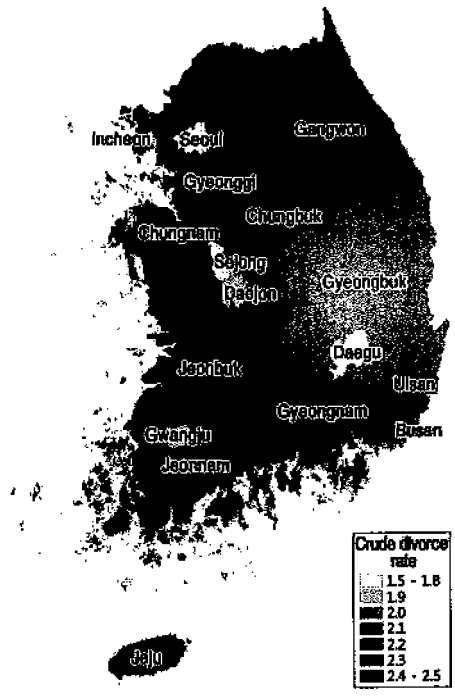


Number of divorces with a foreign spouse (1996-2016)



Crude divorce rate by province (2016)





Marriage and Divorce Statistics in 2015

I. Marriage

The number of marriages went down by 0.9 percent (2.7 thousand cases) to 302.8 thousand cases in 2015.

○ The crude marriage rate (the number of marriages per 1,000 population) stood at 5.9 cases in 2015, which recorded the lowest figure after the first-time statistical production in 1970.

[Table] Number of marriages and crude marriage rate (2005-2015)

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	**2015**
Number of marriages (thousand cases)	314.3	330.6	343.6	327.7	309.8	326.1	329.1	327.1	322.8	305.5	**302.8**
Change (thousand cases)	5.7	16.3	12.9	-15.8	-18.0	16.3	3.0	-2.0	-4.3	-17.3	**-2.7**
Percent (%)	1.8	5.2	3.9	-4.6	-5.5	5.3	0.9	-0.6	-1.3	-5.4	**-0.9**
Crude marriage rate*	6.5	6.8	7.0	6.6	6.2	6.5	6.6	6.5	6.4	6.0	**5.9**

* The number of marriages per 1,000 population

○ The couples of 'males at first marriage and females at first marriage' occupied 78.7 percent of the total marriages. The couples of 'males at remarriage and females at remarriage' occupied 11.5 percent of the total marriages.

○ The mean age at first marriage for males was 32.6 years in 2015, up 0.2 year from 2014. The mean age at first marriage for females was 30.0 years in 2015, up 0.2 year from 2014.

- The mean age at first marriage for females exceeded 30 years for the first time.

[Table] Mean age at first marriage and remarriage (2005-2015)

(Unit: year)

		2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	**2015**	**Change* From 2014**	**Change* From 2005**
First marriage	Males	30.9	31.0	31.1	31.4	31.6	31.8	31.9	32.1	32.2	32.4	**32.6**	**0.2**	**1.7**
	Females	27.7	27.8	28.1	28.3	28.7	28.9	29.1	29.4	29.6	29.8	**30.0**	**0.2**	**2.2**
Remarriage	Males	44.1	44.4	44.8	45.0	45.7	46.1	46.3	46.6	46.8	47.1	**47.6**	**0.5**	**3.5**
	Females	39.6	39.7	40.1	40.3	41.1	41.6	41.9	42.3	42.5	43.0	**43.5**	**0.5**	**3.9**

* Rounded to 2 decimal places

○ Older female couples at first marriage occupied 16.3 percent of the total marriages, which showed an ever-increasing trend.

- Older male couples occupied 67.6 percent of the total marriages, which showed a decreasing trend.

○ The number of marriages with foreign spouses declined by 8.8 percent (2 thousand cases) to 21.3 thousand cases in 2015.

- In 2015, marriages with a foreign spouse occupied 7.0 percent of the total marriages, down 0.6%p from 2014.

[Table] Marriage with a foreign spouse (2005-2015)

(Unit: thousand cases, %)

	2005	2006	2007	2008	2009	2010	2011
Number of marriages	314.3	330.6	343.6	327.7	309.8	326.1	329.1
Marriage with a foreign spouse	42.4	38.8	37.6	36.2	33.3	34.2	29.8
Korean males and foreign females	30.7	29.7	28.6	28.2	25.1	26.3	22.3
Korean females and foreign males	11.6	9.1	9.0	8.0	8.2	8.0	7.5

	2012	2013	2014	**2015**	**Percent**	**Year-on-year percent change**
Number of marriages	327.1	322.8	305.5	**302.8**	**100.0**	**-0.9**
Marriage with a foreign spouse	28.3	26.0	23.3	**21.3**	**7.0**	**-8.8**
Korean males and foreign females	20.6	18.3	16.2	**14.7**	**4.8**	**-9.1**
Korean females and foreign males	7.7	7.7	7.2	**6.6**	**2.2**	**-7.9**

○ As for the crude marriage rate by province, Sejong recorded the highest figures of 8.2 cases, which was followed by Seoul (6.5 cases) and Ulsan (6.4 cases).

[Table] Number of marriages and crude marriage rate by province (2014-2015)

(Unit: case, %, per 1,000 population)

	Number of marriages						*Crude marriage rate*		
	2014	Percent	**2015**	**Percent**	**Year-on-year Change**	**Year-on-year Percent change**	2014	**2015**	**Year-on-year change**
The nation*	305,507	100.0	**302,828**	**100.0**	**-2,679**	**-0.9**	6.0	**5.9**	**-0.1**
Seoul	64,823	21.2	**64,193**	**21.2**	**-630**	**-1.0**	6.5	**6.5**	**0.0**
Busan	18,927	6.2	**18,553**	**6.1**	**-374**	**-2.0**	5.4	**5.3**	**-0.1**
Daegu	12,552	4.1	**12,545**	**4.1**	**-7**	**-0.1**	5.1	**5.1**	**0.0**
Incheon	17,251	5.6	**17,118**	**5.7**	**-133**	**-0.8**	6.0	**5.9**	**-0.1**
Gwangju	8,213	2.7	**7,945**	**2.6**	**-268**	**-3.3**	5.6	**5.4**	**-0.2**
Daejeon	9,118	3.0	**8,805**	**2.9**	**-313**	**-3.4**	6.0	**5.8**	**-0.2**
Ulsan	7,674	2.5	**7,483**	**2.5**	**-191**	**-2.5**	6.6	**6.4**	**-0.2**
Sejong	920	0.3	**1,498**	**0.5**	**578**	**62.8**	6.7	**8.2**	**1.5**
Gyeonggi	74,306	24.3	**73,950**	**24.4**	**-356**	**-0.5**	6.1	**6.0**	**-0.1**
Gangwon	7,785	2.5	**7,876**	**2.6**	**91**	**1.2**	5.1	**5.1**	**0.0**
Chungbuk	8,774	2.9	**8,872**	**2.9**	**98**	**1.1**	5.6	**5.6**	**0.0**
Chungnam	12,040	3.9	**12,331**	**4.1**	**291**	**2.4**	5.9	**6.0**	**0.1**
Jeonbuk	9,211	3.0	**9,060**	**3.0**	**-151**	**-1.6**	5.0	**4.9**	**-0.1**
Jeonnam	9,357	3.1	**9,275**	**3.1**	**-82**	**-0.9**	4.9	**4.9**	**0.0**
Gyeongbuk	14,183	4.6	**14,273**	**4.7**	**90**	**0.6**	5.3	**5.3**	**0.0**
Gyeongnam	19,056	6.2	**18,671**	**6.2**	**-385**	**-2.0**	5.7	**5.6**	**-0.1**
Jeju	3,593	1.2	**3,676**	**1.2**	**83**	**2.3**	6.0	**6.0**	**0.0**

* Including overseas marriages

- The mean age at first marriage for males and females in Seoul was 33.0 years and 30.8 years, respectively, which recorded the highest figure.

[Table] Mean age at marriage by province (2014-2015)

(Unit: year)

	Mean age at first marriage						Mean age at remarriage					
	2014		**2015**		**Year-on-year change****		2014		**2015**		**Year-on-year change****	
	Males	Females	**Males**	**Females**	**Males**	**Females**	Males	Females	**Males**	**Females**	**Males**	**Females**
The nation*	32.4	29.8	**32.6**	**30.0**	**0.2**	**0.2**	47.1	43.0	**47.6**	**43.5**	**0.5**	**0.5**
Seoul	32.8	30.7	**33.0**	**30.8**	**0.1**	**0.1**	48.1	44.4	**48.5**	**45.0**	**0.4**	**0.6**
Busan	32.7	30.4	**32.9**	**30.5**	**0.2**	**0.2**	47.7	43.6	**48.6**	**44.9**	**0.9**	**1.3**
Daegu	32.3	30.0	**32.5**	**30.2**	**0.2**	**0.2**	47.0	43.3	**47.2**	**43.6**	**0.2**	**0.4**
Incheon	32.3	29.6	**32.5**	**29.9**	**0.2**	**0.2**	47.0	43.3	**47.5**	**44.1**	**0.5**	**0.8**
Gwangju	32.5	29.9	**32.8**	**30.1**	**0.3**	**0.2**	46.9	42.7	**46.2**	**42.4**	**-0.7**	**-0.3**
Daejeon	32.1	29.7	**32.3**	**29.8**	**0.1**	**0.1**	46.4	42.9	**47.8**	**43.9**	**1.4**	**1.1**
Ulsan	32.0	29.6	**32.0**	**29.7**	**-0.1**	**0.1**	45.6	42.4	**46.1**	**42.2**	**0.5**	**-0.2**
Sejong	32.9	29.8	**32.5**	**30.3**	**-0.4**	**0.5**	46.5	42.7	**47.3**	**42.4**	**0.7**	**-0.3**
Gyeonggi	32.4	29.9	**32.6**	**30.0**	**0.1**	**0.1**	46.9	43.3	**47.4**	**43.8**	**0.5**	**0.5**
Gangwon	32.2	29.4	**32.2**	**29.6**	**0.0**	**0.2**	47.3	43.7	**48.1**	**44.1**	**0.8**	**0.4**
Chungbuk	31.9	29.1	**32.2**	**29.5**	**0.3**	**0.4**	46.7	42.5	**47.2**	**42.9**	**0.5**	**0.3**
Chungnam	32.0	29.0	**32.1**	**29.2**	**0.0**	**0.2**	46.1	42.1	**47.2**	**43.1**	**1.1**	**1.0**
Jeonbuk	32.3	29.4	**32.6**	**29.4**	**0.3**	**0.0**	46.9	42.4	**47.5**	**42.9**	**0.6**	**0.5**
Jeonnam	32.3	29.2	**32.6**	**29.3**	**0.3**	**0.2**	47.7	43.5	**47.6**	**43.0**	**0.0**	**-0.6**
Gyeongbuk	32.0	29.5	**32.3**	**29.5**	**0.3**	**0.1**	47.2	42.7	**47.8**	**43.4**	**0.6**	**0.7**
Gyeongnam	32.2	29.6	**32.3**	**29.8**	**0.1**	**0.1**	47.0	43.1	**47.5**	**42.9**	**0.5**	**-0.2**
Jeju	32.4	29.8	**32.8**	**30.1**	**0.4**	**0.3**	46.8	42.6	**47.4**	**43.7**	**0.6**	**1.1**

* Including overseas marriages

** Rounded to 2 decimal places

II. Divorce

The number of divorces went down by 5.5 percent (6.4 thousand cases) to 109.2 thousand cases in 2015.

○ The crude divorce rate (the number of divorces per 1,000 population) stood at 2.1 cases in 2015, which recorded the lowest figure after recording 2.0 cases in 1997.

○ The divorce rate of married people (the number of divorces per 1,000 married population) stood at 4.4 cases in 2015, which dropped by 0.3 case from 2014.

[Table] Number of divorces, crude divorce rate and divorce rate of married people (2005-2015)

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	**2015**
Number of divorces (thousand cases)	128.0	124.5	124.1	116.5	124.0	116.9	114.3	114.3	115.3	115.5	**109.2**
Change (thousand cases)	-10.9	-3.5	-0.5	-7.5	7.5	-7.1	-2.6	0.0	1.0	0.2	**-6.4**
Percent change (%)	-7.8	-2.7	-0.4	-6.1	6.4	-5.8	-2.2	0.0	0.9	0.2	**-5.5**
Crude divorce rate*	2.6	2.5	2.5	2.4	2.5	2.3	2.3	2.3	2.3	2.3	**2.1**
Divorce rate of married people**	5.5	5.3	5.2	4.9	5.2	4.8	4.7	4.7	4.7	4.7	**4.4**

* Per 1,000 population

** Per 1,000 married population aged 15 or more

○ The mean age at divorce for males and females was 46.9 years and 43.3 years, respectively. These figures showed an upward trend.

[Table] Mean age at divorce (2005-2015)

(Unit: year)

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	**2015**	**Change***	
												From 2014	**From 2005**
Males	42.1	42.6	43.2	44.3	44.5	45.0	45.4	45.9	46.2	46.5	**46.9**	**0.4**	**4.9**
Females	38.6	39.0	39.5	40.5	40.7	41.1	41.5	42.0	42.4	42.8	**43.3**	**0.5**	**4.8**

* Rounded to 2 decimal places

○ The mean duration of marriage before getting divorced was 14.6 years in 2015, up 0.3 year from the previous year.

- The duration of '20 years or more' of marriage occupied the highest share at 29.9 percent, which was followed by the duration of 'less than 5 years' (22.6 percent).

[Table] Number of divorces by mean duration of marriage before getting divorced (2005-2015)

(Unit: thousand cases, %, year)

	2005	Percent	2006	2007	2008	2009	2010
Total*	128.0	(100.0)	124.5	124.1	116.5	124.0	116.9
Less than 5 years	33.1	(25.9)	33.0	33.7	33.1	33.7	31.5
5 to 9 years	28.5	(22.3)	27.3	25.5	21.7	23.6	22.0
10 to 14 years	23.6	(18.4)	22.4	21.7	18.3	20.0	18.6
15 to 19 years	18.9	(14.8)	18.0	18.3	16.5	18.4	16.9
20 years or more	23.9	(18.6)	23.8	25.0	26.9	28.3	27.8
- 20 to 24 years	12.6	(9.8)	12.0	11.7	11.9	12.8	12.6
- 25 to 29 years	6.5	(5.0)	6.7	7.2	7.9	8.3	7.7
- 30 years or more	4.8	(3.7)	5.2	6.1	7.1	7.2	7.5
Mean duration of marriage	12.0	-	12.1	12.3	12.8	12.9	13.0

	2011	2012	2013	2014	**2015**	**Percent**	**Year-on-year percent change**
Total*	114.3	114.3	115.3	115.5	**109.2**	**100.0**	**-5.5**
Less than 5 years	30.7	28.2	27.3	27.2	**24.7**	**22.6**	**-9.2**
5 to 9 years	21.7	21.5	21.5	22.0	**20.8**	**19.1**	**-5.3**
10 to 14 years	17.4	17.7	16.9	16.3	**14.9**	**13.6**	**-8.7**
15 to 19 years	16.2	16.6	17.2	17.0	**16.2**	**14.8**	**-4.5**
20 years or more	28.3	30.2	32.4	33.1	**32.6**	**29.9**	**-1.6**
- 20 to 24 years	12.6	13.6	14.4	14.2	**13.4**	**12.3**	**-5.7**
- 25 to 29 years	7.7	8.0	8.7	8.6	**8.8**	**8.1**	**2.2**
- 30 years or more	7.9	8.6	9.4	10.3	**10.4**	**9.6**	**1.1**
Mean duration of marriage	13.2	13.7	14.1	14.3	**14.6**	-	-

* Including 'Unidentified'

○ The number of divorces from foreign spouses declined by 15.6 percent (1.5 thousand cases) to 8.2 thousand cases in 2015.

- In 2015, divorces from foreign spouses occupied 7.5 percent of the total divorces, down 0.9%p from 2014.

[Table] Divorce from a foreign spouse (2005-2015)

(Unit: thousand cases, %)

	2005	2006	2007	2008	2009	2010	2011
Number of divorces	128.0	124.5	124.1	116.5	124.0	116.9	114.3
Divorce from a foreign spouse	4.2	6.1	8.3	11.0	11.5	11.1	11.5
Korean males and foreign females	2.4	3.9	5.6	7.9	8.2	7.9	8.3
Korean females and foreign males	1.8	2.2	2.7	3.1	3.2	3.2	3.1

	2012	2013	2014	**2015**	**Percent**	**Year-on-year percent change**
Number of divorces	114.3	115.3	115.5	**109.2**	**100.0**	**-5.5**
Divorce from a foreign spouse	10.9	10.5	9.8	**8.2**	**7.5**	**-15.6**
Korean males and foreign females	7.9	7.6	7.0	**5.7**	**5.3**	**-17.9**
Korean females and foreign males	3.0	2.9	2.8	**2.5**	**2.3**	**-9.5**

○ As for the crude divorce rate by province, Incheon recorded the highest figure of 2.5 cases, which was followed by Jeju (2.4 cases), Chungnam (2.3 cases) and Gangwon (2.3 cases).

[Table] Number of divorces and crude divorce rate by province (2014-2015)

(Unit: case, %, per 1,000 population)

	Number of divorces						Crude divorce rate		
	2014	Percent	**2015**	**Percent**	**Year-on-year Change**	**Year-on-year Percent change**	2014	**2015**	**Year-on-year change**
The nation*	115,510	100.0	**109,153**	**100.0**	**-6,357**	**-5.5**	2.3	**2.1**	**-0.1**
Seoul	19,477	16.9	**18,176**	**16.7**	**-1,301**	**-6.7**	2.0	**1.8**	**-0.1**
Busan	7,345	6.4	**6,649**	**6.1**	**-696**	**-9.5**	2.1	**1.9**	**-0.2**
Daegu	4,794	4.2	**4,497**	**4.1**	**-297**	**-6.2**	1.9	**1.8**	**-0.1**
Incheon	7,417	6.4	**7,116**	**6.5**	**-301**	**-4.1**	2.6	**2.5**	**-0.1**
Gwangju	3,051	2.6	**2,842**	**2.6**	**-209**	**-6.9**	2.1	**1.9**	**-0.1**
Daejeon	3,221	2.8	**2,999**	**2.7**	**-222**	**-6.9**	2.1	**2.0**	**-0.1**
Ulsan	2,731	2.4	**2,406**	**2.2**	**-325**	**-11.9**	2.4	**2.1**	**-0.3**
Sejong	280	0.2	**324**	**0.3**	**44**	**15.7**	2.0	**1.8**	**-0.3**
Gyeonggi	28,892	25.0	**27,688**	**25.4**	**-1,204**	**-4.2**	2.4	**2.2**	**-0.1**
Gangwon	3,630	3.1	**3,484**	**3.2**	**-146**	**-4.0**	2.4	**2.3**	**-0.1**
Chungbuk	3,671	3.2	**3,486**	**3.2**	**-185**	**-5.0**	2.3	**2.2**	**-0.1**
Chungnam	4,915	4.3	**4,724**	**4.3**	**-191**	**-3.9**	2.4	**2.3**	**-0.1**
Jeonbuk	4,091	3.5	**3,755**	**3.4**	**-336**	**-8.2**	2.2	**2.0**	**-0.2**
Jeonnam	4,135	3.6	**4,033**	**3.7**	**-102**	**-2.5**	2.2	**2.1**	**-0.1**
Gyeongbuk	5,503	4.8	**5,348**	**4.9**	**-155**	**-2.8**	2.1	**2.0**	**-0.1**
Gyeongnam	7,602	6.6	**7,368**	**6.8**	**-234**	**-3.1**	2.3	**2.2**	**-0.1**
Jeju	1,530	1.3	**1,447**	**1.3**	**-83**	**-5.4**	2.6	**2.4**	**-0.2**

* Including overseas divorces

Marriage and Divorce Statistics in 2014

Ⅰ. Marriage

The number of marriages fell by 5.4 percent from the previous year. The mean age at first marriage was 32.4 years for males and 29.8 years for females.

○ The number of marriages went down by 17.3 thousand cases (5.4 percent) to 305.5 thousand cases in 2014.

- The crude marriage rate (the number of marriages per 1,000 people) stood at 6.0 cases in 2014, down 0.4 from 2013.

[Table] Number of marriages and crude marriage rate

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	**2014**
Number of marriages (thousand cases)	308.6	314.3	330.6	343.6	327.7	309.8	326.1	329.1	327.1	322.8	**305.5**
Change (thousand cases)	6.1	5.7	16.3	12.9	-15.8	-18.0	16.3	3.0	-2.0	-4.3	**-17.3**
Percent (%)	2.0	1.8	5.2	3.9	-4.6	-5.5	5.3	0.9	-0.6	-1.3	**-5.4**
Crude marriage rate*	6.4	6.5	6.8	7.0	6.6	6.2	6.5	6.6	6.5	6.4	**6.0**

* The number of marriages per 1,000 population

○ The mean age at first marriage for males was 32.4 years in 2014, up 0.2 from 2013. The mean age at first marriage for females was 29.8 years in 2014, up 0.2 from 2013.

[Table] Mean age at first marriage and remarriage

(Unit: year)

		2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	**2014**	**Change**	
													From 2013	**From 2004**
First marriage	Males	30.5	30.9	31.0	31.1	31.4	31.6	31.8	31.9	32.1	32.2	**32.4**	**0.2**	**1.9**
	Females	27.5	27.7	27.8	28.1	28.3	28.7	28.9	29.1	29.4	29.6	**29.8**	**0.2**	**2.3**
Remarriage	Males	43.8	44.1	44.4	44.8	45.0	45.7	46.1	46.3	46.6	46.8	**47.1**	**0.4**	**3.4**
	Females	39.2	39.6	39.7	40.1	40.3	41.1	41.6	41.9	42.3	42.5	**43.0**	**0.5**	**3.8**

○ The number of marriages with foreign spouses declined by 2.6 thousand cases (10.2 percent) to 23.3 thousand cases in 2014.

- The marriage between Korean males and foreign females fell by 11.8 percent from the previous year.

- The marriage between Korean females and foreign males dropped by 6.4 percent from the previous year.

[Table] Marriage with a foreign spouse

(Unit: thousand cases, %)

	2004	2005	2006	2007	2008	2009	2010	2011
Number of marriages	308.6	314.3	330.6	343.6	327.7	309.8	326.1	329.1
Marriage with a foreign spouse	34.6	42.4	38.8	37.6	36.2	33.3	34.2	29.8
Korean males and foreign females	25.1	30.7	29.7	28.6	28.2	25.1	26.3	22.3
Korean females and foreign males	9.5	11.6	9.1	9.0	8.0	8.2	8.0	7.5

	2012	2013	**2014**	**Percent**	**Year-on-year percent change**
Number of marriages	327.1	322.8	**305.5**	**100.0**	**-5.4**
Marriage with a foreign spouse	28.3	26.0	**23.3**	**7.6**	**-10.2**
Korean males and foreign females	20.6	18.3	**16.2**	**5.3**	**-11.8**
Korean females and foreign males	7.7	7.7	**7.2**	**2.3**	**-6.4**

Ⅱ. Divorce

The number of divorces rose by 0.2 percent from 2013. The mean duration of marriage for divorces was 14.3 years in 2014.

○ The number of divorces was 115.5 thousand cases in 2014, which rose by 0.2 thousand cased (or 0.2 percent) from 2013.

- The crude divorce rate (the number of divorces per 1,000 people) stood at 2.3 cases in 2014, which remained the same as the previous year.

[Table] Number of divorces, crude divorce rate and divorce rate of married people

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	**2014**
Number of divorces (thousand cases)	138.9	128.0	124.5	124.1	116.5	124.0	116.9	114.3	114.3	115.3	**115.5**
Change (thousand cases)	-27.7	-10.9	-3.5	-0.5	-7.5	7.5	-7.1	-2.6	0.0	1.0	**0.2**
Percent change (%)	-16.6	-7.8	-2.7	-0.4	-6.1	6.4	-5.8	-2.2	0.0	0.9	**0.2**
Crude divorce rate*	2.9	2.6	2.5	2.5	2.4	2.5	2.3	2.3	2.3	2.3	**2.3**
Divorce rate of married people**	6.0	5.5	5.3	5.2	4.9	5.2	4.8	4.7	4.7	4.7	**4.7**

* The number of divorces per 1,000 population

** The number of divorces per 1,000 married population aged 15 and over

○ The mean duration of marriage for divorces was 14.3 years in 2014, up 0.2 year from the previous year.

[Table] Number of divorces by mean duration of marriage at divorce

(Unit: thousand cases, % year)

	2004	Percent	2005	2006	2007	2008	2009
Total*	138.9	(100.0)	128.0	124.5	124.1	116.5	124.0
Less than 4 years	35.0	(25.2)	33.1	33.0	33.7	33.1	33.7
5 to 9 years	31.8	(22.9)	28.5	27.3	25.5	21.7	23.6
10 to 14 years	26.3	(18.9)	23.6	22.4	21.7	18.3	20.0
15 to 19 years	20.5	(14.7)	18.9	18.0	18.3	16.5	18.4
20 years or more	25.4	(18.3)	23.9	23.8	25.0	26.9	28.3
- 20 to 24 years	14.2	(10.2)	12.6	12.0	11.7	11.9	12.8
- 25 to 29 years	6.6	(4.7)	6.5	6.7	7.2	7.9	8.3
- 30 years or more	4.6	(3.3)	4.8	5.2	6.1	7.1	7.2
Mean duration of marriage	12.0	-	12.0	12.1	12.3	12.8	12.9

	2010	2011	2012	2013	**2014**	**Percent**	**Year-on-year percent change**
Total*	116.9	114.3	114.3	115.3	**115.5**	**100.0**	**0.2**
Less than 4 years	31.5	30.7	28.2	27.3	**27.2**	**23.5**	**-0.5**
5 to 9 years	22.0	21.7	21.5	21.5	**22.0**	**19.0**	**2.0**
10 to 14 years	18.6	17.4	17.7	16.9	**16.3**	**14.1**	**-3.4**
15 to 19 years	16.9	16.2	16.6	17.2	**17.0**	**14.7**	**-1.2**
20 years or more	27.8	28.3	30.2	32.4	**33.1**	**28.7**	**2.2**
- 20 to 24 years	12.6	12.6	13.6	14.4	**14.2**	**12.3**	**-1.1**
- 25 to 29 years	7.7	7.7	8.0	8.7	**8.6**	**7.5**	**-0.9**
- 30 years or more	7.5	7.9	8.6	9.4	**10.3**	**8.9**	**10.1**
Mean duration of marriage	13.0	13.2	13.7	14.1	**14.3**	**-**	**1.5**

* Including 'Unidentified'

○ The divorced couples who didn't have a minor child occupied 50.3 percent of the total divorced couples.

[Table] Number of divorces by minor child

(Unit: thousand cases, %)

	2004	Percent	2005	2006	2007	2008	2009
Total*	138.9	(100.0)	128.0	124.5	124.1	116.5	124.0
Have a minor child	91.1	(65.6)	81.2	75.7	72.8	63.0	68.5
1 person	39.1	(28.1)	35.0	33.4	32.2	28.5	31.5
2 persons	45.5	(32.8)	40.2	36.9	35.2	29.8	31.9
3 persons or more	6.5	(4.7)	6.0	5.5	5.4	4.7	5.1
Have no minor child	46.4	(33.4)	45.4	48.2	50.9	52.9	55.1

	2010	2011	2012	2013	**2014**	**Percent**	**Year-on-year percent change**
Total*	116.9	114.3	114.3	115.3	**115.5**	**100.0**	**0.2**
Have a minor child	62.9	60.1	60.3	59.0	**57.2**	**49.5**	**-3.1**
1 person	30.0	29.0	29.9	30.1	**30.0**	**25.9**	**-0.5**
2 persons	28.3	26.7	26.2	24.7	**23.3**	**20.2**	**-5.4**
3 persons or more	4.6	4.4	4.1	4.2	**3.9**	**3.3**	**-8.4**
Have no minor child	53.7	53.9	53.7	56.1	**58.1**	**50.3**	**3.5**

* Including 'Unidentified'

○ The number of divorces from foreign spouses declined by 0.7 thousand cases (6.9 percent) to 9.8 thousand cases in 2014.

- In 2014, divorces from foreign spouses occupied 8.4 percent of the total divorces, down 0.6%p from 2013.

[Table] Divorce from a foreign spouse

(Unit: thousand cases, %)

	2004	2005	2006	2007	2008	2009	2010	2011
Number of divorces	138.9	128.0	124.5	124.1	116.5	124.0	116.9	114.3
Divorce from a foreign spouse	3.3	4.2	6.1	8.3	11.0	11.5	11.1	11.5
Korean males and foreign females	1.6	2.4	3.9	5.6	7.9	8.2	7.9	8.3
Korean females and foreign males	1.7	1.8	2.2	2.7	3.1	3.2	3.2	3.1

	2012	2013	**2014**	**Percent**	**Year-on-year percent change**
Number of divorces	114.3	115.3	**115.5**	**100.0**	**0.2**
Divorce from a foreign spouse	10.9	10.5	**9.8**	**8.4**	**-6.9**
Korean males and foreign females	7.9	7.6	**7.0**	**6.1**	**-7.8**
Korean females and foreign males	3.0	2.9	**2.8**	**2.4**	**-4.7**

Marriage and Divorce Statistics in 2013

I. Marriage

The number of marriages fell by 1.3 percent from the previous year. The mean age at first marriage was 32.2 years for males and 29.6 years for females.

○ The number of marriages went down by 4.3 thousand cases (1.3 percent) to 322.8 thousand cases in 2013.

- The crude marriage rate (the number of marriages per 1,000 people) stood at 6.4 cases in 2013, down 0.1 from 2012.

[Table] Number of marriages and crude marriage rate

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Number of marriages (thousand cases)	302.5	308.6	314.3	330.6	343.6	327.7	309.8	326.1	329.1	327.1	322.8
Change (thousand cases)	-2.4	6.1	5.7	16.3	12.9	-15.8	-18.0	16.3	3.0	-2.0	-4.3
Percent (%)	-0.8	2.0	1.8	5.2	3.9	-4.6	-5.5	5.3	0.9	-0.6	-1.3
Crude marriage rate*	6.3	6.4	6.5	6.8	7.0	6.6	6.2	6.5	6.6	6.5	6.4

* The number of marriages per 1,000 population

○ The mean age at first marriage for males was 32.2 years in 2013, up 0.1 from 2012. The mean age at first marriage for females was 29.6 years in 2013, up 0.2 from 2012.

[Table] Mean age at first marriage and remarriage

(Unit: year)

		2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Year-on-year change
First marriage	Males	30.1	30.5	30.9	31.0	31.1	31.4	31.6	31.8	31.9	32.1	32.2	0.1
	Females	27.3	27.5	27.7	27.8	28.1	28.3	28.7	28.9	29.1	29.4	29.6	0.2
Remarriage	Males	42.8	43.8	44.1	44.4	44.8	45.0	45.7	46.1	46.3	46.6	46.8	0.1
	Females	38.3	39.2	39.6	39.7	40.1	40.3	41.1	41.6	41.9	42.3	42.5	0.2

○ The number of marriages with foreign spouses declined by 2.4 thousand to 26.0 thousand cases in 2013.

- The marriage between Korean males and foreign females fell by 11.3 percent from the previous year.
- The marriage between Korean females and foreign males dropped by 0.4 percent from the previous year.

[Table] Marriage with a foreign spouse

(Unit: thousand cases, %)

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Percent	Year-on-year percent change
Number of marriages	302.5	308.6	314.3	330.6	343.6	327.7	309.8	326.1	329.1	327.1	322.8	100.0	-1.3
Marriage with a foreign spouse	24.8	34.6	42.4	38.8	37.6	36.2	33.3	34.2	29.8	28.3	26.0	8.0	-8.3
■ Korean males and foreign females	18.8	25.1	30.7	29.7	28.6	28.2	25.1	26.3	22.3	20.6	18.3	5.7	-11.3
■ Korean females and foreign males	6.0	9.5	11.6	9.1	9.0	8.0	8.2	8.0	7.5	7.7	7.7	2.4	-0.4

II. Divorce

The number of divorces rose by 0.9 percent from 2012. The mean duration of marriage for divorces was 14.1 years in 2013.

○ The number of divorces was 115.3 thousand cases in 2013, which rose by 1 thousand cased (or 0.9 percent) from 2012.

- The crude divorce rate (the number of divorces per 1,000 people) stood at 2.3 cases in 2013, which remained the same as the previous year.

[Table] Number of divorces, crude divorce rate and divorce rate of married people

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Number of divorces (thousand cases)	166.6	138.9	128.0	124.5	124.1	116.5	124.0	116.9	114.3	114.3	115.3
Change (thousand cases)	21.7	-27.7	-10.9	-3.5	-0.5	-7.5	7.5	-7.1	-2.6	0.0	1.0
Percent change (%)	15.0	-16.6	-7.8	-2.7	-0.4	-6.1	6.4	-5.8	-2.2	0.0	0.9
Crude divorce rate*	3.4	2.9	2.6	2.5	2.5	2.4	2.5	2.3	2.3	2.3	2.3
Divorce rate of married people**	7.2	6.0	5.5	5.3	5.2	4.9	5.2	4.8	4.7	4.7	4.7

* The number of divorces per 1,000 population

** The number of divorces per 1,000 married population aged 15 and over

○ The mean duration of marriage for divorces was 14.1 years in 2013, up 0.4 year from the previous year.

- The divorces whose duration of marriage was 15 years or more showed a year-on-year increase. In the meantime, the divorces whose duration of marriage was 14 years or less showed a year-on-year decrease.

○ The number of divorces from foreign spouses declined by 3.7 percent to 10.5 thousand cases in 2013.

- In 2013, divorces from foreign spouses occupied 9.1 percent of the total divorces, down 0.4%p from 9.5 percent in 2012.

[Table] Divorce from a foreign spouse

(Unit: thousand cases, %)

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Percent	Year-on-year percent change
Number of divorces	166.6	138.9	128.0	124.5	124.1	116.5	124.0	116.9	114.3	114.3	115.3	100.0	0.9
Divorce from a foreign spouse	2.0	3.3	4.2	6.1	8.3	11.0	11.5	11.1	11.5	10.9	10.5	9.1	-3.7
■ Korean males and foreign females	0.5	1.6	2.4	3.9	5.6	7.9	8.2	7.9	8.3	7.9	7.6	6.6	-3.7
■ Korean females and foreign males	1.5	1.7	1.8	2.2	2.7	3.1	3.2	3.2	3.1	3.0	2.9	2.5	-3.9

Marriage and Divorce Statistics in 2012

I. Marriage

The number of marriages fell by 0.6 percent from the previous year. The mean age at first marriage was 32.1 years for males and 29.4 years for females.

○ The number of marriages went down by 2 thousand cases (0.6 percent) to 327.1 thousand cases in 2012.

- The crude marriage rate (the number of marriages per 1,000 people) stood at 6.5 cases in 2012, down 0.1 from 2011.

[Table] Number of marriages and crude marriage rate

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Number of marriages (thousand cases)	304.9	302.5	308.6	314.3	330.6	343.6	327.7	309.8	326.1	329.1	327.1
Change (thousand cases)	-13.5	-2.4	6.1	5.7	16.3	12.9	-15.8	-18.0	16.3	3.0	-2.0
Percent (%)	-4.2	-0.8	2.0	1.8	5.2	3.9	-4.6	-5.5	5.3	0.9	-0.6
Crude marriage rate*	6.3	6.3	6.4	6.5	6.8	7.0	6.6	6.2	6.5	6.6	6.5

* The number of marriages per 1,000 population

○ The mean age at first marriage for males was 32.1 years in 2012, up 0.2 from 2011. The mean age at first marriage for females was 29.4 years in 2012, up 0.3 from 2011.

[Table] Mean age at first marriage and remarriage

(Unit: year)

		2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Year-on-year change
First marriage	Males	29.8	30.1	30.5	30.9	31.0	31.1	31.4	31.6	31.8	31.9	32.1	0.2
	Females	27.0	27.3	27.5	27.7	27.8	28.1	28.3	28.7	28.9	29.1	29.4	0.3
Remarriage	Males	42.1	42.8	43.8	44.1	44.4	44.8	45.0	45.7	46.1	46.3	46.6	0.3
	Females	37.9	38.3	39.2	39.6	39.7	40.1	40.3	41.1	41.6	41.9	42.3	0.4

○ The number of marriages with foreign spouses declined by 1.4 thousand to 28.3 thousand cases in 2012.

- The marriage between Korean males and foreign females fell by 7.3 percent from the previous year.

- The marriage between Korean females and foreign males rose by 2.5 percent from the previous year.

[Table] Marriage with a foreign spouse

(Unit: thousand cases, %)

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Percent	Year-on-year percent change
Number of marriages	304.9	302.5	308.6	314.3	330.6	343.6	327.7	309.8	326.1	329.1	327.1	100.0	-0.6
Marriage with a foreign spouse	15.2	24.8	34.6	42.4	38.8	37.6	36.2	33.3	34.2	29.8	28.3	8.7	-4.8
■ Korean males and foreign females	10.7	18.8	25.1	30.7	29.7	28.6	28.2	25.1	26.3	22.3	20.6	6.3	-7.3
■ Korean females and foreign males	4.5	6.0	9.5	11.6	9.1	9.0	8.0	8.2	8.0	7.5	7.7	2.4	2.5

II. Divorce

The number of divorces remained the same as the previous year. The mean duration of marriage for divorces was 13.7 years in 2012.

○ The number of divorces was 114.3 thousand cases in 2012, which remained the same as the previous year.

- The crude divorce rate (the number of divorces per 1,000 people) stood at 2.3 cases in 2012, which remained the same as the previous year.

[Table] Number of divorces, crude divorce rate and divorce rate of married people

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Number of divorces (thousand cases)	144.9	166.6	138.9	128.0	124.5	124.1	116.5	124.0	116.9	114.3	114.3
Change (thousand cases)	10.3	21.7	-27.7	-10.9	-3.5	-0.5	-7.5	7.5	-7.1	-2.6	0.0
Percent change (%)	7.7	15.0	-16.6	-7.8	-2.7	-0.4	-6.1	6.4	-5.8	-2.2	0.0
Crude divorce rate*	3.0	3.4	2.9	2.6	2.5	2.5	2.4	2.5	2.3	2.3	2.3
Divorce rate of married people**	6.3	7.2	6.0	5.5	5.3	5.2	4.9	5.2	4.8	4.7	4.7

* The number of divorces per 1,000 population

** The number of divorces per 1,000 married population aged 15 and over

○ The mean duration of marriage for divorces was 13.7 years in 2012, up 0.5 year from the previous year.

- The divorces whose duration of marriage was 20 years or more occupied 26.4 percent. For the first time, this share was higher than the share (24.7 percent) of divorces whose duration of marriage was 4 years or less.

○ The number of divorces with foreign spouses declined by 5.3 percent to 10.9 thousand cases in 2012.

- Divorces with foreign spouses occupied 9.5 percent in 2012, down 0.5%p from 10.1 percent in 2011.

Marriage and Divorce Statistics in 2011

I. Marriage

The number of marriages rose by 0.9 percent from the previous year. The average age of the first marriage was 31.9 years for males and 29.1 years for females.

○ **The number of marriages went up by 3 thousand cases (0.9 percent) to 329.1 thousand cases in 2011.**

- **The crude marriage rate (the number of marriages per 1,000 people) stood at 6.6 in 2011, up 0.1 from 2010.**

< Table > Number of marriages and crude marriage rate

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Number of marriages (thousand cases)	318.4	304.9	302.5	308.6	314.3	330.6	343.6	327.7	309.8	326.1	329.1
Change (thousand cases)	-13.7	-13.5	-2.4	6.1	5.7	16.3	12.9	-15.8	-18.0	16.3	3.0
Percent (%)	-4.1	-4.2	-0.8	2.0	1.8	5.2	3.9	-4.6	-5.5	5.3	0.9
Crude marriage rate*	6.7	6.3	6.3	6.4	6.5	6.8	7.0	6.6	6.2	6.5	6.6

* The number of marriages per 1,000 population

○ **The average age of the first marriage for males was 31.9 years in 2011, up 0.1 from 2010. The average age of the first marriage for females was 29.1 years in 2011, up 0.2 from 2010.**

< Table > Average age of the first marriage and remarriage

(Unit: age)

		2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
The first marriage	Males	29.5	29.8	30.1	30.5	30.9	31.0	31.1	31.4	31.6	31.8	31.9
	Females	26.8	27.0	27.3	27.5	27.7	27.8	28.1	28.3	28.7	28.9	29.1
Remarriage	Males	42.1	42.1	42.8	43.8	44.1	44.4	44.8	45.0	45.7	46.1	46.3
	Females	37.5	37.9	38.3	39.2	39.6	39.7	40.1	40.3	41.1	41.6	41.9

○ **The number of marriages with foreign spouses declined by 4.5 thousand to 29.7 thousand cases in 2011.**

- **Marriages with foreign spouses occupied 9.0 percent in 2011, down 1.5%p from 10.5 percent in 2010.**

< Table > Marriage with a foreign spouse

(Unit: case, %)

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Number of marriages	318,407	304,877	302,503	308,598	314,304	330,634	343,559	327,715	309,759	326,104	329,087
Marriage with a foreign spouse	14,523	15,202	24,775	34,640	42,356	38,759	37,560	36,204	33,300	34,235	29,762
(Share of marriages with a foreign spouse)	(4.6)	(5.0)	(8.2)	(11.2)	(13.5)	(11.7)	(10.9)	(11.0)	(10.8)	(10.5)	(9.0)
Change	2,918	679	9,573	9,865	7,716	-3,597	-1,199	-1,356	-2,904	935	-4,473
Percent change	25.1	4.7	63.0	39.8	22.3	-8.5	-3.1	-3.6	-8.0	2.8	-13.1
■ Korean males and foreign females	9,684	10,698	18,750	25,105	30,719	29,665	28,580	28,163	25,142	26,274	22,265
Percent change	39.4	10.5	75.3	33.9	22.4	-3.4	-3.7	-1.5	-10.7	4.5	-15.3
■ Korean females and foreign males	4,839	4,504	6,025	9,535	11,637	9,094	8,980	8,041	8,158	7,961	7,497
Percent change	3.8	-6.9	33.8	58.3	22.0	-21.9	-1.3	-10.5	1.5	-2.4	-5.8

II. Divorce

The number of divorces fell by 2.2 percent from the previous year. The divorce rate of married people recorded 4.7 cases in 2011.

○ **The number of divorces went down by 2.6 thousand cases (2.2 percent) to 114.3 thousand cases in 2011.**

- **The crude divorce rate (the number of divorces per 1,000 people) stood at 2.3 in 2011, remaining the same level as the previous year.**

○ **The divorce rate of married people* recorded 4.7 cases in 2011. The number of divorces per 1,000 married couples was 9.4 couples, which recorded the lowest figure since 2001.**

* **The number of divorces per 1,000 married population aged 15 or more**

< Table > Number of divorces, crude divorce rate and divorce rate of married people

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Number of divorces (thousand cases)	134.6	144.9	166.6	138.9	128.0	124.5	124.1	116.5	124.0	116.9	114.3
Change (thousand cases)	15.2	10.3	21.7	-27.7	-10.9	-3.5	-0.5	-7.5	7.5	-7.1	-2.6
Percent change (%)	12.7	7.7	15.0	-16.6	-7.8	-2.7	-0.4	-6.1	6.4	-5.8	-2.2
Crude divorce rate	2.8	3.0	3.4	2.9	2.6	2.5	2.5	2.4	2.5	2.3	2.3
Divorce rate of married people	5.9	6.3	7.2	6.0	5.5	5.3p	5.2p	4.9p	5.2p	4.8p	4.7p
(Number of divorces per 1,000 married couples)	11.8	12.6	14.4	12.0	10.9	10.6p	10.5p	9.8p	10.3p	9.7p	9.4p

p: preliminary

○ **The number of divorces with foreign spouses grew by 0.4 thousand cases to 11.5 thousand cases in 2011.**

- **Divorces with foreign spouses occupied 10.1 percent in 2011, up 0.6%p from 9.5 percent in 2010.**

< Table > Divorces with a foreign spouse

(Unit: case, %)

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Number of divorces	134,608	144,910	166,617	138,932	128,035	124,524	124,072	116,535	123,999	116,858	114,284
Divorces with a foreign spouse	1,694	1,744	2,012	3,300	4,171	6,136	8,294	10,980	1,473	11,088	11,495
(Share of divorces with a foreign spouse)	(1.3)	(1.2)	(1.2)	(2.4)	(3.3)	(4.9)	(6.7)	(9.4)	(9.3)	(9.5)	(10.1)
Change	196	50	268	1,288	871	1,965	2,158	2,686	493	-385	407
Percent change	13.1	3.0	15.4	64.0	26.4	47.1	35.2	32.4	4.5	-3.4	3.7
■ Korean males and foreign females	387	380	547	1,567	2,382	3,933	5,609	7,901	8,246	7,852	8,349
Percent change	56.7	-1.8	43.9	186.5	52	65.1	42.6	40.9	4.4	-4.8	6.3
■ Korean females and foreign males	1,307	1,364	1,465	1,733	1,789	2,203	2,685	3,079	3,227	3,236	3,146
Percent change	4.5	4.4	7.4	18.3	3.2	23.1	21.9	14.7	4.8	0.3	-2.8

Marriage and Divorce Statistics in 2010

The number of marriages rose to 326 thousand cases in 2010. The average age of the first marriage was 31.8 years for males and 28.9 years for females.

○ The number of marriages went up by 16.3 thousand cases (5.3 percent) to 326.1 thousand cases in 2010.

- The crude marriage rate (the number of marriages per 1,000 people) stood at 6.5 in 2010, up 0.3 from 2009.

< Table > Number of marriages and crude marriage rate

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Number of marriages (thousand cases)	332.1	318.4	304.9	302.5	308.6	314.3	330.6	343.6	327.7	309.8	326.1
Change (thousand cases)	-28.3	-13.7	-13.5	-2.4	6.1	5.7	16.3	12.9	-15.8	-18.0	16.3
Percent (%)	-7.9	-4.1	-4.2	-0.8	2.0	1.8	5.2	3.9	-4.6	-5.5	5.3
Crude marriage rate*	7.0	6.7	6.3	6.3	6.4	6.5	6.8	7.0	6.6	6.2	6.5

* The number of marriages per 1,000 population

○ The average age of the first marriage for males was 31.8 years in 2010, up 0.2 from 2009. The average age of the first marriage for females was 28.9 years in 2010, up 0.2 from 2009.

< Table > Average age of the first marriage and remarriages

(Unit: age)

		2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
The first marriage	Males	29.3	29.5	29.8	30.1	30.5	30.9	31.0	31.1	31.4	31.6	31.8
	Females	26.5	26.8	27.0	27.3	27.5	27.7	27.8	28.1	28.3	28.7	28.9
Remarriage	Males	42.0	42.1	42.1	42.8	43.8	44.1	44.4	44.8	45.0	45.7	46.1
	Females	37.4	37.5	37.9	38.3	39.2	39.6	39.7	40.1	40.3	41.1	41.6

○ The number of marriages with foreign spouses rose by 0.9 thousand to 34.2 thousand cases in 2010.

- The share of marriages with foreign spouses decreased from 10.8 percent in 2009 to 10.5 percent in 2010.

< Table > Marriage with foreign spouse

(Unit: case, %)

		2000	2001	2002	2003	2004	2005
Number of marriages		332,090	318,407	304,877	302,503	308,598	314,304
Marriage with foreign spouse		11,605	14,523	15,202	24,776	34,640	42,356
(Share of marriages with foreign spouses)		(3.5)	(4.6)	(5.0)	(8.2)	(11.2)	(13.5)
	Change	1,782	2,918	679	9,574	9,864	7,716
	Percent change	18.1	25.1	4.7	63.0	39.8	22.3
■ Korean males and foreign females		6,945	9,684	10,698	18,751	25,105	30,719
	Percent change	29.3	39.4	10.5	75.3	33.9	22.4
■ Korean females and foreign males		4,660	4,839	4,504	6,025	9,535	11,637
Per	Percent change	4.6	3.8	-6.9	33.8	58.3	22.0

		2006	2007	2008	2009	2010
Number of marriages		330,634	343,559	327,715	309,759	326,104
Marriage with foreign spouse		38,759	37,560	36,204	33,300	34,235
(Share of marriages with foreign spouses)		(11.7)	(10.9)	(11.0)	(10.8)	(10.5)
	Change	-3,597	-1,199	-1,356	-2,904	935
	Percent change	-8.5	-3.1	-3.6	-8.0	2.8
■ Korean males and foreign females		29,665	28,580	28,163	25,142	26,274
	Percent change	-3.4	-3.7	-1.5	-10.7	4.5
■ Korean females and foreign males		9,094	8,980	8,041	8,158	7,961
Per	Percent change	-21.9	-1.3	-10.5	1.5	-2.4

The number of divorces fell to 117 thousand cases in 2010. The divorce rate of married people recorded 4.7 cases in 2010.

○ The number of divorces went down by 7.1 thousand cases (5.8 percent) to 116.9 thousand cases in 2010.

- The crude divorce rate (the number of divorces per 1,000 people) stood at 2.3 in 2010, down 0.2 from 2009.

< Table > Number of divorces, crude divorce rate and divorce rate of married people

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Number of divorces (thousand cases)	119.5	134.6	144.9	166.6	138.9	128.0	124.5	124.1	116.5	124.0	116.9
Change (thousand cases)	2.0	15.2	10.3	21.7	-27.7	-10.9	-3.5	-0.5	-7.5	7.5	-7.1
Percent change (%)	1.7	12.7	7.7	15.0	-16.6	-7.8	-2.7	-0.4	-6.1	6.4	-5.8
Crude divorce rate	2.5	2.8	3.0	3.4	2.9	2.6	2.5	2.5	2.4	2.5	2.3
Divorce rate of married people	5.3	5.9	6.3	7.2	6.0	5.5	5.3p	5.2p	4.8p	5.1p	4.7p
(Number of divorces per 1,000 married couples)	10.5	11.8	12.6	14.4	12.0	10.9	10.6p	10.4p	9.7p	10.2p	9.5p

p: preliminary

○ The divorce rate of married people* recorded 4.7 cases in 2010. The number of divorces per 1,000 married couples was 9.5 couples, which recorded the lowest figure since 2000.

○ The number of divorces with foreign spouses dropped by 0.4 thousand cases to 11.2 thousand cases in 2010.

- The share of divorces with foreign spouses grew from 9.4 percent in 2009 to 9.6 percent in 2010.

< Table > Divorces with foreign spouses

(Unit: case, %)

	2000	2001	2002	2003	2004	2005
Number of divorces	119,455	134,608	144,910	166,617	138,932	128,035
Divorces with foreign spouses	1,498	1,694	1,744	2,012	3,300	4,171
(Share of divorces with foreign spouses)	(1.3)	(1.3)	(1.2)	(1.2)	(2.4)	(3.3)
Change	96	196	50	268	1,288	871
Percent change	6.8	13.1	3.0	15.4	64.0	26.4
■ Korean males and foreign females	247	387	380	547	1,567	2,382
Percent change	24.7	56.7	-1.8	43.9	186.5	52
■ Korean females and foreign males	1,251	1,307	1,364	1,465	1,733	1,789
Percent change	3.9	4.5	4.4	7.4	18.3	3.2

	2006	2007	2008	2009	2010
Number of divorces	124,524	124,072	116,535	123,999	116,858
Divorces with foreign spouses	6,136	8,671	11,255	11,692	11,245
(Share of divorces with foreign spouses)	(4.9)	(7.0)	(9.7)	(9.4)	(9.6)
Change	1,965	2,535	2,584	437	-447
Percent change	47.1	41.3	29.8	3.9	-3.8
■ Korean males and foreign females	3,933	5,707	7,962	8,300	7,904
Percent change	65.1	45.1	39.5	4.2	-4.8
■ Korean females and foreign males	2,203	2,964	3,293	3,392	3,341
Percent change	23.1	34.5	11.1	3.0	-1.5

附件三

地方法院刑事第一審案件觸犯刑法第239條之被告裁判結果

年	終結件數	被告人數	科刑情形				無罪	不受理	撤回	其他
			計	六月以下	逾六月至一年以下	拘役				
108	384	539	295	295			26	212	1	5
107	393	553	309	309			17	221	3	3
106	411	589	308	306		2	33	235	2	11
105	397	566	311	310		1	33	217		5
104	389	555	316	316			29	202	6	2
103	392	558	308	308			23	221	4	2
102	403	572	303	303			24	228	3	14
101	393	556	331	331			20	195	1	9
100	428	606	342	339	2	1	29	224	4	7

註：(1)終結件數係依全案罪名為妨害婚姻及家庭罪且被告最重罪為妨害婚姻及家庭罪並觸犯刑法239條統計。
(2)被告人數係依被告最重罪為妨害婚姻及家庭罪並觸犯刑法239條統計。
資料來源：台灣高等法院彙總統計系統

地方法院刑事第二審簡易案件觸犯刑法第239條之被告裁判結果

年	終結件數	被告人數	科刑情形			無罪	不受理	撤回	其他
			計	六月以下	逾六月至一年以下				
108	34	43	37	37		1	1	4	
107	50	65	57	57		2	3	3	
106	50	66	56	56			3	7	
105	44	55	49	48	1	1	1	4	
104	39	52	48	48				4	
103	48	59	45	45		1	2	10	1
102	47	59	42	42			2	15	
101	50	67	56	56				11	
100	52	64	54	54				10	

註：(1)終結件數係依全案罪名為妨害婚姻及家庭罪且被告最重罪為妨害婚姻及家庭罪並觸犯刑法239條統計。
(2)被告人數係依被告最重罪為妨害婚姻及家庭罪並觸犯刑法239條統計。
資料來源：各地方法院統計系統資料庫

高等法院刑事第二審案件觸犯刑法第239條之被告裁判結果

年	終結件數	被告人數	科刑情形			無罪	不受理	免除其刑	撤回	其他
			計	六月以下	逾六月至一年以下					
108	60	80	44	44		23	8		2	3
107	51	75	51	51		8	12		2	2
106	87	113	79	79		14	12	1	1	6
105	71	106	79	79		20	6			1
104	68	86	48	48		27	8		2	1
103	74	97	65	65		15	15			2
102	78	99	74	73	1	16	7			2
101	80	95	66	66		17	6		5	1
100	66	87	58	56	2	18	2		5	4

註：(1)終結件數係依全案罪名為妨害婚姻及家庭罪且被告最重罪為妨害婚姻及家庭罪並觸犯刑法239條統計。
(2)被告人數係依被告最重罪為妨害婚姻及家庭罪並觸犯刑法239條統計。
資料來源：台灣高等法院彙總統計系統

關於刑法第 239 條規定及刑事訴訟法第 239 條但書

聲請大法官解釋之補充理由書

案號：會台字第 13520 號、107 年度憲三字第 10 號

吳志強[1]

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壹、前言

司法院釋字第 554 號解釋曾於民國 91 年 12 月 27 日針對刑法第 239 條對通姦、相姦者處以罪刑之規定（以下簡稱：通姦罪）作成合憲解釋，但隨著時空背景之推移，幾經社會多元思辨，不代表著通姦罪規定在歷經 17 年後之今日，在我國社會中仍有存在之必要性，蓋我國刑事實體法修法之專責機關（即法務部）在這 17 年間曾於 **102 年 2 月 27 日我國初次國家人權報告國際審查會議**中表示通姦罪之存在是否已不合時宜，刑法修正小組會考慮修法[2]；我國為明定「消除

[1] 臺北地方法院法官。

[2] 按法務部陳次長明堂表示：「…第三個，我們也思考到，這種法律是不是不合時宜，在我們的刑法修正小組將來會考慮，因為日本在二次大戰以後就把這種法律修改掉，我們有考慮到，我們的刑法是整體要修的，所以委員這種考慮，我們可以作為以後修法的參考…」。請參考：中華民國初次國家人權報告國際審查會

對婦女一切形式歧視公約」（以下簡稱：CEDAW），行政院於 99 年 5 月 18 日函送「CEDAW 施行法草案」、立法院於 100 年 5 月 20 日三讀通過，經總統公布後自 101 年 1 月 1 日起施行[3]，嗣於 **102 年 9 月 18 日 102 年第 8 次 CEDAW 法規檢視專案審查小組會議決議**指出：通姦罪規定構成對私人生活之干擾，不符合公民與政治權利國際公約第 17 條規定，專家建議政府應採取措施從刑法中廢除，後續應循法務部處理法規違反兩公約之流程辦理[4]；**總統府司法改革國是會議第五分組第六次會議於 106 年 5 月 18 日之會後記錄**亦曾指出：以國家刑罰權介入私人關係之通姦罪，存在之正當性已屬薄弱，配偶依與通姦罪有關之刑事訴訟法（下稱：刑訴法）第 239 條但書得僅對通姦之配偶撤回告訴，該撤回不及於相姦人，此規定違反刑事訴訟之原則，並造成通姦罪實體受刑人數女性遠高於男性，造成壓迫女性之實質不平等[5]。長期存在我國刑法典中之通姦罪之所以難以撼動，不僅是刑

議公民與政治權利國際公約初次報告審查委員會與政府機關之會議紀錄 http://www.humanrights.moj.gov.tw/lp-466-200.html 〔最後瀏覽時間：2020 年 3 月 22 日〕。

[3] 請參考：行政院性別平等會網站 https://gec.ey.gov.tw/Page/FA82C6392A3914ED 〔最後瀏覽時間：2020 年 3 月 22 日〕。

[4] 請參考：行政院性別平等會網站 https://gec.ey.gov.tw/Page/82225D923EAF708A 〔最後瀏覽時間：2020 年 3 月 22 日〕。

[5] 總統府司法改革國是會議第五分組第六次會議 106 年 5 月 18 日會後初步決議：「...(四)刑法第 239 條、第 227 條之 1 條文修正案 **1.廢止刑法第 239 條，若因故無法立即廢止，應即刻刪除刑事訴訟法 239 條但書之規定，回歸刑事訴訟法告訴不可分原則之適用**。理由：(1)刑法通姦罪之存在，於性別平權意識尚未

法或刑訴法層面的問題，**也夾雜著社會所存在以及夫妻間之關係互動等層面之問題**，當刑事處罰無法妥適處理時，是否仍有需要刑法第239條及刑訴法第239條但書規定，以下僅就個人聲請書未完足部分簡要補充理由。

貳、關於刑法第239條

司法院釋字第554號解釋所提及：通姦罪存在係維護**婚姻、家庭制度及社會生活秩序**所必要，學理[6]、實務[7]上亦多肯認此為刑法第239條之立法目的與保護法益，而司法院歷來之解釋，在在顯示婚姻連結家庭已成內容豐富之制度，故而形式上來看，立法者制定刑法

發展、我國性平法制多有缺漏之年代，有其保護弱勢配偶的功能;惟現今我國已有家庭暴力防治法與性侵害防治法，於民法親屬篇內，就夫妻財產制、離婚有責與破綻主義、子女之監護，均已經符合性別主流化之標準，並以子女之最佳利益為親權行使之依歸，是以，**以國家刑罰權介入私人關係之通姦罪，目前存在之正當性已屬薄弱。(2)**與通姦罪有關之刑事訴訟法第239條但書，為「告訴不可分」原則之例外規定，依此規定，配偶得僅對通姦之配偶撤回告訴，該撤回不及於相姦人，**此規定違反刑事訴訟之原則，並造成通姦罪實體受刑人數女性遠高於男性，造成壓迫女性之實質不平等。(3)**何況曾有實際案例，主張受性侵害之告訴人，性侵害案件因證據不足無法定罪，卻反遭被告配偶提告通姦有罪確定，致實務常見性侵害被害人因恐遭行為人配偶提告通姦，而不敢舉發或告訴遭性侵害事實，影響性自主權之保障與被害人告訴權之行使。...」。請參考：總統府司法改革國是會議網站 https://justice.president.gov.tw/meeting/48 〔最後瀏覽時間：2020年3月22日〕。

[6] 甘添貴，「刑法各論（下）」，第277頁、第295頁，初版一刷，2010年2月；林山田，「刑法各罪論（下）」，第491頁，2006年11月；陳子平，「刑法各論（下）」，第435頁，元照，2014年11月。

[7] 司法院(70)廳刑一字第1104號法律問題研究研討結果：刑法分則第239條之通姦罪及相姦罪係「**妨害婚姻及妨害家庭罪**」，因本條之罪，所保護客體，為健全之**婚姻制度及家庭秩序**。

第 239 條用以保障「婚姻、家庭制度」之社會法益，似存在目的正當性。

但倘若進一步細想，同樣保障婚姻、家庭制度及社會生活秩序等社會法益之刑法第 238 條重（相）婚罪，較可明確地找出該條之核心內涵係保障一夫一妻制之婚姻制度的健全秩序，蓋此制度之破壞恐衝擊家庭制度層面之安定（如：夫妻事業成敗、子女人格養成均有賴健全和諧之婚姻與家庭等）、進而連帶影響社會發展；但刑法第 239 條通姦罪之核心內涵呢？爬梳學理、實務見解則有提及刑法第 239 條之立法目的則係在保障「**夫妻婚姻之圓滿不可侵犯性**」[8]，換言之，此所指乃無非係「**婚姻之神聖性**」。不過，如果係這般詮釋通姦罪所保障之社會法益內涵的話，**通姦罪所保障之法益將淪為僅是抽象社會善良風俗或傳統道德觀感，過於模糊而未能具體化[9]，恐將無法符合合憲之重要立法目的，根本上無法通過比例原則之目的合憲性檢視**。

假設立法者制定通姦罪之想法乃係：婚姻係夫妻雙方成立具有親密性及排他性的永久結合關係，如有第三人介入其中，遂將導致夫妻雙方關係減損、惡化，可能影響夫妻各自事業、已生兒育女者影響子

[8] 法務部（87）法檢（二）字第 02560 號；陳子平，「刑法各論（下）」，第 435 頁，元照，2014 年 11 月。

[9] 請參照：許宗力大法官釋字第 666 號解釋協同意見書；黃昭元大法官，「憲法權利限制的司法審查標準：美國類型化多元標準模式的比較分析」，第 125 頁，國立臺灣大學法學論叢第 33 卷第 3 期。

女教養、成長，家庭之安定將隨之動搖，原本締結之婚姻因而分崩離析以離婚告終，進而連帶影響社會，因而必須用刑罰來禁止、處罰避免這樣的情況發生。不過，**國家發動刑罰將導致人民之人身自由及財產受到剝奪，立法者欲以刑法規範處罰婚外性行為，仍需有堅實之事證**，從「地方法院離婚終結事件離婚原因」統計數據（詳見後述附表）來看，自 94 年至 107 年間，離婚原因始終高居不下的是：「受他方虐待（或為不堪同居之虐待）」，而非與配偶以外之人合意性交之通姦，從上開統計數據來看，無法證明婚外性行為是導致我國社會當中婚姻制度離婚之主要原因，亦無從推導出前開立法者制定通姦罪時之擔憂而認為有採用刑罰加以處罰之必要。

而通姦罪為告訴乃論之犯罪，如要國家進行訴追則遭到背叛之配偶一方需加以提出告訴，但**司法院釋字第 569 號解釋理由書及協同意見書**[10]均曾分別提及：「...夫妻之間為維持家庭和諧，不願對配偶追訴...**若提出告訴，依同法（即刑事訴訟法）第 239 條前段之規定，其效力必及於其配偶，於人倫關係之維護，反有不利之影響**。如必於告訴之後，再對配偶部分撤回告訴（同法第 239 條後段），以勉力維持婚姻關係，則亦有虛耗司法資源之虞...」、「...婚姻制度之存續與圓滿

[10] 林子儀大法官釋字第 569 號解釋協同意見書。

必須配偶雙方共同努力維持，而忠誠義務也是當事人雙方在婚姻中互許的承諾，**無法由國家背書或應由國家強制**…」等情，足以知悉一旦提告將無法保障夫妻間之婚姻、家庭和諧，立法者所制定之通姦罪並無法達成原本期望之目的。更何況，從司法實務見聞之案例[11]中亦可得知，有時**通姦行為並非動搖婚姻關係之原因，而係已無法維繫之婚姻關係所產生之結果**，於此情形，立法者以刑罰制定通姦罪而確保所謂婚姻、家庭關係，無非係緣木求魚，**根本無法符合比例原則之適合性層次之要求**。

而兼及個人聲請書前已曾提及**人民作為憲法權利保障之主體，不因其進入婚姻或家庭生活而有異**[12]，在婚姻關係當中，個人生活私密領域仍受有免於他人侵擾之隱私權保障，通姦罪之存在將導致個人私密領域之事項將持續地作為呈堂證據，在當代社會均係對於個人隱私權之重大打擊。爰此，對於通姦罪之**審查標準宜採取中度（從嚴）以上甚至是嚴格[13]之審查標準，而非**僅僅採取合理審查標準；立法者所

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[11] 臺灣高等法院臺中分院 107 年度上易字第 315 號判決：「…甲男於民國 103 年 10 月 23 日與乙女登記結婚，**婚後相處不睦，而有家庭暴力等糾紛**，後於 105 年 5 月 30 日經臺灣臺中地方法院裁判離婚，且經確定在案，並於 105 年 7 月 1 日登記離婚。緣甲男於 105 年 4 月前之某日結識不知情之丙女，甲男明知當時其與乙女間之離婚訴訟仍在法院審理中，尚未離婚，仍處於婚姻關係存續期間，係為有配偶之人，竟仍基於通姦之犯意，於自 105 年 4 月間起至同年 5 月 5 日止之該期間內某時，與不知甲男尚未離婚之丙女為性交行為 1 次…」。

[12] 請參照：葉百修大法官釋字第 696 號解釋部分協同意見書。

[13] 請參照：許玉秀大法官釋字第 646 號解釋不同意見書。

舉出之「婚姻關係神聖不可侵犯」，由於其內涵過於模糊不清楚，且無達成原本期望目的之效果，**難以**作為重要利益；立法者採取以刑事處罰之手段與其欲達成目的之間委實**欠缺實質關聯性**。

參、關於刑訴法第 239 條但書

立法者於刑訴法第 239 條之但書特別制定撤回告訴主觀可分之規定[14]，考量其以刑法第 239 條之案件為限，該條之立法目的及保障法益不外乎係：作為告訴人之配偶一方，常常本於夫妻間之情義，對於有婚外性行為之他方配偶有所宥恕，而對相姦者（即俗稱：小三、小王）則未必然一併宥恕，若一併將撤回效力及於必要共犯之相姦者，有悖於人情，故作為告訴人之配偶一方，得以單獨撤回告訴，乃為**顧及婚姻關係中之夫妻情義、家庭和諧，夫妻可以早日脫離訴訟關係，重修舊好、破鏡重圓，促使婚姻關係得以繼續延續**，此即刑訴法第 239 條但書例外規定之唯一目的[15]。

而告訴制度於當代司法制度的意義，一般認為告訴權之賦予不外乎係讓受到損害之被害人得對犯罪，請求國家進行正當之調查後予以

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[14] 刑訴法第 239 條本文「告訴乃論之罪，對於共犯之一人告訴或撤回告訴者，其效力及於其他共犯」之規定，係所謂「告訴主觀不可分原則」；而同條但書「但刑法第二百三十九條之罪，對於配偶撤回告訴者，其效力不及於相姦人。」之規定，則被認為係「撤回告訴主觀可分」之例外規定。

[15] 臺灣高等法院暨所屬法院 104 年度法律座談會刑事類提案第 26 號。

處罰之制度，但為了避免告訴權行使時之恣意濫用，在法律層面的對應上，往往會制訂「告訴主觀不可分」之規定，此係基於政策考量，**確保作為偵查主體之檢察官行使公訴權時，不會因告訴權人與共犯之一人間存有私人情感而撤回對該特定共犯之告訴，導致檢察官之公訴權受到箝制；亦係避免作為公益代表人之檢察官不會因制度設計，使其在追訴犯罪的過程中存在不當的差別對待**[16]。然刑訴法第 239 條但書將刑法第 239 條之犯罪類型，選擇採用撤回告訴主觀可分之例外，將導致公訴權之行使上，對特定犯罪類型存有因告訴權人個人對共犯之好惡而有不同對待之不公平情形，也無法說明何以其他告訴乃論犯罪沒有撤回告訴主觀可分之適用，**制度設計上將必然導致國家刑罰權運作上存在不公平、不平等之缺陷**。

試想，立法者制定刑訴法第 239 條但書撤回告訴主觀可分例外規定之目的，應係預想了遭到背叛的配偶一方盛怒之下會向通姦者或相姦人提出告訴，而告訴效力均會及於通姦之配偶，但最該被譴責的是破壞婚姻圓滿之相姦人，因而允許僅對通姦之配偶撤告，徒留相姦人於訴訟中，以此迂迴之制度設計方式，企圖達成夫妻彼此間重修舊好、破鏡重圓，挽救搖搖欲墜之婚姻關係於危急存亡之中。

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[16] 黒澤　睦，「告訴権の歴史的発展と現代的意義」，頁 9-10，法学研究論集 18 号，2003 年 2 月；「いわゆる告訴権の濫用とその法的対応論序説」，頁 175-176，明治大学法学創立百三十周年記念論文集，2011 年 11 月 1 日。

然而，如此迂迴之制度設計，加上通姦罪係告訴乃論之罪，刑法第 245 條第 2 項之規定，一旦配偶縱容或宥恕後就不能提告，而宥恕之認定亦包含明示或默示[17]，**為了避免對通姦之他方配偶不提告被視為係刑法第 245 條第 2 項之宥恕**，實務上曾見聞之情形，則係遭到背叛作為告訴權人之配偶一方一併提告通姦之他方配偶後，再撤回對他方配偶之告訴，參酌前揭司法院釋字第 569 號解釋理由書之內容，**如此「先傷己、再傷人」之制度設計果真能達到重修舊好**？

從心理學的角度來看，觀察發生婚外性行為後的夫妻雙方相處之社會實態，雙方締結婚姻時所為之承諾遭到背叛，越軌通姦之配偶一方如要重回原本婚姻關係，承受情感受到背叛的配偶一方往往為了安全感確保，會進一步地要求犯錯的那一方不能有自己之秘密、凡事須公開透明（如：交出手機、信箱、社群帳號之密碼）、甚至交付一定之財產讓對方安心，有心重返原本婚姻關係且帶著道德上之罪惡感的該方往往一開始都會照作，但如此一來雙方在該婚姻關係當中不再是彼此平等、自由之地位，反而存有某種帶有監視行動、情感監禁的意味存在，長此以往，原本帶有道德罪惡感之一方反而會認為對方是虐

[17] 臺灣高等法院臺中分院 108 年上易字第 1347 號判決：「…按刑法第 239 條之罪，配偶縱容或宥恕者，不得告訴，同法第 245 條第 2 項固定有明文，惟所謂『縱容』或『**宥恕**』，**非僅**須有權告訴之人內心有『縱容』或『宥恕』之真意，且**須於外部有**『縱容』或『宥恕』之明示或默示之表示行為，方足當之。……」。

待、羞辱，而一開始遭到背叛之配偶一方亦會因對方之態度轉變而彼此關係更加急轉直下，衍生更多衝突，**立法者制定刑訴法 239 條但書之規定能否確保撤回對通姦之他方配偶告訴後，婚姻能破鏡重圓？還是不斷地嘗試接近、期望能一如往常，結果卻是反覆地期望換來失望呢**？

立法者制定刑訴法第 239 條但書，背後預設了「維持住婚姻關係、不要離婚就能圓滿」的想法，**卻忽略了社會實態層面，對於無意維繫婚姻、遭到背叛之配偶一方，離開這段破敗的關係，可能對其將來的人生旅途才是更好的選擇**；且當無意維繫婚姻、遭到背叛之配偶一方提出告訴後離婚，欲對通姦之他方前配偶撤回告訴、只想對相姦人追究時，由於現行實務見解認為若婚姻關係早已消滅，夫妻情義已逝，又無延續婚姻存續關係之可能時，自無延續婚姻關係之目的可言，刑訴法第 239 條但書規定關於「配偶」之文義解釋，自不能作擴張至「前配偶」之身分，從而，對「前配偶」撤回告訴者，效果上將回歸刑訴法第 239 條前段，效力及於必要共犯之相姦人[18]，**將導致無意維繫婚姻關係者變相地被迫維持假面夫妻關係**，已經沒有夫妻情義而仍需維持婚姻空殼的情況下，對夫妻雙方、子女養育成長果真是最

[18] 臺灣高等法院暨所屬法院 104 年度法律座談會刑事類提案第 26 號。

好考量嗎？或是立法者只是想用傳統道德觀念對於婚姻之美好圖像強行將疏離無法修復之關係框架呢？

況且，依學者之實證研究而言，通姦罪表面上係性別中立之規定，但結合刑法第 245 條第 2 項之縱容與宥恕、刑訴法第 239 條但書規定，進入通姦罪審理變成被告之總數性別是女性多於男性：51%比 47%，再算有罪與非有罪判決之性別比例所得結論是，有罪判決的性別差異在統計上具有顯著性[19]。是以，實證研究之結論：女性在通姦罪之懲罰上相對脆弱，由於社會價值和諸種原因，使得女性處於脆弱之處罰地位，使得刑訴法第 239 條但書搭配刑法第 239 條實際運作上，反而存在著間接之性別差別待遇存在，如此一來，刑訴法第 239 條但書搭配刑法第 239 條之運作，將可能造成國家刑罰權不斷地強化社會文化價值中之刻板印象，不僅違反憲法第 7 條之平等原則，也違反 CEDAW 之精神。

原本訴訟程序之設計宜尊重立法者之決定，審查標準原應採取合理審查標準；惟考量上開刑訴法第 239 條但書之制度設計所連接刑法第 239 條，仍會造成個人隱私權之侵害，以及國家刑罰權不公平及間

[19] 實證研究詳細分析，請參照：官曉薇教授發言，「婚外性的罪與罰」座談會，第 41 頁至第 42 頁，台灣法學雜誌第 223 期，2013 年 5 月 1 日。

接性別不平等之情狀，甚至此一撤回告訴主觀可分之例外存在諸如強要維持假面夫妻等不合理之情形，**宜將審查標準調升至中度（從嚴）或嚴格之審查標準**；夫妻婚姻關係能否重修舊好、破鏡重圓並非國家刑罰權、刑事訴訟程序所能強行修復，此對國家而言並非重大迫切之利益，也不屬於國家之重要利益；**在嚴格審查標準下，存在涵蓋過廣之情形**；在**中度（從嚴）之審查標準下，手段與目的間亦難認有實質關連性**。

肆、結論：司法院釋字第 554 號解釋應有變更解釋之必要

司法院釋字第 554 號解釋雖然指出「婚姻與家庭為社會形成與發展之基礎，受憲法制度性保障…」，但人權原本先於國家而存在，過度強調制度性保障，而不仔細審查制度保障之內涵為何時，恐導致制度優先於人權、進而產生箝制、侵蝕人民基本權利之危險[20]，通姦罪則是明顯的例子。

環顧世界各國，刑法典保有通姦罪規定者，委實寥寥可數，韓國（2015 年：2009Hun-Ba17）[21]及印度（2018 年：*Joseph Shrine v Union*

[20] 許志雄大法官，「制度性保障」，第 78 頁至第 79 頁，月旦法學雜誌別冊，元照，2002 年 2 月。

[21] 請參照： http://english.ccourt.go.kr/cckhome/engNew/index.do 〔韓國憲法

of India）[22]也是幾經爭論而此二國最終都廢除了通姦罪；隨著社會文化變遷，17 年後的我國卻仍保留了陳腐過時、侵害人權甚深之通姦罪，誠屬我國作為民主、自由、法治國家之一大缺憾。

多數民意保留通姦罪之執念，除了對我國刑法典長期存在此一罪名，早已習以為常外，不外乎係對廢除通姦罪後之婚姻關係感到不安全，而不安全感往往來自人們面對預期外、未知之事物的主觀感受，但要解消這內心的擔憂、畏懼等不安感受，仍應如同醫生治病時必須對症下藥，17 年來我國社會各領域之思辨、對話，應不難理解人與人間之關係無法強行以刑事制裁手段來加以改善，若要維繫夫妻間之婚姻關係，夫妻雙方宜彼此用心對待、善盡溝通、避免蓋築高牆排斥互動，避免踏入婚姻後全然地扼殺自我人格而處於如窒息之狀態。

職此，**刑法既係憲法之執行法、刑訴法是憲法之測震儀**，宣告通姦罪違憲，不僅是卸除侵害人權、自由之枷鎖，迎頭趕上國際思潮，更重要的是同時宣達刑罰具有最後手段性，刑事制裁不是解決任何問題之萬靈丹。此時此刻，作為具有民主、自由、法治的我國，再次徘徊在保守與自由之十字路口，**懇請作為憲法守護者之大法官們，變更**

法院網站；最後瀏覽時間：2020 年 3 月 22 日〕。

[22] 請參照：https://www.rgics.org/wp-content/uploads/PW.7.05.pdf 〔*Adultery in India: Law, Court and Sanctity of Marriage*；最後瀏覽時間：2020 年 3 月 22 日〕。

釋字第 554 號解釋，宣告刑法第 239 條、刑訴法第 239 條但書違憲。

【附表[23]】

	受他方虐待（或為不堪同居之虐待）（單位：件）	與配偶以外之人合意性交（單位：件）
94 年	695	35
95 年	626	44
96 年	558	26
97 年	388	44
98 年	297	18
99 年	260	14
100 年	219	17
101 年	175	19
102 年	140	16
103 年	134	15
104 年	121	21
105 年	96	22

[23] 請參考：https://www.judicial.gov.tw/tw/np-1260-1.html 〔司法院司法統計年報網站；最後瀏覽時間：2020 年 3 月 22 日〕。

106 年	117	9
107 年	88	14

國家不能只為滿足情緒而動用刑罰

—刑法通姦罪釋憲案言詞辯論意旨

台北地方法院刑事第十庭
發言代表：林孟皇

聲請範圍：刑法第239條部分之爭點題綱

- 1.刑法第239條之立法目的為何？其係為保障何種法益或基本權利而設？又因此限制或侵害人民何種基本權利？其審查基準為何？
- 2.刑法第239條處罰婚外性行為之手段，是否有助於所揭目的之達成？手段與目的間是否存有一定關聯性？
- 3.司法院釋字第554號解釋有無變更解釋之必要？

前言：當台灣多數民意支持通姦罪時，法官為何不依法審判，仍聲請大法官宣告通姦罪違憲？

◆**中華民國台灣是一個民主國家，同時也是一個共和國家：**

- 憲法規定的不是單一的民主，而是一種共和體制，政府權力分散由相對獨立的部門行使。共和制既保證公民的民主與積極性，又被設計用來抵抗「多數人暴政」的保護機制。
- 台灣是一個民主共和國，政府權力分由相對獨立的各部門行使。其中，司法院大法官從事違憲審查工作，本質上是反民主與反多數決的。

◆**議會多數決、公投彰顯民主，卻不能削弱被憲法保護的個人自由：**

- 「民主憲政」的意義：政府權力受到限制、人民基本權利得到保護、憲法具有崇高性、憲法文化成為公民社會生活與政府行為的一部份。
- 針對107年同性婚姻議題的公投結果，誠如司法院所說的：「立法機關必須尊重公投結果，並採納為立法、修法方向，但無論公投結果如何，仍然不能違背憲法及司法院大法官解釋。」

…… 接續前頁

◆背景襯托前景—通姦罪乃傳統中國法之道德法律化的餘緒：

- 傳統中國法從《唐律》訂頒，採行 「一准乎禮」的立法原則以來，刑事法律一直呈現高度的倫理性，法律道德化、道德法律化。
- 清末變法，在研議《大清新刑律》草案時，衍生「法理派」與「禮教派」之爭；1910年資政院（相當於現在的立法院）審議時，就「無夫姦是否構成犯罪」（「無夫」指：未婚女子、寡婦或妾）進行表決（藍白之爭），最後由「禮教派」獲勝，除處罰無夫姦之外，並處罰有夫姦（有夫之婦與人通姦）。100多年後，這2個高度道德性的法條或廢除或修正。這說明通姦罪乃傳統道德法律化的餘緒，該是廢除通姦罪的時候了。

◆百餘年後由大法官審查通姦罪存廢，彰顯台灣的民主憲政：

- 法務部提供的民意調查，顯示多數人反對通姦除罪化；但百餘年前「禮教派」雖獲勝，仍不敵歷史潮流。如今，由大法官而不是由立法院決定通姦罪存廢，彰顯台灣的民主憲政更邁前一步，是真正的民主共和國。

爭點１：刑法第239條之立法目的為何？其係為保障何種法益或基本權利而設？又因此限制或侵害人民何種基本權利？其審查基準為何？

◆通姦罪的立法目的：

- 一般認為是為了確保配偶間性生活的純潔，並保護一夫一妻的婚姻制度而設。釋字第554號解釋指出：國家為確保婚姻制度之存續與圓滿，自得制定相關規範，約束夫妻雙方互負忠誠義務。

◆通姦罪的保護法益：

- 因通姦而受害者可能僅為「遭感情背叛之配偶一方的憤恨情緒」，或是社會一般善良風俗。問題是：情緒的滿足是刑法所要保護的法益？
- 依照釋字第554、696、712號解釋的意旨，婚姻及家庭受憲法的制度性保障，亦即國家有義務保障婚姻及家庭關係。問題是：國家有義務確保雙方忠誠、至死不渝？可以推導出國家應以刑罰處罰通姦行為？

…… 接續前頁

- **通姦罪限制或侵害的基本權利：**
  - 通姦罪處罰已婚之人與他人為性行為，限制人民自主決定是否、與何人發生性行為的自由（性行為自主權）；而當事人為了追訴犯罪並舉證，也勢必侵害個人生活秘密空間免受國家權力侵擾的權利（隱私權）。
- **大法官審查通姦罪所應採行的審查基準：**
  - 司法審查基準寬嚴的決定，是釋憲者在審查不同類型的案件時，對於政治部門已作成之決定要介入到多少程度的判斷。
  - 依照釋字第603號、第666號、第689號解釋的意旨，聲請人認為通姦罪「行為條款」違憲與否（需罰性，指保護法益的審查），應採取「中度審查基準」—審查立法者所追求的目的是否為重大公益，而手段選擇與目的達成之間是否具有實質關聯。
  - 依照釋字第777號及相關解釋的意旨，聲請人認為通姦罪「制裁條款」以有期徒刑作為唯一刑罰，攸關人身自由的限制，其違憲與否（應罰性，指審查動用刑罰的手段，以達到保護法益的目的，是否符合比例原則），自應採取「嚴格審查基準」—通常推定違憲，立法目的必須是追求「重大迫切利益」，手段與目的之間必須具有必要。

爭點2：刑法第239條處罰婚外性行為之手段，是否有助於所揭目的之達成？手段與目的間是否存有一定關聯性？

- **為維持婚姻，以通姦罪限制人民的性行為自主權、隱私權，目的欠缺正當：**
  - 通姦罪僅是道德法律化結果，目的在確保配偶間性生活的純潔、保護婚姻制度，並未涉及保護遭感情背叛的配偶的性自主權或名譽，如有非婚生子女存在，更可能使其遭受污名歧視，難以認為所追求的目的攸關重大公益。
  - 立法者希望藉由刑法的威嚇、懲罰所生痛苦，阻止婚外性行為對於婚姻關係的傷害；結果卻是對個案中的人際關係有害無益，甚至是導致夫妻離婚。
- **為維持婚姻，對於婚外性行為者以自由刑作為制裁手段，有違比例原則：**
  - 當夫妻一方不履行較低位階之性行為的同居義務時，法律僅是提供得請求離婚的保障（民法第1052條），不能強制履行；較高位階的個人性行為自主權與較低位階的婚姻保障相衝突時，法律卻使用最嚴厲的刑罰作為制裁手段，顯然違反「過度禁止」的狹義比例原則。
  - 從嚴格審查基準來看，通姦罪所要保護的法益不僅不是合乎憲法價值的特定重要法益，施以刑罰也無助於目的達成，何況有相同有效達成目的而侵害較小的民事賠償手段可資運用，通姦罪制裁條款即應認為違憲。

爭點3：司法院釋字第554號解釋有無變更解釋之必要？

◆ **法與時轉則治，治與世宜則有功：**

- 大法官因應社會變遷，變更其先前見解的情況，所在多有（如釋字第784號變更第382號解釋意旨；釋字第771號變更第108號、第174號解釋意旨）。
- 釋字第554號解釋自始不脫傳統的家庭倫理觀念，欠缺明確的論理基礎，既未能深入考慮時空變遷因素及國際立法趨勢，又在有明顯爭議的情形下，缺乏實證數字及佐證資料，逕以既抽象又短淺的解釋理由書宣告通姦罪合憲，正如論者所說：是在台灣憲法變遷脈絡中，「保守有餘、 前瞻不足」、「群疑未釋、爭議無解」的不妥適憲法解釋。
- 隨著時代環境的變遷、婦女經濟地位的提升，尤其在這多元化的現代社會裡，「倫理」是一個相對的概念，發軔自「家父長制」思維的通姦罪（早期立法僅課予妻子貞操義務），即不應再容任其繼續存在。
- 如果重新檢視憲法保障 「婚姻與家庭」的制度與權利內涵，仍不能指出與人性尊嚴相當的具體保護法益時，即不應僅以抽象的社會生活秩序為由，作為以刑罰限制人性尊嚴一環的性行為自由的理由。

…… 接續前頁

◆釋字第748號解釋、相關國際公約給我們的啟示：

- 釋字第748號解釋已肯認同性伴侶在婚姻自由的平等保護，雖然不能因此推論出通姦罪違憲，但確實提供我們一個得以重新思索刑法介入婚姻家庭妥適與否的契機。
- 聯合國《公政公約》第17條禁止對個人私生活的無理侵擾，102年、106年兩公約國際審查會議提出的審查結論性意見中，都明白指出通姦罪的處罰，構成對私生活的任意干涉，建議中華民國台灣政府應採取措施，並指出廢除此一罪名乃是政府的責任。
- 通姦罪以國家權力限制人民的性行為自主權、隱私權，既然目的欠缺正當，且其刑罰有違比例原則，更有違《公政公約》第17條規範意旨，大法官自應參照其變更判決先例（解釋）的作法，變更釋字第554號解釋意旨，宣告通姦罪規定違憲。

結論：大法官應拿出捍衛人權的魄力，勇於承擔，讓台灣告別道德法律化的社會

- 大法官從事司法審查工作，本質上是反民主、反多數決的。在民主憲政制度下，政策問題由多數人投票決定；順從公眾意願，是立法者與行政部門的事情。大法官的最主要職責，則在於超脫民意，保障人民基本權利並維護自由民主憲政秩序。
- 為了被害配偶或公眾情緒的滿足，以最具嚴厲性的刑罰，制裁單純違反道德、婚姻契約中性忠貞義務的通姦行為，限制人民的性行為自主權及隱私權，不僅不是攸關重大公益，而且無助於目的達成，更有違憲法上的比例原則，應屬違憲。
- 請　大法官懍於「憲法守護者」職責，一如在釋字第748號解釋中勇於承擔、肯認同性伴侶婚姻自由的作法，宣告刑法通姦罪規定違憲，以保人民權益，並貫徹民主憲政國家的精神。

釋憲聲請書(補充理由)

聲請人　臺灣臺中地方法院刑事第五庭

功股法官　張淵森

一、 憲法法庭為審理通姦罪行言詞辯論程序，聲請人提出補充理由如下。

二、 聲請人受理之案件，告訴人妻對夫撤告，依刑事訴訟法（下稱刑訴）第 239 條但書規定，撤回告訴之效力不及於相姦人。聲請人未針對刑訴第 239 條但書聲請解釋，原因在於聲請人並不認為該規定違憲，惟有其他聲請人認為該規定違反平等原則、比例原則而違憲，故聲請人於此表示不同意見。

三、 在決定刑訴第 239 條但書是否違憲之前，應先考慮該條本文中「告訴乃論之罪，對於共犯之一人告訴或撤回告訴，其效力及於其他共犯」，即告訴及撤回告訴不可分的規定，是否合理。如果撤回告訴不可分是不合理的，則刑訴第 239 條但書反而是合理的規定[1]。

四、 告訴不可分是否合理，學者各有看法，本案亦無適用，故暫不討論，僅討論撤回告訴不可分的合理性。聲請人認為撤回告訴不可分的規定有以下不合理之處：

(1) 體系矛盾：

例 1：甲與乙共同傷害乙父，乙父對甲乙提起告訴後，後來考量父子情誼，欲對乙撤告，但保留對甲的告訴。

→乙父不得只對乙撤告而保留對甲的告訴。刑訴第 239 條但書考量配偶間的情誼而為例外規定，但是難道乙父與乙之間的父子情誼就比配偶間來得不重要嗎？

[1] 目前法律中只有刑訴第 239 條但書及營業秘密法第 13 條之 3 第 2 項，為撤回告訴不可分的例外。

例 2：甲夫及乙共同竊取丙妻的勞力士手錶，依刑法第 324 條第 2 項規定，此竊盜罪為告訴乃論之罪。丙妻欲對甲夫撤告，對丙保留告訴。

→依撤回告訴不可分，丙妻對甲夫撤告的同時，會產生也對丙撤告的效力。刑訴第 239 條但書允許在通姦罪時只對配偶撤告。但在上開案例，卻不允許丙妻在竊盜罪中只對甲夫撤告，形成通姦罪為撤回告訴不可分的例外，構成其他罪名時則只能回到原則規定，這樣的區別對待沒有任何的理由。

(2) 阻礙和解

例 3：甲乙丙共同傷害丁，甲乙願賠償，丙不願賠償。

→若丁對甲乙撤告，則沒有賠償的丙無端受益。若丁堅持丙賠償，才願對甲乙撤告，則甲乙的刑事責任取決於丙是否願賠償。甲乙丙的刑事責任被綁在一起，往往造成和解的困難。

(3) 超出告訴人的合理預期

例 4：甲乙丙共同傷害丁，甲乙均賠償，丙未賠償，丁對甲乙撤告。

→依撤回告訴不可分，丁對甲乙撤告的效力及於丙。但丁完全沒有要對丙撤告的意思，法律撤回告訴不可分的擬制規定，對丁來說已經超乎其合理預期的效果。

五、 告訴乃論之罪，若告訴人不追究而撤回告訴，國家刑罰權就不介入，顯見國家尊重告訴人的意願大於國家訴追的公益，那麼為何不讓告訴人決定要告誰、不告誰呢？撤回告訴不可分要保護什麼樣的公益，可以凌駕勝告訴人的意願呢？

六、 聲請人認為撤回告訴不可分沒有合理的立論基礎，已限制告訴人告訴權的行使，可能是個違憲的規定，合憲的規定反而是「撤回告訴可分」。刑訴第 239 條但書尊重告訴人單獨撤回對配偶的告訴，在此範圍內採撤回告訴可分，聲

請人認為這是合理的規定。至於沒有規定可單獨撤回對相姦人的告訴，此部分聲請人認為並不合理，但因為此非聲請人案件中應適用的法律，故無從聲請解釋。

謹呈

司法院大法官公鑒

中　華　民　國　一〇九　年　三　月　九　日

臺灣臺中地方法院刑事第五庭

法　官　張淵森

司法院刑事廳言詞辯論書狀

關於本院大法官為審理會台字第 12664 號臺灣苗栗地方法院苗栗簡易庭快股法官等聲請解釋案，定於民國 109 年 3 月 31 日本院憲法法庭進行言詞辯論，就爭點題綱一、二，本廳意見分述如下：

爭點題綱一、刑法第 239 條部分：

壹、刑法第 239 條之立法目的為何？其係為保障何種法益或基本權利而設？又因此限制或侵害人民何種基本權利？其審查基準為何？

一、刑法第 239 條的立法目的，係為維繫婚姻與家庭，兼具一般預防之功能：

本條是 24 年 1 月 1 日制定公布，於同年 7 月 1 日施行。經查閱立法院公報，僅有條文內容，查無立法理由，故僅得由實務及學者探求立法者立法之目的。

關於刑法第 239 條所要保護之法益，因本條規範於刑法「妨害婚姻及家庭罪章」，一般認為係「維繫婚姻與家庭之和諧」[1]。依司法院釋字第 554 號解釋意旨，認為刑法第 239 條之立法目的在於「預防通姦」、「維繫婚姻與家庭制度之存續與圓滿」。綜合學者及大法官解釋之看法，本條立法目的不外乎「維繫婚姻」及「預防通姦」。前者包括兩個意涵：「維繫婚姻與家庭制度（之存續與圓滿）」及「維繫（個案）

[1] 例如，有認「婚姻家庭之和諧」，參見陳煥生、劉秉鈞，〈刑法分則實用（三版）〉，一品文化，100 年 9 月，頁 294；有認「家庭生活或夫妻感情的圓滿」，參見盧映潔，〈刑法分則新論〉，新學林，105 年 10 月，頁 441；有認「保障夫婦婚姻之圓滿不可侵犯性」，陳子平，〈刑法各論（下）〉，元照，109 年 1 月，頁 482。

婚姻家庭之和諧」，後者則係指以刑法一般預防功能達到維繫婚姻與家庭制度之目的。

二、以刑罰手段處罰通（相）姦行為，乃限制人民之性自主決定權，而追訴過程過度侵害人民隱私權：

（一）性自主決定權部分：

我國憲法並未明文保障性行為自由（或稱性自主權、性自主決定權），惟得以憲法第 22 條作為憲法上未列舉之基本權利之立論依據。

我國刑法第 221 條至第 229 條之 1 規定，於 88 年 4 月 21 日修正時從原「妨害風化罪章」獨立出，增訂「妨害性自主罪章」，刪除「致使不能抗拒」而改以「其他違反其意願之方法」作為構成要件要素，將性自主決定權作為刑法所保護之法益。最高法院 107 年度台上字第 3348 號判決指出「刑罰制裁妨害性自主行為，係為保障他人關於性意思形成與決定之自由，因性侵害犯罪係侵犯他人之性自主權，即任何他人在法律範圍內，得自主決定其是否及如何實施性行為而不受他人強迫及干涉之權利，屬人格權之範疇。」進一步闡釋性自主權之內涵，及其為刑法所保護之重要法益。

司法院釋字第 554 號解釋肯認性行為自由雖非憲法明文列舉保障之權利，惟為維護個人主體性及人格發展之完整，並為保障個人生活私密領域免於國家公權力及他人之侵擾，亦受憲

法第 22 條規定所保障[2]。性自主權保障個人對於諸如個人性別認同與性傾向、性觀點、性生活之對象、時間、地點及方式、乃至是否基於對價關係而從事性行為等性領域之事項得自主決定之權利[3]。從而，刑法第 239 條通（相）姦罪，禁止有配偶之人與婚姻外之他人發生和姦行為，同時也禁止他人與有配偶之人發生和姦行為，乃以刑罰為手段限制人民之性自主權。

（二）隱私權部分：

司法院釋字第 603 號解釋意旨認為，基於人性尊嚴與個人主體性之維護及人格發展之完整，並為保障個人私密領域免於遭受國家及他人之任意侵擾，隱私權亦屬憲法第 22 條所保障之基本權。

刑法第 239 條所處罰之行為即性行為本身，然性行為乃隱私權所要保護最私密的領域[4]，蒐證與訴訟上證明都勢必窺探通（相）姦者之性行為。實務上向認通（相）姦行為係指「和姦」[5]，而「姦」指男女性器官接合之行為[6]，故通（相）姦指男女間

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[2] 參見林錫堯、陳敏、陳春生，司法院釋字第 666 號解釋協同意見書。

[3] 同前註。相同意見可參見陳新民，司法院釋字第 666 號解釋協同意見書。

[4] 隱私權之領域，包括性行為隱私（司法院釋字第 554 號解釋）、個人自主控制資料之資訊隱私權（司法院釋字第 603 號）、秘密通訊自由（司法院釋字第 631 號）、個人生活私密空間（司法院釋字第 689 號）等，依歷次大法官解釋，可知隱私權保護有階層之分，越是私密、敏感之核心領域，國家須追求重要公共利益始能干預，大法官審查也越嚴格，故性行為應界定為隱私權保障的最核心領域。

[5] 最高法院 17 年度決議（五），17 年 10 月 13 日。

[6] 本院院字第 1042 號、最高法院 51 年台上字第 878 號判例、58 年台上字第 51 號判例意旨參照。

合意之性器官之接合行為，蒐證、證明自有相當之困難度[7]，為了要證明配偶婚外和姦行為，往往要先以侵害他人隱私權等非法方式進行蒐證，引發諸多私人不法取證爭議，甚至遭對方提出刑法第 306 條侵入住宅罪、第 315 條之 1 妨害秘密罪之告訴[8]。由此可知，為了追訴通姦行為之捉姦行為本身，反而衍生其他刑法法益的侵害。

在審判上，通（相）姦之被告如否認犯行，法官對婚外性行為之有無當會詳加調查，包括法庭上公開勘驗播放捉姦或偷拍之錄影、或通（相）姦者間有關性行為之錄音、錄影，且任何親密對話、性行為之經過都會在判決書內描述甚至上網公開，刑事審判過程勢必暴露被告之絕對隱私，再度對個人隱私權造成侵害。此外，實務在通姦案件審理時，對於上述捉姦者以侵害他人隱私等非法手段所取得之證據，一般認為具有證據能力[9]，也間接助長了私人不法取證，進而等同侵害了通（相）姦者之隱私權。

按公民與政治權利國際公約(International Covenant on Civil

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[7] 實務上對於「通姦」要件之解釋，限於男女性器官接合之和姦行為，衍生在訴訟證明上，往往委託徵信社捉姦在床，或以偷拍方式進行蒐證，或偷看配偶之電腦、手機或日記等方式為之。如無法證明確有和姦行為，基於「罪疑唯輕」原則，只能由檢察官處分不起訴或法院判決無罪。

[8] 實務上常見因違法取證而被起訴之罪名，尚包括刑法第 304 條強制罪、刑法第 277 條傷害罪、刑法第 354 條毀損罪。

[9] 臺灣高等法院 108 年度上易字第 741 號判決（妨害婚姻）意旨參照，該判決引用最高法院 97 年度台上字第 734 號、98 年度台上字第 578 號、106 年度台上字第 3982 號判決之見解。

and Political Rights，下稱公政公約）第 17 條第 1 項規定：「一、任何人之私生活、家庭、住宅或通信，不得無理或非法侵擾，其名譽及信用，亦不得非法破壞。」98 年 12 月 10 日施行之公民與政治權利國際公約及經濟社會文化權利國際公約施行法（下稱兩公約施行法）第 2 條規定：「兩公約所揭示保障人權之規定，具有國內法律之效力。」通姦罪既對個人私領域之隱私權、性自主權進行干預，自應通過兩公約之檢驗，始具存在之正當性。就此，102 年、106 年之兩公約國際審查會議，所提出之兩公約國際審查結論性意見均明確指出通姦罪構成對私生活的無理侵擾、對隱私權的侵犯，違反公政公約第 17 條，建議政府應予除罪。

三、關於立法機關為維護重要法益而制定之行為規範，如選擇以刑罰加以處罰，其違憲審查之基準：

國家立法機關為達到特定之立法目的，固得選擇以刑罰作為強制手段，但因此對人民基本權利構成限制時，仍應符合憲法第23條比例原則之要求。依司法院釋字第669號、第646號、第551號、第544號解釋理由，就刑罰手段所發展出之違憲審查基準，有4個步驟：立法目的是否在保護具有憲法位階之特定重要法益（目的正當性）、施以刑罰是否有助目的達成（適合性）、是否別無其他相同有效達成目的而侵害較小的手段可資運用（必要性），以及刑罰對人民基本權之限制與所欲維護之法益間是否符合比例關係（狹義比例原則），依序逐一審查。倘立法目的不具正當性，或手段不具適合性、必要性，或手段

造成的侵害與目的所欲維護之公益間不合乎狹義比例原則，該法即牴觸憲法第23條之比例原則，而有被宣告違憲之可能。

違憲審查在立法事實判斷上，究應達到何種確信程度，才足以認定事實之存在，司法院大法官逐漸發展寬嚴不同之審查標準。不同寬嚴審查標準的選擇，應考量許多因素，例如系爭法律所涉基本權之種類、對基本權干預之強度，還有憲法本身揭示的價值秩序等等，都會影響寬嚴不同審查基準之選擇[10]。就通姦罪涉及干預性自主權及隱私權部分，許宗力大法官認為通姦罪所處罰之行為本身為性行為，性行為乃隱私權所要保護最私密的領域[11]，且隱私範疇屬人格自由發展的最核心[12]，德國學者 Silberkuhl 指出，個人性自主權包含本身性別認同及其性傾向之發現與認識，此乃屬於人格最私密之範圍，僅能在特別之公共利益存在時始得被限制之[13]。司法院大法官過去對於隱私權之解釋，是以極為嚴密及嚴格的審查標準把關，除非有極為高度的公共利益考量，方得許可立法侵犯之[14]。據此，從干預基本權之性質及強度而論，系爭規定以刑罰手段限制性行為自由，且追訴過程同時侵

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[10] 參見許宗力，司法院釋字第 578 號、第 584 號解釋協同意見書。

[11] 參見許宗力發言，〈「婚外性的罪與罰」座談會〉，102 年 4 月 12 日，收錄於臺灣法學雜誌第 223 期，頁 34。

[12] 參見許宗力，〈比例原則之操作試論〉，法與國家權力（二），頁 131。

[13] 參見林錫堯、陳敏、陳春生，司法院釋字第 666 號解釋協同意見書。

[14] 例如司法院釋字第 631 號有關人民秘密通訊自由、釋字第 603 號有關指紋之解釋，可知隱私權受憲法極為嚴格的保障，參見陳新民，釋字第 666 號解釋協同意見書。其更進一步闡釋，以性行為的絕對隱密性，遠遠超過了一般通訊隱私權與泛泛的指紋隱私權，其披露曝光造成人格尊嚴的高度扭曲，使得系爭條文的執行過程與獲得適用，都不可避免會侵犯隱私權與人格權，而產生違憲的後果，非文明法治國家所可容忍者。

害隱私權，過度干預基本權之最核心領域；自由刑之刑事處罰剝奪人身自由[15]，而性行為隱私、性自主權與人性尊嚴密切相關，屬重要人格權，在憲法秩序中應具重要價值，只有為追求特別重要的公共利益必要時，方能予以限制。以刑罰手段對性自主權之限制，及對於隱私權之干預，均應受嚴格之司法審查。從而，本案對立法事實之審查，應該採取「嚴格」審查基準。

在嚴格審查下，該限制所追求目的須屬特別急迫、重要之正當公益目的，在審查相關立法事實的預測與判斷上，要求至少須達充分蓋然性、相當確定性之程度，且舉證之不利益歸國家一方負擔[16]，對立法者判斷就須作具體詳盡的深入分析，倘無法確信立法者的判斷是正確的，就只能宣告系爭手段不符適合原則之要求[17]。

貳、刑法第 239 條處罰婚外性行為之手段，是否有助於所揭目的之達成？手段與目的間是否存有一定關聯性？

一、通姦罪某程度可發揮威嚇效果，達到刑罰一般預防功能：

國家透過刑罰的預告與威嚇，讓一般人民衡量利害關係，考量犯罪結果得不償失，不敢以身試法，而發揮預防犯罪的一般預防、保護法益之功能。但婚外和姦行為通常出於感情或性慾，此涉及到人類最

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[15] 司法院釋字第 646 號、第 669 號、第 775 號及第 790 號解釋，均指出立法機關為保護特定重要法益，以刑罰限制人身自由，雖非憲法所不許，惟因刑罰乃不得已之強制措施，具有最後手段之特性，應受到嚴格之限制。

[16] 參見許宗力，司法院釋字第654號解釋協同意見書，及〈比例原則之操作試論〉，法與國家權力（二），頁121以下。

[17] 參見許宗力，司法院釋字第 578 號解釋協同意見書。

深層本能慾望，並非純理性的選擇，很難期待可用法律甚至刑罰強制約束規範。因此，想要用法律限制人類的情慾，達到所謂刑法嚇阻的一般預防目的，不無疑問[18]。刑法第 239 條之通（相）姦罪，法定本刑為 1 年以下有期徒刑之輕罪，且係告訴乃論之罪。實務上有罪確定的案件也幾乎判處得易科罰金之刑[19]。從犯罪預防政策的實務角度而言，一般預防之威嚇作用效果恐怕是有限的。

不可否認的，以刑罰為手段威嚇人民，自古以來是國家約束人民行為之有效手段，但效果則有好壞之分。通姦罪之存在，畢竟是一種犯罪，或考量家庭、職業、宗教等因素而不敢觸法者有之，或惟恐通姦罪所帶來之「恥辱感」而退卻者亦有之。誠如司法院釋字第 554 號解釋表示「刑法所具一般預防功能，於信守夫妻忠誠義務使之成為社會生活之基本規範，進而增強人民對婚姻尊重之法意識，及維護婚姻與家庭制度之倫理價值，仍有其一定功效。」即此道理。只是在現代社會變遷下，人民性觀念、婚姻觀念逐漸轉變，更重視性自主權，要藉由通姦罪達到保護法益、預防犯罪之目的，效果越來越薄弱。從這個角度，通姦罪雖有助於發揮刑法一般預防，藉以維繫婚姻家庭制度的功能，但效果是相當有限的。

二、通姦罪無助於維繫（個案）婚姻、家庭目的之達成，反而對婚姻、

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[18] 有關通姦罪無法達到預防通姦目的之詳細論述，參見徐昌錦，〈通姦罪合憲性解釋之評析〉，《臺灣本土法學雜誌》，77 期，2005 年 12 月，頁 44 以下。

[19] 依 105 年至 108 年 4 月法務部統計資料，通（相）姦罪裁判確定有罪者中，判處 6 個月以下有期徒刑者占 99.8%，其餘為免刑，且無判處逾 6 個月有期徒刑之案件。見法務統計摘要，專題分析：妨害婚姻及家庭罪案件統計分析，頁 25-26。

家庭有破壞性之作用：

司法院釋字 554 號解釋固認通姦罪合憲，但該罪能否達到維護婚姻、家庭之立法目的，審判實務上有不少質疑，諸如於判決量刑理由傍論指出「刑罰規範之目的，無非係就告訴權人維繫婚姻繼續存在之利益予以保護，然告訴權人所受之損害既得以民事請求之方式彌補其權利之損害，且於通姦、相姦事實已然發生之此情況下，維繫婚姻續存之目的究竟對婚姻雙方是福是禍，亦未可知」[20]、「婚姻關係之維持乃夫妻雙方共同之責任，人類係感情之動物，感情之發展絕非刑事通姦罪章所能禁錮規範」[21]、「現今自由、多元社會之發展趨勢下，被告為追求自身情感之發展及性自主之權利而無視於社會道德之觀感，其所為尚非惡性重大，刑法制裁之後果對自訴人原有婚姻關係之維繫亦無實質之助益，然被告所為仍非現行法律制度所允許」[22]、「通姦罪之規範目的無非是婚姻關係的維護，然事實上該罪所能維護者僅止於形式上的婚姻關係，對於婚姻的尊嚴及幸福婚姻之維護並無助益，蓋幸福之婚姻必須由夫妻雙方共同努力經營，這包括任何一方的自我成長，對他方的瞭解、包容與體諒，以及雙方對婚姻神聖性之尊重等眾多因素，感情既是人類自由意志的產物，性質上全然是主觀的，對之施以強制的手段，非但無益，恐更有害。」[23]從立法論觀點質疑通姦罪可否達到維繫婚姻之規範目的。

學者亦指出：「通姦罪的追訴，不能對婚姻有什麼維護的作用，

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[20] 參見臺灣新竹地方法院 97 年度易字第 940 號刑事判決。

[21] 參見臺灣臺北地方法院 97 年度自字第 15 號刑事判決。

[22] 參見臺灣高等法院 98 年度上易字第 1618 號刑事判決。

[23] 參見臺灣臺中地方法院 92 年度易字第 855 號刑事判決。

相反的，在大部分的情況下，只有毀滅婚姻的作用。因為無論如何，對通姦之配偶或第三人的刑罰只會促使通姦之配偶決意離婚」[24]。德國決定要廢除通姦罪時，國會曾做過研究調查報告，可知通姦罪對於婚姻的維護沒有正面作用，相反地，有加速破壞的功能[25]。韓國憲法法院於 104 年 2 月 26 日以「保護婚姻制度與夫婦間履行貞潔義務之公共利益，已難以透過對審判對象施加條款懲罰來達成，該條款已過份限制國民在性方面的自決等基本權利，造成法益均衡性喪失」為由，宣告韓國刑法通姦罪違憲[26]。

綜合上述國內外經驗，益徵通姦罪顯然無法達到維繫個案上婚姻及家庭和諧的功能，且從捉姦、訴追乃至審判之過程，通姦者之隱私權及人格尊嚴一再被侵害，亦有通姦者對配偶反擊提起侵入住宅、妨害秘密等告訴，夫妻間之感情、信任關係已然遭破壞，不僅難以彌補，而且感情破裂更深。以刑罰處罰通姦之配偶係為維持婚姻之立法目的，邏輯上已有矛盾。

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[24] 黃榮堅，〈刑罰的極限〉，元照，89 年 4 月，頁 4。

[25] 黃榮堅發言，〈「婚外性的罪與罰」座談會〉，102 年 4 月 12 日，收錄於臺灣法學雜誌第 223 期，頁 18；黃榮堅，〈刑罰的極限〉，元照，89 年 4 月，頁 13。

[26] 楊虔豪，〈韓國憲法法院裁定通姦入罪違憲〉，BBC NEWS 中文，https://www.bbc.com/zhongwen/trad/world/2015/02/150226_skorea_law（最後閱覽日期：109 年 3 月 7 日）。有關韓國憲法法院多數及少數大法官之見解，詳見該憲法法院網站資料：http://search.ccourt.go.kr/xmlFile/0/010400/2015/pdf/e2009b17_1.pdf（最後閱覽日期：109 年 3 月 15 日）。

參、本院釋字第 554 號解釋有無變更解釋之必要？

基於下列理由，本廳認為本院釋字第 554 號解釋有變更解釋之必要：

一、刑法第 239 條牴觸憲法第 23 條比例原則：

（一）立法目的正當性（目的合憲性）審查：

關於目的合憲性審查，嚴格審查基準下，應要求立法者以刑罰限制人民性行為自由及干預隱私權之法律所追求目的是特別重要公益，已如前述。依釋字第 554 號解釋意旨，可知刑法第 239 條有關「維護婚姻與家庭制度存續與圓滿」之立法目的，攸關社會形成與發展之基礎，受憲法制度性保障[27]，其重要性其應屬特別重要公益位階，合於憲法第 23 條所定「維持社會秩序」或「增進公共利益」之目的，符合特別重要公益之要件，是刑法第 239 條立法目的應屬正當。

（二）手段適合性審查：

適合原則不能要求手段對目的之達成必須非常有效或完全有效，只要對目的之達成有部分助益或效果，而不是完全無效，甚至有害，就已滿足適合原則之要求[28]。換言之，此一階段之判斷，嚴格度要求不需太高，只要限制手段與目的間，具有「相

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[27] 司法院釋字第 362 號、第 552 號、第 696 號、第 712 號解釋亦認為婚姻與家庭為社會形成與發展之基礎，受憲法制度性保障。且釋字第 712 號解釋更進一步闡釋：家庭制度植基於人格自由，具有繁衍、教育、經濟、文化等多重功能，乃提供個人於社會生活之必要支持，並為社會形成與發展之基礎。

[28] 參見許宗力，司法院釋字第 578 號解釋協同意見書。

當關聯性」即為已足[29]。因此，只要手段非全然不適合於目的之達成，即不違反適合原則。依前所述，通姦罪雖無助於維繫個案婚姻、家庭，但某程度可發揮威嚇效果，達到預防通姦、維護家庭婚姻制度之目的，故系爭手段並非完全不適合立法目的之達成，符合適合性原則。

（三）手段必要性審查：

通姦行為破壞婚姻、家庭，對配偶權造成侵害，固應受到非難，但手段選擇上，可對通（相）姦者請求民事上財產上或非財產上之高額損害賠償，亦可訴請離婚[30]，某程度仍有助於預防通姦、維繫家庭婚姻制度目的之實現。再者，民事訴訟對人民基本權之限制、侵害較輕微，且以刑罰手段訴追通姦行為，耗費大量時間、人物力進行偵查、舉證，耗費國家成本較民事訴訟為高[31]。從而，尚有與刑罰規定相同有效，侵害較小之替代手段可資採用，刑罰手段已逾越必要之程度，不具必要性。

再者，刑法應基於謙讓抑制之本旨，在必要合理之最小限度範圍內，始予適用，而且屬於最後的手段。如果某一不法行

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[29] 李惠宗，〈職業自由主觀要件限制之違憲審查-司法院大法官釋字第五八四號解釋評析〉，憲政時代，30 卷 3 期，2005 年 1 月，頁 273。

[30] 得依民法第 184 條第 1 項（侵權行為損害賠償請求權）、第 185 條第 1 項（共同侵權行為損害賠償請求權）、第 195 條（非財產上損害之賠償請求權）、第 1056 條（判決離婚時對有責配偶財產上及非財產上損害賠償請求權）對通姦配偶及相姦人請求損害賠償；得依第 1052 條第 1 項第 2 款規定（與配偶以外之人合意性交）訴請離婚；另訴請離婚時，經濟弱勢配偶亦可依民法第 1057 條對有責配偶請求贍養費，及依民法第 1030 條之 1 請求剩餘財產分配。

[31] 德國學界通說認為必要原則的審查，尚須加上手段的公益成本耗費的考量因素，參見許宗力，〈比例原則之操作試論〉，法與國家權力（二），頁 128 以下。

為，適用其他替代方式即可達到維持社會公平正義之作用時，則無須施以刑罰制裁。如前所述，民事手段屬於侵害較小之手段，不僅可保護配偶權，某程度亦可達到預防通姦、維護婚姻家庭制度之目的。國家動用刑罰權處罰通姦行為，顯然違反刑法謙抑原則。

此外，配偶發生通姦之家庭，有婚姻關係早已破裂者（甚至有夫妻因此分居已久，對方亦不肯離婚之例）。於此種情形，婚姻既已名存實亡，無夫妻情誼，配偶提告有時是出於報復、索賠之動機，實欠缺刑法保護必要之社會秩序公益性，已失去以刑罰干預之正當基礎。

（四）狹義比例原則審查：

通姦罪非最小侵害之手段，已不符合「必要性原則」，已如前述。退萬步言，縱認以刑罰處罰通姦行為具有必要性，惟通姦罪限制、侵害人民憲法所保障之性自主權、隱私權，僅能在特別之重要公共利益存在時始得限制之，雖系爭規範能預防通姦、維繫婚姻家庭制度之重要公共利益，但效果已相當有限，且尚有侵害較小之民事手段可以代替。因此，若不採取刑罰手段，不僅不會加速個案婚姻之破裂，亦不會面臨必然發生通姦行為並破壞家庭婚姻制度之嚴重急迫危險[32]，更免除對性自主權、隱私權的過度侵害。綜此，經權衡以刑罰為手段「對人身

[32] 有關狹義比例原則審查公益之迫切性是否足以正當化對基本權之限制，須先行判斷立法者倘不採干預行動，公益所可能面臨危險的嚴重程度與危險發生的可能性。參見許宗力，司法院釋字第 578 號解釋協同意見書。

自由之剝奪」、「過度限制、侵害人民性自主權、隱私權」、「僅能某程度達到預防通姦以維護家庭婚姻制度之目的」及「若不採取刑罰手段對家庭婚姻制度可能面臨危險的嚴重程度與危險發生的可能性不高」之結果，限制基本權之手段所增進之公益並未大於對私人所造成之不利益、損害，兩者顯失均衡，違反「狹義比例原則」。

此外，如以德國法學方法論及公法學家 Robert Alexy 教授所發表之「重力公式」（die Gewichtsformel, the weight formula）[33]檢視我國通姦罪手段造成的侵害與目的追求所保護之公益間孰輕孰重，亦可得出相同結論：

重力公式[34]：

$$W_{i,j} = \frac{I_i \cdot W_i \cdot R_i}{I_j \cdot W_j \cdot R_j}$$

I 表示「受侵害之密度」、W 表示「抽象之重量」、R 表示「經驗上確定性之程度」，而 $W_{i,j}$ 則表示「原則 Pi 相對於原則 Pj 之具體重量」。在侵害密度（抽象重量亦同）遞增下，將獲得越來越多之力量或抵抗力道，亦即「邊際替代遞減法則」（Gesetz der abnehmenden Grenzrate der Substitution），故「重力公式」之核心係基於「幾何序列」

[33] 有關 Robert Alexy 重力公式之介紹與論述，參見吳元曜，〈Robert Alexy 重力公式之理論與應用〉，元照，102 年 8 月。

[34] 同前註，頁 33 以下。

（即等積序列，依輕、中、重給予 1、2、4 不同值）之「商公式」。於「在一定條件下」之具體個案中，「重力公式」之運用結果即係「優先規則」之提出：若 Wi,j＞1，則 Pi 優先於 Pj；若 Wi,j＜1，則 Pj 優先於 Pi。

手段：

1.以自由刑為手段限制性自主權部分：

系爭規定以刑罰為手段處罰通（相）姦行為，遵守規範者，其性行為自由則遭限制，不遵守規範者，則處以自由刑，因此系爭規定所限制及違反規定所剝奪之基本權必須合併觀察：系爭規定限制性自主權，而違反之效果為自由刑，均屬自由權之一環，自由權為重要之人格權，惟在法益位階體系上不及高位階之生命權或身體完整權等權利，故 W 值設定為 2（1 為低度，2 為中度，4 為高度，下同）；通姦罪對於因恐懼遭判刑而不敢為通姦行為之人，雖限制其性行為自由，但並非當下立即之強制力，且違反系爭規定之刑度為「1 年以下有期徒刑」，在刑法領域中屬於輕度自由刑，且實務上如果判決有罪，幾乎均判處得易科罰金之刑，故侵害的嚴重程度較低，I 值設定為 1；又通姦罪之存在對嚇阻通姦行為之蓋然性不高，且實務上對於通（相）「姦」採嚴格解釋，限於男女間之性器官接合，故起訴案件有不少因無法證明此一要件而判決無罪[35]，或因撤回告訴而判決

[35] 以地方法院第一審 89 至 108 年間被訴刑法第 239 條終結統計結果，被訴共 12,888 人，有罪 7,528 人，有罪比率 58.41%。詳地方法院刑事第一審訴訟案件被

公訴不受理，故系爭規定侵害的蓋然性中等，R 值設定為 2。

2.刑罰追訴過程侵害隱私權部分：

隱私權為重要之人格權，惟在法益位階體系上不及高位階之生命權或身體完整權等權利，故 W 值設定為 2；又通姦罪之追訴及審判過程中，極私密之性行為相關情節可能被揭露，性行為既屬隱私權之最核心領域，則侵害隱私權之程度相當嚴重，故 I 值設定為 4；又通姦罪必須要證明有和姦行為，而相關證明及追訴活動侵害隱私權的蓋然性相當高，故 R 值設定為 4。

目的：

通姦罪所欲維護之家庭婚姻制度，係受憲法制度性保障，對於個人人格發展、社會生活形成具有根本性之重大影響及價值，可謂幾乎所有人之成長及人格養成均無法避免家庭婚姻功能之影響，因此 W 值設定為 4；又通姦行為之存在，對於部分家庭婚姻確實有強大之破壞作用，故 I 值設定為 4；惟如通姦罪除罪化，其與通姦行為之存在，進而對於家庭婚姻產生實質破壞力間整體因果關係鏈之蓋然性，由於尚涉及諸多主觀及客觀變數之介入，故 R 值設定為 1。

權衡結果：

Pi 之重量為（2x1x2）+（2x4x4）=36；Pj 之重量為（4x4x1）=16，Pi 之於 Pj 之具體重量大於 1，表示系爭規定之手段對基本

告違反刑法第 239 條終結有罪、無罪及不受理統計資料。

權所造成之限制、侵害，大於該規定所追求之公共利益，故系爭規範並不具憲法上之正當性或違憲。

（五）結語：

通姦罪立法所要保護之婚姻、家庭法益，固屬受憲法所保障之重要價值，但在手段上，僅能某程度達成預防通姦以維護婚姻家庭制度之一般預防功能，並無助於個案上婚姻之維繫，有時反而加速婚姻之破壞，系爭規定不僅過度限制、侵害人民憲法上所保障之性自主權、隱私權，亦非屬達成目的之最小侵害手段，已逾越必要程度，其與立法者所欲維護法益之重要性並未處於合乎比例關係，牴觸憲法第23條比例原則。

二、民主先進國家大都已廢除通姦罪，通姦除罪化係國際潮流趨勢：

德國舊刑法第 172 條對於通姦罪設有處罰規定，並以通姦行為導致離婚為構成要件，嗣於 1970 年廢除；日本刑法第 183 條通姦罪僅就有夫之婦與人通姦者設有處罰規定，至於有婦之夫與人通姦者，則不在處罰範圍，該規定於 1947 年廢除；法國刑法之通姦罪，就有配偶之夫婦分設處罰條件，已於 1975 年刪除；奧地利刑法第 194 條通姦罪平等處罰有配偶之一方與他人通姦，該規定於 1997 年 3 月廢止；瑞典、丹麥、挪威目前均無通姦罪處罰規定。韓國憲法裁判所於 2015 年 2 月宣告該國刑法第 241 條通姦罪違憲，至此廢除通姦罪。至美國目前雖有 23 州保留通姦罪的處罰規定，但除了軍人犯通姦罪仍可能被處

罰外，上述存在通姦罪之各州，幾乎沒有被起訴之案件[36]。

三、釋字第 554 號解釋迄今，國人觀念已有轉變，與婚姻有關之法律修法後足以保護婚姻中弱勢配偶：

106 年「總統府司法改革國是會議」第五分組第六次會議於 106 年 5 月 18 日通過「廢止刑法第 239 條及刪除刑事訴訟法 239 條但書」之決議，其理由說明「刑法通姦罪之存在，於性別平權意識尚未發展、我國性平法制多有缺漏之年代，有其保護弱勢配偶的功能；惟現今我國已有家庭暴力防治法與性侵害防治法，於民法親屬篇內，就夫妻財產制、離婚有責與破綻主義、子女之監護，均已經符合性別主流化之標準，並以子女之最佳利益為親權行使之依歸，是以，以國家刑罰權介入私人關係之通姦罪，目前存在之正當性已屬薄弱。」[37]司法院釋字第 554 號解釋公布於 91 年 12 月 27 日，迄今已 16 年，時代社會變遷，國人對於婚姻及性的觀念已有所轉變，重視性自主權，且相關法律規範已經歷修正，讓遭妨害婚姻之配偶得請求高額損害賠償、離婚、剩餘財產分配、贍養費及爭取子女監護，使其在經濟上可以自立，已足以保障弱勢配偶爭取權益，並懲罰通(相)姦者對婚姻家庭的破壞，通姦罪已無繼續存在之必要。

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[36] 有關各國廢除通姦罪之立法例，參見法務部 105 年 1 月 14 日法檢字第 10504501620 號函立法院「刑法通姦罪修法方向之說明」，立法院議案關係文書 105 年 3 月 30 日印發院總第 887 號政府提案第 15350 號之 148，頁 588-590。

[37] 總統府（2017），總統府司法改革國是會議第五分組第六次會議紀錄，https://justice.president.gov.tw/meeting/48（最後瀏覽日：3/8/2019）

肆、結論：

通姦罪無法通過「必要性」、「狹義比例原則」之審查，牴觸憲法第 23 條比例原則。而釋字第 554 號解釋作成至今，社會環境大幅變遷，與婚姻及家庭有關之法律制度逐漸成熟，國人對性、家庭觀念有所轉變，且世界各民主法治國家紛紛廢除通姦罪，益徵通姦罪不具應刑罰性，司法院釋字第 554 號解釋自應予變更。

<u>爭點題綱二、刑事訴訟法第239條但書部分：</u>

<u>壹、刑事訴訟法第239條但書之立法目的為何？其係為保障何種法益或基本權利而設？又因此限制或侵害人民何種基本權利？其審查基準為何？</u>

<u>一、刑事訴訟法第239條但書欲達「顧全夫妻情誼、隱私及避免婚姻、家庭破裂」之立法目的或維護此等法益：</u>

刑事訴訟法（以下未載法律名稱者，亦同）第239條規定：「告訴乃論之罪，對於共犯之一人告訴或撤回告訴者，其效力及於其他共犯。但刑法第二百三十九條之罪，對於配偶撤回告訴者，其效力不及於相姦人。」本條係於56年1月28日修正公布，經查其修法過程，僅將24年1月1日修正公布之第218條移列為第239條，條文內容不變，且查無修正理由；再經調閱前次修正時之立法院公報，亦僅刊載第218條之條文內容，查無修正理由。故其立法目的，僅能從學說及實務見解加以推知。

依學說及實務見解，第239條前段係所謂「告訴（主觀）不可分原則」之規定[38]，其規範意旨為「共犯間對於犯罪本具有互相利用之關係，為求偵查之便利，訴追條件之充實，自無庸為逐一之告訴。…告訴，係對於犯罪事實為之，並非對於特定之犯人為之，與公訴有別。因之，其告訴權之行使，僅就該犯罪事實是否告訴有自由決定之權，

[38] 參見朱石炎，〈刑事訴訟法論〉，修訂6版，2016年8月，頁328-330；林鈺雄，〈刑事訴訟法（下冊）〉，8版，2017年9月，頁127-128、132-133；最高法院74年度第6次刑事庭會議決議、最高法院71年度台上字第948號、90年度台上字第50號刑事裁判意旨、司法院釋字第569號解釋理由書。

並非許其有選擇所告訴之犯人之意」[39]，從而「告訴（主觀）不可分原則」乃基於告訴之性質（屬偵查起因或訴訟條件，係申告某犯罪事實請求追訴，而不得選擇特定犯人為之，旨在不使告訴人以選擇犯人而限制公訴權之行使），有別於公訴（或自訴）之性質（為當事人之檢察官或自訴人對於特定被告之犯罪案件，向法院起訴請求審判）使然[40]。又第 239 條前段所稱「共犯」，係指廣義用語，包括刑法總則、分則之任何型態的共犯，如共同正犯、教唆犯、幫助犯，並且無論其為任意共犯或必要共犯（含聚眾犯、對合犯）[41]。

觀諸日本刑事訴訟法第 238 條第 1 項亦為「告訴（主觀）不可分原則」之規定：「就告訴乃論之罪對於共犯之一人或數人提出或撤銷告訴，對於其他共犯亦生效力。」[42]其所稱「共犯」，同樣不僅指共同正犯、教唆犯、幫助犯，亦包含必要共犯；且告訴應就犯罪事實為之，若指定特定犯人而為告訴，該指定不生意義，如就其被害事實之犯人為複數，告訴之效力及於全部犯人[43]。[44]

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[39] 參見林鈺雄，〈刑事訴訟法（下冊）〉，8 版，2017 年 9 月，頁 127 轉引陳樸生，〈刑事訴訟法實務〉，再訂版，1999 年，頁 310-311。

[40] 參見司法院釋字第 569 號解釋理由書；林永謀，〈刑事訴訟法釋論（中冊）〉，改訂版，2010 年 12 月，頁 322。

[41] 參見林鈺雄，〈刑事訴訟法（下冊）〉，8 版，2017 年 9 月，頁 127。

[42] 中譯參見法務部編，朱學瑛、張弘昌、劉河山、蔡甄漪譯，〈日本刑事訴訟法暨刑事訴訟規則〉，105 年 8 月，頁 53。

[43] 參見松尾浩也監修，松本時夫、土本武司、池田修、酒巻匡編著，〈条解刑事訴訟法〉，第 4 版增補版，2016 年 12 月，頁 462。

[44] 然而，德國刑事訴訟法第 158 條雖有關於告訴（Strafantrag）之規定，惟並未規範「告訴（主觀）不可分原則」；在德國實務上，當告訴人明確指明僅就共犯一人提出告訴時，該告訴效力僅及於該共犯，對其他共犯不生效力，只有在告訴人究竟係對何共犯為告訴，遇有懷疑而無從判斷其真意時，始例外認為該項告訴

第 239 條但書係「告訴（主觀）不可分原則」之例外[45]，其立法意旨，似可觀諸林永謀大法官所著「刑事訴訟法釋論」之說明：「…蓋告訴人常有本於夫妻之情義，對於配偶有所宥恕者，而對於相姦者則未必然，若一併使其撤回之效力併及於必要共犯之相姦者，實有乖於人情，故設此規定」[46]。又司法院釋字第 554 號解釋理由書認為刑法第 245 條第 1 項規定通姦罪為告訴乃論，「使受害配偶得兼顧夫妻情誼及隱私，避免通姦罪之告訴反而造成婚姻、家庭之破裂」，且第 239 條但書與刑法第 245 條第 1 項同屬通(相)姦罪訴訟要件之規範，僅一為前階段告訴乃論之規定，一為後階段撤回告訴之規定，故兩者規範目的亦應相同。綜上所述，得推認第 239 條但書乃以「使告訴人得僅宥恕配偶，而不一併宥恕相姦人」為手段，俾達「顧全夫妻情誼、隱私及避免婚姻、家庭破裂」之立法目的或維護此等法益。

二、第 239 條但書實質上係以性別作為基礎而為差別待遇：

及於全部共犯，撤回告訴之情形亦同，KK-StPO/Griesbaum, 8. Aufl. 2019, StPO §158 Rn. 49-52; Meryer-Goßner/Schmidt, StPO Kommentar, 2016, 59 Aufl., §158 Rn.19-22. 故德國原則上係採告訴（主觀）可分原則，論者即以德國法採可分主義，從而認為「告訴（主觀）不可分原則」並非告訴此一制度之當然，實乃立法政策上之考量，參見林永謀，〈刑事訴訟法釋論（中冊）〉，改訂版，2010 年 12 月，頁 322。

[45] 現行法律中「告訴（主觀）不可分原則」之例外，只有刑事訴訟法第 239 條但書，以及營業秘密法第 13 條之 3 第 2 項「對於共犯之一人告訴或撤回告訴者，其效力不及於其他共犯。」

[46] 參見林永謀，〈刑事訴訟法釋論（中冊）〉，改訂版，2010 年 12 月，頁 329。類似見解，認為「告訴人雖本於夫妻之情，為宥恕配偶而撤回告訴，但對其相姦人則少有一併宥恕者，今若依人之不可分原則，則顯有違人情之常，故本法乃特設人之不可分原則之例外規定。」參見林山田，〈刑事程序法〉，2004 年，頁 518。

依司法院釋字第 476 號、第 544 號、第 554 號等解釋意旨之脈絡，必須立法目的具有正當性，系爭手段有助於立法目的之達成（適合原則），且別無其他侵害較小亦能達成相同目的之手段可資運用（必要原則），而系爭手段對基本權利之限制與立法者所欲維護法益之重要性及行為對法益危害之程度，處於合乎比例之關係（狹義比例原則）者，始符合憲法第 23 條之比例原則[47]。再者，操作比例原則涉及對立法事實判斷之審查，參酌外國釋憲經驗，約可分為三種審查基準：如採「最寬鬆審查標準」，只要立法者對事實的判斷與預測，不具公然、明顯的錯誤，或不構成明顯恣意，即予尊重；如採「中度審查標準」，則進一步審查立法者的事實判斷是否合乎事理、說得過去，因而可以支持；如採「最嚴格審查標準」，司法者對立法者判斷就須作具體詳盡的深入分析，倘無法確信立法者的判斷是正確的，就只能宣告系爭手段不符比例原則之要求。又系爭法律所設基本權之種類、對基本權干預之強度，還有憲法本身揭示的價值秩序等等，都會影響寬嚴不同審查基準之選擇[48]。

因第 239 條但書特別創設告訴不可分原則之例外，致法院對同為必要共犯之配偶及相姦人，在判決上產生不平等之結果。亦即依該告訴不可分及其例外規定，告訴人撤回對於相姦人被告之告訴時，其效力及於配偶被告，惟告訴人撤回對於配偶被告之告訴時，其效力卻不及於相姦人被告，使得同為必要共犯之相姦人被告，處於較配偶被告更不利之地位。

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[47] 參見司法院釋字第 476 號、第 544 號、第 554 號解釋理由書。

[48] 參見許宗力，司法院釋字第 578 號解釋協同意見書。

該但書規定雖然表面上不是以「非屬人力所能控制之生理狀態」即性別作為分類之基礎，實質上卻是如此。亦即雖然該但書規定表面上所規範的相姦人及於男性與女性，看似屬「中性」的性別分類，惟其實質上卻是優厚男性配偶、不利女性相姦人的性別歧視[49]。詳言之，該但書規定係民國 20 年代傳統社會時空背景下所制定，當時社會男尊女卑，標榜女性三從四德，女性婚外情為社會所鄙視，男性婚外情則未必受到社會責難，且男性為家庭經濟來源，女性求職謀生不易，通常必須在家服侍公婆及教養子女。於男性配偶通姦之情形，女性告訴人若不選擇原諒，下場不外離開夫家，無以為繼，背負拋家棄子污名，難有再婚機會；反之，倘若選擇原諒男性配偶，不僅可以繼續受到男性配偶扶養，雙方子女不致在破裂家庭中成長，不會受到離婚之污名，同時還能夠單獨懲罰破壞家庭之女性相姦人，滿足女性告訴人

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[49] 法律表面上是性別中立，實際效果卻是不成比例地不利於特定性別，必須要探究：(1)法律的實質目的是否出於歧視；(2)實際目的與實際效果是否確有關連。"When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination." Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 274 (1979).

如對性別分類採取更寬鬆之認定，則由於刑法第 239 條規定：「有配偶而與人通姦者，處一年以下有期徒刑。其相姦者亦同」，其所謂「姦」，係指男女間性器之結合，「通姦」係指有配偶之人與異性為性器之結合，「相姦」則是與有配偶之異性為性器之結合，通姦罪與相姦罪之必要共犯，分屬男、女不同性別，要無疑義。因此，刑事訴訟法第 239 條但書就配偶被告與相姦人被告為不同待遇，因配偶與相姦人分屬不同性別，即是以「非屬人力所能控制之生理狀態」即性別來分類。

之處罰情感。至於女性配偶與男性相姦人之情形，由於男性告訴人掌握家庭經濟來源，離婚不致對其造成生活上之負擔，又較少親身扶養子女之情感牽絆，加上倘不追究到底恐將顏面盡失，在社會上抬不起頭，故男性告訴人少有對共犯為差異之處理。是若觀察其制定時之時空背景，該但書規定所著眼之典型規範對象顯然就是「男性配偶」及「女性相姦人」，強化性別之刻板印象，而構成性別分類。

縱使距離制定之時已久，觀諸近年來法院判決之統計資料，還是難以脫離性別因素之影響。以 104 年至 108 年共 5 年間「地方法院刑事第一審訴訟案件被告違反刑法第 239 條終結有罪、無罪及不受理統計（依性別）」結果為例，通姦罪及相姦罪案件合計，男性、女性被告判決有罪人數分別為 713 人、826 人，占判決有罪總人數之比例分別為 46.33%、53.67%，且占全部男性（1,323 人）、女性（1,440 人）被告之比例分別為 53.89%、57.36%。如將統計期間拉長至 20 年，上開比例差距更大，以 89 年至 108 年共 20 年間「地方法院刑事第一審訴訟案件被告違反刑法第 239 條終結有罪、無罪及不受理統計（依性別）」結果為例，通姦罪及相姦罪案件合計，男性、女性被告判決有罪人數分別為 3,460 人、4,068 人，占判決有罪總人數之比例分別為 45.96%、54.04%，且占全部男性（6,155 人）、女性（6,733 人）被告之比例分別為 56.21%、60.42%。故整體而言被依通姦罪或相姦罪論罪科刑之人數及比例，女性皆顯然多於男性[50]。由於性別因素之影響

[50] 就偵查結果方面，類似於審判結果，男女性別因素亦同樣有其影響。依法務部統計處於 108 年 6 月 27 日提出之「法務統計摘要」所載，105 年至 108 年 4 月地方檢察署偵查通姦罪及相姦罪案件終結情形，男性、女性總起訴人數分別為 913 人、988 人，占全部男性、女性被告之比例分別為 21.8%、22.7%，就起訴人

仍然存在，得認第 239 條但書所生不平等，實質上係以性別作為基礎而為差別待遇。

三、應採取嚴格審查標準：

按中華民國人民無分男女，在法律上一律平等，且國家應維護婦女之人格尊嚴，保障婦女之人身安全，消除性別歧視，促進兩性地位之實質平等，憲法第 7 條及憲法增修條文第 10 條第 6 項分別定有明文。「消除對婦女一切形式歧視公約」（Convention on the Elimination of All Forms of Discrimination Against Women）第 2 條 a 款、第 15 條第 2 項規定，應以法律或其他適當方法，保證實現男女平等的原則，且在法院和法庭訴訟的各個階段給予平等待遇；公政公約第 26 條亦規定，法律應禁止任何歧視，並保證人人享受平等而有效之保護，以防因性別而生之歧視[51]。又憲法第 7 條所揭示之平等原則非指絕對、機械之形式上平等，而係保障人民在法律上地位之實質平等，要求本質上相同之事物應為相同之處理，不得恣意為無正當理由之差別待遇，如因處罰對象之取捨，而形成差別待遇者，須與立法目的間具有實質

數及比例而言，女性皆多於男性。又同期間地方檢察署執行通姦罪及相姦罪案件裁判確定情形，男性、女性總有罪確定人數分別為 480 人、568 人，占全部男性、女性執行案件人數之比例分別為 56.2%、60.2%，比例差距益大於上開起訴比例差距，應可佐證此等案件隨著程序進行越發不利於女性被告之傾向。

[51] 此二公約於我國均已內國法化，參見消除對婦女一切形式歧視公約施行法第 2 條規定：「公約所揭示保障性別人權及促進性別平等之規定，具有國內法律之效力。」又兩公約施行法第 2 條規定：「兩公約所揭示保障人權之規定，具有國內法律之效力。」

關聯，始與平等原則無違[52]；以性別作為分類基礎之差別待遇，應採較為嚴格之審查基準，如手段與目的間欠缺實質關聯，應認違反平等權之意旨[53]。[54]

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[52] 參見司法院釋字第 666 號解釋理由書。

[53] 參見司法院釋字第 748 號解釋理由書。依我國目前釋憲實務，司法院釋字第 626 號（警察大學入學考試限制色盲者應試合憲）、第 649 號（按摩業限視障者始得從事違憲），就與性別一樣同為「非屬人力所能控制之生理狀態」之分類，即色盲、視障，亦認應受較嚴格之審查。
關於性別歧視的審查標準，美國聯邦最高法院在 United States v. Virginia 維吉尼亞州軍校限收男性學生是否構成性別歧視乙案中指出：本案應適用中度審查標準，並且由維州軍校負舉證責任，維州軍校必須提出「非常具說服力的正當理由」（exceedingly persuasive justification），來證明此項性別分類係為達成「重要的政府目的」（important governmental objectives），而且所使用的歧視性手段與該等目的之達成具有實質關連（substantially related），才能使性別的差別待遇合憲。United States v. Virginia, 518 U.S. 515-516 (1996).

[54] 美國聯邦最高法院就平等原則的審查標準，依密度的不同，可分為三種：一、合理審查基準（Rational Basis Review）；二、中度審查基準（Intermediate Review）；三、嚴格審查基準（Strict Scrutiny）。種族分類或涉及投票、被選舉權、訴訟權、遷徙自由等民主政治基本權利的案件類型一般採嚴格審查，而性別分類一般採中度審查。各標準的適用範圍、目的之強度、手段與目的關連性如下表所示：

標準	適用範圍	目的之強度	手段與目的之關連性
合理	一般社經事項之政府措施	正當之正府利益	合理
中度	以性別或婚生子女為標準之分類措施	重要	實質
嚴格	有違憲嫌疑之分類、涉及基礎權利之政府措施	極重要	密切 必要並嚴格限縮適用範圍

參見廖元豪，〈如何觸不平而去之〉，收錄於司法院大法官 103 年度學術研討會論

綜上所述，由於第 239 條但書實質上係以性別作為基礎而為差別待遇，則依前揭說明，就「使告訴人得僅宥恕配偶，而不一併宥恕相姦人」之手段與「顧全夫妻情誼、隱私及避免婚姻、家庭破裂」之目的，為比例原則（含目的正當性、適合原則、必要原則及狹義比例原則）之審查時，應採取嚴格審查標準，於分析後倘無法確信相關立法判斷為正確，即須宣告此等手段不符比例原則及平等原則之要求。

貳、刑事訴訟法第 239 條但書之手段，是否有助於所揭目的之達成？手段與目的間是否存有一定關聯性？

一、目的正當性之檢驗：

依前述比例原則操作之順序，首先探討「顧全夫妻情誼、隱私及避免婚姻、家庭破裂」之立法目的是否具有正當性。觀諸長期釋憲實務所發展出關於「婚姻與家庭為社會形成與發展之基礎，受憲法制度性保障」[55]，及婚姻之安定、家庭之和諧、婚姻關係之隱私[56]等價值宣示，足認此等目的具有正當性。

二、適合原則之檢驗：

其後探討「使告訴人得僅宥恕配偶，而不一併宥恕相姦人」之手段，是否有助於達成「顧全夫妻情誼、隱私及避免婚姻、家庭破裂」之立法目的（適合原則）。為求嚴謹，宜從「正面」及「反面」兩個方

文集，頁 96。

[55] 參見司法院釋字第 362 號、第 552 號、第 554 號、第 620 號、第 696 號、第 712 號解釋文及理由書。

[56] 參見司法院釋字第 587 號解釋文及理由書。

向來分析，亦即先正面分析採取此等手段是否有助於達成該目的，再反面分析若不採取此等手段是否即難以達成該目的。

先正面分析採取此等手段是否有助於達成該目的。告訴人宥恕配偶，看似能顧全夫妻情誼，惟相姦人部分既未獲宥恕而須繼續審理，則經由相姦人於庭訊時之供述、該配偶以證人身分到庭作證，或其他證據調查及辯論程序，關於告訴人婚姻關係之隱私甚或難堪事項仍可能遭公開，甚至因此造成婚姻、家庭之破裂。從而，採取此等手段未必有助於達成該目的。

再反面分析若不採取此等手段是否即難以達成該目的。「不採取此等手段」意指回歸「告訴（主觀）不可分原則」，對於配偶撤回告訴之效力亦及於相姦人，若告訴人即因此不對配偶撤回告訴，寧可使配偶及相姦人全部之審理繼續進行，產生反於該目的之後果，則「若不採取此等手段即難以達成該目的」此陳述應可證立。然而，「告訴人即因此不對配偶撤回告訴，寧可使配偶及相姦人全部之審理繼續進行」，其確定性若何？抑或有可能「告訴人為達成該目的，即使告訴不可分，仍選擇對配偶撤回告訴（儘管十分不情願撤回告訴之效力亦及於相姦人）」？在欠缺實證研究或其他有力研究結果之下，既無法證明前一陳述具有確定性，亦無法證明後一陳述不具可能性。故充其量僅能認為「若不採取此等手段即難以達成該目的」之陳述係基於某種推測，而尚難斷言該陳述業經客觀證立。

再者，並非僅通姦及相姦罪存在「告訴人僅願原諒部分共犯，而仍欲處罰其他共犯」之現象，於其他告訴乃論之犯罪，依案件情節、犯罪分工、和解與否等條件，同樣不乏告訴人僅願原諒部分共犯之情

形。則為何立法者就此普遍情形，特別為通姦及相姦罪創設「告訴（主觀）不可分原則」之例外？若配偶與相姦人共同對告訴人為傷害、公然侮辱等其他告訴乃論之犯罪，即又回歸適用「告訴（主觀）不可分原則」，此等差異處理是否合理？通姦及相姦罪在規範上是否具備特殊及充分之理由，而有為其特設例外之正當性？均顯有疑義。

從而依嚴格審查標準，對於「使告訴人得僅宥恕配偶，而不一併宥恕相姦人」之手段與「顧全夫妻情誼、隱私及避免婚姻、家庭破裂」之立法目的，經以適合原則作正、反兩面之分析，一方面採取此等手段未必有助於達成該目的，另一方面亦無法斷言若不採取此等手段即難以達成該目的，自無法確信「第 239 條但書之手段有助於所揭目的之達成」或「手段與目的間存有一定關聯性」之立法判斷為正確（既未通過適合原則之檢驗，即無須繼續以必要原則及狹義比例原則為審查）。則依前揭說明，得認第 239 條但書以性別作為基礎而為差別待遇，手段與目的間欠缺實質關聯，故違反比例原則及平等原則。

參、結論：

如依嚴格審查標準，第 239 條但書以性別作為基礎而為差別待遇，其手段與目的間欠缺實質關聯，無法通過適合原則之檢驗，故該但書規定違反比例原則及平等原則。

鑑定意見書

張文貞[1]

交大科法學院教授兼院長/臺大法律學院教授

2020/03/27

一、刑法第 239 條部分 ---------- 1
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司法院大法官為審理會台字第 12664 號等聲請解釋案，其中關於刑法第 239 條及刑事訴訟法第 239 條但書規定是否合憲，請我出具鑑定意見，茲依司法院大法官書記處所列爭點題綱，表示意見如下：

一、 刑法第 239 條部分

（一） 刑法第 239 條之立法目的為何？其係為保障人民何種法益或基本權利而設？又因此限制或侵害人民何種基本權利？其審查基準為何？

1. 刑法第 239 條的立法目的，在於落實憲法對婚姻權的保障

刑法第 239 條規定：「有配偶而與人通姦者，處一年以下有期徒刑。其相姦者亦同」。本條的立法目的，是立法者希望透過刑罰手段達到預防通姦、落實配偶之間在性關係上的忠誠義務，藉以維繫婚姻關係，強化我國憲法對婚姻權及婚姻自由的保障。[2]

我國憲法雖未明文保障婚姻權及婚姻自由（right to marry, right to marriage, freedom of marriage），但司法院大法官已多次透過解釋明確表示，婚姻權及婚姻自由是憲法第 22 條所保障的基本權利。例如，大法官在司法院釋字第 748 號審查民法親屬編婚姻章，未使相同性別二人得為經營共同生活之目的而成立具有「親密性及排他性之永久結合關係」的立法闕漏時，即明確表示婚姻權及婚姻自由是憲法上重要的基本權。根據該號解釋理由書：「適婚人民而無配偶者本有結

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[2] 司法院釋字第 554 號解釋理由書參照。

婚自由，包含『是否結婚』暨『與何人結婚』之自由。該項自主決定攸關人格健全發展與人性尊嚴之維護，為重要之基本權(a fundamental right)，應受憲法第 22 條之保障」。[3] 此外，大法官也曾於司法院釋字第 569 號提及：「有配偶而與人通姦，悖離婚姻忠誠，破壞家庭和諧，侵害憲法第 22 條所保障之自由權利。」[4]

立法者認為配偶之間在性關係上的忠誠是「親密及排他性之永久結合關係」的婚姻權中之重要內涵，而婚姻外的性行為（通姦行為）破壞此一內涵，因此必須透過刑法第 239 條來加以處罰，以落實人民受憲法第 22 條所保障的婚姻權。

2. 刑法第 239 條所限制的權利，亦為重要的基本權—隱私權

刑法第 239 條在落實對婚姻權保障的同時，亦限制了人民另外一個同受憲法保障的基本權—隱私權，導致基本權之間的競合與衝突。

同樣地，我國憲法沒有明文保障隱私權，但司法院大法官多次透過解釋明確表示隱私權是憲法第 22 條所保障的基本權利。隱私權的核心內涵在於保障個人生活私密領域免於他人侵擾以及個人的自主決定權。例如，大法官在司法院釋字第 603 號解釋理由書強調，「基於人性尊嚴與個人主體性之維護及人格發展之完整，並為保障個人生活私密領域免於他人侵擾及個人資料之自主控制，隱私權乃為不可或缺之基本權利，而受憲法第 22 條所保障」。[5] 此外，在司法院釋字第 585 號、第 603 號及第 689 號等解釋中，大法官亦明白肯認隱私權保障的範圍，包含個人的資訊自主權、以及自主控制的權利。[6]

大法官在司法院釋字第 554 號審查刑法第 239 條是否合憲時，曾以刑法第 239 條主要是在「以刑罰手段限制有配偶之人與第三人間之性行為自由」，並認為「性行為自由與個人之人格有不可分離之關係」，個人得自主決定是否及與何人發生性行為，在不妨害社會秩序公共利益的前提下，是受憲法第 22 條所保障的基本權利。[7] 但事實上，刑法第 239 條所限制的權利，並非僅僅是性行為自由，更重要的是其涉及了限制個人基於人性尊嚴及平等人格發展所需，對於個人私密及親密關係的自主決定、及不受任意侵擾的權利，為隱私權保障的核心內涵。

司法院釋字第 554 號作成時，我國釋憲實務尚未明白將隱私權納入憲法第

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[3] 司法院釋字第 748 號解釋理由書參照。

[4] 司法院釋字第 569 號解釋理由書參照。

[5] 司法院釋字第 603 號參照。

[6] 司法院釋字第 535 號、第 509 號、第 293 號等解釋，雖有提到「隱私權」的字眼，但大法官並沒有仔細論述隱私權的權利範圍。直到司法院釋字第 585 號、第 603 號對於隱私權的權利內涵才有比較清楚的闡述。

[7] 司法院釋字第 554 號參照。

22 條的保障範圍，對於隱私權的權利內涵與範圍也還未清楚釐清與闡明。但在司法院釋字第 603 號作成之後，個人自主決定是否、以及與何人發生包括性行為在內的親密及私密關係，毫無疑問是隱私權所保障的核心內涵，也應受憲法第 22 條對隱私權所作的保障。

比較憲法及國際人權法上也廣為肯認個人生活私密領域的自主決定及免於侵擾，是隱私權保障的核心內涵。以美國為例，1965 年，美國聯邦最高法院在 *Griswold v. Connecticut* 案中，清楚表明除了美國聯邦憲法增補條款第 1 條至第 8 條所明文保障的權利外，這些權利所涵蓋的其他內容就有如光照外的陰影圈(penumbra)一樣，也同受憲法的保障。隱私權，就是憲法雖未明文、但仍須加以保障的重要基本權利。[8] 在美國法的脈絡下，個人對於私密空間、以及私密關係的自主控制權，一直都是隱私權的核心領域。[9] Douglas 大法官在 *Griswold* 案中，不但強調親密及私密關係的神聖性，也高度質疑警察在私密空間（例如臥房）執法及蒐證的合理性。[10] *Griswold* 案建立了國家不得干涉人民是否、及如何建立私密及親密關係，也不得干涉人民私密及親密領域活動等隱私權保障的核心內涵。

1972 年，*Eisenstadt v. Baird* 案延續並擴大了 *Griswold* 案的見解，認為憲法所保障的隱私權，是一個重要的基本權利，不應該因身分關係不同而有區別。因此，不論是已婚或單身，對於個人私密及親密關係的建立、以及私密及親密領域的活動，均享有不受公權力干涉的權利。[11] 在 1973 年 *Roe v. Wade* 案和 1977 年 *Carey v. Population Services Int'l* 案中，美國聯邦最高法院進一步總結前述相關案例對於個人私密及親密關係保障的意旨，認為這些內涵均指向隱私權中的自主決定權，而這樣的自主決定權，是重要的基本權利，國家不得任意干涉。[12]

美國聯邦最高法院也確實透過判決，日益強化隱私權中個人自主決定權的保障範圍。在 1992 年 *Planned Parenthood of Southeastern Pa. v. Casey* 案中，最高法院指出，任何涉及個人最私密的自主決定都和人性尊嚴與自主決定權有關，而為聯邦憲法增補條款第 14 條所必須保障的權利核心。若要求個人依國家界定的標

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[8] "The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Griswold et al. v. Connecticut*, 381 U.S. 479, 485 (1965). 另參見：張文貞，〈美國憲法〉，收於王澤鑑主編：《英美法導論》，台北：元照出版，頁 159-185（2010）。

[9] "The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Griswold et al. v. Connecticut*, 381 U.S. 479, 485 (1965).

[10] *Id.* at 485-86 (1965).

[11] "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. . . ." *Eisenstadt v. Baird*, 405 U. S. 438, 453 (1972).

[12] *Roe v. Wade*, 410 U. S. 113, 153 (1973); *Carey v. Population Services Int'l*, 431 U. S. 678, 685-86 (1977).

準行動，將破壞自我價值決定而無法完整發展人格。[13] 在 2003 年 *Lawrence et al. v. Texas* 案中，法院更明白指出，國家對於性行為的懲罰涉及到人類在「最私密的地方」(the most private of places, the home)的「最私密行為」。這類規範試圖控制一種私密關係，無論這種關係是否有權在法律上得到承認，都涉及個人的選擇而不應予以懲罰。個人選擇在其私人生活領域建立各種關係攸關憲法對人性尊嚴的維護，不應受國家干涉。[14]

在國際人權法上，公民與政治權利國際公約（International Covenant on Civil and Political Rights, ICCPR）第 17 條，明文保障隱私權。該條規定：「任何人之私生活、家庭、住宅或通信，不得無理或非法侵擾，其名譽及信用，亦不得非法破壞；對於此種侵擾或破壞，人人有法律保護之權利。」[15] 在隱私權的保障下，個人不但有權享有其隱私及其自主領域，更重要的是也可以隨時從公共領域退出回到自己的私人領域，根據自己期望不受他人干涉和侵擾的塑造自己生活。[16]

個人在公共領域的行為或表現，會受到法律、社會或道德規範的限制；但個人在其私密空間或「房間的四壁之內」(one's own four walls)的私人領域，應該受到完全的保障，根據其自由人格及意願來充分發展。[17] 此種保障包含了對私密及親密權利(right of intimacy)的保障，也保護這些私密與親密的行為及其相關的資

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[13] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 850 (1992): "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

[14] *Lawrence et al. v. Texas*, 539 U.S. 558, 566-67 (2003): " Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. . . . It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."

[15] "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 999 U.N.T.S. 171.

[16] "It entitles the individual to isolate oneself from one's fellow human beings, to withdraw from public life into one's own private sphere, in order to shape one's life according to one's own (egocentric) wishes and expectations." MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 378 (2nd ed. 2005).

[17] *Id.* at 379: "Whereas public life represented that area in which the individual's developmental possibilities were limited by strict legal, social and/or moral norms, one could fully develop, unrestricted and unobserved, one's individuality within the private sphere of one's 'own four walls'. . . . In principle, the right to respect for privacy includes private acts in public."

訊，不得對外揭露。

揭露個人私密或親密領域的資訊是否構成對隱私權的干涉，必須將個人主觀感受納入考量。將個人私密領域的相關資訊公開而導致其難堪，使個人遭受公眾議論，當然構成了對隱私權的侵害，例如：公開一個人的裸照、個人物品（日記、信件等）、性生活、或其他悖離常軌（不管是真實或捏造的）的嗜好。[18] 除此之外，任何違背當事人意願而對其私密及親密領域的侵犯、騷擾或窺探，也會構成對隱私權的限制及侵害。[19]

在公民與政治權利國際公約第 17 條的規定下，國家對於個人在其私密及親密領域的自主決定、及不受侵擾的權利的干預，構成對隱私權的限制，尤其是對私密及親密的性行為的管制，[20]必須通過合法且非恣意的高標準的檢驗。[21]

國家透過處罰婚姻外性行為的通姦罪來維護婚姻權，很顯然必須要對人民在私密及親密領域中的行為，進行直接的窺探與干預。此不僅侵入個人的私密與親密領域，也明顯干涉個人對於人際關係及生活決定的安排。因此，通姦罪構成對於個人及其與他人建立私密與親密關係的自主決定權的侵害，是對憲法第 22 條（以及公民與政治權利國際公約第 17 條）所保障隱私權的重大限制。

3. 刑法第 239 條涉及婚姻權與隱私權的競合與衝突

我國憲法對隱私權的保障，是在司法院釋字第 603 號作成後，才真正開始建構。除此之外，在司法院釋字第 748 號解釋之前，我國釋憲實務並未明白肯認婚姻權是憲法上所保障的重要基本權利，反而僅將其定位為是受憲法保障的制度。既然隱私權與婚姻權均為我國憲法所保障的重要基本權，司法院大法官在面對刑

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[18] *Id.* at 387-88: "As mentioned at the outset, privacy also guarantees a right of intimacy, i.e., to secrecy from the public of private characteristics, actions or data. In determining whether personal information is so private that its publication would constitute impermissible interference with privacy, a variety of factors must be taken into consideration, including the specific conduct and the subjective feelings of the person concerned. . . . Intimacy protects a person's likeness from being published without his or her consent. Qualified protection is enjoyed by that data from the intimacy sphere whose procurement, conveyance and publication would be embarrassing or awkward for the person concerned for reasons of morals. One might conceive in this context of the publication of secretly acquired nude photos or personal writings (diaries, letters, etc.) or of revelations of a person's sex life, so-called anomalies, perversions or other (true or fabricated) peculiarities that would subject the person concerned to public ridicule."

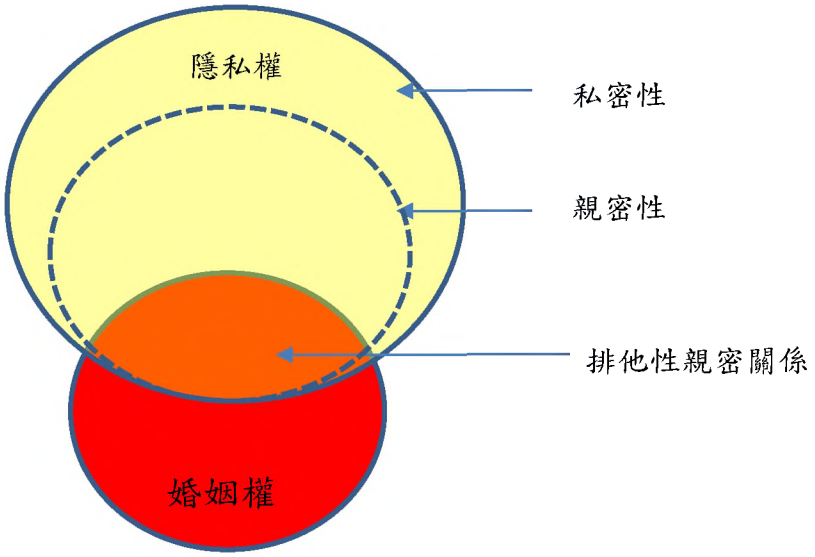
[19] "[P]rotection of intimacy goes beyond publication. Every invasion or even mere exploration of the intimacy sphere against the will of the person concerned may constitute unjustified interference." *Id.*

[20] "Sexual autonomy represents a particularly important case of the right to communication in the area of privacy. Regulation of sexual behaviour therefore constitutes interference with privacy." *Id.* at 391.

[21] 一般將「任意」一詞適用於國家干預，將「非法」一詞適用於私人間權利的競合與衝突。NOWAK, *supra* note 16, at 382.

法第 239 條是否合憲的這個問題上，就必須直接面對婚姻權及隱私權這兩個基本權的競合與衝突，並予以權衡。

如前所述，隱私權的保障範圍，包含個人生活私密領域免於他人侵擾、及其自主決定權。從隱私權所保障的私密及親密關係來觀察，其保障範圍可區分為私密性（與第三人無關）與親密性（涉及第三人）兩部分。而「親密性」的部分，可再區分「排他性」以及「非排他性」。誠如司法院釋字第 748 號所明白表示，婚姻權及婚姻自由的核心，在於與他人建立親密性及排他性之永久結合關係。在此意義上，隱私權與婚姻權之間相互有所重疊，作為婚姻權內涵的親密關係及親密行為亦為隱私權的核心範圍（如下圖示）。



國家透過刑法第 239 條處罰婚姻外的性行為，是想要透過刑罰手段維護婚姻中的排他性親密關係。然而，這樣的手段同時也直接干預了基本權利主體之間自主建立親密關係的權利（親密性）；更重要的是，國家為了執法勢必會干預到基本權利主體的個人私密領域及其活動（私密性）。因此，在審理刑法第 239 條是否違憲時，如何權衡婚姻權與隱私權這兩者間的衝突，就是本案最核心的關鍵。

4. 刑法第 239 條是否合憲的審查，應提高審查標準：立法目的必須至少具有重大公益，且其手段必須與此一重大公益有實質關聯

人民雖然選擇進入婚姻，但並不代表即放棄其受憲法所保障對個人私密領域的活動不受侵擾及享有自主決定的隱私權。刑法第 239 條透過處罰婚姻外性行為，希望達到落實憲法對婚姻權的保障，明顯干預個人私密及親密領域及其行為，涉及憲法第 22 條所保障隱私權的侵害。依我國釋憲實務，隱私權攸關「人性尊嚴與個人主體性之維護及人格發展之完整，並為保障個人生活私密領域免於他人

侵擾及個人資料之自主控制」。[22]國家要能通過憲法的檢驗來對隱私權加以限制，必須基於「特定重大公益之目的」[23]，且其手段必須「與重大公益目的之達成，具有密切之必要性與關聯性」。[24] 從而，刑法第 239 條對隱私權侵害是否合憲的審查，必須提高審查標準。尤其面對憲法所保障的婚姻權及隱私權這兩個最重要基本權的競合與衝突，釋憲者更須謹慎以待。

在比較法上，2015 年，南韓憲法法院認定該國刑法處罰通姦罪違憲，其中一個重要的原因，就是因為審查標準的提高。該國憲法法院認為，立法者要透過刑罰手段來處罰通姦行為、維繫婚姻，必須是為避免重大利益遭受明顯危害的最後手段。[25]

除此之外，釋憲者對刑法第 239 條是否合憲的審查必須提高審查標準的原因，還有憲法增修條文第 10 條第 6 項所賦予國家消除性別歧視的積極任務。大法官曾於司法院釋字第 666 號表明，，即可能涉及實質上的性別差別待遇。[26] 而此一實質上的性別差別待遇，是前述憲法增修條文所特別課予國家必須消除的任務。從這個角度來說，本案必須進一步特別檢討有無違反憲法第 7 條及增修條文第 10 條第 6 項性別平等的問題。

（二） 刑法第 239 條處罰婚姻外性行為之手段，是否有助於所揭目的之達成？手段與目的間是否存有一定關聯性？

1. 處罰婚姻外性行為無助於婚姻的維護，手段與目的間欠缺實質關聯

如前所述，刑法第 239 條涉及憲法第 22 條所保障的隱私權，對其是否合憲的審查，必須提高審查標準，詳究其立法目的是否具有重大公益，而其手段是否與此一重大公益有實質關聯。

刑法第 239 條對有配偶而與人通姦者及相姦者處以刑罰，是立法者為落實配偶間在性關係上的忠誠義務，以維繫婚姻關係，強化我國憲法對婚姻權的保障，

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[22] 司法院釋字第 603 號解釋理由書第 8 段參照

[23] 司法院釋字第 603 號解釋理由書第 14 段參照。

[24] 司法院釋字第 603 號解釋理由書第 14 段參照。

[25] Adultery Case, 27-1(A) KCCR 20, 2009Hun-Ba17.205, 2010Hun-Ba194, 2011Hun-Ba4, 2012Hun-Ba57.255.411, 2013Hun-Ba139.161.267.276.342.365, 2014Hun-Ba53.464, 2011Hun-Ka31, 2014Hun-Ka4(consolidated), February 26, 2015, 7: "Individuals' sexual life belonging to the intimate domain of privacy should be subject to the individual's self-determination, refraining from State's intervening and regulation, for its nature. The exercise of criminal punishment should be the last resort for the clear danger against substantial legal interests and should be limited at least."

[26] 司法院釋字第 666 號參照。

自屬重大公益。不過，以刑罰手段處罰婚姻外性行為，是否真能有助於婚姻權的保障，且具婚姻權保障之間有實質關聯，顯有疑問。

憲法上所保障婚姻權的本質，是肯認兩個具有平等人格尊嚴的主體間依其自由意志形成具有親密性及排他性的永久結合關係。[27] 在這樣自由結合的親密性及排他性的關係中，親密性關係是其中的一部分，但並非核心，也不是全部。立法者想要透過刑法第 239 條處罰婚姻外性行為以維繫婚姻關係，落實憲法上對婚姻權的保障，顯然是誤以為只要強化配偶間在性關係上的忠誠，就可以維繫婚姻。但既然親密性關係並非婚姻的核心、也非全部，僅僅針對性關係的忠誠義務進行刑罰，顯然無助於立法目的之達成。

南韓憲法法院宣告通姦罪違憲，主要論據即在於此。法院認為是否維持婚姻，應該由具有平等人格尊嚴的主體間，透過其自由意志與感情來決定，而不應透過刑罰來加以強制，更難從刑事政策的角度預期這樣的刑罰強制手段可以達到一般或特殊預防婚姻外性行為的效果。民事制度如：兩願或破綻離婚、贍養費及懲罰性賠償金等相關配套，可以更有效地實現相關的立法政策目標。從這個觀點來看，處罰通姦行為，來達到維繫婚姻、保障婚姻權的立法目的並不具實效性。

再者，通姦罪的處罰，也不符合手段適當性的要求，更非是最小侵害手段。如前所述，用刑法來處罰婚姻外性行為，並無助於達成配偶間的性忠誠義務要求以維繫婚姻；更重要的是，此種手段明顯過度侵害了個人的隱私(freedom of privacy)，尤其更具體的在個人隱私權範圍內的性自主決定及私密權(the right to sexual self-determination and secrecy)，不符衡平性原則。[28]

另外，2018 年，印度最高法院亦認定該國刑法通姦罪違憲。在其判決中，最高法院明白指出，將通姦行為視作犯罪是對受憲法所保障的隱私領域的極大侵犯。通姦行為可能是婚姻關係不睦的原因，也可能是結果。對婚姻關係內或婚姻關係外當中的任何一人處以刑罰，都無助於挽救婚姻關係不睦的局面。[29]

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[27] 司法院釋字第 748 號參照。

[28] *Adultery Case*, 27-1(A) KCCR 20, 2009Hun-Ba17.205, 2010Hun-Ba194, 2011Hun-Ba4, 2012Hun-Ba57.255.411, 2013Hun-Ba139.161.267.276.342.365, 2014Hun-Ba53.464, 2011Hun-Ka31, 2014Hun-Ka4(consolidated), February 26, 2015.

[29] *Joseph Shine v. Union of India*, (2019) 3 SCC 39, ¶54: "When the parties to a marriage lose their moral commitment of the relationship, it creates a dent in the marriage and it will depend upon the parties how they deal with the situation. Some may exonerate and live together and some may seek divorce. It is absolutely a matter of privacy at its pinnacle. The theories of punishment, whether deterrent or reformative, would not save the situation. A punishment is unlikely to establish commitment, if punishment is meted out to either of them or a third party. Adultery, in certain situations, may not be the cause of an unhappy marriage. It can be the result. It is difficult to conceive of such situations in absolute terms. The issue that requires to be determined is whether the said act should be made a criminal offence especially when on certain occasions, it can be the cause and in certain situations, it can be the result. If the act is treated as an offence and punishment is provided, it would tantamount to punishing people who are unhappy in marital relationships and any law that

如前所述，透過刑法來處罰婚姻外性行為，是否能達到維繫婚姻、保障憲法上的婚姻權的目的，在手段及目的之間具有實質的關聯，頗有疑問。更重要的是，刑罰作為國家所能使用的最嚴苛的強制工具，為了執行婚姻間的性忠誠義務的要求，透過國家權力的行使不管是從其訴追、審理到後續的執行，均嚴重侵犯人民同受憲法所保障的隱私權，過度限制其個人私密領域及其自主決定權，違背憲法對人性尊嚴維護的承諾。

綜上，刑法第 239 條無法通過比例原則的檢驗，在婚姻權與隱私權兩者的保障間嚴重失衡，應認定違憲。

2. 處罰婚姻外性行為的刑罰規定，違反性別實質平等

根據學者的統計分析，通姦罪的處罰，無論從偵查期間的告訴、告訴撤回、起訴、或於審判期間之告訴撤回、到最後的有罪判決，均呈現性別上的明顯差異，而有女性被告多於男性被告的情形。實務上，通姦罪的處罰，顯然對女性較為不利，而違反性別實質平等。[30]

聯合國提高婦女地位司(UN Division for the Advancement of Women, DAW)於 2009 年即建議各國應廢止通姦等婚姻外性行為的犯罪，並指出相關立法的具體實踐，往往是對女性的歧視。[31] 聯合國女性平權法律實務人權工作小組(UN working Group on Discrimination against women in law and in practice)亦於 2012 年針對仍存在通姦罪的國家進行調查，發現各國通姦罪的執行皆呈現出女性在刑事程序中極度弱勢，且其尊嚴、隱私與平等等重要的基本人權皆遭受侵害之情形。因此，該小組明確指出通姦罪歧視女性，違反《公民與政治權利國際公約》及《消除對婦女一切形式歧視公約》對於性別實質平等的保障。[32]

《公民與政治權利國際公約》國內法化後，我國依其施行法規定提出國家報告，在 2013 年及 2017 年對國家報告審查所做的結論性意見與建議中，均明白指出通姦罪造成對婦女不成比例的負面影響，而請我國政府加以檢討。[33]

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would make adultery a crime would have to punish indiscriminately both the persons whose marriages have been broken down as well as those persons whose marriages are not. A law punishing adultery as a crime cannot make distinction between these two types of marriages. It is bound to become a law which would fall within the sphere of manifest arbitrariness."

[30] 學者官曉薇發言，法務部網站 102 年 11 月 28 日「通姦罪應否除罪化」公聽會紀錄，https://www.moj.gov.tw/fp-199-61978-2b73b-001.html（最後瀏覽日：03/20/2020）。

[31] *Good Practices in Legislation on "Harmful Practices" Against Women*, 19 (2009), https://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Final%20report%20EGMGPLVAW.pdf.

[32] *See generally* United Nations Human Rights Office of the High Commissioner, *Adultery as a Criminal Offence Violates Women's Human Rights* (2012).

[33] 兩公約第二次國家報告國際審查會議結論性意見與建議，http://www.humanrights.moj.gov.tw/cp-487-31598-9616e-200.html（最後瀏覽日:：03/20/2020）。

因此，刑法第 239 條通姦罪的規定，在性別不平等的現實中，女性持續面臨該條文適用上的差別待遇，並侵犯其尊嚴、隱私與平等等受憲法所保障的重要基本權，違反憲法第 7 條保障的性別實質平等。

（三） 司法院釋字第 554 號有無變更解釋之必要？

婚姻權及婚姻自由，在司法院釋字第 748 號作成後已成為憲法上的基本權。這與司法院釋字第 554 號作成時，僅認為婚姻是憲法所保障的制度，且認為通姦罪的立法目的是為了保障婚姻關係中的性忠誠義務，而非為落實受憲法保障的婚姻權的前提，已不相同。從這個角度而言，司法院釋字第 748 號作成之後，對司法院釋字第 554 號的相關論理，明顯有補充或變更的需要。

此外，我國憲法對隱私權的保障是在司法院釋字第 603 號作成後，才建構完整。司法院釋字第 554 號作成時，認為刑法第 239 條通姦罪所侵害的是性行為自由，在大法官作成釋字第 603 號後，也顯然必須要加以補充或改變。如前所述，刑法第 239 條通姦罪所涉及的是對個人私密及親密領域、以及自主決定的隱私權的嚴重侵害，並非單單僅有性行為自由。司法院釋字第 554 號作成當時，僅狹隘認定刑法第 239 條侵害個人的性行為自由，且此一自由受婚姻與家庭制度的制約；這與我國釋憲實務後來所發展出，對婚姻權及隱私權的肯認與高度保障，已有很大差距，顯有重新解釋並加以補充或變更的需要。

如前所述，作為憲法重要基本權的婚姻權，其保障固然重要，但以刑法處罰通姦罪的方式來保障婚姻權的落實，已明顯侵害同為攸關人性尊嚴與自主決定的隱私權核心—私密領域活動以及建立親密關係之自主決定權，過度限制人民同受憲法第 22 條所保障的隱私權。就此，司法院釋字第 554 號，應在大法官後續所作解釋的基礎上，對相關論理加以補充，對刑法第 239 條是否合憲的認定加以變更。

二、刑事訴訟法第 239 條但書部分

（一） 刑事訴訟法第 239 條但書之立法目的為何？其係為保障人民何種法益或基本權利而設？又因此限制或侵害人民何種基本權利？其審查基準為何？（二）刑事訴訟法第 239 條但書之手段，是否有助於所揭目的之達成？手段與目的間是否存有一定關聯性？

1. 刑事訴訟法第 239 條但書的立法目的，並非為了維繫婚姻，而在於單獨懲罰相姦人，並不符合重大公益目的

刑事訴訟法第 239 條但書特別規定：「刑法第 239 條之罪，對於配偶撤回告訴者，其效力不及於相姦人」，是我國刑事訴訟法上的告訴不可分原則的例外規

定。

實務見解認為，刑事訴訟法第 239 條但書特別規定的立法目的，「乃告訴人常有本於夫妻之情義，對於配偶有所宥恕者，而對相姦者則未必然，若一併使其撤回之效力及於必要共犯之相姦者，實有乖人情，故設此例外規定。換言之，告訴人得以單獨對通姦之配偶撤回告訴，乃為顧及婚姻關係中之夫妻情義、家庭和諧，夫妻可以早日脫離訴訟關係，重修舊好，破鏡重圓，促使婚姻關係得以繼續延續。」[34]

不過，刑事訴訟法第 239 條但書特別規定的立法目的究竟是否為了維繫婚姻、落實憲法對婚姻權的保障，有進一步詳究的必要。除了通姦罪以外，同樣是考量親屬或家庭關係的和睦，慮及被害人通常多願意宥恕，國家強制干涉的結果有時反而是增加被害人苦痛，擴大受害範圍，所以刑法對某些親屬間的犯罪，設有告訴乃論的規定。[35] 例如竊盜、侵占、詐欺、背信等罪，因涉及公益，本為非告訴乃論之罪，但立法者特別將具家庭成員身分者所犯竊盜、侵占、詐欺、背信等罪，納入告訴乃論之罪，以尊重被害人的告訴意願。

值得注意的是，對前述家庭成員身分者的財產犯罪，立法者雖考量家庭和諧及家庭關係的維繫，但其所採取手段是直接將此種財產犯罪改為告訴乃論，同時也沒有如通姦罪一般，設有撤回告訴例外可分的規定。不管是具家庭成員身分或不具家庭成員身分的共同被告，均適用告訴不可分的原則，而撤回告訴，亦不可分。[36] 從這裡可以明顯看出，刑事訴訟法第 239 條但書特別規定的立法目的，並非真如上述實務所稱是為了維繫婚姻關係，因為立法者對同樣有維護家庭和諧關係必要的類似案件，僅需要設計成告訴乃論之罪即已足，無庸對非親屬之被告另作差別安排。立法者既然在刑事政策上，已認為通姦罪所涉的公益性，無需達非告訴乃論之程度，卻又設計撤回告訴不可分的例外，讓告訴人得以針對相姦人維持告訴，其真正的目的其實並非透過寬宥配偶而維護婚姻，而是基於報復目的來單獨懲罰相姦人。

同時，我國實務對刑事訴訟法第 239 條但書特別規定的解釋，認為該條所稱的「配偶」，是指撤回告訴時尚具有法律上的配偶關係者；倘若已離婚，則非該條所稱的配偶，維繫婚姻存續與家庭和諧的必要性並不存在，就沒有該條但書規定的適用。亦即，對前夫或前妻撤告者，其撤回告訴的效力仍將及於相姦人。所

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[34] 最高法院 104 年度台非字第 293、第 273 號刑事判決參照。

[35] 顧立雄（1984），〈由親屬間竊盜告訴乃論之規定，檢討竊盜罪所保護之法益究係持有抑或所有權？〉，《萬國法律》，18 期，頁 17。

[36] 雖然竊盜、侵占、詐欺、背信等罪為非告訴乃論之罪，因此就算撤回告訴亦不影響國家之追訴，但在法制上確實沒有如通姦罪相同的撤回告訴可分的例外設計。

以對已經離婚的配偶來說，只能選擇同時告前配偶及相姦者，或同時不告。[37] 不過，無論婚姻關係存續與否，都可能有前述實務見解所稱「告訴人常有本於夫妻之情義，對於配偶有所宥恕者，而對相姦者則未必然」的情形；亦即，不論是否離婚，都有可能發生有願意原諒配偶（或前配偶），而不願意原諒相姦人的情形。依據目前刑事訴訟法第 239 條但書特別規定的實務操作，倘若被害人已經想離婚，但不忍對配偶提告，卻又不願原諒相姦人，就必須要繼續維持婚姻關係，才能在提告後對配偶撤告，而維持對相姦人的告訴。這樣為了單獨懲罰相姦人，而勉強維持婚姻關係的情況，恰恰說明刑事訴訟法第 239 條但書特別規定的立法目的並非真正為了維繫婚姻關係，而只是特別給予配偶對相姦人單獨懲罰的程序規定。此目的與其嚴重侵害相姦人受憲法所保障的隱私權及平等權所必須符合的重大公益，並不相符。

2. 刑事訴訟法第 239 條但書規定，構成相姦罪被告與其他告訴乃論被告間的差別待遇，而此一差別待遇的目的，亦不符合重大公益

刑事訴訟法第 239 條本文之所以規定告訴不可分，在於告訴是針對犯罪事實，而非針對特定行為人，與公訴有別。告訴權的行使，僅就該犯罪事實是否告訴，有自由決定的權利，並不是給予告訴權人，在被告訴者之間，有選擇的權利。[38] 而刑事訴訟法第 239 條但書規定，對犯通姦罪的配偶撤回告訴，仍得就犯相姦罪的必要共犯進行偵查追訴；對犯相姦罪的必要共犯撤回告訴時，該撤回效力卻及於犯通姦罪之配偶。這樣的規定，是對於包括通姦罪在內的所有告訴乃論之罪中，僅對犯相姦罪的相姦人有所例外，構成相姦人與其他告訴乃論之罪的被告間，有差別待遇。

告訴乃論之罪所以須告訴乃論，是因為此類犯罪的訴追，有尊重被害人意思的必要，且其影響的公益不致重大。[39] 立法者既然將刑法第 239 條通姦罪列為告訴乃論之罪，相姦人既屬告訴乃論之罪的被告，應與其他告訴乃論之罪的被告相同，當被害人撤回告訴時，相姦人即應受告訴撤回主觀不可分的效力所及。相較於其他告訴乃論之罪的被告，刑事訴訟法第 239 條但書規定單獨對通姦罪之相姦人做例外撤回可分的差別待遇，嚴重侵害相姦人受憲法保障的隱私權及平等權，卻未有任何符合重大公益目的的論理。

此外，在刑事訴訟法第 239 條但書規定的實際適用上，卻對女性構成特別不利的情形。如前所述，在告訴權人對配偶撤回告訴，使被告僅有相姦人的情形，

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[37] 最高法院 104 年度台非字第 293、第 273 號刑事判決參照。

[38] 陳樸生（1982），《刑事訴訟法實務》，頁 292。

[39] 陳樸生，同前揭註 37。

往往有女性多於男性的結果，具統計學上的顯著性別差異。[40] 如此一來，刑事訴訟法第 239 條但書規定，不但沒有對相姦人及其他告訴乃論之罪的被告做合理差別待遇的基礎，更實質上造成了針對女性相姦人的歧視，不但與違憲法第 7 條性別實質平等的保障有違，也嚴重侵害其等受憲法所保障的隱私權。

三、結論

婚姻權及婚姻自由，在司法院釋字第 748 號作成後，已成為憲法上所保障的重要的基本權。司法院釋字第 603 號作成後，基於人性尊嚴與個人主體性之維護及人格發展之完整，並為保障個人生活私密領域免於他人侵擾及自主控制，隱私權已成為受憲法第 22 條所保障的重要基本權。如前所述，刑法第 239 條通姦罪的處罰，是對個人私密及親密領域及其自主決定的隱私權，所為的嚴重干預及侵害，並非如過去司法院釋字第 554 號作成當時所狹隘認定的對個人性行為自由的違反，且受婚姻與家庭制度的制約。在此一釋憲實務大幅進展的基礎上，確有必要對司法院釋字第 554 號來加以重新檢討。

刑法第 239 條通姦罪的規定，是立法者想要透過對婚姻外性行為的處罰，來維繫婚姻關係，落實憲法上對婚姻權的保障。但立法者很顯然是誤以為只要強化配偶間在性關係上的忠誠，就可以維繫婚姻。事實上，親密性關係並非婚姻的核心、也非全部。針對婚姻關係的性忠誠義務違反施以刑罰，顯然無助於立法目的之達成。更重要的是，此一刑罰手段，已明顯侵害同為攸關人性尊嚴與自主決定的隱私權核心—私密領域活動以及建立親密關係之自主決定權，過度限制了人民同受憲法第 22 條所保障的隱私權。此外，刑事訴訟法第 239 條但書特別規定，並非真正為了維繫婚姻關係，而是針對相姦人單獨懲罰的規定，與其嚴重侵害相姦人受憲法所保障的隱私權及平等權兩相權衡，不符合其所需達成的重大公益，其針對相姦人所做差別待遇的手段，亦不具實質關連，且在實質上造成了針對女性相姦人的歧視，與憲法第 7 條對性別實質平等的保障有所違背。

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[40] 學者官曉薇發言（2013），〈婚外性的罪與罰座談會〉，《台灣法學雜誌》，223 期，頁 41-42。

通姦罪之爭議

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壹、從立法沿革看通姦罪

中國傳統重視禮教，對於妨害風俗的行為，範圍設定的很廣，舉凡非夫妻關係之男女間的性交行為，均概稱為「姦非罪」；未結婚之婦女與男子姦淫者，稱為「無夫姦」；男子未使用強暴、脅迫等方式與女子姦淫者，稱為「和姦」。在傳統中國律法中，「無夫姦」與「和姦有夫之婦」，均受刑法處罰。[1]中華民國元年（1912）頒布之「暫行新刑律」，第 23 章「姦非及重婚罪」章中，其中第 289 條規定，「和姦有夫之婦者，處四等以下有期徒刑或拘役，其相姦者亦同。」所謂「和姦有夫之婦」，即是今日刑法上所指涉的「通姦罪」，主要是以侵害「夫權」作為處罰之核心；[2]至於「無夫姦」則不再以刑法處罰。[3]

民國 17 年（1928）施行之中華民國舊刑法，關於通姦罪之規定，係沿襲暫行律之體例，僅針對「有夫之婦」與人通姦者，始加以處罰。其規定在第 256 條，「有夫之婦，與人通姦者，處 2 年以下有期徒刑；其相姦者亦同。」此外，在第 259 條中規定本罪應告訴乃論，「第二五五條及第二五六條之罪，需告訴乃論；第二五六條之罪，本夫縱容通姦者，不得告訴。」[4]舊刑法只處罰有夫之婦的通姦行為，受處罰之主體，為姦婦與相姦者，刑度為 2 年以下有期徒刑。本罪為告訴乃論之罪，條文雖未載明告訴權人為誰，但根據民國 18 年的司法院解釋，乃以「本夫」為告訴權人，且本夫之告訴權為專屬告訴權。[5]

現行刑法通姦罪於民國 24 年 1 月 1 日公布，同年 7 月 1 日施行，第 239 條文義則修正為，「有配偶與人通姦者，處一年以下有期徒刑，其相姦者亦同」。此外第 245 條規定，「第二三八條、第二三九條之罪及第二四〇條第二項之罪，須告訴乃論。第二三九條之罪配偶縱容或宥恕者，不得告訴。」

從我國前面通姦罪規定的立法沿革可知，最早刑法上通姦罪規定之目的，並非為了維護婚姻制度，因為處罰之對象，一直鎖定在「有夫之婦」與他人和姦，因此比較像是在維護「夫權」，而僅對已婚婦女的通姦行為予以處罰；反之，倘若為「有婦之夫」，則並非通姦行為的處罰對象。民國 24 年制訂之現行

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[1] 鄭昆山（2004），〈通姦犯罪在法治國刑法的思辯：評釋字第五五四號解釋〉，《月旦法學雜誌》，105 期，頁 215。

[2] 黃源盛（2010），《晚清民國刑法史料輯註（上）》，頁 475，臺北：元照。

[3] 在「暫行新刑律」第 289 條的「補箋」（補充理由）有謂，「本律於姦淫行為中，僅罰強姦及有夫和姦，而無處罰其餘純然私通野合之條文。論者謂與中國禮教相反，宜將和誘處女、寡婦等罪名加入，然據編訂者之意，謂此種行為，當依家庭教育、學堂教育及輿論制裁以防止之，非刑罰所能矯正也。」黃源盛，前揭註 2，頁 475。

[4] 黃源盛（2010），《晚清民國刑法史料輯註（下）》，頁 982，臺北：元照。

[5] 司法院 18 年第 35 號解釋：「有夫之婦與人通姦。姦夫、姦婦均犯刑法第 256 條之罪。依同法第 259 條第 1 項及刑事訴訟法第 215 條第 2 項之規定。須本夫告訴乃論。其因戀姦和誘已滿二十歲之婦女者。關於和誘部分法無處罰正條。應不為罪。」

規定，則採取了男女平等處罰之概念，但在法定刑的設計上，將通姦罪之處罰從 2 年有期徒刑降低為 1 年，並明文規定不得科以拘役或罰金，目的是為了使犯罪者知所警惕，顯然於立法時，仍舊因禮教道德思想，而有將婚姻問題刑法化之情形。故在此立法沿革下，現行規定雖以維護家庭制度為名，骨子裡仍是以刑罰權來維護「對婚姻忠貞」的道德觀念。

貳、通姦罪之保護法益與解釋爭議

一、保護法益與其爭議

從前面立法沿革可以知道，清末民初受中國傳統禮教之影響，所有「婚姻外的性行為」均被視為妨害善良風俗之可罰行為，因此未婚男女之間的性行為，即「無夫姦」，因為違反禮教與善良風俗，即使沒有破壞婚姻制度，也受到刑法處罰。然而，到了民國時代，則將「婚姻外的性行為」鎖定為僅處罰「通姦」行為，而且也更明確地表示，通姦罪之處罰，並非關乎違反善良風俗，而是以其「破壞婚姻制度」作為處罰之理由。

現行刑法通姦罪是安排在「第 17 章妨害婚姻及家庭罪」中，刑法學說上，多將本罪之保護法益理解為維護婚姻制度。在刑法第 17 章中，可以劃歸為保護婚姻制度的條文，計有如下 4 個規定：

1、 第 237 條重婚罪
2、 第 238 條以詐術締結無效或得撤銷婚姻罪
3、 第 239 條通姦罪
4、 第 240 條第 2 項和誘有配偶之人脫離家庭罪

早期刑法學說與教科書上，對於婚姻制度之保護，最經典之論述，要屬韓忠謨教授之看法，「夫婦為人倫之始，而夫婦之身分又肇基於婚姻制度，故有婚姻，而後有夫婦之家庭，有家庭，而後有父母子女，由是親族繁衍，聚合而為社會.....刑法有鑒於此，特設專章以為保護，內容大別有二：一為關於婚姻制度下夫妻家庭生活之保護，一為關於父母子女間家庭生活之保護。前者注重一夫一妻婚姻制度之維持，所設主要犯罪類型有下列各端：（一）重婚罪，（二）詐術締婚罪，（三）和姦罪（通姦罪），（四）和誘有配偶之人罪。....」[6]

長久以來，我國對於「婚姻制度」，均理解為「一夫一妻制」，因此刑法學說上對於通姦罪之保護法益，常將其等同於重婚罪，也認為是用以保護「一夫一妻制的健全性秩序」[7]，甚至大法官釋字第 554 號解釋理由書中，亦直接將通姦罪理解為破壞一夫一妻之婚姻制度。此可在本號解釋理由書以下字句中窺知：

「按婚姻係一夫一妻為營永久共同生活，並使雙方人格得以實現與發展之生活共同體。因婚姻而生之此種永久結合關係，不僅使夫妻在精神上、物質上互相

[6] 韓忠謨（著），吳景芳（增補）（2000），《刑法各論》，頁 278-289，臺北：自版。
[7] 參見陳子平（2020），《刑法各論（下）》，3 版，頁 477，臺北：元照。

扶持依存，並延伸為家庭與社會之基礎。至於婚姻關係存續中，配偶之一方與第三人間之性行為應為如何之限制，以及違反此項限制，應否以罪刑相加，因各國國情不同，立法機關於衡酌如何維護婚姻與家庭制度而制定之行為規範，如選擇以刑罰加以處罰，倘立法目的具有正當性，刑罰手段有助於立法目的達成，又無其他侵害較小亦能達成相同目的之手段可資運用，而刑罰對基本權利之限制與立法者所欲維護法益之重要性及行為對法益危害之程度，亦處於合乎比例之關係者，即難謂與憲法第二十三條規定之比例原則有所不符。」

姑且不論釋字第 554 號解釋以一夫一妻來理解「婚姻制度」，已受到後來的釋字第 748 號解釋之挑戰；此外，重婚罪固然可以明確得知是為了保護「一夫一妻制」而存在，但通姦罪又是如何破壞一夫一妻制，實讓人難以理解，倘若通姦罪是破壞一夫一妻制，則現代社會各種沒有提告通姦罪的出軌、外遇行為層出不窮，不是造成大家的價值錯亂：有提告通姦罪之外遇，就是破壞一夫一妻婚姻制度，沒有提告通姦罪之外遇，就不算破壞一夫一妻婚姻制度？

再者，釋字第 554 號理由書中主張，通姦罪之存在是為了保護「婚姻制度」，但此號解釋理由書，卻也出現自相矛盾的論述。釋字第 554 號解釋理由書中提及，「刑刑法就通姦罪處一年以下有期徒刑，屬刑法第六十一條規定之輕罪；同法第二百四十五條第一項規定，通姦罪為告訴乃論，使受害配偶得兼顧夫妻情誼及隱私，<u>避免通姦罪之告訴反而造成婚姻、家庭之破裂</u>；同條第二項並規定，經配偶縱容或宥恕者，不得告訴，對通姦罪追訴所增加訴訟要件之限制，已將通姦行為之處罰限於必要範圍，與憲法上開規定尚無牴觸」，此段論述，大法官其實已經承認，對通姦行為提出告訴，會造成婚姻、家庭之破裂，然而，卻又以通姦罪為告訴乃論之罪，認為法律上已增加對通姦罪追訴之限制為由，認定通姦罪符合必要性。

其實，配偶之一方對他方之通姦行為提出告訴，「會造成婚姻、家庭之破裂」，此乃淺顯易懂的道理，真的算不上什麼深奧且值得辯論的釋憲難題，因為不管一百年前的立法者，或做出釋字 554 號解釋的大法官們，或是配偶雙方，甚至一般尋常小老百姓，都可以輕而易舉地預料通姦罪之提告，對婚姻的殺傷力更甚於維護。然而，刑法卻依然蒙著眼睛，自我催眠地堅持通姦罪是為了維護婚姻制度此等論述。此外，從通姦罪的刑事判決數量上來看，亦可以發現民眾利用「提起通姦罪」，以「挽回婚姻」的案件數，極為稀少。[8]因此，刑法學說上，大多數的學者每每提及通姦罪是為了「保護婚姻制度」，常常會有「心虛」之感。

也正因為通姦罪有這樣「理不直氣不壯」的保護法益，以致對於通姦罪在刑法解釋與適用，也叢生爭議，完全無法以「保護法益」作為目的解釋的依

[8] 參見後面關於通姦罪判決之實證研究。

歸。所見者，反而是各種流於意識形態、似是而非的解釋，徒增法律適用的上的「不安定性」與「不平等」之現象。以下先就「通姦」之解釋爭議，再就實務上之認定難題，加以說明。

二、「通姦」行為與「性交」行為定義是否相符？

刑法第 239 條通姦罪之規定為，「有配偶而與人通姦者，處一年以下有期徒刑。其相姦者亦同。」通姦罪的犯罪構成要件，首先，行為主體必須為「有配偶之人」，所謂「有配偶之人」，目前民法婚姻制度，在尚未依釋字第 748 號進行修法之前，仍然僅限異性結合之異性婚，並不包括同性結合之同性伴侶關係。其次，必須要有與人「通姦」之行為。由於通姦罪之條文仍然使用「通姦」或「相姦」一語，並未隨著民國 88 年刑法增訂「性交」立法定義時，一併修正為「性交」，因而引發學界與實務界對於「性交」與「通姦」概念是否相同的爭議，亦即「通姦」究竟何指？其定義是否與「性交」相同？

刑法第 10 條第 5 項關於「性交」定義之規定，乃配合民國 88 年關於刑法「妨害性自主罪章」而增訂。民國 88 年間，刑法將「強姦罪」修正為「強制性交罪」，過去使用「姦淫」作為行為態樣，司法實務的解釋上，認為僅限男女之「性器官結合」，至於「口交」或「肛交」行為，僅論以「猥褻行為」。修法後改為「強制性交罪」，對於「性交」之定義則予以擴大。所謂性交，其行為態樣，不僅男女性器官之結合，也包括以性器進入肛門（肛交）或口腔（口交），或以性器以外之身體部位（如手指）或器物（如棍棒、酒瓶），進入他人之性器、肛門（但不包含口腔）之行為。此外，所謂「使之接合之行為」，乃指涉女對男「性交」情形。[9]

然而，在「性交」定義增訂之後，對於「通姦」行為之解釋，便成為重大爭議問題。爭議點在於，「通姦」或「相姦」之解釋，是否亦同步擴大而與「性交」範圍相同？對此問題，刑法學說上多認為，「通姦」或「相姦」，仍應與傳統「姦淫」解釋相同，僅限男女之「性器官結合」情形。理由在於，民國 88 年通過刑法第 10 條第 5 項有關性交定義時，亦同時將刑法條文內有關「為猥褻行為或姦淫」之規定，同步修正成「為猥褻行為或性交」。尤其是與刑法第 239 條同屬妨害婚姻與家庭罪之刑法第 240 條和誘罪、第 241 條略誘罪中，原來的「姦淫」一語，即同時修正為「性交」，唯獨刑法第 239 條之通姦罪並未同步修正，學說見解從立法者之意思與文義、脈絡解釋，認為就通姦罪條文的未予修正，應屬立法者「有意的沉默」，亦即立法者有意不予規範之「法外空間」，故有配偶之人與他人為口交或肛交行為，應認為不屬於通姦行為，[10]且在立法例

[9] 王皇玉（2019），《刑法總則》，5 版，頁 114，臺北：新學林。
[10] 甘添貴（2003），〈妨害婚姻與口交通姦〉，《台灣本土法學雜誌》，42 期，頁 149；王皇玉，前揭註 9，頁 115。

上，通姦罪已逐步除罪化，尤其有鑑於刑法之強制手段不宜介入人與人之間的感情世界，故寧可採嚴格解釋。[11]本文則是認為，刑法乃國家對人民最為嚴厲的制裁手段，為了避免國家刑罰權的濫用，刑法上的罪刑法定原則嚴格禁止對人民不利益的「類推適用」，從而，將「通姦」之解釋擴大及於「性交」之各種類型，實已違反「類推適用禁止原則」。

司法實務見解亦與學說見解相同，認為「通姦」行為，僅限於「男女姦淫行為」，不能擴及修正後之「性交」。此可見台灣高等法院暨所屬法院 91 年法律座談會刑事類提案第 7 號之如下決議：

刑法第二百三十九條「通姦」，係指由於男女雙方合意，而為姦淫；和姦係指與有配偶之人互相合意，而為姦淫行為；姦淫係指男女交媾行為，而修正刑法第十條第五項之前，口交係屬姦淫以外足以興奮或滿足性慾之色情行為。民國八十八年三月三十日立法院修正通過刑法第十條第五項有關性交之定義，亦同時修正刑法第二百四十條、第二百四十一條、第二百四十三條、第二百九十八條、第三百條・・・，均將上開條文內有關「為猥褻之行為或『姦淫』」修正為「為猥褻之行為或『性交』」。而修正後刑法之「性交」範圍較「姦淫」為廣，而刑法第二百三十九條與修正之刑法第二百四十條、第二百四十一條同屬刑法第十七章之妨害婚姻及家庭罪，惟該章刑法第二百四十條、第二百四十一條之「姦淫」均與刑法第十條第五項之性交同時修正，而同章第二百三十九條之「通姦」或「相姦」則未與刑法第十條第五項之「性交」同時修正，顯係就刑法第二百三十九條之通姦或相姦，仍維持原來該條係指男女姦淫行為而不擴及修正後之「性交」，是本件甲男、乙女之口交行為尚不構成刑法第二百三十九條前段、後段之罪。

然而必須注意的是，實務上仍有少數法官於網路上投書，主張通姦罪之成立，必須擴大及於「口交」行為，以避免「與民眾法律感情嚴重脫節的判決」，…否則「受害最深的恐怕還是案件中的當事人及司法的公信與社會形象」[12]。對於個別法官維護「通姦罪」如此不遺餘力，除了令人感到感慨外，也凸顯出通姦罪所存在之新舊價值的矛盾與衝突。倘若司法實務者對「通姦」行為的定義與範圍，有著如此大的思想上差距，法官個別的情感、意識形態的「個別差異性」，可以使一個「口交」行為，在不同法官手中獲得「有罪」或「無罪」之兩極化判決，實足以造成通姦罪判決的不平等與法不安定性。

三、通姦罪之行為主體是否必須是「異性」結合？

[11] 甘添貴（2016），《刑法各論下》，修訂 4 版，頁 300，臺北：三民。

[12] 錢建榮（2012），〈性器官接合才算通姦嗎？〉，https://tw.appledaily.com/headline/daily/20121124/34661999/（最後瀏覽日：03/23/2020）。

關於通姦罪的另一個爭議，是雙方行為人是否限於一方為男性、一方為女性？此一問題，有學說主張，刑法第 10 條「性交」之定義，已經包括同性間的肛交、口交、異物插入生殖器等行為，因此同性之間可以有刑法上的性交行為，已無疑問，倘配偶之一方另與他人為同性戀行為，當然即為發生婚姻外的性行為，此等同性戀行為對於婚姻純潔性的破壞，並不稍遜於異性戀，因此應該同樣成立通姦罪。[13]

對於通姦罪之行為人，是否包含同性間的性交行為，在實務上比較沒有爭議，因為前面所提之台灣高等法院暨所屬法院 91 法律座談會刑事類提案第 7 號，在其決議內容中，一開始即表示，「刑法第二百三十九條『通姦』，係指由於男女雙方合意，而為姦淫；和姦係指與有配偶之人互相合意，而為姦淫行為；姦淫係指男女交媾行為」，換言之，實務見解認為，通姦必須是「男女雙方合意而為姦淫」之「男女交媾行為」，因此不應擴大及於同性間的性交行為。

從本罪立法之初所認定之婚姻制度，乃一夫一妻之異性婚的觀點來看，這樣的解釋，亦即通姦僅限於男女雙方合意而為姦淫，實為合理之解釋。至於學說所稱，「同性戀行為對於婚姻純潔性的破壞，並不稍遜於異性戀」，固然沒錯，然而對於婚姻破壞之行為，其實不是只有「姦淫」，精神上的出軌、肉體上的撫摸，配偶之一方與他人有大筆金錢借貸或配偶賭博，甚或婆媳問題，均可能是導致婚姻破裂的因素，何以刑法獨獨將「姦淫」視為破壞婚姻的可罰性行為，而其他破壞婚姻之行為，都不用處罰？

四、通姦罪之行為罪與舉證爭議

通姦罪之核心行為，是姦淫行為，關於通姦行為，如何論其行為數與犯罪數，在實務上也叢生爭議。在民國 95 年 7 月 1 日廢除刑法第 56 條連續犯規定之前，尚可將通姦罪行為人在一段期間內所為之數次通姦行為，以其主觀上出於一個「概括犯意」，客觀上先後連續數行為，觸犯構成要件相同之罪名，而以連續犯的方式論罪，亦即「以一罪論，但得加重其刑至二分之一」。

在連續犯廢除之後，對於雙方行為人在一段期間內，實行多次的通姦、相姦行為，應如何論罪？目前實務與學說見解分歧，實務見解主張「一罪一罰」、「數罪併罰」，始符合立法本旨，此可參考台灣高等法院暨所屬法院 101 年法律座談會刑事類提案第 6 號之法律問題與決議：

【法律問題】甲男與乙女係夫妻，甲男仍與丙女交往成為男女朋友，並自民國 101 年 1 月 1 日起至同年 3 月底止，在外租屋同居，期間每隔 3、4 天性交 1 次，共計性交 24 次，嗣乙女於 101 年 5 月 1 日發現上情，對甲男提出通姦之告訴，甲男對上揭犯行坦承不諱，就甲所犯各罪應如何論罪？

【研討結果】採甲說

[13] 林東茂（2020），《刑法分則》，頁 329，臺北：一品文化。

甲說：應予分論併罰。

按刑法於 94 年 2 月 2 日修正公布，刪除第 56 條所定連續犯之規定，並自 95 年 7 月 1 日起生效施行。而行為人於刑法修正前基於概括犯意連續通姦多次之行為，於刑法修正刪除連續犯規定之前，均依連續犯論以一罪。前開刑法第 56 條修正理由之說明謂：「對繼續犯同一罪名之罪者，均適用連續犯之規定論處，不無鼓勵犯罪之嫌，亦使國家刑罰權之行使發生不合理之現象」、「基於連續犯原為數罪之本質及刑罰公平原則之考量，爰刪除有關連續犯之規定」等語，即係將本應各自獨立評價之數罪，回歸本來就應賦予複數法律效果之原貌。而所謂集合犯是指立法者所制定之犯罪構成要件中，本就預定有數個同種類之行為將反覆實行之犯罪而言，將各自實現犯罪構成要件之反覆多數行為，解釋為集合犯，而論以一罪。是以對於集合犯，必須從嚴解釋，以符合立法本旨。觀諸刑法第 239 條前段所定之通姦罪之構成要件文義，實無從認定立法者本即預定該犯罪之本質，必有數個同種類行為而反覆實行之集合犯行，故通姦罪，難認係集合犯，因此，就刑法修正施行後多次相姦之犯行，採一罪一罰，始符合立法本旨。又按數行為於同時同地或密切接近之時地實施，侵害同一之法益，各行為之獨立性極為薄弱，依一般社會健全觀念，在時間差距上，難以強行分開，在刑法評價上，以視為數個舉動之接續施行，合為包括之一行為予以評價，較為合理時，始屬包括一罪之接續犯。本件甲 24 次通姦犯行，在主觀上，非基於一個犯罪決意，在客觀上，犯罪時間前後長達 3 個月，其犯罪時間互有相當之間隔，難認有時、地密接之情形，在刑法評價上，亦難論以接續犯，而應屬分論併罰之數罪關係（臺灣高等法院高雄分院 100 年度上易字第 707 號、臺灣高等法院 100 年度上易字第 1655 號判決、最高法院 99 年度第 5 次刑事庭會議參照）。

前面對於通姦行為採取一罪一罰、數罪併罰之實務見解，實在令人感到無言。姑且不論在現代各國紛紛將通姦罪除罪化的情形下，我國實務見解卻是反其道而行，以一罪一罰、數罪併罰的方式，加重通姦行為之懲罰，已令人不知刑罰之合理性與正當性為何。[14]此外，在實務運作上，也遭遇證明上的難題，如前面法律問題中所稱「101 年 1 月 1 日起至同年 3 月底止，…期間每隔 3、4 天性交 1 次，共計性交 24 次」，這 24 次的性交次數，在犯罪事實的舉證上，究竟是根據當事人雙方的口供，抑或單方口供，抑或各憑記憶而認定，還是以其他違法方式，諸如跟蹤、竊聽、破門而入、抓姦在床等方式而證明，令人不敢想像，因為不管是何種方式，都是一種將成年人之性愛隱私，赤裸裸地假借通姦罪之訴訟程序，公諸於世。性交行為本有其私密的特性，對於通姦罪之偵查與審判，竟然可以要求個人隱私退讓，而令雙方當事人自行揭露或任由他人揭露成年人間的性愛過程，其實已非「正義的伸張」，而是披著「被害人」外衣的配偶，利用訴訟程序所進行的報復行為。

[14] 陳子平，前揭註 7，頁 485。

此外，也由於性交行為本身之私密特性，在實務上，通姦罪的證據，常無直接證明性交行為之證據，而是廣泛使用「情況證據」，例如「孤男寡女深夜共處一室，如無曖昧，其誰能信」等擬制或推測方式論罪，此等論罪方式，實已違反罪疑唯輕或無罪推定原則。[15]

參、歐洲與德國通姦罪之除罪化

西方世界的通姦罪，可以溯及羅馬法時代，而且通姦罪最早是被列為「性犯罪」之一種。不過，羅馬法時代的性犯罪，不是保護所謂的「性自主決定權」，而是以保障婚姻作為前提。羅馬法時代，曾經出現所謂的「通姦法」（Lex Julia de adulteris coersendis），此部通姦法，是以維護家父長制度下的婚姻關係與家族連結為目的，其中以刑法規範了「血親和姦」（incestus）、「媒介性交」（lenocinium）、「通姦」（adulterium）與「未婚性交」（stuprum）等四種犯罪類型，可以說是西方最早的性犯罪法律。其中通姦罪、未婚性交罪，其目的均是為了維護對貴族婦女之子嗣為合法子嗣的期待權。[16]

這樣對於性犯罪的處罰架構，在基督教支配歐洲後，仍然承襲。基督教強調婚姻的神聖性，因此任何婚姻外的性行為都是一種悖德（Unzucht）行為。合法的性行為，指的是結婚後（亦即經教會許可）的性行為。西方教會法對於婚姻神聖性的看法，以及對於悖德行為的處罰，可以說歷經了整過中世紀。因此有很長一段歷史中，西方對於性犯罪的處罰，就圍繞在對婚姻有所侵害之行為，以及各式各樣的悖德行為，例如強姦、媒介性交、同性戀、血親性交、誘拐、通姦、重婚等型態。[17]

總括而言，20 世紀以前的歐洲與德國刑法對性犯罪的處罰，一方面可以說來自維護家父長的權力與對合法子嗣的期待利益，因此針對婚姻或家庭有所侵害的行為，例如通姦，一直訂有處罰規定。在基督教思想加入之後，則加入了側重一夫一妻制與婚姻神聖性的理念，刑法上又增加了許多破壞婚姻與維護性道德的處罰規定，例如媒介性交、不正常的性方式、同性戀、人獸姦等。因此近代德國刑法典，不管是 1851 年的普魯士刑法典，1871 年的德國刑法典，甚至是 1973 年之前的德國刑法典，關於性犯罪的處罰，是統稱在「違反善良風俗罪章」（Verbrechen und Vergehen wider die Sittlichkeit）之下，且性犯罪的重心也

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[15] 徐昌錦（2006），〈也談通姦除罪化：從審判實務之角度出發〉，《司法週刊》，1274 期，頁 2。

[16] 以上參考 Maurach/Schroeder/Maiwald, Strafrecht, Besonderer Teil, Tb.1 ,9. Aufl, 2003, §17, Rn. 1；王皇玉（2013），〈強制手段與被害人受欺瞞的同意：以強制性交猥褻罪為中心〉，《台大法學論叢》，42 卷 2 期，頁 386。

[17] Maurach/Schroeder/Maiwald, (Fn. 16), §17, Rn. 1.

置放在性道德秩序的維護上。[18]

歐洲諸國對於通姦罪之廢除，是在上個世界第二次世界大戰之後。1964 年於海牙所舉辦的第 9 次國際刑法會議中，就將刑法上保護「家庭與善良風俗」之相關規定作為討論之議題。不管是此次會議在 1963 年先舉行的會前會，或是 1964 年的正式會議中，參加的刑法學者超過 600 人，來自超過 50 國家。關於通姦罪，與會之刑法學者則是一面倒地呼籲應該予以除罪化，然而也有少數零星的國家或學者，主張仍應保留通姦罪，例如西班牙與阿拉伯聯合大公國，其主要原因均是出於宗教因素。[19]在這次會議中，來自美國的 Ploscowe 教授擔任大會報告人之一，他表示通姦罪對於婚姻制度的保護毫無作用與效果，應該予以除罪化。來自法國的 Levasseur 教授則表示，通姦罪在法國刑事訴訟程序的案件量極低，而所判的刑期均是最低刑期，諷刺的是，法國監獄方面卻要求應該增加通姦罪之刑度，如此始可針對男性受刑人與女性受刑人違犯之通姦罪，個別給予不同的監獄教化措施。不過法國代表主張，最重要的除罪化理由是，通姦罪一旦進入刑事訴訟程序，往往催化與加速了離婚速度，而非維護原來的婚姻狀態，因此反而無法藉由刑罰而達到維護婚姻之目的。[20]最後，本次會議最後做出的決議是，「通姦行為不應該以刑罰處罰」，其附帶的紀錄包含，對於性的節制，刑法並非適當的手段；此外，對於通姦罪之處罰，不應罰及沒有婚姻關係的成年人，簡單的說，僅能處罰有婚姻關係之人，而相姦人如果是沒有婚姻關係的成年人，其性交行為不應該受到刑罰處罰。[21]

德國刑法上的通姦罪，一直到 1969 年第一次刑法修正法案（1. StrÄndG）才廢除。這一波的刑法修正，刪除了眾多性道德保護條文，包括通姦罪、普通同性戀罪（einfache Homosexualität）[22]、人獸姦、詐術性交罪。1969 年以前，德國刑法第 172 條通姦罪的規定為：「因通姦而惹起離婚者，有責配偶之一方及其共同責任人，處 6 月以下懲役。刑事訴追，非經告訴不得開始。」[23]德國通姦罪之舊法，與我國刑法第 239 條最大的不同是，其犯罪構成要件之成立，以通姦行為導致離婚為前提。就當時德國通姦罪之立法理由，根據德國聯邦參議院 1962 年刑法修正草案及理由（Entwurf eines Strafgesetzesbuches E1962 mit Begründung）中所提及，通姦罪具有塑造與維護善良風俗之作用，以及國家視婚姻為社會共同生活重要基礎的宣示作用。[24]不過此一草案理由中，亦進一步

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[18] Schröder, Die Revolution des Sexualstrafrechts 1992-1998, JZ 1999, S. 827

[19] Blau, Die Beratung des 9. Internationalen Strafrechtskongresses in Den Haag (24.-30.8.1964) hinsichtlich der Straftaten gegen Familie und Sittlichkeit, FamRZ, 1964, S. 244.

[20] Blau, (Fn. 19), S. 244.

[21] Blau, (Fn. 19), S. 244.

[22] 普通同性戀罪，指的是成年男性間的同性戀行為被除罪化，如果同性戀的對象是未滿 16 歲之幼年男性，則另有處罰規定，參考王皇玉，前揭註 16，頁 387。

[23] § 172 (1)Der Ehebruch wird, wenn wegen desslben die Ehe geschieden ist, an dem schuldigen Ehegatten, sowie dessen Mitschuldigen mit Gefängnis bis zu sechs Monaten bestraft. (2)Die Verfolgung tritt nur auf Antrag ein.

[24] 黃榮堅（1998），〈論通姦罪除罪化〉，氏著，《刑罰的極限》，頁 9，臺北：元照。

說明，通姦罪的追訴，不能對婚姻有什麼維護的作用，相反的，在大部分的情況下，只有毀滅婚姻的作用，因為無論如何，對通姦之配偶或第三人的刑罰只會促使通姦之配偶決意離婚。[25]換言之，德國立法者也瞭解到，通姦罪的出發點，雖然是為了宣稱國家重視婚姻制度之保護，然而，在過去的法律實踐過程中，通姦罪之存在卻展現了破壞婚姻的反效果。

德國後來於 1969 年正式廢除通姦罪，在 1969 年聯邦議會第 5 任期刑法修正特別委員會第一次書面報告中，說明了廢除通姦罪規定的理由，主要是有罪案件數量稀少、刑罰異常地輕微，以及非常貧乏的規範意義，因而認為刑事政策上沒有規定通姦罪之必要。[26]以德國廢除通姦罪之前的實務案件量來看，自 1958 年到 1966 年之間，每年有罪的通姦罪案件約 100 到 200 件之間；此外，就量刑來看，以 1966 年為例，該年通姦罪之有罪判決為 136 件，其中有 117 件是諭知罰金刑，其餘則宣告自由刑，但絕大多數同時宣告緩刑。此外，刑法修正特別委員會更進一步地認為，通姦罪的規定毋寧說是有害的，因為通姦罪是告訴乃論犯罪，而提出通姦罪告訴之配偶，不少是出於「卑劣的動機」而提起，亦即通姦罪規定提供了一個危險的手段，讓人進行報仇，以及貫徹金錢上的要求而去勒索，然而這樣的作法對於婚姻的維繫，沒有任何幫助。此次刑法修正特別委員會遂提出以下看法：通姦罪的廢除並不至於影響國民意識，也不致於使一般國民誤以為國家不再重視婚姻。此從其他國家的實證經驗亦可佐證，例如：挪威、丹麥、瑞典、芬蘭及英格蘭等國家均廢除通姦罪，然而通姦罪之廢除對於國民意識關於婚姻意義的認知。並沒有影響。[27]

肆、我國通姦罪現象面之觀察

一、案件數量稀少

前面法國與德國廢除通姦罪的理由中，都提到，通姦罪在該國實務上之案件量，極其少數，且以通姦罪作為維護婚姻之手段，往往只有催化離婚、使婚姻破裂之反效果。關於我國通姦罪的判決數量，由於司法院所為之官方統計資料「司法院統計專輯」，是將刑法第 17 章妨害婚姻與家庭罪的被告人數一併統計，並未針對「通姦罪」之案件量或被告數進行個別統計，在文獻上，針對通姦罪所進行之實證研究中，有碩士論文以「通姦」與「相姦」為關鍵字，於司法院法學資料檢索系統中，搜尋判決數並自行計算通姦罪被告人數（包含自訴、公訴案件）。該論文所搜尋之司法院法學資料檢索系統，主要針對台北地院、宜蘭地院、雲林地院三個地方法院，自民國 89 年至 99 年間通姦罪被告人數進行統計。搜尋所得之通姦罪統計結果發現，通姦罪的一審法院判決數量極

[25] 黃榮堅，前揭註 24，頁 10。
[26] 黃榮堅，前揭註 24，頁 10。
[27] 黃榮堅，前揭註 24，頁 10。

低，被告人數一年不超過 30 人（附表一）。[28]此外，通姦罪之法定刑為一年以下有期徒刑，法定刑中沒有「拘役」或「罰金刑」之選項，然法院所判之刑期，幾乎均為 6 月以下有期徒刑，且均得易科罰金或易服社會勞動。[29]

附表一：台北、宜蘭、雲林地院通姦罪被告人數統計（89 年—99 年）

	89 年	90 年	91 年	92 年	93 年	94 年	95 年	96 年	97 年	98 年	99 年
台北地院	18	14	28	20	14	8	14	30	27	26	29
宜蘭地院	4	10	19	6	10	1	7	2	6	6	4
雲林地院	11	15	11	3	5	2	4	4	3	5	7

本人於撰寫本篇文章前，也曾進行相關研究，本人於 Lawsnote 資料庫以「通姦罪」為關鍵字，搜尋台北地方法院（都會區）與屏東地方法院（非都會區），在 100 年到 106 年之間的通姦罪判決數量。統計結果，台北地方法院自 100 年到 106 年間，通姦罪的判決數維持在 24 到 35 件之間，屏東地方法院自 100 年到 106 年間，通姦罪的判決數，則在 7 到 18 件之間（附表二）。

附表二：台北、屏東地院通姦罪案件數統計（100 年—106 年）

	100 年	101 年	102 年	103 年	104 年	105 年	106 年
台北地院	24	35	30	21	23	24	29
屏東地院	13	18	12	12	7	9	7

本人雖僅初步統計台北與屏東兩個地方法院的通姦罪判決數，但也發現與前開碩士論文的實證研究有相同之結果，亦即通姦罪在實務判決上的數量極少，此情形就如同前面德國、法國在廢除通姦罪之前的實務現狀一樣。

[28] 以上參考林如君（2011），《通姦罪判決之實證研究》，頁 36 以下，國立臺灣大學國家發展研究所碩士論文。
[29] 林如君，前揭註 28，頁 40。

如此少量的通姦罪案件量，其所代表的意義為何？首先，我們可以檢視我國每年的離婚率，根據內政部戶政司統計處的統計，[30] 台灣每年離婚對數，約在 5 萬 3 千對至 5 萬 8 千對之間（附表三），套句目前年輕人常用的語言，到底是哪來的自信，認為刑法上的通姦罪，可以維護婚姻制度？若要細數現代社會中的離婚原因，「婚外性行為」絕非主因，甚至婆媳之間的紛爭，婆婆媽媽的介入，對婚姻的殺傷力更甚於婚外性行為，何以刑法不去追究此等破壞婚姻之行為？更何況現代社會中，維繫婚姻的方式千奇百怪，有些婚姻有性無愛、有些是有愛無性，也有些採取開放式性關係，或是只要給錢安撫就睜一隻眼閉一隻眼的態度，從而，以「婚外性行為」作為婚姻破裂的主因，並進而以刑法加以追究與干預，根本是一種用一百年前農業社會的單一價值觀來衡量現代人，且將刑罰桎梏不當地強加於現代人民身上的作法。

附表三：結婚對數與離婚對數（2010—2019）

年代	結婚			離婚(終止結婚)		
	結婚對數	粗結婚率	年增率	離婚對數	粗離婚率	年增率
2010	138,819	6%	X	58,115	2.51%	X
2011	165,327	7.13%	19%	57,008	2.46%	-2%
2012	143,384	6.16%	-13%	55,980	2.41%	-2%
2013	147,636	6.32%	3%	53,604	2.3%	-4%
2014	149,287	6.38%	1%	53,190	2.27%	-1%
2015	154,346	6.58%	3%	53,459	2.28%	1%
2016	147,861	6.28%	-4%	53,837	2.29%	1%
2017	138,034	5.86%	-7%	54,412	2.31%	1%
2018	135,403	5.74%	-2%	54,443	2.31%	0%
2019	134,524	5.7%	-1%	54,473	2.31%	0%

此外，通姦罪之判決數量少，也意味著犯罪黑數極高。所謂犯罪黑數，乃客觀存在著犯罪，但卻未進入官方犯罪統計數字中，且不用受到法律制裁。通姦行為基本上就是一般民眾口中的「外遇」、「婚外情」、「包二奶」現象，此乃現代人周遭大量上演、遭遇的生活事件。此等生活事件，之所以成為「犯罪黑數」，極大的可能是因為一般人普遍將之視為感情事件、家庭失和，而不會認為是犯罪，因此也不會去提告。再者，國民對通姦罪是犯罪行為一事，欠缺「不法意識」。新聞媒體常見知名企業的總裁、董事長、總經理等外遇、包二奶，這些人只要擺得平原配，就不會被提告，因此台灣大量存在著犯了「通姦罪」卻不受法律制裁之人。

[30] 內政部戶政司統計處網站，https://www.stat.gov.tw/ct.asp?xItem=15409&CtNode=3622&mp=4（最後瀏覽日：03/26/2020）。

通姦罪存在如此大量犯罪黑數，其可能代表的意義有二：

1、法律除了制定之外，還要實踐，也就是要講究法律的有效性。通姦罪犯罪黑數過多，顯示所制定的法律，其有效性受到質疑，亦即法律並未有效地運作，規範並未有效地貫徹，如此不僅將影響人民的守法意願，也無法形成國民對此等犯罪的不法意識。

2、通姦罪犯罪黑數之存在，形同該條文如同具文般的存在，而每年偶爾會有數百件判決，並非意味著正義被實現，反而營造司法不公之氣氛，甚至違反平等原則。

二、提告者往往出於卑劣的動機或使用違法手段取得證據

在前面所論述之德國廢除通姦罪的刑法修正理由中，提到通姦罪規定毋寧是有害的，因為通姦罪提出告訴之配偶，不少是出於「卑劣的動機」而提起，亦即通姦罪提供配偶一個可以利用法律程序進行報仇，或貫徹金錢上勒索的手段，而這樣的提告，根本無助於婚姻的維繫。關於卑劣的動機，在幾年前轟動一時的「房思琪」受到補教老師誘姦的小說中，一個未成年人受到已婚成年教師的性侵害，本為權勢下的被害人，卻反而可能遭通姦罪提告的威脅與心理煎熬。顯見通姦罪的存在，並無法「嚇阻」有心外遇之人，但在特殊個案中，卻不無可能被拿來威脅法治觀念欠缺的未成年人。

由於通姦罪之成立，必須「抓姦在床」，因此激發出各式各樣私人違法蒐證的手段。一般社會新聞中常出現的抓姦手段，幾乎都是犯罪手段，例如自行或是委託徵信社，以跟蹤、監聽、在車上裝 GPS、在臥室裝針孔攝影機、侵入住宅或闖入飯店房間等方式，甚或將通姦之二人強行脫衣拍照、違法搜索使用過的保險套、衛生紙等方式，進行蒐證。因此往往抓姦者所違犯之犯罪行為，比通姦行為更為惡劣。此外，實務上常見的是舉證手段，是提告之一方先對配偶予以原諒且撤告，但條件是該外遇配偶必須以「證人」身分，證明與相姦人發生過姦淫行為，以證明相姦人之罪行；另一種舉證上的亂象，則是將通姦行為所生的小孩，作為證明通姦罪之「證據」，而對兒童進行親子鑑定，完全忽略該無辜兒童身為一個人所應該具有的主體性。[31]

伍、結論

在撰寫本文期間，本人試圖搜尋與閱讀其他國家廢除通姦罪的法學文獻，但在找資料與閱讀資料時，頓時有種陷入時空錯置的感覺，因為廢除通姦罪是上個世紀中期，亦即 1960 至 1970 年代討論非常熱烈的議題，在閱讀這些 1960 年代的文獻時，除了有一種彷彿在進行法律考古學的荒謬之感，更令人錯愕的是，50 年前各國討論廢除通姦罪的主流原因，就是通姦罪的存在，不管是理論上或實際上，都不能對婚姻有什麼維護的作用，相反的，只有毀滅婚姻的作用，而何以這麼簡單的道理，在今天號稱亞洲最為自由、民主的國家，卻不適

[31] 林如君，前揭註 28，頁 47。

用？

此外，在前面所述國際刑法會議中，對於通姦罪除罪化的討論，另一個具啟發性的想法就是，即便要對通姦行為加以處罰，也不應罰及無婚姻關係的成年相姦人，簡單的說，就是僅能處罰有婚姻關係之人，因為沒有婚姻關係的人，只要是成年人，就有性的自由，即便他與有婚姻關係之人為性交行為，其性交行為也不應該受到刑罰處罰。目前通姦罪案件中，非常多的婚姻外性行為，相姦人一開始是被有配偶之人欺瞞而不知他方已婚，然而到頭來，這樣的感情受害者卻反而被指控為他人婚姻的加害者，這種感情糾紛，難道上了法庭，就可以說的明白嗎？順著這樣的想法，我國刑事訴訟法對 239 條第 2 條，通姦罪對配偶撤回告訴者，其效力不及於相姦人，此規定不僅是一種不當限制無婚姻關係之人性自主權的規定，也助長了有婚姻中之雙方，藉由法律的不當保護，玩弄法律，一再行破壞婚姻之行為（配偶一方一再通姦，他方一再對配偶撤回告訴），卻推卸責任到相姦人的頭上。

本文最後的結論上是，不管是刑法第 239 條通姦罪，或是刑事訴訟法第 239 條通姦罪撤回告訴之規定，均屬違憲之條文，應儘速廢除。

關於通姦罪合憲性的鑑定意見

蔡聖偉 / 臺北大學法律學系教授

壹、審查基準說明

本次憲法法庭針對刑法第 239 條的部分，提出了以下三個問題：

（1）刑法第 239 條之立法目的為何？其係為保障何種法益或基本權利而設？又因此限制或侵害人民何種基本權利？其審查基準為何？

（2）刑法第 239 條處罰婚外性行為之手段，是否有助於所揭目的之達成？手段與目的間是否存有一定關聯性？

（3）本院釋字第 554 號解釋有無變更解釋之必要？

以下的鑑定意見會先彙整國內外文獻上的各種意見，再逐一提出評論意見。分析各種意見時，將採取以下的檢驗方式：首先，相關的支持論據在刑法上是否具有法益資格（法益適格性）？審查結果若為肯定，則還要繼續探究，立法者為了保護該法益而制訂通姦罪制裁規範的作法，能否合於比例原則的要求？亦即，就算能提出多數能認可的法益作為保護對象，將婚姻關係外的性行為犯罪化的立法能否達到保護該法益的目的（有效性審查）？這也就是憲法法庭的第二個提問：「處罰婚外性行為之手段是否有助於所揭目的之達成？手段與目的間是否存有一定關聯性？」若具備有效性，接著還要繼續審查，刑罰制裁規範的存在對此目的之達成來說，是否必要（必要性、最小侵害性審查）？若於此亦得出肯定結論，最後則要檢視，為了維護該法益制訂刑罰制裁規範，和付出的代價相比，是否衡平、相當（衡平性、合比例性審查）。

必須先說明的是，通姦罪的構成要件行為是否僅限於異性間的性器官接合，抑或可適用刑法第 10 條第 5 項關於性交所設的立法定義，仍有討論的空間[1]。前

[1] 相關討論可參閱林山田，刑法各罪論（下），5 版，2005 年，497 頁；甘添貴，刑法各論（下），2 版，2013 年，300 頁；陳子平，刑法各論（下），3 版，2020 年，483 頁以下。

者為我國實務及學界多數說所採。由於這個爭議和通姦罪的立法正當性沒有直接關聯，本文以下不打算進一步探究，一律以「婚外性行為」來概稱通姦行為。

貳、關於通姦罪立法正當性的意見彙整

討論一個刑罰制裁規範是否合憲，出發點就是：相關的處罰規定背後是否存在著刑法上具備法益資格的利益？這也是要進入廣義比例原則討論之前的一個先決問題，同時也就是憲法法庭的第一個提問的前半部。關於通姦罪的立法正當性根據，文獻上有許多不同說法，彙整其主要論據如下。

國內早年在說明通姦行為的應罰性時，多數會援用「風化」或「善良風俗」的概念[2]。類似想法也曾出現在德國早期文獻中，像是德國參議院於 1962 年提出的刑法修改草案（E 1962）立法說明中便強調，通姦罪的存在具有形塑道德（sittenprägend）與維護道德（sittenerhaltend）的效用，並藉由本罪表達國家對於婚姻制度作為社會重要基礎的認可[3]。此外，亦有不少文獻主張本罪係為維護一夫一妻制[4]，立法者藉此來維護單配偶婚姻秩序及其純淨（monogamische Eheordnung und ihre Reinheit）、婚姻的純潔性[5]。

目前支持通姦罪立法的文獻中，多數會強調婚姻與家庭的價值：婚姻為社會組織之基礎，男女一旦結為夫妻，即發生法律上的效力，其婚姻便受法律之保障，無論夫或妻皆不得違背婚姻所生之義務，倘有違背則應受法律之禁止。刑法上之

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[2] 指出通姦行為本質上屬妨害風化之一種態樣者，如韓忠謨，刑法各論，7 版，1982 年，282 頁；黃東熊，刑法概要，1998 年，346 頁。認此種行為有害善良風俗者，則如陳樸生，實用刑法，重訂再版，1993 年，628 頁。

[3] 此見 Entwurf eines Strafgesetzbuches (StGB), E 1962 mit Begründung, S. 348。其實早在一百多年前的德國文獻中，已可見道德（風化）犯屬性與維護家庭（婚姻）秩序兩種立場的對立，如 Mittermaier, Vergleichende Darstellung des Deutschen und Ausländischen Strafrechts, BT, IV. Band, 1906, S. 91 f.。

[4] 見周冶平，刑法各論，1972 年，490 頁。

[5] 林東茂，刑法分則，2018 年，315 頁；或是婚姻在道德上的純淨（sittliche Reinheit der Ehe）Mittermaier, Vergleichende Darstellung des Deutschen und Ausländischen Strafrechts, BT, IV. Band, 1906, S. 92。

妨害婚姻罪，係對違背某種婚姻義務之情形所設的處罰規定[6]。在德國刑法刪除通姦罪前，維護婚姻這種社會倫理機制（sozialethische Institution）也是常見的說法[7]，甚至有文獻指出，刪除通姦罪將會讓人認為國家不再如往昔般重視家庭制度[8]。大法官釋字第 554 號解釋也提到「國家為確保婚姻制度之存續與圓滿，自得制定相關規範，約束夫妻雙方互負忠誠義務」，並且認為通姦罪的存在「為維護婚姻、家庭制度及社會生活秩序所必要」。與此類似的其他說法則像是：維護「家庭生活或夫妻感情的圓滿」[9]、「婚姻制度下夫妻家庭生活」[10]，或是「健全的婚姻制度與家庭生活的安全平和」[11]。最後，也有透過「夫妻相互間之貞操義務」[12]、「配偶間的相互忠誠關係」（gegenseitiges Treueverhältnis）、忠誠義務（Treuepflicht）[13]或誠實義務[14]等說法來嘗試證立通姦罪的立法正當性。

與此相對，目前國內所發表的相關文獻幾乎一面倒地支持通姦行為除罪化。其中部分論者認為上述說法都不能算是刑法所認可的法益，因此本罪係屬「無法益之犯罪」[15]。另亦有強調婚姻乃民事契約的一種，於一方違反婚姻存續中的忠誠義務時，本質上只是單純破壞婚姻契約的違約行為，他方應循民事途徑請求損害賠償、慰撫金或離婚，如此已能充分保障當事人權益，而不應用刑罰來處理私法上的契約義務違反問題[16]。另則有呼籲立法者應順應世界潮流，本於刑法謙抑

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6 參考自蔡墩銘，刑法各論，5 版，2006 年，442 頁。維護婚姻及家庭制度的說法亦見韓忠謨，刑法各論，7 版，1982 年，282 頁；褚劍鴻，刑法分則釋論（下），4 版，2004 年，727 頁。

7 如 Welzel, Lb, 1962, S. 361。

8 此見 Entwurf eines Strafgesetzbuches (StGB), E 1962 mit Begründung, S. 348。

9 盧映潔，刑法分則釋論，14 版，2019 年，460 頁。

10 韓忠謨，刑法各論，7 版，1982 年，279 頁。

11 語見陳子平，刑法各論（下），3 版，2020 年，483 頁。

12 梁恒昌，刑法各論，11 版，1986 年，248 頁。

13 Maurach, BT, 5. Aufl., 1969, S. 408, 413。

14 周冶平，刑法各論，1972 年，500 頁。

15 如甘添貴，罪與刑（林山田教授六十歲生日祝賀論文集），1998 年，628 頁；王皇玉，刑法總則，5 版，2019 年，29 頁；靳宗立，刑法各論 I，2011 年，649、660 頁；鄭昆山，月旦法學雜誌，105 期，217 頁；婚外性的罪與罰座談會紀錄，台灣本土法學，223 期，21 頁（林鈺雄發言部分）。

16 鄭昆山，月旦法學雜誌，105 期，218、222、225 至 226 頁。類似說法已見林山田，刑法各罪

性思維應予除罪[17]。

與通姦行為所影響的利益相較，通姦罪限制了何種基本權利這個問題則顯得較無爭議。首先，通姦罪限制了婚姻關係雙方當事人的性自由，更精準地說，就是實施婚姻關係外性行為的自由。其次，由於追訴審判過程中，免不了會觸及當事人的私密領域，所以隱私權也是受到通姦罪立法所影響的法益[18]。

在現代法治國中，國家不能用刑法來維護特定道德觀，這已是現今刑法學上的基礎共識[19]。為避免討論失焦，以下便不再處理前述基於風化、道德、善良風俗立論的看法，而僅針對維護夫妻忠誠（忠貞）義務以及維護婚姻與家庭這兩個主流看法進行分析。

參、維護夫妻間的忠誠（忠貞）義務？

以夫妻間忠誠（忠貞）義務來支持通姦罪立法的論述經常出現在相關文獻中，釋字第 554 號解釋理由書中也有提到類似說法。所謂婚姻關係形成性忠誠義務的說法，有其歷史背景[20]。在性自主意識覺醒後，婚姻關係已不再是合法性行為的前提，性關係甚至也不再是婚姻關係的必然組成元素[21]，因此，由婚姻關係導出性忠誠義務的說法似嫌過速。

更重要的是，「違反性忠誠義務」這個陳述本身根本沒有回答任何問題。因為在這裡要追問的是「國家對通姦行為施加刑罰的理由何在」，忠誠義務的說法

論（下），5 版，2005 年，500 頁；邱忠義，輔仁法學，46 期，141 頁；謝如媛，台大法學論叢，35 卷 6 期，316 頁；莊喬汝，台灣本土法學雜誌，223 期，59 頁。德國文獻當時也有此種質疑，如 Welzel, Lb, 1962, S. 361。

17 見陳煥生、劉秉鈞，刑法分則實用，5 版，2016 年，314 頁；謝如媛，刑法規範下的家庭秩序，台大法學論叢，35 卷 6 期，316 頁。

18 參閱邱忠義，輔仁法學，46 期，130 頁以下、140 頁。

19 僅參閱 Roxin, AT/1, 4. Aufl., 2006. 2/17 ff.。

20 早年將性理解成婚姻關係的主要內涵，也把婚姻關係當作合法性行為的前提，婚外性、婚前性行為均屬傷風敗俗，甚至違法。因此，一旦締結了婚姻關係，就要承擔性忠誠義務。

21 許玉秀，刑事法學之理想與探索（甘添貴教授六秩祝壽論文集），2002 年，13 頁。

在實質上等於是提出了「因為構成了通姦罪」這句話來回答，荒謬處不言而喻[22]。換言之，所謂的違反性忠誠義務，意思也就是指婚姻關係中的一方實施了婚外性行為，這只不過是構成要件行為「通姦」一詞的改寫或重言反覆（Tautologie）而已，沒有真正指出法益侵害的內容[23]。打個更容易理解的比方：刑法第 342 條第 1 項背信罪的構成要件行為乃「違背其任務之行為」，所謂的違背任務，依照通說看法，就是未忠實履行財產信託義務[24]。但背信罪的刑罰理由當然不會是行為人未盡財產照料義務（因為這樣也只是重複描述構成要件行為而已），而應該是未盡義務所引起的財產損害。任何的法律義務都有背後想要達到的目的，真正能夠具有法益資格的，只有這些背後的實質目的，而不是形式上的未履行義務。否則，任何契約關係都會有未履行義務的情形，豈不是皆可由立法者恣意地規定成犯罪？更何況，本罪關於告訴乃論以及告訴撤回效力例外不及於相姦人的設計（刑事訴訟法第 239 條但書），會產生不罰通姦之配偶，單罰第三者的情形，而這也是司法實務上的常態。如果要以違反性忠誠義務來說明處罰的正當性，就會導致弔詭的局面：最後受處罰的不是侵害性忠誠義務的配偶，而是不負性忠誠義務的第三人[25]。事實上，婚姻的忠誠（eheliche Treue）、家庭的拘束、性方面的紀律約束，都是建立在人類道德基礎上的價值，只能透過人格發展過程養成[26]。這些價值之所以珍貴，是因為背後的感情來自於人的自由意願，所以不可能透過強制的途徑來實現[27]，而只能求諸於彼此基於感情而來的自我約束。

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22 亦有文獻指出，破壞忠誠義務的說法是「以問題來回應問題」，見黃榮堅，刑罰的極限，1999 年，10 頁。

23 同理，用「維護國家婚姻秩序」或是「維護一夫一妻（單配偶）婚姻制度」等說詞來解釋重婚罪的保護法益，或者是用「具體家庭關係的純淨」來說明血親性交罪的保護法益，也都會有相同的問題。因為這些說詞都只是各該構成要件行為的重述，而沒有提出任何獨立於行為人行為的利益影響事實；此見 Hefendehl, Kollektive Rechtsgüter im Strafrecht, 2002, S. 33。

24 僅參閱林山田，刑法各罪論（上），5 版，2008 年，483 頁。或是「違背他人委任其處理事務應盡之義務」（91 年台上字第 2656 號判決）。

25 已見莊喬汝，台灣本土法學雜誌，223 期，62 頁。

26 Lackner, FamRZ 1962, S. 412。國內文獻中亦早有類似說法，見林山田，刑法各罪論（下），5 版，2005 年，499 頁。

27 參閱婚外性的罪與罰座談會紀錄，台灣本土法學，223 期，19 至 20 頁（黃榮堅發言部分）。

此外，依照學說與實務的理解，本罪所稱的「通姦」限於和姦（最高法院 17 年 10 月 13 日決議）。如果配偶之一方對於第三人實施強制性交，並不會該當本罪[28]。如此的限縮解釋有其合理的考量，因為在此種情形並未涉入感情因素，非屬立法者想要透過本罪來介入的情形。但這樣的限縮解釋卻無法由配偶間的性忠誠義務推導出來，因為即便是透過強制手段實施的性行為，也還是婚外性行為，亦屬侵害對他方配偶的性忠誠義務。同樣的道理，實務上也極少見到有人因為從事性交易而被配偶依照通姦罪提起告訴，因為當事人也知道性交易行為並沒有什麼真正的感情，不至於影響到原來的婚姻關係[29]。論述至此，應該就可以清楚看出，在通姦罪的脈絡下，感情忠誠才是真正的重點[30]。然而更清楚的是，感情是一種只能給不能要的東西[31]，強制手段無法對感情提供任何擔保或影響，不可能透過刑罰威嚇讓人不變心[32]。

肆、維護婚姻與家庭？

所謂維護婚姻與家庭這樣的論點，是目前支持通姦罪立法的各種論據中，被運用的最為廣泛者。在大法官釋字第 554 號解釋中亦可看到「確保婚姻制度之存續與圓滿」以及「維護婚姻、家庭制度及社會生活秩序」的表述[33]。婚姻和家庭在刑法上是否具備法益資格，尚有討論的空間，這裡涉及到刑法學界長久以來關於集體法益資格要求的固有爭議[34]。但即使我們肯定婚姻與家庭在刑法上的法益

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[28] 在司法實務上有時甚至會見到，當配偶遭他人提告強制性交，後因證據不足無法定罪，強制性交被告的配偶反而會對原本提告強制性交者提出相姦罪的告訴（或脅以提出告訴）。

[29] 此見黃榮堅，刑罰的極限，1999 年，11 頁。

[30] 對於現行法用「婚外性」來替代「婚外情」的作法，批判已見婚外性的罪與罰座談會紀錄，台灣本土法學，223 期，22 頁（林鈺雄發言部分）。

[31] 語見黃榮堅，靈魂不歸法律管—給現代公民的第一堂法律思辨課，2017 年，163 頁。

[32] 另請參閱下文肆、二、(二)。

[33] 婚姻制度與家庭制度，精準言之，其實是兩個可以相互分離的機制。婚姻關係雖然是大多數家庭的基礎，但並非絕對必要，部分事實家庭關係並非以一個形式上有效的婚姻關係為基礎。因此，保障婚姻制度與保障家庭制度二者間沒有邏輯上的必然關聯。不過鑑於這兩種機制所面臨的問題均屬相同，以下便不再區分此二者。

[34] 國內文獻可參閱陳志龍，法益與刑事立法，3 版，1997 年，136 頁以下；周漾沂，台大法學

資格，後續也無法通過比例原則的檢驗。

在進一步分析前必須說明的是，「婚姻與家庭制度」一詞有不同的詮釋可能性，有可能是指超脫任何個別家庭及婚姻關係的抽象機制本身，也可能是指稱被通姦行為所影響的具體婚姻關係與家庭。由於過去經常可見到有論者擺盪游移在這兩種不同理解之間，致使對話無法聚焦，故以下將這兩種不同解讀意涵區隔開來，以利討論溝通[35]。

一、作為抽象機制的婚姻及家庭

大法官釋字第 554 號解釋中提到「婚姻與家庭為社會形成與發展之基礎，受憲法制度性保障」，由於其中提及「制度性保障」一詞，而制度性保障的對象為抽象制度本身，而非個人的具體權利，故應係採抽象制度的理解，屬性上很清楚的是一種集體法益（社會法益）[36]，而這樣的理解也合於本罪在刑法典中的體系位置（第 17 章：妨害婚姻及家庭罪）[37]。

依照這種抽象機制的理解方式，婚姻及家庭制度是否受到國家保障，其實和刑法上有無設置通姦罪這個刑罰制裁規範沒有必然的關聯。一個純粹經驗性的論據就是，那些業已廢除通姦罪的國家，並沒有因此被質疑放棄對婚姻制度的保障。特別是德國基本法中清楚表明婚姻與家庭應受國家特別保障（第 6 條第 1 項），但這也沒有構成立法者除罪的障礙。事實上，國家只要在其他法領域（特別是民事法）仍對婚姻及家庭設有保障的規範，便已可算是履行了保障此一機制

論叢，41 卷 3 期，981 頁以下、1030 頁以下。

35 從刑法釋義學的技術層面來看，也有區分的必要，因為會影響到以下兩問題的處理：①他方配偶的同意是否得以阻卻違法，以及②一個形式上有效但實質無效的婚姻關係是否仍受本罪保護？此處參閱 Maurach, BT, 5. Aufl., 1969, S. 413。

36 德國學界在說明舊法通姦罪的保護法益時，亦採整體法益（抽象制度）的立場；僅參閱 Maurach, BT, 5. Aufl., 1969, S. 407, 413, 414。

37 「制度性保障」一詞源自於德國憲法學理，早在釋字第 554 號解釋之前就已出現在大法官的解釋中（如釋字第 380 號與第 483 號解釋）。在釋字第 554 號之後，也出現在釋字第 563 號、第 605 號以及第 696 號等解釋中。應否將此概念導入國內，文獻上有不同意見（反對者如許志雄，月旦法學雜誌，8 期，49 頁）。由於本文所要處理的問題與此爭議無涉，以下將避免使用此概念。

的義務，而和是否運用刑罰來反應通姦行為無關。

其次，這種作為抽象機制的婚姻與家庭制度，也和其他立基於大眾信賴的集體法益（如文書作為證明工具的制度、以貨幣作為支付工具的制度）不同[38]，並不會被具體的通姦行為所影響。就以貨幣制度為例，我們之所以能夠用貨幣當作支付工具進行交易，是因為社會大眾對於貨幣的真正性有一定程度的信賴。如果一直有偽幣或偽鈔流入市場，致使使用這些工具的風險（成本）持續升高，一旦超過了臨界值，大眾就會改變行為模式，亦即會選擇放棄使用貨幣來交易。此時即便國家繼續印製鈔票，亦無濟於事。為了避免這種信賴崩盤導致機制失靈的情形出現，國家使用刑罰來維護大眾對於貨幣真正性的信賴，而這樣的刑罰制裁也是正當的[39]。與此相對，通姦犯行則沒有這樣的特質，一般人並不會因為通姦行為的大量存在而喪失對婚姻或家庭制度的信賴，進而自外於這些體制。自己是否要走入婚姻關係以及是否要實施婚外性行為，都是取決於自己的自由意志，不會受到他人犯行影響。由此可知，對於婚外性行為的刑罰制裁與維護抽象的婚姻與家庭制度之間，不具任何關聯，手段與目的間欠缺有效性。

更有甚者，如果通姦罪所保護者確為某種超脫具體個人的抽象制度（整體法益），那麼告訴乃論的設計就會是一種體系上的違反，因為如此就會讓刑事追訴取決於告訴權人的恣意，某程度上也就是賦予個人處分集體法益的權限[40]。但在另一方面，鑑於本罪的特性，告訴乃論的設計卻也是無法避免。因為相關的刑事程序對於當事人的生活影響甚鉅，很可能會直接觸及內心的私密領域。而當通姦

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[38] 也就是所謂對制度的信賴（Vertrauen in Institutionen），詳參閱 Hefendehl, Kollektive Rechtsgüter im Strafrecht, 2002, S. 124 ff., 318 ff.。

[39] 參閱 Hefendehl, Kollektive Rechtsgüter im Strafrecht, 2002, S. 130 f.。

[40] 此見 Lackner, FamRZ 1962, S. 411 ff., 412。林子儀大法官於釋字 569 號解釋所提出的協同意見書中，亦曾提出類似的質疑，認為通姦罪既係用以保護社會法益，則通姦者的配偶就不會是通姦犯行的直接被害人。不過也有學者透過需刑罰性（Strafbedürfnis）的觀點來解消這個衝突，主張即便是維護公共利益，也必須顧慮具體被害之家庭成員的主觀需求；如 Maurach, BT, 5. Aufl., 1969, S. 407。至於國內文獻，對此問題則僅以像是「婚姻究與個人私生活關係密切，國家不便強事干涉」等話語帶過（如周冶平，刑法各論，1972 年，490 頁），而無法理上的分析。

者受到刑罰制裁時，也可能會對他方配偶形成心理上的極大負擔[41]。更不用說在當事人間選擇原諒宥恕的情形，國家若仍依職權介入起訴，反而會對當事人造成額外的傷害[42]。因此，制度上讓那些直接受通姦犯行影響的人決定是否追訴，應該是較妥適的設計[43]。不過，由此也可再次印證，通姦罪的存在和抽象的婚姻、家庭制度的維護並無關係，而是僅涉及到告訴權人與被告所身處的具體婚姻關係。

二、具體的婚姻及家庭關係與夫妻間感情的圓滿狀態

通姦罪脈絡下所稱的婚姻與家庭如果不可能指涉抽象的制度本身，那就只剩下解讀為「具體個案中被介入（或是所謂「被破壞」）的具體婚姻關係與家庭」這個選項，這應該就是文獻上使用「婚姻生活之和諧與圓滿」一詞時所要表達的意思。然而，所謂「家庭生活或感情生活的圓滿」，在概念上能否充分明確地定義，以及經驗上能否被客觀地確認，都非常值得懷疑。即便略此不談，處罰通姦行為恐怕也無法維護到這樣的利益，這可從通姦行為前與通姦行為後兩方面來觀察。

（一）事前的預防功能？

通姦罪維護婚姻或家庭的說法，是著眼於未來的預防面向，意指通姦罪的存在能夠嚇阻未來的通姦犯行：由於婚姻關係外的性行為可能會招來刑罰，便會進而促使原本有意出軌或介入他人家庭的潛在行為人打消念頭。這應該就是釋字第554號解釋理由書中所稱「預防通姦」的意思，也就是對於潛在的通姦行為人產生「消極一般預防」的嚇阻作用。因為這些婚姻關係外的性行為被嚇阻，所以夫妻間的感情就不會遇到通姦行為的影響，進而得以保持原本的狀態。

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41 Lackner, FamRZ 1962, S. 412。

42 類似想法已見 Mittermaier, Vergleichende Darstellung des Deutschen und Ausländischen Strafrechts, BT, IV. Band, 1906, S. 97，不過該文是從名譽保護的觀點切入。

43 但通姦罪的告訴權有很高的濫用風險，因為在離婚協商過程中，往往會討論子女的監護及扶養，以及財產分配等事項，於此階段，通姦罪的告訴權通常就會成為一個非常有效的脅迫工具；此見 Lackner, FamRZ 1962, S. 412。

這樣的推論若能成立，就可以通過有效性審查。但在很大程度上背離現實，並且過份高估了刑罰的效能。詳言之，這種消極一般預防的嚇阻效果，恐怕只可能發生在那些沒有感情成分（或感情因素不強）的潛在婚外性行為。相反地，當通姦者與相姦人之間涉有濃厚的感情因素時，摧毀具體婚姻關係與夫妻感情的，恐怕就不是婚姻關係外的性行為，而是更早階段的變心。從心裡浮現「恨不相逢未嫁時」的念頭起，本罪所要追求的所謂婚姻、家庭的圓滿感情狀態往往就已不復存在，那麼在技術上，時序在後的婚外性行為就不可能再度摧毀這些已被摧毀的利益。當徐志摩在劍橋初見林徽音心頭一顫的那刻起，他和張幼儀的婚姻便已敲起喪鐘，已經不再可能會有所謂的圓滿狀態，儘管當時徐與林沒有實施任何性行為。另一方面，對於已經變心的人來說，通姦罪的存在能讓他懸崖勒馬，恐怕也只有極為少數的特例[44]。但即便真的會有在這種情境下還會因顧慮觸法而放棄婚外性行為的人，只要內心的悸動程度夠強，通姦罪的存在就也只會讓他(或她)想方設法擺脫自己在本罪的主體適格性，促使他（或她）先行解消婚姻關係，而無法讓「恨不相逢未嫁時」的想法從心中抹去。道理很簡單，法律無法製造或撲滅愛情的火焰[45]，刑罰無法讓人不變心。

更何況，為了這種（純屬臆測的）預防作用，法制度上必須要容忍嚴重侵害個人隱私的刑事程序，也無法見容於狹義的比例原則（衡平性要求）。性行為位於隱私權所要保障的核心領域，通姦罪卻是以這個最私密領域的行為作為處罰對象，勢必導致在整個追訴審判程序中，大開國家入侵當事人隱私的大門，諸如調查私密通訊對話甚或日記[46]。這樣的代價，竟然只是為了追訴一個 1 年以下的輕罪，而且只是為了追求一個純粹出於臆測猜想的嚇阻效果，恐怕難以通過衡平性

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[44] 正如莊喬汝，台灣本土法學雜誌，223 期，59 頁所指出，如此的推想顯然低估人類的情慾與排除風險的自信，因為一個人在決定是否要發展婚外情時，主要的考量因素是配偶與第三者的比較、如何能不被發現，以及未來一旦東窗事發的可能影響，而非法律規範。

[45] 語見黃榮堅，靈魂不歸法律管—給現代公民的第一堂法律思辨課，2017 年，160 頁。

[46] 除了妨害秘密罪之外，其他可能因為蒐證目的而被誘發的犯行像是侵入建物罪、妨害電腦使用罪章的諸項罪名，甚至傷害或毀損罪，而這些犯罪的法定刑幾乎都比通姦罪更高，參閱莊喬汝，台灣本土法學雜誌，223 期，60 頁。

的檢驗[47]。

（二）事後的修補效用？

在通姦行為業已發生的情形，所謂維護當事人婚姻、家庭或是夫妻感情，應該是指他方配偶能夠透過通姦罪的追訴可能性來維繫（或修補）夫妻間被破壞的感情。但從社會現實來看，一旦動用通姦罪來追究通姦配偶的刑事責任，最後大多都會以離婚收場；通姦罪的存在不但不能維護或修補原本的婚姻與家庭，反而是相反地補上最後致命的一刀[48]。在這種情形，通姦罪的存在意義就只是撫平告訴人內心怨恨憤怒的情緒而已。固然在絕大部分的通姦事件中，告訴權人都會因為配偶的背叛而在心理上產生極大的痛苦。但心理上的痛苦並不當然就可以成為對另一個人施加刑罰的理由[49]。如何平復（或補償）這類精神上的痛苦情緒，應該是民法的任務，當事人可以針對離婚原因請求慰撫金，而不是透過刑法來解決[50]。

純理論來看，當然也存在著以下的可能性：通姦的一方在受到刑事有罪判決的宣告與執行後，幡然悔悟，事後再回到告訴人身邊繼續原本的婚姻關係。若果如此，或許可以說通姦罪的存在和婚姻關係的維護能夠有所關聯，但如此的假設背離了一般經驗認知。在司法實務上，被告的通姦配偶往往會轉而責難堅持提告的配偶，原本的婚姻關係在這種狀況自然難以存續。德國舊法的通姦罪要求婚姻必須因通姦行為而解消[51]，就是因為考慮到婚姻的本質，要在婚姻關係存續中對

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[47] 參閱婚外性的罪與罰座談會紀錄，台灣本土法學，223 期，23 至 24 頁、31 至 32 頁（林鈺雄發言部分）以及 34 頁（許宗力發言部分）。

[48] 已見林山田，刑法各罪論（下），5 版，2005 年，499 頁；陳子平，刑法各論（下），3 版，2020 年，489 頁；謝如媛，台大法學論叢，35 卷 6 期，314 頁。

[49] 參見黃榮堅，刑罰的極限，1999 年，16 頁。

[50] 見前文註 16 所引文獻。關於離婚案件的慰撫金請求，可參閱婚外性的罪與罰座談會紀錄，台灣本土法學，223 期，37 頁以下（詹森林發言部分）。

[51] 在 1969 年刪除前，德國刑法第 172 條第 1 項規定：通姦，若因此而離婚，有責配偶及其共同有責者處 6 月以下懲役。至於這個婚姻解消要件的屬性，學說上則有不同看法，有認為係屬客觀處罰條件（如 Liszt, Lehrbuch des Deutschen Strafrechts, 4. Aufl., 1891, S. 406 f.），亦有認為係屬程序要件（如 Welzel, Lb, 1962, S. 361; Maurach, BT, 5. Aufl., 1969, S. 414; Dreher, StGB, 1966, S. 553）。

其中一方施加刑罰是不可能的。德國立法者甚至明白指出，本罪不但不會有維持婚姻的效果，而且還會相反地摧毀婚姻[52]。和其他的刑事程序相較，在通姦罪的刑事追訴程序中，會較直接、明顯地觸及當事人的尊嚴與隱私。整個偵審過程都是集中在被告與證人最為私密的領域，無論最終的審理結果為何，整個程序所造成的傷害往往無法彌補、回復，和維護婚姻及家庭的宗旨剛好背道而馳[53]。況且，就如前文已指出的，通姦罪的存在會形成更多法益侵害的風險，特別是誘使蒐證的國家與私人以追訴通姦之名侵犯他人隱私[54]。為了達到上述偏離一般經驗的臆想效果，而創設或保留這種侵犯隱私的罪名，恐怕無法通過衡平性要求。

或許在部分案件中，通姦的配偶會擔心被追究刑事責任而選擇留在原婚姻關係中，此時或可說是因為通姦罪的存在而維持了原本的婚姻。但這種情形所維繫的婚姻恐怕只是形式上的存續，失去感情基礎的婚姻關係對於雙方當事人及其他人（尤其是子女）來說，根本就是一個不利（甚至有害）的狀態，不能當作法律所要追求的目的[55]。在司法現實面，經常有告訴權人相信（或希望）另一半會對自己的寬宏大量（不提告或是撤回告訴）心存感激，從此不再心猿意馬，但往往只換得對方的疏離與防備，甚至是假意回歸，暗地裡伺機而動[56]。自我負責、自由發展是婚姻與家庭制度的重要內涵，國家不應指導人民該過著如何的婚姻生活，也不能強制人民留在特定的婚姻及家庭內。國家應該做的是擔保一切讓人民得以自由決定是否締結或解消婚姻關係以及如何形塑婚姻關係的外在條件[57]。即便認為性行為自由應受婚姻制度拘束、限制，也只是當事人決定要從事婚外性行為時，應自承婚姻破裂風險的問題。道德上要譴責背叛感情的通姦行為是一回事，用刑罰伺候則又是另一回事。正如桃園地院刑一庭的釋憲申請書所言，國家

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52 Entwurf eines Strafgesetzbuches (StGB), E 1962 mit Begründung, S. 349。

53 參閱 Lackner, FamRZ 1962, S. 412; Alternativ-Entwurf eines Strafgesetzbuches, BT, Sexualdelikte, 1968, S. 61。

54 婚外性的罪與罰座談會紀錄，台灣本土法學，223 期，22 至 23 頁（林鈺雄教授的發言部分）。

55 已見黃榮堅，刑罰的極限，1999 年，11 頁；鄭昆山，月旦法學雜誌，105 期，221 頁。

56 莊喬汝，台灣本土法學雜誌，223 期，63 頁。

57 鍾宏彬，法益理論的憲法基礎，2012 年，211 頁。類似說法亦見林慈偉，軍法專刊，58 卷 5 期，137 頁。

不可能保障婚姻的美滿，而只能透過婚姻制度給予人民追尋美滿婚姻的可能性；婚姻與家庭受憲法保護的內涵，立基於個人自主選擇透過結婚、共同生活來實現人格與生命，這是自我決定的價值展現，不能擴大推論憲法保障已婚者享有不受性忠貞背叛的自由。

在我國刑事訴訟法第 239 條但書的設計下，告訴權人當然可以選擇單獨追究第三者的刑事責任[58]，這也是我國實務上的常態。但這部分的追訴恐怕也對告訴人的婚姻關係沒有助益。告訴權人經常會以為可透過刑事告訴單獨追訴第三者來拯救自己的婚姻，但這是心理上對於刑罰效果的錯誤預期。如前所述，刑事程序的進行通常只會摧毀婚姻。在程序中對於他方配偶的詆毀，以及不可避免地會讓整起事件被公眾（或當事人的朋友圈）指指點點，凡此種種都會摧毀夫妻雙方修復和解的可能性[59]。基此，即便告訴權人僅對第三者提告，整個程序的進行也還是會對自己的婚姻與家庭產生相當程度的負面影響。正因為如此，文獻上才會指出告訴權在這種情形會淪為單純的報復工具。或許在單獨追訴第三者的情形，也可以著眼於未來的預防效果立論，亦即透過這次的刑罰來迫使第三者放棄日後再次「破壞」自己的家庭，這就涉及到前文肆、二、（一）所討論過的事前預防效果，於此不贅。

伍、審查結論與釋字第 554 號解釋

如上所述，從目前文獻上各種支持通姦罪立法的論述來看，似乎都無法證立通姦罪的正當性。儘管理由各有不同，部分論據不具刑法上的法益資格，部分論據無法與制裁規範的存在建立有效性關聯，部分論點則是不合於衡平性，但結論均屬相同，都是導向無法支持通姦罪合憲的結論。針對憲法法庭的第三個提問（本院釋字第 554 號解釋有無變更解釋之必要？），本鑑定意見的答覆如下：

首先，釋字第 554 號解釋之解釋文第一段的論述並無問題，本鑑定意見與此

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[58] 德國舊法通姦罪的告訴亦同，亦可僅針對通姦行為其中一方提告，但縱使不對通姦之配偶提告，也還是必須完成離婚始得提出告訴，僅參閱 Maurach, BT, 5. Aufl., 1969, S. 414。

[59] Lackner, FamRZ 1962, S. 413。

段內容沒有任何扞格衝突之處，自無變更解釋的必要。然而，即便將通姦罪刪除，此段論述的正確性也不會受到影響，換句話說，由這段論述並不能推導出國家必須用刑罰來回應婚外性行為。

而本解釋的第二段解釋文中，則指明通姦行為是否犯罪化係屬立法選擇問題，應由立法者衡酌定之，並且指出通姦罪的制訂對於婚姻、家庭制度及社會生活秩序的維護而言係屬必要。本鑑定報告對此部分則有不同意見。蓋如前述，維護夫妻間忠誠義務的說法明顯不具法益適格（而只是構成要件的重述）。至於維護婚姻與家庭制度這部分，無論是指抽象的婚姻機制還是具體的婚姻與家庭關係，通姦罪的存在，要不是與前開目的之達成不具有效性關聯，不然就是無法通過衡平性（狹義比例原則）的檢驗。由於無法通過比例原則的審查，自然就不會是立法者的政策選擇問題。不過在衡平性審查的部分，由於衡量因子及衡量觀點的開放性與多元性，結論並非絕對的正確性宣稱。不過無論如何可以確定的是，必須先證立刑事制裁合於比例原則，刑事制裁才能夠成為一個立法選項，也才稱得上是立法裁量問題。

會台字第 12664 號聲請釋憲案法律鑑定書

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貴院大法官為審理會台字第 12664 號臺灣苗栗地方法院苗栗簡易庭快股法官等聲請解釋案，囑託本人就刑法第 239 條與刑事訴訟法第 239 條但書之合憲性提供書面鑑定意見，敬覆如下：

壹、刑法第 239 條之合憲性

刑法第 239 條規定：「有配偶而與人通姦者，處一年以下有期徒刑。其相姦者亦同。」依據學說與實務見解，通姦係指異性之性器接合，口交及肛交等性行為即使符合刑法第 10 條第 5 項之性交定義，亦不屬於本罪的通姦行為[1]。依此，本罪禁止有配偶之人與第三人實施性器接合，違反者將受一年以下有期徒刑之制裁。本罪對於有配偶之人及第三人的基本權干預，形式上必須有法律根據（法律保留原則），此一法律實質內涵對於基本權的限制，又必須符合比例原則之限制，始屬合憲。本罪的構成要件及法律效果皆已有明確的法律規定，故合憲性的審查重點在於，其對於基本權之限制是否符合比例原則。

一、刑法規範之合憲性審查結構

在審查刑法第 239 條的合憲性之前，有必要先說明的是，對於刑法規範如何進行合憲性審查。依據規範理論，刑法規範的內容包含兩個部分：「行為規範」與「制裁規範」，行為規範是指禁止或要求行為人從事特定行為，制裁規範是指授權國家處罰違反行為規範之人，以維護行為規範的適用效力。不少德國文獻認為，刑法規範所包含的「行為規範」與「制裁規範」，其干預基本權的目的、種類和方式不同，對

[1] 林山田，刑法各罪論（下），5 版，2006 年，台北：自版，頁 497-498；盧映潔，刑法分則新論，15 版，2020 年，台北：新學林，頁 458-459；甘添貴，刑法各論（下），4 版，2015 年，台北：三民，頁 300。不同見解：林東茂，刑法分則，2020 年，台北：一品，頁 329；陳子平，刑法各論（下），3 版，2020 年，頁 483，皆基於維護家庭婚姻之目的，認為應該比照性交來解釋通姦概念。

於刑法規範的合憲性審查，應該區分「行為規範」和「制裁規範」進行[2]。

以刑法第 310 條第 1 項誹謗罪為例，其行為規範係指「禁止指謫或傳述足以毀損他人名譽之事」，制裁規範係指法院得對於誹謗者判決有罪，並科處「一年以下有期徒刑、拘役或一萬五千元以下罰金」。本罪之「行為規範」禁止個人發表特定的言論，構成對於言論自由的限制，此一限制之目的在保護他人名譽。為了保護名譽而限制言論自由，是否符合比例原則，應視此一限制是否為保護名譽所適合、必要且均衡的手段。相對地，本罪之「制裁規範」授權法院對於誹謗之人判決有罪並科處徒刑、拘役或罰金，有罪判決是國家宣示對於誹謗行為的譴責，構成對於一般人格權的限制，刑罰制裁則是構成對於人身自由或財產的限制，其目的是強化「禁止誹謗」之行為規範的效力。為了強化「禁止誹謗」之行為規範的效力而限制一般人格權、人身自由及財產，是否符合比例原則，則是取決於此一限制是否為維護行為規範效力所適合、必要且均衡的手段。因此，在進行誹謗罪的合憲性審查時，必須先確認其所隱藏的「禁止誹謗」行為規範是否合憲；如果「禁止誹謗」的行為規範合憲，才進一步審查「宣告有罪及科處刑罰」的制裁規範是否合憲。

上述區分「行為規範」和「制裁規範」進行合憲性審查的主張，看似是使合憲性審查的內容和層次更加清晰，但是忽略了行為規範和制裁規範的密切關連性[3]。一方面，行為規範對於基本權的干預程度，必定和違反行為規範的法律效果有關，不考量制裁規範就不可能完整說明行為規範的意義。例如，「禁止誹謗」作為一個行為規範，其前提必定是誹謗會帶來一定的法律後果，如果誹謗不會對行為人帶來任何法律後果，「禁止誹謗」根本就無法成為一個具有法律拘束力的行為規範。如果違反「禁止誹謗」的行為規範會帶來某種法律上的後果，那麼此一法律上的後果究竟是民事損害賠償、行政罰或刑罰，也必定構成行為人決定是否發表誹謗言論時的重要因素，影響「禁止誹謗」對於言論自由的限制程度。另一方面，制裁規範對於基本

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[2] 中文文獻之詳細說明，許澤天，刑法規範的基本權審查—作為刑事立法界限的比例原則，載於：黃舒芃主編，憲法解釋之理論與實務（第七輯），2010 年 12 月，台北：中央研究院法律學研究所籌備處，頁 266-270。德文文獻，參考 Ivo Appel, Verfassung und Strafe, 1998, Berlin: Duncker & Humblot, S. 569 ff.; Otto Lagodny, Strafrecht vor den Schranken der Grundrechte, 1996, Tübingen: Mohr Siebeck, S. 78 ff.

[3] 參考薛智仁，刑法觀點下的公民不服從，中研院法學期刊，17 期，2015 年 9 月，頁 179；Ingke Goeckenjan, Überprüfung von Straftatbeständen anhand des Verhältnismäßigkeitsgrundsatzes: überfällige Inventur oder Irrweg? in: Matthias Jestaedt/Oliver Lepsius (Hrsg.), Verhältnismäßigkeit, 2015, Tübingen: Mohr Siebeck, S. 193 ff.

權的干預，目的看似是在維護行為規範的效力，但是其所達成的公共利益到底有多大，還是必須看行為規範所欲保護的利益有多重要，制裁規範的合憲性審查也無法完全不看行為規範。例如，誹謗罪授權國家對於行為人宣告有罪與刑罰，是否符合比例原則，必須看確保「禁止誹謗」行為規範的適用效力所實現的「保護名譽」利益，相對於對行為人的一般人格權、人身自由或財產的干預，是否尚屬均衡。基於如此的考量，如果在進行刑法規範的合憲性審查時，分開審查「行為規範」和「制裁規範」是否符合比例原則，尤其是在審查「行為規範」時完全不考量國家係以刑罰維護其適用效力，反而是把原本屬於一個整體的問題割裂討論，看不清刑法規範以其譴責與刑罰的效力干預基本權的特色。因此，**對刑法規範的合憲性審查，應該是合併行為規範和制裁規範所干預的全部基本權，審查其是否符合比例原則**。

若是貫徹對於刑法規範整體審查其合憲性的模式，應該就行為規範對於憲法所例示之自由權利或一般行為自由的干預，以及制裁規範授權國家宣告有罪及刑罰所干預之一般人格權、人身自由或財產權，合併審查其干預是否符合比例原則，缺一不可[4]。回顧我國的釋憲實務，大法官對於刑法規範的合憲性審查，在形式上並未明白區分行為規範和制裁規範，而是將二者合併視為一體，審查其干預基本權是否符合比例原則。但是，根據筆者的初步觀察，大法官在認定刑法規範是否符合比例原則時，似乎有時只考量行為規範所干預的基本權，有時只考量裁判規範所干預的基本權。例如，釋字 554 號對於刑法第 239 條通姦罪，僅以其對於「性行為自由」之侵害未違反比例原則為由宣告合憲;釋字 558 號對於民國 81 年修正之國安法第 3 條第 1 項明訂人民入出境一律應經主管機關許可，不分國民在台灣有無戶籍，同法第 6 條第 1 項明訂，未經許可入境者科處三年以下有期徒刑、拘役或科或併科新台幣九萬元以下罰金，以其「侵害國民得隨時返國之自由」違反比例原則宣告違憲，皆是僅以行為規範所干預之基本權為審查對象。相對地，釋字 594 號對於民國 82 年修正商標法第 77 條侵害商標罪，則是以其對於「人民之身體自由與財產權」侵害未違反比例原則為由宣告合憲，僅以制裁規範所干預之基本權為審查對象。由此可否推

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[4] 此種整體審查模式的最大作用是，在進行合比例性審查時，必須以行為規範及制裁規範所干預的全部基本權為基礎，將這些基本權被侵害的加乘效果納入考量。相反地，如果分開審查行為規範與制裁規範，可能其各自的基本權干預均屬合乎比例，刑法規範即屬合憲，無法考量基本權干預的加乘效果。關於考量干預多個基本權的加乘或累積效果，僅參考 Torsten Kingreen/Ralf Poscher, Grundrechte Staatsrecht II, 32. Aufl., 2016, Heidelberg: C. F. Müller, Rn. 307.

論出，大法官在形式上採取整體審查的模式底下，其實有意區分行為規範與制裁規範的合憲性，仍有待進一步推敲。本文只想強調，如果大法官是將刑法規範的整體當成審查對象，卻僅挑選所涉及之部分基本權進行比例原則的審查，此種審查顯然是不夠完備，可能因為低估刑法規範的基本權干預程度而不當放寬合憲要件。

二、刑法第 239 條之實質合憲性

（一）本罪所干預之基本權

刑法第 239 條對於通姦配偶及其相姦人，處一年以下有期徒刑，其干預基本權的種類及程度，必須合併行為規範和制裁規範加以判斷。可以確定的是，本罪之制裁規範是授權國家宣告有罪及有期徒刑，限制有配偶之人及第三人的**一般人格權**（憲法第 22 條）、**人身自由**（憲法第 8 條）。同樣確定的是，本罪之行為規範是禁止有配偶之人與第三人性器接合，限制個人選擇與何人從事**性行為的自由**。依據釋字第 554 號解釋：「性行為自由與個人人格有不可分離之關係，固得自主決定是否及與何人發生性行為，惟依憲法第 22 條規定，於不妨害社會秩序公共利益之前提下，始受保障」，性行為自由被承認是憲法第 22 條保障之基本權，任何人都享有是否、與誰、如何從事性行為的自由，故本罪之行為規範構成對性行為自由的限制。

值得討論的是，本罪之行為規範是否構成對**隱私權**的限制。2013 年與 2017 年兩次的兩公約國際審查委員會結論性意見與建議，均認為我國通姦罪侵害公政公約第 17 條保障之隱私權，建議我國政府應予刪除；部分學說亦借鏡外國法，認為通姦罪侵害隱私權[5]。對於這個問題，大法官並無機會表達立場。在大法官作成釋字第 554 號之前，儘管就已經承認人民的隱私權應受保障，但是並未明確闡述其內涵[6]，故當

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[5] 邱忠義，以自主隱私權之侵害評析我國通姦罪之處罰，輔仁法學，46 期，2013 年 12 月，頁 130-140。美國法的隱私權概念強調「個人自主決定」之保障，參考劉靜怡，隱私權：第二講　隱私權保障與國家權力的行使—以正當程序和個人自主性為核心，月旦法學教室，50 期，2006 年 12 月，頁 39-49。

[6] 司法院釋字第 293 號解釋：「銀行法第四十八條第二項規定「銀行對於顧客之存款、放款或匯款等有關資料，除其他法律或中央主管機關另有規定者外，應保守秘密」，旨在保障銀行之一般客戶財產上之秘密及防止客戶與銀行往來資料之任意公開，以維護人民之隱私權。」；司法院釋字第 509 號解釋理由書：「惟為保護個人名譽、隱私等法益及維護公共利益，國家對言論自由尚非不得依其傳播方

時並未從隱私權角度審查通姦罪是否合憲。直至釋字第 585 號解釋理由書，大法官始首次說明：「隱私權雖非憲法明文列舉之權利，惟基於人性尊嚴與個人主體性之維護及人格發展之完整，並為保障個人生活秘密空間免於他人侵擾及個人資料之自主控制，隱私權乃為不可或缺之基本權利，而受憲法第 22 條所保障」[7]。問題是，依據這個定義，通姦罪構成對隱私權的限制嗎？本文認為，大概沒有人會否認，性生活不僅是私人領域，甚至有時是不可被侵犯的私生活領域[8]，屬於上述隱私權定義中的「個人生活秘密空間」。但是，國家禁止有配偶之人與第三人性器接合，是否構成對於個人生活秘密空間的「侵擾」，則容有解釋空間。如果此處的「侵擾」係指他人對於個人生活秘密空間的刺探，那麼國家禁止有配偶之人與第三人性器接合的本身，如果沒有後續調查通姦的手段，尚未發生刺探生活秘密空間的效果，故不算是對於隱私權的限制。然而，如果此處的「侵擾」泛指介入他人安排個人生活秘密空間的自主決定，包括個人與特定人從事性行為在內，通姦罪禁止有配偶之人與第三人性器接合的本身，就構成對於隱私權的限制。在上述兩種可能的解釋之間，**本文比較傾向將「侵擾」理解為對於個人生活秘密空間的刺探，不包括介入他人對此生活秘密空間的安排**[9]。因為，大法官對於隱私權的理解至今仍然著重在防止個人資訊被刺探與揭露，而不是藉此賦予個人安排私人生活空間（例如婚姻、家庭或生育）的自由，似乎無意將性行為自由當成隱私權的保護對象[10]。再者，既然大法官已經將性行為自由承認為憲法第 22 條的基本權之一，並且強調其與個人人格有不可分離之關係，個人對性生活的自主決定權已獲得憲法保障，將之排除在隱私權之外並不會產

式為適當限制。」；司法院釋字第 535 號解釋：「臨檢實施之手段：檢查、路檢、取締或盤查等不問其名稱為何，均屬對人或物之查驗、干預，影響人民行動自由、財產權及隱私權等甚鉅，應恪遵法治國家警察執勤之原則。」

[7] 司法院釋字第 585 號解釋理由書、司法院釋字第 603 號解釋。大法官對於隱私權的發展歷程，詳見葉俊榮，探尋隱私權的空間意涵—大法官對基本權利的脈絡論證，中研院法學期刊，18 期，2016 年 3 月，頁 5-19。

[8] Vgl. nur Udo Di Fabio, in: Maunz/Dürig (Hrsg.), Grundgesetz-Kommentar, Werkstand: 88 EL, 2019, GG Art. 2 Abs. 1 Rn. 200.

[9] 似乎也傾向此種理解者，李惠宗，憲法要義，8 版，2019 年，台北：元照，邊碼 1950；吳庚、陳淳文，憲法理論與政府體制，6 版，2019 年，台北：自版，頁 342-343。

[10] 亦參考林子儀，公共隱私權，第五屆馬漢寶講座論文彙編，2015 年，台北：財團法人馬氏思上文教基金會，頁 38：「如與美國司法實務或美國學者所主張的隱私權類型比較，我國司法院大法官到目前為止，只肯認空間隱私權及資訊隱私權兩種類型，而未及於自主決定隱私權、具財產價值之隱私權其它類型。」

生保護漏洞，將之包含在隱私權之內似乎也不會提升其保護程度。基此，通姦罪之行為規範並未限制隱私權。

簡言之，本罪對有配偶之人及第三人構成性行為自由（憲法第 22 條）、一般人格權（憲法第 22 條）及人身自由（憲法第 8 條）之限制。接著的問題是，此一限制是否符合比例原則（憲法第 23 條）。

（二）目的正當性

首先要檢討的是，通姦罪所追求之目的是否正當。不少刑法學說批評通姦罪的正當性，理由之一是不符合刑法保護法益的目的。張明偉認為「單純善良風俗或一般道德觀念的維護，甚至是婚姻或人生的幸福美滿，均非刑法存在之目的。[11]」邱忠義認為「通姦行為被視為無被害人的犯罪，僅屬於道德錯誤，維護舊時代思潮下的性道德價值，不足以正當化通姦入罪。[12]」林慈偉認為「在性質上，家庭婚姻圓滿利益自始不適用以處理公共事務為目的的刑法。[13]」這些觀點的出發點是，刑法以保護法益為目的，而善良風俗或道德觀念不屬於刑法保護的法益，故通姦行為不應該被入罪化。問題是，刑法學的法益概念，在憲法層次上，應該成為審查刑法規範是否追求正當目的的標準嗎？

答案應是否定的。依據憲法第 23 條，法律對基本權的限制必須是出於「防止妨礙他人自由、避免緊急危難、維持社會秩序或增進公共利益」之目的，一般認為此一限制僅在禁止立法者追求明顯違憲的目的，換言之，**所追求之公共利益為憲法所容許，即可滿足目的正當性的要求**[14]。所謂立法者負有維護公共利益的任務，則是在強調禁止國家只為了部分個人或群體（例如貴族）之利益而限制基本權。因此，一個刑法規範是否符合憲法第 23 條之目的正當性，判斷標準在於是否追求憲法所容

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[11] 張明偉，通姦罪合憲性之再思考，月旦裁判時報，59 期，2017 年 5 月，頁 63。同此見解：王皇玉，刑法總則，5 版，2019 年，台北：新學林，頁 29。

[12] 邱忠義，註 5 文，頁 138。

[13] 林慈偉，通姦除罪化思維於我國司法實務之實踐—以高等、地方法院近年相關裁判為中心，軍法專刊，58 卷 5 期，2012 年 10 月，頁 137。

[14] 許宗力，基本權的保障與限制（下），月旦法學教室，14 期，2013 年 12 月，頁 51-52。

許的公共利益，而不在於其是否符合刑法學的法益概念[15]。在我國釋憲實務上，大法官也從未將刑法學的法益理論當成審查刑法規範之目的正當性的標準。例如，關於刑法第 235 條的合憲性，釋字第 617 號解釋認為「為維持男女生活中之性道德感情與社會風化，立法機關如制定法律加以規範，則釋憲者就立法者關於社會多數共通價值所為之判斷，原則上應予尊重」，釋字第 666 號解釋針對社會秩序維護法第 80 條第 1 項第 1 款意圖得利與人姦宿之處罰，也是承認其「維護國民健康與善良風俗」之目的正當性，僅指責其差別待遇與立法意旨之間欠缺實質關聯性，違反平等原則（憲法第 7 條）。由此可知，大法官並未比照刑法的法益理論，否定所謂性道德感情或社會風化的目的正當性。本文認為，這是可以支持的作法。刑法學的法益概念發展至今，其實還沒有辦法提出一個稍具共識的判斷標準，作為刑事立法的界限。例如，法益理論向來將違反道德和侵害法益一分為二，主張單純違反道德的行為並沒有侵害法益，但是到底什麼是單純違反道德，又為何所謂道德就不代表刑法應予保護的利益，法益理論仍然無法提出有說服力的解釋[16]。除此之外，民主國家中立法者作為民意的代表，其立法權力僅受到憲法的拘束，法益理論是刑法釋義學所發展的刑事立法界限，而不當然具有憲法的拘束力。因此，刑法規範即使是在保護道德或風俗，只要這個道德或風俗沒有違反憲法價值（例如性別平等），仍可認為是追求正當目的[17]。

根據上述，就算通姦罪被認為是單純保護與性有關的道德風俗，仍然可以通過目的正當性的審查。更何況，所謂不得從事婚外性行為的道德風俗，在現實上也不是和婚姻或家庭成員毫無利害關係。有許多文獻指出，外遇（包含通姦在內）會對於他方配偶造成生理與心理的負面影響，包括作息失調、產生失落感、失去自我認同或自尊，甚至也會影響子女[18]。因此，他方配偶請求配偶忠誠或維護家庭和諧，即使在憲法上不被承認為基本權利，也無礙於肯認其係憲法所容許的公共利益。就此而言，釋字第 554 號解釋所說「國家為確保婚姻制度之存續與圓滿，自得制定相關

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[15] 詳細說明，許澤天，註 2 文，頁 273-279；Appel, (Fn. 2), S. 199 ff.; Lagodny, (Fn. 2), S. 145 ff.。

[16] Vgl. nur Georg Freund, in: Joecks/Miebach (Hrsg.), Münchener Kommentar zum StGB, 3. Aufl., 2017, Vorbemerkungen zu § 13 Rn. 50 ff.

[17] Appel, (Fn. 2), S. 200 f.; Goekenjan, (Fn. 3), S. 199.

[18] 詳見 Janis Abrahms Spring & Michael Spring 著，柯清心、高蘭馨譯，外遇的男女心理：如何走出創傷與重建信任，1998 年，台北：天下文化，頁 11-43；簡春安，外遇的分析與處置，1991 年，台北：張老師文化，頁 103-121、125-139。

規範，約束夫妻雙方互負忠誠義務」，認定通姦罪是在保護婚姻存續與圓滿，係正當的公益目的，值得肯定。至於釋字第 569 號解釋理由書「有配偶而與人通姦，背離婚姻忠誠，破壞家庭和諧，侵害憲法第 22 條所保障之自由權利」，在婚姻忠誠及家庭和諧以外，承認他方配偶之自由權利亦受通姦罪保護，雖然內涵不明[19]，仍然無礙於通姦罪之目的正當性。

（三）手段適合性

然後要檢討的是，就維護婚姻存續、圓滿或家庭和諧而言，通姦罪是否符合手段適合性，也就是通姦罪是否足以產生維護婚姻或家庭的效果。對於這一點，多數學說也有強烈的質疑，認為在夫妻感情已有裂痕的情形下，處罰通姦並無法增進夫妻雙方之信賴與婚姻和諧，對簿公堂的結果反而會加速婚姻毀滅，因為對於通姦之配偶或第三人科以刑罰，只會加深雙方裂痕，促使通姦之配偶決意離婚[20]。也有文獻認為，通姦罪並未使通姦行為減少，甚至成為社會常態，顯示刑法無法完成抑制犯罪的固有任務，反而成為統治者的鎮壓工具[21]。上述觀點，特別是通姦罪的追訴會加速婚姻毀滅，通姦行為並未因為通姦罪而消失等，固然算是可信的經驗性陳述，但通姦罪是否因此不能通過手段適合性的審查，則是有待進一步檢討。我們必須先確定刑罰是以什麼方式達成保護法益的效果，再檢討是否符合手段適合性的標準。

刑法規範的主要作用是對於違反行為規範之人宣告有罪與施加刑罰，以維護行為規範所欲保護的法益。問題是，刑罰是如何達成保護法益的效果？這就涉及刑法學上的「刑罰目的」。一般認為，刑罰具有一般預防和特別預防的作用，前者係指嚇

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[19] 對此之批評，林子儀大法官，釋字第 569 號解釋協同意見書。

[20] 參考邱忠義，註 5 文，頁 142；張明偉，註 11 文，頁 65；林慈偉，註 13 文，頁 133；李惠宗，註 9 書，編碼 1942；陳子平，註 1 書，頁 489；林山田，註 1 書，頁 499-501；黃榮堅，論通姦罪的除罪化，載於：刑罰的極限，1999 年，台北：元照，頁 16；徐昌錦，通姦罪合憲性解釋之評析，台灣本土法學雜誌，77 期，2005 年 12 月，頁 46；鄭昆山，通姦罪在法治國刑法的思辨—評釋字第五五四號解釋，月旦法學雜誌，105 期，2004 年 2 月，頁 221-222；鄭錦鳳，論通姦除罪化—兼評大法官釋字第 554 號解釋，軍法專刊，55 卷 5 期，2009 年 10 月，頁 117；莊喬汝，看不見的第三者—通姦罪導向較好的婚姻？，台灣法學雜誌，223 期，2013 年 5 月，頁 62-63。

[21] 陳文貴，評大法官釋字第五五四號解釋—比例原則之再檢視，刑事法雜誌，58 卷 5 期，2014 年 10 月，頁 21。

阻潛在行為人實施犯罪（消極一般預防）及穩固社會大眾對於法規範的信賴（積極一般預防），後者係指嚇阻犯罪人將來再犯（消極特別預防）及使其重新回歸社會（積極特別預防）。換言之，**刑罰保護法益的作用，並不是使已經被危害的具體法益獲得修復（例如：死者復活），而是阻止行為人或潛在行為人未來犯罪，保護不特定法益在未來不受到侵害**。大法官在審查刑法規範的合憲性時，也多次強調一般預防的作用[22]。不過，依據目前為止的犯罪學研究，刑罰具有預防效果的理論主張，至今尚未獲得充分證實[23]。以刑罰的消極一般預防（嚇阻）效果來說，目前的實證研究「無法排除」刑罰有嚇阻作用，犯罪被發現的風險比起刑罰嚴厲性而言，對於刑罰的嚇阻效力影響力較大（但也不是適用於所有犯罪或所有人），其他刑罰變數在什麼條件下影響嚇阻作用，仍有待繼續尋找[24]。至於刑罰的積極一般預防效果，則是更難以成為實證研究的對象，因為光是其所使用的「法規範信賴」及「穩定規範」就是無法操作的概念，以至於被批評是對於刑罰的真正效力提出一個模糊不清的主張，藉此使其無法被證明為虛偽[25]。因此，刑罰究竟有無積極和消極一般預防作用，只能說尚未被證實，但也尚未被推翻。

在目前對於刑罰一般預防作用的有限認知之下，立法者以刑法規範追求保護法益的目的，能否通過手段適合性的審查？這涉及手段適合性的標準及審查密度。按照德國聯邦憲法法院的觀點，手段適合性係指國家所採手段並非完全不適合，換言之，只要對於所追求的公益目的有部分或些微的助益或效果，即可通過手段適合性

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[22] 釋字第 544 號解釋：「但究其目的，無非在運用刑罰之一般預防功能以嚇阻毒品之施用，挽社會於頹廢」；釋字第 669 號解釋理由書：「但立法機關認前述行為已足造成高度危險，為保護上開重要法益，乃採取刑罰之一般預防功能予以管制，可認係有助於重要公益目的之達成。」釋字第 790 號解釋理由書：「又栽種大麻固屬製造毒品之前階段行為，但對生命、身體法益之侵害已具一定程度之危險性，立法機關為保護此等重要法益，乃採取刑罰之一般預防功能予以管制，可認係有助於重要公益目的之達成。」

[23] 就我們討論刑法規範本身的保護法益效果而言，由於在設立刑法規範之時，還不存在已經被確定犯罪的行為人存在，我們可以暫且不討論刑罰有無特別預防效果，而是把焦點放在刑罰的一般預防效果上。

[24] 中文文獻的相關介紹，鍾宏彬，刑罰一般嚇阻作用之實證研究回顧，載於：春風煦日論壇編輯小組（編），刑事法與憲法的對話—許前大法官玉秀教授六秩祝壽論文集，2017 年，台北：元照，頁 311-358。

[25] Vgl. nur Goeckenjan, (Fn. 3), S. 203; Bernd Meier, Strafrechtliche Sanktionen, 5. Aufl., 2019, Berlin: Springer, S. 28 f.

的審查。對於手段適合性的審查，涉及事實的認定和調查，德國聯邦憲法法院發展出三種寬嚴不同的審查基準：明白性審查、可支持性審查與強烈內容審查。何種情形應該適用哪個審查標準，應依所涉及規範領域的性質、形成有足夠把握之決定的可能性大小、以及所涉相關法益之重要性等因素而定，不過還是相當不明確[26]。我國釋憲實務的比例原則審查，雖然在近年來也有結合不同審查基準的趨勢，但是依據學者的觀察，其所採取之審查標準寬嚴，對於最終的審查結果影響不明顯，最終似乎還是著重於個案的衡量[27]。例如，釋字第 646 號解釋在審查未辦理營利事業登記而經營電子遊戲場之刑罰合憲性時，雖然事涉憲法第 8 條人身自由之限制，卻表明「惟對違法行為是否採取刑罰制裁，涉及特定時空下之社會環境、犯罪現象、群眾心理與犯罪理論等諸多因素綜合之考量，而在功能、組織與決定程序之設計上，立法者較有能力體察該等背景因素，將其反映於法律制度中，並因應其變化而適時調整立法方向，是立法者對相關立法事實之判斷與預測如合乎事理而具可支持性，司法者應予適度尊重。」換言之，大法官並未因為系爭規定涉及人身自由就採取嚴格內容審查，反而是遷就立法者對於刑罰效力的判斷與預測，採取可支持性審查。

本文初步認為，大法官沒有因為刑法規範限制重大的基本權利，就在操作比例原則時採取嚴格的審查基準，至少就適合性及必要性的審查階段，應該是值得支持的。主要理由在於，刑罰到底是如何去影響、操縱人類行為，涉及諸多目前已知和未知的複合因素，此種無法證實也無法推翻刑罰一般預防效力的知識狀態，在可預見的未來也難以改變。基於此種**事務領域的特殊性**，如果釋憲者基於刑法規範限制一般人格權及人身自由，二者皆屬重要的基本權利，就採取嚴格內容審查[28]，要求立法者積極證實刑罰的預防效力才能制定刑法規範，那就必定會癱瘓刑事立法[29]。因

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[26] 參考許宗力，註 14 文，頁 52-53；法治斌、董保城，憲法新論，7 版，2020 年，台北：元照，頁 233-234；吳庚、陳淳文，註 9 書，頁 831-834。

[27] 參考黃舒芃，比例原則及其階層化操作—一個著眼於司法院釋憲實務發展趨勢的反思，中研院法學期刊，19 期，2016 年 9 月，頁 11-43。黃舒芃建議，系爭規定對於重要基本權利有重大影響，就應該採取嚴格或偏向嚴格的審查標準，提升合憲性門檻。同樣呼籲應該根據不同基本權領域，建立類型化的審查基準，參考許宗力，比例原則與法規違憲審查，載於：戰鬥的法律人—林山田教授退休祝賀論文集，2004 年，台北：元照，頁 229-230。

[28] 如此主張，許宗力，註 14 文，頁 53；吳庚、陳淳文，註 9 書，頁 835-836；法治斌、董保城，註 26 書，頁 235；徐昌錦，註 20 文，頁 48。

[29] Vgl. Lagodny, (Fn. 2), S. 319.

此，在主要進行經驗性認定的適合性及必要性審查階段，就刑罰有無一般預防效力的認定，釋憲者廣泛地**尊重立法者的評價優先權限**（Einschätzungsprärogative），僅在證實刑罰毫無預防效果時才否定適合性，有其道理[30]。然而，在進行價值權衡的手段合比例性階段，刑法規範限制之一般人格權及人身自由價值重大，則是構成提升干預所造成不利益的因素。

基於上述觀點，前述學說否定通姦罪之手段適合性的理由，並不具說服力。**在判斷通姦罪有無維護家庭婚姻的作用時，重點在於對通姦行為的譴責及刑罰，能否嚇阻其他潛在行為人實施通姦，或者強化社會大眾對於禁止通姦的規範信賴**，而不是在於追訴通姦能否挽救行為人的婚姻關係。如同對於殺人行為的處罰，我們不會說處罰殺人無法讓被害人復活，挽回其生命，就說殺人罪沒有保護生命的效果，我們也不應該說，對於通姦行為的處罰無法修復行為人與其配偶之間的關係，就認為通姦罪沒有保護家庭婚姻的作用。據此，多數學說指出通姦的追訴經常加速婚姻的崩壞，固然可能是個事實，但是這與判斷通姦罪的手段適合性無關，因為通姦罪維護婚姻家庭的效果，來自刑罰嚇阻他人通姦或強化大眾對禁止通姦之規範信賴。從消極一般預防來看，我們並不能排除在潛在行為人之中，有人因為害怕刑罰而不實施通姦行為，雖然這種嚇阻作用的高低還是取決於行為人是否預期通姦行為會被發覺和追訴。從積極一般預防來看，立法者透過通姦罪向社會大眾傳達保持對配偶的忠誠、維護家庭和諧的價值觀念，此種觀念的建立和鞏固，同樣可能影響個別的行為人是否通姦的決定[31]。通姦罪的上述一般預防效果，到目前為止並無證據予以推翻。至於部分論者所說通姦罪從來沒有讓通姦行為消失，反而已是社會常態，也無法改變通姦罪可能有一般預防效力的事實。因為，刑罰原本就只是可能影響個人是否犯罪的因素之一，即使社會觀念變遷而使通姦行為的數量增加，只要不排除其可

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[30] 這並不是說，立法者可以拿著這個評價優先權限，說刑罰多有效就多有效，完全不去考量犯罪學對於刑罰嚇阻作用的研究成果。例如，至今犯罪學研究大致上獲得一個共識，亦即刑罰加重或重刑（死刑）並不會提升嚇阻作用，這就是立法者不能忽視不理的經驗知識。因此，對於加重刑罰的刑法規定（尤其我國諸多特別刑法）的手段適合性審查，大法官就應該嚴格把關，不能以「尊重立法形成自由」帶過。

[31] 釋字第 554 號解釋理由書：「然刑法所具一般預防功能，於信守夫妻忠誠義務使之成為社會生活之基本規範，進而增強人民對婚姻尊重之法意識，及維護婚姻與家庭制度之倫理價值，仍有其一定功效。」

能阻止部分的人實施通姦，就足以肯定其手段適合性。

或許有人會質疑，就算通姦罪能夠嚇阻他人通姦，但是婚姻美滿和家庭和諧倚賴的是當事人的感情投入與用心經營，嚇阻其通姦並無助於婚姻家庭的圓滿，因此通姦罪無法達到維護家庭婚姻的公益目的。本文並不否認，婚姻家庭的圓滿主要是靠雙方感情的投入，刑罰無法改變一個人的感情，強制一個感情生變的配偶用心經營婚姻。但是，刑罰對於法益的保護作用，從來不是在改善或增進法益持有人的福祉，而只是在防止法益持有人的福祉下降而已。因此，通姦罪對於家庭婚姻的保護作用，也不是在使一個已經感情生變的婚姻，提升為一個感情濃密的婚姻，而只是在防止家庭婚姻的狀態(即使原本就已經是感情破裂)，因為配偶違反忠誠義務而更加惡化。如果我們不排除通姦罪能夠嚇阻他人通姦，或是使他人認同家庭價值而不為通姦，那麼通姦罪可以減少他方配偶遭到背叛、妨礙家庭和諧的負面因素，應該也是難以被否認的作用。因此，婚姻家庭圓滿有賴雙方配偶的自願感情投入，並不能否定通姦罪可能減少妨礙家庭和諧的負面因素，進而有助於維護家庭婚姻，得以通過手段適合性的審查。

（四）手段必要性

接下來審查通姦罪是否合乎手段必要性原則。此一原則的意思是，當立法者所追求之公益目的，可以透過同樣有效，但是干預基本權較為輕微的手段達成時，則應該採取輕微手段，系爭手段欠缺必要性[32]。在這個層次上，通姦罪的手段必要性也受到很多學說的質疑，認為我國民法提供他方配偶請求裁判離婚(民法第 1052 條第 1 項第 2 款）的可能性，並得請求損害賠償（民法第 1056 條)，其因通姦所受之非財產上損害，亦得以「侵害基於配偶關係所生之身份法益」而請求慰撫金（民法第 195 條第 3 項）[33]，已經足以彌補他方配偶的傷痛與損失[34]。因此，對於通姦這種違

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[32] 李惠宗，註 9 書，邊碼 05306。詳細說明，許宗力，註 14 文，頁 54-57。

[33] 相關學說及實務，參考王澤鑑，侵權行為法，增訂新版，2015 年，台北：自版，頁 214-217；孫森焱，民法債篇總則（上)，4 版，2018 年，台北：自版，頁 222-223；陳聰富，人格權的保護，月旦法學教室，132 期，2013 年 10 月，頁 48；葉啟洲，身分法益侵害之損害賠償的實務發展及其檢討，政大法學評論，128 期，2012 年 8 月，頁 39、42-43；陳洸岳，配偶及未成年子女對通姦行為相對人之慰撫金請求，台灣法學雜誌，184 期，2011 年 9 月，頁 87-92。

[34] 參考張明偉，註 11 文，頁 63；陳文貴，註 21 文，頁 22-23；邱忠義，註 5 文，頁 141；徐昌錦，

反婚姻契約義務的行為，沒有必要再以刑罰制裁通姦行為[35]。

上述觀點從通姦行為已有民事損害賠償及請求裁判離婚的效果，推論通姦行為之入罪化不符合必要性，符合刑法學所提出之刑罰最後手段性原則（ultima-ratio-Prinzip）或補充性原則（Subsidiaritätsprinzip）[36]。但是，從形式上觀察，就可以發現其論證過於簡略。如果以通姦行為已有相應的民事法律效果，就能夠推論出沒有必要對之祭出刑罰手段，那麼至少有必要進一步解釋，許多行為（例如竊盜、侵占或背信）已有民事責任，同時也被入罪化，卻無人質疑其違反刑罰最後手段性，為何對於通姦行為之入罪化就是違反刑罰最後手段性。至於以通姦僅係「違反婚姻契約義務」就否定入罪化的必要性，也是一個速斷的說法。我們可以看到，違背義務遺棄罪（刑法第 294 條第 1 項）及損害債權罪（刑法第 356 條），形式上都含有行為人違反民法契約義務的性質，立法者卻從保護生命或確保強制執行程序效力的角度，將這些違反民法契約義務的行為入罪化。同樣地，通姦作為違反婚姻忠誠義務的行為，仍然有可能在某種維護公共利益的角度底下，同時成為刑法所禁止與處罰的對象。因此，上述學說否定通姦行為之刑罰必要性，在說理上過於簡略，並無法當然證立通姦罪違反手段必要性原則。

如果要證立通姦罪違反手段必要性原則，我們必須審查：就通姦罪所欲追求之公益目的而言，民事損害賠償及裁判離婚係（1）「同樣有效」且（2）「干預基本權較輕微」的手段。針對前提（2）「干預基本權較輕微」，我們可以肯定，通姦行為之民事法律效果係干預財產權及婚姻自由，通姦罪之制裁規範則是具有限制人身自由的效果，即使得易科罰金或易服社會勞役，亦無法排除個案中限制人身自由的可能性，民事法律效果比刑罰手段更輕微。但是，前提（1）民事法律效果和刑罰手段「同樣有效」，是否真的存在？本文持否定的立場，理由有二。

第一個理由是，**二者所追求的「目的」並不相同，難以相互比較**。通姦所衍生的民事損害賠償及請求裁判離婚，其目的是填補他方配偶所受到的（財產上及非財產上）損害，並且結束關係已有破綻而難以存續的婚姻。相對地，通姦罪的譴責及

註 20 文，頁 47；鄭昆山，註 20 文，頁 222；林慈偉，註 13 文，頁 138；鄭錦鳳，註 20 文，頁 112-113；莊喬汝，註 20 文，頁 60。

[35] 參考莊喬汝，註 20 文，頁 60；鄭昆山，註 20 文，頁 218、223。

[36] 概念定義：王皇玉，註 11 書，頁 57；林鈺雄，新刑法總則，7 版，2019 年，頁 11-12。

制裁，其目的並不在填補他方配偶的損害和處理已被破壞的婚姻關係，而是在嚇阻或引導其他人不為通姦行為，進而達成維護不特定多數婚姻家庭的效果。因此，對於通姦行為的民事法律效果與刑罰手段，在抽象層次上都是在保護婚姻家庭，但是在具體層次上，民事法律效果的任務在回顧式處理已被破壞的婚姻，刑罰手段的任務是在展望式防止其他婚姻受到破壞，二者無法相互比較。

第二個理由是，即使我們承認民事損害賠償也帶有一般預防的效果，使其在所追求的目的上得以和刑罰手段相提並論，**二者的「預防效果」也難以相互比較**。前面提過，犯罪學至今無法證實也無法推翻刑罰的嚇阻效果，至多能夠指出某些因素足以影響嚇阻作用，刑罰的穩定規範效力更是難以實證測量。民事損害賠償的預防效力有多大，則是很少被實證研究；即使加以研究，也必定會遭遇刑罰嚇阻作用研究的困難，也就是無法分辨損害賠償影響人類行為的複合因素及機制。因此，在目前以及可預見的將來，我們並沒有證據去論斷民事法律效果和刑罰手段在一般預防效力上的高低[37]，此一經驗知識的欠缺也適用在通姦罪上。經驗上無法斷定民事法律效果和刑罰之預防效果高低，釋憲者也無法做出比立法者更周全睿智的判斷，因此在手段必要性的審查上，只能尊重立法者的優先評價權限。就保護婚姻家庭的公益目的而言，立法者既然認為民事效果欠缺與刑罰手段相同的保護效果，那麼在違憲審查上就無法否定刑罰手段之必要性。

（五）手段合比例性

最後必須審查的是，通姦罪以干預性行為自由、一般人格權及人身自由，達成維護家庭婚姻完整性不被通姦破壞的目的，在手段與目的之間是否合乎比例。在進行整體的利益衡量時，一方面必須考量立法者所欲保護之法益的價值、系爭法益遭受損害的程度、損害發生的可能性高低；另一方面必須考量干預的嚴重性、干預幅度以及所處罰的行為和所欲防止之損害是否密切[38]。

1. 手段之正面效益

我們前面已經反覆提過，通姦罪係透過刑罰阻止他人以婚外性行為破壞家庭或

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[37] Vgl. Lagodny, (Fn. 2), S. 362; Appel, (Fn. 2), S. 541 f.; Goeckenjan, (Fn. 2), S. 205; 許澤天，註 2 文，頁 287-290。

[38] Goeckenjan, (Fn. 3), S. 206; Sondervotum B. Sommer BVerfGE 90, 145 (214).

婚姻和諧，其所維護的公共利益價值有多大，則是需要更具體的分析。本文認為可以從兩個角度切入：一是婚姻忠誠義務的價值大小，二是刑罰維護婚姻忠誠義務的效力高低。

「不從事婚外性行為」作為婚姻忠誠義務的型態之一，其價值無法只訴諸家庭和諧或圓滿等抽象概念，而是需要配合社會背景予以具體化。在婚姻以生殖繁衍後代為目的的傳統中，不得與第三者從事性行為的忠誠義務，主要作用在確保生殖只發生在婚姻之中，避免造成後代血統的混淆。不過，在發展出避孕方法及親子血緣鑑定技術之後，以禁止通姦防止後代血統混淆的必要性已不存在，此種忠誠義務的意義必須根據現代的婚姻概念重新界定。亦即，婚姻僅被視為具有親密性與排他性之永久結合關係，其功能不在於繁衍後代，而是在維護個人人格健全及人性尊嚴[39]，不得與第三者從事性行為的忠誠義務，其作用在於維持配偶彼此的尊重及信任，發展親密的情感。我們可以肯認，配偶之間的尊重、信任及親密情感，絕對是建立實質婚姻關係的基礎，因此禁止通姦的忠誠義務所維護的價值重大。

評估刑罰禁止通姦所產生的維護婚姻效果有多高，則是存在兩個困難。前面已經提過第一個困難，亦即刑罰嚇阻作用至今難以證實，也難以推翻，此一嚇阻效力不穩定的問題也適用在通姦罪。如果根據目前實證研究所能夠確定的論點，刑罰的嚇阻效果和行為人犯罪被發覺的風險有正相關，**考量通姦行為通常具有隱密性，刑罰嚇阻作用在通姦罪可能相對偏低**。第二個困難則是專屬於通姦罪，亦即處罰通姦行為和維護婚姻關係之間的關聯性不高。理由是，存在形式的婚姻關係並不等於配偶之間就有尊重、信任及親密情感，而配偶之間的尊重、信任及親密情感多寡，則是受到個人、家庭或社會的各式各樣因素所影響，哪些因素會使彼此的情感產生化學變化，因人因時因地而異，連當事人都不易察覺及預料。我們不容易指認某個單一因素和配偶相互尊重、信任及親密情感之間的因果關係。例如，先生因公司裁員而失業，可能增加其陪伴家人的時間而提升親密關係，也可能因為在家時間增加而增加口角衝突；先生工作獲得陞遷，可能緩解雙方以往因為經濟壓力而來的關係緊張，也可能因為應酬增加而使彼此關係更疏離。同樣地，**在通姦行為和配偶相互尊**

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[39] 參考釋字第 748 號解釋理由書：「復鑑於婚姻自由，攸關人格健全發展與人性尊嚴之維護，就成立上述親密、排他之永久結合之需求、能力、意願、渴望等生理與心理因素而言，其不可或缺性，於同性性傾向者與異性性傾向者間並無二致，均應受憲法第 22 條婚姻自由之保障。」

重、信任及親密情感之間，也很難找到一個若 A 則 B 的線性關係。文獻上已經有不少人指出，通姦行為有時不是破壞配偶雙方關係的原因，而是雙方已無尊重、信任或親密情感，或者雙方關係無法支撐其中一方回應外在環境或壓力變動，才產生通姦行為。即使在雙方關係親密的狀況下，通姦行為可能會短期地破壞配偶雙方的信任或親密情感，但是這最終會使婚姻毀滅或維持，則是很大程度上取決於雙方如何面臨這個危機事件。有文獻指出，抓姦、與配偶對質等作法無助於改善彼此的關係[40]，相反地，雙方花時間去了解自己與對方的關係，透過彼此坦誠溝通，重新建立信任，才可能尋求改變現狀的作法，不管最後是走向分手或復合[41]。據此，對於所有潛在受保護的婚姻家庭而言，在配偶感情已有裂痕時，刑罰禁止通姦行為可能根本無助於維護婚姻關係；在配偶感情沒有裂痕時，刑罰禁止通姦行為可能不是維護婚姻關係所必要。

綜上所述，刑罰禁止通姦所維護的實質婚姻關係雖然價值重大，但是通姦的隱密性使原本就不穩定的刑罰嚇阻作用更加降低，加上配偶實質感情的狀態及影響因素多端，禁止通姦對於維護實質婚姻關係的影響力可能非常稀薄。

2. 手段之負面效益

接著要審查的是，通姦罪的刑罰所造成的權利干預程度及幅度有多大。本文認為可以考量以下因素：一是本罪行為規範對於性行為自由的干預，二是本罪制裁規範對於一般人格權和人身自由的干預，三是踐行刑事程序對於隱私的干預[42]。

首先，本罪行為規範「禁止通姦」對性行為自由之限制程度重大。性行為自由係指個人得自由決定是否、與誰、何時、以何種方式從事性行為，由於性行為是滿足性慾的基本人類需求的手段，同時也是與他人發展最親密關係的方法，因此性行

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[40] Peggy Vaughan 著，施寄青譯，當外遇發生時，1991 年，台北：方智，頁 74-80。

[41] 參考 Janis Abrahms Spring & Michael Spring 著，註 18 書，頁 88 以下。另外，陳宜倩，改寫異性戀霸權腳本？--通姦罪與罰之女性主義法學透視，世新法學，2 卷 1 號，2008 年 12 月，頁 33 指出「關於婚外情慾議題之研究，大約可確定兩件事：婚姻的不滿意不一定是導致婚外性行為發生的原因，婚前性的自由經驗與對性忠誠的價值觀相較於前者更是常被提及影響婚外性行為的因素。婚外性行為的發生對婚姻造成的衝擊與效果也不一定都是負面的。」

[42] 建議一併考量程序的副作用，林明昕發言，婚外性的罪與罰，台灣法學雜誌，223 期，2013 年 5 月，頁 29、33。

為自由和個人人格健全發展及人性尊嚴有密切關係，是價值重大的基本權利。本罪「禁止通姦」的影響是，有配偶之人不得與配偶以外之人性器接合，無配偶之人不得與有配偶之人性器接合。由於性行為自由保障個人得選擇與何人從事性行為，「禁止通姦」的行為規範將會干預（限制）有配偶之人及其（潛在）相對人的性行為自由，此一限制在有配偶之人身上尤其重大，因為其於「婚姻存續期間」不得和「配偶以外」之所有人為性器接合。儘管本罪在法律上保留有配偶之人與「配偶」為性行為的可能性，不過實現此一性行為自由仍然以獲得配偶同意為前提，如果配偶不同意與之為性行為，在極端情況（例如雙方長期分居或關係破裂）之下，將導致有配偶之人現實上沒有實施性器接合的可能性[43]。據此，本罪行為規範「禁止通姦」對於性行為自由之限制程度重大[44]。

其次，本罪制裁規範「宣告有罪」及「宣告一年以下有期徒刑」也重大限制行為人的一般人格權及人身自由。一般人格權的內涵之一是個人在公眾的名聲或形象不會受到貶損，然而本罪授權國家宣告行為人成立「通姦罪」，係對於行為人公開正式譴責其實施犯罪，因而構成對其一般人格權的限制。基本上，由於國家是將特別具有社會可非難性的行為模式規定為犯罪行為，因此「有罪宣告」是對於個人行為的重大譴責及人格否定。由於我國目前並無註銷犯罪紀錄的相關規範，任何人在網路上亦得隨時查詢有罪判決及其犯罪事實，有罪判決對於一般人格權的侵害程度也隨之大幅增加[45]。至於「宣告一年以下有期徒刑」構成對於人身自由的干預，則是沒有疑問。雖然本罪屬於一年以下有期徒刑的輕罪，通常得以易科罰金、易服社會勞動或緩刑等方式避免限制人身自由，不過這並未改變行為人之人身自由受到限制的危險。

最後，本罪也授權給國家機關踐行刑事程序，以調查通姦（異性性器接合）事實存在，除非已有外遇所生小孩可以作為通姦的最佳證據[46]，否則必須取得其他直接證明性器接合的證據。然而，通姦通常發生在私密領域裡，取得性器接合證據的手段必定伴隨著高度侵害隱私的後果，例如住宅搜索、身體檢查。在實務上，由於

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[43] 參考張明偉，註 11 文，頁 65；鄭錦鳳，註 20 文，頁 114，二者主張這是對人性尊嚴的侵害。

[44] 比較李惠宗，註 9 書，邊碼 1942，其認為這類似國家強迫私人應如何為情感之表達，類似國家對個人思想之改造，應絕對予以禁止。

[45] 邱忠義，註 5 文，頁 142：通姦罪使外遇者或第三者背負一輩子的污名，難免影響其人生。

[46] 莊喬汝，註 20 文，頁 61-62，其認為此種證明方式侵害小孩的人性尊嚴。

通姦罪既是輕罪也是告訴乃論之罪，檢警鮮少發動職權取得性器接合的證據，而是往往仰賴告訴人提出私人不法取得之證據，例如竊錄性愛錄音或錄影、擅自截取通訊軟體訊息等。相對於檢警取證仍然受到法律的限制，例如調查通姦不得進行通訊監察（通訊保障及監察法第 5 條），搜索或身體檢查亦應受比例原則之拘束，私人取證行為不適用刑事訴訟法的相關規定，即使取證行為實際上逾越應有的尺度，其合法性在實務上甚至受到寬認[47]。不僅如此，法院在審判期日調查通姦證據的方法，不論是勘驗性愛錄影或錄音、朗讀當事人記載通姦事實的文件（日記或記事本），都是公開揭露當事人最私密的個人資訊，令當事人極度難堪[48]，構成對其隱私的二度傷害。或有認為，我國刑事訴訟法採取證據排除法則，法院不得調查國家或私人違法取得之證據，即可排除法院調查通姦證據再度侵害個人隱私的危險。但是，我國並非採取絕對證據排除法則（刑事訴訟法第 158-4 條），實務在決定是否排除違法取得之證據時，不論是在國家或私人不法取證的狀況，通常傾向追訴犯罪的公益大於程序合法性，容許使用違法取得之證據[49]。基於這些考量，通姦罪之追訴在事實上潛藏過度侵害當事人隱私權的危險。

3. 整體權衡

上述分析分別描述通姦罪所帶來的正面與負面效益，接著是對於正負效益進行整體權衡，看看通姦罪所造成的負面效益，相對於其所帶來的正面效益是否不合乎比例。依據德國聯邦憲法法院「越如何，則越如何」的比較性衡量公式，對基本權的侵犯越嚴重，所獲致的利益就必須越大，越有份量[50]。從前面的分析可知，通姦罪所直接干預之性行為自由、一般人格權、人身自由，以及間接影響之隱私權，不僅都是和人性尊嚴的實現有密切關係的基本權利，其侵害程度也都相當直接重大，因此只有在正面效益重要而迫切的時候，才能夠認定其合於比例。就此，通姦罪所欲保護之實質婚姻關係儘管價值亦屬重大，但是一來因為通姦被察覺的風險低，二來實質婚姻關係之影響因素多端，通姦罪刑罰透過嚇阻作用，所產生維護不特定多數

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[47] 詳見薛智仁，基於取證目的之私人竊聽，台灣法學雜誌，183 期，2011 年 9 月，頁 162-175。

[48] 參考林鈺雄發言，婚外性的罪與罰，台灣法學雜誌，223 期，2013 年 5 月，頁 23-24。相同意見：莊喬汝，註 20 文，頁 60-61。

[49] 關於私人不法取證之證據能力，參考薛智仁，刑事程序上私人取證之證據能力—評析最高法院判決之新發展，台灣法學雜誌，260 期，2014 年 11 月，頁 47-62。

[50] 許宗力，註 14 文，頁 58-59。

實質婚姻關係的效果相當稀薄，通姦罪的正面效益和負面效益之間不成比例。

值得討論的是，通姦罪作為法定刑一年以下有期徒刑之輕罪，以及告訴乃論之罪，是否足以減少其負面效益，因而扭轉前述整體權衡的結果。釋字第 554 號解釋強調，本罪作為刑法第 61 條之輕罪及告訴乃論之罪，使受害配偶得兼顧夫妻情誼及隱私，避免通姦之告訴反而造成婚姻、家庭之破裂。這個論點似乎是認為，法定刑低及告訴乃論，可以緩和通姦罪的制裁規範所造成的負面效益，因此尚可認定手段合乎比例。本文認為，此一觀點有重新檢討的必要。

首先，法定刑高低，確實是影響刑罰手段是否合乎比例的因素。按照大法官歷年的解釋，各罪之法定刑必須和犯罪情節符合比例，對情節輕微案件之刑罰不會過苛，始符合罪刑相當原則；如果違反罪刑相當原則，似乎就被認為違反憲法第 23 條比例原則[51]。從罪刑相當原則來看，通姦罪法定刑為一年以下有期徒刑，保留了情節輕微案件適用易科罰金、緩刑及緩起訴的可能性，不會造成過苛的刑罰，故應該是符合罪刑相當的要求。不過，刑法規範符合罪刑相當原則，並不當然就符合手段合比例性，因為二者的審查內容並不完全一致：手段合比例性則是審查刑罰的一般預防效果與其帶來的利益侵害之間是否符合比例，刑罰一般預防效力之大小必須被納入考量；相對地，罪刑相當則原則，是在確定刑罰之預防效力合乎比例之後，審查刑罰程度和犯罪情節是否均衡，將刑罰的預防作用限定在合乎罪責的程度之內。因此，罪刑相當可以成為手段合比例性審查的一部分，但無法和手段合比例性劃上等號。基此，**即使通姦罪符合罪刑相當原則，這並不能改變通姦罪的一般預防效果稀薄，無法平衡其所帶來的負面效益**。就此而言，釋字第 554 號解釋提及通姦罪的法定刑很低，或許隱含有本罪符合罪刑相當的想法，卻可能忽略了本罪之刑罰一般預防效力稀薄，會使其整體利益權衡的結果不成比例。

其次，告訴乃論的設計，使他方配偶可以透過不提告訴或撤回告訴，阻止法院對通姦行為人宣告有罪及刑罰，可以減少制裁規範的負面效益，因此釋字第 554 號解釋在進行手段合比例性審查時，將本罪屬於告訴乃論之罪納入考量，是可支持的作法。不過，釋字第 554 號解釋所忽略的是，**告訴乃論的設計，同時也使通姦罪之制裁規範所能達成的一般預防作用降低**，因為只要告訴人不提告訴或撤回告訴，國

[51] 相關整理，參考薛智仁，肇事逃逸罪之合憲性—評釋字第 777 號解釋，月旦裁判時報，92 期，2020 年 2 月，頁 88-91。

家就不能處罰本案的通姦行為人，無法嚇阻其他潛在行為人不得通姦或向社會大眾宣示維護婚姻的價值。我們甚至可以進一步說，通姦罪採取告訴乃論的設計，使國家刑罰權是否發動完全取決於他方配偶的意思，而他方配偶又是純粹根據自己如何解決婚姻關係，決定是否提起通姦罪告訴，使得通姦罪的處罰，不是淪為爭取有利離婚條件（例如贍養費）的籌碼，就是對於通姦配偶的復仇。一旦刑罰的發動是繫諸他方配偶之財產或復仇需求，在社會大眾的眼光裡，通姦罪之刑罰宣示維護婚姻價值的一般預防作用，就會被大幅抵銷。基於上述考量，告訴乃論會同時降低通姦罪之負面效益與正面效益，在結果上無法扭轉二者不成比例的整體權衡結果。

（六）結論

至此可以確定，通姦罪對於性行為自由、一般人格權及人身自由之限制違反比例原則。本罪目的在維護婚姻家庭，不論是稱之為性道德、善良風俗、忠誠義務或家庭圓滿等，皆具有目的正當性。本罪透過刑罰嚇阻其他人不得通姦，宣示維護婚姻家庭的價值，尚未被證明是完全不適合的手段，而且具有民事損害賠償及請求裁判離婚所無法取代的效果，故符合手段適當性與必要性。但是，本罪對於行為人造成的基本權干預程度重大，其所達成之維護家庭婚姻的效益過於稀薄，故不符合手段合比例性[52]。據此，**通姦罪違反憲法第 23 條比例原則**。

依此，**司法院釋字第 554 號解釋有予以變更的必要性**。本文認同該號解釋對於通姦罪之目的正當性（維護婚姻與家庭制度）及手段有效性（刑罰就維護婚姻家庭之倫理價值仍有一定功效）的觀點，但是不認同其僅以通姦罪是輕罪又屬告訴乃論之罪為理由，立即肯認刑罰符合手段必要性。該號解釋不僅並未實質說明，為什麼民事法律效果不屬於更輕微之相同有效手段，刑罰手段符合手段必要性，其對於刑

[52] 此一利益權衡的結果，可能被質疑是不當地取代了立法者所做的價值決定。手段合比例性的審查潛藏這種危險，這是無可否認的。不過，本文認為，立法者在民國 24 年制定通姦罪，至今已經過了 85 年，追訴通姦的社會背景已有重大轉變，尤其婚姻制度的意義從繁衍後代變成實現自我人格、社會對於婚外情的非難程度下降、民法離婚規定更趨於男女平等、科技發展大幅提升蒐集通姦證據的隱私侵害程度等。這些社會變遷，無一不會影響處罰通姦行為之正負效益比重及利益權衡結果。原本立法者應該體察社會背景的轉變，重新檢討通姦罪是否仍然符合憲法對於基本權利的保障，但是迄今並無任何作為。因此，大法官根據幾乎是全新的社會背景，在價值權衡上否定通姦罪之手段合比例性，應該不至於過分凌駕立法者的權限。

罰手段所造成的正負效應是否合乎比例，也完全缺乏應有的細緻分析。無怪乎已有文獻批評，該號解釋認定通姦罪合憲的唯一實質理由就是尊重「立法形成自由」，並未實質進行比例原則審查[53]。

貳、刑事訴訟法第 239 條但書之合憲性

刑事訴訟法第 239 條規定：「告訴乃論之罪，對於共犯之一人告訴或撤回告訴者，其效力及於其他共犯。但刑法第二百三十九條之罪，對於配偶撤回告訴者，其效力不及於相姦人。」系爭規定之本文採取「告訴主觀不可分」原則，但書規定局部排除適用「告訴主觀不可分」原則。系爭規定將通姦罪之告訴人撤回對配偶告訴的情形，不適用告訴主觀不可分原則，可能涉及違反憲法第 7 條平等原則。

依據大法官解釋的見解，「憲法第 7 條保障之平等權，並不當然禁止任何差別待遇，立法與相關機關基於憲法之價值體系及立法目的，自得斟酌規範事物性質之差異而為合理差別待遇。法規範是否符合平等原則之要求，應視該法規範所以為差別待遇之目的是否合憲，及其所採取之分類與規範目的之達成間，是否存有一定程度之關聯性而定。」(釋字第 790 號解釋理由書)由於系爭規定並不涉及告訴人之重要基本權利或屬於「嫌疑分類」[54]，故本文以下採取合理關聯性審查，檢驗系爭規定是否符合平等原則。

一、構成差別待遇

首先審查系爭法律規定是否構成差別待遇。可以確定的是，系爭規定在三個方面構成差別待遇：(1)**所犯罪名**：在「非通姦罪」與「通姦罪」之間，前者適用主觀不可分，後者不適用主觀不可分；(2)**行使告訴權之方式**：在通姦罪之「告訴」與「撤回告訴」，前者適用告訴不可分，後者不完全適用告訴不可分；(3)**撤回告訴之對象**：在通姦罪之「共犯」之間，對「配偶」撤回告訴效力不及「相姦人」，對「相姦人」撤回告訴效力及於「配偶」。

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[53] 陳文貴，註 21 文，頁 14-17。

[54] 平等原則審查基準之考量因素，僅參考法治斌、董保城，註 26 書，頁 343-349。

二、差別待遇之規範目的

其次審查系爭規定差別待遇之規範目的。關於告訴主觀不可分之原則與例外的規範目的，似乎無法從立法相關資料獲知，僅能參考刑事訴訟法文獻的看法。何賴傑歸納學說看法，發現告訴主觀不可分之理論基礎有三：一是**犯罪偵審之便利**：共犯間對犯罪有相互利用關係，因而毋庸告訴權人逐一對被告為告訴，國家偵審機關即可對所有共犯追訴處罰[55]。二是**告訴之性質**：告訴係對於犯罪事實為之，並非對特定犯人為之，因而告訴本來即應就所有共犯發生效力。告訴權人只能決定是否欲提出告訴；如欲告訴，則告訴之對象即應由法律定之。三是**公平考慮**：不應任由告訴權人恣意選擇犯罪行為人而為告訴，否則有的共犯被追訴處罰，有的共犯卻不能追訴處罰，將產生不公平現象[56]。如果將學說所歸納的三個理論基礎理解為系爭規定之規範目的，除了「告訴之性質」似乎純屬概念推演以外，告訴主觀不可分所追求的「犯罪偵審之便利」及「追訴公平」，至少都是不違反憲法價值之規範目的。

三、分類與規範目的之關聯性

最後審查的是，系爭規定所採取之分類與規範目的之達成間，是否存有一定程度之關聯性。以下分別就（1）所犯罪名；（2）行使告訴權之方式；（3）撤回告訴之對象，審查其與三個可能規範目的之間有無合理關聯性。

（一）所犯罪名

系爭規定依據所犯罪名係「非通姦罪」和「通姦罪」區分是否適用告訴主觀不可分，其與「犯罪偵審之便利」之間，並不存在關聯性。依照此一規範目的，系爭規定使國家一次調查共犯的犯罪事實，就得以同時追訴處罰所有共犯，不受限於告

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[55] 此說是國內多數意見，參考林俊益，刑事訴訟法概論（下），15 版，2019 年，台北：新學林，頁 38；林鈺雄，刑事訴訟法（下），9 版，2019 年，台北：自版，頁 127；黃朝義，刑事訴訟法，5 版，2017 年，台北：新學林，頁 169。

[56] 何賴傑，論刑事告訴之法律性質與適用，載於：王兆鵬主編，當代刑事法學之理論與發展，2002 年，台北：學林，頁 342-343。不過，何賴傑教授認為，上述三點理由並不足以正當化告訴主觀不可分的規定。

訴人只對部分共犯追訴的意思。換言之，告訴主觀不可分之適用必要性，來自共犯之犯罪事實的證據共通性，節省國家重複調查的耗費。就此而言，由於通姦事實是由有配偶之人與相姦人的行為組合而成，屬於所謂「必要共犯」，對於單一通姦事實的調查，必定能夠同時證明共犯雙方的犯罪，共犯的犯罪事實存在證據共通性，無庸置疑。因此，系爭規定排除通姦罪適用告訴主觀不可分，與達成犯罪偵審之便利的規範目的，根本沒有合理關聯性。

系爭規定依據所犯罪名區分是否適用告訴主觀不可分，與「告訴之性質」更是毫無關聯性。一般認為，告訴的對象是「犯罪事實」，不同於自訴的對象是「犯罪事實」及「行為人」，告訴人僅能選擇是否對「犯罪事實」提起告訴，不能選擇對那個共犯提起告訴。事實上，此一說法只是套套邏輯，因為它根本沒有解釋，既然告訴乃論制度的用意在於尊重被害人的追訴意思，為什麼被害人只對特定共犯追訴的意思卻不被尊重。但是，暫且不論此說的合理性，假如以「告訴之性質」作為告訴主觀不可分的理論基礎，此一告訴性質應該是一體適用於全部的告訴乃論之罪，系爭規定獨排通姦罪適用告訴主觀不可分，與此一告訴性質並不相符。

系爭規定獨排通姦罪適用告訴主觀不可分與「追訴公平」之關聯性，則是有討論空間。如果系爭規定以「追訴公平」為規範目的，其背後的考量可能是擔心，不同的共犯雖然是違犯相同的犯罪，卻可以基於告訴人恣意的決定，受到「追訴」與「不追訴」的差別待遇，這會引起社會大眾對於刑事追訴公正性的質疑。我們可以舉一個極端的例子：甲、乙一起毆打丙成傷，兩人都沒有道歉賠償的意願，丙卻害怕乙的惡勢力而不敢對之告訴，只敢對甲提出告訴。如果沒有告訴主觀不可分的規定，丙對甲告訴的效力不及於乙，甲、乙因為家世背景的差異就受到「追訴」與「不追訴」的差別待遇，會令社會大眾質疑國家放過強勢犯罪人、只追訴弱勢犯罪人的印象。如果暫且接受「追訴公平」作為告訴主觀不可分的規範目的，系爭規定獨排通姦罪適用告訴主觀不可分，其理由可能就在於：對於通姦罪的告訴權人而言，本罪共犯必定是「配偶」及「第三人」，**告訴權人選擇原諒配偶（例如基於情感、子女福祉或經濟因素），只追訴第三人（例如基於憤恨），社會大眾或許仍然能夠體諒或接受告訴人的決定[57]，即使產生不平等的追訴後果，還不至於動搖對刑事追訴的公**

[57] 黃朝義，註 55 書，頁 170：「該條之立法目的在於，告訴人本於夫妻之情，宥恕配偶而撤回告訴，若依主觀不可分原則，撤回告訴之效力亦及於相姦人，然甚少對於相姦人一併宥恕，如此一來顯有

正性信賴。當然，如果採取這種觀點，立法者承認告訴主觀可分的範圍，應該可以進一步擴大到多數共犯有「配偶」與「第三人」的所有情形（例如：先生協同友人毆打妻子成傷），不必然僅限於通姦罪。但是，在所有告訴乃論之罪當中，只有通姦罪的共犯必定有「配偶」及「第三人」，其他犯罪的共犯不必然有此種身分關係，故系爭規定只排除通姦罪適用告訴主觀不可分，屬於立法形成自由。

據此，根據維護「追訴公平」之規範目的，系爭規定依據所犯罪名為「通姦罪」或「非通姦罪」，區分是否適用告訴主觀不可分原則，尚有其合理關聯性。

（二）行使告訴權之方式

接著的問題是，系爭規定依據通姦罪告訴人「提起告訴」和「撤回告訴」，區分是否適用告訴主觀不可分，與「尊重追訴意思」之規範意旨有無合理關聯性。依據前面的分析，通姦罪不適用告訴主觀不可分的理由是，此時尊重通姦罪告訴人之追訴意思不至於重大影響社會對於刑事追訴公正性的信賴。從尊重通姦罪告訴人之追訴意思的規範目的來看，系爭規定對於「提起告訴」適用告訴主觀不可分，對於「撤回告訴」不適用告訴主觀不可分，唯一可能的解釋是，告訴人選擇性追訴的意思在「提起告訴」不值得尊重，在「撤回告訴」時較值得尊重。問題是，告訴人的追訴意思原本就是會隨著時空而變動，只要沒有意思瑕疵，都是個人的自主決定，法律不能代替告訴人判定其追訴意思的價值高低，遑論概括地假定「提起告訴」時的追訴意思不值得尊重，「撤回告訴」時的追訴意思才值得尊重。因此，**不論是「提起告訴」或「撤回告訴」，二者都是通姦罪告訴人實現其追訴意思的方式，尊重追訴意思的需求應屬一致，系爭規定之差別待遇並不合理**。系爭規定在實際上只造成一個程序繁複的後果：只欲追訴第三人的告訴人，不能一開始只對第三人提起告訴，而是必須先就通姦事實提起告訴之後，再撤回對配偶告訴，迂迴地達成只追訴第三人的目標。據此，系爭規定依據通姦罪告訴人行使告訴權的方式，區分是否適用告訴主

違人情，故特設此一例外。」另外參考林永謀，刑事訴訟法釋論（中），改訂版，2006 年，台北：自版，頁 329：「蓋告訴人常有本於夫妻之情義，對於配偶有所宥恕者，而對於相姦者則未必然，若一併使其撤回之效力併及於必要共犯之相姦者，實有乖於常情，故設此規定。」林俊益，註 55 書，頁 39：「刑訴法第 239 條但書規定之立法目的在於：為顧及婚姻關係中之夫妻情義、家庭和諧，夫妻可早日脫離訴訟關係，重修舊好，破鏡重圓，促使婚姻關係得以繼續延續…」

觀不可分，與尊重追訴意思的規範目的欠缺合理關聯性。

（三）撤回告訴之對象

最後的問題是，系爭規定根據通姦罪告訴人撤回告訴的對象是「配偶」或「相姦人」，區分是否適用告訴主觀不可分，與「尊重追訴意思」之規範目的有無合理關聯性。依據系爭規定，告訴人對「配偶」撤回告訴的效力不及「相姦人」，對「相姦人」撤回告訴的效力及於「配偶」。從「尊重追訴意思」之規範目的來看，系爭規定絕對尊重告訴人單獨追訴「相姦人」的意思，卻不尊重告訴人單獨追訴「配偶」的意思。然而，為何單獨追訴「配偶」的意思比較不值得尊重呢？本文推測，立法者或許認為，社會大眾較能夠理解告訴人只原諒配偶而不原諒第三者，但是較不能夠理解告訴人不原諒配偶卻原諒第三者，故單獨追訴配偶卻不追訴相姦人，動搖社會大眾對於國家追訴公正性信賴的程度可能較高。此一考量或許在立法當時尚符合社會觀念，不過，現代社會已經逐漸理解異性或同性感情的複雜性，不再理所當然地將第三者視為破壞婚姻的人或最應該被咎責的人，告訴人同情理解第三者的處境並不是不合理之事。因此，在現代多元社會當中，既然告訴人單獨追訴配偶卻不追訴相姦人的意思能夠獲得理解，就很難說此一追訴不平等將令人不信賴國家追訴的公正性。據此，**告訴人單獨追訴配偶的意思，相較於其單獨追訴相姦人的意思，其應受尊重的需求並無差異，系爭規定之差別待遇，與其規範目的之間欠缺合理關聯性**。

四、結論

系爭規定對於「通姦罪」局部排除告訴主觀不可分原則之適用，就維護追訴公平之規範目的而言，尚有合理關聯性。但是，系爭規定依據通姦罪之告訴人「行使告訴權之方式」與「撤回告訴之對象」，區分是否適用告訴主觀不可分原則，就尊重告訴人意思的規範目的而言，欠缺合理關聯性，**違反憲法第 7 條平等原則**。

司法院會台字第 12664 號聲請解釋案鑑定意見書

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壹. 本件在刑法學上的主要問題概觀

一. 總說

本鑑定意見是就司法院會台字第 12664 號聲請解釋案件（以下簡稱本件）所提出的法律意見。如後所述，因為如就本件聲請人等所提出的聲請書內容觀之，可知聲請人等在結論上均認為本件所涉及的刑法上犯罪即同法第 239 條的通姦罪[1]（以下簡稱通姦罪）屬於違反憲法且無存在必要的規定；且因為鑑定人的專長為刑事法，因此以下的鑑定意見將就此一問題，從刑法學的觀點，說明鑑定的意見。

因為一個犯罪處罰條款是否有存在正當性與必要的問題，若從刑法學的觀點，主要將涉及（1）此一犯罪處罰條款在保護法益上有無足以支持其存在的實質內涵；（2）此一犯罪處罰條款在規範上可否提供適切、妥當而明確的處罰範圍的兩個問題。前者的問題關係到刑法能否落實以法益保護為目的的基本立場，後者的問題則涉及罪刑法定原則中的下位原則，即罪刑明確性原則是否能被妥當地實踐的問題，兩者均有根本的重要性。

另一方面，因為依照刑法第 245 條的規定，本件所涉及的通姦罪是告訴乃論之罪，所以在同罪的處罰範圍廣狹實質上將受告訴權是否行使左右的意義下，自然也必須將——性質上屬於刑事訴訟法上的——告訴權運用如何反映於通姦罪的處罰範圍的問題納入視野中。

考慮到本件的聲請理由書內容相當豐富，且聲請的理由也有相當多樣的內容，在本鑑定意見以下的內容中，必須先將本件各聲請理由加以概觀，並先整理這些理由在上述的刑法學觀點下其意義為何，再進一步就聲請人等所提出的各項理由在刑法學的觀點下先進行初步的檢視，藉以明確化在刑法理論上必須面對與處理的本質問題。因此，以下本鑑定意見第一部份的內容，將先簡要地整理各聲請書的主要理由（壹、二），再進一步地說明各聲請理由在刑法學的意義與所涉及的面向，乃至於本件題綱間的關連（壹、三）。在這樣的釐清之後，本鑑定意見再於第二部分，先對各聲請人所提出的主要聲請理由進行檢討（貳、一），再具體化判斷前所需面對的進一步問題（貳、二），並且簡要地介紹日本於第二次世界大戰後將通姦罪刪除的經驗（貳、三），再就本鑑定意見認為還有檢討餘地的論點加以補充（貳、四），最後再將本鑑定意見的內容，提出結論（貳、五）。

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[1] 現行我國刑法第 239 條之規定內容為：「有配偶而與人通姦者，處一年以下有期徒刑，其相姦者亦同。」關於本鑑定意見所引用的我國現行法律規定，是引用自法務部的全國法規資料庫。https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=C0000001 （最終瀏覽日：2020 年 3 月 25 日）。

二. 各聲請書的主要理由概觀

本件的聲請書，以台灣苗栗地方法院陳文貴法官所提之聲請書為首，總共有 16 份[2]，扣除內容有相當程度重疊的聲請書，在此先簡要地將鑑定人所見各聲請書的主要理由歸納如下。本件各聲請書的內容，主要基於以下各點理由，認為我國刑法的通姦罪規定違憲，且不應繼續存在於我國的法秩序中。

（1）日本、德國、韓國廢除通姦罪的國際潮流，可知通姦罪的存在與國際趨勢並不符合[3]。

（2）做成於 2002 年的司法院釋字第 554 號解釋，固然指出受憲法第 22 條保障之性行為的自由應受婚姻與家庭制度制約，通姦罪之處罰對性行為自由之限制為維護婚姻、家庭制度與社會生活秩序所必要，且通姦罪也有追訴條件的附加，因此此一立法者就維護婚姻、家庭制度及性行為自由之間所為的價值判斷，並不逾越立法形成空間，也不違背憲法第 23 條的比例原則。但是，同號解釋距今已經有十數年，我國的社會背景，特別是對於性的行為等之觀念已經不同，應該予以變更[4]。

（3）即使提供婚姻制度性的保障，婚姻生活圓滿也無法成為通姦罪的保護法益之內涵[5]。

（4）夫妻之間的性忠誠義務無法成為通姦罪的保護法益之內涵[6]。

（5）通姦罪客觀上並無被害人存在或無法益侵害[7]。

（6）對通姦行為使用刑罰作為威嚇手段，一般預防的效果甚為有限[8]。

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[2] 以司法院所提供之聲請書影本紙本為準。並且，本鑑定意見以下引用各聲請書內容時所舉之頁碼，也以司法院所提供之聲請書影本紙本每頁最下方的總頁碼為準，於此合先說明。

[3] 參照：臺灣花蓮地方法院吳志強法官聲請書，頁 29-30；台灣花蓮地方法院何效鋼法官聲請書，頁 106-107。

[4] 參照：臺灣苗栗地方法院陳文貴法官聲請書，頁 2；臺灣雲林地方法院吳基華、陳碧玉、李奕逸法官聲請書，頁 12；花蓮地方法院林恒祺、何效鋼、謝欣宓法官聲請書，頁 90；聲請人林建宏聲請書，頁 99；台灣花蓮地方法院何效鋼法官聲請書，頁 105；臺灣高雄地方法院何一宏法官聲請書，頁 114；台北地方法院廖晉賦法官聲請書，頁 179。關於司法院釋字第 554 號的內容，可參照：司法院法學資料檢索系統 http://cons.judicial.gov.tw/jcc/zh-tw/jep03/show?expno=554 最終瀏覽日：2020 年 3 月 25 日。

[5] 參照：臺灣雲林地方法院吳基華、陳碧玉、李奕逸法官聲請書，頁 14-15；花蓮地方法院林恒祺、何效鋼、謝欣宓法官聲請書，頁 89；臺灣高雄地方法院何一宏法官聲請書，頁 117；台北地方法院廖晉賦法官聲請書，頁 190。指出此一問題者，另可參照：張明偉（2017），〈通姦罪合憲性之再思考〉，《月旦裁判時報》，59 期，頁 65。

[6] 參照：臺灣雲林地方法院吳基華、陳碧玉、李奕逸法官聲請書，頁 16；台北地方法院廖晉賦法官聲請書，頁 193-194；台北地方法院林孟皇、蔡英雌、林怡君法官聲請書，頁 213；台中地方法院張淵森法官聲請書，頁 223。另亦可參照：黃源盛（2012），〈從無夫姦到通姦的除罪化——以晚清民國刑法為例〉，收於：《甘添貴教授七秩華誕祝壽論文集下冊》，台北：甘添貴教授七秩華誕祝壽論文集編輯委員會，頁 120。

[7] 參照：台北地方法院廖晉賦法官聲請書，頁 186；台中地方法院張淵森法官聲請書，頁 224。指出此一問題者，另可參照：張明偉，同前註（5），頁 62。

[8] 參照：臺灣苗栗地方法院陳文貴法官聲請書，頁 3-4；台灣花蓮地方法院何效鋼法官聲請書，頁 108。

（7）現行通姦罪規定僅處罰異性間的性器接觸接合即姦淫行為，不處罰同性間的肛交、口交，特別是考慮到釋字 748 號解釋施行法已經成為實定法的我國社會現況而言，也違反平等原則[9]。

（8）因為通姦罪的存在，使得人民無法與有配偶之他人為性交行為，或在夫妻感情長期不合乃至婚姻出現破綻時，也無法有性自主發揮的空間，將使性自主決定權無法充分發揮，導致對於可認為受憲法第 22 條所保障的性自主的過度干涉[10]。

（9）通姦罪類型不只有一種，但是現行規定僅有一種法定刑即一年以下有期徒刑，屬於對不同事物未為合理之差別待遇[11]。

（10）國家對婚姻家庭應給予制度性保障但是並不因此當然可推論此一制度性保障需以通姦罪即刑罰作為手段加以保護[12]。

（11）婚姻關係之締結屬民法上之（身分的）契約關係，而民事契約之違反，僅會產生民事法上之法律效果（例如損害賠償或解除契約等），一般而言不當然因契約違反即當然可導出得科以刑罰之結論[13]。並且以刑罰保護契約，僅在涉及重大公益的情況，例如刑法第 108 條、第 194 條、第 294 條，始有正當性，僅涉及結婚的兩人間的身分契約則非這種情形[14]。

（12）使用民事上手段，例如民事損害賠償，或者離婚等方式，也已經足以達到通姦罪欲保護婚姻之目的，並且法院實際宣告通姦罪的處罰後，大多數的被告也都能易科罰金，因此實際上與民事手段差異不大[15]。

（13）在告訴權的行使上，實際上可能出現的情形是無通姦的女性配偶在家中若處於經濟弱勢的地位，即使有告訴權也不敢對有通姦的丈夫提起告訴，因此即使有通姦罪規定，對這樣的婦女也無法提供保障[16]。

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[9] 參照：台北地方法院廖晉賦法官聲請書，頁 185。指出此一問題者，另可參照：邱忠義（2013），〈以自主隱私權之侵害評析我國通姦罪之處罰〉，《輔仁法學》，46 期，頁 136-137；林慈偉（2018），〈同性婚姻釋字後的通姦罪解釋及其因應——從司法院釋字第 554 號到第 748 號解釋〉，《國立臺灣大學法學論叢》，47 卷特刊，頁 1536。

[10] 參照：台灣花蓮地方法院何效鋼法官聲請書，頁 104；臺灣苗栗地方法院陳文貴法官聲請書，頁 2、4；臺灣雲林地方法院吳基華、陳碧玉、李奕逸法官聲請書，頁 12、19；聲請人林建宏聲請書，頁 100。指出此一問題者，另可參照：張明偉，同前註（5），頁 63。

[11] 參照：臺灣花蓮地方法院吳志強法官聲請書，頁 35。

[12] 參照：臺灣苗栗地方法院陳文貴法官聲請書，頁 3。

[13] 參照：台北地方法院廖晉賦法官聲請書，頁 185-186；台中地方法院張淵森法官聲請書，頁 223。

[14] 參照：台中地方法院張淵森法官聲請書，頁 223。

[15] 參照：花蓮地方法院林恒祺、何效鋼、謝欣宓法官聲請書，頁 90；台灣花蓮地方法院何效鋼法官聲請書，頁 109-110；臺灣高雄地方法院何一宏法官聲請書，頁 119-120；台北地方法院廖晉賦法官聲請書，頁 184。

[16] 參照：臺灣花蓮地方法院吳志強法官聲請書，頁 35。

（14）從通姦罪實際適用的狀況來看，實際上是女性反而受到的追訴較男性多[17]。

（15）通姦罪及其告訴要件依照刑事訴訟法第 239 條但書在刑事程序中的適用，在對於前配偶仍可提出告訴之點、以及對於前配偶撤回告訴將使撤回告訴效力及於相姦人之點，其手段不僅無助於目的達成，也將導致人民離婚的自由將受干涉，甚至鼓勵人民為提出告訴進行無真意的違法假結婚行為，違反憲法第 7 條的平等原則，也無法合乎比例原則地限制受同法第 22 條保障的婚姻自由[18]。

（16）通姦罪的存在本身，以及法院實務將通姦行為的認定嚴格地限定於異性間性器接合的情形，將使得配偶之一方為蒐證有通姦之他方配偶的通姦行為，將導致更多隱私侵害或者住居侵害的犯罪發生[19]。

三. 本件所涉及的問題面向

上述本件各聲請書所主張的理由至少多達 16 個，並且從內容看來包含各種面向，各不相同。不過，倘若在此進一步探究其主張的內容在刑法學理上的意義，應可認為上述的 16 個理由在刑法學理上，主要是與以下幾個問題有關。

第一，上述聲請理由（2）（3）（4）（5），主要涉及到的是通姦罪究竟有無較為實質的保護法益的問題。亦即，2002 年的司法院釋字第 554 號解釋雖然揭示了婚姻制度與家庭作為通姦罪的保護法益，並認為藉此可以進一步地限制性自主權的行使，亦即使處於婚姻關係存續狀態中之人不能恣意與非配偶之人性交。且因這樣的性交選擇受限，實質上也將產生處於婚姻關係存續中之人對於配偶需負性行為的忠誠義務的效果。

但是，倘若如同上述聲請理由（3）（4）所指，一旦此處的婚姻制度與家庭的內容無法具體化，則除了將導致上述聲請理由（5）所指的通姦罪無實質被害人存在的問題以外，更為根本的是，一旦欠缺實質的保護法益支撐，將無法支持通姦罪對性的自主決定權造成的限制，並且也將無法支持可限制有罪確定之被告的人身自由的通姦罪之法定刑[20]。

第二，上述聲請理由（6）（7）（8）（9）（10）（11）（12），主要涉及到作為犯罪處罰條款的刑罰手段本身的問題。這部分的問題，又有以下的幾個面向：

首先，倘若如上述聲請理由（6）所指，通姦罪雖然存在，但是對於預防法益不受侵害本身，並無實質的一般預防效果，則通姦罪的規定將成為欠缺預防功

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[17] 參照：臺灣花蓮地方法院吳志強法官聲請書，頁 27-28、33-34；台北地方法院林孟皇、蔡英雌、林怡君法官聲請書，頁 215-216。

[18] 參照：桃園地方法院施育傑法官聲請書，頁 63-64。

[19] 參照：臺灣花蓮地方法院吳志強法官聲請書，頁 39；台北地方法院廖晉賦法官聲請書，頁 183、190；台北地方法院林孟皇、蔡英雌、林怡君法官聲請書，頁 206。指出此一問題者，另可參照：錢建榮（2013），〈是堅守罪疑唯輕原則還是恐龍判例作祟——兼談通姦除罪化〉，《台灣法學雜誌》，223 期，頁 66。

[20] 現行我國刑法第 239 條通姦罪的法定刑為 1 年以下有期徒刑。

能的刑罰條款。這種無法發揮功能達到目的的刑罰手段，其存在的正當性自然將受到質疑。

其次，倘若如上述聲請理由（7）考慮的是目前我國的婚姻或法律上的伴侶關係態樣不只有一種，而目前規定僅就向來的異性婚姻中的通姦行為加以處罰，在手段上無法符合平等原則的要求。倘若如上述聲請理由（8）（9）所指，通姦罪既然有多種的態樣，僅以單一主刑種類規定其處罰，且法定刑並無對應不同行為種類的分類，也同樣與平等原則的要求有違。倘若貫徹這樣的聲請理由，那麼從刑法學的觀點，通姦罪也將可能因為不分情節地僅能適用相同的法定刑，而同樣地違反罪刑法定原則的下位原則，亦即罪刑均衡的要求[21]。

再其次，上述聲請理由（10）（11）（12）則是指出即使通姦罪所要保護的法益為正當，然而是否存在有需要保護的法益時，就必需要用刑罰手段仍然成為問題。特別是如上述聲請理由（11）與（12）所指，倘若還能考慮透過科以民事上的責任作為保護婚姻的手段，且效果與刑罰大致相同，則從刑法學的觀點來看，在刑法謙抑性的思考下[22]，也將導致通姦罪所規定的刑罰處罰欠缺存在的必要性的重大疑慮。

第三，上述聲請理由（13）（14）（15）（16）所涉及的，則是通姦罪刑事處罰的實踐上所呈現的現象。亦即，若如上述聲請理由（13）（14）（15）所指，則通姦罪在我國的實際追訴上，將發生女性受到追訴較多，以及經濟上弱勢的女性較難行使告訴權的問題。這一方面會發生前述聲請理由提到的違反平等原則的問題，在刑法學的意義上，這樣的現象將導致實際的處罰界線在男性與女性之間不相同，從而難以認為通姦罪的實際處罰範圍妥當的疑問。

另外，如上述聲請理由（16）所指，通姦罪的存在，將使無通姦行為之配偶為了蒐證，而引發隱私侵害的相關犯罪，以及住居權侵害的相關犯罪，亦即對此等犯罪加以誘發的負面效果，這也將導致在刑事政策上通姦罪對社會的不良作用不會僅停留在家庭內，反而有可能逸散的問題。

第四，從上述聲請理由（1）在數份聲請書中均有提及可知，在比較法的觀點下，外國法領域已經廢除通姦罪或宣告通姦罪的事實，也是本件聲請人等的重要參考。

在得到上述的四個問題面向後，大致可以認為，這些問題與司法院提供的爭點題綱之間，也有如下的對應關係：

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[21] 王皇玉(2019),《刑法總則》,5 版,台北:新學林出版股份有限公司,頁 55;林鈺雄(2019),《新刑法總則》,7 版，台北：作者自版，頁 43-45；陳子平（2017),《刑法總論》,4 版，台北：作者自版，頁 55-56。另外亦可參照：山口厚（2016),《刑法総論》,3 版，東京：有斐閣，頁 21-22；井田良（2018),《講義刑法学・総論》,2 版，東京：有斐閣，頁 29-30；浅田和茂（2019),《刑法総論》,2 版，東京：成文堂，頁 67；高橋則夫（2019),《刑法総論》,4 版，東京：成文堂，頁 41

[22] 王皇玉，同前註（21)，頁 46-48；林鈺雄，同前註（21)，頁 11；陳子平，同前註（21)，頁 11。另外亦可參照山口厚，同前註（21)，頁 5：井田良，同前註（21)，頁 18-19；浅田和茂，同前註（21)，頁 47；高橋則夫，同前註（21)，頁 63。

第一，上述的第一部分的面向主要是對通姦罪保護法益內涵的疑問，對應的是爭點題綱的「一、」部分的 1.的問題。而因為司法院釋字第 554 號解釋中對此部分已經有所論述，因此這部分的問題面向自然也與爭點題綱的「一、」部分的 3.的問題相對應。

第二，上述的第二部份的面向，則主要是對通姦罪構成要件行為，以及其所採取的處罰手段的疑問。這樣的疑問，應是對應爭點題綱的「一、」部分的 2.的問題。

第三，上述的第三部分的面向，因為涉及通姦罪的告訴權行使的問題，因此應可認為與上述爭點題綱的「二、」的部分之問題相對應。

第四，至於上述的第四部分的面向，看起來似乎僅關乎外國法務情勢而與本件的爭點題綱無直接關連，但是從本鑑定意見的立場看來，這樣的外國法情勢觀察之重點並不僅在外國立法例上設有通姦罪的國家處於少數，或者本有通姦罪的國家其通姦罪被司法機關宣告違憲或被立法機關廢止。重要的毋寧是在於這些外國的司法機關宣告違憲或者立法機關廢止的過程中，有如何的議論、或者有如何的觀點曾經被提出可供參考，而有助本件問題的判斷。

貳. 鑑定意見

一. 各聲請書所提指問題的進一步釐清

儘管在本鑑定意見前述「壹、」的部分將上述各聲請意見的理由加以歸納，大致整理成四個面向，同時也確認了這四個面向與本件爭點題綱間的對應關係，但是，考慮到①本鑑定意見是立於刑法學理的觀點就本件爭點題綱的問題提供判斷的參考；②本件各聲請人提出的多樣的聲請理由雖然是針對刑法通姦罪的解釋論與立法論，但是是否均依據刑法學理作為其出發點，或在刑法學的觀點也可認為是通姦罪的本質問題仍須檢驗等因素，在此必需先對上述前三個面向的聲請理由進行初步的檢視。透過這樣的檢視，才能進一步確認上述各聲請理由中的何者（或哪些），才是在本件中真正的核心問題所在。並且，透過這樣的初步檢討，也才能確認在比較法的觀點下，屬於上述第四面向外國法的經驗上，除了結論是廢止通姦罪或通姦罪違憲以外，還有如何的實質內容可供我國思考通姦罪的存在正當性時進一步參考。因此，以下即先依照本鑑定意見上述「壹、三、」所整理的前三個面向中的各個理由進行初步的檢討。

關於本鑑定意見上述「壹、三、」所整理的第一個面向中的聲請理由（2）（3）（4）（5），基本上可以認為有其正當的意義。因為在刑法學的觀點上同樣也會認為欠缺保護法益作為支撐的犯罪處罰條款不具備存在的正當性[23]。

但是，在此必須注意的是，不論是 2002 年做成的釋字第 554 號解釋，或者上述聲請理由（2）（3）（4）（5），在檢討通姦罪的保護法益內涵時，似乎並未特別從刑法解釋論的觀點，論及我國刑法第 239 條的通姦罪規定於同法第二編「分

[23] 參照：黃榮堅（2012），《基礎刑法學（上）》，4 版，台北：元照出版有限公司，頁 20。

則」第 17 章「妨害婚姻及家庭罪」[24]之中。倘若如此，若考慮到①同章之設置本身即蘊含對婚姻與家庭加以保障之意[25]；②通姦罪既然也處於「妨害婚姻及家庭罪」章中，那麼通姦罪除了可能以婚姻為保護內涵，也可能以家庭為保護內涵，則判斷通姦罪本身是否確實欠缺實質的保護法益之前，即應該考慮通姦罪的處罰對於各種型態的家庭是否均無意義，以求慎重。關於此點，在本鑑定意見後數貳、四、(一) 的部分將再進一步說明。

關於本鑑定意見上述「壹、三、」所整理的第二個面向中的聲請理由（6）（7）（8）（9）（10）（11）（12），雖然均與使用刑罰作為手段的問題有關，但是因為內容不完全相同，所以其等在刑法學理上是否均為對於通姦罪的本質性疑問，或者其意義，仍須個別地再加檢討。

關於前述聲請理由（6），其主旨在於立法者雖希望以刑罰為手段，企圖達成一般預防通姦罪，但是從社會上仍廣泛地存在性交易現象，以及刑罰對通姦罪的

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[24] 參照：法務部全國法規資料庫 https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=C0000001 最後瀏覽日：2020 年 3 月 25 日。

[25] 倘若從目前有效地施行於我國的中華民國刑法的沿革觀之，原本相當於現行我國刑法第 239 條通姦罪的規定，在實質上承襲自 1911 年欽定大清新刑律的 1912 年中華民國暫行新刑律，即於同律第 2 編「分則」第 23 章「姦非及重婚罪」第 289 條有所規定，其規定為：「和姦有夫之婦者，處四等以下有期徒刑或拘役。其相姦者亦同。」（參照：黃源盛編（2010），《晚清民國刑法史料輯注（上）》，台北：元照出版有限公司，頁 475）。

但是到了 1928 年中華民國刑法（即刑法學上一般所稱的舊刑法）制訂時，其第二編「分則」之中，原本 1912 年中華民國暫行新刑律的「姦非及重婚罪」章，即被分為第 15 章「妨害風化罪」與第 16 章「妨害婚姻及家庭罪」，其理由是考慮到本在「姦非及重婚罪」的各罪之中，存在著屬於本質為性犯罪（當時的強姦罪與強制猥褻等罪）、性道德之妨害（例如公然猥褻罪或散布猥褻物品罪）類型的犯罪，以及本質為對婚姻、家庭之妨害的犯罪（例如重婚罪、通姦罪、和誘與略誘未成年人等罪），因此將兩者各自獨立為一章，此時 1928 年中華民國刑法的第 256 條通姦罪的規定仍是「有夫之婦與人通姦者，處二年以下有期徒刑；其相姦者，亦同。」（參照：黃源盛編（2010），《晚清民國刑法史料輯注（下）》，台北：元照出版有限公司，頁 977、981）。

再至 1935 年中華民國刑法（現行刑法）的時代，在規定體例上，仍是在同法第二編「分則」分別設有第 16 章「妨害風化罪」與第 17 章「妨害婚姻及家庭罪」，不過為了明確化立法者重視男女平等的意旨，將 1928 年中華民國刑法為止僅處罰有夫之婦通姦的規定，改為有婦之夫與有夫之婦的通姦兩者均罰，而成為現在刑法第 239 條的「有配偶而與人通姦者，處一年以下有期徒刑。其相姦者亦同。」（參照：黃源盛編，前揭書《晚清民國刑法史料輯注（下）》，頁 1162）。

儘管條文規定內容不相同，但是從上述的簡要說明可知，我國現行刑法將「妨害風化罪」章與「妨害婚姻及家庭罪」章分為兩章加以規定在沿革上是承襲 1928 年中華民國刑法的體例，而 1928 年中華民國刑法採取這樣的立法例之理由在於包含重婚、通姦、和誘略誘等罪與保護婚姻、家庭制度之性質有關。因此，若要理解通姦罪在保護法益上能發揮的功能，除了本件聲請意見中多數的聲請人均指出的對於婚姻的保護外，也必須要考慮在家庭的保護上，通姦罪能否發揮功能，如可能則能發揮如何的功能之問題，才是較為慎重的處理。關於此部分的立法沿革，另可參照：黃源盛，同前註（6），頁 108-110。

一般預防效果缺乏實證觀之，刑罰作為一般預防通姦罪的手段值得懷疑[26]。關於此部分的聲請理由，本鑑定意見認為應非通姦罪的本質問題。

理由在於，以刑罰作為對犯罪之一般預防手段時，欠缺對犯罪預防之有效性的實證基礎的質疑，在肯定一般預防為刑罰的目的的理解下，事實上適用於所有刑法中的犯罪處罰規定[27]。然而，倘若貫徹此一立場，只要一般預防的有效性尚未實證，則刑罰手段的使用即有疑問。如此一來，向來不曾被懷疑其存在有正當性的殺人罪、強盜罪等犯罪，既然同樣也以刑罰為手段，那麼其手段的正當性也反而將受質疑。除此之外，倘若如上述的聲請理由所指摘，婚姻外的性交現象仍於我國社會層出不窮，而以此為理由認為通姦罪處罰規定的一般預防效果失靈，並進而以此認為通姦罪使用刑罰作為處罰手段欠缺正當性，則若貫徹這樣的立場，那麼例如我國刑事實務中每年均有相當多件數——但是刑罰條款存在的正當性卻罕受質疑——的普通竊盜罪、詐欺取財罪[28]，其使用刑罰作為效果的正當性勢將面臨同樣的質疑。

關於前述聲請理由（7），其主旨則是在於現在我國社會秩序中已經肯定異性婚姻以外的伴侶關係，在這種伴侶關係下可能發展的關係外性行為顯然無法被現在的「通姦」行為所包含，因此認為不符平等的現象。對於此部分的聲請理由，本鑑定意見認為也並非通姦罪的本質問題，並且也難以此立即認為通姦罪的規定有無法修正的不平等的疑慮。理由在於，倘若是因為對原本不在我國法秩序中的非異性間伴侶關係在我國法秩序受到承認，從而原本以異性間結合為預設的通姦罪處罰範圍因此縮小，則——如同我國於 1935 年現行刑法立法時將通姦罪的處罰從僅罰有夫之婦擴張為夫、婦均罰一樣——只要在立法上擴張處罰，使非異性間的伴侶關係外的性交等行為也受處罰，那麼同樣可以處理不平等的疑慮。

關於前述聲請理由（8）（9），若將其一起觀察，應可認為其主要的旨趣應在於通姦行為的背景其實有多種的態樣，特別是在瀕臨破碎的婚姻關係為背景時，其可非難的程度顯然較低，卻也要處罰（前述聲請理由（8））；另一方面，在通姦罪雖有各種不同的基礎背景，但是其法定刑僅有一年以下的有期徒刑一種，顯然難以對應這樣多樣的行為態樣（前述聲請理由（9））。關於此部分的聲請理由，本鑑定意見認為，這也同樣無法認為通姦罪的本質問題。

理由在於，首先，倘若僅有單一的主刑做為法定刑有正當性上的疑問，那麼若貫徹這樣的立場，則事實上我國刑法典（中華民國刑法）之中僅設有單一主刑作為法定刑的刑罰規定，其正當性也將同受質疑[29]。

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[26] 參照：台灣花蓮地方法院何效鋼法官聲請書，頁 108。

[27] 參照：佐伯仁志（2004），〈刑法の基礎理論〉，《法学教室》，283 号，頁 44。

[28] 僅以 2018 年司法院的司法統計為例，普通竊盜竊占罪在我國第一審法院終結的件數有 15584 件；一般詐欺罪則有 12541 件。這僅是終結的件數，倘若加上每年檢察官偵查後起訴的案件數量，顯不只如此。參照：司法院網站 https://www.judicial.gov.tw/tw/lp-1820-1-xCat-10-4-20.html 最後瀏覽日：2020 年 3 月 25 日。

[29] 根據本鑑定意見的初步確認，在我國刑法中以單一主刑作為法定刑的規定，至少可舉出：100 條第 1 項前段的內亂罪（7 年以上有期徒刑）、刑法第 111 條第 1 項的刺探收集國防秘密

其次，倘若此處聲請理由的重點是在範圍過小的有期徒刑不足以應付有多樣化背景的通姦行為，則可能的疑問是，倘若依照本件聲請人之一在聲請書中提及

罪（5 年以下有期徒刑）、刑法第 112 條的刺探軍機罪（1 年以下有期徒刑）、刑法第 124 條的枉法裁判罪（一年以上七年以下有期徒刑）、刑法第 125 條第 1 項的濫權追訴罪（一年以上七年以下有期徒刑）、刑法第 126 條第 1 項的凌虐人犯罪（一年以上七年以下有期徒刑）、刑法第 127 條第 1 項的濫權不追訴罪（五年以下有期徒刑）、刑法第 128 條的越權受理訴訟罪（三年以下有期徒刑）、刑法第 130 條的廢弛職務釀成災害罪（三年以上十年以下有期徒刑）、刑法第 132 條第 1 項的洩漏國防以外秘密罪（三年以下有期徒刑）、第 138 條的毀壞公物罪（五年以下有期徒刑）、第 142 條第 1 項的妨害投票罪（五年以下有期徒刑）、第 145 條的利誘投票罪（三年以下有期徒刑）、刑法第 146 條第 1 項的詐術變更投票結果罪（五年以下有期徒刑）、刑法第 151 條的恐嚇公眾安全罪（二年以下有期徒刑）、刑法第 152 條的妨害合法集會罪（二年以下有期徒刑）、第 155 條的煽惑軍人罪（六月以上五年以下有期徒刑）、第 156 條的私募軍隊罪（五年以下有期徒刑）、第 159 條的冒用公務員服飾徽章等罪（一萬五千元以下罰金）、第 161 條第 1 項的脫逃罪（一年以下有期徒刑）、刑法第 162 條第 1 項的縱放人犯罪（三年以下有期徒刑）、刑法第 163 條的公務員職務上縱放人犯罪（一年以上七年以下有期徒刑）、第 168 條的偽證罪（七年以下有期徒刑）、第 169 條的誣告罪（七年以下有期徒刑）、刑法第 174 條第 1 項的放火罪（三年以上十年以下有期徒刑）、第 175 條第 1 項的放火罪（一年以上七年以下有期徒刑）、第 179 條第 1 項的決水罪（一年以上七年以下有期徒刑）、第 180 條第 1 項的決水罪（五年以下有期徒刑）、第 181 條第 1 項的潰決提防等罪（五年以下有期徒刑）、第 184 條第 1 項的致生往來危險罪（三年以上十年以下有期徒刑）、第 185 條之 4 的肇事逃逸罪（一年以上七年以下有期徒刑）、第 186 條之 1 的無正當理由使用爆裂物罪（一年以上七年以下有期徒刑）、第 187 條的製造、販賣、運輸爆裂物罪（五年以下有期徒刑）、第 187 條之 1 的違法製造、販賣、運輸、持有核子物質等罪（五年以下有期徒刑）、第 187 條之 2 的放逸核能等罪（五年以下有期徒刑）、第 187 條之 3 第 1 項的無正當理由使用放射線致傷罪（三年以上十年以下有期徒刑）、第 189 條第 1 項的損害礦坑罪（一年以上七年以下有期徒刑）、第 189 條之 2 第 1 項的阻塞公共場所逃生通道罪（三年以下有期徒刑）、第 190 條第 1 項的投放毒物罪（一年以上七年以下有期徒刑）、第 191 條之 1 第 1 項的對陳列販賣物品下毒罪（七年以下有期徒刑）、第 210 條的偽造變造私文書罪（五年以下有期徒刑）、第 211 條的偽造變造公文書罪（一年以上七年以下有期徒刑）、第 213 條的公務員登載不實罪（一年以上七年以下有期徒刑）、第 217 條第 1 項的偽造印章等罪（三年以下有期徒刑）、第 218 條第 1 項的偽造公印罪（五年以下有期徒刑）、第 221 條的強制性交罪（處三年以上十年以下有期徒刑）、第 222 條第 1 項的加重強制性交罪、第 224 條的強制猥褻罪（六月以上五年以下有期徒刑）、第 224 條之 1 的加重強制猥褻罪（三年以上十年以下有期徒刑）、第 225 條第 1 項的趁機性交罪（三年以上十年以下有期徒刑）、第 2 項的趁機猥褻罪（六月以上五年以下有期徒刑）、第 227 條的對未成年人性交猥褻罪、第 228 條的利用權勢性交（六月以上五年以下有期徒刑）猥褻（三年以下有期徒刑）罪、第 229 條的詐術性交罪（三年以上十年以下有期徒刑）、第 230 條的血親性交罪（五年以下有期徒刑）、第 237 條的重婚罪（五年以下有期徒刑）、第 238 條的詐術結婚罪（三年以下有期徒刑）、第 240 條的和誘未成年人罪（三年以下有期徒刑）、第 241 條第 1 項的略誘未成年人罪（一年以上七年以下有期徒刑）、第 247 條第 1 項的毀棄屍體罪（六月以上五年以下有期徒刑）、第 248 條第 1 項的發掘墳墓罪（六月以上五年以下有期徒刑）、第 249 條第 1 項的發掘墳墓結合罪、第 254 條的販賣、陳列或輸入偽造貨物罪（六萬元以下罰金）、第 266 條第 1 項的賭博罪（三萬元以下罰金）、第 273 條第 1 項的義憤殺人罪（七年以下有期徒刑、第 274 條第 1 項的生母殺嬰罪（六月以上五年以下有期徒刑）、第 275 條第 1 項的受囑託承諾殺人罪（一年以上七年以下有期徒刑）、第 2 項的加工自殺罪（五年以下有期徒刑）、第 296 條第 1 項的使人為奴隸罪（一年以上七年以下有期徒刑）、第 298 條第 1 項的略誘婦女罪（五年以下有期徒刑）、第 299 條第 1 項的移送被誘婦女出國罪（五年以上有期徒刑）、第 325 條第 1 項的搶奪罪（六月以上五年以下有期徒刑）等為例。

的法院實務經驗，事實上通姦罪的處罰也經常可能易科罰金[30]，且依照我國刑法的規定，通姦罪法定刑範圍合乎刑法第 74 條第 1 項之規定，因此當其他緩刑要件也具備時，也可能對成立通姦罪的被告宣告緩刑。若粗略地將這些通姦罪成立時可能使用的處斷方式整體加以觀察，則應可認為在法院方面至少可能有：①附緩刑宣告的有罪判決、②不附緩刑宣告的有罪判決兩種。並且，事實上即使宣告了有罪判決，也可能在符合易科罰金的要件時，於執行時③由檢察官易科罰金。

考慮到現在刑事法學的基本立場一般認為對於短期自由刑應該盡量避免實際的執行[31]，而通姦罪在上述①的處理下並不實際執行短期自由刑、②與③的處理倘能並用，也能夠避免短期自由刑的實際執行。這樣複數種處理方式在刑法理論上的意義是，即使在現在的通姦罪法定刑僅規定一年以下有期徒刑的單一主刑，通姦罪成立時的處理方式仍然不僅有宣告有期徒刑一種，實質上有包含了不實際執行的複數種處理方式可供選擇。如此一來，那麼是否能如此直接地斷定通姦罪的法定刑規定之下，無法提供不同的案件不同的差別處理，即非沒有再檢討的餘地。

關於前述聲請理由的（10）（11）（12），其主要的旨趣應該是在於①在可能使用民事手段讓通姦的行為人在法律上充分負責時，即不應該加以使用（聲請理由（10）（12））；②民事上的（身分）契約之違反，只能導出契約上的法律效果，無法導出刑罰的施加作為法律效果（聲請理由（11））；③契約履行之保護，以涉及公益的情況才能使用刑罰為手段，僅涉私人間的結婚既然不涉及公益，自然不應以刑罰作為手段加以保障（聲請理由（11））。

關於此部分的聲請理由，本鑑定意見認為上述①部分的旨趣（聲請理由（10）（12））可認為正當而可贊同。理由在於，如前所述，刑罰手段的謙抑性，亦即在無法以其他手段達成保護法益之目的時才使用刑罰的補充性格，是應該貫徹於刑法解釋論以及刑法立法論的重要基本原則[32]。倘若如同聲請理由所指，即使透過民事法上的損害賠償責任與離婚等制度的運用，也可以達到使通姦行為人負責的結果，那麼刑罰的手段即無必要。

其次，上述②與③部分的旨趣，則均較難作為對通姦罪本質的批判。理由在於，首先，關於②的部分，若從為違反契約可能發生的效力的角度，財產法上的契約被違反時，透過法定的程序（例如民事訴訟程序與強制執行法所定的程序），可能使用強制執行制度實現權利的內容，但是在身分契約的內容——例如我國民法第 1001 條之同居義務——發生不履行的情形時，則無法使用強制執行制度實現[33]。其次，再從保護法益的觀點來檢討，可能使用強制執行制度的財產上契約，

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[30] 參照：台灣花蓮地方法院何效鋼法官聲請書，頁 110。

[31] 參照：王皇玉，同前註（21），頁 636。

[32] 參照：佐伯仁志，同前註（27），頁 48-49。

[33] 參照：林洲富（2016），《實用強制執行法精義》，11 版，台北：五南圖書出版股份有限公司，頁 393。至於夫妻間的性交部分，考慮到刑法第 229 條之 1 已經將夫妻間的強制性交定性為犯罪（告訴乃論之罪），則應認為夫妻間更無性交之義務。

一旦有發生詐欺的情況（例如 A 實際上賣假錶給 B，但宣稱自己賣的為真錶，再依照真錶的定價販賣），也有刑法上詐欺罪的保護，而無法使用強制執行制度的身分上契約，為何反而不能使用刑法上的犯罪處罰條款作為保護手段？這樣的情況一旦出現，在刑法理論上即必需考慮，倘若仍認為與身分有關的契約無法使用刑罰作為保護手段，這樣的思考在法益保護的層面是否可能引起不均衡？的問題。

其次，關於③的部分，在此也可指出的是，如同前述聲請理由（11）中也有提到的，刑法上在涉及公益的時候會對契約的履行以刑罰為手段加以處罰，但是倘若考慮到以商業投資交易等未必涉及公益內容的契約，刑法上也可能成立詐欺罪[34]，則契約內容是否涉及公益即與是否以刑罰作為保護契約履行的手段，在刑法理論上似無必然的關連。

關於上述聲請理由（13）（14）（15）（16），其主要的旨趣在於：①通姦行為發生時，經濟弱勢的婦女可能於事實上無法行使告訴權（聲請理由（13））；②通姦罪的實際追訴以女性為對象者多，將導致處罰範圍因性別而有差異（聲請理由（14））；③通姦罪的告訴權行使也將導致違反平等原則與過度干涉婚姻自由的問題（（聲請理由（15））；④通姦罪的存在將導致人民為蒐證而進行更多的妨害秘密或侵入住居等違法行為（聲請理由（16））。

在這些聲請的旨趣中，首先，本鑑定意見認為上述①（聲請理由（13））②（聲請理由（14））③（（聲請理由（15））的部分從刑法學的觀點也可認為有正當的意義。理由在於，①③的部分看起來雖然與告訴權的行使較為相關，但是在刑法學的意義上，告訴權行使後，在其他要件具備時通姦罪即會成立，因此在此限度內，告訴權的行使與否也將牽動通姦罪處罰的實際範圍大小。而當女性配偶的告訴權行使實質上因為經濟的不平等因素受到阻礙（如上述①部分的旨趣），反映在通姦罪的實際處罰範圍，即是導致男性配偶通姦時實際上較少受到處罰；另一方面，告訴權在離婚前、後行使上的難易度差距（如上述③部分的旨趣），反映在通姦罪的實際處罰範圍，也將使離婚前、後的通姦罪實際處罰範圍不相同。在這樣的處罰範圍差異沒有實質的根據時，刑法上自然也難以認為有正當性。除此之外，上述②部分的旨趣顯示了實際上通姦罪的處罰範圍也是在女性為被告的時候大於男性為被告時。這樣的處罰範圍差異在沒有實質的基礎時，刑法上同樣難以認為有正當性。

至於上述④部分的旨趣，本鑑定意見則認為其並非屬於通姦罪的本質問題。其理由在於，此一主張的旨趣核心在於通姦罪的存在之所以會誘發其他的侵犯隱私的犯罪，是因為要舉證。然而，倘若舉證是這些侵犯隱私等的犯罪之真正原因，那麼只要舉證的需求存在，這樣的誘發犯罪的原因亦仍會存在。因此，即使假定通姦罪不存在，而改以前述本件聲請書之中也曾提到的損害賠償或離婚等民事制度作為通姦行為人的法律責任內容，只要在民事訴訟程序提出主張之一方有舉證

[34] 參照：黃士軒（2020），〈詐欺罪的財產損害與被害人之錯誤——法益關係錯誤說的應用嘗試〉，《中研院法學期刊》，26 期，頁 91-97 所舉的各個我國詐欺罪實務案例，即與公益未必有關。

責任的基本原則存在，那麼為了舉證而再進一步違犯侵害隱私權或住居權的犯罪的可能性，仍將存在。在此限度內，是否為了舉證通姦行為而進一步違犯侵害隱私權或住居權等權利的犯罪，與是否使用刑罰手段處罰通姦之間，似無絕對的關連。

二. 需進一步檢討的問題

經過上述的初步檢討，大致可認為，在本件各聲請書中所提出的各式各樣的聲請理由中，對於通姦罪的存在正當性有無之問題較為重要的，應該是上述聲請理由（10）（12），以及上述聲請理由（13）（14）（15）的部分。而從本鑑定意見前述「壹、三、」之內容可知，這樣的問題顯示了在①刑罰作為處罰通姦行為之手段或法律效果的必要性的問題（上述聲請理由（10）（12）），以及②通姦罪的實際處罰範圍是否不平等的問題（上述聲請理由（13）（14）（15）），有進一步探討的必要。除此之外，考慮到如前所述，在刑法學的一般理解中，如果使用刑罰作為手段，則應有相對應的實質保護法益內涵，始能認為該刑罰手段的使用有實質的正當性。因此，如前所述[35]，③作為上述的刑罰手段必要性問題的前提問題，究竟通姦罪有無較為明確的保護法益仍待確認。

以上述的整理歸納為基礎，至少在以下的兩點，還需進一步確認與檢討：

第一，是通姦罪的保護法益內涵的確認。

第二，是立法者選擇用以保護法益且實現平等的處罰的刑罰手段，在透過解釋論形成一定的處罰範圍後可確認無法達到其目的時，可能的處理方式為何的問題？

關於這兩個問題的探討，考慮到（1）最近我國刑法學界已多有從法益概念與使用刑罰手段之必要性等途徑出發的檢討與研究[36]，且如前述本件聲請書中也已經從同樣的途徑多所著墨，（2）本鑑定意見的目的在於盡量地從理論上還有可能的其他面向提出意見供司法院大法官在判斷時參考，因此以下本鑑定意見的內容，將會從比較法的觀點，就日本刪除通姦罪的立法過程進行概觀。理由在於，經上述歸納後，目前需探討的問題的性質屬於解釋論現狀確認後的立法論層次問題；除此之外，比較法的面向在本次聲請意見書中大多較為強調最近韓國刑事法的動向，對於日本大致只指出該國已經廢除通姦罪，而在我國學界的相關介紹也

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35 參照本鑑定意見貳、一、的內容。

36 關於通姦罪法益內涵的檢討，例如：黃榮堅（1999），〈論通姦罪的除罪化〉，收於：氏著，《刑罰的極限》，台北：元照出版公司，頁 9-12；鄭錦鳳（2009），〈論通姦除罪化——兼評大法官釋字第 554 號解釋〉，《軍法專刊》，55 卷 5 期，頁 111-112；黃源盛，同前註（6），頁 117-120；林慈偉（2012），〈通姦除罪化思維於我國司法實務之實踐——以高等地方法院近年相關裁判為中心〉，《軍法專刊》，58 卷 5 期，頁 136-138；張明偉，同前註（5），頁 62-63；邱忠義，同前註（9），頁 140-142 參照。關於以刑罰手段處罰通姦行為之必要性的問題，例如：黃榮堅，前揭論文，頁 12-15；鄭錦鳳，前揭論文，頁 112-113；黃源盛，同前註（6），頁 120-124；林慈偉，前揭論文〈通姦除罪化思維於我國司法實務之實踐——以高等地方法院近年相關裁判為中心〉，頁 138；張明偉，同前註（5），頁 63-65 等參照。

僅較為簡潔地介紹廢除該罪的立法過程以外[37]，事實上究竟在有通姦罪的規定時日本的解釋論如何理解該罪？從平等的觀點如何理解日本立法刪除通姦罪規定的意義？等問題，仍可進一步補充以充實本件判斷的基礎。

三. 日本刪除通姦罪的立法過程概觀

（一）日本刑法近代化以後通姦罪規定的沿革與學說的一般理解

日本的近代化刑法典，始於明治 15（1882）年施行的日本舊刑法（1882-1908 年）[38]，通姦罪的規定在同法第 3 編「對於身體財產之重罪輕罪」第 11 章「猥褻、姦淫、重婚之罪」第 353 條[39]，其規定內容為：

「（1 項）有夫之婦通姦者，處 6 月以上 2 年以下之重禁錮，其相姦者，亦同。

（2 項）本條之罪，須待本夫之告訴乃論。但本夫先前已宥恕通姦者，告訴無效。」[40]

此一規定，被明治 40（1097）年制訂的現行刑法（1908 年-現在）承襲，亦即在同法第 2 編「罪」第 22 章「猥褻、姦淫及重婚之罪」第 183 條，訂有通姦罪的處罰條款。其規定之內容為：

「（1 項）有夫之婦通姦者，處 2 年以下懲役。其相姦者，亦同。

（2 項）前項之罪須待本夫告訴乃論。但本夫縱容通姦時，告訴無效。」[41]

除了刑法的規定以外，第二次世界大戰前即大正 11（1922）年制訂的日本刑事訴訟法第 264 條，也訂有通姦罪告訴權行使上的相關規定。其規定的內容為：「關於刑法第 183 條之罪，如非於婚姻消滅或離婚之訴提起後，不得為告訴。再為婚姻或撤回離婚之訴時，視為告訴之撤回。」[42]

不過，如同在我國也廣泛地為人所知地，上述日本舊刑法時代以來，經 20 世紀初的日本現行刑法承繼至第二次世界大戰前通姦罪的規定，在第二次世界大戰後，為與新的日本國憲法的制訂在法制上相配合，成為了檢討的對象，最終被國會立法刪除[43]。

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[37] 參照：黃源盛，同前註（21），頁 125；林慈偉，同前註（36），頁 124-125。

[38] 日本舊刑法是日本第一部近代化的刑法典，是由日本政府聘請的法國巴黎大學教授布瓦索納德所起草。其成立過程可參照：新井勉（1975），〈旧刑法の編纂（一）〉，《法学論叢》，98 卷 1 号，頁 54-76；新井勉（1976），〈旧刑法の編纂（二）•完〉，《法学論叢》，98 卷 4 号，頁 98-110。

[39] 至於日本的刑法近代化以前的歷代通姦罪規定的演變，可參照：林弘正（2004），《姦通罪についての法制史的一考察》，收於：氏著，《改正刑法假案成立過程の研究》，東京：成文堂，頁 127-141。

[40] 參照：博文館（1907），《改正刑法》，東京：博文館，頁 136。以下本文所引用之日本舊刑法、日本現行刑法，以及日本舊刑事訴訟法的條文中譯，均由鑑定人翻譯。

[41] 參照：博文館，同前註（40），頁 52。

[42] 參照：山野金藏編（1922），《改正刑事訴訟法》，東京：有斐閣，頁 71-72。

[43] 參照：大塚仁(1977)，《注解刑法》，2 版，東京：青林書院，頁 810；升本喜兵衛、吉田常次郎、八木國之編(1963)，《刑法各論編（中）》，東京：中央大学出版部，頁 1097-1098 等參照。

在通姦罪仍施行於日本的時代，關於同罪相關規定的解釋，一般的學說認為：

（1）通姦罪的處罰根據是包含①違背婚姻的誓約造成對婚姻的侵害[44]、②將使家庭內出現非夫之血統的子女，導致血統混亂[45]；

（2）通姦罪的告訴權行使在刑事訴訟法的規定上有所限制的理由在於，既然告訴權人提起告訴，則至少會有脫離夫妻關係的決心，倘若無此決心而提起告訴，只是徒然製造危害家庭和平之原因[46]。

（二）廢止通姦罪過程的主要論點

儘管上述日本通姦罪的規定，是到第二次世界大戰後的 1947 年刪除，但是事實上，在日本現行刑法的立法過程中，即已經有力的實務家主張通姦除罪化。若將日本第二次世界大戰前的現行刑法立法過程，以及第二次世界大戰後刪除通姦罪規定的修法過程中，關於通姦罪的檢討意見加以歸納，可知意見大致集中在以下幾點：

第一，從當時的通姦罪告訴權行使狀況觀之，通姦罪的告訴權人往往以告訴權之撤回而要求換取相當的對價，這樣的狀況無異於以國家權力為後盾，利用行使法定的告訴權不構成犯罪的機會，向對方喝取金錢，這種行為的疑問在於其一方面是以節操為代價買賣，一方面實質內容上與恐嚇取財相近，而這樣的弊害正是來自於通姦罪的規定[47]。

第二，關於通姦罪的規定方式上，由於日本通姦罪的規定僅以有夫之婦的通姦行為為中心規定處罰，在違反平等原則之點早有疑慮[48]，因此，為了滿足平等原則的要求，在日本通姦罪廢除前曾經有以下的兩種主要立法模式主張：

①制訂對於夫、妻的通姦行為均在刑法上加以處罰的通姦罪規定[49]；

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44 參照：宮城浩蔵（1893），《刑法正義（下卷）》，東京：講法会，頁 738-739；岡田朝太郎（1895），《日本刑法論・各論之部》東京：有斐閣，頁 854-855；亀山貞義（1898），《刑法講義卷之二》，東京：明治法律学校講法會，頁 511；大場茂馬（1912），《刑法各論下卷》，3 版，東京：中央大学，頁 473。

45 參照：ボアソナード（1886），《刑法草案注釈（下）》，東京：司法省，頁 532-533；宮城浩藏，同前註（44），頁 739；亀山貞義，同前註（44），頁 511；平井彦三郎（1931），《刑法論綱各論》，東京：松華堂書店，頁 233。

46 參照：平井彦三郎，同前註（45），頁 233。

47 此為第二次世界大戰前曾擔任日本東京控訴院（相當於我國的高等法院）院長、日本大審院檢事、大審院判事的倉富勇三郎的主張。關於其發言的介紹，可參照：林弘正，同前註(39)，頁 169。

48 第二次世界大戰前的平井彦三郎，同前註（45），頁 233，即已經可見介紹此種主張。相關的中文文獻介紹，可參照：林慈偉，同前註（36），頁 124-125。

49 參照：松尾浩也增補解題、倉富勇三郎、平沼騏一郎、花井卓蔵監修、高橋治俊、小谷二郎共編（1990），《增補刑法沿革綜覽》，東京：信山社，頁 2032（江藤哲藏發言）。

②或者如同 1947 年的日本立法例，將通姦罪完全刪除，使夫、妻的行為在刑法上均不處罰[50]。

1947 年，日本最後的立法選擇為刪除通姦罪的規定，使得夫與妻在婚姻外的性行為在刑法上均不處罰。關於此一立法上的刪除，依照在日本國會說明提案旨趣的主管大臣的報告，其立法旨趣如下：

「在男女的本質的平等與夫婦同權明定於憲法的今日，如向來一般僅處罰妻之通姦的制度應加以修正，自不待言。政府雖從去年已經基於臨時法制調查會與司法法制審議會的答詢，成立將通姦罪廢止，而將此一問題之解決委諸夫妻間的道義與愛情之旨趣的法案，不過究竟應將刑法通姦罪的規定廢止，或同等處罰夫妻的通姦，則是伴隨著利害得失的問題，各國立法例也有各種類型，因此關於此點，懇請（國會）充分地討論並慎重決定」[51]。

（三）廢止通姦罪規定的一般評價

對於通姦罪刪除，今日的日本刑法學界未見反對的意見。主要的理由在於：

第一，夫與妻的婚姻外行為在刑法上均非犯罪，符合日本國憲法第 14 條所揭示的平等原則[52]。

第二，在夫婦的事實上（特別是經濟上）平等無法實現的限度內，即使採取形式上平等的兩罰論仍然也將造成不平等的實際適用結果，因此廢止通姦罪是較為妥當的立法[53]。

（四）小括

從上述關於日本立法過程的比較法觀察，大致可認為有以下幾點可供我國參考：

第一，日本的通姦罪廢除，雖然該罪違反憲法上平等原則的考慮，但是實質上並未經過違憲審查[54]。

第二，從通姦罪作為實體法上的犯罪的問題而言，只處罰妻之通姦行為的規定形式本身即已經違反憲法上的平等原則，是日本通姦罪的規定最集中地受到批判之處。

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[50] 參照：升本喜兵衛、吉田常次郎、八木國之編，同前註（43），頁 1098-1099；大塚仁，同前註（43），頁 810；大塚仁等編(2000)，《大コンメンタール刑法第 9 巻》，2 版，東京：青林書院，頁 105（亀山継夫執筆）。

[51] 參照：日本法文会編集部編（1947），《改正刑法》，東京：日本法文会，頁 5-6。

[52] 參照：団藤重光編(1965)，《注釈刑法（4）》，東京：有斐閣，頁 324（所一彦執筆）；大塚仁等編(2013) ，《大コンメンタール刑法第 9 巻》，3 版，東京：青林書院，頁 113（亀山継夫、河村博執筆）。

[53] 參照：団藤重光（1990），《刑法綱要各論》，3 版，東京：創文社，頁 331。同旨的意見，可參照団藤重光編，同前註（52），頁 324（所一彦執筆）。

[54] 參照：団藤重光編，同前註（52），頁 324（所一彦執筆）。

第三，如前所述，倘若是規定形式的問題，立法論上日本也曾經出現夫與妻兩者均處罰的主張，然而最終仍然未被採取。

第四，這樣的立法決定背後，隱含前述夫妻間的問題希望能委由夫妻間的感情與道義處理的立法旨趣。不過，更值得關注的是立法後日本學界肯定此一立法的實質理由。亦即，即使形式上採取夫與妻均罰的措施，在婦女的經濟上地位與夫實質上仍不平等的情況下，也難以謀求通姦罪分別適用在夫、妻時能有平等的處罰範圍。

第五，值得我國參考的是，儘管日本戰前刑事訴訟法中的告訴權規定內容與我國現行刑事訴訟法第 239 條的規定並不相同，但是在通姦罪的告訴權運用上，戰前日本實務家的批判即指出通姦罪的告訴權行使可能隱含被濫用的危險，值得注意。如同眾所周知地，我國通姦罪的告訴權除了規定於刑法第 245 條，在刑事訴訟法第 239 條，也有通姦罪的告訴權人撤回告訴權時，撤回之效力不及於相姦人的特別規定。因為無法取得刑事訴訟法此一規定的立法史料，所以此一規定的主旨、立法當時是基於保護何種法益的目的，無法直接且充分地確認。而我國一般的刑事訴訟法教科書，是認為這樣的刑事訴訟法規定是因為有告訴權之配偶對於有通姦行為之配偶仍有夫妻之情，為宥恕配偶才撤回告訴，但是對相姦人未必如此[55]。如果這樣的理解可採，那麼這樣的告訴權撤回規定的主要目的，可能在於通姦行為後的家庭的維護[56]。

四. 若干補充

（一）通姦罪保護法益內涵的再思考

經過上述比較法的考察，本鑑定意見在此也將嘗試檢討通姦罪的保護法益內涵。

從上述有關日本通姦罪廢除的比較法觀察可知，日本通姦罪的解釋上，或許受制於僅處罰妻之通姦行為的法律規定形式，解釋論上將夫的家庭中的血統紊亂也當作保護法益，顯然對我國較無參考的價值。除此之外，戰前的日本學說也僅是較為泛泛地稱「婚姻」是通姦罪的保護法益，但是並無較為明確的內涵，這對於我國而言參考的價值相對較低。

因此，要再一次確認通姦罪是否完全沒有值得保護的法益，即必需從我國的法解釋論出發。

如前所述，我國的通姦罪規定，是在刑法第 2 編「分則」第 17 章「妨害婚姻及家庭罪」章之中。倘若僅關注通姦行為是對婚姻的身分契約的違反，那麼對於通姦罪保護法益的觀察視野自然也會著重締結婚姻之契約的當事人即夫與妻之間。但是，倘若考慮本章的章名所示，本章之罪並非僅有對婚姻制度侵害，也可能有對於家庭的影響，那麼即使通姦罪的處罰可認為對婚姻維持或圓滿並無實

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[55] 參照：林山田(2001)，《刑事程序法》，4 版，台北：五南圖書出版股份有限公司，頁 466；林永謀(2006) ，《刑事訴訟法釋論（中冊）》，2 版，台北，作者自版，頁 329。

[56] 參照：林國賢、李春福著(2006) ，《刑事訴訟法論（下冊）》，台北：作者自版，頁 64。

質的意義，但是若將對於家庭的影響也納入考慮保護法益內涵的視野時，即不當然可能認為通姦行為的處罰對家庭也無意義。關於此，主要的理由在於：

當夫與妻結婚後並無子女，或雖有子女但子女均成年時，通姦行為確實可認為象徵著夫妻感情本已破裂，因此通姦行為對於這種瀕臨破裂的家庭內夫妻關係並無實質上的破壞。

但是，當夫與妻結婚後有子女，且子女尚未成年時，若在家庭內原本感情和諧的情況下，因夫或妻之通姦行為導致其等婚姻關係惡化或離婚時，這種情況下對於未成年子女而言，原本應保護其健全發育、成長的家庭，即無法充分發揮功能（關係惡化時），乃至於喪失（離婚時）。倘若這樣的觀點尚夠接受，那麼在這種情況中通姦罪的處罰是否還能認為完全沒有意義，並非沒有再檢討的餘地。本鑑定意見中前述「壹、二、」的聲請意見中，對於這種情況似乎並未特別考慮，因此，認為通姦罪完全沒有實質保護法益內涵的論點，也可能有再斟酌的餘地[57]。

（二）符合罪刑明確性原則的立法困難

然而，即使如上所述，實質地將通姦行為理解為對於家庭的破壞，導致未成年人失去保護其健全成長的家庭機制的行為，在立法論上要處罰這種行為仍然面臨著以下的困難：

第一，倘若將未成年人因為夫或妻通姦之行為導致家庭破碎的情形作為保護法益加以考慮，那麼在立法上，實質上能導致有未成年人家庭破碎的行為均應該處罰，始能周全地對法益加以保護。

第二，但是如此一來，為了能滿足這樣的保護法益需求，處罰之範圍顯然不應限於婚姻外與他人發生的各種性行為。因為當夫或妻與婚姻關係外之他人發生性行為時，固然可能象徵其對原本家庭的感情破裂，但是實際上能造成實質上使家庭破裂的行為，經驗上也未必以性行為為限。

第三，然而，在立法上想要擴張處罰範圍至性交等行為以外，且能破壞家庭的行為時，顯然難以限定。舉例而言，甲與乙結婚並育有年幼的未成年子女後，甲又與職場上的同僚丙發生戀愛關係，並開始冷落乙與自己的子女，經常不回家，而又與丙在多次的約會、喝茶、聚餐、牽手散步後，感情加溫，而終於發生性交等行為的情形中，實質上導致甲與乙及其等之未成年子女的家庭崩壞的行為，並非僅有性交，事實上在性交之前的階段的行為也同樣可能導致甲與乙及其等之未成年子女的家庭崩壞。然而，倘若將此種行為也犯罪化，即可能將處罰範圍及至

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[57] 在此可以補充說明的是，前述日本法廢除通姦罪的脈絡中之所以沒有出現對於家庭內未成年子女的觀察視野，可能的原因是在於日本法的通姦罪在體系上，是規定在一般認為屬於個人的自由法益侵害的未成年人和誘略誘罪章之後，因此在此種立法體系安排下，家庭的視野也較難進入通姦罪的解釋中。相對於此，我國對未成年人和誘略誘行為的處罰從 1928 年的中華民國刑法開始即列於「妨害婚姻即家庭罪章」，因此對這種犯罪類型的掌握角度與日本即有不同。關於此部分，可參照：黃士軒（2019），〈台湾における親による児童の連れ去りに対する処罰のあり方（上）〉，《法律時報》，91 巻 3 号，頁 116－118。

約會出遊、喝茶、一同吃飯、牽手散步等社會生活上正當且普遍的行為。這樣的處罰範圍顯然過於廣泛。更為根本的問題是，立法技術上，也難以設計出可充分明確且妥當地區分不可罰的一般社交行為與可罰的實質侵害家庭行為。

第四，倘若因為考慮處罰範圍可能過廣，最終還是將要處罰的行為類型限定在性交（含刑法第 10 條第 5 項所規定的各種行為）或性交以外的其他性行為，則反而也可能導致對法益保護不充分的問題。

第五，因此綜合以上各點，應可認為，即使可能透過通姦罪規定所在罪章的體系解釋，認為通姦罪與該章節的其他規定均可以家庭（特別是有未成年人的家庭）作為保護法益之內涵，但是即使如此思考，在立法技術上，應認為難以設計出充分明確且能確保妥當處罰範圍的犯罪構成要件，從而也難以滿足罪刑法定原則下的罪刑明確性原則的基本要求。

五. 結論

基於以上鑑定意見內容，在此將結論說明如下：

第一，刑法第 239 條通姦罪的保護法益，未必僅能限於婚姻制度，而應考慮其被規定於妨害婚姻與家庭罪章，將家庭的保護也納入通姦罪法益內涵。特別是在有未成年子女的家庭，這樣的思考在保護未成年子女的健全成長之點，並非完全沒有實益。

第二，如上所述，這樣的保護法益思考固然可能有其正當性，但是在這樣的法益保護內涵下，僅限定夫或妻之一方不能與婚姻外的他人性交，亦即僅限制性自主權，可能無法充分防止家庭受侵蝕，另外一方面若想擴張處罰的行為類型，在對構成要件行為無法定型時，立法技術上也難以滿足罪刑法定原則下的罪刑明確性原則的要求，從而也將過度限制國民的行動自由，在刑法學的觀點也難以正當化。若考慮到罪刑法定原則在刑法學的領域一般也認為屬於憲法上的基本原則[58]，那麼無法滿足此一原則的通姦罪規定，自然在憲法上的正當性也將受到質疑。

第三，司法院釋字第 554 號解釋文[59]的要點包含（1）國家為確保婚姻制度之存續與圓滿，自得制定相關規範，約束夫妻雙方互負忠誠義務；（2）此通姦罪的規定在維護婚姻、保護家庭制度及生活秩序上有其必要；（3）通姦罪也有告訴乃論的規定以適度緩和其處罰；（4）我國現行的通姦罪規定仍尚未逾越立法形成自由之空間，與憲法第二十三條比例原則之規定尚無違背。

從本鑑定意見上述內容看來，儘管在保護家庭的部分並非沒有意義，但是①僅限制不進行婚外性行為（上述（1）部分）可能無法充分保護法益，②欲擴張處罰則無法滿足罪刑法定原則，③立法者所設計的告訴權，如同本鑑定意見前述的本件聲請意見，以及日本的比較法觀察可知，在夫與妻實質經濟地位不對等時，告訴權的設計難以發揮充分的功能，因此將會實際上創造不平等的處罰範圍。同

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[58] 參照：王皇玉，同前註（21），頁 40。

[59] 參照：司法院法學資料檢索系統 http://cons.judicial.gov.tw/jcc/zh-tw/jep03/show?expno=554 最後瀏覽日：2020 年 3 月 25 日。

時也如同日本的比較法觀察可知，通姦罪的告訴權可能也會產生被濫用的危險。基於這樣的考慮，本鑑定意見認為司法院釋字第 554 號即使在通姦罪的保護法益部分（上述（1）（2）部分）雖然尚非完全無理由，但是在現行規定無法充分達成保護法益目的、要達成保護法益目的時又難以制訂充分明確而符合罪刑法定原則的處罰條款、通姦罪的告訴權也有受濫用並導致實際上的不平等的危險等考慮下，釋字第 554 號解釋認為通姦罪的處罰仍有必要的結論，應有變更的餘地。

第四，最後可補充的是，儘管上述的釋字第 554 號解釋與本件聲請書中的許多理由，均是從通姦罪的處罰在手段上的必要性為何的觀點，對通姦罪加以檢討，但是，若從日本戰後廢止通姦罪處罰的比較法上沿革觀察，也可得知廢止通姦罪的立法之所以能得到刑法學理上的支持，其重要的意義應是在於僅是形式地維持夫與妻均處刑罰，實質的平等仍難以確保。在這樣的意義下，我國的立法雖然在形式上確保了平等的處罰，但是倘若如前述本件聲請書所指出的，實際追訴與處罰的現實上平等仍尚未確保，則考慮到此規定已經實施超過 80 年，仍難達到當時立法者所欲實現的男女平等，那麼在繼續肯定此一規定也未必能確保平等的實現，則此一規定的意義為何？以及是否可考慮如日本的立法過程所顯示的，以實質意義的平等的追求為目標，即有積極地加以檢討的必要。

釋字第554號解釋有無變更必要之探討

意　見　書

提案人　許 幸 惠（最高法院退休法官）

中華民國109年3月23日

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司法院大法官釋字第554號解釋有無變更必要之探討

壹、前言

一、近二、三十年來有學者開始以國家公權力不應介入人民私生活領域性自由之觀點出發提多項理由主張系爭刑法第 239 條應予廢除。而社會各界卻以公序良俗，道德基準等理由力主此有關通姦罪之規定不宜廢除，兩派論述對峙多時，沸沸揚揚討論不斷，近日在司法改革國是會議上再度提起，且經提案通過「刑法第239條通姦罪應予廢除」。

二、本案經地方法院16名承審法官另一被告當事人提出釋憲，其理由略以（依司法院提供資料釋憲聲請書共17件，以下簡稱資料），(一)社會時空環境已有相當程度之變遷，社會對性行為之觀念丕變，廢除通姦除罪是國際民主法制國家之潮流。(二)刑法第239條抵觸憲法第22條保障人民性自主決定權。(三)違反憲法第23條限制比例原則之規定。(四)認為個人最基本身體自由之一的性行為自由（性自主權之決定），不應由國家刑法加以限制與剝奪。

三、按**法律為實用社會科學之一，與自然科學或科技科學不同**，即無絕對的是非對錯，僅係在各該社會國家集體認知及歷史文化民情風俗背景等元素下之產物，審查利害平衡、興利除弊等因素所為最適合該社會集體之規範。系爭法律，乃因有婚姻關係使然，有婚姻才有家庭，而家庭為國家社會安定的基石，此乃民法設置內涵人倫元素之親屬繼承兩篇身分法制之意義。惟「**婚姻涉及身分關係之變更，攸關公共利益**」（釋字第552號解釋），是否能以近來少數學者、法界、社運人士之大聲疾呼，論文、媒體、網路齊發，大力主張性自主廢除系爭法律，即能代表國人之心聲？即能為廣大沈默大多數國人所認同？真能因廢除系爭法律對個人自由人權及婚姻家庭穩固暨國家社會之安定有所裨益？茲審視聲請釋憲主張廢除系爭法律之各項理由，深入研討剖析，謹提供意見如下，期能於　鈞院審理本案時有所幫贊，是所幸也。

貳、程序問題之探討

一、本件聲請釋憲理由之一為刑法第239條立法遠於民國17年間，大法官第554號解釋作成於民國91年12月27日，距今時日均已久，「當時」社會「通念」之社會事實認定已發生重大變化，現今社會上對於個人之情感與性自主權意識逐漸建立，社會與法秩序對於婚姻及家庭之認知已經有大幅度的變動；今日社會已不存在「通姦刑罰化之通念或共識之社會事實」，乃確信上開釋字第554號解釋之「社會事實」基礎已經不復存在。並舉與我國社會風俗、文化觀念相近之日、韓兩國為例，日本刑法已無通姦罪規定，韓國憲法法院亦於104年2月26日判決，認為韓國社會已經改變成為個人性自主利益高於性道德和家庭的社會利益的社會，因此廢除通姦罪的刑罰處分。事實上，日本乃因第二次世界大戰敗戰後男性人口大量減少，不得不由女性支撐社會經濟，迫於現實社會充滿形成各種不同原由之婚外性行為，以致廢除通姦罪；印度則因通姦只準男性提告也只處罰男性第三者顯然不平等，乃致廢除通姦罪，中國則因建國之初的男女關係採「一杯水主義」嗣後又經文化大革命，破壞倫理道德觀念至鉅，而無通姦罪刑。各國國情不同，自難據以稱東方文化相近似各國已廢系爭法律，我國亦理應跟進廢除。

二、我國現今社會對婚姻價值及婚姻、家庭制度之「通念」、「社會風俗」、「文化觀念」、「社會公共利益」之認知如何？果真如聲請人所言，與十八年前釋字第554號解釋當時之社會事實基礎已迥然不同大幅度的變遷了嗎？按社會現象、民情風俗、公共秩序、社會公益等認知以至文明文化的產生，乃各該社會長期深遠的累積堆疊淬鍊所形成，在歷史的長河中，**社會現象民情風俗乃至公序良俗之準則有無變動變遷，實二、三十年短時間所難窺測**。君不見目前社會新聞常有公眾人物、社會人士於婚姻中有不軌行為時，仍必向社會大眾「道歉」，媒體報導亦常以「不倫」形容之，演藝人員、公務人員、各界各行業也常有因此不正行為而失去當紅機會工作職務升遷備受撻伐批判等情形比比皆

是。由此觀之，國人真已「多數」不存在通姦刑罰化之通念或共識了嗎？況**依法務部委託民意所做調查結果，自 102 年、104 年及最近數據觀之反對廢除的比率高達百分之 82、85、72 之數據視之，主張廢除系爭法律者並無堅強立論根據**。

三、聲請釋憲人等聲請理由又稱：國際間多數國家已無通姦罪法律之規定，且依國際兩公約（經濟、社會與文化權利公約 ICESCR 及公民與政治權利公約 ICCPR）均揭示「結婚與組成家庭個人自由之權利」以及「家庭生活及私生活不受國家侵犯」，兩公約審查委員會曾於 2013 年及 2017 年對我國提出建議，指刑法第 239 條違反 ICCPR 公約第 17 條之隱私權保障，足見在國際潮流中此乃普世人權價值。**惟查各國國情不同，社會對通姦罪認知之通念或共識，乃文化形成、歷史沈澱累積的呈現，前述二已說明，非國際外人所能決定**，不再贅言。試問如民主國家新加坡的鞭刑、中東伊斯蘭國家宗教警察的執行罰責顯與兩公約所倡人權保障不符，但仍因各國不同文化背景保有其不同的社會刑罰與處罰原則，國際兩公約提示並無約束力。**法律為社會科學非自然科學或科技有實驗可實證**，何況近日德法政治領袖梅克爾、馬克宏等敏銳之士，正在省視自己國家過去的做法已動搖他們 300 年來的霸權，覺知到有須要去重新審視和制定規則的空間，重新樹立深刻的歐洲文明，並以此高度去考慮存亡問題。他們以如此沈重嚴肅的省思檢討態度之際，**吾人不能僅因所謂國際潮流趨勢盲目追隨而漠視自己國人對此通姦罪存否及婚姻家庭建構價值等立場之實相**。

四、提出聲請本釋憲案之法官總計 16 人（花蓮地院同一合議庭法官 3 人共 3 件，桃園、臺北地院合議庭法官 3 人各 1 件，李奕逸、吳志強、何一宏法官各 2 件，陳文貴、施育傑、廖晉賦、張淵森法官各 1 件）僅占全體司法官人數極小部分而已，**彼等僅因個人見解率以斷論社會對通姦及婚姻家庭觀念已變遷，完全沒有證實其「變遷說」的證據與根據何在**，卻以「已變遷」為立論基礎質疑釋字第 554 號解釋有違憲法第

22 條、第 23 條之規定實為不宜。上開**第 554 號解釋文明言「立法機關**就當前對夫妻忠誠義務所為評價，於無違社會一般人通念，而人民遵守此項義務規範亦非不可期待之情況下，自得以刑罰手段達到預防通姦、維繫婚姻之立法目的」等意旨，足見所謂**「有無違社會一般人通念」、「人民遵守規範可否期待」此等社會人民思維觀念心態等現象應由代表民意最高之立法機關來定奪。立法者較有能力體察違法行為是否採取刑罰制裁，涉及特定時空下之社會環境、犯罪現象、群眾心理與犯罪理論等諸多因素之考量（釋字第 646 號解釋）**。鈞院歷來尊重立法權而不踰越，豈容法界極少數人執個人想當然爾之思維見解，即予擅斷？此項**當今社會對婚姻家庭價值、婚姻中性行為自主之「通念」以及實際存在之事實「有無變遷」或「變遷程度如何」等狀況**，乃為社會文化背景國民法社會意識，**涉及法社會學非單純之法律解釋問題**，亦非　鈞院憲法法庭於無法實證又不知實際社會民情民意情況下所能論斷。

本釋憲案，如變更上開第 554 號解釋，無異直接廢除刑法第 239 條之刑罰結果。立法、修法、廢法本乃立法院之權責，今擬以透過釋憲之方式達廢法之實質目的，有擴張司法權踰越立法權之疑慮，其程序自有非議不當之瑕疵。

五、本案提出釋憲時間分別自 104 年 7 月 3 日至 109 年 2 月 5 日長達近 5 年之久，共計 16 件通姦罪停止訴訟，期間全國其他受理該罪刑事案件之絕大多數法官仍依法執法，如此已致形成「一國兩制」不同之司法裁判，人民對司法如何信賴？是以釋字第 371 號雖明文「各級法院得以之為先決問題裁定停止訴訟程序，並提出客觀上形成確信法律為違憲之具體理由，聲請大法官解釋」，似應有更嚴謹之條件，以避免將最高階之憲法法庭下降為地方法院之上級法院層級。另則似應規定限時儘速審理聲請釋憲案件，以免執法之司法人員處於用法不確定之窘境，鈞院為全國最高司法機關宜有積極作為，是國人所期盼。

參、實體問題之研究

一、是否違反憲法第 7 條平等權原則？

聲請釋憲主張廢除通姦罪之意旨稱：依法務部民國 93 年至 103 年十年間之「妨害婚姻及家庭罪案件性別統計分析」所示，偵查終結 2 萬 7,379 人，男性佔 52.6%，女性佔 47.4%；女性起訴比率 24.7%，較男性高 2.7 百分點，男性不起訴比率 64.8%，較女性高 2.4 個百分點，足見對女性不平等。又女性告訴人對通姦配偶撤告比例高，而獨留相姦人不撤告，任其接受刑罰處分，此項犯罪女性被告，受處罰比率亦偏高，有違憲法第 7 條保障男女平等之原則云云。但查刑法第 239 條通姦罪是處罰「有配偶而與人通姦者，及其相姦者」並無因性別差異而有不同處罰規定，即無違反男女平等原則，自不得指為違憲。至於上開訴訟案件屬性與被告性別比率之分析，僅足以呈現男性與女性面對妨害婚姻及家庭案件訴訟時所持不同態度之結果，與刑法第 239 條處罰之規定本身完全無關係。而造成上開分析所呈女性被告被起訴被處罰較多於男性之現象，或係因刑事訴訟法第 239 條第 1 項但書規定：「但刑法第 239 條之罪，對於配偶撤回告訴者，其效力不及於相姦人」，女性告訴人常於提告後撤回對通姦配偶之告訴而不撤相姦人部分之告訴所致。**故可討論之問題是刑事訴訟法第 239 條但書應否廢除，而非刑法第 239 條刑事處罰廢除問題。**因為刑事訴訟第 238 條第 1 項規定「告訴人於第一審辯論終結前，得撤回告訴。」同法第 239 條規定「告訴乃論之罪，對於共犯之一告訴或撤回告訴者，其效力及於其他共犯。**但刑法第 239 條之罪，對於配偶撤回告訴者，其效力不及於相姦人**」。此項但書規定雖未能貫徹告訴權、撤回告訴權不可分及於共犯之理論，然此例外條款並未針對性別限制或規定男性或女性始有行使權，故亦無涉及違反憲法第 7 條男女平權之問題。何況現今女性配偶出軌通姦事件日漸增多，適用刑事訴訟法第 239 條但書得以免受追究者未必然只是男性。基於此被訴及撤回告訴案件男女性別數字之多寡，從而推論刑法第 239 條涉及違反憲法第 7 條之平權原則不足採，至於該但書規定違背告訴不可分原則屬另一問題，容後討論。

二、是否違反憲法第 8 條第 22 條對人民自由之保障？

1. **聲請釋憲理由**多以性行為自由與個人之人格有不可分離之關係，人民得自主決定是否及與何人發生性行為，此等性自主決定權為受憲法第 22 條之保障，為憲法保障之基本權利，而刑法第 239 條以「有配偶而與他人通姦者」及「其相姦者」為要件，對上開性為設定處罰之規定，**以刑罰之手段禁止、嚇阻有配偶之人與配偶以外之人為性交行為**，即禁止他人與有配偶之人為性行為，**顯然已經構成對人民性自主權之干涉**，刑罰之規定侵害人民受憲法第 8 條、第 22 條人身自由保障之干涉」（資料 P.99）。或稱：「婚姻為兩人成立的身分契約，雖然婚姻的雙方都期待對自己有性及情感的忠誠，但**並非成立了婚姻的身分契約，就拋棄了自己憲法上的性自主權**（資料 P.225）」，或謂「**通姦行為**為雙方合意之性交行為，雙方均為成年人，**客觀上並無法益侵占存在**，唯一受害的可能僅為遭感情背叛之配偶一方之憤恨情緒而已」、「刑法學界亦早已形成善良風俗或倫理道德無法成為刑法保護法益，從而以刑法處罰通姦行為，實欠充分之正當理由」（資料 P.183）「通姦行為亦屬自主權之行使，自主之核心概念在於個人有權定義自己存在之價值與意義，故如不對通姦罪予以除罪化，外遇或第三者所背負之污名將會繼續烙印在人之一生當中……，2 名成年人合意之私密通姦行為，其生活之隱私及自主決定權之選擇，應獲尊重，**立法者不應藉由通姦行為入罪化之方式，試圖操縱個人之命運與性慾望**，亦即法律並不具有任何重大迫切之政府利益（優勢利益），足以正當化其窺視並介入當事人之私人生活」（資料 P.188），進而主張「**外遇是個人私生活問題，在道德上或許可以非難，但不具有公共性**，法律僅因外遇或通姦事實即將個人**以刑法相繩應屬不正當之刑法**」（資料 P.191），「傳統的社會集體意識中，婚姻與性行為不可分」、「傳統婚姻觀與性道德的社會意義僅在維護傳統並穩定父權思維下之性秩序，恐難以繼續肯認忠誠義務與一生一世內涵之傳統婚姻為所謂（善良）風俗」、「國家既有義務排除任何人性尊嚴之侵犯，則何以立法配偶一方只能與他方發生性行

為，於婚姻出現破綻時，卻仍執意以通姦罪限制他方配偶只能與配偶發生性行為，應評價為對人性尊嚴（性行為自由）過度侵害，不符合憲法要求維護人性尊嚴之國家義務」（資料 P.194、195），亦有謂「性行為，非憲法所明文之基本權，惟經釋字第 554 號肯認為憲法第 22 條之基本權。**系爭條文造成配偶不得與自己以外之人為性行為，已造成對性自主權之限制**，釋字第 554 號有重新客觀檢討之必要」（資料 P.222）以上各項說詞據為主張廢除刑法第 239 條通姦罪之理由。

2. 但查**釋字第 554 號解釋文第一段揭示：「婚姻與家庭為社會形成與發展之基礎，受憲法制度性保障**（參照本院釋字第 362 號、第 552 號解釋）婚姻制度植基於人格自由，具有維護人倫秩序、男女平等、養育子女等社會性功能，**國家為確保婚姻制度之存續與圓滿，自得制定相關規定，約束夫妻雙方互負忠誠義務**。性行為自由與個人之人格有不可分離之關係，固得自主決定是否及與何人發生性行為，惟憲法第 22 條規定，**於不妨害社會秩序公共利益之前提下，始受保障，是性行為之自由，自應受婚姻與家庭制度之制約**」等意旨。明白告示性自主權固得決定與何人發生性行為，但是不能妨害社會秩序公共利益。而婚姻及家庭制度即屬社會秩序公共利益，釋字第 362 號、第 552 號亦均有明示「婚姻涉及身分關係之變更，攸關公共利益」。次查釋字第 554 號解釋文第二段揭示：「婚姻關係存續中，配偶之一方與第三人間之性行為應如何之限制，以及**違反此項限制，應否以罪刑相加，各國國情不同，應由立法機關衡酌定之**。刑法第 239 條對於通姦者、相姦者處 1 年以下有期徒刑之規定，固對人民之性行為自由有所限制，惟此維護、家庭制度及社會生活秩序所必要」，「婚姻與家庭為社會形成與發展之基礎，受憲法制度性保障（參照本院釋字第 362 號、第 552 號解釋）。婚姻制度植基於人格自由，具有維護人倫秩序、男女平等、養育子女等社會性功能，國家為確保婚姻制度之存續與圓滿、自得制定相關規範，約束夫妻雙方互負忠誠義務」等意旨至為明確。

3. 綜觀聲請釋憲者一直圍繞身體自由權性自主的不可侵犯，以致主張通姦是通姦人與相姦人二成年人之自由，與任何第三者無關即便婚姻關係存續中，僅係傷害婚姻忠誠屬道德規範而已，未通姦之配偶亦不得介入，與公序公益無關。通姦行為此與個人人格有不可分尊嚴私密性行為，任何人不得侵害隱私權，既使未通姦配偶亦然。又稱通姦罪無異於婚姻關係解消前永久禁止有婚姻關係之個人與異性通姦，已過度限制個人無法享有性生活帶來之愉悅與幸福（即放棄親密關係獲得歸屬感之權利），屬對個人性行之過度限制，而侵害人性尊嚴。（資料 P.196）**釋憲聲請理由主張個人自由至高無上，性自由亦超越一切，個人自我意識無限上綱，以致否認婚姻及家庭制度為公共秩序公共利益**。果真婚姻及家庭制度之維繫無關公益？與公共秩序無關？主張廢法者又謂「通姦行為是一個男人和一個女人發生性關係，從純粹生物學上的觀點來看，這只是「互相滿足生理上需要的正常行為」，再稱「男歡女愛是自由的」，「情慾自由是人權」，「法律不宜介入個人私事」，甚至也有人說「法律的手不要伸入老百姓的床上」……等等說詞。其實這些看似動聽振振有詞的話語，真是似是而非，簡直要將我們帶回雄雌交媾動物本能的原始叢林，**人類群居如僅主張性慾的權利與自由，而沒有一定的規範，想想那是怎麼樣的社會**，如果是毫無前提條件的自由民主人權，「只要我喜歡，有什麼不可以」，那算是哪門子的「人權」與「自由」？我們是所謂文明的社會，當然不能純以生物學的觀點來看通姦行為。

總之，人權自由是以自律自制為前提法治為基礎，如無限上綱的主張性自主權高於保障社會秩序社會公益，則有濫用人權主張以保障之名行縱慾之實，氾濫的人權潮會淹沒了應受保障的人權。本案系**爭法律揭示之法意即成年人無婚姻，性可自主可自由，有婚姻則必須有約束有規範，個人及社會之婚姻家庭制度方有保障**。釋字第 554 號解釋闡述系爭法律並無違反憲法第 8 條及第 22 條之理由至為清楚，反之釋憲聲請人以似是而非不合邏輯之上開林林總總理由提出申請，指稱釋字第 554 號違反憲法第 8 條、第 22 條保障人民性自主權之說，為無理由。

三、保障之法益及有無違反憲法第23條之比例原則？

1. 查憲法第 23 條規定「以上各條列舉之自由權利，除為防止妨害他人自由避免緊急危難，維持社會秩序或增進公共利益所必要者外，不得以法律限制之」，釋字第 554 號解釋文第三段明示「刑法所具一般預防功能，於信守夫妻忠誠義務使之成為社會生活之基本規範，進而增強人民對婚姻尊重之法意識，及維護婚姻與家庭制度之倫理價值，仍有其一定功效」、**「立法機關就當前對夫妻忠誠義務所為評價於無違社會一般人通念，而人民遵守此項義務規範亦非不可期待之情形下，自得以刑罰手段達到預防通姦、維繫婚姻之立法目的」，立法機關將刑法第239條列於「妨害婚姻家庭罪章」即明確宣示系爭法條乃為保障婚姻家庭制度之維繫至為明白**。而「通姦罪為告訴乃論，使受害配偶得兼顧夫妻情誼及隱私，避免通姦罪之告訴反而造成婚姻家庭之破裂，同條第二項並規定，經配偶縱容或宥恕者，不得告訴，對通姦罪追訴所增加訴訟要件之限制，**已將通姦行為之處罰限於必要範圍**，與憲法上開（第 23 條規定之比例原則）規定尚無抵觸」等意旨釋字第 554 號亦解釋至為明確。釋憲聲請人等否定系爭法律與「婚姻制度具有維護人倫秩序、男女平等、養育子女等社會性功能」及「國家為確保婚姻制度之存續與圓滿」有關，完全誤解釋字第554號解釋之意涵，按此解釋文所稱**保障之婚姻制度之存續，除婚姻當事人「小我」之婚姻關係外更保障社會國民全體「大我」婚姻制度之遵循**，而釋文中所稱「圓滿」亦非如聲請人所誤解之「美滿」，圓滿與美滿有其層次的差異，至為明顯。任何人皆知婚姻及家庭生活之「美滿」須婚姻當事人及家庭成員之共同努力與經營，絕非國家法律能力所及，聲請人等曲解釋文原意。釋字第554號所謂「婚姻家庭制度之維繫及圓滿」其內涵即為婚姻家庭平穩安定之發展，此乃國家社會所期待及保障之社會環境，亦即所謂公共秩序、公共利益是也。

2. 次查配偶違背婚姻之忠誠義務，動搖夫妻婚姻關係中最重要的信任情操，致使另一方有被背叛在情緒上身心靈上受重大傷害外[註]，常因外遇增加與相姦人交際之費用等，以致減少原婚姻家庭之生活費，或依民法規定之相互扶持照應、日常家務互為代理人（民法 1003 條）、及夫妻間互負扶養義務(民法 1116-1 條)的品質及共有財產的減損(民法 1010 條、1030-1 條）等狀況在所難免，甚至如有非婚生子女出生，影響家庭財產權分配等等諸多有形財產權的侵害。均因配偶通姦以致另一方婚姻品質家庭安定性受傷害穩定性受威脅，凡此等均屬個人法益之侵害。而系爭法律乃為維護婚姻及家庭制度人倫秩序，有其社會性功能而設，故其通姦侵害之法益除上述個人法益外，社會法益亦受侵害，亦即此系爭法律預防犯罪、保障個人婚姻生活之存續及社會婚姻家庭制度之倫理價值，**個人私法益與社會公法益均為其保障之客體**，故不能輕言廢除通姦罪。

【註】依據耕莘醫院精神科門診的統計數字顯示，現今台灣至少有 46 萬個家庭正為外遇所苦，看診求助之已婚婦女中，3 成係因外遇問題所造成之外遇型精神疾病；有 8 成因此診斷出罹患憂鬱症；8 成有睡眠障礙；7 成 5 有環境適應障礙；及 7 成患有焦慮症，顯見配偶之通姦行為往往造成另方配偶之精神上創傷，而使另方配偶心理健康嚴重受傷害。

3. 但查刑事政策處罰本有預警、警示與教化等目的與作用。主張廢除系爭法律者又稱：有系爭法律社會通姦者不減反增，實務上又常以輕微量刑法律並未達刑事處罰嚇阻效果，社會上仍存大量的通姦事實，系爭法律僅成為對通姦配偶報復之武器，對婚姻及家庭之撕裂更甚；何況通姦行為為二成年人合意之性自主及隱私權之範疇，與他人乃至社會公益無關云云。試想！如謂刑罰效果不彰就廢法，那麼殺人、竊盜、詐欺、毒品等等諸多案件訴源不斷，難道要廢除刑法殺人罪、竊盜罪、毒品防制條例了嗎？如謂輕微處罰無法制止犯罪，因飢餓偷麵包量刑輕就廢竊盜罪，兒子賭博敗家，父母生氣打他耳光，傷害、賭博罪就廢嗎？此即刑法第 57 條規定付予執法人員裁量權之作用，以微罪輕

罰就主張廢法，實是非不明。刑期無期刑罰目的在教育而非報復，為目前刑法理論之主流，如果說刑法有通姦罪之處罰規定而社會上仍普遍存在有通姦之事實，無法消弭即謂刑法之規定毫無效益應該廢除，那應要廢除的不止通姦罪，所有殺人、放火、詐欺、侵占層出不窮的犯罪行為無法消除，豈不是要廢除刑法所有犯罪之規定？這社會豈不是無法無天？所以西德於一九六九年修刑法時以通姦案件少、量刑輕，無法防止通姦行為而主張廢除通姦的理由並不充足，吾人無須跟進。以上似是而非不合邏輯之說詞，均無理由。

4. **論者又謂民事責任及離婚制度已足以保障家庭與婚姻制度**（資料 P.156、173、182），但查民事訴訟程序冗長，且訴訟前須先繳納裁判費，況對請求因侵權所受損害亦負有舉證責任（民法第 184、185、195 條），如以配偶通姦為由請求賠償，不亦落入與刑事舉證同樣常易觸犯妨害隱私祕密罪之困境嗎？再者民事訴訟常有拖延訴訟，隱匿財產之情事，原告長期磨難於訴訟，不下於通姦罪之訴訟；最後如終於勝訴，強制執行卻常無所獲，僅得一紙債權憑證而已，豈能與刑罰之嚇阻警示效力相比。**刑法第 239 條科以刑罰有其立法目的與必要性，非民事訴訟請求損害賠償可替代彌補**，而釋字 554 號解釋對於論以刑法 61 條微罪輕刑之列，復因刑法以 245 條規定告訴乃論，給予通姦者與另一方甚至第三者間有協商談判轉圜之空間，乃立法機關立法時之用心配套設計。**權衡通姦罪侵害個人與社會雙法益而以刑罰輕刑論罪相較，並無違反憲法第 23 條保護目的比例原則**，聲請釋憲人等以刑法第 239 條通姦罪之處罰違反憲法第 23 條比例原則云云，並無理由。

肆、實務經驗分享

一、司改國是會議在討論兒少性別議題時，因女作家輕生，補教名師涉嫌性侵乃決議通過通姦除罪化，其決議內容主要考慮性侵案被害人提告常因證據不足而無法定罪，反遭被告配偶控告妨害家庭定罪，對人權保障不周。事實上，性被侵與明知有配偶之人而合意與之相姦情況完全不同，**國是會議以此理由主張廢除通姦罪，有引論不當及混淆通姦相姦罪刑成立要件之錯誤**。查刑法第 239 條科相姦人以刑責，係以明知對方有配偶之人而仍與之相姦者為要件。按通姦除罪無關性別平權，通姦是嚴重婚外情事件，破壞了家庭的和諧與信任，現代核心家庭的組成是父母與未成年子女，通姦的制裁不是針對性別，而是制裁對家庭的破壞者，讓無辜孩子及家人等受苦。至於兒少議題應以兒少保護為核心，通姦如除罪受害最深的就是下一代兒童，無法在親愛和諒解正常的家庭成長，主張廢法者卻推論通姦除罪與兒少保護有助益，顛倒是非完全不合邏輯（參見附件二）。另部分婦運團體或社會人士，因同情被誘姦之少女或未婚媽媽獨嚐偷吃禁果的苦楚，從而主張廢除通姦罪，亦有誤會。概如被誘姦或未婚媽媽在不知性交對象為有配偶之人時，並非刑法第 239 條所處罰之相姦人，反而彼等為妨害性自主罪之被害人，根本與通姦罪無關。

二、現行實務對通姦罪證據認定「通姦」之採證，以嚴格狹義之性器官插入、接合為基準，僅限於「姦淫行為」說為認定基準，實與社會一般發生「婚外姦情」為「通姦」之認知有相當程度之落差，司法界執法人員應瞭解社會一般認知之通念而採較廣義之「性行為」說，始與刑法修正後之「性行為」定義一致。今實務上所採狹義說，毋疑自設匡架限制「通姦」為體物化、機械化式之定義，而產生明明有「不軌」「傷風敗俗」之性行為，卻無通姦罪法可繩，為社會通念所不能接受以致影響對司法的信賴度。另釋字第 748 號解釋後，同婚者亦有婚姻關係（釋字第 748 號解釋施行法第 2 條、第 4 條），同婚者其追求伴侶關係

穩定，經營共同生活之渴望，約束雙方成立具有親密及排他性永久結合等，即與異性婚姻結婚互負忠誠義務彼此信賴之目的相同。現行法婚姻法既包括同婚及異性婚兩種，通姦罪既是為法保障社會婚姻及家庭維繫與圓滿之社會法益，及配偶個人法益而立法，則刑法第 239 條規定「通姦」之定義，宜重新定義。將同婚者及現行社會現實存在之各種性行為涵蓋，即通姦不再僅限是異性間性器官之插入、接合，宜擴張為廣義之「婚外性行為」，將異性、同性、跨性、變性（LGPT）均納入，相姦者亦然，如此才能發揮國家制定刑法之目的並利及社會公共秩序及公共利益。

三、婚外情、通姦罪為近來社會所常見之現象，於處理此類案件時，最好的方法即是進行調解、協商，讓陷入家庭風暴的當事人，坦然面對問題之所在，對自己婚姻、家庭存續與否以及將持何種態度處理深入檢討。世事百態，有通姦人要離，另一方不離、有通姦人不離，另一方要離、有通姦人不離，卻想享齊人之福、有相姦人逼婚，要通姦人離，有相姦人要未通姦者讓位，有相姦者大言不慚指未通姦配偶才是第三者，說「人家已不再愛你了」，天下事不一而足……三角關係感情財務混雜糾結，難以數計。清官雖難斷各家務事，有道是「身在公門好修行」執法人員、家事法庭的執事者或調解委員等可善用刑法第 239 條、第 245 條、刑事訴訟法第 239 條等規定，從中曉以利害關係，以及民事侵權行為精神上財產上物質求償權之靈巧運用，讓三方知己知彼好聚好散，勞燕分飛或浪子回家、紅杏不再出牆，亦或成全通姦與相姦人成雙達心願不再偷偷摸摸，各種不同的結果，就因當事人面對同一樣事物，心態不同，處理方式不同，結果就會不一樣。執法執事者如能給與當事人時間、空間並加以開導，不急於結案了事，定能將刑事及附帶民事訴訟一併解決並疏減訟源，依法行事護持正法，又能與人為善成人之美，為民服務又功德無量，真是美事一樁。

伍、論爭點議題

一、刑法第 239 條部分

(一) 刑法第 239 條之立法目的為何？其係為保障何種法益或基本權利而設？又因此限制或侵害人民何種基本權利？其審查基準為何？

1. 刑法第 239 條之立法目的，將該條文置於「妨害婚姻及家庭」罪章中，立法理由為利用刑法一般預防作用保護婚姻及家庭制度之完整性，以維護善良風俗及倫理道德，於不妨害社會秩序公共利益的前提下，制約婚姻中的性行為自由。

2. 保護法益有二，即保護婚姻及家庭制度完整性的社會法益及配偶之個人、婚姻、家庭的平穩發展及身心靈精神上、物質生活上之法益。前參之三之 1，之 2（本文 P.10～11）已詳述。

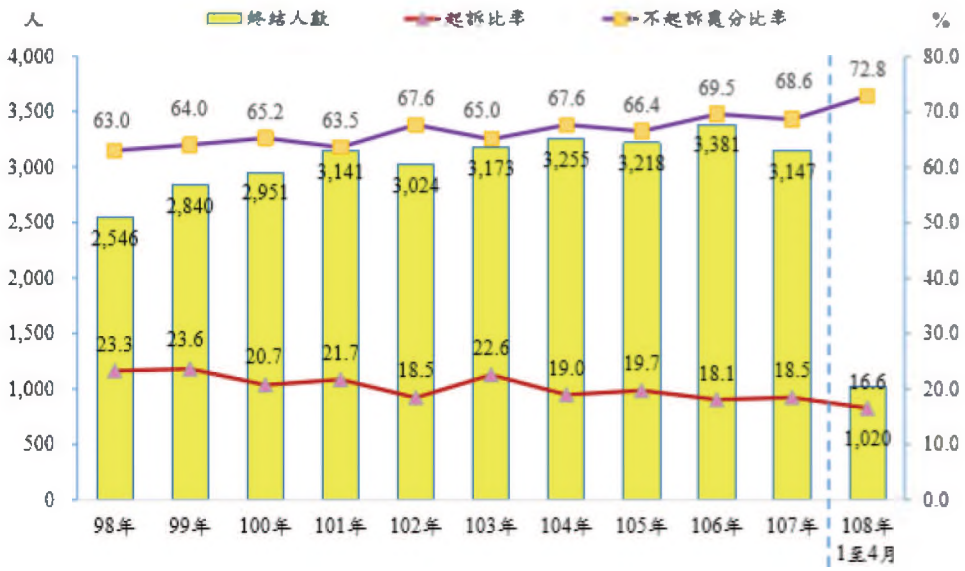
3. 刑法第 239 條限制婚姻中配偶不得與婚外人通姦之性自主權，同時亦限制明知他方有配偶者不得與之相姦人之性自由。雖涉及憲法第 8 條人民身體之自由保障問題，但審查基準在於憲法第 22 條中所謂是否「妨害社會公共利益」及憲法第 23 條之「維持社會秩序」、「增進公共利益所必要」部分。而此部分釋字第 554 號已明確闡述，見前參之二、之三（本文 P.7～11）所述。

(二) 刑法第 239 條處罰婚外性行為之手段，是否有助於所揭目的之達成？手段與目的間是否存有一定關聯性？

1. 通姦罪有助於立法目的之達成

依地方檢察署辦理妨害婚姻及家庭案件偵查終結人數表如後附圖示：

圖1　地方檢察署辦理妨害婚姻及家庭罪案件偵查終結人數



單位：人、%

項目別		總計	有罪 計	免刑及無期徒刑	有期徒刑 六月以下	有期徒刑 逾六月未滿一年	有期徒刑 一年以上未滿二年	有期徒刑 二年以上	拘役、罰金及免刑	無罪	不受理 a	撤回告訴 b	b/a ×100	其他
妨害婚姻及家庭罪案件	98年至108年4月	6,329	3,630	-	3,466	45	102	13	4	353	2,313	2,175	94.0	33
	結構比(%)	100.0	57.4	-	54.8	0.7	1.6	0.2	0.1	5.6	36.5	34.4		0.5
			100.0	-	95.5	1.2	2.8	0.4	0.1					
	98年	622	366	-	343	7	12	4	-	26	225	214	95.1	5
	99年	629	367	-	344	8	12	2	1	36	223	209	93.7	3
	100年	647	372	-	357	2	11	1	1	41	231	222	96.1	3
	101年	603	371	-	351	6	14	-	-	28	201	189	94.0	3
	102年	652	364	-	349	3	9	3	-	39	243	229	94.2	6
	103年	596	354	-	333	7	13	1	-	36	204	192	94.1	2
	104年	595	319	-	306	5	7	1	-	42	232	219	94.4	2
	105年	583	327	-	316	4	6	1	-	35	218	202	92.7	3
	106年	602	347	-	338	2	5	-	2	32	221	200	90.5	2
	107年	607	342	-	330	1	11	-	-	26	235	223	94.9	4
	108年1至4月	193	101	-	99	-	2	-	-	12	80	76	95.0	-
全般刑案	98年至108年4月	2,132,626	1,889,677	463	1,059,652	206,921	77,890	77,140	467,611	72,932	158,723	136,161	85.8	11,294
	結構比(%)	100.0	88.6	0.0	49.7	9.7	3.7	3.6	21.9	3.4	7.4	6.4		0.5

說明：本表全般刑案含法人(妨害婚姻及家庭罪案件無法人)。

法務部統計自 98 年迄 108 年 4 月，刑法妨害婚姻及家庭罪章之偵查終結數據顯示，提起刑事告訴之人數逐年增加、檢察官起訴之比率則逐年下修，而法院裁判有罪之人數則維持約 300 至 400 人間，足徵人民藉由通姦罪等婚姻及家庭罪章規定，維護自身權益之意識漸長，惟

有罪人數並未因此增加，**顯見通姦罪實有助於保障人民信賴婚姻關係存續期間之安穩及不受外力侵擾，並可預防及嚇阻通姦等破壞他人家庭及婚姻之行為發生**。

2. 以刑法第 239 條通姦罪，處罰婚外性行為，其手段與目的間存有實質關聯：

(1)主張廢除通姦罪論者，雖強調已有民事侵權損害賠償等配套措施得以規制通姦行為，惟以**民法損害賠償**之方式處理通姦行為對另方配偶所生侵害，無非將通姦行為有價化，對於婚姻家庭制度之價值反生不利之影響，況民事損害賠償之目的僅在於填補損害，除冗長訴訟程序外，常有拖延訴訟隱匿財產等問題發生，及至最後僅得一紙債權憑證，**無法彌補真正損害**尤其精神上損害難以金錢計算以致無實質意義；**刑事犯罪則係國家刑罰權之行使，二者目的作用、效果不同，實不可相提並論**。

(2)現行實務以刑法訴追通姦罪之制度，雖僅得判處 1 年以下有期徒刑，且首犯者多處 6 月以下有期徒刑，而可易科罰金，然於 1 年法定刑之規範下，承審法官尚得依個案情況裁量 6 月以上至 1 年以下之刑度，並無違憲法第 23 條比例原則，前已述明且縱判處 6 月以下之刑，得否易科罰金亦為執行檢察官之裁量權範疇，遑論再犯者，承審法官可斟酌刑法第 47 條累犯規定及第 57 條通盤考量犯罪後態度等情節酌定其刑，仍尚有多例因涉犯通姦罪而遭判處不得易科罰金之有期徒刑者。**由此以觀刑罰阻嚇犯罪之有效性，相較於罰金，限制人身自由之刑罰具有較大之警戒效果**，蓋其更易為人所預見，且於行為人及他人心理均能留下深刻之印象及警惕；限制人身自由之刑罰可以作為一種信號，藉此可使他人信服行為人確實對社會造成一定程度之危險，具有教化功能，況提告通姦罪並無礙其民事損害賠償之請求權。準此，將通姦罪所保障之法益與限制之法益兩相權衡，以刑罰處罰通姦行為，實有必要，堪以認定。

3. 本院釋字第 554 號解釋有無變更解釋之必要？

刑法第 239 條通姦及相姦人之處罰，依釋字第 554 號解釋，為確保婚姻制度之存續與圓滿，於不妨害社會秩序公共利益之前提下，約束夫妻雙方互負忠誠義務，並無如釋憲聲請理由所指違背憲法第 7 條、第 8 條、第 22 條、第 23 條等之情狀，本文第參章（本文 P.6～12）已詳加研討剖析，**應無變更解釋之必要**。

二、刑事訴訟法第 239 條但書部分

(一) 刑事訴訟法第 239 條但書之立法目的為何？其係為保障何種法益或基本權利而設？又因此限制或侵害人民何種基本權利？其審查基準為何？

1. 刑事訴訟法第 239 條但書之立法理由及保障法益：

查刑事訴訟法第 239 條但書規定「刑法第 239 條之罪，對於配偶撤回告訴者，其效力不及於相姦人。」此為刑事訴訟法所定撤回告訴不可分之例外規定，立法目的乃因告訴人之配偶，常因本於夫妻情義，對於配偶有所宥恕者，而對相姦者則未必然，若一併使其撤回之效力及於必要共犯之相姦者，有乖人情。換言之，告訴人得以單獨對通姦之配偶撤回告訴，乃為顧及婚姻關係中之夫妻情義、家庭和諧，期早日脫離訴訟牽絆，重修舊好，破鏡重圓，**促使婚姻關係得以繼續延續。此即刑事訴訟法第 239 條但書例外規定原本之目的，而對於相姦人不得撤回則係因通姦罪蘊含社會法益之故**。

2. 刑事訴訟法第 239 條但書規定，即告訴之撤回以是否為告訴權人之配偶而有別，造成得否撤回告訴之差異待遇，涉及刑事訴訟法第 238 條告訴不可分原則之平等權。

3. 以平等權審查之標準，刑事訴訟法第 239 條但書既有上開不平等因素，應予廢除。以貫徹刑事訴訟法第 238 條規定告訴乃論罪對於共犯之一人告訴或撤回告訴者，其效力及於其他共犯之立法意旨。

(二) 刑事訴訟法第239條但書之手段，是否有助於所揭目的之達成？手段與目的間是否存有一定關聯性？

1. 按通姦罪的告訴乃論，乃是尊重婚姻當事人維繫婚姻與否的權利，民國24年公布刑法第239條通姦罪立法當時之社會背景，以父權為重，男女社會地位及經濟能力差異較大，女性常為弱勢，而通姦者多為男性，刑事訴訟法對通姦配偶撤回告訴效力不及於必要共犯之相姦人，係屬對弱勢者之保護；且係對相姦人予處罰性之宣示，以維護善良風俗社會秩序。**但書之手段**是有達**立法當時**所揭目的，**其手段與目的間仍有某種程度之關聯**。

2. 惟查時至現今，男女、教育、工作、經濟各方面均日趨平等，父權為主不再，個人對婚姻家庭經營觀念，小家庭制代替三代同堂，社會人際關係頻繁，社會風氣日益開放，對離婚的認知與過去社會亦不同。雖然社會一般仍然認為結婚是人生終身大事，但婚後不合即離，離婚不再視為羞恥事；不能愉快相處的二人，不必勉強婚姻生活，幾乎是現代人的共識。從而發生婚外情通姦事時，在講求速度效率的現代人，**通姦罪告訴乃論，反而與離婚有手段及目的的關聯。刑事訴訟法但書的規定，撤回告訴效力不及相姦人，已不全然與維繫婚姻家庭和諧等目的有關聯**。徹底告訴、撤回告訴效力及於相姦人，亦即提告全告、撤告全撤，將迫使婚姻當事人及第三者更理性面對三角關係之實相，總檢討婚姻及家庭各種元素如子女、財產分配、扶養、贍養諸多問題，從而對個人「小我」以及社會「大我」婚姻家庭制度之維持與圓滿更有積極意義，且可杜絕仙人跳之類不法事件發生。如前所述**刑事訴訟法第239條但書規定，既有失平等原則，而平等權的法益位階高於保護弱勢原則，乃建議立法機關就此但書例外規定應予廢除**。

陸、結論

一、法律是最低的道德規範，也是人類社會一般認知應遵守的習慣規律所形成，在我們社會存在已久且深植人心的是～有婚姻關係不可以有通姦行為，如果冒然將通姦罪廢除，必定給社會帶來非常大的衝擊。一般的人民總是認為法律沒有處罰的就是可以做的，那麼通姦罪廢除後，一開始大家直覺「通姦無罪」，接著會覺得通姦「不要緊」，再來就會變成「通姦可以」，在兩性關係開放的今天，無疑雪上加霜，豈非以「除罪」來鼓勵婚姻外之性行為氾濫？

二、司法國是會議雖通過「通姦除罪化」，但此乃與會社會金字塔尖端極少數人士之見解，不能代表是社會大眾的一般「通念」。**通姦罪規定於「刑法婚姻家庭罪章」，即明確宣示其保障之社會法益重於婚姻配偶權之個人法益**。而聲請釋憲人等所持理由卻呈極端對比，強調個人性自主權，否定通姦罪妨害社會婚姻家庭制度之社會公益。　鈞院衡酌此關係是否違憲之前提事實條件～**「是否維護婚姻與家庭制度」「不妨害社會秩序公共利益」**等時，自不應以聲請人等及少數社會人士之認知為依據，**應回歸最有能力體察社會環境背景因素之最高民意機關立法院來判斷**，甚或以公投方式來決定現今台灣社會對通姦罪廢存問題之看法。立法不易，廢法更不能草率。

三、古哲人言「人生三重境界，看山是山看水是水 → 看山不是山看水不是水 → 看山是山看水是水」，論者或因迷思於個人性自主權至上，及國際時尚潮流，未能明察事理真相，僅見表相假相，以致看山不是山，看水不是水，主張廢除通姦罪。冀望　鈞院為國家最高司法機關，憲法法庭諸位大法官學養登峰、經歷豐碩已達人生最高境界，明心見性、洞察細微，看山還是山看水還是水內涵卻不同。寄望藉此次憲法解釋案能終結沸沸揚揚二十多年來爭論不休的通姦除罪問題，並對婚姻價值、家庭制度之維繫及社會公共利益之發展等為正能量之詮釋，守護臺灣社會良善秩序及文化底蘊。國人頂禮致敬，是所期盼！

【附件一】建議事項

一、通姦罪廢除與否屬立法修法廢法事宜，應為國家最高立法機關之立法權責，不宜由大法官以釋憲形式行實質立法權，以免有踰越之虞。

二、釋字第 748 號解釋同婚法施行後，婚姻包括同性婚與異性婚，為保障婚姻家庭制度之維繫，刑法第 239 條「通姦」「相姦」行為應重新定義，而非狹義之異性性器官之插入或接合說。按「姦」即性行為，故應涵蓋同性、異性、跨性、變性者所有之「婚外性行為」。社會變遷婚姻內涵已變更，刑法第 239 條「通姦」罪行要件應予修正以符合刑法修正後妨害性自主罪中「性犯罪」行為要件之一致性。

三、為貫徹告訴權不可分原則，應廢除刑事訴訟法第 239 條但書例外條款規定，以符合憲法第 23 條之平等原則。

四、釋字第 371 號法官之釋憲行使權宜嚴加約束，以免浮濫。我國司法審判採三級審制，地方法院之上級審高等法院，再上級最高法院均有定期舉辦法律座談會，其決議宜有約束下級法院之效力。聲請釋憲權宜應於其上級法院統一見解不可得時，方得聲請大法官釋憲。否則如本案同級地方法院，審理同類型案件，因極少數承審法官個人不同見解致與全國其他絕大多數法官用法不一，徒增執法人員用法不確定之困擾，並且妨害訴訟當事人權益，影響人民對司法之信賴與政府之威信至鉅。

【附件二】《論 通姦罪，該不該除罪？

～我們處在一個自以為聰明卻最為自私的世代》

【附件三】《停聽看通姦除罪化》

論 通姦罪，該不該除罪？

我們處在一個自以為最聰明卻最為自私的世代

文：尊重生命全民運動大聯盟

論 通姦罪，該不該除罪？

----我們處在一個自以為最聰明卻最為自私的世代

文：尊重生命全民運動大聯盟

講個故事： 聰明建築師

有一天，一群建築師看見有許多人在亭子下吹著涼風，很是快樂。於是，亭子驕傲地跟建築師們說：「你看，涼亭四處通風，人來人往自由，為什麼要歧視我們，說我們不是住宅房屋？」建築師於是認真思考是否應該與時俱進，人人有其自由各取所需所愛，又不傷害別人，有何不可？況且在建築概念上操作一下，並非難事。儘管其他同業者有所批評和反對，但是這群建築師還是代表建築界改變房屋定義，從此，亭子和傳統房屋一樣，都是人們可以選擇的住宅，都稱為房屋。他們相信如此之後應該會有皆大歡喜的自由氣氛，想著想著不禁拍拍手，讚嘆自己太聰明。

不多久，這些建築師又發現住在傳統房屋中的有些人不願「正門」進出，為能任意隨〝性〞只好爬牆爬窗。這點又觸動了這群建築師。於是心想，少了幾面牆的限制，房屋還是房屋，人就可以自由進出，無須狼狽，即不會增加也不會減少家人關係間原本就存在的種種問題，又有何不可？聰明的我們做得到啦！

故此，這群聰明建築師認真思量：「房屋少築幾面牆其實無妨；倘若還想要牆的人可自行設計、不需要的人能自得其樂，如此，豈不又是兩全其美了……。」

這故事的後來，我們可以臆測，當地震或風雨或盜賊來臨時，住在其中的人將面臨什麼景況？

人類古老社會演化出強制性一夫一妻結合規範

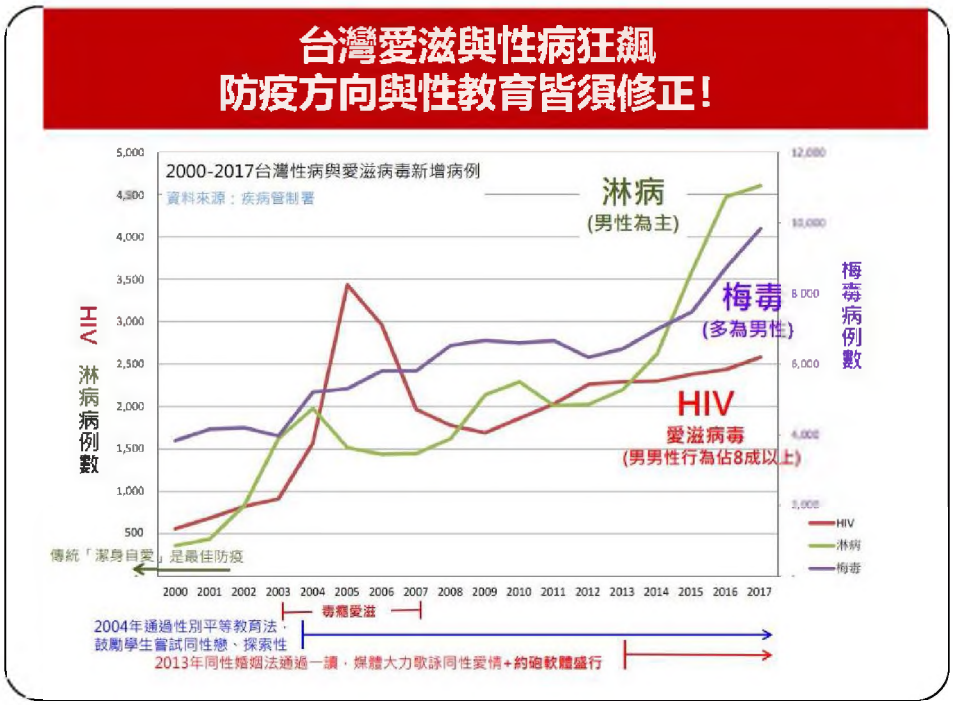
社會人類學研究[1]指出，歷史發現，已知的人類古老社會大多數（曾經是或至今還是）允許一夫多妻結合；然而，一些最成功的農業社會，其一夫多妻型態逐漸被「社會強制性的一夫一妻制（socially imposed monogamy）」所取代，這演變發生的時間點是從狩獵採集的社會變遷到農業社會形成之時，其改變的結果是形成了較大的聚落。隨後，近幾千年來，世界人口不成比例的成長，是由相當少數的社會所驅動達成，而這些社會很多是實行社會強制性的一夫一妻制。這種透過禁令式的社會規範來實施一夫一妻制是人類社會特有現象，一夫一妻制規範伴隨以昂貴處罰（costly punishment），要求人們性行為受到高度管制，這與動物性擴張繁殖的本能和人的本性似乎有違，引起社會人類學家的好奇。

該研究發現，在現代醫學介入之前，「性病傳播（STIs）對人類祖先的選擇帶來巨大壓力」；於是在聚落大小、性病動態和社會規範之間的相互作用下，控制性病的傳播是導致人類社會演化成強加一夫一妻制度，不可漠視的因素。該研究參照淋病、梅毒和披衣菌等性病的流行病學史發現，在聚落小且零散的地區，性病很難得以廣泛傳播，一夫多妻制就占主導地位。然而，在人口密度較高且群體連結性較強的農業地區，性病則易在地區流行（特別在此地區，一些一夫多妻的網絡同時發生性病感染）而衝擊生育力。一夫一妻制使群體降低性病盛行率，反之，一夫多妻制由於性病流行造成醫療負擔和人口減少。因著疾病的競爭性，人類選擇隨之調整，即開始懲罰一夫多妻型態而推崇一夫一妻。該研究為社會強加性一夫一妻制的出現提供了解釋途徑，並豐富了我們對該規範為何會伴隨代價高昂的懲罰之演變的理解。

[1] Bauch, C. T. & McElreath, R. Disease dynamics and costly punishment can foster socially imposed monogamy. *Nat. Communication.* 2016 https://www.nature.com/articles/ncomms11219

反觀現代醫學治療介入的今天

相較幾千年前的古老社會，**現代醫療進步，性病有抗生素等藥物可治，不致於死亡；但是依然具有感染性，並且影響生育力**。2017 年研究顯示，女性不育症是全世界主要的公共衛生問題，大多數病例歸因於性病[2]。「**披衣菌和淋病是可導致不育的性傳播疾病**」[3]。2018 年美國CDC（疾病管制與預防中心）[4]估計，披衣菌、淋病和梅毒置感染男女和嬰兒於嚴重的終生健康後果中，如慢性疼痛、生殖健康的嚴重併發症和愛滋。而且未診斷的性病，導致該國每年造成不孕婦女超過 2 萬人。婦女梅毒不會不孕，若生產，孩子則會得新生兒梅毒，導致新生兒嚴重健康併發症和死亡；淋病造成男性副睪炎而不孕。另一資訊也指出，女性梅毒易流產，梅毒也造成男性副睪炎而不孕[5]。至於台灣，性病感染情況如何？以下是以疾管署數據所整理的資料：



（圖一、2000 年~2017 年，台灣**全體國民**性病與愛滋病毒**每年新增之病例數**）

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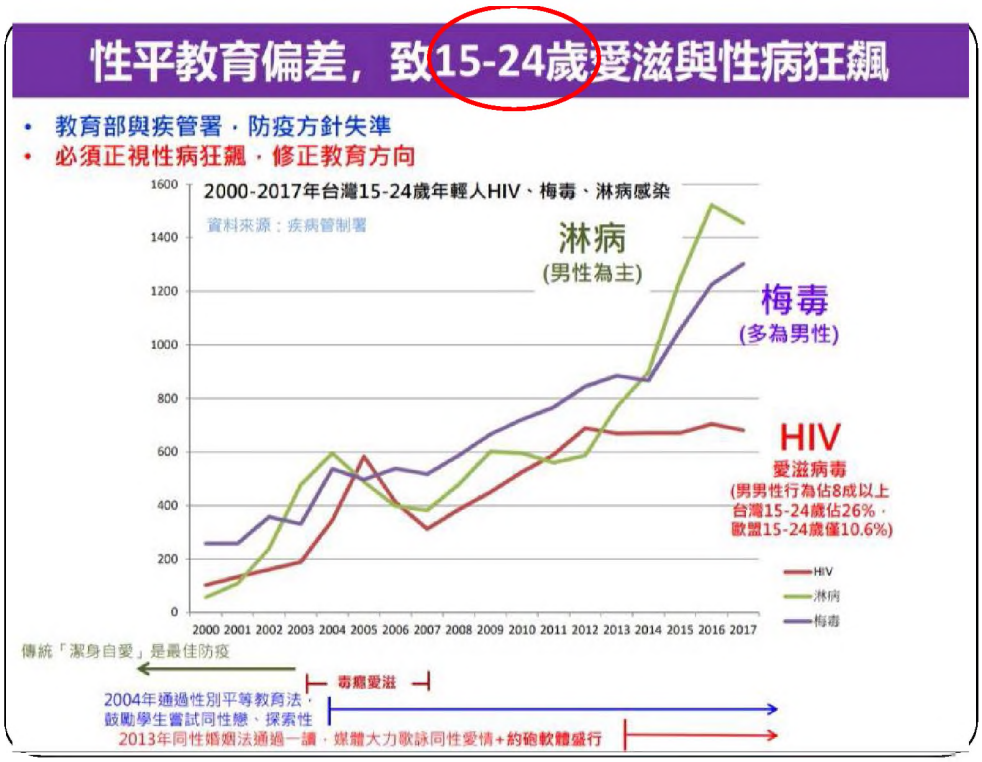
[2] Sexually Transmitted Diseases and Infertility *Am J Obstet Gynecol.* 2017

[3] STDs and Infertility. *CCRM fertility* https://www.ccrmivf.com/stds-infertility/

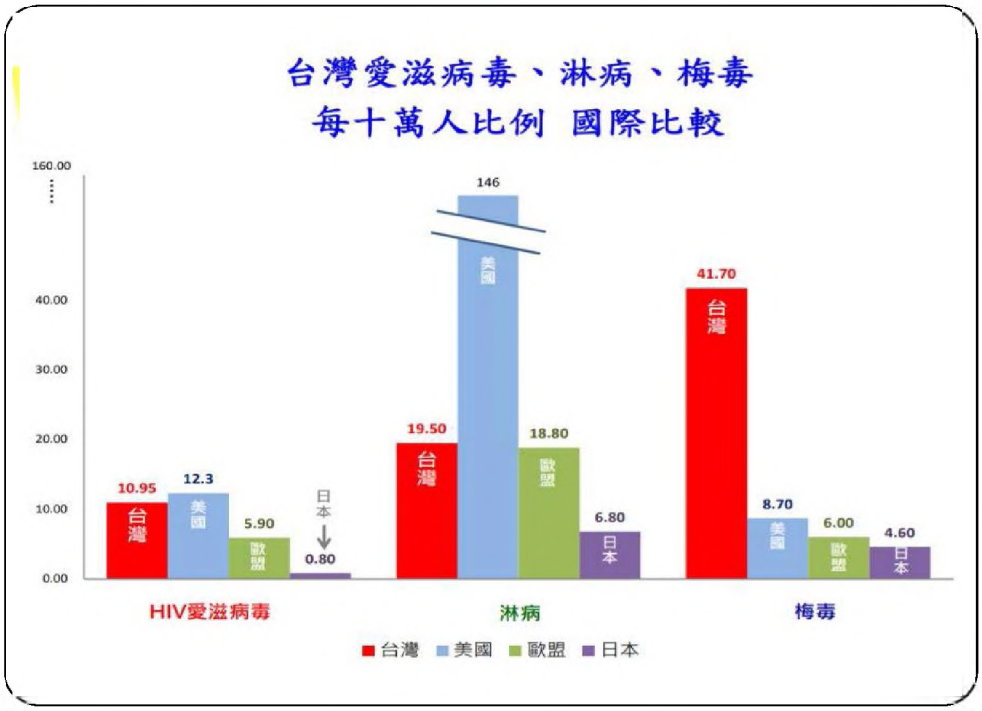
[4] https://www.cdc.gov/nchhstp/newsroom/docs/factsheets/std-trends-508.pdf

[5] https://www.bustle.com/articles/158969-6-stds-that-can-affect-fertility



（圖二、2000 年~2017 年，台灣 **15-24 歲國民**性病與愛滋病毒**每年新增之病例數**）

將國內疾管署資料與美國、歐盟及鄰近日本之性病衛生資料相比，顯示如下：



（圖三、台灣與美國、歐盟及日本之性病感染數據比較[6]）

[6] 每 10 萬人中 HIV 新案例數、梅毒及淋病通報數（台灣為 2017 年疾病管制署資料，美國為 2016 年 CDC 資料，日本為 2015-2016 年國立感染研究所及文獻資料，及歐盟為 2015 年 ECDC 數據）

台灣制定一夫一妻婚姻制度，但近年來，其他法律、政策和教育等面向並未支撐這個制度。隨著倡議性自主權和性自由的人權思潮，社會風氣愈來愈加速開放，一夜情、婚前或婚外性行為、婚外同居、多人開放性關係等屢見不鮮，如圖，**台灣性病盛行率明顯持續上升**的現象，應不屬偶然。

性病導致不孕，不孕患者求助於昂貴的人工生殖輔助技術；台灣一份本土醫學研究指出，此技術提高下一代的終生健康風險[7]，這種惡性循環已然在國內運轉。更甚者，世界衛生組織（WHO）人類生殖醫官威伊（Teodora Wi）指出，超級淋病[8]（即抗藥性淋病）問題「非常嚴峻」，全球已有 3 例無藥可醫的個案；反觀台灣，2014 年疾管署科技研究計畫的報告即已指出，該計畫五年來所收集的淋菌菌株已出現了抗藥性現象，密切監測中[9]。以上研究顯示，國內偏重保險套的防疫政策須重新檢討，也看出社會風氣對一男一女、一夫一妻婚姻制度的態度似乎愈來愈可有可無。

國家形成之後一夫一妻的立法

有趣的是，近幾百年來，一夫一妻制的婚姻遍及歐洲，更近期幾乎遍及全球。一

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[7] 台灣研究，從 2011 年到 2017 年，人工生殖輔助技術（ART）產生的嬰兒比自然受孕新生兒有較高風險，諸如，極低的出生體重、先天缺陷風險及早產…心血管壁較厚，舒張壓較差及有較大的心房。…有較高的高血壓機率…自閉症機率是自然受孕者的二倍…容易發生輕度至重度的智能障礙…試管嬰兒有較高的癌症風險。
Children Conceived by Assisted Reproductive Technology Prone to Low Birth Weight, Preterm Birth, and Birth Defects: A Cohort Review of More Than 50,000 Live Births During 2011–2017 in Taiwan. *Front. Pediatr.*, 2020
https://www.frontiersin.org/articles/10.3389/fped.2020.00087/full?&utm_source=Email_to_authors_&utm_medium=Email&utm_content=T1_11.5e1_author&utm_campaign=Email_publication&field=&journalName=Frontiers_in_Pediatrics&id=517090

[8] 〈口交感染 超級淋病無藥可醫〉，自由時報 2017-07-08
https://news.ltn.com.tw/news/world/paper/1117093

[9] 〈性病病原菌檢驗、監測與流行病學研究-II〉衛生福利部疾病管制署 103 年科技研究計畫
https://www.cdc.gov.tw/File/Get/sqrAKrJg_Uq8Ki5B0HtO3g?path=Q0tfCn_a2UczUvDO5Rr9NUTdE-k4yRstwVU_Z3lcm4Z9U_jL9jzmAGyF0zgKmSqi&name=vx4u_F_Wtr-qdNTnpJgN_ScSnHsJqJkJZGkkjuGgW7x4vmdvjeTBlfqAD73N7qvX

份橫跨各人類科學領域所提出的研究證據匯集而成的研究發現[10]，在近代文明進化的過程中，一夫一妻「規範性」制度之所以得到各個國家極大的青睞，原因是它的「群體獲益效應（group-beneficial effects）」。群體內的競爭時，此制度效應也能促成其成就。**一夫一妻制婚姻能夠因減少未婚男子人數而降低社會犯罪率及減少個人虐待、配偶年齡差距縮小、降低性別不平等現象。而且，該制度將男性努力的焦點從「尋找妻子」轉移到「做一個父親的投資」上，如此，雖（個人）生育率下降一點，但不僅能減少家庭內部衝突，從而降低了對孩子的忽視、虐待、意外死亡和兇殺的發生率。此外，還能促進儲蓄的增加、增加對孩子的投資並改善孩子的未來出路以及大幅提高GDP（國內生產總值）。**

如上述，現代國家形成後，絕 大多數國家選用 一夫一妻 制度，也多在法律中有通姦罪處罰規定，就不太令人意外了 。很遺憾的，近年來，各國紛紛廢除通姦罪以及改變婚姻制度，成為世界潮流，台灣也積極趕搭這流行列車。

回到刑法第 239 條來看，到底是否該廢除？正反兩方許多論述重點多聚焦在婚姻制度中夫妻兩人和婚外第三者的感情和權利，似乎忽略去考量婚姻家庭中重要的成員---我們的下一代---的權益問題。殊不知他們是我們生命的延續，而且對社會和國家的未來永續發展至為重要。下一代的最佳權益應當一併考慮，才能更合理衡量刑法第 239 條是該廢，還是不能廢。

釋字第 362、552、554 號解釋指出，「婚姻與家庭為社會形成與發展之基礎，受憲法制度性保障」。這句話很清楚，國家徒有土地和主權，沒有人口不成國家；人民的存在才是社會得以形成與發展的基礎。培養健康後代應當是國家最重要的

[10] Joseph Henrich, Robert Boyd and Peter J. Richerson The puzzle of monogamous marriage. Philosophical Transactions of the Royal Society B: Biological Sciences. 2012
https://royalsocietypublishing.org/doi/full/10.1098/rstb.2011.0290
該研究發現，以男性犯罪率來看，結婚使之明顯下降，美滿婚姻比普通婚姻更具預防性；離婚或喪偶時犯罪率會上升。**未婚同居則不能降低犯罪率**。

考量而將婚姻納入制度化管理的原因，同時，人民身心健康，國家才得以富強亦是必然道理。**554 號解釋：「婚姻制度植基於人格自由，具有維護人倫秩序、男女平等、養育子女等社會性功能…」，很巧妙地與上述研究之「群體獲益效應（group-beneficial effects）」相符合，並且明確指出婚姻制度中有養育子女的重要功能。**「國家為確保婚姻制度之存續與圓滿，自得制定相關規範，約束夫妻雙方互負忠誠義務。」；若一夫一妻互負忠誠義務，共同經營家庭，自然其最大受惠者是他們兩人的孩子（們）。有些研究顯示[11][12]，在與親生的父親與母親同住的自然家庭中，子女情緒問題發生率最低，幸福感比例最高。沒有下一代，社會必將萎縮；沒有健全的下一代，國家難有好未來。

刑法第 239 條規定「有配偶而與人通姦者，處一年以下有期徒刑。其相姦者亦同。」「通姦罪所定義的「通姦」十分狹隘，只有一男一女的性器接合才可構成通姦要件，某匿名A律師表示，多數法官甚至將口交等性行為排除在外。」[13]

這樣，就很明白了，想必當初法律制定者自知法律是道德的最低限度，故並不管束男歡女愛的可能，親吻、擁抱、甚至口交、肛交等也都不在他考慮的規定之內，只要求男女自制，不准性器（生殖器官）的接合即不准有發生懷孕的任何可能。粗一點的說法，就是不准玩到有孩子。可見「惟本罪之目的係希望藉由刑罰之預防功能及嚇阻性，使夫或妻不為通姦行為…」[14]。因為一旦與婚外第三者有了孩子，國家即認可這胎兒的生存權（民法第 7 條規定：胎兒以將來非死產者為限，關於其個人利益之保護，視為既已出生），而且不准墮胎來殺害這生命（刑法第 288、289、290、291、292 條）；即便如此，生米煮成熟飯的兩人如何對得起這

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[11] Sullins（2015）National Health Interview Survey（以 20 多萬個 4~17 歲子女為研究對象）
https://www.lifesitenews.com/news/sociologist-evidence-shows-homosexual-parenting-harms-children

[12] Flinn, M., Ward, C. & Noone, R. J. *Hormones and the human family.* In Handbook of evolutionary psychology(ed. D. Buss), pp. 552–580. New York, NY: Wiley. 2005

[13]〈通姦除罪化 到底除什麼？〉https://castnet.nctu.edu.tw/castnet/article/11457?issueID=675

[14]法務部函送「刑法通姦罪修法方向之說明」p.596
https://lci.ly.gov.tw/LyLCEW/agenda1/02/pdf/09/01/07/LCEWA01_090107_00166.pdf

個小孩？如何給他一個健全完整的家庭？並使國家陷入兩難，即要維護整體公益所制定的原有法律的同時，又如何能給予這孩子相同其他孩子的法益保護？同時，外遇者是如何真實地傷害其配偶的感情與權益？倘若原本家庭已有孩子，則家庭生活的摧毀又如何直接傷害兩人原有孩子的身心健康？是故，通姦行為嚴重破壞男女雙方在婚姻關係中應負之忠實義務，嚴重侵害配偶之法益，破壞家庭和諧以致直接傷害配偶及家中孩子，也傷害這外遇關係中的第三者和孩子。

此等自私失職的無節制行徑，造成他人和社會秩序無法抹滅的種種有形無形的損失，理所當然具有可罰性。此等行為關係國家重大利益和社會秩序，屬國家決定刑罰權行使之範圍，故以刑法規定具正當性。再者，「……**國民對於通姦罪之存在並非無認知之可能性，亦無不能遵守規範之情形，以刑罰作為一般預防的手段，杜絕通姦行為之氾濫，並無不當。本罪處罰行為限於『男女性器接合』之姦淫行為，範圍已較刑法第 10 條定義之『性交』狹隘，刑度亦僅為『一年以下有期徒刑』，且有告訴乃論罪作為起訴之條件，已符合比例原則及罪刑相當性原則。**」[15]

國家其他部門的責任何在？

必須承認，法律有其功能之限制，法律只是道德的最低限度。如果一個國家所有事務責任和結果都丟給法律「解決」，如此，國家的其他部門都應廢除。若只要因社會中發生通姦行為，即表示通姦罪處罰規定不足以避免犯罪行為發生而應除罪化，這樣的邏輯，其它犯罪行為，又有何不可廢除的理由？如此，法務部直接改名為「廢法部」即可。至於，司法院在不斷解構法律的時候，不應只考慮個人性愛的自由與權利，也不應考慮廢除通姦罪對婚姻沒有什麼太大影響（試想，**通姦除罪後，社會難不趨向一男多女、一女多男，甚至多男多女的方向發展，一夫一妻只剩其名，實將瓦解**，如前述之各國數據研究，可預測其後續可能的影響），

[15] 同上 p.597

而應思考並具體提出通姦除罪化之後，為國家、社會、家庭、下一代到底帶來什麼合理好處？再者，「**一個由人類文明自然形成，行之數千年，受民族文化、傳統思想薰陶，而與全國人民生活息息相關的婚姻制度，在考慮…之際，能不斟酌歷史學家、人類學家、社會學家、教育學家、醫學專家、宗教團體、家長團體的意見？**僅憑數位與大法官相同背景的法律學者…，能增添多少能力？」[16]

沒有家，哪有國。要達到維護婚姻及家庭之目的，不是在拆除最後界線，而是該著重在預防性教育。所謂不教而殺謂之虐，故應在法律之前，先行積極推動教育：學校性健康教育、家庭教育和社會教育，以及重視文治教化，開創良善社會風氣。試問，衛福部、文化部、教育部等各部會之存在是否有責任應該齊心提出具體政策和作為，合力推動社會改造，指引青少年和成年民眾認知「一夫一妻制度之婚姻與家庭」所需負的責任，以及習得經營和維護個人婚姻家庭所需的知識與能力（skill），並提供足夠的支援與資源？如果這些部會都不具功能或往相反維護家庭的方向推動，致使人民無法正己守法，家庭無法安全穩定，最後，司法沉重面對許多無法處理的社會問題，又只能便宜行事，選擇刪改法律而無更佳法律制定或配套措施的作法，這樣推展下去，我們國家的未來將是何種景況？

以古為鑑，可知興替。先人曾對婚姻制度做出了選擇和維護，我們這個自以為最聰明卻最為自私的世代，如今該作出何種選擇？只能說，司法諸公的定奪必將產生後果，是人民之福？還是禍？隨著時間推移，必將昭顯；諸公的判決在歷史中也必定留名，是美？是臭？後人必將公道論斷。

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[16]〈同性婚姻應該合法化嗎？〉台灣高等法院法官 陳筱珮
http://chinadev.ucanews.com/2019/02/25/%ef%bb%bf%e3%80%90%e8%a9%95%e8%ab%96%e3%80%91%e5%90%8c%e6%80%a7%e5%a9%9a%e5%a7%bb%e6%87%89%e8%a9%b2%e5%90%88%e6%b3%95%e5%8c%96%e5%97%8e%ef%bc%9f/?variant=zh-hant

停聽看

通姦除罪化

前最高法院法官
台灣省諮議會議員
許幸惠

停聽看通姦除罪化

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近日在司法改革國是會議上重提十多年前沸沸揚揚的通姦除罪化問題，並經通過。年代雖有變遷，但人性依然、情理法依舊，是否有刪除刑法第二三九條之必要，末學深以為茲事體大，有再深入探討之必要。茲將九十一年一月間所著「停、聽、看通姦除罪化」一文，摘錄於下，俾供參考。

論者謂通姦不處罰是潮流，順應世界各國立法的發展，挪威、丹麥、瑞典、芬蘭、英格蘭、西德等歐洲國家早已廢除通姦罪，就是鄰近的日本，及對岸中共也都不處罰通姦行為。我國刑法第二百三十九條通姦罪的處罰規定，在婚外情以男性居多的台灣社會常製造「兩個女人的戰爭」，並無法提昇婚姻的品質。婚外情是社會多元化與複雜的人性使然，法律特別是刑法不僅不該涉入，也無從提供解答，這個空間應該留給當事個人用其他的方式去面對去學習，法律無規定處罰之必要。

真的這樣嗎？通姦罪的廢除就可以消弭兩個女人的戰爭了嗎？通姦罪的廢除就可以減少夫妻的摩擦提昇婚姻的品質了嗎？通姦罪的廢除就容易挽救婚姻的危機、減少離婚了嗎？其實婚外情的處罰，應該說人類社會有法律開始就有處罰的規定，不管那法律是成文是不成文，對於不是婚姻關係所為之男女性行為都有處罰的律法，以民主、自由、自主人性人道等等理論思維的推演，廢除通姦罪乃是近幾十年的事。我們透過一九六九年西德、一九七九年中共廢除通姦罪（一九八〇年一月一日起施行）歸納其廢除的理由，從各角度來探討，通姦罪有必要在這個時候廢除嗎？

甲、綜括主張廢除通姦罪的理由不外如下：

一、通姦罪數量稀少，量刑輕微在刑事政策上沒有規定通姦罪的必要。在案件的數量上，從一九五八年到一九六六年之間全西德每一年成立的通姦罪都在一百件到二百件之間。在刑罰量刑方面，以一九六六年為例，在全年一百三十六個成立通姦罪的判決中，有一百一十七個是判罰金，其餘宣告自由刑的判決，絕大多數都同時宣告緩刑，動用刑罰情況很少。

二、從實際情況來看，因為通姦罪是告訴乃論的犯罪，因此通姦罪的規定提供受苦者有法源根據進行報仇，

甚至貫徹金錢上的要求去勒索，這樣的規定毋寧說對婚姻的尊嚴以及婚姻的維護都沒有幫助而是有害的，通姦罪的告訴對於配偶之間的關係，也只有破壞的作用，而沒有建樹的作用。

三、一九六二年西德聯邦參政院提出的刑法草案保留通姦罪規定的目的是在塑造與維護所謂善良風俗以及國家視婚姻為社會共同生活重要基礎的宣示作用，但國家動用了刑罰權，從來也不曾稍微改善社會大量的通姦事實存在，可見無法發揮塑造及維護善良風俗的功能。通姦罪的處罰，既不是有效保護婚姻及家庭的手段，而僅僅是止於為國家做表面重視婚姻的宣示而已，而為了宣傳就以對人民的刑罰做為代價，有違背法治國家衡平性原則。

四、通姦罪所要保護的法益究竟是什麼？男女結婚是共同經營家庭生活為目的的契約行為，夫妻雙方雖各負有貞操的義務，但身體還是自己的，並非妻的身體歸屬夫所有，夫的身體歸屬妻所有，所以發生婚姻外之性行為，純屬個人生物生理行為。如果依照傳統的法益三分法，區分為個人法益（又可分為專屬法益及非專屬法益）、社會法益、國家法益。通姦罪無被害人之存在，無行為侵害客體，即無「應刑罰性」，故不應論罪。

五、通姦罪的廢除並不致於誤導國民意識，例如廢除通姦罪的挪威、丹麥、瑞典、芬蘭、英國等國家，通姦

罪的廢除對於國民意識關於婚姻意義的認知並沒有影響。而西德對於婚姻的保護，在西德的基本法第六條及其他法律例如婚姻法以及家庭法，已經有所規定，因此沒有必要保留通姦罪之規定。

六、通姦是從婚姻制度和舊思想意識帶來的不良現象，是道德問題，應靠教育和社會輿論逐步加以解決，靠刑罰解決不了。通姦有各種不同的原因，有許多複雜情況罰不勝罰。

七、一般婦運團體主張除罪化，因為通姦罪常使通姦之女方（第三人）受到報復性處罰，男方則常置身事外（太太通常撤回對丈夫的告訴，而使第三者女方受罰），顯不合理，不如廢除通姦罪罰規定。又因為許多已婚男性只會玩弄未婚年輕女性，造成未婚媽媽之社會問題，結果涉世未深之女性不但受刑罰，且在男性不負責任之下，造成許多社會問題，亦顯然不公平，因而有廢除通姦罪之主張。

乙、唯上開諸立論理由，顯不夠堅強，且亦非解決婚外情之正途：

一、因為稀少的有罪案件（通姦罪為告訴乃論之罪），輕微的量刑又無法制止社會上大量的通姦事實存在，乃主張廢除通姦罪，這樣的思維方式是非常不合邏輯且不務實的想法與作法。我們難道可以因叛亂、妨害國家的案子很少就不立法處罰了嗎？我們難道可以因賭博、打人耳光、因飢餓偷麵包量刑輕就廢除了

賭博、傷害、竊盜罪嗎？刑期無期刑罰目的在教育而非報復，為目前刑法理論之主流，如果說刑法有通姦罪之處罰規定而社會上仍普遍存在有通姦之事實，無法消弭即謂刑法之規定毫無效益，應該廢除，那應要廢除的不止通姦罪，所有殺人、放火、詐欺、侵占層出不窮的犯罪行為無法消除，豈不是要廢除刑法所有犯罪之規定？這社會豈不是無法無天？所以西德於一九六九年修刑法時以通姦案件少、量刑輕，無法防止通姦行為而主張廢除通姦的理由，並不充足。

二、主張廢除通姦罪者，多稱通姦罪沒有被害人的存在，法律保護的客體是什麼不清楚。這是一項值得深思的問題。食色性也，人類群居社會，除經濟活動的規範，人與人間秩序的維持靠婚姻及家庭制度，縱使在男女不平等可納妾的時代，幾乎可以說不論古今中外對婚姻、同居以外的男女性關係，都有禁止有所處罰，隨時代的演進，一夫一妻制為中西文明世界普遍採取的婚姻制，也成為普世價值，如果因為我們的法律規定採取一夫一妻制度，並在法律上維持夫妻各別有獨立的人格，即妻非夫所有，夫亦非妻所有，就認為婚姻以外之通姦行為的當事人，即一男一女為滿足生理上需要而為生物學上的正常行為，並沒有侵害配偶的權益，這樣的論述，似乎是唯物主義的觀點，反而破壞一夫一妻制的精神。從前以妻歸屬為夫所有，或家長家屬歸屬關係，來論通姦罪的被害客體，現代男女平等，夫妻身體不再歸還對方所有，

即以二分法原理謂通姦行為無侵害客體，毋寧否定了人類婚姻制度。請問，天下有沒有因配偶一方有通姦行為，而完全無動於衷，絲毫不會影響婚姻生活的情緒氣氛，不會影響婚姻生活的品質的呢？主張廢除通姦罪之論者，以為通姦罪之處罰規定提供一個危險的手段讓「受苦者」有進行報仇、勒索之機會，而這樣的做法對婚姻的尊嚴以及婚姻的維護都沒有幫助。致於通姦罪之規定就婚姻的尊嚴以及維護有無幫助，係屬另一問題，容後討論。而事實上因通姦行為，既然有所謂「受苦者」，如果說通姦行為沒有被侵害客體，似乎說不過去，「受苦者」之「苦」何來？豈非通姦行為所致？致使人「受苦」，即為侵害行為。從而通姦罪有侵害之客體，甚為明顯。「受苦者」受的「苦」是什麼？一方面因配偶的不忠背叛致身心靈受創痛苦自不在話下。另一方面通姦人與相姦人因交往所增加之花費甚至買車買房租屋另築香巢等，減損原婚姻家庭的生活品質及財物供應，於是精神上與財產上均受侵害，豈能稱無受害客體？

三、完整合法美滿的婚姻當然不是靠法律就可維護，更不是通姦罪處罰規定就可維護，要有幸福美滿的婚姻生活是一大學問，精神、心理、生理、經濟、家庭各層面的條件配合，還有婚姻當事人的努力種種，不在話下，此屬另一值得討論的問題。但也絕非如支持除罪化者所言通姦罪對婚姻維繫一無是處，反而有害婚姻，破壞婚姻。實務上通姦罪之所以要告訴乃論，乃尊重配偶一方的選擇，當有婚外情通姦行為發

生時，他或她必定衡量自己婚姻關係之全盤情況決定是否提出告訴，這正是何以社會有大量通姦事實存在，而法院判刑案件不多？有選擇以通姦罪來終結婚姻者，也有主張提告通姦罪而讓浪子回頭維繫延續婚姻的，所以如果說破壞婚姻的，應是通姦行為本身，而非刑法有關通姦罪處罰之規定。主張除罪化的論者，似乎倒果為因。

四、主張通姦除罪化者謂「通姦行為是一個男人和一個女人發生性關係，從純粹生物學上的觀點來看，這只是個互相滿足生理上需要的正常行為」，又稱「男歡女愛是自由的」，「情慾自由是人權」，「法律不宜介入個人私事」，甚至也有人說「法律的手不要伸入老百姓的床上」……等等說詞。其實這些動聽看似振振有詞的話語，真是似是而非，簡直要將我們帶回原始叢林，雄雌交媾是動物的本能，人類群居如僅主張性慾的權利與自由，而沒有一定的規範，想想那是怎麼樣的社會，主張人權自由的前提是要有更高的道德水準，以及責任義務的負擔，如果是毫無前提條件的自由民主人權，「只要我喜歡，有什麼不可以」，那算是哪門子的「人權」與「自由」？我們是所謂文明的社會，就不能純然以生物學的觀點來看通姦行為，而維持通姦罪之規定，應是維持一夫一妻制精神的延續。

五、主張通姦除罪化者以為，即使有所謂受害的一方，也不可能因提出通姦罪的告訴，而得到好處，也不可

能維護美好的婚姻關係，所以提出通姦罪的告訴，是一種褻瀆婚姻關係的觀念與作法；又說：在法律上，在經過利益衡平的考量之前，任何人都有主張他們的個別利益的基本權利。配偶的任何一方以及所謂的第三人，並不因為一個婚姻的存在，就當然喪失所有原本可以主張的利益（即情慾的自由，性自由權）。這樣的理論，不禁讓人懷疑婚姻的意義為何？現代文明國家的一夫一妻制的實質內涵為何？個人的自由凌駕於一切，縱使有婚姻關係，而人們的婚姻關係依社會的經驗法則或習俗，當然是夫妻互負忠實義務，所謂忠實義務，應包括身與心，通姦行為至少是身的不忠實，「貞操的忠誠」不應是保守衛道主義者之主張，倡導人權自由，個人獨立自主意識的人更應有如是的修養，否則就會誤導扭曲自由與人權的真義。如謂在婚姻關係中可以無視婚姻存在的事實，第三人亦可無視他人有婚姻的存在，而力主自己有「性自由權」，這樣看來這些人何不干脆主張廢除一夫一妻的婚姻制度？何況這種說法豈非太膨脹太囂張的濫用權利？法律是最低的道德規範，也是人類社會一般認知應遵守的習慣規律所形成，在我們的社會存在已久深植人心的是有婚姻關係不可以有通姦行為，如果冒然將通姦罪廢除，必定給社會非常大的衝擊，一般的人民總是認為法律沒有處罰的行為，就是可以做的，那麼通姦罪廢除後，一開始大家會覺得通姦「不要緊」，接著就會變成「可以」，在這兩性關係氾濫的今天，無疑雪上加霜。豈非以「除罪」來鼓勵

婚姻外之性行為？主張廢除者，有沒有思考過廢除通姦罪能為社會帶來什麼好處？如果未見其利先見其弊，一動不如一靜，應三思。

六、通姦罪除罪化的論者質疑沒有通姦事實的社會是否即為善良風俗，又認為通姦罪之規定無法維護良好婚姻，僅止於宣示國家重視婚姻，均無實質意義。又謂廢除通姦罪的國家，其國民意識關於婚姻意義認知並沒有影響，國家對於婚姻的保護可以婚姻家庭法等宣示，沒有必要維持一個沒有保護婚姻作用而問題叢生的通姦罪的規定。首先，說通姦罪沒有保護婚姻的作用似嫌太冒然，保護維護婚姻方法有千千萬萬，當然非僅靠通姦罪規定一項，但通姦罪的規定絕對有保護婚姻的潛在意義與某程度的實際效果，君不見撤回告訴而延續婚姻的案件也不少？婚姻法家庭法縱有「禁止重婚」、「禁止有配偶者與他人同居」、「禁止家庭成員間的虐待和遺棄等等」，都屬訓示宣導性的規定，而無處罰的規定即無約束無嚇阻作用，對於自律性較弱之通姦人，絲毫不起作用。至於通姦罪除罪後的國家到底對婚姻認知有無影響，我們沒有看到有關報告，但從北歐、挪威、丹麥、瑞典、芬蘭，各除罪國性氾濫愛滋病率高，單親家庭離婚率遞增等情形以觀，說對婚姻的認知不受影響是有疑問的。

七、最近有些婦女菁英強調通姦除罪化的主張是蘊含促進個人深刻成長，落實人性的拓展，希望女性結婚後

時時刻刻學習成長展現魅力捉住丈夫的心，而不是靠通姦罪之處罰規定來維護婚姻。這更是一種不切實際烏托邦理想主義的說法，相信天下沒有這麼笨的女人，以為有通姦罪之規定，就可高枕無憂保有美滿婚姻。為了要有美滿婚姻，培養夫妻感情，不要讓自己變成黃臉婆要保有魅力這是對的教育，但是這與通姦除罪化完全是兩回事。將通姦除罪絕不是要您告訴女性朋友：「妳沒有法律可保障了，自求多福，先生真的是一丈之內才是妳的丈夫」，也不是告訴婦女姐妹：「沒有感情的婚姻，不滿意的先生，妳隨時可以不要，妳可以找喜歡的伴侶去」。更不是要花心的男生可以大剌剌的說：「刑法不處罰通姦，我喜歡誰就是誰，妳管不著」。保留通姦罪的規定，難道真的會妨害女性的成長與開拓人性？真的就會讓女性不知長進了嗎？

八、實務上，發生通姦案件時，每每發現讓人覺得不公平不合理的情況，例如越過出軌的丈夫（撤回對丈夫的告訴），僅處罰第三者，又社會對於出軌的丈夫責難少甚至還暗地裡誇讚為有辦法的男人；對於出牆的紅杏大家窮追猛打毫不留生路；對於被玩弄的第三者或未婚媽媽獨嚐偷吃禁果的苦楚，種種讓婦運團體或部份社會界人士不忍，乃挺身大喊不合理大鳴不平的個案，實際上是整個社會道德及價值觀的問題，也是男女平等有無落實的問題。如有偏差不合時宜不合情理不合公平原則，要糾正的、要教育的應

是整個社會的認知，而不是一味怪罪刑法有通姦罪處罰的規定。想想？通姦是做錯事的，至少他不是做對事的吧！（但主張除罪化的論者看法不同，以為一男一女同意性行為，未侵害他人性自主，男歡女愛有自由權並沒做錯事），主張除罪化論者竟為他們或她們被追究通姦罪抱不平，反而怪罪沒做半點差錯的一方，有道理嗎？公平嗎？就像不責備竊盜犯，卻怪你自己錢財露白，不處罰搶劫犯，卻怪被搶的人怎麼那麼有錢？因果顛倒，是非混淆，不責怪通姦行為，而怪為妻者不好好散發魅力抓住丈夫的心，不怪第三者的糊塗不智，而怪為妻的動用告訴權？這就是衡平法則了嗎？為避免被竊被劫我們不要炫耀財富，為擁有幸福的家庭，隨時充實自己讓自己魅力十足，讓丈夫不花心，妻子不紅杏出牆，不錯，這些都是教育的重點，防患於未然最好的方法，但絕不是除罪的理由。

九、有謂清官難斷家務事，法律不宜介入個人私事，尤其關於男女情事性事。本來婚姻家庭是講感情人倫的地方，有情有義又有愛的地方，是不用法律也可以生活得好好的。但是在配偶中有一方不講情義與愛時，就需要講理用法，古代雖有「家有家法，國法不入家門」的美談，但時代不同，法律介入家務事的時代來臨了，例如夫妻互負扶養義務，夫妻有履行同居的義務，夫妻財產制，婚姻家庭暴力防治法等等規定，都是法律朝務實的方向來規範夫妻婚姻家庭生活的基準。學法的人都知道，夫妻履行同居義務是不能強

制執行的，也就是說法律根本無法發揮執行的效用，但是法律還是開宗明義明明白白的介入夫妻此項私生活，其意義即在維護婚姻制度的健全。如果兩個各別都是沒有婚姻關係的成年男女，他們之間的性行為性關係法律從來未介入。通姦罪因為是為性行為的男女，一方有婚姻關係，而與第三者為婚姻外之性關係，才有通姦罪的成立，所以通姦罪的規定，無疑是法律為維護婚姻一夫一妻制而設。**無婚姻，性可以自由，有婚姻不能**，否則婚姻的意義何在？因此不能以性行為事關個人私事以及性自由為理由，而欲排除法律的規範予以除罪。雖然清官難斷家務事，但是在糾紛不解，雙方無法協調之下，還是須要清官來斷，只是難為「清官」，辛苦了「清官」罷了。

丙、結語：停聽看！謀定而後動，一動不如一靜

社會上一齣齣活生生物慾權慾色慾的各種節目上演，社會新聞小三、包二奶、小王等等不斷的報導，台灣社會充斥著色情與八卦，浮躁與不安，但未見針對這些男男女女之所為做出有意義的社會教育報導，或為警世的評論。台灣社會沒有因為這些婚姻外性行為事件的發生，大家沈靜下來省思深思我們的價值觀、人生觀是什麼？我們沒有告訴年輕的下一代什麼是人生的方向，什麼樣的人生才是真正的美好，什麼樣的男女關係才是幸福。主張

人權強調民主自由的正義之士，高唱男女平等女性主義的婦女菁英，請別忘了民主自由的前提是自制自律，男女平等的前提是自立自強，不論是民主自由或男女平等，起碼的修養是尊重別人，人類生而平等，不分男女老幼種族、宗教、職業，要無分別心才有真平等。崇高的理想，神聖的任務，不是口號喊喊而已，需要有許許多多無數的具體方法來落實，當然包括法律、教育與道德。眾人所週知，目前台灣社會只學歐美民主自由男女平等的皮毛，而未得其精髓，以至假民主自由男女平等之名隨興任性甚至放縱，我們希望在舊道德淪喪新道德觀尚未建立的今天，大家一起來從教育、法律甚至宗教方面來努力，建樹正確的價值觀，台灣社會才不致濫用人權主張，甚至自由民主男女平等潰堤，氾濫的人權潮反而淹沒了真正應受保障的人權。在這兒我們要特別提醒大家，所謂教育，不是只有學校、家庭教育，在資訊如此發達的現代，媒體傳播界的朋友，似乎更應負起社會教育工作的重責大任。

社會科學本來就沒有絕對的答案，更沒有放諸四海萬世皆準的法則，通姦行為是否單純的個人行為？一夫一妻制是否為最好的婚姻制度？不錯，都有探討的餘地，也各有不同版本的論說。法律是一實用的社會科學，既然現行法律持一夫一妻的婚姻制，通姦罪的規定本是維護一夫一妻制的配套規定，我國現行民法已廢除配偶因通姦罪離婚後，不得與相姦人結婚之報復懲罰性規定，通姦與相姦人某程度的性自由似有被尊重。相對的通姦罪的告訴乃論，乃是尊重婚姻當事人維繫婚姻與否的權利。我們似乎應逆向思考一下，積極作為**廢除通姦罪對社會的影**

響如何？消極不作為**不廢除的結果又如何**？主張廢除通姦罪的論者，似乎只看到發生通姦行為的婚姻出狀況的當事人或第三者所遭受的問題；反之，我們似乎也應研究一下通姦罪的規定對於婚姻的穩定是否也發揮了「不作為」的作用（即備而不用的約束力），社會學者以及社會工作者也許可以探討一下。國情民情文化以及時空的不同，通姦罪有無為趕上所謂其他國家的潮流而除罪的必要嗎？曾有日本學者感嘆稱日本因戰後民族的自信心幾乎崩潰，日本男性大量缺乏，時代背景與崇外的心理等因素使然廢除了通姦罪，如果是現在提出廢除也許不會通過的說法。所以我們似乎也可以探討一下，北歐各國以及日本西德、中共等國家**廢除通姦罪後社會的反應如何**？尤其結婚後的男女，兩性是否更和諧，夫妻是否為維護婚姻更懂得自律？如果所得結果不是正面的答案，希望我們不要像有些國家，高喊人權及時代潮流，在廢除了死刑後又恢復死刑。誠然，立法不容易，廢法亦不可太草率，總之環視台灣目前形勢，社會人心浮躁，民主自由的涵養素質有待提高，宗教道德力量均未深植人心，我們的社會男男女女還沒有教育成熟；寄望人們能自制自律，是對有修養有道德的人而言。但是我們都是凡人，人人都是一般普通水準的人，人性的缺點難免，通姦罪雖不是完美的法律，但保留著應該也沒有什麼大不好，**怕的是，廢除通姦罪後馬上會讓社會大眾產生負面的錯誤認知，誤解為「通姦無罪」演變下去的是「通姦不要緊」、「通姦可以」再下去是「性自由」、「縱慾」、「淫亂」**，一連串的離譜。這當然不是也絕對不是主張廢除通姦罪論者的本意，更

不是他們所要見到的。但這卻正是社會一般老百姓認知的演變必然流程，希望在我們社會尚未全面發展教育、宗教、道德、輿論力量來改善提昇芸芸眾生的人格成熟之前談通姦除罪化能不再思三思？社會的領導人們，婦女菁英們，關懷我們社會所有的人們，請放下腳步，停、聽、看！

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司法院大法官會台字第12664號鑑定意見

李念祖

謹依大院來示，提出鑑定意見如下：

一　前言

婚姻與家庭制度乘載著維護人倫秩序、性別平等、養育後代等多樣重要社會性功能，乃社會形成、穩定與發展之基礎，且不論是同性或異性婚，均受我國憲法制度性保障[1]。結婚應以書面為之，有二人以上證人之簽名，並應由雙方當事人向戶政機關為結婚之登記，此為民法第 982 條之明文，顯見婚姻制度具有公示性、對世性，而為世人所應遵從者。配偶除負有同居生活、不得惡意遺棄他方等法定之契約義務外[2]，為確保婚姻與家庭制度之完整與延續，按民法第 985 條、民法第 1052 條第 1 款、第 2 款，夫妻互負忠誠義務，亦即配偶當然負有不得通姦之民法上契約義務；基於登記主義之婚姻公示制度[3]，任何人也不得與他人之配偶發生性行為。此等不得通姦之義務應載入而未載於親屬編明文[4]，但於通姦已構成離婚之可歸責事由的立法[5]，以及長期以來，侵犯配偶權足以構成侵權行為之司法實務案例中[6]，可知非虛。

1　參釋字 554 號解釋理由書、釋字 748 號解釋理由書。

2　參民法第 1052 條第 1 項第 5 款：「夫妻之一方，有下列情形之一者，他方得向法院請求離婚：五、夫妻之一方以惡意遺棄他方在繼續狀態中。」民法第 1001 條：「夫妻互負同居之義務。但有不能同居之正當理由者，不在此限。」

3　民法上婚姻原採儀式婚制，固已具有一定公示性，後改採登記婚制，更加彰顯婚姻公示、對世之特性。民法第 982 條：「結婚應以書面為之，有二人以上證人之簽名，並應由雙方當事人向戶政機關為結婚之登記。」參照。

4　現行民法僅規定夫妻不得重婚。參民法第 985 條第 1 項：「有配偶者，不得重婚。」

5　參民法第 1052 條第 1 項第 2 款：「妻之一方，有下列情形之一者，他方得向法院請求離婚：二、與配偶以外之人合意性交。」

6　司法實務向來承認，通姦行為乃對於配偶之侵權行為。早期實務認為，鑒於現代民法採婚姻自由制度，夫權觀念已不復存在，與有夫之婦相姦並非侵犯夫之夫權，只不過尚未闡明通姦行為將侵犯他方配偶何種權利，惟已明確指出他方配偶將因而受有損害財產上或非財產上損害，得請求損害賠償。參最高法院 41 台上 278 號民事判決：「按夫對於妻在現行法上並無何種權利可言，他人與其妻通姦，除應負刑事責任外，固無所謂侵害夫之權利，惟依社會一般觀念，如該他人明知為有夫之婦而與之通姦，不得謂非有以違背善良風俗之方法加損害於人之故意，苟夫確因此受有財產上或非財產上之損害，依民法第一百八十四條第一項後段，自仍得請求賠償損害。」；最高法院 49 年度台上字第 489 號：「民法親屬編施行後，夫權制度已不存在，明知有夫之婦而與之通姦，對其夫應負賠償責任者，係以家室

本案之問題不在配偶是否負有不為婚外性行為之法律義務，而是在於，根據憲法，國家於民法已設有救濟制度之情形下（請求離婚及損害賠償、慰撫金等），得否額外動用刑罰處罰違背配偶忠誠義務之人？相關刑事處罰規定之適用，是否已造成並助長了實質上的社會性別歧視而應由司法予破除？從法律文化角度論，通姦罪及其追訴制度明顯是由禮教宗法制度確立並延續之父系社會傳統的遺留；是則通姦

和諧因此破壞，使其夫在精神上不免感受痛苦之故，若夫已納妾，與其妻之感情本不融洽，則家室和諧並非因其妻與人通姦而破壞，其夫既無所謂受非財產上之損害，自無請求賠償之可言。」；最高法院 55 年度台上字第 2053 號判決：「通姦之足以破壞夫妻間之共同生活，而非法之所許，此從公序良俗之觀點可得斷言，不問所侵害係何權利，對於配偶之他方應構成共同侵權行為，再按婚姻係以夫妻之共同生活為其目的，配偶應互相協力，保持其共同生活之圓滿安全，及幸福，而夫妻互守誠實，係為確保其共同生活之圓滿安全及幸福之必要條件，故應解為配偶因婚姻契約而互負誠實之義務，配偶之一方行為不誠實，破壞共同生活之圓滿安全及幸福者，即為違反因婚姻契約之義務，而侵害他方之權利。」至晚近，**配偶權之概念則已獲得普遍肯認，通姦行為乃侵害他方配偶之配偶權，通姦人與相姦人應負共同侵權行為損害賠償責任**，可參最高法院 100 年度台上字第 1355 號民事判決：「倘被上訴人與劉哲俊於離婚前五日期間以前，曾有多次相姦行為，並維持婚外情親密情誼，致影響上訴人與劉哲俊間夫妻生活之圓滿和諧，劉哲俊甚而與上訴人協議離婚，則劉哲俊陳述其與被上訴人於離婚前五日期間仍有相姦行為，是否顯然悖於常情而全然不可採？並非無疑。倘被上訴人與劉哲俊二人於該期間內雖無相姦行為，然二人並未分手，依然保持有婚外情誼之親密異性友人關係，是否仍應屬侵害上訴人配偶權益之侵權行為，始符情理？非無研求之餘地。」；臺灣高等法院 98 年度上易字第 659 號民事判決：「按因故意或過失，不法侵害他人之權利者，負損害賠償責任，民法第 184 條第 1 項前段定有明文。而所謂身分權，係指基於特定身分而發生的權利，主要有親權、配偶權及繼承權，均屬於上開規定所稱的權利。又所謂配偶權，指配偶間因婚姻而成立以互負誠實義務為內容的權利，因此一方配偶與第三人通姦時，係共同侵害他方配偶之配偶權。」；最高法院 88 年度台上字第 1549 號民事判決：「按婚姻係以夫妻之共同生活為其目的，配偶應互相協力保持其共同生活之圓滿、安全及幸福，而夫妻互守誠實，乃為確保其共同生活之圓滿、安全及幸福之必要條件，故應解為配偶因婚姻契約而互負誠實之義務，配偶一方行為不誠實，破壞共同生活之圓滿、安全及幸福者，即為違反因婚姻契約之義務而侵害他方之權利，故有配偶而與人通姦者，係故意以背於善良風俗之方法加損害於配偶之他方，依民法第一百八十五條共同侵權行為之規定，應與相姦人連帶負損害賠償責任。」；甚且，**多數實務見解認為只要一方配偶與婚姻外第三人之行為舉止有逾越朋友關係，而侵害配偶所享有普通友誼以外情感交往之獨占權益程度，便足以破壞婚姻制度下共同生活之信賴基礎，而構成侵害配偶權利之侵權行為**。參臺灣高等法院 107 年度上易字第 1085 號民事判決：「惟侵害配偶權不以通姦、相姦行為為必要。且婚姻與家庭為社會形成與發展之基礎，受憲法制度性保障，交友行為之自由，尚應受婚姻與家庭制度之制約，本件係因柯山文為有配偶之人，上訴人二人卻仍結伴進入汽車旅館，始經認定侵害配偶權而須負損害賠償責任，尚難謂逾越比例限制上訴人遷徙自由。」；臺灣高等法院花蓮分院 104 年度上易字第 80 號民事判決：「本件雖無積極證據足資證明上訴人與鄧達義有發生性行為，然有配偶之人與異性第三人正常交友，本可自由選擇於非晚間之時段在公共場合為之，此乃有配偶之人基於對家庭和諧生活之維持及婚姻關係之尊重而應恪遵之分際，惟上訴人明知鄧達義為被上訴人之配偶，其與鄧達義間交往行為，卻已逾越我國社會一般善良風俗對於有配偶之人與異性友人間合理往來之認知，衝情足以斷喪被上訴人與鄧達義間家庭共同生活之互信基礎，並破壞被上訴人與鄧達義夫妻共同生活之圓滿、安全及幸福，而非身為配偶之被上訴人可得忍受，揆諸前揭說明，上訴人自係不法侵害被上訴人基於配偶關係之身分法益。」；臺灣高等法院臺中分院 108 年度上易字第 101 號民事判決：「又足以破壞婚姻共同生活之圓滿安全之行止，絕非僅以通姦及相姦行為為限，倘夫妻任一方與他人間存有逾越結交普通朋友等一般社交行為之不正常往來，且其侵害配偶所享有普通友誼以外情感交往之獨占權益程度，已達破壞婚姻制度下共同生活之信賴基礎程度，亦足以構成侵害配偶權利之侵權行為。」

罪背後所代表「家國相通」、「法入家門」之觀念，是否與民主自由憲政體制無所扞格？國家是否有憲法義務停止因刑事法律所鞏固之父系社會文化，並且積極破除社會性別歧視現象？凡此均是本案的核心問題。

二 傳統禮教思想下的通姦罪

(一) 男女有別的禮教與強調身份差等的社會秩序

儒家與法律發生關係始於西漢初期，盛於東漢，法律漸次附庸於儒家禮教，儒家思想自此支配其後之傳統法律思想[7]。社會深受儒家宗法制度的影響，形成宗族及倫理本位的「身份秩序社會」，從而建構出「家國相通，親貴合一，天、君、忠、孝相連的政治體制」[8]。而「家族為社會組織的基礎，國家為家族的擴大型態。家族生活的父慈、子孝、兄友、弟恭的倫常禮則，往往也成為社會生活的行為規範」[9]。在家族主義的法律體制下，義務是單向的，個人並非獨立的主體，而女子，毋寧只能與隱身且服膺於社會預立身分關係中的「小人」相提並論[10]。《禮記》〈哀公問〉記載孔子語，甚為扼要：

> **民之所由生，禮為大，非禮無以節事天地之神也；非禮無以辨君臣、上下、長幼之位也；非禮無以別男女、父子、兄弟之親，婚姻疏數之交也[11]。**

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7 張國鍵，中華法系的源遠流長，載於固有法制與現代法學：戴炎輝先生七秩華誕祝壽論文集，頁 203，成文出版，1978 年。

8 黃源盛，從傳統身份差等到近代平權立法—兼論沈家本的法律平權理念及其變革，載於：固有法制與當代民事法學：戴東雄教授六秩華誕祝壽論文集，頁 41，三民書局，1997 年。

9 戴炎輝、戴東雄、戴瑀如，親屬法，頁 10-11，自版，2011 年。

10 《論語》〈陽貨〉：「子曰：『唯女子與小人為難養也。』」，錢穆，論語新解，頁 645，東大圖書，1988 年。馬漢寶教授謂：「儒家重個人，在重其倫理道德之修養，而實踐之方法，則是責成個人各盡其人倫上的義務。質言之，個人之倫理道德須在人與人之關係中，始能完成與發揮。因此，可以說在儒家思想中，難有與任何他人無關的『個人』觀念之產生，亦難有與任何他人完全『平等』的觀念之產生。」參馬漢寶，法律與中國社會之變遷，頁 47，自刊，1999 年。

11 孫希旦，禮記集解，頁 1258，文史哲出版社，1990 年。

傳統統治哲學家國相通，透過禮教，由上而下，在父子、君臣、兄弟等諸多社會倫理關係之中嵌入絕對的君（父）權，從而建構身份差等秩序，以求社會穩定，鞏固統治關係。而夫妻關係，也正處在這樣的身分差等秩序之下；夫唱婦隨，男尊而女卑[12]。

今之論者歸納，傳統禮教舊律向來重男系而輕女系，婚姻以丈夫為中心，謂之男權或父權主義[13]。父權首先體現在父母子女關係中。「倫常觀念是傳統中國文化的核心特色之一，且一向被視為穩定社會的重要支柱。觀夫整個帝制時期的農業社會，家父長的權威維繫著家屬的秩序，家父長與家屬之間實為主從的關係」[14]。瞿同祖先生則曾舉出一例，足見其餘；在「父母控告子女」一事上，「呈控子孫忤逆不孝，司法機構是不會拒不受理的，同時，也不要求呈控人提供證據。法律上明文規定『父母控子，即照所控辦理，不必審訊』。『天下無不是的父母』，父母對子女的管教懲戒權本是絕對的，倫理告訴我們，子當『有順無違』，這不是『是非』的問題，而是『倫常』的問題。...父母將兒子告到官裏，官府懷疑到父母所陳處的理由是否充足，或是追問子女究竟是否忤逆不孝，也是不可想像的事。如果法官追問誰是誰非，便等於承認父母的不是，而否認父權的絕對性了」[15]。

父權的絕對性同樣體現在婚姻與夫妻關係上。傳統禮教下婚姻的功能目的在傳宗接代，光耀祖宗，祭祀祖先與傳香火乃是傳統社會宗族生活之核心[16]。實則，遠古時代原係始於母系社會，只

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12 《儀禮》〈喪服〉：「（傳曰）故未嫁從父，既嫁從夫，夫死從子。」顧寶田、鄭淑媛注譯《儀禮讀本》，三民書局，頁 355，2002 年。《列子》〈天瑞〉：「孔子遊於太山，見榮啟期行乎郕之野，鹿裘帶索，鼓琴而歌。孔子問曰：『先生所以樂，何也？』對曰：『吾樂甚多。天生萬物，雖人為貴。而吾得為人，是一樂也。男女之別，男尊女卑，故以男為貴；吾既得為男矣，是二樂也。』」如果比較西漢時期成書之《禮記》〈禮運〉與秦前典籍《孔子家語》〈禮運〉之內容，則可知「男有分、女有歸」六字見於前者而為後者所無，楊朝明，《孔子家語通解》，頁 368，萬卷樓，2005 年。禮教宗法制度，漢後趨於嚴格，此為一證。

13 黃源盛，唐律中的禮教法律思想，政大法學評論第 58 期，頁 13，1997 年 12 月。

14 黃源盛，「禮刑之間—從供養有闕到遺棄尊親屬」，法制史研究第 23 期，頁 69，2013 年 6 月。

15 瞿同祖，中國法律與中國社會，里仁，頁 15，1994 年。

16 戴炎輝、戴東雄、戴瑀如，親屬法，頁 10-11，自版，2011 年。

是隨著社會發展，母系社會逐漸為父系社會及儒家禮教所取代，而宗法制度同時也有助於統治者鞏固權力，由於父系社會需要辨識嫡長子(即宗子)以求取父子血統關係之明確，只須單方面要求女性守貞之故，一夫多妻的婚姻制度乃成為社會之普遍現象。

論者因而指出：「在夫妻關係上，我國傳統社會採取齊體主義…妻之人格為夫所吸收，妻唯夫馬首是瞻」、「夫為尊長，妻為卑幼」[17]。並且「母權是得之於父的，是因夫之妻的身分而得的」、「妻是從夫的，在治家上居於輔從的地位」[18]。另根據郭店楚簡佚書《六德》：

> **君子不普明乎民微而已，或以知其一矣。男女不辨，父子不親；父子不親，君臣亡義。是故先王之教民也，始於孝弟。君子於此一冊者亡所法。是故先王之教民也，不使此民也憂其身、失其冊。孝，本也[19]。**

從六德所謂「男女無別，則父子不親」的觀念，即可知古代「男女有別」而建立的婚姻秩序，在於貫徹父系宗法制度，利於鞏固統治關係，維持社會秩序。換言之，男女有別的婚姻秩序，乃是父系制度的產物。忠貞義務是身分義務，不是契約義務。

(二) 出禮入刑：國家用公權力懲罰違反家族父權秩序之人

古代法制係根據行為人所屬的身分，決定其所應適用之處罰。論者提到：「自漢以來，在法制上汲取了儒家的靈魂與法家的軀體，以『禮』為倫常的基模，以『刑』為循禮的鞭策；而中國舊律，自唐以降，其立法基礎既植根於禮教，而禮教又是建立於五倫之上，由於人倫有尊卑之別、上下之分、昭穆之序；因此，即使同一個行為，可能論以不同之罪或同罪但異罰，易言之，行

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[17] 戴炎輝、戴東雄、戴瑀如，親屬法，頁 10-11，自版，2011 年。

[18] 瞿同祖，中國法律與中國社會，頁 17，里仁，1994 年。

[19] 涂宗流、劉祖信，《郭店楚簡—先秦儒家佚書校釋》，頁 215，萬卷樓，2001 年。

為人所犯的罪行相同，法律每因行為人及被害者的身分、輩分、性別、甚至職業、族群的不同而差異其罪之適用，或分別其刑之重輕，有其明顯的『身份秩序』差等性。具體地說，父尊子卑、夫尊妻卑，禮所謂『尊尊也、親親也、男女有別』，在歷代法律中表現得淋漓盡致。[20]此中尤其強調妻子單方面貞操義務之遵守，且妻子一旦違反此義務，即破壞了男女有別的婚姻秩序，可以招致刑責。

根據唐律，女性被片面課予較重的貞操義務。夫可以納妾，且人數不受限制；反之，妻則無相同權利[21]。再按清律，男子與有夫之婦通姦，係侵害相姦人的夫權，固須接受處罰，但是妻子與夫以外任何男子通姦，都構成法律上的通姦罪[22]。**可知，通姦罪在最初乃為維護夫權所設。**至清光緒二十八年(1902)，清廷因內外交迫之情事所迫，開始變法，邁開繼受近代歐陸法制的步伐。光緒三十三年，沈家本奏上《刑律草案》共 387 條，該草案第 278 條規定：「凡合姦有夫之婦，處四等以下有期徒刑，其相姦者，亦同。[23]」按修律大臣所奏陳之「修訂大旨」，該草案之編定為「折衷各國大同之良規，兼採近世最新之學說，而仍不戾乎我國歷世相沿之禮教民情。」[24] 至民國初年『暫行新刑律』(1912)第 289 條仍沿襲《刑律草案》之規定：「和姦有夫之婦者，處四等以下有期徒刑或拘役。其相姦者，亦同[25]。」在之後的『修正刑法草案』(1915)[26]、『刑法第二次修正案』(1918)[27]、以及『中華民國刑法』

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[20] 黃源盛，「禮刑之間—從供養有闕到遺棄尊親屬」，法制史研究第 23 期，頁 83~84，2013 年 6 月。

[21] 參唐律戶婚律「義絕離之條」；黃源盛，唐律中的禮教法律思想，政大法學評論第 58 期，頁 13，1997 年 12 月。

[22] 戴炎輝、戴東雄、戴瑀如，親屬法，頁 12，自版，2011 年。

[23] 黃源盛主編，晚清民國刑法史料輯注(上)，頁 156，元照，2010 年。

[24] 黃源盛主編，晚清民國刑法史料輯注(上)，頁 35，元照，2010 年。

[25] 黃源盛主編，晚清民國刑法史料輯注(上)，頁 475，元照，2010 年。

[26] 黃源盛主編，晚清民國刑法史料輯注(上)，頁 586，元照，2010 年。

[27] 黃源盛主編，晚清民國刑法史料輯注(上)，頁 720，元照，2010 年。

(1928)[28]等版本中，**通姦罪的條文均仍承襲維護夫權之精神，處罰「有夫之婦與人通姦者」**[29]。學者認為該等規定乃在傳達「夫對妻可不守所謂『貞操』義務，而妻則必守其婦貞」之精神，且如有違反者應屬「妨害夫權，破壞家庭，故刑法視為刑罰之根據」[30]。「此種現象，表面上是有關法律與道德分合問題，究其根源，乃在於宗法倫理社會重視血統及男尊女卑的根深蒂固觀念。」[31]

綜言之，我國刑法選擇以刑罰處罰通姦者，乃係源自於傳統透過刑事手段處罰不守貞操婦女之制度設計，無非係憑藉禮教之治，在社會中以法律建立父系社會。對於古代的統治者來說，妻子對丈夫謹守貞操，關乎父系家族宗祧傳承與團體秩序之維持，而父系家族團體秩序又與社會秩序之穩定息息相關，故妻子是否對於丈夫守貞，不僅為家事而也是國事，從而「法入家門」、「出禮入刑」，以刑罰維繫婚姻之完整，乃是為了維護婚姻以外，社會之間更龐大而嚴密的身分差等秩序。法律乃將伸手進入家門，以公權力懲罰違犯禮教、威脅家國的犯姦妻。

(三) 從「家國相通」到沈家本的法律平權改革

然而，到了清末民初，傳統的禮教入法、以刑循禮的法制秩序開始受到衝擊。在西方憲法思想輸入以前，對於習慣於身分差等秩序社會的大清君主臣民而言，「平等的觀念可能會令人難以理解、理解之後卻又感到不可思議。」[32]光緒年間(1907)，沈家本

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[28] 黃源盛主編，晚清民國刑法史料輯注(上)，頁 982，元照，2010 年 7 月。

[29] 值得一提的是，在『中華民國刑法』(1928)第 256 條：「有夫之婦與人通姦者，處二年以下有期徒刑；其相姦者，亦同。」其理由(暫行律)謂：「本條於姦淫行為中，僅罰強姦及有夫和姦，而無處罰其於純然私通野合之條文，論者謂與中國禮教相反，宜將和誘處女寡婦等罪名加入，然據編訂者之意，謂此種行為，當依家庭教育、學校教育及輿論制裁以防止之，非刑罰所能矯正也。」參黃源盛主編，晚清民國刑法史料輯注(下)，頁 982，元照，2010 年。如果認為和誘處女寡婦等與中國禮教相反之行為，得透過教育及輿論防止之，何以與人通姦仍須以刑罰繩之?是否代表，該時的中國社會，對於倫理與法律之界線，已開始能有所分辨？

[30] 黃源盛，西法東漸中無夫姦存廢之爭，政大法學評論第 91 期，頁 89~90，2006 年 8 月。

[31] 黃源盛，民國十七年的舊刑法與司法實踐，輔仁法學第 47 期，頁 24，2014 年 5 月。

[32] 李念祖，從陌生到顯赫---平等條款入憲史談片，法制史研究第 24 期，頁 270，2013 年 12 月。

認識到平等思想關係到制度的根本變革，故下大決心幡然於向慈禧及光緒呈上奏摺建議廢奴[33]：

方今朝廷頒行憲法，疊奉諭旨，不啻三令五申，凡與憲法有密切關係者，尤不可不及時變通。買賣人口一事，久為西國所笑，律例內奴婢各條與買賣人口事實相同，此而不早圖禁革，與頒行憲法之旨，顧相違背。

並曾言[34]：

立憲之國，專以保護臣民權利為主。現行律中，以階級之間如品官制，使良賤奴僕區制最深，殊不知富貴貧賤品類不能強使齊，等同隸皁，權由天壤，於法律實不應有厚薄之殊。

當時視天下臣民為奴僕的「予一人」尚存，滿朝官員不分滿漢，何人府中無奴？沈家本清楚認知平等為憲法之根本與基礎，蓄奴制度與憲法絕不相容，數千年奴隸制度因其奏而終遭廢除[35]。沈家本的法律平權改革，首先開啟了千百年來平等入憲的契機。而基於男女有別之婚姻所設的通姦罪，進入民國之後，也可觀察到某些邁入平權的改變。

按民國 24 年公布的『中華民國刑法』(1935)，關於通姦罪之審議修正，當時有三種意見：第一，完全不規定通姦罪處罰條文，第二，主張原先處罰「有夫之婦與人通姦者」之版本，第三，主張處罰「有配偶者與人通姦」者。根據學者整理當時的起草章程，乃經多方折衝討論，其中，部分立法委員如黃右昌以及史尚寬等

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[33] 沈家本乃於《修訂法律大臣奏遵議滿漢通行刑律摺》提及此議，參《沈家本全集》(北京：中國政法大學，2010 年)，卷二，頁 458-460；卷四，頁 624-627。沈氏並言及「現在歐美各國均無買賣人口之事，係用尊重人格之主義，其法實可取。」

[34] 語出《欽定大清現行刑律》(宣統朝)，奏疏，宣統二年(1911)四月。收入《清代各部院則例》，第 32 冊，蝠沁書院，2004 年；轉引自黃源盛，黃源盛，從傳統身份差等到近代平權立法—兼論沈家本的法律平權理念及其變革，載於：法律繼受與近代中國法，頁 310，自刊，2007 年。

[35] 李念祖，從陌生到顯赫---平等條款入憲史談片，法制史研究第 24 期，頁 273，2013 年 12 月。

曾主動提案要求刪除處罰有夫之婦與人通姦的條文，亦有當時之婦女團體推舉代表請願，以致於原條文先由「有夫之婦與人通姦者」改為「有配偶而與人通姦者」，再由「有配偶而與人通姦者」改回「有夫之婦與人通姦者」，最終則再改回「有配偶而與人通姦者」，三改後而定案，自此成為我國現行刑法第 239 條通姦罪之處罰依據[36]。對此，論者認為：「至是，夫妻間的貞操義務，刑法上通姦罪與民法上男女互負貞操義務遙相呼應，無復重輕，在法律上男女地位可謂趨於平等。」[37]其實，此處所指平等，僅可謂條文形式上的平等，刑法第 239 條實際上之操作，仍難擺脫父系社會男性優越之體質文化，其詳容後述之。

(四) 從身份到契約：基於個人平等自由意志締結的婚姻契約秩序

如今，婚姻已脫離過去父系社會依照家父長意志而建立的家族連結秩序(禮法)與身分關係。當代婚姻乃是依照當事人之平等自由意志所締結的契約關係。因此，婚姻制度跨入當代後，已經產生了「從身分到契約」之質變。從而針對過去在男尊女卑的身分差等秩序下，為施行父權而設立的通姦處罰規定，踏入到現代，是否合於現代婚姻之平等契約本質，已是無可迴避之問題。

從婚姻契約之本質觀察，作為對向犯[38]的通姦者及相姦者，其可責性程度非無區別。婚姻制度既然已從「身分到契約」，現代夫妻所締結之婚姻契約，之所以應互負忠誠義務，不再是基於父系社會所預立的身分誡命，而是基於彼此的自由意志所為之平等承諾。根據我國司法實務，如果任何一方不忠，發生通姦行為，

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36 蔡樞衡，修正新刑法通姦規定反覆修改之社會的意義，法律評論第 12 卷，19 期及 23 期，1935 年 3 月、4 月；楊幼炯，近代中國立法史，頁 386-387，台灣商務，1966 年 6 月。

37 論者又提到：「此等平等立法精神，事實上究能貫徹至何程度？就當時而論，問題仍多。」參黃源盛，『西法東漸中無夫姦存廢之爭』，政大法學評論第 91 期，頁 90，2006 年 6 月。

38 對向犯學理上又稱對立犯或對合犯，指以二人以上的對向行為為必要所實現的犯罪。參甘添貴，謝庭晃，捷徑刑法總論，頁 249，瑞興，2004 年 4 月；蔡墩銘，刑法總論，頁 262，三民，2011 年 9 月；林山田，刑法通論(下冊)，頁 153，自版，2008 年 1 月；林鈺雄，新刑法總則，頁 489，元照，2019 年 9 月。

辜負他方信任而使家室和諧因此破壞，即屬違反婚姻義務而得請求民事上的賠償[39]。因此，我國民法下所謂夫妻間「忠誠義務」乃**屬人義務**，亦即為婚姻契約之當事人始應負擔之義務。婚姻契約外的第三人則是基於婚姻公示性、對世性，而負有尊重他人婚姻契約之義務；惟此義務與夫妻間之忠誠義務內容當然不同，其主要差別在於是否負擔無過失責任。第三人對於婚姻之尊重義務取決於，如果第三人並無認識行為對象乃是他人之配偶，而無過失者，應無侵權行為責任之可言。相較下，配偶身為婚姻契約之當事人，必須「不與配偶以外之人通姦」，發生婚外性行為時，違反婚姻契約下忠誠義務的仍然是為通姦行為的一方配偶，因其負有婚姻契約關係的原生義務，其可責之程度顯然高於婚姻關係外的第三人—不負無過失侵權行為責任的第三人。當婚姻制度本質從身份轉變為契約，忠實婚姻契約之責任首先是兩個人之間的事，其次才由法律論究第三人不侵犯婚姻的法律責任之有無。從另一角度說，如無配偶之違法行為存在，不可能成立通姦罪；配

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39 參最高法院 100 年度台上字第 1355 號民事判決：「倘被上訴人與劉哲俊於離婚前五日期間以前，曾有多次相姦行為，並維持婚外情親密情誼，致影響上訴人與劉哲俊間夫妻生活之圓滿和諧，劉哲俊甚而與上訴人協議離婚，則劉哲俊陳述其與被上訴人於離婚前五日期間仍有相姦行為，是否顯然悖於常情而全然不可採？並非無疑。倘被上訴人與劉哲俊二人於該期間內雖無相姦行為，然二人並未分手，依然保持有婚外情誼之親密異性友人關係，是否仍應屬侵害上訴人配偶權益之侵權行為，始符情理？非無研求之餘地。」；最高法院 88 年度台上字第 1549 號民事判決：「按婚姻係以夫妻之共同生活為其目的，配偶應互相協力保持其共同生活之圓滿、安全及幸福，而夫妻互守誠實，乃為確保其共同生活之圓滿、安全及幸福之必要條件，故應解為配偶因婚姻契約而互負誠實之義務，配偶一方行為不誠實，破壞共同生活之圓滿、安全及幸福者，即為違反因婚姻契約之義務而侵害他方之權利，故有配偶而與人通姦者，係故意以背於善良風俗之方法加損害於配偶之他方，依民法第一百八十五條共同侵權行為之規定，應與相姦人連帶負損害賠償責任。」；最高法院 55 年度台上字第 2053 號民事判決：「通姦之足以破壞夫妻間之共同生活，而非法之所許，此從公序良俗之觀點可得斷言，不問所侵害係何權利，對於配偶之他方應構成共同侵權行為，再按婚姻係以夫妻之共同生活為其目的，配偶應互相協力，保持其共同生活之圓滿安全，及幸福，而夫妻互守誠實，係為確保其共同生活之圓滿安全及幸福之必要條件，故應解為配偶因婚姻契約而互負誠實之義務，配偶之一方行為不誠實，破壞共同生活之圓滿安全及幸福者，即為違反因婚姻契約之義務，而侵害他方之權利。」；最高法院 41 台上 278 號民事判決：「按夫對於妻在現行法上並無何種權利可言，他人與其妻通姦，除應負刑事責任外，固無所謂侵害夫之權利，惟依社會一般觀念，如該他人明知為有夫之婦而與之通姦，不得謂非有以違背善良風俗之方法加損害於人之故意，苟夫確因此受有財產上或非財產上之損害，依民法第一百八十四條第一項後段，自仍得請求賠償損害。」；最高法院 49 年度台上字第 489 號民事判決：「民法親屬編施行後，夫權制度已不存在，明知有夫之婦而與之通姦，對其夫應負賠償責任者，係以家室和諧因此破壞，使其夫在精神上不免感受痛苦之故，若夫已納妾，與其妻之感情本不融洽，則家室和諧並非因其妻與人通姦而破壞，其夫既無所謂受非財產上之損害，自無請求賠償之可言。」

偶之出軌行為才是通姦罪的要素，對向犯不是。因此，如果通姦罪之最終結果是「罰小三不罰配偶」，此顯然不符合婚姻契約之本質，亦無法通過憲法比例原則之檢驗。

三　通姦罪為傳統父系制度文化的遺留，與憲法第 7 條、第 23 條、憲法增修條文第 10 條第 6 項、以及釋字第 666 號解釋牴觸

(一) 釋字第 748 號解釋已重新檢視婚姻之定義，釋字第 554 號解釋亦應重為檢視

首先，應思考釋字第 554 號解釋是否應予補充或變更。按我國目前司法實務認為刑法第 239 條之通姦行為以「男女間性行為」者為限[40]，法務部也曾提出研究意見，認「婚姻」既存於異性之間，且我國法令目前尚未明文納入同性「婚姻」，故通姦罪僅適用於異性之間的性行為[41]。釋字第 748 號解釋於 106 年 05 月 24 日公布後，司法院釋字第 748 號解釋施行法亦已於 108 年 5 月 22 日施行，相同性別之兩人得以辦理結婚登記，則相互結合而完成登記之同性是否有刑法第 239 條規定之「配偶」身分適格？若依我國目前司法實務僅於異性之配偶有其適用，有無歧視異性性傾向者之顧慮？不能無疑。乃有必要在釋字第 748 號解釋公布後，就釋字第 554 號解釋重為討論應否予以相應之補充或變更。

(二) 釋字第 554 號未提及的社會性別歧視

依釋字第 554 號解釋，基於婚姻制度之存續與美滿，國家得制定相關規範約束夫妻雙方互負忠誠義務，且性行為自由應受婚姻與家庭制度之制約。刑法第 239 條對於通姦者、相姦者處一年以下有期徒刑之規定。

「固屬於對人民之性行為自由有所限制，惟此為維護婚姻、

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40 參最高法院 45 年台上字第 1149 號判例、62 年台上字第 2090 號判例。

41 參法務部(87)法檢（二）字第 02560 號。

家庭制度及社會生活秩序所必要。」

為免此項限制過嚴，已對於通姦罪附加訴追條件，於同法第二百四十五條第一項規定通姦罪為告訴乃論，以及同條第二項經配偶縱容或宥恕者，不得告訴。

此乃立法者就婚姻、家庭制度之維護與性行為自由間所為價值判斷，並未逾越立法形成自由之空間，而與憲法第 23 條比例原則之規定尚無違背。

另一方面，告訴乃論之罪，對於共犯之一人告訴或撤回告訴者，其效力及於其他共犯。但刑法第二百三十九條之罪，對於配偶撤回告訴者，其效力不及於相姦人。此為刑事訴訟法第 239 條所明定。最高法院 104 年度台非字第 273 號刑事判決乃認為現行刑事訴訟法第 239 條但書係為保障告訴人與通姦人之間的「夫妻情義」與「家庭和諧」而設，目的在促使告訴人與通姦人所共築的婚姻關係得以繼續延續[42]。

由上可知，刑法第 239 條以及刑事訴訟法第 239 條之旨均在家庭與婚姻制度之維護[43]。又刑事訴訟法第 239 條之規定係為實現刑法第 239 條之罪所隨設，大院如果宣告刑法第 239 條違憲，刑事訴訟法第 239 條即失所附麗。故本案之討論，應將兩個法條(以下亦合稱"系爭規定")合併觀察，並以刑法第 239 條為討論核心。

系爭規定以維護家庭與婚姻制度為標榜，但在實際適用上，

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[42] 最高法院 104 年度台非字第 273 號刑事判決乃認為：「刑事訴訟法第二百三十九條但書規定：刑法第二百三十九條之罪，對於配偶撤回告訴者，其效力不及於相姦人。此為告訴不可分原則之例外規定。乃告訴人常有本於夫妻之情義，對於配偶有所宥恕者，而對相姦者則未必然，若一併使其撤回之效力及於必要共犯之相姦者，實有乖人情，故設此例外規定。換言之，告訴人得以單獨對通姦之配偶撤回告訴，乃為顧及婚姻關係中之夫妻情義、家庭和諧，夫妻可以早日脫離訴訟關係，重修舊好，破鏡重圓，促使婚姻關係得以繼續延續。」

[43] 釋字第 569 號解釋：「惟訴訟權如何行使，應由法律予以規定；法律於符合憲法第二十三條意旨之範圍內，對於人民訴訟權之實施自得為合理之限制。刑事訴訟法第三百二十一條規定，對於配偶不得提起自訴，係為防止配偶間因自訴而對簿公堂，致影響夫妻和睦及家庭和諧，為維護人倫關係所為之合理限制，尚未逾越立法機關自由形成之範圍。」可知大院曾經肯認立法者得基於「人倫關係」、「家庭和諧」等目的，對於人民之訴訟權為一定限制。

卻蔓生出平等原則的問題。

按憲法第七條所揭示之平等原則，非指絕對、機械之形式上平等，而係保障人民在法律上地位之實質平等，要求本質上相同之事物應為相同之處理，不得恣意為無正當理由之差別待遇。法律為貫徹立法目的，而設處罰規定時，如因處罰對象之取捨，而形成差別待遇者，須與立法目的間具有實質關聯，始與平等原則無違。此觀釋字第 666 號解釋意旨甚明。

根據我國法務部於 108 年 6 月所發布的「妨害婚姻及家庭罪案件統計分析」(下稱 108 年統計分析)[44]，自 98 年至 108 年 4 月為止，犯包含刑法第 237 條重婚罪、第 239 條通姦罪、第 240 條和誘罪、第 241 條略誘罪等妨害婚姻及家庭罪案件者，一共 6,448 名被告被起訴，其中以犯第 239 條通姦罪者為大宗(佔 93.6%)，共 6,036 位。又上開被以通姦罪起訴的 6,036 位被告當中，男性僅佔 2,883 位，女性則多達 3,153 位[45]。

進入到審判後，共有 568 位女性被告獲有罪判決，遠遠多於 480 位男性被告。若進一步區分被訴罪名究竟是通姦或相姦(統計自 105 年開始)，被起訴相姦的女性共 593 位(其中 376 位被定罪)，遠多於因相姦被起訴的 416 位男性(其中 266 位男性被定罪)。又，因通姦被起訴的 805 位被告(男性 457 位、女性 348 位)當中，有 220 位男性因告訴權人撤回告訴而獲不受理判決，顯然多於因告訴權人撤回告訴而獲不受理判決的 139 位女性[46]。至於偵查中，也有明顯為數較多的男性(1,091 位)因配偶撤回告訴而獲得不起訴處分(女性只有 769 位)[47] 。

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[44] http://163.29.130.186/RJSDWeb/common/WebListFile.ashx?list_id=1654 (最後瀏覽日期 2020 年 3 月 25 日)

[45] 參 108 年統計分析表 2。

[46] 參 108 年統計分析表 5。

[47] 參 108 年統計分析表 4。

由上可知，根據法務部的統計數據，以刑法第 239 條而言，實務上有比較多的女性被起訴、定罪(主要是相姦行為)。相對地，不論是偵查中或進入審判後，受惠**於刑事訴訟法第 239 條但書之規定，有明顯較多的男性因告訴權人撤回告訴而免受刑法第 239 條之控訴。出軌的先生往往容易被女性配偶宥恕，而與有婦之夫為性行為的女性(小三)也通常因撤回效力不及於而成為唯一遭到刑法第 239 條控訴、定罪者**[48]。

因此，釋字第 554 號解釋所未曾說明的是：「性別社會歧視問題」。縱使系爭規定係為「維護家庭和諧、促使婚姻關係得以延續」而立，但實際上操作的結果卻是以維護出軌男性的家庭和諧為主，幫助出軌男性的婚姻關係得以延續。本條但書雖**形式上未區分男女**，而僅係分別通姦、相姦者，然適用上及**實質上對待男女仍厚薄有殊**。女性相姦人往往必須獨自面對通姦罪之控訴與處罰，為通姦行為的男性配偶通常能獲得他方配偶事後宥恕(即可分地撤回告訴)，而免於刑罰。此無異已是一種獨厚通姦男性而單方面懲罰相姦女性之立法[49]，明確構成釋字第 666 號解釋所謂「表面上中立，實質上存在歧視」的情形[50]。如此現象，是否意味著，我國社會仍然在默許以刑事法律維繫父系社會？民國 91 年 12 月 27 日釋字第 554 號公布前後，法律學者對於通姦除罪化的呼籲不斷[51]，即非無故。

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48 此外，當通姦夫因配偶的宥恕而脫離刑事偵查或審判時，因通姦係對向犯，如通姦夫從原先被告的身分轉為證人，待證事實為有有無發生性行為以及對向犯是否明知性行為對象已婚，其證詞將陷小三於明顯不利之處境。形同通姦夫與原配偶聯合追訴女性對向犯。也有限制女性對向犯訴訟權行使之虞。

49 論者認為：「刑法上通姦罪的規定固然性別中立，在性別不平等的現實中，通姦罪仍舊是作為處罰出軌妻子與女性第三者的利器，丈夫相較於外遇的妻子與第三者較少受到通姦罪的懲罰」參陳昭如，婚外性的罪與罰，台灣法學雜誌第 223 期，頁 12，2013.5。

50 相同意旨，可參釋字第 666 號解釋理由書：「系爭規定既不認性交易中支付對價之一方有可非難，卻處罰性交易圖利之一方，鑑諸性交易圖利之一方多為女性之現況，此無異幾僅針對參與性交易之女性而為管制處罰，尤以部分迫於社會經濟弱勢而從事性交易之女性，往往因系爭規定受處罰，致其業已窘困之處境更為不利。系爭規定以主觀上有無意圖得利，作為是否處罰之差別待遇標準，與上述立法目的間顯然欠缺實質關聯，自與憲法第七條之平等原則有違。」

51 甘添貴，刑法各論(下)，頁 301-302，三民，2013 年 6 月；林山田，刑法各論罪(下冊)，自版，頁 498-501，2006 年 11 月；黃榮堅，論通姦罪的除罪化，刑罰的極限，元照，頁 11-12，1994 年 4 月。

(三) 刑法第 239 條與刑事訴訟法第 239 條但書不存在區分性別的極重要公益目的，也無或特殊例外情形

姑且不論通姦罪實際上能否有效預防配偶之不貞行為，因系爭規定涉及基於男女性別所為之差別待遇，基於憲法增修條文第 10 條第 6 項對國家課以排除社會性別歧視之義務，復涉及刑事處罰之動用，侵犯或威脅人身自由，誠有適用嚴格審查基準(strict/heightened scrutiny)之必要，亦即國家的法律手段與達成某一極重要公益目的(compelling interest)之間，需有直接的實質關聯性。次按釋字第 744 號解釋，所謂特別(極)重要之公益目的，係指為「防免人民生命、身體、健康遭受直接、立即及難以回復之危害」。

另一方面，根據釋字第 365 號解釋理由書：

「『中華民國人民，無分男女、宗教、種族、階級、黨派，在法律上一律平等』『國家應維護婦女之人格尊嚴，保障婦女之人身安全，消除性別歧視，促進兩性地位之實質平等』，憲法第七條及憲法增修條文第九條第五項，分別定有明文。...因性別而為之差別規定僅於特殊例外之情形，方為憲法之所許，而此種特殊例外之情形，必須基於男女生理上之差異或因此差異所生之社會生活功能角色上之不同，始足相當。」

可知**有關性別，國家應以無差別待遇為原則**，只有在上開理由書所稱「須基於男女生理上之差異或因此差異所生之社會生活功能角色上之不同」之情形，國家始能例外為男女之區別。

查系爭規定固然以家庭與婚姻制度之維護為其標榜，已如前述。然而，論者也指出，一個欠缺感情基礎的婚姻，不可能是法律所要追求的目的，難以想像國家企圖藉由立法製造夫妻間的感

情義務[52]。「訂立婚姻契約的雙方當事人，應以愛情與麵包經營婚姻關係，而不能依賴刑罰，做為保護婚姻的工具，正如同支票的發票與受款人(或執票人)，必須依賴彼此的信用，而非依賴支票刑罰的制裁，來達成支票做為支付工具的立法目的。」[53]今日的婚姻制度，乃基於私人間自由意志所締結，不可復從古代家國相通的概念理解。夫妻情義之周全或家庭關係之和諧，原屬民事，理應由家庭成員共同維護，而與「防免人民生命、身體、健康遭受直接、立即、及難以回復危害」並無必要關聯。刑法第 239 條處罰通姦相姦行為，再輔以刑事訴訟法第 239 條但書撤回告訴不可分的例外規定，兩者交互作用，不啻係在助長以夫為尊之刻板社會意識的支配作用，不能認為是極重要之公益目的。此等基於性別所為的差別立法，亦毫無任何基於男女生理差異或因此差異所生之社會生活功能角色所生的特殊例外情形存在。綜言之，此基於性別所為的差別立法，與釋字第 365 號解釋保障性別平等以及釋字第 666 號解釋所揭櫫之性別實質平等保障，顯然有違。

(四) 通姦罪追訴制度庇蔭復仇之刑罰目的，非憲法所許

按系爭法規既應採嚴格審查基準，則依釋字第 744 號解釋以及黃昭元大法官所提釋字第 744 號解釋協同意見書之意旨，系爭法規原則上應推定為違憲，並應由政府機關負舉證責任，證立系爭規定之合憲[54]。次按以復仇為刑罰目的之法律並非憲法所許。釋字第 551 號解釋理由指出，行為人負擔刑事責任應以其行為本身惡害程度予以評價，以同害之原始報應刑思想為出發點的刑事處罰，將產生罪刑不相對應之問題，而與憲法第 23 條比例原則有違

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[52] 黃榮堅，論通姦罪的除罪化，刑罰的極限，元照，頁 11-12，1994 年。

[53] 林山田，刑法各論罪(下冊)，自版，頁 500，2006 年 11 月

[54] 參黃昭元大法官所提釋字第 744 號解釋協同意見書：「本號解釋所稱『系爭規定之立法資料須足以支持…』等語，就是進一步強調：在嚴格審查標準之下，應依本院調查所得或(及)政府機關所提出之相關立法資料，去證立系爭規定之目的及手段合憲。如相關立法資料無法證立，系爭規定即屬違憲。…本院自應盡量舉行言詞辯論或說明會，並明確要求政府機關提出立法資料以證立受審查法令之合憲，以求程序完備。」

[55]。論者從刑罰論觀點出發，認為人與人之間應報復仇，將對於整體社會利益產生惡性循環的作用[56]，至不足取法。

實則，民主憲政社會重視人性尊嚴價值，任何以復仇為目的之刑罰規定，都與當今憲政秩序嚴重扞格；而植基於「以牙還牙」、「以眼還眼」原始正義觀的應報思想，將賠償與懲罰混為一談，開啟民刑不分，以刑逼民之淵數；以復仇作為目的之刑事立法，不能符合限制人權立法應具備「防止防害他人自由，避免緊急危難維持社會秩序，增進公共利益」等正當目的之憲法誡命，在憲法上並無立足之地。應報思想始於古代社會，或因迷信神權，或因偏於感情直覺，而迷信可以應報手段發揮刑罰功用。自刑事法思潮言之十八世紀之後，刑法思想激盪，應報思想亦不足以滿足正義之要求，東西社會同斯一理，人類滿足正義感之方法由嚴酷趨於寬和，由感情之發洩趨於合理之建設，而由應報觀念趨向於威嚇警戒之一般預防，其後更進而注重教育改善之特別預防，以維持社會秩序為目的之立法，譴責手段，僅以警戒社會所必要者為限，與憲法比例原則之要求，亦若合符節。

質言之，刑法第 239 條之實際操作結果，即是一種報復對方對婚姻不忠誠的工具[57]。通姦罪實質上成為基於應報思想的私刑法律，配偶透過通姦罪的刑事裁判與刑事訴訟的偵審過程，懲罰第三者，實與一般預防或特別預防等法政策關連甚微，此種助長復

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55 參釋字第 551 號解釋理由：「然同條例第十六條規定：『栽贓誣陷或捏造證據誣告他人犯本條例之罪者，處以其所誣告之罪之刑。』此項規定係承襲原戡亂時期肅清煙毒條例第十五條規定而來，固有其時代背景及立法政策之考量，然與該條例規定製造、運輸、販賣、施用、轉讓、持有或栽種毒品等行為之不法內涵及暴利特質兩不相侔，逕依所誣告之罪反坐，顯未考量行為人之誣告行為並未涉及毒品或其原料、專供施用器具等之製造、散布或持有，亦無令他人施用毒品致損及健康等危險，與該條例肅清煙毒、防制毒品危害之立法目的與嚴於其刑之規定，並無必然關聯，而未顧及行為人負擔刑事責任應以其行為本身之惡害程度予以非難評價之刑法原則，強調同害之原始報應刑思想，以所誣告罪名反坐，所採措置與欲達成目的及所需程度有失均衡；其責任與刑罰不相對應，罪刑未臻相當，與憲法第二十三條規定之比例原則未盡相符。」

56 黃榮堅，基礎刑法學(上)，頁 14-17，元照，2012 年。

57 林山田，德國胡思錄(下)，頁 163 以下，前衛，1995 年。

仇的刑罰規定，即與憲法第 23 條之比例原則相牴觸[58]。

(五) 通姦罪法入家門並非維護家庭與婚姻制度的最小侵害手段

刑法第 239 條雖有維護家庭與婚姻制度完整圓滿之目的，但學說上認為欲以刑罰來達成此目的，根本是緣木求魚。按有配偶之人與他人性交，雖為法律與道德觀念所不容，但終究屬於私人之事，如以刑罰強行介入，反而可能導致婚姻破裂之結果[59]。縱使認為刑事處罰得以達成維繫家庭與婚姻完整美滿之目的，刑法第 239 條也不是一個較小侵害的手段。

欲達成家庭與婚姻之維繫，至少還有兩種較小侵害之途徑可資對照。第一，民事賠償制度原已可達相同之目的，無須國家耗費司法資源發動刑罰權。第二，將刑法第 239 條後段「其相姦者亦同」之規定刪除，亦可減少性別歧視之作用。

首先，系爭規定原係民事制度刑事化之結果，但其實踐，卻有國家刑罰制度民事化的現象。根據前開法務部統計數據可知，從 105 年至 108 年 4 月間，共有 1048 位有罪者，其中高達 1046 位獲判有期徒刑 6 月以下，佔 99.8%(其餘 2 位是判拘役或免刑)[60]，均屬於依法得易科罰金之情形。從結果論，此與侵害配偶權的民事賠償制度無異，為通姦行為者均可以支付金錢為其行為代價，已形同是國家刑罰權的民事化，亦即，多數被判刑的行為人，都是「繳錢了事」。國庫反而與被害者處於競爭金錢給付的狀態。通姦罪在操作上皆是「繳錢即足以了事」，政策上又何需國家額外動用刑事訴訟之偵查及審判？何不讓受本罪刑之宣告者將原應繳納給國庫的罰金，轉換為民事賠償？將刑法第 239 條宣告違憲，「刑法退出家門」以容婚姻契約之糾紛留在民事法律的領域解

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58 我國獨有之自訴制度，源於應報思想，而將國家刑罰權的發動取決於人民，助長以刑遏民之私刑化疑慮，本案系爭法規，亦足資證明。

59 甘添貴，妨害婚姻與口交通姦，台灣法學雜誌第 42 期，頁 149，2003 年 1 月。

60 參 108 年統計分析表 5。

決，透過民事求償機制的強化健全(例如舉證責任的減輕或移轉、提高損害賠償額)，使違法者負擔更重的賠償責任，應屬侵害較小，而效益較大之法律手段。

或有認為，雖然多數犯本罪之行為人獲判 6 月以下有期徒刑而得易科罰金，但行為人在偵審程序中仍有某種程度教化、法治教育及預防再犯之功能[61]。然而，統計上有高達 99.8%的受本罪刑之宣告人終究「繳錢了事」，以新台幣 1000 元、2000 元、或 3000 元折算一日刑期，試問偵審過程能有多少教化、法治教育而應給予更多的教化，或預防再犯之功能？刑事訴訟程序是要偵審人員「作之君」「作之師」以行教化嗎[62]？婚姻契約之違反，動用整套刑事偵審程序來進行所謂教化、法治教育或預防再犯的工作，不是維繫婚姻制度的必要手段。且不論偵審程序是否真的能達成教化、法治教育及預防再犯之功能，國家在刑事實務上放棄教化或教育通姦男性而獨獨教化相姦女性，其本身亦是性別歧視之舉指。何況並無可信之任何數據支持女性對向犯有更高的再犯率。

其次，通姦配偶行為可責程度高於對向犯，已如前述。如果我們直接揚棄「相姦人都是狐狸精，通姦配偶只是犯了全天下男人都會犯的錯」這類性別刻板意識基調。實際上每一個通姦行為事實的發生，結果上真正破壞配偶信賴，違反婚姻契約忠誠義務者，是通姦配偶。相姦人做為婚姻契約外之第三人，固應尊重他人家庭，但終究並非婚姻契約當事人，無論如何通姦配偶之可責性必定遠高於相姦人。反之，真正能有效維繫家庭與婚姻、完滿履行神聖婚姻契約的，也是雙方配偶(畢竟婚姻契約外的第三者眾)。故，如果刑法第 239 條只單純處罰「有配偶而與人通姦者」，而無後段處罰相姦者之條文，釋字第 554 號所揭櫫之制度目的，

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61 參立法院第 9 屆第 1 會期第 7 次會議議案關係文書，105 年 1 月 14 日法務部關於刑法通姦罪修法方向說明函，頁 598。

62 《尚書》〈泰誓〉：「天佑下民，作之君，作之師，惟其克相上帝，寵綏四方。」錢宗武、江灝譯注，《尚書》，頁 222，臺灣古籍出版社，1996 年。

亦可完全達到。

若係如此，處罰對向犯之規定即非屬必要之限制。民國 24 年中華民國刑法公布後，立法者縱使將原先處罰「有夫之婦與人通姦者」之規定修正為用語形式上中性的「有配偶之人與人通姦」，惟父系社會片面要求女性守貞的罪罰精神，依存在現行刑法第 239 條之上，猶如附骨之蛆。申言之，即令進入到民主自由憲政體制後，婚姻制度已然從「男女有別」的身分差等質變為「自由締結」的婚姻契約，古代一夫多妻制度也逐漸被一夫一妻制所取代，然而多年來我們的立法者未能一併刪去通姦罪此一深受父系制度文化支配的傳統規範，乃無法避免使得女性之對向犯繼續因其性別的緣故成為婚姻制度轉變下的犧牲者。

所應注意者，刪除對向犯固然是個選項，然若採此選項，大院則須進一步指明，釋字第 748 號解釋之後，系爭規定中「配偶」一詞，是否將因性傾向之不同而異，其應如何適用的問題。

綜之，系爭規定不僅造成對女性的實質性別歧視，究其本質，告訴乃論而可選擇性撤回告訴，更已成為滿足復仇心理的應報刑罰。不論是刑法第 239 條或刑事訴訟法第 239 條但書，不具目的正當性，也非維護家庭與婚姻制度之最小侵害手段，與憲法第 7 條、第 23 條、憲法增修條文第 10 條第 6 項以及釋字第 666 號解釋意旨，均生嚴重衝突。釋字第 554 號解釋應予變更。

四　大法官應依憲法增修條文第 10 條第 6 項及釋字第 666 號解釋之意旨，竭力消除系爭條文所生實質上之性別歧視

憲法增修條文第 10 條第 6 項規定，國家應維護婦女之人格尊嚴，保障婦女之人身安全，消除性別歧視，促進兩性地位之實質平等。此一規定，乃係鑒於社會上性別歧視之現象嚴重，亟待公權力積極加以破除之故。根據釋字第 372 號解釋意旨，司法亦有義務依照憲法增修條文第 10 條第 6 項之規定，以積極作為破除性別歧視之社會現象。

從前述法務部統計數字可知，雖然實務上有更多的男性出軌者受到妻子的通姦罪控訴，但是，男性通姦罪被告獲得告訴權人宥恕而事後撤回告訴的機率也較高。此現象受到「男尊女卑」思想的影響明顯。然而，其實際結果是，對於通姦行為應負擔最主要責任的丈夫，受既有法制之惠，而免於受到刑事處罰。甚且，在妻子即告訴權人撤回對其之告訴後，出軌者搖身一變成為入女性相姦人於罪的「關鍵證人」，其證詞不論對於相姦行為的存在或犯罪故意之證明，都幾乎能收一錘定音之效。其實際結果是，真正應該對於通姦行為負最主要責任的丈夫，與告訴權人即妻子共同懲罰婚姻契約外之第三人。男性的婚姻出軌者，仍因易於得到宥恕而使得異性之對向犯單獨受到刑事制裁，享受其繼續優越的社會地位，此一結果完全符合「男尊女卑」的社會常識認知。

通姦行為本質為民事侵權行為，通姦人基於婚姻契約，負有忠誠義務，違反該義務乃侵害他方配偶之配偶權。此為我國司法實務向來之見解，已如前所述。當婚姻制度之本質從禮教預立的不平等「身分」轉變平等締結的「契約」，通姦行為本質上是違反民法義務之行為。只是現行民法對於僅僅透過重婚、離婚等條文邊際地形塑夫妻忠誠義務，卻未明文揭示「配偶不得與他方配偶以外之人為性行為」以及「任何人不得與他人之配偶為性行為」之民法義務；反而是舊日為「身分」婚姻而設的通姦罪處罰規定繼續遁入現代刑法典，「規範之時差錯置」，導致帶有男尊女卑刻板意識之民間社會，對於通姦行為之處罰抱有錯誤的期待，受到「男尊女卑」思想壓迫的女性，迄今乃仍然活在一個性別歧視的社會中。法律（刑法第 239 條暨刑事訴訟法第 239 條）容認並授權檢察機關依照配偶之選擇，只起訴女性相姦人，而不起訴原應負擔婚姻守貞義務之主要義務人即其丈夫時，不啻在實質上允許公權力成為男尊女卑刻板社會意識繼續歧視女性的幫兇。此際，公權力一方面實質上違反憲法第七條應該平等對待性別的誡命；另一方面，也懈怠了，同時也產生了，國家或憲法機關依據憲法增修條文第十條第六項消除性別歧視，促進兩性地位之實質平等的憲法義務。

系爭規範不僅違反憲法第 7 條平等原則以及第 23 條比例原則，對於社會性別歧視復又長期推波助瀾，國家自有義務依憲法增修條文第 10 條第 6 項，積極破除通姦罪所造成社會性別歧視現象。

另一方面，根據釋字 371 號解釋意旨，法官有優先適用憲法審判之義務，如個案審判時對所應適用法律，本於其合理確信而認有牴觸憲法之疑義時，各級法院得以之為先決問題裁定停止訴訟程序，並提出客觀上形成確信法律為違憲之具體理由，聲請大法官解釋。換言之，法官聲請釋憲，是為義務，而非權利[63]。又法官聲請釋憲並非代表個案當事人爭取權利，而是基於個案上已無合憲性解釋之空間，確信通案抽象規範違憲，進而發動學理上所說「純規範控制」型態的違憲審查。

本件聲請解釋案，先後分別有來自苗栗、雲林、花蓮、桃園、高雄、台中、台北等地方法院法官提出多達 15 份之釋憲聲請書，姑不論各該個別案件當事人基本權侵害之有無或具體情形，可知刑法第 239 條以及刑事訴訟法第 239 條但書所交疊形構出的客觀法秩序，在為數極多之法官心中形成法律違憲之確信。則系爭規範存在違憲疑義，已無可迴避。發動聲請之法官均已意識到司法者負有積極破除社會上男尊女卑之性別意識及歧視行為之憲法義務，發動大院針對通姦制度從事違憲審查，即是履行其憲法義務。

大院應如何破除通姦罪所造成的社會性別歧視，其具體界線之拿捏，仍有賴大院裁量。本人以為刑法第 239 條以及刑事訴訟法第 239 條但書，雙雙違憲。若為避免造成社會秩序過大變動，單獨宣告刑法第 239 條後段處罰相姦人之規定違憲，或者單獨宣告刑事訴訟法第 239 條但書違憲，亦均為選項。

人生而平等或是不平等，乃價值命題而非事實的描述。社會生活中人心不同，各如其面，本即易導致「人不平等」的誤信；人類數千年歷史之中，假設「人不平等」「男女不平等」的時期遠遠長過「人

[63] 李念祖，純規範控制的憲政難題，司法者的憲法(二)，頁 565，元照，2013 年。

人平等」「性別平等」的時期，不為無故。憲法文本中的理想無論如何瑰麗顯赫，如無釋憲者要為解釋適用，也不必然保證落實為憲政現實[64]。誠如同黃源盛教授所言[65]：

> **近半世紀來的台灣，社會結構急速轉變，大家庭制解體，傳播媒體盛行，歐風美雨挾其工商業威勢，浸入人心，自由主義思想大為普及，個人性自主意識也不斷提升。想來，廢除我國刑法上的通姦罪，不論時程的遠近，似乎已是無可避免的趨勢，倫理道德與法律關係的再一次鬆綁，又要跨前一步，新的法制史頁正由史家書寫中。**

五 結論

本案的核心問題是，刑法以刑罰做為強制民法上婚姻義務之手段，是否符合憲法？其實也就是人類歷史上從身分到契約一項革命性的思想轉折，在法律制度上加以反映實現而形成變革的過程中，因受社會男尊女卑刻板意識影響，形成了觀念滯礙、制度闕漏、權力與權利的誤用等等因素，使得性別不平等的身分關係，仍成頑強不退的社會制度遺留，尚待憲法機關依據憲法增修條文加以破除的嚴肅課題。

一方面，寫於民國 18 年的民法，已將傳統婚姻之係由家父長決定的親族聯姻身分秩序安排，改為本於性別平等之宗旨，由當事人依其個人自由意志平等締結之契約。此正是在法律上，將婚姻從可由國法強制維繫的、不平等的禮教秩序身分關係，一舉釋放為平等的民事契約關係，構成婚姻制度一個重大的轉捩點。當時復採取公開儀式婚，之後修法改採登記婚，均使婚姻制度形成因締結契約而產生排他效力。然則婚姻契約所產生的兩種法律義務，均未見民法之直接明文規

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[64] 李念祖，從陌生到顯赫---平等條款入憲史談片，法制史研究第 24 期，頁 273；284-285，2013.12。

[65] 黃源盛，『西法東漸中無夫姦存廢之爭』，政大法學評論第 91 期，頁 91，2006.6。

定，而只能從其他相關規定推演得出。一是「有配偶之人不得與他人為性行為」之契約義務，未見民法之明文，而是寓含於判決離婚的規定之中。二是「任何人不得與他人之配偶為性行為」之第三人義務，此為婚姻契約締結完全登記後之法律衍生義務，亦未見民法明文規定，而是在司法實務上以侵權行為規定保障配偶權的方式，加以解釋建構。

另一方面，寫於民國 17 年的刑法，雖然已將原係維護夫權，因出禮而入刑所生的刑事制裁，改採形式上性別中立的「配偶」字眼，但是刑法第 245 條以之為告訴乃論之罪，國家復因刑事訴訟法第 239 條規定得由配偶宥恕而僅追究相姦人的刑責，乃從未真正脫離、也極易重新陷入舊日禮教社會慣由統治者以刑罰手段介入家庭，強制形成人倫性別身分與男女尊卑秩序的法制窠臼。一遇男尊女卑的社會刻板意識盤踞不去，**男尊女卑的不平等關係即已沿著刑事追訴的管道借屍還魂，繼續支配社會性別秩序**。

簡單地說，民法所建立的，從不平等的性別身分關係走向平等契約關係的婚姻制度新紀元，已因刑法殘留的出禮入刑禮教秩序法制結構而生遲滯甚至遭到解消，現代婚姻仍隨時可能再從平等的契約回到不平的性別身分關係。以上舉出的統計數字，足以證明此一社會事實確實存在。當眾多目睹數十年社會不平等現象的法官，紛紛警覺而凜於司法者負有依據憲法增修條文第 10 條第 6 項消除性別歧視、促進兩性地位實質平等的憲法義務，而停止訴訟聲請釋憲時，大院誠宜善用憲法解釋權限，以盡到與法官相同的，**積極實現性別平等的憲法義務與職責，依憲法增修條文第 10 條第 6 項之意旨變更釋字第 554 號解釋，宣告兩法系爭條文違憲，以使婚姻制度從不平等的性別身分還歸到性別平等的契約關係！**

以上是釋字第 554 號解釋所未曾論及之憲法增修條文第 10 條第 6 項規定，足以影響其原有結論之相關論述與分析。就大院下詢釋字第 554 號解釋依原有之論理路徑，應否變更其審查基準而可得到不同的結

論，則可另行歸納結論如下。

釋字第 554 號解釋係就憲法第 22 條之概括性人權之限制為比例原則之審查，解釋中並未言明使用之審查基準。按本案所涉之基本人權，除憲法第 22 條所規定者外，因本案涉及限制人身自由之刑罰，同時並涉及性別平等實質上遭到無形侵蝕，且有待公權力積極加以實現。大院亦宜施以最嚴格之審查，兼顧實現憲法第 8 條保障之人身自由，以及憲法第 7 條與增修條文第 10 條第 6 項雙向保障實現之性別平等，從而要求，立法須以保護特別重要之公共利益為目的，目的與手段間應具備直接的實質關連性，且無其他侵害較小之手段存在，始足以當之。此為釋字第 554 號所未言及者，大院允有必要重加考量。

衡之釋字第 554 號解釋所言之係以刑罰手段達到預防通姦、維繫婚姻之目的，原為民法婚姻制度所追求之目的，通姦罪在刑法中不是公訴罪名，僅屬告訴乃論，此中具有助長配偶復仇，延續男尊女卑社會刻板意識的作用；如何能謂符合特別重要之公共利益？乃應嚴加檢討，毋宜放過。此則係言**系爭立法的目的正當性不足**。

刑罰手段是否真有預防通姦、維繫婚姻的實際效用，具備目的與手段間應有之直接的實質關連性，不能只憑立法者與執法機關一廂情願的主觀設想；獲宥恕配偶之再犯率及其婚姻之維持率如何？有何統計數據作為依據？未見關係機關提出資料加以驗證，即不能認為其目的與手段間已然具備直接的、實質關連性。此則係言**系爭立法的手段必要性不足**。

事實上，任何預防通姦、維繫婚姻的法律手段，均不應使得刑事執法機關的處罰權力，因性別而使契約主義務人脫罪，衍生義務人入罪，成為助長社會男尊女卑之性別歧視刻板意識報復行為的工具。

通姦罪除罪化之同時，若在民法中載明，配偶有不與配偶以外之人為性行為之義務；第三人則有不與他人之配偶為性行為之義務，並適當增加被害人獲得損害賠償之項目與規模，即不失為平行、可行而

且目的相同的較少侵害法律手段。

退步言之，相姦者若無認識婚姻關係存在之故意，不會成罪；但是違反婚姻契約義務的配偶出軌，皆非無過。配偶出軌，原是相姦行為真正的成立要素；但配偶一旦得到宥恕成為污點證人，對向犯即成唯一究責對象，即使不言性別歧視，亦欠公允。是則法律若是只以負擔婚姻契約主義務之配偶為刑事制裁對象，而不及於第三人者，亦為現行立法之外的別種選擇，卻可免除使配偶無責而對向之婚姻外第三人有罪，所可能形成之實質性別歧視的嚴重後果。但此時大院尚需明示，「配偶」一詞是否得因性傾向之差異而有不同之適用，又不待言。

與以上兩例相互對照，均可得知現行立法不符合較小侵害手段之比例原則要求。此則是言**系爭立法的限制妥當性不足**。

一言以蔽之，系爭立法違反比例原則且有助長性別歧視之明顯社會效應，大院基於消除性別歧視，促進性別平等的憲法職責，明白揭示平等婚姻契約關係，具有民事排他性之內容要旨後，變更過去之解釋而宣告系爭刑事立法兩皆違憲，值得期待。此呈

司法院大法官　公鑒

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2020 年 3 月 27 日

司法院大法官會台字第 12664 號鑑定意見發言要點

李念祖

一、關於破除性別歧視（憲法增修條文第 10 條第 6 項）

- 釋字第 748 號解釋出現後必須重新檢視刑法的配偶定義與釋字第 554 號解釋。
- 婚姻制度的演變，已從過去不平等的身分性別關係轉變為現代性別平等的契約關係。
- 配偶的不通姦義務，是契約當事人的原生義務，不是親族間的出嫁從夫義務；第三人的不相姦義務，則是婚姻登記後的法律衍生義務，兩者之性質不同。民法未能明示兩項義務，只能透過其他條文意會，不無闕憾。
- 用刑法懲處通姦與相姦行為，是傳統禮教人倫秩序，強制建立男尊女卑身分關係，出禮入刑的思想遺留；刑法雖採看似性別中立的法條文字，仍對男尊女卑的社會刻板意識欠缺免疫力。配偶可選擇處罰同性相姦者而宥恕異性配偶的告訴乃論制度(刑法第 239 條以及刑訴第 239 條但書)，有使刑罰公權力成為配偶復仇的工具，並且繼續復刻並延長鞏固男尊女卑、不平等的身分性別關係之虞。
  - 印度 Dipak Misra 大法官在 2018 年 Joseph Shine v. Union of India 一案判決開篇之處即云：「任何制度歧視女性，或侵犯女性尊嚴、公允與平等原則者，都足以在憲法上引起憤慨；以致於逝者如斯而不舍晝夜，即使過去數十年間曾有任何相關法令條文得到沈默的支持背書，隨著日趨成熟的

憲法觀念與思想的進步，應該已經到了為之書寫輓歌的時候。要求女性按照男性的或社會期待的方式思考，足以摧毀女性的核心自我認同，堪稱可惡；宣布丈夫不是主人的時刻，已當其時[1]。」(Any system treating a woman with indignity, inequity and inequality or discrimination invites the wrath of the Constitution. Any provision that might have, few decades back, got the stamp of serene approval may have to meet its epitaph with the efflux of time and growing constitutional precepts and progressive perception. A woman cannot be asked to think as a man or as how the society desires. Such a thought is abominable, for it slaughters her core identity. And, it is time to say that a husband is not the master.)

- 反過來看，如果主張相關條文是在保障弱勢女性，印度最高法院引用南韓憲法法院宣告通姦罪違憲之判決論述如下：「過去南韓確實將通姦罪看成是用來保障弱勢女性的規定。以為女性在社會與經濟上處於弱勢，違法通姦的主要是男性。因此，通姦罪成為在心理上嚇阻男性的立法，同時也幫助女性配偶獲得金錢賠償，或是以分配財產做為撤銷告訴的條件。然而，社會的變遷稀釋了通姦犯罪刑事立法的正當性。最緊要的是女性的收入及經濟能力因社會

[1]https://cdn.fbsbx.com/v/t59.2708-21/42374210_1241504319324828_6819368336070017024_n.pdf/Joseph-Shine-v.-Union-of-India.pdf?_nc_cat=104&_nc_sid=0cab14&_nc_ohc=4zzPhBHZLyMAX-v6h6S&_nc_ht=cdn.fbsbx.com&oh=af79970d4a8753d1963e79775b8bad57&oe=5E81CD06&dl=1 (最後瀏覽日期 2020 年 3 月 20 日)

與經濟活動的能量而進步，女性是經濟上的弱勢假設，不再普遍適用於已婚的配偶。[2]」(The Court also analyzed the argument that adultery provisions protected women: “It is true that the existence of adultery crimes in the past Korean society served to protect women. Women were socially and economically underprivileged, and acts of adultery were mainly committed by men. Therefore, the existence of an adultery crime acted as psychological deterrence for men, and, furthermore, enabled female spouses to receive payment of compensation for grief or divided assets from the male spouse on the condition of cancelling the adultery accusation. However, the changes of our society diluted the justification of criminal punishment of adultery. Above all, as women’s earning power and economic capabilities have improved with more active social and economic activities, the premise that women are the economically disadvantaged does not apply to all married couples.)

- 歷年相關刑事資料統計數字足以證明，傳統上男尊女卑之社會刻板意識仍然存在而且緣附於刑法第 239 及刑訴 239 但書作用，延續了通姦關係中男性受到宥恕而女性不受宥恕的優越地位；婚姻的性別平等契約關係，也因之回到了不平等的身分性別關係。
- 法官紛紛基於保障性別平等的理由聲請釋憲，堪可證明業已普遍體認自身負有消除性別歧視，促進性別平等的憲法義務

[2]同前註。

與職責（憲法增修條文第 10 條第 6 項）。大院為憲法機關，負有相同的憲法義務。釋字第 372 號即為使用此條項之一項前例。

二、關於比例原則

- 本案系爭法律限制基本人權（包括憲法第 22 條所保障者，無論以隱私權，或如釋字第 554 號以性自主自由稱之皆無不可），涉及實際性別歧視（釋字第 666 號）與限制人身自由的刑罰規定，應依比例原則施以嚴格審查。
- 系爭規定表面上在防止通姦以維繫婚姻，卻在實質配合配偶復仇並延續也助長男尊女卑之社會刻板意識，即不能認為具有特別重要之公共利益。
- 刑罰追訴能否直接而實質地達到預防通姦與維繫婚姻的實際效用，不能徒憑假設。沒有實證資料顯示獲得宥恕配偶之再犯率及其婚姻之維持率如何，即無從證明其手段必要性果然存在。
- 較小之侵害手段，至少有二，一是於**民法中明確載入**，有配偶者不得通姦，以及第三人不得與他人之配偶為性行為兩項義務，並提高賠償額度與慰撫金，以替代刑罰，也可避免除罪化引起通姦具有社會相當性的誤會，同時消除國庫與民事原告自被告之財產求償發生任何競爭關係。
- 二是**只罰配偶，以避免性別歧視**。但大法官必須補充釋 748 解釋，說明配偶的定義是否不因性傾向而有差異。
- 以上二者均指向系爭規定不符限制妥當性而屬違憲立法的結

論。

- 至於主張民事賠償是給予富人以金錢換取不法的說法，至少有兩個錯誤。

1. 此一論據如果成立，民法賠償責任制度，豈不盡在獎勵富人為侵權行為而悉應改以刑罰施之？民事法院原得斟酌富人被告之財力而判給與其財力相當之賠償，此則與刑罰秩序無涉。問題不只在於損害賠償並不等於用金錢換取違法行為，也在違約的公平法律救濟，並不依賴施以刑罰嚇阻補充。
2. 在婚姻私事上也迷信刑罰萬能而不重民事救濟，正是國家秩序無遠弗屆，出禮入刑，刑罰直入家門以貫徹人倫秩序的德治傳統思想路徑。而通姦成罪，以刑替民甚或以刑逼民，是民事救濟欠發達的舊時法律文化特徵，也是婚姻制度，從身分轉變到契約迄今猶是困難重重，無法擺脫禮教社會中男性配偶的優越地位，也難以破除社會性別刻板意識的重大障礙。

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 194 OF 2017

Joseph Shine **...Petitioner(s)**

VERSUS

Union of India **...Respondent(s)**

J U D G M E N T

Dipak Misra, CJI (For himself and A.M. Khanwilkar, J.)

The beauty of the Indian Constitution is that it includes 'I' 'you' and 'we'. Such a magnificent, compassionate and monumental document embodies emphatic inclusiveness which has been further nurtured by judicial sensitivity when it has developed the concept of golden triangle of fundamental rights. If we have to apply the parameters of a fundamental right, it is an expression of judicial sensibility which further enhances the beauty of the Constitution as conceived of. In such a situation, the essentiality of the rights of women gets the real requisite space in the living room of individual dignity rather than the

space in an annexe to the main building. That is the manifestation of concerned sensitivity. Individual dignity has a sanctified realm in a civilized society. The civility of a civilization earns warmth and respect when it respects more the individuality of a woman. The said concept gets a further accent when a woman is treated with the real spirit of equality with a man. Any system treating a woman with indignity, inequity and inequality or discrimination invites the wrath of the Constitution. Any provision that might have, few decades back, got the stamp of serene approval may have to meet its epitaph with the efflux of time and growing constitutional precepts and progressive perception. A woman cannot be asked to think as a man or as how the society desires. Such a thought is abominable, for it slaughters her core identity. And, it is time to say that a husband is not the master. Equality is the governing parameter. All historical perceptions should evaporate and their obituaries be written. It is advisable to remember what John Stuart Mill had observed:-

> "The legal subordination of one sex to another – is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a system of perfect

> equality, admitting no power and privilege on the one side, nor disability on the other."[1]

We are commencing with the aforesaid prefatory note as we are adverting to the constitutional validity of Section 497 of the Indian Penal Code (IPC) and Section 198 of the Code of Criminal Procedure (CrPC).

2. At this juncture, it is necessary to state that though there is necessity of certainty of law, yet with the societal changes and more so, when the rights are expanded by the Court in respect of certain aspects having regard to the reflective perception of the organic and living Constitution, it is not apposite to have an inflexible stand on the foundation that the concept of certainty of law should be allowed to prevail and govern. The progression in law and the perceptual shift compels the present to have a penetrating look to the past.

3. When we say so, we may not be understood that precedents are not to be treated as such and that in the excuse of perceptual shift, the binding nature of precedent should not be allowed to retain its status or allowed to be diluted. When a constitutional court faces such a challenge, namely, to be detained by a precedent or to grow out of the same because of the normative

[1] On the Subjection of Women, Chapter 1 (John Stuart Mill, 1869)

changes that have occurred in the other arenas of law and the obtaining precedent does not cohesively fit into the same, the concept of cohesive adjustment has to be in accord with the growing legal interpretation and the analysis has to be different, more so, where the emerging concept recognises a particular right to be planted in the compartment of a fundamental right, such as Articles 14 and 21 of the Constitution. In such a backdrop, when the constitutionality of a provision is assailed, the Court is compelled to have a keen scrutiny of the provision in the context of developed and progressive interpretation. A constitutional court cannot remain entrenched in a precedent, for the controversy relates to the lives of human beings who transcendentally grow. It can be announced with certitude that transformative constitutionalism asserts itself every moment and asserts itself to have its space. It is abhorrent to any kind of regressive approach. The whole thing can be viewed from another perspective. What might be acceptable at one point of time may melt into total insignificance at another point of time. However, it is worthy to note that the change perceived should not be in a sphere of fancy or individual fascination, but should be founded on the solid bedrock of change that the society has

perceived, the spheres in which the legislature has responded and the rights that have been accentuated by the constitutional courts. To explicate, despite conferring many a right on women within the parameters of progressive jurisprudence and expansive constitutional vision, the Court cannot conceive of women still being treated as a property of men, and secondly, where the delicate relationship between a husband and wife does not remain so, it is seemingly implausible to allow a criminal offence to enter and make a third party culpable.

4. We may presently state the nature of the *lis*.

5. The instant writ petition has been filed under Article 32 of the Constitution of India challenging the validity of Section 497 IPC. A three-Judge Bench, on the first occasion, taking note of the authorities in ***Yusuf Abdul Aziz v. State of Bombay***[2], ***Sowmithri Vishnu v. Union of India and another***[3], ***V. Revathi v. Union of India and others***[4] and ***W. Kalyani v. State through Inspector of Police and another***[5] and appreciating the submissions advanced by the learned counsel for the petitioner, felt the necessity to have a re-look at the

[2] 1954 SCR 930 : AIR 1954 SC 321
[3] (1985)Supp SCC 137 : AIR 1985 SC 1618
[4] (1988)2 SCC 72
[5] (2012) 1 SCC 358

constitutionality of the provision. At that juncture, the Court noted that:-

> "*Prima facie*, on a perusal of Section 497 of the Indian Penal Code, we find that it grants relief to the wife by treating her as a victim. It is also worthy to note that when an offence is committed by both of them, one is liable for the criminal offence but the other is absolved. It seems to be based on a societal presumption. Ordinarily, the criminal law proceeds on gender neutrality but in this provision, as we perceive, the said concept is absent. That apart, it is to be seen when there is conferment of any affirmative right on women, can it go to the extent of treating them as the victim, in all circumstances, to the peril of the husband. Quite apart from that, it is perceivable from the language employed in the Section that the fulcrum of the offence is destroyed once the consent or the connivance of the husband is established. Viewed from the said scenario, the provision really creates a dent on the individual independent identity of a woman when the emphasis is laid on the connivance or the consent of the husband. This tantamounts to subordination of a woman where the Constitution confers equal status. A time has come when the society must realise that a woman is equal to a man in every field. This provision, *prima facie*, appears to be quite archaic. When the society progresses and the rights are conferred, the new generation of thoughts spring, and that is why, we are inclined to issue notice."

That is how the matter has been placed before us.

6. At this stage, one aspect needs to be noted. At the time of initial hearing before the three-Judge Bench, the decision in ***Yusuf Abdul Aziz*** (supra) was cited and the cited Law Report reflected that the judgment was delivered by four learned Judges and later on, it was noticed, as is reflectible from the Supreme Court Reports, that the decision was rendered by a Constitution Bench comprising of five Judges of this Court.

7. The said factual discovery will not detain us any further. In ***Yusuf Abdul Aziz*** (supra), the Court was dealing with the controversy that had travelled to this Court while dealing with a different fact situation. In the said case, the question arose whether Section 497 contravened Articles 14 and 15 of the Constitution of India. In the said case, the appellant was being prosecuted for adultery under Section 497 IPC. As soon as the complaint was filed, the husband applied to the High Court of Bombay to determine the constitutional question under Article 228 of the Constitution. The Constitution Bench referring to Section 497 held thus:-

> "3. Under Section 497 the offence of adultery can only be committed by a man but in the absence of any provision to the contrary the woman would be punishable as an abettor. The last sentence in Section 497 prohibits this. It runs—

"In such case the wife shall not be punishable as an abettor." It is said that this offends Articles 14 and 15.

The portion of Article 15 on which the appellant relies is this:

"The State shall not discriminate against any citizen on grounds only of ... sex."

But what he overlooks is that that is subject to clause (3) which runs—

"Nothing in this article shall prevent the State from making any special provision for women ...."

The provision complained of is a special provision and it is made for women, therefore it is saved by clause (3).

4. It was argued that clause (3) should be confined to provisions which are beneficial to women and cannot be used to give them a licence to commit and abet crimes. We are unable to read any such restriction into the clause; nor are we able to agree that a provision which prohibits punishment is tantamount to a licence to commit the offence of which punishment has been prohibited.

5. Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children. The two articles read together validate the impugned clause in Section 497 of the Indian Penal Code.

> 6. The appellant is not a citizen of India. It was argued that he could not invoke Articles 14 and 15 for that reason. The High Court held otherwise. It is not necessary for us to decide this question in view of our decision on the other issue."

On a reading of the aforesaid passages, it is manifest that the Court treated the provision to be a special provision made for women and, therefore, saved by clause (3) of Article 15. Thus, the Court proceeded on the foundation of affirmative action.

8. In this context, we may refer to the observation made by the Constitution Bench in ***Central Board of Dawoodi Bohra Community and another v. State of Maharashtra and another***[6] while making a reference to a larger Bench. The said order reads thus:-

> "12. Having carefully considered the submissions made by the learned Senior Counsel for the parties and having examined the law laid down by the Constitution Benches in the above said decisions, we would like to sum up the legal position in the following terms:
>
> (*1*) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.
>
> (*2*) A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case

[6] (2005) 2 SCC 673

of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(*3*)The above rules are subject to two exceptions: (*i*) the abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (*ii*) in spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of the Chief Justice constituting the Bench and such listing. Such was the situation in *Raghubir Singh*[7] and *Hansoli Devi*[8]."

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[7] *Union of India and Anr. v. Raghubir Singh (dead) by Lrs. etc.*, (1989) 2 SCC 754

[8] *Union of India & Anr. v. Hansoli Devi & Ors.*, (2002) 7 SCC 273

In the light of the aforesaid order, it was necessary to list the matter before a Constitution Bench consisting of five Judges. As noted earlier, considering the manner in which we intend to deal with the matter, it is not necessary to refer to a larger Bench.

9. Sections 497 and 498 of IPC read thus:-

> "**Section 497 : Adultery**
>
> Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.
>
> **Section 498 : Enticing or taking away or detaining with criminal intent a married woman**
>
> Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

10. Section 198 of CrPC provides for prosecution for offences against marriage. Section 198 is reproduced below:-

> "**198. Prosecution for offences against marriage.—**(1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence: Provided that-
>
> (a) Where such person is under the age of eighteen years or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;
>
> (b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub- section (4) may make a complaint on his behalf;
>
> (c) where the person aggrieved by an offence punishable under section 494 or section 495 of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father' s or mother' s brother or sister 2, or, with the leave of the Court, by any other person

related to her by blood, marriage or adoption.

(2) For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was com- mitted may, with the leave of the Court, make a complaint on his behalf.

(3) When in any case falling under clause (a) of the proviso to sub-section (1), the complaint is sought to be made on behalf of a person under the age of eighteen years or of a lunatic by a person who has not been appointed or declared by a competent authority to be the guardian of the person of the minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, the Court shall, before granting the application for leave, cause notice to be given to such guardian and give him a reasonable opportunity of being heard.

(4) The authorisation referred to in clause (b) of the proviso to sub-section (1), shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, shall be countersigned by his Commanding Officer, and shall be accompanied by a certificate signed by that Officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband.

> (5) Any document purporting to be such an authorisation and complying with the provisions of sub-section (4), and any document purporting to be a certificate required by that sub-section shall, unless the contrary is proved, be presumed to be genuine and shall be received in evidence.
>
> (6) No Court shall take cognizance of an offence under section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual intercourse by a man with his own wife, the wife being under 3 [eighteen years of age], if more than one year has elapsed from the date of the commission of the offence.
>
> (7) The provisions of this section apply to the abetment of, or attempt to commit, an offence as they apply to the offence."

11. On a perusal of the aforesaid provision, it is clear that the husband of the woman has been treated to be a person aggrieved for the offences punishable under Sections 497 and 498 of the IPC. The rest of the proviso carves out an exception as to who is entitled to file a complaint when the husband is absent. It may be noted that the offence is non-cognizable.

12. The three-Judge Bench, while referring the matter, had briefly dwelled upon the impact of the provision. To appreciate the constitutional validity, first, we shall deal with the earlier pronouncements and the principles enunciated therein and how we can have a different perspective of such provisions. We have

already referred to what has been stated in ***Yusuf Abdul Aziz*** (supra).

13. In ***Sowmithri Vishnu*** (supra), a petition preferred under Article 32 of the Constitution challenged the validity of Section 497 IPC. We do not intend to advert to the factual matrix. It was contended before the three-Judge Bench that Section 497 confers upon the husband the right to prosecute the adulterer but it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery; that Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman; and that Section 497 does not take in cases where the husband has sexual relations with an unmarried woman with the result that husbands have a free licence under the law to have extramarital relationships with unmarried women. That apart, the submission was advanced that Section 497 is a flagrant instance of 'gender discrimination', 'legislative despotism' and 'male chauvinism'. At first blush, it may appear as if it is a beneficial legislation intended to serve the interests of women but, on closer examination, it would be found that the provision contained in the section is a kind of "romantic paternalism" which stems from

the assumption that women, like chattels, are the property of men.

14. The Court referred to the submissions and held thus:-

> ".....The argument really comes to this that the definition should be recast by extending the ambit of the offence of adultery so that, both the man and the woman should be punishable for the offence of adultery. Were such an argument permissible, several provisions of the penal law may have to be struck down on the ground that, either in their definition or in their prescription of punishment, they do not go far enough. For example, an argument could be advanced as to why the offence of robbery should be punishable with imprisonment for ten years under Section 392 of the Penal Code but the offence of adultery should be punishable with a sentence of five years only: "Breaking a matrimonial home is no less serious a crime than breaking open a house." Such arguments go to the policy of the law, not to its constitutionality, unless, while implementing the policy, any provision of the Constitution is infringed. We cannot accept that in defining the offence of adultery so as to restrict the class of offenders to men, any constitutional provision is infringed. It is commonly accepted that it is the man who is the seducer and not the woman. This position may have undergone some change over the years but it is for the Legislature to consider whether Section 497 should be amended appropriately so as to take note of the "transformation" which the society has undergone...."

Proceeding further, the three-Judge Bench held that the offence of adultery as defined in that Section can only be committed by a man, not by a woman. Indeed, the Section expressly provides that the wife shall not be punishable even as an abettor. No grievance can then be made that the Section does not allow the wife to prosecute the husband for adultery. The contemplation of the law, evidently, is that the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime. The offence of adultery, as defined in Section 497, is considered by the Legislature as an offence against the sanctity of the matrimonial home, an act which is committed by a man, as it generally is. Therefore, those men who defile that sanctity are brought within the net of the law. In a sense, the same point is reverted to; who can prosecute whom for which offence depends, firstly, on the definition of the offence and, secondly, upon the restrictions placed by the law of procedure on the right to prosecute.

15. The Court further held:-

> ".....Since Section 497 does not contain a provision that she must be impleaded as a necessary party to the prosecution or that she would be entitled to be heard, the section is said to be bad. Counsel is right that Section 497 does not contain a

> provision for hearing the married woman with whom the accused is alleged to have committed adultery. But, that does not justify the proposition that she is not entitled to be heard at the trial. We have no doubt that if the wife makes an application in the trial court that she should be heard before a finding is recorded on the question of adultery, the application would receive due consideration from the court. There is nothing, either in the substantive or the adjectival criminal law, which bars the court from affording a hearing to a party, which is likely to be adversely affected, directly and immediately, by the decision of the court. In fact, instances are not unknown in criminal law where, though the prosecution is in the charge of the Public Prosecutor, the private complainant is given permission to oversee the proceedings. One step more, and the wife could be allowed a hearing before an adverse finding is recorded that, as alleged by her husband, the accused had committed adultery with her. The right of hearing is a concomitant of the principles of natural justice, though not in all situations. That right can be read into the law in appropriate cases. Therefore, the fact that a provision for hearing the wife is not contained in Section 497 cannot render that section unconstitutional as violating Article 21."

After so stating, the Court placed reliance on ***Yusuf Abdul Aziz*** (supra) and held that the same does not offend Articles 14 and 15 of the Constitution and opined that the stability of marriages is not an ideal to be scorned. Being of this view, the Court dismissed the petition.

16. In ***V. Revathi v. Union of India and others***[9], the Court analysed the design of the provision and ruled:-

> ".....Thus the law permits neither the husband of the offending wife to prosecute his wife nor does the law permit the wife to prosecute the offending husband for being disloyal to her. Thus both the husband and the wife are disabled from striking each other with the weapon of criminal law. The petitioner wife contends that whether or not the law permits a husband to prosecute his disloyal wife, the wife cannot be lawfully disabled from prosecuting her disloyal husband....."

It placed heavy reliance on the three-Judge Bench in ***Sowmithri Vishnu*** (supra) and proceeded to state that the community punishes the 'outsider' who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses subject to the rider that the erring 'man' alone can be punished and not the erring woman. It further went on to say that it does not arm the two spouses to hit each other with the weapon of criminal law. That is why, neither the husband can prosecute the wife and send her to jail nor can the wife prosecute the husband and send him to jail. There is no discrimination

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[9] (1988) 2 SCC 72

based on sex. While the outsider who violates the sanctity of the matrimonial home is punished, a rider has been added that if the outsider is a woman, she is not punished. There is, thus, reverse discrimination in "favour" of the woman rather than "against" her. The law does not envisage the punishment of any of the spouses at the instance of each other. Thus, there is no discrimination against the woman insofar as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated as an offender in the eye of law. The wife is not permitted as Section 198(1) read with Section 198(2) does not permit her to do so. In the ultimate analysis, the law has meted out even-handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other. Thus, no discrimination has been practised in circumscribing the scope of Section 198(2) CrPC and fashioning it in such a manner that the right to prosecute the adulterer is restricted to the husband of the adulteress but has not been extended to the wife of the adulterer. Expressing this view, the Court held that the provision is not vulnerable to the charge of hostile discrimination.

17. In ***W. Kalyani v. State Thro' Inspector of Police and another***[10], the Court held:-

> "10. The provision is currently under criticism from certain quarters for showing a strong gender bias for it makes the position of a married woman almost as a property of her husband. But in terms of the law as it stands, it is evident from a plain reading of the section that only a man can be proceeded against and punished for the offence of adultery. Indeed, the section provides expressly that the wife cannot be punished even as an abettor. Thus, the mere fact that the appellant is a woman makes her completely immune to the charge of adultery and she cannot be proceeded against for that offence."

Be it noted, the issue of constitutional validity did not arise in the said case.

18. At this juncture, we think it seemly to state that we are only going to deal with the constitutional validity of Section 497 IPC and Section 198 CrPC. The learned counsel for the petitioner submits that the provision by its very nature is arbitrary and invites the frown of Article 14 of the Constitution. In ***Shayara Bano v. Union of India and others***[11], the majority speaking through Nariman, J., ruled thus :-

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[10] (2012) 1 SCC 358
[11] (2017) 9 SCC 1

"60. Hard as we tried, it is difficult to discover any ratio in this judgment, as one part of the judgment contradicts another part. If one particular statutory enactment is already under challenge, there is no reason why other similar enactments which were also challenged should not have been disposed of by this Court. Quite apart from the above, it is a little difficult to appreciate such declination in the light of Prem Chand Garg (supra). This judgment, therefore, to the extent that it is contrary to at least two Constitution 346 Bench decisions cannot possibly be said to be good law.

61. It is at this point that it is necessary to see whether a fundamental right has been violated by the 1937 Act insofar as it seeks to enforce Triple Talaq as a rule of law in the Courts in India.

62. Article 14 of the Constitution of India is a facet of equality of status and opportunity spoken of in the Preamble to the Constitution. The Article naturally divides itself into two parts- (1) equality before the law, and (2) the equal protection of the law. Judgments of this Court have referred to the fact that the equality before law concept has been derived from the law in the U.K., and the equal protection of the laws has been borrowed from the 14th Amendment to the Constitution of the United States of America. In a revealing judgment, Subba Rao, J., dissenting, in State of U.P. v. Deoman Upadhyaya, (1961) 1 SCR 14 at 34 further went on to state that whereas equality before law is a negative concept, the equal protection of the law has positive content. The early judgments of this Court referred to the "discrimination" aspect of Article 14, and evolved a rule by which subjects could be classified. If 347 the

classification was "intelligible" having regard to the object sought to be achieved, it would pass muster under Article 14's anti-discrimination aspect. Again, Subba Rao, J., dissenting, in Lachhman Das v. State of Punjab, (1963) 2 SCR 353 at 395, warned that:

> "50.....Overemphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the Article of its glorious content."

He referred to the doctrine of classification as a "subsidiary rule" evolved by courts to give practical content to the said Article.

63. In the pre-1974 era, the judgments of this Court did refer to the "rule of law" or "positive" aspect of Article 14, the concomitant of which is that if an action is found to be arbitrary and, therefore, unreasonable, it would negate the equal protection of the law contained in Article 14 and would be struck down on this ground. In S.G. Jaisinghani v. Union of India, (1967) 2 SCR 703, this Court held:

> "In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, 348 discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions

> should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey — "Law of the Constitution" — 10th Edn., Introduction cx). "Law has reached its finest moments", stated Douglas, J. in United States v. Wunderlick [342 US 98],
>
> "9.....when it has freed man from the unlimited discretion of some ruler.... Where discretion, is absolute, man has always suffered". It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilkes [(1770) 4 Burr. 2528 at 2539],
>
> > ".....means sound discretion guided by law. It must be governed by rule, not by humour : it must not be arbitrary, vague, and fanciful.....".."
>
> This was in the context of service rules being seniority rules, which applied to the Income Tax Department, being held to be violative of Article 14 of the Constitution of India."

19. Thereafter, our learned brother referred to the authorities in ***State of Mysore v. S.R. Jayaram***[12], ***Indira Nehru Gandhi v. Raj Narain***[13], ***E.P. Royappa v. State of Tamil Nadu***[14], ***Maneka***

[12] (1968) 1 SCR 349
[13] (1975) Supp SCC 1

Gandhi v. Union of India[15], ***A.L. Kalra v. Project and Equipment Corporation of India Ltd.***[16], ***Ajay Hasia v. Khalid Mujib Sehravardi***[17], ***K.R. Lakshmanan v. State of T.N.***[18] and two other Constitution Bench judgments in ***Mithu v. State of Punjab***[19] and ***Sunil Batra v. Delhi Administration***[20] and, eventually, came to hold thus:-

> "It is, therefore, clear from a reading of even the aforesaid two Constitution Bench judgments that Article 14 has been referred to in the context of the constitutional invalidity of statutory law to show that such statutory law will be struck down if it is found to be "arbitrary"."

And again:-

> ".....The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as

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[14] (1974) 4 SCC 3
[15] (1978) 1 SCC 248
[16] (1984) 3 SCC 316
[17] (1981) 1 SCC 722
[18] (1996) 2 SCC 226
[19] (1983) 2 SCC 277
[20] (1978) 4 SCC 494

> pointed out by us above would apply to negate legislation as well under Article 14."

20. We respectfully concur with the said view.

21. In ***Yusuf Abdul Aziz*** (supra), the Court understood the protection of women as not discriminatory but as being an affirmative provision under clause (3) of Article 15 of the Constitution. We intend to take the path of expanded horizon as gender justice has been expanded by this Court.

22. We may now proceed to test the provision on the touchstone of the aforesaid principles. On a reading of the provision, it is demonstrable that women are treated as subordinate to men inasmuch as it lays down that when there is connivance or consent of the man, there is no offence. This treats the woman as a chattel. It treats her as the property of man and totally subservient to the will of the master. It is a reflection of the social dominance that was prevalent when the penal provision was drafted.

23. As we notice, the provision treats a married woman as a property of the husband. It is interesting to note that Section 497 IPC does not bring within its purview an extra marital relationship with an unmarried woman or a widow. The dictionary meaning of "adultery" is that a married person

commits adultery if he has sex with a woman with whom he has not entered into wedlock. As per Black's Law Dictionary, 'adultery' is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. However, the provision has made it a restricted one as a consequence of which a man, in certain situations, becomes criminally liable for having committed adultery while, in other situations, he cannot be branded as a person who has committed adultery so as to invite the culpability of Section 497 IPC. Section 198 CrPC deals with a "person aggrieved". Sub-section (2) of Section 198 treats the husband of the woman as deemed to be aggrieved by an offence committed under Section 497 IPC and in the absence of husband, some person who had care of the woman on his behalf at the time when such offence was committed with the leave of the court. It does not consider the wife of the adulterer as an aggrieved person. The offence and the deeming definition of an aggrieved person, as we find, is absolutely and manifestly arbitrary as it does not even appear to be rational and it can be stated with emphasis that it confers a licence on the husband to deal with the wife as he likes which is extremely excessive and disproportionate. We are constrained to

think so, as it does not treat a woman as an abettor but protects a woman and simultaneously, it does not enable the wife to file any criminal prosecution against the husband. Indubitably, she can take civil action but the husband is also entitled to take civil action. However, that does not save the provision as being manifestly arbitrary. That is one aspect of the matter. If the entire provision is scanned being Argus-eyed, we notice that on the one hand, it protects a woman and on the other, it does not protect the other woman. The rationale of the provision suffers from the absence of logicality of approach and, therefore, we have no hesitation in saying that it suffers from the vice of Article 14 of the Constitution being manifestly arbitrary.

24. Presently, we shall address the issue against the backdrop of Article 21 of the Constitution. For the said purpose, it is necessary to devote some space with regard to the dignity of women and the concept of gender equality.

25. In ***Arun Kumar Agrawal and another v. National Insurance Company Limited and others***[21], the issue related to the criteria for determination of compensation payable to the dependents of a woman who died in road accident. She did not

[21] (2010) 9 SCC 218

have a regular income. Singhvi, J. rejected the stand relating to determination of compensation by comparing a house wife to that of a house keeper or a servant or an employee who works for a fixed period. The learned Judge thought it unjust, unfair and inappropriate. In that context, the learned Judge stated:-

> "26. In India the courts have recognised that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by the wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the employer's work for particular hours. She takes care of all the requirements of the husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean, etc., but she can never be a substitute for a wife/mother who renders selfless service to her husband and children."

26. Ganguly, J., in his concurring opinion, referred to the Australian Family Property Law and opined that the said law

had adopted a very gender sensitive approach. The learned Judge reproduced:-

> "the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of a homemaker or parent."

27. In ***State of Madhya Pradesh v. Madanlal***[22], the Court held:-

> "Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct. Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error. Or to put it differently, it would be in the realm of a sanctuary of error."

28. In ***Pawan Kumar v. State of Himachal Pradesh***[23], the Court, dealing with the concept of equality and dignity of a woman, observed:-

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[22] (2015) 7 SCC 681
[23] (2017) 7 SCC 780

"47 ...in a civilized society eve-teasing is causing harassment to women in educational institutions, public places, parks, railways stations and other public places which only go to show that requisite sense of respect for women has not been socially cultivated. A woman has her own space as a man has. She enjoys as much equality under Article 14 of the Constitution as a man does. The right to live with dignity as guaranteed under Article 21 of the Constitution cannot be violated by indulging in obnoxious act of eve-teasing. It affects the fundamental concept of gender sensitivity and justice and the rights of a woman under Article 14 of the Constitution. That apart it creates an incurable dent in the right of a woman which she has under Article 15 of the Constitution. One is compelled to think and constrained to deliberate why the women in this country cannot be allowed to live in peace and lead a life that is empowered with a dignity and freedom. It has to be kept in mind that she has a right to life and entitled to love according to her choice. She has an individual choice which has been legally recognized. It has to be socially respected. No one can compel a woman to love. She has the absolute right to reject.

48. In a civilized society male chauvinism has no room. The Constitution of India confers the affirmative rights on women and the said rights are perceptible from Article 15 of the Constitution. When the right is conferred under the Constitution, it has to be understood that there is no condescendation. A man should not put his ego or, for that matter, masculinity on a pedestal and abandon the concept of civility. Egoism must succumb to law. Equality has

> to be regarded as the summum bonum of the constitutional principle in this context."

29. Lord Keith in ***R v. R***[24] declared:-

> "marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband."

30. Lord Denning[25] states:-

> "A wife is no longer her husband's chattel. She is beginning to be regarded by the laws as a partner in all affairs which are their common concern."

31. In ***Shamima Farooqui v. Shahid Khan***[26], the Court ruled:-

> "Chivalry, a perverse sense of human egotism, and clutching of feudal megalomaniac ideas or for that matter, any kind of condescending attitude have no room. They are bound to be sent to the ancient woods, and in the new horizon people should proclaim their own ideas and authority."

And again:-

> "Any other idea floated or any song sung in the invocation of male chauvinism is the proposition of an alien, a total stranger - an outsider. That is the truth in essentiality."

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[24] [1991] 4 All ER 481 at p. 484
[25] The Due Process of Law (London, Butterworths, 1980, at page 212)
[26] (2015) 5 SCC 705

32. In ***Voluntary Health Association of Punjab v. Union of India***[27], one of us (Dipak Misra, J.), in his concurring opinion, stated that women have to be regarded as equal partners in the lives of men and it has to be borne in mind that they have equal role in the society, that is, in thinking, participating and leadership. The issue related to female foeticide and it was stated thus:-

> "21. When a female foeticide takes place, every woman who mothers the child must remember that she is killing her own child despite being a mother. That is what abortion would mean in social terms. Abortion of a female child in its conceptual eventuality leads to killing of a woman. Law prohibits it; scriptures forbid it; philosophy condemns it; ethics deprecate it, morality decries it and social science abhors it. Henrik Ibsen emphasised on the individualism of woman. John Milton treated her to be the best of all God's work. In this context, it will be appropriate to quote a few lines from *Democracy in America* by Alexis de Tocqueville:
>
> "If I were asked ... to what the singular prosperity and growing strength of that people [Americans] ought mainly to be attributed, I should reply: To the superiority of their women."
>
> 22. At this stage, I may with profit reproduce two paragraphs from *Ajit Savant*

[27] (2013) 4 SCC 1

Majagvai v. *State of Karnataka*[28]: (SCC pp. 113-14, paras 3 & 4)

"3. Social thinkers, philosophers, dramatists, poets and writers have eulogised the female species of the human race and have always used beautiful epithets to describe her temperament and personality and have not deviated from that path even while speaking of her odd behaviour, at times. Even in sarcasm, they have not crossed the literary limit and have adhered to a particular standard of nobility of language. Even when a member of her own species, Madame De Stael, remarked 'I am glad that I am not a man; for then I should have to marry a woman', there was wit in it. When Shakespeare wrote, 'Age cannot wither her; nor custom stale, her infinite variety', there again was wit. Notwithstanding that these writers have cried hoarse for respect for 'woman', notwithstanding that Schiller said 'Honour women! They entwine and weave heavenly roses in our earthly life' and notwithstanding that the Mahabharata mentioned her as the source of salvation, crime against 'woman' continues to rise and has, today undoubtedly, risen to alarming proportions.

4. *It is unfortunate that in an age where people are described as civilised, crime against 'female' is committed even when the child is in the womb as the 'female' foetus is often destroyed to prevent the birth of a female child. If that child comes into existence, she starts her life as a daughter, then becomes a wife and in due course, a mother. She rocks the cradle to rear up her*

[28] (1997) 7 SCC 110

> *infant, bestows all her love on the child and as the child grows in age, she gives to the child all that she has in her own personality. She shapes the destiny and character of the child. To be cruel to such a creature is unthinkable.* To torment a wife can only be described as the most hated and derisive act of a human being."
>
> [Emphasis supplied]

And again:-

> "23. In *Madhu Kishwar* v. *State of Bihar*[29] this Court had stated that Indian women have suffered and are suffering discrimination in silence.
>
> "*28.* ... Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination." (SCC p. 148, para 28)
>
> 24. The way women had suffered has been aptly reflected by an author who has spoken with quite a speck of sensibility:
>
> "Dowry is an intractable disease for women, a bed of arrows for annihilating self-respect, but without the boon of wishful death."
>
> 25. Long back, Charles Fourier had stated:
>
> "The extension of women's rights is the basic principle of all social progress."
>
> 26. Recapitulating from the past, I may refer to certain sayings in the *Smritis* which put women in an elevated position. This Court

[29] (1996) 5 SCC 125

in *Nikku Ram case*[4] had already reproduced the first line of the *shloka*. The second line of the same which is also significant is as follows:

"यत्र तास्तु न पूज्यन्ते सर्वास्तत्राफलाः क्रियाः"

Yatra tastu na pujyante sarvastatraphalah kriyah

A free translation of the aforesaid is reproduced below:

"All the actions become unproductive in a place, where they are not treated with proper respect and dignity."

27. Another wise man of the past had his own way of putting it:

"भर्तृभ्रातृ पितृजाति श्रवश्रुश्वसुर देवरैः।
बन्धुभिश्च स्त्रियः पूज्यां भूषणाच्छादनाशनैः।।"

Bhartr bhratr pitrijnati
swasruswasuradevaraih
Bandhubhisca striyah pujyah
bhusnachhadanasnaih

A free translation of the aforesaid is as follows:

"The women are to be respected equally on a par with husbands, brothers, fathers, relatives, in-laws and other kith and kin and while respecting, the women gifts like ornaments, garments, etc. should be given as token of honour."

28. Yet again, the sagacity got reflected in following lines:

"अतुलं तत्र तत्तेजः सर्वदेवशरीरजम्।
एकस्थं तदभून्नारी व्याप्तलोकत्रयं त्विषा।।"

Atulam yatra tattejah sarvadevasarirajam
Ekastham tadabhunnari vyaptalokatrayam
tvisa

A free translation of the aforesaid is reproduced below:

"The incomparable valour (effulgence) born from the physical frames of all the gods, spreading the three worlds by its radiance and combining together took the form of a woman."

29. From the past, I travel to the present and respectfully notice what Lord Denning had to say about the equality of women and their role in the society:

"A woman feels as keenly, thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom — to develop her personality to the full as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important of the family. Neither can do without the other. Neither is above the other or under the other. They are equals."

33. In ***Charu Khurana and others v. Union of India and others***[30], speaking about the dignity of women, the Court held:-

"33. ... Be it stated, dignity is the quintessential quality of a personality and a human frame always desires to live in the

[30] (2015) 1 SCC 192

> mansion of dignity, for it is a highly cherished value. Clause (*j*) has to be understood in the backdrop that India is a welfare State and, therefore, it is the duty of the State to promote justice, to provide equal opportunity to all citizens and see that they are not deprived of by reasons of economic disparity. It is also the duty of the State to frame policies so that men and women have the right to adequate means of livelihood. It is also the duty of the citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement."

34. In ***Shakti Vahini v. Union of India and others***[31], the *lis* was in a different context. The Court reproduced a passage from Joseph J. Ellis which is also relevant for the present purpose. It reads:-

> "We don't live in a world in which there exists a single definition of honour anymore, and it's a fool that hangs onto the traditional standards and hopes that the world will come around him."

35. In the said case, a contention was advanced that the existence of a woman is entirely dependent on the male view of the reputation of the family, the community and the milieu. The Court, in that context, observed:-

> "5. ...The collective behaves like a patriarchal monarch which treats the wives,

[31] (2018) 7 SCC 192

> sisters and daughters subordinate, even servile or self-sacrificing, persons moving in physical frame having no individual autonomy, desire and identity. The concept of status is accentuated by the male members of the community and a sense of masculine dominance becomes the sole governing factor of perceptive honour."

36. We have referred to the aforesaid as we are of the view that there cannot be a patriarchal monarchy over the daughter or, for that matter, husband's monarchy over the wife. That apart, there cannot be a community exposition of masculine dominance.

37. Having stated about the dignity of a woman, in the context of autonomy, desire, choice and identity, it is obligatory to refer to the recent larger Bench decision in ***K.S. Puttaswamy and another v. Union of India and others***[32] which, while laying down that privacy is a facet of Article 21 of the Constitution, lays immense stress on the dignity of an individual. In the said judgment, it has been held:-

> "108. Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee

[32] (2017) 10 SCC 1

against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).

xxx xxxx xxx

119. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence..."

xxx xxx xxx

"298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably inter-twined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a

private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination."

xxx xxx xxx

"525. But most important of all is the cardinal value of fraternity which assures the dignity of the individual.359 The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorized use of such information. It is clear that Article 21, more than any of the other Articles in the fundamental rights chapter, reflects each of these constitutional values in full, and is to be read in consonance with these values and with the international covenants that

> we have referred to. In the ultimate analysis, the fundamental right of privacy, which has so many developing facets, can only be developed on a case to case basis. Depending upon the particular facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted."

38. In this context, we may profitably refer to ***National Legal Services Authority v. Union of India and others***[33] wherein A.K. Sikri, J., in his concurring opinion, emphasizing on the concept of dignity, has opined:-

> "The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard of the people and to give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and cooperative living. If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral his/her personality and is one of the most basic aspect of self-determination dignity and freedom. In fact, there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity."

[33] (2014) 5 SCC 438

39. Very recently, in ***Common Cause (A Registered Society) v. Union of India and another***[34], one of us has stated:-

> "... Human dignity is beyond definition. It may at times defy description. To some, it may seem to be in the world of abstraction and some may even perversely treat it as an attribute of egotism or accentuated eccentricity. This feeling may come from the roots of absolute cynicism. But what really matters is that life without dignity is like a sound that is not heard. Dignity speaks, it has its sound, it is natural and human. It is a combination of thought and feeling, and, as stated earlier, it deserves respect even when the person is dead and described as a "body"....."

And again:-

> "The concept and value of dignity requires further elaboration since we are treating it as an inextricable facet of right to life that respects all human rights that a person enjoys. Life is basically self-assertion. In the life of a person, conflict and dilemma are expected to be normal phenomena. Oliver Wendell Holmes, in one of his addresses, quoted a line from a Latin poet who had uttered the message, ―Death plucks my ear and says, Live- I am coming‖ . That is the significance of living. But when a patient really does not know if he/she is living till death visits him/her and there is constant suffering without any hope of living, should one be allowed to wait? Should she/he be cursed to die as life gradually ebbs out from her/his being? Should she/he live because of innovative medical technology or, for that matter, should he/she continue to live with the support system as people around him/her think that science in its progressive invention may bring about an innovative method of cure? To put it differently,

[34] (2018) 5 SCC 1

should he/she be –guinea pig for some kind of experiment? The answer has to be an emphatic –Not because such futile waiting mars the pristine concept of life, corrodes 139 the essence of dignity and erodes the fact of eventual choice which is pivotal to privacy."

In Mehmood Nayyar Azam v. State of Chhattisgarh and others, a two-Judge Bench held thus:-

> "1..... Albert Schweitzer, highlighting on Glory of Life, pronounced with conviction and humility, "the reverence of life offers me my fundamental principle on morality". The aforesaid expression may appear to be an individualistic expression of a great personality, but, when it is understood in the complete sense, it really denotes, in its conceptual essentiality, and connotes, in its macrocosm, the fundamental perception of a thinker about the respect that life commands. The reverence of life is insegragably associated with the dignity of a human being who is basically divine, not servile. A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, 'a brief candle', or 'a hollow bubble'. The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of "creative intelligence"

40. In the said judgment, A.K. Sikri, J. reproduced a passage from Professor Upendra Baxi's lecture in First Justice H.R. Khanna Memorial Lecture which reads as follows:-

> "I still need to say that the idea of dignity is a metaethical one, that is it marks and maps a difficult terrain of what it may mean to say being 'human' and remaining 'human', or put another way the relationship between 'self', 'others', and 'society'. In this formulation the word 'respect' is the keyword: dignity is respect for an individual person based on the principle of freedom and capacity to make choices and a good or just social order is one which respects dignity via assuring 'contexts' and 'conditions' as the 'source of free and informed choice'. Respect for dignity thus conceived is empowering overall and not just because it, even if importantly, sets constraints state, law, and regulations."

41. From the aforesaid analysis, it is discernible that the Court, with the passage of time, has recognized the conceptual equality of woman and the essential dignity which a woman is entitled to have. There can be no curtailment of the same. But, Section 497 IPC effectively does the same by creating invidious distinctions based on gender stereotypes which creates a dent in the individual dignity of women. Besides, the emphasis on the element of connivance or consent of the husband tantamounts to subordination of women. Therefore, we have no hesitation in holding that the same offends Article 21 of the Constitution.

42. Another aspect needs to be addressed. The question we intend to pose is whether adultery should be treated as a criminal offence. Even assuming that the new definition of

adultery encapsules within its scope sexual intercourse with an unmarried woman or a widow, adultery is basically associated with the institution of marriage. There is no denial of the fact that marriage is treated as a social institution and regard being had to various aspects that social history has witnessed in this country, the Parliament has always made efforts to maintain the rights of women. For instance, Section 498-A IPC deals with husband or relative of husband of a woman subjecting her to cruelty. The Parliament has also brought in the Protection of Women from Domestic Violence Act, 2005. This enactment protects women. It also enters into the matrimonial sphere. The offences under the provisions of the said enactment are different from the provision that has been conceived of under Section 497 IPC or, for that matter, concerning bringing of adultery within the net of a criminal offence. There can be no shadow of doubt that adultery can be a ground for any kind of civil wrong including dissolution of marriage. But the pivotal question is whether it should be treated as a criminal offence. When we say so, it is not to be understood that there can be any kind of social licence that destroys the matrimonial home. It is an ideal condition when the wife and husband maintain their loyalty. We are not

commenting on any kind of ideal situation but, in fact, focusing on whether the act of adultery should be treated as a criminal offence. In this context, we are reminded of what Edmund Burke, a famous thinker, had said, "a good legislation should be fit and equitable so that it can have a right to command obedience". Burke would like to put it in two compartments, namely, 'equity' and 'utility'. If the principle of Burke is properly understood, it conveys that laws and legislations are necessary to serve and promote a good life.

43. Dealing with the concept of crime, it has been stated in "Principles of Criminal Liability"[35] thus :-

> "1. *Definition of crime.*—There is no satisfactory definition of crime which will embrace the many acts and omissions which are criminal, and which will at the same time exclude all those acts and omissions which are not. Ordinarily a crime is a wrong which affects the security or well-being of the public generally so that the public has an interest in its suppression. A crime is frequently a moral wrong in that it amounts to conduct which is inimical to the general moral sense of the community. It is, however, possible to instance many crimes which exhibit neither of the foregoing characteristics. An act may be made criminal by Parliament simply because it is criminal process, rather than civil, which

[35] *Halsbury's Laws of England,* 4th Edn., Vol. 11 p.11,

> offers the more effective means of controlling the conduct in question."

44. In *Kenny's Outlines of Criminal Law*, 19th Edn., 1966 by J.W. Cecil Turner, it has been stated that:-

> "There is indeed no fundamental or inherent difference between a crime and a tort. Any conduct which harms an individual to some extent harms society, since society is made up of individuals; and therefore although it is true to say of crime that is an offence against society, this does not distinguish crime from tort. The difference is one of degree only, and the early history of the common law shows how words which now suggest a real distinction began rather as symbols of emotion than as terms of scientific classification."

And again:-

> "So long as crimes continue (as would seem inevitable) to be created by government policy the nature of crime will elude true definition. Nevertheless it is a broadly accurate description to say that nearly every instance of crime presents all of the three following characteristics: (*1*) that it is a harm, brought about by human conduct, which the sovereign power in the State desires to prevent; (*2*) that among the measures of prevention selected is the threat of punishment; (*3*) that legal proceedings of a special kind are employed to decide whether the person accused did in fact cause the harm, and is, according to law, to be held legally punishable for doing so."

45. Stephen defines a "crime" thus:-

> "A crime is an unlawful act or default which is an offence against the public, rendering the person guilty of such act or default liable to legal punishment. The process by which such person is punished for the unlawful act or default is carried on in the name of the Crown; although any private person, in the absence of statutory provision to the contrary, may commence a criminal prosecution. Criminal proceedings were formerly called pleas of the Crown, because the King, in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community. Wherefore he is, in all cases, the proper prosecutor for every public offence."

46. Blackstone, while discussing the general nature of crime, has defined crime thus:-

> "A crime, or misdemeanour, is an act committed or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanours; which, properly speaking, are mere synonym terms: though, in common usage, the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of "misdemeanours" only."

47. In this regard, we may reproduce a couple of paragraphs from ***Central Inland Water Transport***

Corporation Limited and another v. Brojo Nath Ganguly[36]. They read as under:-

> "25. The story of mankind is punctuated by progress and retrogression. Empires have risen and crashed into the dust of history. Civilizations have nourished, reached their peak and passed away. In the year 1625, Carew, C.J., while delivering the opinion of the House of Lords in Re the Earldom of Oxford in a dispute relating to the descent of that Earldom, said:
>
> > "... and yet time hath his revolution, there must be a period and an end of all temporal things, finis rerum, an end of names and dignities, and whatsoever is terrene...."
>
> The cycle of change and experiment, rise and fall, growth and decay, and of progress and retrogression recurs endlessly in the history of man and the history of civilization. T.S. Eliot in the First Chorus from "The Rock" said:
>
> O perpetual revolution of configured stars,
> O perpetual recurrence of determined seasons,
> O world of spring and autumn, birth and dying;
> The endless cycle of idea and action,
> Endless invention, endless experiment."
>
> 26. The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable. The

[36] (1986) 3 SCC 156

> early nineteenth century essayist and wit, Sydney Smith, said: "When I hear any man talk of an unalterable law, I am convinced that he is an unalterable fool." *The law must, therefore, in a changing society march in tune with the changed ideas and ideologies."*

48. Reproducing the same, the Court in ***Common Cause (A Registered Society)*** (supra), has observed :-

> "160. The purpose of saying so is only to highlight that the law must take cognizance of the changing society and march in consonance with the developing concepts. The need of the present has to be served with the interpretative process of law. However, it is to be seen how much strength and sanction can be drawn from the Constitution to consummate the changing ideology and convert it into a reality. The immediate needs are required to be addressed through the process of interpretation by the Court unless the same totally falls outside the constitutional framework or the constitutional interpretation fails to recognize such dynamism."

49. We have referred to the aforesaid theories and authorities to understand whether adultery that enters into the matrimonial realm should be treated as a criminal offence. There can be many a situation and we do not intend to get into the same. Suffice it to say, it is different from an offence committed under Section 498-A or any violation of the Protection of Women from Domestic Violence Act, 2005 or, for that matter, the protection conceived of under Section 125 of the Code of Criminal Procedure

or Sections 306 or 304B or 494 IPC. These offences are meant to sub-serve various other purposes relating to a matrimonial relationship and extinction of life of a married woman during subsistence of marriage. Treating adultery an offence, we are disposed to think, would tantamount to the State entering into a real private realm. Under the existing provision, the husband is treated as an aggrieved person and the wife is ignored as a victim. Presently, the provision is reflective of a tripartite labyrinth. A situation may be conceived of where equality of status and the right to file a case may be conferred on the wife. In either situation, the whole scenario is extremely private. It stands in contradistinction to the demand for dowry, domestic violence, sending someone to jail for non-grant of maintenance or filing a complaint for second marriage. Adultery stands on a different footing from the aforesaid offences. We are absolutely conscious that the Parliament has the law making power. We make it very clear that we are not making law or legislating but only stating that a particular act, i.e., adultery does not fit into the concept of a crime. We may repeat at the cost of repetition that if it is treated as a crime, there would be immense intrusion into the extreme privacy of the matrimonial sphere. It is better to

be left as a ground for divorce. For any other purpose as the Parliament has perceived or may, at any time, perceive, to treat it as a criminal offence will offend the two facets of Article 21 of the Constitution, namely, dignity of husband and wife, as the case may be, and the privacy attached to a relationship between the two. Let it be clearly stated, by no stretch of imagination, one can say, that Section 498-A or any other provision, as mentioned hereinbefore, also enters into the private realm of matrimonial relationship. In case of the said offences, there is no third party involved. It is the husband and his relatives. There has been correct imposition by law not to demand dowry or to treat women with cruelty so as to compel her to commit suicide. The said activities deserve to be punished and the law has rightly provided so.

50. In this regard, we may also note how the extramarital relationship cannot be treated as an act for commission of an offence under Section 306 IPC. In ***Pinakin Mahipatray Rawal v. State of Gujarat***[37], the Court has held :-

> "*27.* Section 306 refers to abetment of suicide which says that if any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment for a term

[37] (2013) 10 SCC 48

> which may extend to 10 years and shall also be liable to fine. The action for committing suicide is also on account of mental disturbance caused by mental and physical cruelty. To constitute an offence under Section 306, the prosecution has to establish that a person has committed suicide and the suicide was abetted by the accused. *The prosecution has to establish beyond reasonable doubt that the deceased committed suicide and the accused abetted the commission of suicide. But for the alleged extra-marital relationship, which if proved, could be illegal and immoral, nothing has been brought out by the prosecution to show that the accused had provoked, incited or induced the wife to commit suicide."*
>
> [Emphasis added]

51. In the context of Section 498-A, the Court, in ***Ghusabhai Raisangbhai Chorasiya v. State of Gujarat***[38], has opined that even if the illicit relationship is proven, unless some other acceptable evidence is brought on record to establish such high degree of mental cruelty, the Explanation (a) to Section 498-A IPC, which includes cruelty to drive the woman to commit suicide, would not be attracted. The relevant passage from the said authority is extracted below :-

> "*21.* ...True it is, there is some evidence about the illicit relationship and even if the same is proven, we are of the considered opinion that cruelty, as envisaged under the first limb of Section 498-A IPC would not get attracted. It would be difficult to hold that the mental cruelty

[38] (2015) 11 SCC 753

> was of such a degree that it would drive the wife to commit suicide. Mere extra-marital relationship, even if proved, would be illegal and immoral, as has been said in *Pinakin Mahipatray Rawal*, but it would take a different character if the prosecution brings some evidence on record to show that the accused had conducted in such a manner to drive the wife to commit suicide. In the instant case, the accused may have been involved in an illicit relationship with Appellant 4, but in the absence of some other acceptable evidence on record that can establish such high degree of mental cruelty, the Explanation to Section 498-A IPC which includes cruelty to drive a woman to commit suicide, would not be attracted."
>
> [Emphasis added]

52. The purpose of referring to the aforesaid authorities is to highlight how adultery has not been granted separate exclusive space in the context of Sections 306 and 498-A IPC.

53. In case of adultery, the law expects the parties to remain loyal and maintain fidelity throughout and also makes the adulterer the culprit. This expectation by law is a command which gets into the core of privacy. That apart, it is a discriminatory command and also a socio-moral one. Two individuals may part on the said ground but to attach criminality to the same is inapposite.

54. We may also usefully note here that adultery as a crime is no more prevalent in People's Republic of China, Japan,

Australia, Brazil and many western European countries. The diversity of culture in those countries can be judicially taken note of. Non-criminalisation of adultery, apart from what we have stated hereinabove, can be proved from certain other facets. When the parties to a marriage lose their moral commitment of the relationship, it creates a dent in the marriage and it will depend upon the parties how they deal with the situation. Some may exonerate and live together and some may seek divorce. It is absolutely a matter of privacy at its pinnacle. The theories of punishment, whether deterrent or reformative, would not save the situation. A punishment is unlikely to establish commitment, if punishment is meted out to either of them or a third party. Adultery, in certain situations, may not be the cause of an unhappy marriage. It can be the result. It is difficult to conceive of such situations in absolute terms. The issue that requires to be determined is whether the said 'act' should be made a criminal offence especially when on certain occasions, it can be the cause and in certain situations, it can be the result. If the act is treated as an offence and punishment is provided, it would tantamount to punishing people who are unhappy in marital relationships and any law that would make adultery a

crime would have to punish indiscriminately both the persons whose marriages have been broken down as well as those persons whose marriages are not. A law punishing adultery as a crime cannot make distinction between these two types of marriages. It is bound to become a law which would fall within the sphere of manifest arbitrariness.

55. In this regard, another aspect deserves to be noted. The jurisprudence in England, which to a large extent, is adopted by this country has never regarded adultery as a crime except for a period of ten years in the reign of Puritanical Oliver Cromwell. As we see the international perspective, most of the countries have abolished adultery as a crime. We have already ascribed when such an act is treated as a crime and how it faces the frown of Articles 14 and 21 of the Constitution. Thinking of adultery from the point of view of criminality would be a retrograde step. This Court has travelled on the path of transformative constitutionalism and, therefore, it is absolutely inappropriate to sit in a time machine to a different era where the machine moves on the path of regression. Hence, to treat adultery as a crime would be unwarranted in law.

56. As we have held that Section 497 IPC is unconstitutional and adultery should not be treated as an offence, it is appropriate to declare Section 198 CrPC which deals with the procedure for filing a complaint in relation to the offence of adultery as unconstitutional. When the substantive provision goes, the procedural provision has to pave the same path.

57. In view of the foregoing analysis, the decisions in ***Sowmithri Vishnu*** (supra) and ***V. Revathi*** (supra) stand overruled and any other judgment following precedents also stands overruled.

58. Consequently, the writ petition is allowed to the extent indicated hereinbefore.

.....CJI.
(Dipak Misra)

.....J.
(A.M. Khanwilkar)

New Delhi;
September 27, 2018

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 194 OF 2017

JOSEPH SHINE **… PETITIONER**

VERSUS

UNION OF INDIA **… RESPONDENT**

J U D G M E N T

R.F. Nariman, J. (Concurring)

1. What is before us in this writ petition is the constitutional validity of an archaic provision of the Indian Penal Code ("IPC"), namely, Section 497, which makes adultery a crime. Section 497 appears in Chapter XX of the IPC, which deals with offences relating to marriage. Section 497 reads as follows:-

> "**497. Adultery.**—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be

> punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor."

The offence of bigamy, which is contained in Section 494 in the same Chapter, is punishable with a longer jail term which may extend to 7 years, but in this case, the husband or the wife, as the case may be, is liable to be prosecuted and convicted. Section 494 reads as follows:

> "**494. Marrying again during lifetime of husband or wife.**—Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
>
> *Exception*.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction,
>
> nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such

> marriage is contracted of the real state of facts so far as the same are within his or her knowledge."

It will be noticed that the crime of adultery punishes only a third-party male offender as against the crime of bigamy, which punishes the bigamist, be it a man or a woman. What is therefore punished as 'adultery' is not 'adultery' *per se* but the proprietary interest of a married man in his wife.

Almost all ancient religions/civilizations punished the sin of adultery. In one of the oldest, namely, in Hammurabi's Code, death by drowning was prescribed for the sin of adultery, be it either by the husband or the wife. In Roman law, it was not a crime against the wife for a husband to have sex with a slave or an unmarried woman. The Roman *lex Iulia de adulteriis coercendis* of 17 B.C., properly so named after Emperor Augustus' daughter, Julia, punished Julia for adultery with banishment. Consequently, in the case of adulterers generally, both guilty parties were sent to be punished on different islands, and part of their property was confiscated.

2. In Judaism, which again is an ancient religion, the Ten Commandments delivered by the Lord to Moses on Mount Sinai contains the Seventh Commandment – "Thou shalt not commit adultery" – set out in the book of Exodus in the Old Testament.[1] Equally, since the wages of sin is death, the book of Leviticus in the Old Testament prescribes the death penalty for the adulterer as well as the adulteress.[2]

3. In Christianity, we find adultery being condemned as immoral and a sin for both men and women, as is evidenced by St. Paul's letter to the Corinthians.[3] Jesus himself stated that a man incurs sin the moment he looks at a woman with lustful intent.[4] However, when it came to punishing a woman for adultery, by stoning to death in accordance with the ancient Jewish law, Jesus uttered the famous words, "let him who has not sinned, cast the first stone."[5]

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[1] *Exodus* 20:14 (King James Version).
[2] *Leviticus* 20:10 (King James Version).
[3] 1 *Corinthians* 6:9-10 (King James Version).
[4] *Matthew* 5:27-28 (King James Version).
[5] *John*, 8:7 (English Standard Version).

4. In this country as well, in the Manusmriti, Chapters 4.134[6] and 8.352[7] prescribes punishment for those who are addicted to intercourse with wives of other men by punishments which cause terror, followed by banishment. The Dharmasutras speak with different voices. In the Apastamba Dharmasutra, adultery is punishable as a crime, the punishment depending upon the class or caste of the man and the woman.[8] However, in the Gautama Dharmasutra, if a man commits adultery, he should observe a life of chastity for two years; and if he does so with the wife of a vedic scholar, for three years.[9]

5. In Islam, in An-Nur, namely, Chapter 24 of the Qur'an, Verses 2 and 6 to 9 read as follows:

> "2. The adulteress and the adulterer, flog each of them (with) a hundred stripes, and let not pity for them detain you from obedience to Allah, if you believe in Allah and the Last Day, and let a party of believers witness their chastisement."[10]
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> xxx xxx xxx

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[6] THE LAWS OF MANU 150 (Translation by G. Buhler, Clarendon Press, UK, 1886).
[7] *Id.*, 315.
[8] DHARMASUTRAS – THE LAW CODES OF APASTAMBA, GAUTAMA, BAUDHAYANA, AND VASISTHA 70-71 (Translation by Patrick Olivelle, Oxford University Press 1999).
[9] *Id.*, 116-117.
[10] THE KORAN (AL–QUR'AN): ARABIC-ENGLISH BILINGUAL EDITION WITH AN INTRODUCTION BY MOHAMED A. 'ARAFA 363 (Maulana Muhammad Ali Translation, TellerBooks, 2018).

> "6. And those who accuse their wives and have no witnesses except themselves, let one of them testify four times, bearing Allah to witness, that he is of those who speak the truth.
>
> 7. And the fifth (time) that the curse of Allah be on him, if he is of those who lie.
>
> 8. And it shall avert the chastisement from her, if she testify four times, bearing Allah to witness, that he is of those who lie.
>
> 9. And the fifth (time) that the wrath of Allah to be on her, if he is of those who speak the truth."[11]

What is interesting to note is that if there are no witnesses other than the husband or the wife, and the husband testifies four times that his wife has committed adultery, which is met by the wife testifying four times that she has not, then earthly punishment is averted. The wrath of Allah alone will be on the head of he or she who has given false testimony – which wrath will be felt only in life after death in the next world.

6. In sixth-century Anglo-Saxon England, the law created "elaborate tables of composition" which the offended husband could accept in lieu of blood vengeance. These tables were schemes for payment of compensation depending upon the

[11] *Id.*

degree of harm caused to the cuckolded husband. However, as Christianity spread in England, adultery became morally wrong and therefore, a sin, as well as a wrong against the husband. Post 1066, the Normans who took over, viewed adultery not as a crime against the State, but rather as an ecclesiastical offence dealt with by the Church. The common law of England prescribed an action in tort for loss of consortium based on the property interest a husband had in his wife. Thus, the action for conversation, which is compensation or damages, usually represented a first step in obtaining divorce in medieval England. In fact, adultery was the only ground for divorce in seventeenth-century England, which had to be granted only by Parliament. Interestingly enough, it was only after King Charles I was beheaded in 1649, that adultery became a capital offence in Cromwell's Puritanical England in the year 1650, which was nullified as soon as King Charles II came back in what was known as the 'restoration of the monarchy'. It will be seen therefore, that in England, except for an eleven-year period when England was ruled by the Puritans, adultery was never considered to be a criminal offence. Adultery was only a tort for

which damages were payable to the husband, given his proprietary interest in his wife.[12] This tort is adverted to by a 1904 judgment of the Supreme Court of the United States in **Charles A. Tinker v. Frederick L. Colwell**, 193 US 473 (1904), as follows:

> "…… We think the authorities show the husband had certain personal and exclusive rights with regard to the person of his wife which are interfered with and invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault even when, as is almost universally the case as proved, the wife in fact consents to the act, because the wife is in law incapable of giving any consent to affect the husband's rights as against the wrongdoer, and that an assault of this nature may properly be described as an injury to the personal rights and property of the husband, which is both malicious and willful……
>
> The assault vi et armis is a fiction of law, assumed at first, in early times, to give jurisdiction of the cause of action as a trespass, to the courts, which then proceeded to permit the recovery of damages by the husband for his wounded feelings and honour, the defilement of the marriage bed, and for the doubt thrown upon the legitimacy of children."[13]
>
> "We think that it is made clear by these references to a few of the many cases on this subject that the cause of action by the husband is based upon the

[12] Linda Fitts Mischler, *Personal Morals Masquerading as Professional Ethics: Regulations Banning Sex between Domestic Relations Attorneys and Their Clients*, 23 HARVARD WOMEN'S LAW JOURNAL 1, 21-22 (2000) ["Linda Fitts Mischler"].

[13] Tinker v. Colwell, 193 U.S. 473, 481 (1904).

> idea that the act of the defendant is a violation of the marital rights of the husband in the person of his wife, and so the act of the defendant is an injury to the person and also to the property rights of the husband."[14]

To similar effect is the judgment in **Pritchard v. Pritchard and Sims**, [1966] 3 All E.R. 601, which reconfirmed the origins of adultery or criminal conversation as under:

> "In 1857, when marriage in England was still a union for life which could be broken only by private Act of Parliament, there existed side by side under the common law three distinct causes of action available to a husband whose rights in his wife were violated by a third party, who enticed her away, or who harboured her or who committed adultery with her. …… In the action for adultery known as criminal conversation, which dates from before the time of BRACTON, and consequently lay originally in trespass, the act of adultery itself was the cause of action and the damages punitive at large. It lay whether the adultery resulted in the husband's losing his wife's society and services or not. All three causes of action were based on the recognition accorded by the common law to the husband's propriety interest in the person of his wife, her services and earnings, and in the property which would have been hers had she been feme sole."[15]

[14] *Id.,* 485.
[15] [1966] 3 All E.R. 601, 607.

7. In England, Section LIX of the Divorce and Matrimonial Causes Act, 1857 abolished the common law action for criminal conversation while retaining, by Section XXXIII of the same Act, the power to award the husband damages for adultery committed by the wife. This position continued right till 1923, when the Matrimonial Causes Act, 1923 made adultery a ground for divorce available to both spouses instead of only the husband. The right of a husband to claim damages for adultery was abolished very recently by the Law Reforms (Miscellaneous Provisions) Act, 1970.[16]

8. In the United States, however, Puritans who went to make a living in the American colonies, carried with them Cromwell's criminal law, thereby making adultery a capital offence. Strangely enough, this still continues in some of the States in the United States. The American Law Institute, however, has dropped the crime of adultery from its Model Penal Code as adultery statutes are in general vague, archaic, and sexist. None of the old reasons in support of such statutes, namely,

[16] Section 4, Law Reforms (Miscellaneous Provisions) Act, 1970.

the controlling of disease, the preventing of illegitimacy, and preserving the traditional family continue to exist as of today. It was also found that criminal adultery statutes were rarely enforced in the United States and were, therefore, referred to as "dead letter statutes". This, plus the potential abuses from such statutes continuing on the statute book, such as extortion, blackmail, coercion etc. were stated to be reasons for removing adultery as a crime in the Model Penal Code.[17]

9. When we come to India, Lord Macaulay, in his draft Penal Code, which was submitted to the Law Commissioners, refused to make adultery a penal offence. He reasoned as follows:

> "The following positions we consider as fully established: first, that the existing laws for the punishment of adultery are altogether inefficacious for the purpose of preventing injured husbands of the higher classes from taking the law into their own hands; secondly, that scarcely any native of the higher classes ever has recourse to the Courts of law in a case of adultery for redress against either his wife, or her gallant; thirdly, that the husbands who have recourse in cases of adultery to the Courts of law are generally poor men whose wives have run away, that these husbands seldom have any delicate feelings about the intrigue, but think themselves injured by the elopement, that they

[17] Linda Fitts Mischler, *supra* n. 12, 23-25.

consider their wives as useful members of their small household, that they generally complain not of the wound given to their affections, not of the stain on their honor, but of the loss of a menial whom they cannot easily replace, and that generally their principal object is that the woman may be sent back. The fiction by which seduction is made the subject of an action in the English Courts is, it seems, the real gist of most proceedings for adultery in the Mofussil. The essence of the injury is considered by the sufferer as lying in the "per quod servitium amisit." Where the complainant does not ask to have his wife again, he generally demands to be reimbursed for the expenses of his marriage.

These things being established it seems to us that no advantage is to be expected from providing a punishment for adultery. The population seems to be divided into two classes- those whom neither the existing punishment nor any punishment which we should feel ourselves justified in proposing will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honor are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances we think it best to treat adultery merely as a civil injury."

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"These arguments have not satisfied us that adultery ought to be made punishable by law. We cannot admit that a Penal code is by any means to be considered as a body of ethics, that the legislature ought to punish acts merely because those acts are immoral, or that because an act is not punished at all it follows that the legislature

considers that act as innocent. Many things which are not punishable are morally worse than many things which are punishable. The man who treats a generous benefactor with gross in gratitude and insolence, deserves more severe reprehension than the man who aims a blow in a passion, or breaks a window in a frolic. Yet we have punishments for assault and mischief, and none for ingratitude. The rich man who refuses a mouthful of rice to save a fellow creature from death may be a far worse man than the starving wretch who snatches and devours the rice. Yet we punish the latter for theft, and we do not punish the former for hard-heartedness."

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"There is yet another consideration which we cannot wholly leave out of sight. Though we well know that the dearest interests of the human race are closely connected with the chastity of women, and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is unhappily very different from that of the women of England and France. They are married while still children. They are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy of the wife while the law admits the privilege of the husband to fill his zenana with women, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking by law an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain operation of education and of time. But while it exists, while it continues to produce its never failing effects on the happiness and

> respectability of women, we are not inclined to throw into a scale already too much depressed the additional weight of the penal law. We have given the reasons which lead us to believe that any enactment on this subject would be nugatory. And we are inclined to think that if not nugatory it would be oppressive. It would strengthen hands already too strong. It would weaken a class already too weak. It will be time enough to guard the matrimonial contract by penal sanctions when that contract becomes just, reasonable, and mutually beneficial."[18]

10. However, when the Court Commissioners reviewed the Penal Code, they felt that it was important that adultery be made an offence. The reasons for so doing are set out as follows:

> "**353.** Having given mature consideration to the subject, we have, after some hesitation, come to the conclusion that it is not advisable to exclude this offence from the Code. We think the reasons for continuing to treat it as a subject for the cognizance of the criminal courts preponderate. We conceive that Colonel Sleeman is probably right in regarding the difficulty of proving the offence according to the requirement of the Mohammedan law of evidence, which demands an amount of positive proof that is scarcely ever to be had in such a case, as having some effect in deterring the Natives from prosecuting adulterers in our courts, although the

[18] A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONERS, AND PUBLISHED BY COMMAND OF THE GOVERNOR GENERAL OF INDIA IN COUNCIL 91-93 (G.H. Huttmann, The Bengal Military Orphan Press, 1837).

Regulations allow of a conviction upon strong presumption arising from circumstantial evidence. This difficulty, if it has had the effect supposed, will be removed, should the Code be adopted. Colonel Sleeman's representation of the actual consequences of the present system, which, while it recognizes the offence, renders it, in the opinion of the Natives, almost impossible to bring an offender to justice, it will be observed, coincides with and confirms practically Mr. Livingstone's view of the result to be expected when the law refuses to punish this offence. The injured party will do it for himself; great crimes, assassinations, poisonings, will be the consequence. The law here does not refuse, but it fails to punish the offence, says Colonel Sleeman, and poisonings are the consequence.

354. Colonel Sleeman thinks that the Commissioners have wrongly assumed that it is the lenity of the existing law that it is complained of by the Natives, and believes that they would be satisfied with a less punishment for the offence than the present law allows; viz. imprisonment for seven years, if it were certain to follow the offender. He proposes that the punishment of a man "convicted of seducing the wife of another" shall be imprisonment which may extend to seven years, or a fine payable to the husband or both imprisonment and fine. The punishment of a married woman "convicted of adultery" he would limit to imprisonment for two years. We are not aware whether or not he intends the difference in the terms used to be significant of a difference in the nature of the proof against the man and the woman respectively.

355. While we think that the offence of adultery ought not to be omitted from the Code, we would limit its cognizance to adultery committed with a

married woman, and considering that there is much weight in the last remark in Note Q, regarding the condition of a women of this country, in deference to it we would render the male offender alone liable to punishment. We would, however, put the parties accused of adultery on trial together, and empower the Court, in the event of their conviction, to pronounce a decree of divorce against the guilty woman, if the husband sues for it, at the same time that her paramour is sentenced to punishment by imprisonment or fine. By Mr. Livingstone's Code, the woman forfeits her "matrimonial gains", but is not liable to other punishment.

356. We would adopt Colonel Sleeman's suggestion as to the punishment of the male offender, limiting it to imprisonment not exceeding five years, instead of seven years allowed at present, and sanctioning the imposition of a fine payable to the husband as an alternative, or in addition.

357. The punishment prescribed by the Code of Louisiana is imprisonment not more than six months, or fine not exceeding 2,000 dollars, or both. By the French Code, the maximum term of imprisonment is two years, with fine in addition, which may amount to 2,000 francs.

358. If the offence of adultery is admitted into the Penal Code, there should be a provision in the Code of Procedure to restrict the right of prosecuting to the injured husband, agreeably to Section 2, Act II of 1845."[19]

(emphasis supplied)

[19] COPIES OF THE SPECIAL REPORTS OF THE INDIAN LAW COMMISSIONERS 76 (James C. Melvill, East India House, 1847).

These are some of the reasons that led to the enactment of Section 497, IPC.

11. At this stage, it is important to note that by Section 199 of the Code of Criminal Procedure, 1898, it was only the husband who was to be deemed to be aggrieved by an offence punishable under Section 497, IPC. Thus, Section 199 stated:

> "**199. Prosecution for adultery or enticing a married woman.—** No Court shall take cognizance of an offence under section 497 or section 498 of the Indian Penal Code (XLV of 1860), except upon a complaint made by the husband of the woman, or, in his absence, by some person who had care of such woman on his behalf at the time when such offence was committed."

12. Even when this Code was replaced by the Code of Criminal Procedure ("CrPC"), 1973, Section 198 of the CrPC, 1973 continued the same provision with a proviso that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf. The said Section reads as follows:

"**198. Prosecution for offences against marriage.—** (1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:

Provided that—

(a) where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;

(b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub-section (4) may make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable under Section 494 or Section 495 of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister, or, with the leave of the Court, by any other person related to her by blood, marriage or adoption.

(2) For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under Section 497 or Section 498 of the said Code:

Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.

(3) When in any case falling under clause (a) of the proviso to sub-section (1), the complaint is sought to be made on behalf of a person under the age of eighteen years or of a lunatic by a person who has not been appointed or declared by a competent authority to be the guardian of the person of the minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, the Court shall, before granting the application for leave, cause notice to be given to such guardian and give him a reasonable opportunity of being heard.

(4) The authorisation referred to in clause (b) of the proviso to sub-section (1), shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, shall be countersigned by his Commanding Officer, and shall be accompanied by a certificate signed by that Officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband.

(5) Any document purporting to be such an authorisation and complying with the provisions of sub-section (4), and any document purporting to be a certificate required by that sub-section shall, unless the contrary is proved, be presumed to be genuine and shall be received in evidence.

> (6) No Court shall take cognizance of an offence under Section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual intercourse by a man with his own wife, the wife being under eighteen years of age, if more than one year has elapsed from the date of the commission of the offence.
>
> (7) The provisions of this section apply to the abetment of, or attempt to commit, an offence as they apply to the offence."

At this stage, it is important to advert to some of the judgments of the High Courts and our Court. In **Yusuf Abdul Aziz v. State**, 1952 ILR Bom 449, a Division Bench of the Bombay High Court, consisting of M.C. Chagla, C.J. and P.B. Gajendragadkar, J. held that Section 497 of the IPC did not contravene Articles 14 and 15 of the Constitution. However, in an instructive passage, the learned Chief Justice stated:

> "…… Mr. Peerbhoy is right when he says that the underlying idea of Section 497 is that wives are properties of their husbands. The very fact that this offence is only cognizable with the consent of the husband emphasises that point of view. It may be argued that Section 497 should not find a place in any modern Code of law. Days are past, we hope, when women were looked upon as property by their husbands. But that is an argument more in favour of doing away with Section 497 altogether."[20]

[20] 1952 ILR Bombay 449, 454.

An appeal to this Court in **Yusuf Abdul Aziz v. State of Bombay**, 1954 SCR 930, ("**Yusuf Abdul Aziz**"), met with the same result.

This Court, through Vivian Bose, J., held that the last part of Section 497, which states that the wife shall not be punishable as an abettor of the offence of adultery, does not offend Articles 14 and 15 in view of the saving provision contained in Article 15(3), being a special provision made in favour of women.

This is an instance of Homer nodding. Apart from a limited *ratio* based upon a limited argument, the judgment applies a constitutional provision which is obviously inapplicable as Article 15(3), which states that, "nothing in this article shall prevent the State from making a special provision for women", would refer to the "State" as either Parliament or the State Legislatures or the Executive Government of the Centre or the States, set up under the Constitution after it has come into force. Section 497 is, in constitutional language, an "existing law" which continues, by virtue of Article 372(1), to apply, and

could not, therefore, be said to be a law made by the "State", meaning any of the entities referred to above.

13. We have noticed a judgment of the Division Bench of the Bombay High Court in **Dattatraya Motiram More v. State of Bombay**, AIR 1953 Bom 311, in which the Division Bench turned down a submission that Article 15(3) is confined to laws made after the Constitution of India comes into force and would also apply to existing law thus:

> "**8.** An argument was advanced by Mr. Patel that Art. 15(3) only applies to future legislation and that as far as all laws in force before the commencement of the Constitution were concerned, those laws can only be tested by Art. 15(1) and not by Art. 15(1) read with Art. 15(3). Mr. Patel contends that Art. 15(3) permits the State in future to make a special provision for women and children, but to the extent the laws in force are concerned Art. 15(1) applies, and if the laws in force are inconsistent with Art. 15(1), those laws must be held to be void. Turning to Art. 13(1), it provides:
>
> > "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."
>
> Therefore, before a law in force can be declared to be void it must be found to be inconsistent with one of the provisions of Part III which deals with

> Fundamental Rights, and the fundamental right which is secured to the citizen under Art. 15 is not the unlimited right under Art. 15(1) but the right under Art. 15(1) qualified by Art. 15(3). It is impossible to argue that the Constitution did not permit laws to have special provision for women if the laws were passed before the Constitution came into force, but permitted the Legislature to pass laws in favour of women after the Constitution was enacted. If a law discriminating in favour of women is opposed to the fundamental rights of citizens, there is no reason why such law should continue to remain on the statute book. The whole scheme of Art. 13 is to make laws, which are inconsistent with Part III, void, not only if they were in force before the commencement of the Constitution, but also if they were enacted after the Constitution came into force. Mr. Patel relies on the various provisos to Art. 19 and he says that in all those provisos special mention is made to existing laws and also to the State making laws in future. Now, the scheme of Art. 19 is different from the scheme of Art. 15. Provisos to Art. 19 in terms deal with law whether existing or to be made in future by the State, whereas Art. 15(3) does not merely deal with laws but deals generally with any special provision for women and children, and therefore it was not necessary in Art. 15(3) to mention both existing laws and laws to be made in future. But the exception made to Art. 15(1) by Art. 15(3) is an exception which applies both to existing laws and to laws which the State may make in future."

14. We are of the view that this paragraph does not represent the law correctly. In fact, Article 19(2)-(6) clearly refers to "existing law" as being separate from "the State making any

law", indicating that the State making any law would be laws made after the Constitution comes into force as opposed to "existing law", which are pre-constitutional laws enacted before the Constitution came into force, as is clear from the definition of "existing law" contained in Article 366(10), which reads as under:

> "**366. Definitions.—**In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—
>
> xxx xxx xxx
>
> (10) "existing law" means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation;"

15. Article 15(3) refers to the State making laws which therefore, obviously cannot include existing law. Article 15(3) is in this respect similar to Article 16(4), which reads as follows:

> "**16. Equality of opportunity in matters of public employment.—**
>
> xxx xxx xxx

> (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

The vital difference in language between Articles 15(3) and 16(4) on the one hand, and Article 19(2)-(6) on the other, must thus be given effect.

16. Coming back to **Yusuf Abdul Aziz** (supra), the difference in language between Article 15(3) and Article 19(2)-(6) was not noticed. The limited *ratio* of this judgment merely refers to the last sentence in Section 497 which it upholds. Its *ratio* does not extend to upholding the entirety of the provision or referring to any of the arguments made before us for striking down the provision as a whole.

17. We then come to **Sowmithri Vishnu v. Union of India and Anr.**, (1985) Supp SCC 137, ("**Sowmithri Vishnu**"). In this case, an Article 32 petition challenged the constitutional validity of Section 497 of the Penal Code on three grounds which are set out in paragraph 6 of the judgment. Significantly, the

learned counsel in that case argued that Section 497 is a flagrant instance of 'gender discrimination', 'legislative despotism', and 'male chauvinism'. This Court repelled these arguments stating that they had a strong emotive appeal but no valid legal basis to rest upon. The first argument, namely, an argument of discrimination was repelled by stating that the ambit of the offence of adultery should make the woman punishable as well. This was repelled by saying that such arguments go to the policy of the law and not its constitutionality. This was on the basis that it is commonly accepted that it is the man who is the seducer and not the woman. Even in 1985, the Court accepted that this archaic position may have undergone some change over the years, but it is for the legislature to consider whether Section 497 be amended appropriately so as to take note of the transformation that society has undergone.

The Court then referred to the 42nd Law Commission Report, 1971, which recommended the retention of Section 497, with the modification that, even the wife, who has sexual relations

with a person other than her husband, should be made punishable for adultery. The dissenting note of Mrs. Anna Chandi was also taken note of, where the dissenter stated that this is the right time to consider the question whether the offence of adultery, as envisaged in Section 497, is in tune with our present-day notions of women's status in marriage.

The second ground was repelled stating that a woman is the victim of the crime, and as the offence of adultery is considered as an offence against the sanctity of the matrimonial home, only those men who defile that sanctity are brought within the net of the law. Therefore, it is of no moment that Section 497 does not confer any right on the wife to prosecute the husband who has committed adultery with another woman.

The third ground, namely, that Section 497 is underinclusive inasmuch as a husband who has sexual relations with an unmarried woman is not within the net of the law, was repelled stating that an unfaithful husband may invite a civil action by the wife for separation, and that the Legislature is entitled to deal with the evil where it is felt and seen most.

A challenge on the ground of Article 21 was also repelled, stating that the fact that a provision for hearing the wife is not contained in Section 497 cannot render that Section unconstitutional. This Court then referred to the judgment in **Yusuf Abdul Aziz** (supra) and stated that since it was a 1954 decision, and 30 years had passed since then, this Court was examining the position afresh. The Court ended with the sermon, "stability of marriages is not an ideal to be scorned."

18. In **V. Revathi v. Union of India and Ors.**, (1988) 2 SCC 72, this Court, after referring to **Sowmithri Vishnu** (supra), repelled a similar challenge to Section 198 of the CrPC, 1973. After referring to **Sowmithri Vishnu** (supra), since Section 497, IPC and Section 198, CrPC go hand in hand and constitute a 'legislative packet' to deal with the offence of adultery committed by an outsider, the challenge to the said Section failed.

19. International trends worldwide also indicate that very few nations continue to treat adultery as a crime, though most

nations retain adultery for the purposes of divorce laws. Thus, adultery continues to be a criminal offence in Afghanistan, Bangladesh, Indonesia, Iran, Maldives, Nepal, Pakistan, Philippines, United Arab Emirates, some states of the United States of America, Algeria, Democratic Republic of Congo, Egypt, Morocco, and some parts of Nigeria.

On the other hand, a number of jurisdictions have done away with adultery as a crime. The People's Republic of China, Japan, Brazil, New Zealand, Australia, Scotland, the Netherlands, Denmark, France, Germany, Austria, the Republic of Ireland, Barbados, Bermuda, Jamaica, Trinidad and Tobago, Seychelles etc. are some of the jurisdictions in which it has been done away with. In South Korea[21] and Guatemala,[22] provisions similar to Section 497 have been struck down by the constitutional courts of those nations.

[21] 2009 Hun-Ba 17, (26.02.2015) [Constitutional Court of South Korea].
[22] *Expediente* 936-95, (07.03.1996), *República de Guatemala Corte de Constitucionalidad* [Constitutional Court of Guatemala].

20. The Supreme Court of Namibia, in an instructive judgment,[23] went into whether the criminal offence of adultery would protect marriages and reduce the incidence of adultery. It said:

> "**[45]** But does the action protect marriages from adultery? For the reasons articulated by both the SCA and the Constitutional Court, I do not consider that the action can protect marriage as it does not strengthen a weakening marriage or breathe life into one which is in any event disintegrating. [*DE* v. *RH*, 2015 (5) SA 83 (CC) (Constitutional Court of South Africa) para 49]. The reasoning set out by the SCA is salutary and bears repetition:
>
> > 'But the question is: if the protection of marriage is one of its main goals, is the action successful in achieving that goal? The question becomes more focused when the spotlight is directed at the following considerations:
> >
> > > (a) First of all, as was pointed out by the German Bundesgericht in the passage from the judgment (JZ 1973, 668) from which I have quoted earlier, although marriage is —
> > >
> > > > 'a human institution which is regulated by law and protected by the Constitution and which, in turn, creates genuine legal duties. Its essence . . . consists in the

[23] James Sibongo v. Lister Lutombi Chaka and Anr. (Case No. SA77-14) (19.08.2016) [Supreme Court of Namibia].

> readiness, founded in morals, of the parties to the marriage to create and to maintain it.'

If the parties to the marriage have lost that moral commitment, the marriage will fail, and punishment meted out to a third party is unlikely to change that.

(b) Grave doubts are expressed by many about the deterrent effect of the action. In most other countries it was concluded that the action (no longer) has any deterrent effect and I have no reason to think that the position in our society is all that different. Perhaps one reason is that adultery occurs in different circumstances. Every so often it happens without any premeditation, when deterrence hardly plays a role. At the other end of the scale, the adultery is sometimes carefully planned and the participants are confident that it will not be discovered. Moreover, romantic involvement between one of the spouses and a third party can be as devastating to the marital relationship as (or even more so than) sexual intercourse.

(c) If deterrence is the main purpose, one would have thought that this could better be achieved by retaining the imposition of criminal sanctions or by the grant of an interdict in favour of the innocent spouse against both the guilty spouse and the third party to prevent future acts of adultery. But, as we know, the crime of adultery had become abrogated through disuse exactly 100

years ago while an interdict against adultery has never been granted by our courts (see, for example, *Wassenaar* v *Jameson, supra* at 352H – 353H). Some of the reasons given in *Wassenaar* as to why an interdict would not be appropriate are quite enlightening and would apply equally to the appropriateness of a claim for damages. These include, firstly, that an interdict against the guilty spouse is not possible because he or she commits no delict. Secondly, that as against a third party —

> 'it interferes with, and restricts the rights and freedom that the third party ordinarily has of using and disposing of his body as he chooses; . . . it also affects the relationship of the third party with the claimant's spouse, who is and cannot be a party to the interdict, and therefore indirectly interferes with, and restricts her rights and freedom of, using and disposing of her body as she chooses'. [At 353E.]

(d) In addition the deterrence argument seems to depart from the assumption that adultery is the cause of the breakdown of a marriage, while it is now widely recognised that causes for the breakdown in marriages are far more complex. Quite frequently adultery is found to be the result and not the cause of an unhappy marital relationship. Conversely stated, a marriage in which the spouses are living in harmony is

> hardly likely to be broken up by a third party.'"[24]

21. Coming back to Section 497, it is clear that in order to constitute the offence of adultery, the following must be established:

(i) Sexual intercourse between a married woman and a man who is not her husband;

(ii) The man who has sexual intercourse with the married woman must know or has reason to believe that she is the wife of another man;

(iii) Such sexual intercourse must take place with her consent, i.e., it must not amount to rape;

(iv) Sexual intercourse with the married woman must take place without the consent or connivance of her husband.

22. What is apparent on a cursory reading of these ingredients is that a married man, who has sexual intercourse

[24] *Id.*, 17-19.

with an unmarried woman or a widow, does not commit the offence of adultery. Also, if a man has sexual intercourse with a married woman with the consent or connivance of her husband, he does not commit the offence of adultery. The consent of the woman committing adultery is material only for showing that the offence is not another offence, namely, rape.

23. The background in which this provision was enacted now needs to be stated. In 1860, when the Penal Code was enacted, the vast majority of the population in this country, namely, Hindus, had no law of divorce as marriage was considered to be a sacrament. Equally, a Hindu man could marry any number of women until 1955. It is, therefore, not far to see as to why a married man having sexual intercourse with an unmarried woman was not the subject matter of the offence. Since adultery did not exist as a ground in divorce law, there being no divorce law, and since a man could marry any number of wives among Hindus, it was clear that there was no sense in punishing a married man in having sex with an unmarried woman as he could easily marry her at a subsequent point in

time. Two of the fundamental props or bases of this archaic law have since gone. Post 1955-1956, with the advent of the “Hindu Code”, so to speak, a Hindu man can marry only one wife; and adultery has been made a ground for divorce in Hindu Law.

Further, the real heart of this archaic law discloses itself when consent or connivance of the married woman’s husband is obtained – the married or unmarried man who has sexual intercourse with such a woman, does not then commit the offence of adultery. This can only be on the paternalistic notion of a woman being likened to chattel, for if one is to use the chattel or is licensed to use the chattel by the “licensor”, namely, the husband, no offence is committed. Consequently, the wife who has committed adultery is not the subject matter of the offence, and cannot, for the reason that she is regarded only as chattel, even be punished as an abettor. This is also for the chauvinistic reason that the third-party male has ‘seduced’ her, she being his victim. What is clear, therefore, is that this archaic law has long outlived its purpose and does not square with today’s constitutional morality, in that the very object with

which it was made has since become manifestly arbitrary, having lost its rationale long ago and having become in today's day and age, utterly irrational. On this basis alone, the law deserves to be struck down, for with the passage of time, Article 14 springs into action and interdicts such law as being manifestly arbitrary. That legislation can be struck down on the ground of manifest arbitrariness is no longer open to any doubt, as has been held by this Court in **Shayara Bano v. Union of India and Ors.**, (2017) 9 SCC 1, as follows:

> "**101.** …… Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

24. It is clear, therefore, that the ostensible object of Section 497, as pleaded by the State, being to protect and preserve the sanctity of marriage, is not in fact the object of Section 497 at all, as has been seen hereinabove. The sanctity of marriage can be utterly destroyed by a married man having sexual

intercourse with an unmarried woman or a widow, as has been seen hereinabove. Also, if the husband consents or connives at such sexual intercourse, the offence is not committed, thereby showing that it is not sanctity of marriage which is sought to be protected and preserved, but a proprietary right of a husband. Secondly, no deterrent effect has been shown to exist, or ever to have existed, which may be a legitimate consideration for a State enacting criminal law. Also, manifest arbitrariness is writ large even in cases where the offender happens to be a married woman whose marriage has broken down, as a result of which she no longer cohabits with her husband, and may in fact, have obtained a decree for judicial separation against her husband, preparatory to a divorce being granted. If, during this period, she has sex with another man, the other man is immediately guilty of the offence.

25. The aforesaid provision is also discriminatory and therefore, violative of Article 14 and Article 15(1). As has been held by us hereinabove, in treating a woman as chattel for the purposes of this provision, it is clear that such provision

discriminates against women on grounds of sex only, and must be struck down on this ground as well. Section 198, CrPC is also a blatantly discriminatory provision, in that it is the husband alone or somebody on his behalf who can file a complaint against another man for this offence. Consequently, Section 198 has also to be held constitutionally infirm.

26. We have, in our recent judgment in **Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.**, (2017) 10 SCC 1, ("**Puttaswamy**"), held:

> "**108.** Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom

(Article 19) and in the right to life and personal liberty (Article 21)."

xxx xxx xxx

"**298.** Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary State action. It prevents the State from discriminating between individuals. The destruction by the State of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary State action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these

guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha-suffixed right to privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and

freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination."

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"**482.** Shri Sundaram has argued that rights have to be traced directly to those expressly stated in the fundamental rights chapter of the Constitution for such rights to receive protection, and privacy is not one of them. It will be noticed that the dignity of the individual is a cardinal value, which is expressed in the Preamble to the Constitution. Such dignity is not expressly stated as a right in the fundamental rights chapter, but has been read into the right to life and personal liberty. The right to live with dignity is expressly read into Article 21 by the judgment in *Jolly George Varghese* v. *Bank of Cochin* [*Jolly George Varghese* v. *Bank of Cochin*, (1980) 2 SCC 360], at para 10. Similarly, the right against bar fetters and handcuffing being integral to an individual's dignity was read into Article 21 by the judgment in *Sunil Batra* v. *Delhi Admn.* [*Sunil Batra* v. *Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155], at paras 192, 197-B, 234 and 241 and *Prem Shankar Shukla* v. *Delhi Admn.* [*Prem Shankar Shukla* v. *Delhi Admn.*, (1980) 3 SCC 526 : 1980 SCC (Cri) 815], at paras 21 and 22. It is too late in the day to canvas that a fundamental right must be traceable to express language in Part III of the Constitution. As will be pointed out later in this judgment, a Constitution has to be read in such a way that words deliver up principles that are to be followed and if this is kept in mind, it is clear that the concept of privacy is contained not merely in

personal liberty, but also in the dignity of the individual."

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"**525.** But most important of all is the cardinal value of fraternity which assures the dignity of the individual. [In 1834, Jacques-Charles DuPont de l'Eure associated the three terms liberty, equality and fraternity together in the *Revue Républicaine*, which he edited, as follows: "Any man aspires to liberty, to equality, but he cannot achieve it without the assistance of other men, without fraternity." Many of our decisions recognise human dignity as being an essential part of the fundamental rights chapter. For example, see *Prem Shankar Shukla* v. *Delhi Admn.*, (1980) 3 SCC 526 at para 21, *Francis Coralie Mullin* v. *UT of Delhi*, (1981) 1 SCC 608 at paras 6, 7 and 8, *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161 at para 10, *Maharashtra University of Health Sciences* v. *Satchikitsa Prasarak Mandal*, (2010) 3 SCC 786 at para 37, *Shabnam* v. *Union of India*, (2015) 6 SCC 702 at paras 12.4 and 14 and *Jeeja Ghosh* v. *Union of India*, (2016) 7 SCC 761 at para 37.] The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorised use of such information. It is clear that Article 21, more than any of the other articles in the fundamental rights chapter, reflects each of these constitutional values in full, and is to be read in consonance with these values and with the international covenants that we have referred to. In the ultimate analysis, the fundamental right to privacy, which has so many developing facets, can

> only be developed on a case-to-case basis. Depending upon the particular facet that is relied upon, either Article 21 by itself or in conjunction with other fundamental rights would get attracted."

The dignity of the individual, which is spoken of in the Preamble to the Constitution of India, is a facet of Article 21 of the Constitution. A statutory provision belonging to the hoary past which demeans or degrades the status of a woman obviously falls foul of modern constitutional doctrine and must be struck down on this ground also.

27. When we come to the decision of this Court in **Yusuf Abdul Aziz** (supra), it is clear that this judgment also does not, in any manner, commend itself or keep in tune with modern constitutional doctrine. In any case, as has been held above, its *ratio* is an extremely limited one as it upheld a wife not being punishable as an abettor which is contained in Section 497, IPC. The focus on whether the provision as a whole would be constitutionally infirm was not there in the aforesaid judgment.

At this stage, it is necessary to advert to Chief Justice Chagla's foresight in the Bombay High Court judgment which landed up

in appeal before this Court in **Yusuf Abdul Aziz's** (supra). Chief Justice Chagla had stated that since the underlying idea of Section 497 is that wives are properties of their husbands, Section 497 should not find a place in any modern Code of law, and is an argument in favour of doing away with Section 497 altogether. The day has long since arrived when the Section does, in fact, need to be done away with altogether, and is being done away with altogether.

28. In **Sowmithri Vishnu** (supra), this Court upheld Section 497 while repelling three arguments against its continuance, as has been noticed hereinabove. This judgment also must be said to be swept away by the tidal wave of recent judgments expanding the scope of the fundamental rights contained in Articles 14, 15, and 21. Ancient notions of the man being the seducer and the woman being the victim permeate the judgment, which is no longer the case today. The moving times have not left the law behind as we have just seen, and so far as engaging the attention of law makers when reform of penal law is undertaken, we may only hasten to add that even when the

CrPC was fully replaced in 1973, Section 198 continued to be on the statute book. Even as of today, Section 497 IPC continues to be on the statute book. When these sections are wholly outdated and have outlived their purpose, not only does the maxim of Roman law, *cessante ratione legis, cessat ipsa lex,* apply to interdict such law, but when such law falls foul of constitutional guarantees, it is this Court's solemn duty not to wait for legislation but to strike down such law. As recently as in **Shayara Bano** (supra), it is only the minority view of Khehar, C.J.I. and S. Abdul Nazeer, J., that one must wait for the law to change legislatively by way of social reform. The majority view was the exact opposite, which is why Triple Talaq was found constitutionally infirm and struck down by the majority. Also, we are of the view that the statement in this judgment that stability of marriages is not an ideal to be scorned, can scarcely be applied to this provision, as we have seen that marital stability is not the object for which this provision was enacted. On all these counts, therefore, we overrule the judgment in **Sowmithri Vishnu** (supra). Equally, the judgment in **V. Revathi** (supra), which upheld the constitutional validity of Section 198 must, for

similar reasons, be held to be no longer good law. We, therefore, declare that Section 497 of the Indian Penal Code, 1860 and Section 198 of the Code of Criminal Procedure, 1973 are violative of Articles 14, 15(1), and 21 of the Constitution of India and are, therefore, struck down as being invalid.

……..J.
(R.F. Nariman)

New Delhi;
September 27, 2018.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO 194 OF 2017

JOSEPH SHINE **...Petitioner**

VERSUS

UNION OF INDIA **...Respondent**

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Dr Dhananjaya Y Chandrachud, J

A Gender: the discursive struggle

1 Our Constitution is a repository of rights, a celebration of myriad freedoms and liberties. It envisages the creation of a society where the ideals of equality, dignity and freedom triumph over entrenched prejudices and injustices. The creation of a just, egalitarian society is a process. It often involves the questioning and obliteration of parochial social mores which are antithetical to constitutional morality. The case at hand enjoins this constitutional court to make an enquiry into the insidious permeation of patriarchal values into the legal order and its role in perpetuating gender injustices.

2 Law and society are intrinsically connected and oppressive social values often find expression in legal structures. The law influences society as well but societal values are slow to adapt to leads shown by the law. The law on adultery cannot be construed in isolation. To fully comprehend its nature and impact, every legislative provision must be understood as a 'discourse' about social structuring.[1] However, the discourse of law is not homogenous.[2] In the context particularly of Section 497, it regards individuals as 'gendered citizens'.[3] In doing so, the law creates and ascribes gender roles based on existing societal

[1] Ratna Kapur and Brenda Cossman, Subversive Sites: Feminist Engagements with Law in India, Sage Publications (1996) at page 40
[2] Ibid at page 41
[3] Ibid

stereotypes. An understanding of law as a 'discourse' would lead to the recognition of the role of law in creating 'gendered identities'.[4]

3 Over the years, legal reform has had a significant role in altering the position of women in societal orderings. This is seen in matters concerning inheritance and in the protection against domestic violence. However, in some cases, the law operates to perpetuate an unequal world for women. Thus, depending on the manner in which it is used, law can act as an agent of social change as well as social stagnation. Scholar Patricia Williams, who has done considerable work on the critical race theory, is sanguine about the possibility of law engendering progressive social transformation:

> "It is my deep belief that theoretical legal understanding and social transformation need not be oxymoronic"[5]

The Constitution, both in text and interpretation, has played a significant role in the evolution of law from being an instrument of oppression to becoming one of liberation. Used in a liberal perspective, the law can enhance democratic values. As an instrument which preserves the status quo on the other hand, the law preserves stereotypes and legitimises unequal relationships based on pre-existing societal discrimination. Constantly evolving, law operates as an important "site for discursive struggle", where ideals compete and new visions are shaped.[6]. In regarding law as a "site of discursive struggle", it becomes

[4] Ibid
[5] Patricia Williams, The Alchemy of Race and Rights, Cambridge: Harvard University Press (1991)
[6] Ratna Kapur and Brenda Cossman, Subversive Sites: Feminist Engagements with Law in India, Sage Publications (1996) at page 41

imperative to examine the institutions and structures within which legal discourse operates:[7]

> "The idea of neutral dialogue is an idea which denies history, denies structure, denies the positioning of subjects."[8]

In adjudicating on the rights of women, the Court must not lose sight of the institutions and values which have forced women to a shackled existence so far. To fully recognise the role of law and society in shaping the lives and identities of women, is also to ensure that patriarchal social values and legal norms are not permitted to further obstruct the exercise of constitutional rights by the women of our country.

4 In the preceding years, the Court has evolved a jurisprudence of rights-granting primacy to the right to autonomy, dignity and individual choice. The right to sexual autonomy and privacy has been granted the stature of a Constitutional right. In confronting the sources of gendered injustice which threaten the rights and freedoms promised in our Constitution, we set out to examine the validity of Section 497 of the Indian Penal Code. In doing so, we also test the constitutionality of moral and societal regulation of women and their intimate lives through the law.

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[7] Ibid

[8] Gayatri Spivak, The Post Colonial Critic: Interviews, Strategies, Dialogies, Routledge (1990)

B Judicial discourse on adultery

5 This Court, on earlier occasions, has tested the constitutionality of Section 497 of the Indian Penal Code as well as Section 198(2) of the Code of Criminal Procedure.

Section 497 reads thus:

> "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor."

Section 198(2) of the Code of Criminal Procedure reads thus:

> "(2) For the purposes of sub- section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was com- mitted may, with the leave of the Court, make a complaint on his behalf."

6 The decision of the Constitution Bench in **Yusuf Abdul Aziz** v **State of Bombay**[9], arose from a case where the appellant was being prosecuted for adultery under Section 497. On a complaint being filed, he moved the High Court to determine the constitutional question about the validity of the provision, under

[9] 1954 SCR 930

Article 228. The High Court decided against the appellant[10], but Chief Justice Chagla made an observation about the assumption underlying Section 497:

> "Mr Peerbhoy is right when he says that the underlying idea of Section 497 is that wives are properties of their husbands. The very fact that the offence is only cognizable with the consent of the husband emphasises that point of view. It may be argued that Section 497 should not find a place in any modern Code of law. Days are past, when women were looked upon as property by their husbands."

A narrow challenge was addressed before this Court. The judgment of Justice Vivian Bose records the nature of the challenge:

> "3. Under Section 497 the offence of adultery can only be committed by a man but in the absence of any provision to the contrary the woman would be punishable as an abettor.
> The last sentence in Section 497 prohibits this. It runs—
> "In such case the wife shall not be punishable as an abettor".
> It is said that this offends Articles 14 and 15."

Hence, the challenge was only to the prohibition on treating the wife as an abettor. It was this challenge which was dealt with and repelled on the ground that Article 14 must be read with the other provisions of Part III which prescribe the ambit of the fundamental rights. The prohibition on treating the wife as an abettor was upheld as a special provision which is saved by Article 15(3). The conclusion was that:

> "5. Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children. The two articles read together validate the impugned clause in Section 497 of the Indian Penal Code."

[10] AIR 1951 Bom 470

7 The challenge was to a limited part of Section 497: that which prohibited a woman from being prosecuted as an abettor. Broader issues such as whether (i) the punishment for adultery violates Article 21; (ii) the statutory provision suffers from manifest arbitrariness; (iii) the legislature has, while ostensibly protecting the sanctity of marriage, invaded the dignity of women; and (iv) Section 497 violates Article 15(1) by enforcing gender stereotypes were neither addressed before this Court nor were they dealt with.

This Court construed the exemption granted to women from criminal sanctions as a 'special provision' for the benefit of women and thus, protected under Article 15(3) of the Constitution. In **Union of India** v **Elphinstone Spinning and Weaving Co. Ltd**,[11] a Constitution Bench of this Court held:

> "17…When the question arises as to the meaning of a certain provision in a statute it is not only legitimate but proper to read that provision in its context. The context means the statute as a whole, the previous state of law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy…"[12]

It is of particular relevance to examine the mischief that the provision intends to remedy. The history of Section 497 reveals that the law on adultery was for the benefit of the husband, for him to secure ownership over the sexuality of his wife. It was aimed at preventing the woman from exercising her sexual agency. Thus, Section 497 was never conceived to benefit women. In fact, the provision is steeped in stereotypes about women and their subordinate role in marriage. The

[11] (2001) 4 SCC 139
[12] Ibid. at page 164

patriarchal underpinnings of the law on adultery become evident when the provision is considered as a whole.

8 In the subsequent decision of the three judge Bench in **Sowmithri Vishnu** v **Union of India**[13], the court proceeded on the basis that the earlier decision in **Yusuf Abdul Aziz** had upheld Section 497 against a challenge based on Articles 14 and 15 of the Constitution. This is not a correct reading or interpretation of the judgment.

9 **Sowmithri Vishnu** did as a matter of fact consider the wider constitutional challenge on the ground that after the passage of thirty years, "particularly in the light of the alleged social transformation in the behavioural pattern of women in matters of sex", it had become necessary that the matter be revisited. **Sowmithri Vishnu** arose in a situation where a petition for divorce by the appellant against her husband on the ground of desertion was dismissed with the finding that it was the appellant who had deserted her husband. The appellant's husband then sued for divorce on the ground of desertion and adultery. Faced with this petition, the appellant urged that a decree for divorce on the ground of desertion may be passed on the basis of the findings in the earlier petition. She, however, opposed the effort of the husband to urge the ground of adultery. While the trial court accepted the plea of the husband to assert the ground of adultery, the High Court held in revision that a decree of divorce was liable to be passed on the ground of desertion, making it unnecessary to inquire into adultery. While the petition for

[13] 1985 Supp SCC 137

divorce was pending against the appellant, her husband filed a complaint under Section 497 against the person with whom the appellant was alleged to be in an adulterous relationship. The appellant then challenged the constitutional validity of Section 497.

The judgment of the three judge Bench indicates that three grounds of challenge were addressed before this Court : **first**, while Section 497 confers a right on the husband to prosecute the adulterer, it does not confer upon the wife to prosecute the woman with whom her husband has committed adultery; **second**, Section 497 does not confer a right on the wife to prosecute her husband who has committed adultery with another woman; and **third**, Section 497 does not cover cases where a man has sexual relations with an unmarried woman. The submission before this Court was that the classification under Section 497 was irrational and 'arbitrary'. Moreover, it was also urged that while facially, the provision appears to be beneficial to a woman, it is in reality based on a notion of paternalism "which stems from the assumption that women, like chattels, are the property of men."

10 The decision in **Sowmithri Vishnu** dealt with the constitutional challenge by approaching the discourse on the denial of equality in formal, and rather narrow terms. Chandrachud, CJ speaking for the three judge Bench observed that by definition, the offence of adultery can be committed by a man and not by a woman. The court construed the plea of the petitioner as amounting to a

suggestion that the definition should be recast in a manner that would make the offence gender neutral. The court responded by observing that this was a matter of legislative policy and that the court could invalidate the provision only if a constitutional violation is established. The logic of the court, to the effect that extending the ambit of a statutory definition is a matter which requires legislative change is unexceptionable. The power to fashion an amendment to the law lies with the legislature. But this only leads to the conclusion that the court cannot extend the legislative prescription by making the offence gender neutral. It does not answer the fundamental issue as to whether punishment for adultery is valid in constitutional terms. The error in **Sowmithri Vishnu** lies in holding that there was no constitutional infringement. The judgment postulates that:

> "7…It is commonly accepted that it is the man who is the seducer and not the woman. This position may have undergone some change over the years but it is for the Legislature to consider whether Section 497 should be amended appropriately so as to take note of the "transformation" which the society has undergone. The Law Commission of India in its Forty-second Report, 1971, recommended the retention of Section 497 in its present form with the modification that, even the wife, who has sexual relations with a person other than her husband, should be made punishable for adultery. The suggested modification was not accepted by the Legislature. Mrs Anna Chandi, who was in the minority, voted for the deletion of Section 497 on the ground that "it is the right time to consider the question whether the offence of adultery as envisaged in Section 497 is in tune with our present-day notions of woman's status in marriage". The report of the Law Commission shows that there can be two opinions on the desirability of retaining a provision like the one contained in Section 497 on the statute book. But, we cannot strike down that section on the ground that it is desirable to delete it."[14]

[14] Ibid. at page 141

These observations indicate that the constitutional challenge was addressed purely from the perspective of the argument that Section 497 is not gender neutral, in allowing only the man but not to the woman in a sexual relationship to be prosecuted. The court proceeded on the assumption, which it regards as "commonly accepted that it is the man who is the seducer and not the woman." Observing that this position may have undergone some change, over the years, the decision holds that these are matters for the legislature to consider and that the desirability of deleting Section 497 is not a ground for invalidation.

11 The decision in **Sowmithri Vishnu** has left unanswered the fundamental challenge which was urged before the Court. Under Article 14, the challenge was that the statutory provision treats a woman purely as the property of her husband. That a woman is regarded no more than as a possession of her husband is evidenced in Section 497, in more than one context. The provision stipulates that a man who has sexual intercourse with the wife of another will not be guilty of offence if the husband of the woman were to consent or, (worse still, to connive. In this, it is evident that the legislature attributes no agency to the woman. Whether or not a man with whom she has engaged in sexual intercourse is guilty of an offence depends exclusively on whether or not her husband is a consenting individual. No offence exists if her husband were to consent. Even if her husband were to connive at the act, no offence would be made out. The mirror image of this constitutional infirmity is that the wife of the man who has engaged in the act has no voice or agency under the statute. Again, the law does

not make it an offence for a married man to engage in an act of sexual intercourse with a single woman. His wife is not regarded by the law as a person whose agency and dignity is affected. The underlying basis of not penalising a sexual act by a married man with a single woman is that she (unlike a married woman) is not the property of a man (as the law would treat her to be if she is married). Arbitrariness is writ large on the provision. The problem with Section 497 is not just a matter of under inclusion. The court in **Sowmithri Vishnu** recognised that an under-inclusive definition is not necessarily discriminatory and that the legislature is entitled to deal with the evil where it is felt and seen the most. The narrow and formal sense in which the provisions of Article 14 have been construed is evident again from the following observations:

> "8...The contemplation of the law, evidently, is that the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime. The offence of adultery, as defined in Section 497, is considered by the Legislature as an offence against the sanctity of the matrimonial home, an act which is committed by a man, as it generally is. Therefore, those men who defile that sanctity are brought within the net of the law. In a sense, we revert to the same point: Who can prosecute whom for which offence depends, firstly, on the definition of the offence and, secondly, upon the restrictions placed by the law of procedure on the right to prosecute."[15]

The decision of the three judge Bench does not address the central challenge to the validity of Section 497. Section 497, in its effort to protect the sanctity of marriage, has adopted a notion of marriage which does not regard the man and the woman as equal partners. It proceeds on the subjection of the woman to the will of her husband. In doing so, Section 497 subordinates the woman to a

[15] Ibid. at page 142

position of inferiority thereby offending her dignity, which is the core of Article 21. Significantly, even the challenge under Article 21 was addressed on behalf of the petitioner in that case in a rather narrow frame. The argument before this Court was that at the trial involving an offence alleged to have been committed under Section 497, the woman with whom the accused is alleged to have had sexual intercourse would have no right of being heard. It was this aspect alone which was addressed in **Sowmithri Vishnu** when the court held that such a right of being heard can be read in an appropriate case. Ultimately, the court held that:

> "12…It is better, from the point of view of the interests of the society, that at least a limited class of adulterous relationships is punishable by law. Stability of marriages is not an ideal to be scorned."[16]

Sowmithri Vishnu has thus proceeded on the logic that in specifying an offence, it is for the legislature to define what constitutes the offence. Moreover, who can prosecute and who can be prosecuted, are matters which fall within the domain of the law. The inarticulate major premise of the judgment is that prosecution for adultery is an effort to protect the stability of marriages and if the legislature has sought to prosecute only a limited class of 'adulterous relationships', its choice could not be questioned. '**Sowmithri Vishnu**' fails to deal with the substantive aspects of constitutional jurisprudence which have a bearing on the validity of Section 497: the guarantee of equality as a real protection against arbitrariness, the guarantee of life and personal liberty as an essential recognition of dignity, autonomy and privacy and above all gender equality as a cornerstone of a truly equal society. For these reasons, the decision in **Sowmithri Vishnu** cannot be

[16] Ibid. at page 144

regarded as a correct exposition of the constitutional position. **Sowmithri Vishnu** is overruled.

12 The decision of a two judge Bench in **V Revathi** v **Union of India**[17] involved a challenge to Section 497 (read with Section 198(2) of the Code of Criminal Procedure) which disables a wife from prosecuting her husband for being involved in an adulterous relationship. The court noted that Section 497 permits neither the husband of the offending wife to prosecute her nor does it permit the wife to prosecute her offending husband for being disloyal. This formal sense of equality found acceptance by the court. The challenge was repelled by relying on the decision in **Sowmithri Vishnu**. Observing that Section 497 and Section 198(2) constitute a "legislative packet", the court observed that the provision does not allow either the wife to prosecute an erring husband or a husband to prosecute the erring wife. In the view of the court, this indicated that there is no discrimination on the ground of sex. In the view of the court :

> "5…The law does not envisage the punishment of any of the spouses at the instance of each other. Thus there is no discrimination against the woman insofar as she is not permitted to prosecute her husband. A husband is not permitted because the wife is not treated as an offender in the eye of law. The wife is not permitted as Section 198(1) read with Section 198(2) does not permit her to do so. In the ultimate analysis the law has meted out even-handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other. Thus no discrimination has been practised in circumscribing the scope of Section 198(2) and fashioning it so that the right to prosecute the adulterer is restricted to the husband of the adulteress but has not been extended to the wife of the adulterer."[18]

[17] (1988) 2 SCC 72
[18] Ibid. at page 76

13 The decision in **Revathi** is a reiteration of **Sowmithri Vishnu.** It applies the doctrine of equality and the prohibition against discrimination on the ground of sex in a formalistic sense. The logic of the judgment is that since neither of the spouses (man or woman) can prosecute the erring spouse, the provision does not discriminate on the ground of sex. Apart from reading equality in a narrow confine, the judgment does not deal with crucial aspects bearing on the constitutionality of the provision. **Revathi,** like **Sowmithri Vishnu** does not lay down the correct legal principle.

C Relics of the past

> "Our Massachusetts magistracy…have not been bold to put in force the extremity of our righteous law against her. The penalty thereof is death. But in their great mercy and tenderness of heart they have doomed Mistress Prynne to stand only a space of three hours on the platform of the pillory, and then and thereafter, for the remainder of her natural life to wear a mark of shame upon her bosom."[19]

14 Section 497 of the Indian Penal Code, 1860 makes adultery a punishable offence against "whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man." It goes on to state that, "in such case the wife shall not be punishable as an abettor." The offence applies only to the man committing adultery. A woman committing adultery is not considered to be an

[19] Nathaniel Hawthorne, The Scarlet Letter, Bantam Books (1850), at page 59

"abettor" to the offence. The power to prosecute for adultery rests only with the husband of the woman.

Understanding the gendered nature of Section 497 needs an inquiry into the origins of the provision itself as well as the offence of adultery more broadly. The history of adultery throws light upon disparate attitudes toward male and female infidelity, and reveals the double standard in law and morality that has been applied to men and women.[20]

15 Throughout history, adultery has been regarded as an offence; it has been treated as a religious transgression, as a crime deserving harsh punishment, as a private wrong, or as a combination of these.[21] The earliest recorded injunctions against adultery are found in the ancient code of the Babylonian king Hammurabi, dating from circa 1750 B.C. The code prescribed that a married woman caught in adultery be bound to her lover and thrown into water so that they drown together.[22] By contrast, Assyrian law considered adultery to be a private wrong for which the husband or father of the woman committing adultery could seek compensation from her partner.[23] English historian Faramerz Dabhoiwala notes that the primary purpose of these laws was to protect the property rights of men:

[20] See David Turner, Adultery in The Oxford Encyclopaedia of Women in World History (2008)
[21] Ibid
[22] James A. Brundage, Law, Sex, and Christian Society in Medieval Europe, at page 10
[23] Ibid, at page 11

> "Indeed, since the dawn of history every civilisation had prescribed severe laws against at least some kind of sexual immorality. The oldest surviving legal codes (c.2100-1700 BCE), drawn up by the kings of Babylon made adultery punishable by death and most other near Eastern and classical culture also treated it as a serious offence...The main concern of such laws was usually to uphold the honour and property rights of fathers, husbands and higher status groups..."[24]

16 In Ancient Greco-Roman societies, there existed a sexual double standard according to which adultery constituted a violation of a husband's exclusive sexual access to his wife, for which the law allowed for acts of revenge.[25] In 17 B.C., Emperor Augustus passed the *Lex Julia de adulteriis coercendis*, which stipulated that a father was allowed to kill his daughter and her partner when caught committing adultery in his or her husband's house.[26] While in the Judaic belief adultery merited death by stoning for both the adulteress and her partner,[27] Christianity viewed adultery more as a moral and spiritual failure than as a public crime.[28] The penalties of the *Lex Julia* were made more severe by Christian emperors. Emperor Constantine, for instance, introduced the death penalty for adultery, which allowed the husband the right to kill his wife if she committed adultery.[29] Under the *Lex Julia*, adultery was primarily a female offence, and the law reflected the sentiments of upper-class Roman males.[30]

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[24] Faramerz Dabhoiwala, The Origins of Sex: A History of the First Sexual Revolution (2012), at page 5
[25] David Turner, Adultery in The Oxford Encyclopaedia of Women in World History (2008), at page 30
[26] Vern Bullough, Medieval Concepts of Adultery, at page 7
[27] The Oxford Encyclopaedia of Women in World History, (Bonnie G Smith ed.), Oxford, at page 27
[28] Martin Siegel, For Better or for Worse: Adultery, Crime & the Constitution, Vol. 30, Journal of Family Law (1991), at page 46
[29] Vern Bullough, Medieval Concepts of Adultery, at page 7
[30] James A. Brundage, Law, Sex, and Christian Society in Medieval Europe, at page 27

17 Once monogamy came to be accepted as the norm in Britain between the fourth and fifth centuries, adultery came to be recognized as a serious wrong that interfered with a husband's "rights" over his wife.[31] The imposition of criminal sanctions on adultery was also largely based on ideas and beliefs about sexual morality which acquired the force of law in Christian Europe during the Middle Ages.[32] The development of canon law in the twelfth century enshrined the perception of adultery as a spiritual misdemeanour. In the sixteenth century, following the Reformation, adultery became a crucial issue because Protestants placed new emphasis on marriage as a linchpin of the social and moral order.[33] Several prominent sixteenth century reformers, including Martin Luther and John Calvin, argued that a marriage was irreparably damaged by infidelity, and they advocated divorce in such cases.[34]

Concerned with the "moral corruption" prevalent in England since the Reformation, Puritans in the Massachusetts Bay Colony introduced the death penalty for committing adultery.[35] The strict morality of the early English colonists is reflected in the famous 1850 novel 'The Scarlet Letter' by Nathaniel Hawthorne, in which an unmarried woman who committed adultery and bore a child out of wedlock was made to wear the letter A (for adulterer) when she went out in public; her lover was not so tagged, suggesting that women were punished

[31] Jeremy D. Weinstein, Adultery, Law, and the State: A History, Vol. 38, Hastings Law Journal (1986), at page 202; R. Huebner, A History of Germanic Private Law (F. Philbrick trans. 1918)
[32] James A. Brundage, Law, Sex, and Christian Society in Medieval Europe, at page 6
[33] David Turner, Adultery in The Oxford Encyclopaedia of Women in World History (2008), at page 30
[34] Ibid.
[35] The Oxford Encyclopaedia of Women in World History, (Bonnie G Smith ed.), Oxford, at page 30

more severely than men for adultery, especially when they had a child as evidence.[36]

18 In 1650, England enacted the infamous Act for Suppressing the Detestable Sins of Incest, Adultery and Fornication, which introduced the death penalty for sex with a married woman.[37] The purpose of the Act was as follows:

> "For the suppressing of the abominable and crying sins of…adultery… wherewith this Land is much defiled, and Almighty God highly displeased; be it enacted...That in case any married woman shall…be carnally known by any man (other than her husband)…as well the man as the woman…shall suffer death."

The Act was a culmination of long-standing moral concerns about sexual transgressions, sustained endeavours to regulate conjugal matters on a secular plain, and a contemporaneous political agenda of socio-moral reform.[38] It was repealed in 1660 during the Restoration. The common law, however, was still concerned with the effect of adultery by a married woman on inheritance and property rights. It recognized the "obvious danger of foisting spurious offspring upon her unsuspecting husband and bringing an illegitimate heir into his family."[39] Accordingly, secular courts treated adultery as a private injury and a tort

[36] James R. Mellow, Hawthorne's Divided Genius, The Wilson Quarterly (1982)
[37] Mary Beth Norton, Founding Mothers and Fathers: Gendered Power and the Forming of American Society (1996).
[38] Keith Thomas, The Puritans and Adultery: The Act of 1650 Reconsidered, in Puritans and Revolutionaries: Essays in Seventeenth-Century History Presented to Christopher Hill (Donald Pennington, Keith Thomas, eds.), at page 281
[39] Charles E. Torcia, Wharton's Criminal Law, Section 218, (1994) at page 528

for criminal conversation was introduced in the late 17th century, which allowed the husband to sue his wife's lover for financial compensation.[40]

19 In 19th century Britain, married women were considered to be chattel of their husbands in law, and female adultery was subjected to ostracism far worse than male adultery because of the problem it could cause for property inheritance through illegitimate children.[41] Consequently, many societies viewed chastity, together with related virtues such as modesty, as more central components of a woman's honor and reputation than of a man's.[42] The object of adultery laws was not to protect the bodily integrity of a woman, but to allow her husband to exercise control over her sexuality, in order to ensure the purity of his own bloodline. The killing of a man engaged in an adulterous act with one's wife was considered to be manslaughter, and not murder.[43] In **R** v **Mawgridge**,[44] Judge Holt wrote that:

> "…[A] man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for Jealousy is the Rage of a Man and **Adultery is the highest invasion of property.**" (Emphasis supplied)

20 In his Commentaries on the Laws of England, William Blackstone wrote that under the common law, "the very being or legal existence of the woman

[40] J. E. Loftis, Congreve's Way of the World and Popular Criminal Literature, Studies in English Literature, 1500 – 1900 36(3) (1996), at page 293
[41] Joanne Bailey, Unquiet Lives: Marriage and Marriage Breakdown in England, 1660–1800 (2009), at page 143
[42] David Turner, Adultery in The Oxford Encyclopaedia of Women in World History (2008), at page 28
[43] Blackstone's Commentaries on the Laws of England, Book IV (1778), at page 191-192
[44] (1707) Kel. 119

[was] suspended during the marriage, or at least [was] incorporated and consolidated into that of the husband: under whose wing, protection and cover, she performe[d] everything."[45] In return for support and protection, the wife owed her husband "consortium" of legal obligations, which included sexual intercourse.[46] Since adultery interfered with the husband's exclusive entitlements, it was considered to be the "highest possible invasion of property," similar to theft.[47] In fact, civil actions for adultery evolved from actions for enticing away a servant from a master and thus depriving the master of the quasi-proprietary interest in his services.[48]

Faramerz Dabhoiwala notes that a man's wife was considered to be his property, and that another man's "unlawful copulation" with her warranted punishment:

> "…[T]he earliest English law codes, which date from this time, evoke a society where women were bought and sold and lived constantly under the guardianship of men. Even in cases of consensual sex, its system of justice was mainly concerned with the compensation one man should pay to another for unlawful copulation with his female chattel."

21 When the IPC was being drafted, adultery was not a criminal offence in common law. It was considered to be an ecclesiastical wrong "left to the feeble coercion of the Spiritual Court, according to the rules of Canon Law."[49] Lord Thomas Babington Macaulay, Chairman of the First Law Commission of India

[45] William Blackstone, Commentaries on the Laws of England. Vol. I (1765), at pages 442 445
[46] Vera Bergelson, Rethinking Rape-By-Fraud in Legal Perspectives on State Power: Consent and Control (Chris Ashford, Alan Reed and Nicola Wake, eds.) (2016), at page 161
[47] R v. Mawgridge, (1707) Kel. 119
[48] Vera Bergelson, Rethinking Rape-By-Fraud in Legal Perspectives on State Power: Consent and Control (Chris Ashford, Alan Reed and Nicola Wake, eds.) (2016), at page 161
[49] Blackstone's Commentaries on the Laws of England, Book IV (1778), at pages 64-65

and principal architect of the IPC, considered the possibility of criminalizing adultery in India, and ultimately concluded that it would serve little purpose.[50] According to Lord Macaulay, the possible benefits from an adultery offence could be better achieved through pecuniary compensation.[51] Section 497 did not find a place in the first Draft Penal Code prepared by Lord Macaulay. On an appraisal of the facts and opinions collected from all three Presidencies about the feasibility criminalizing adultery, he concluded in his Notes to the IPC that:

> "…All the existing laws for the punishment of adultery are altogether inefficacious for the purpose of preventing injured husbands of the higher classes from taking the law into their own hands; secondly; that scarcely any native of higher classes ever has recourse to the courts of law in a case of adultery for redress against either his wife, or her gallant; thirdly, that the husbands who have recourse in case of adultery to the Courts of law are generally poor men whose wives have run away, that these husbands seldom have any delicate feelings about the intrigue, but think themselves injured by the elopement, that they consider wives as useful members of their small households, that they generally complain not of the wound given to their affections, not of the stain on their honor , but of the loss of a menial whom they cannot easily replace, and that generally their principal object is that the women may be sent back." **These things being established, it seems to us that no advantage is to be expected from providing a punishment for adultery. We think it best to treat adultery merely as a civil injury**."[52] (Emphasis supplied)

22 The Law Commissioners, in their Second Report on the Draft Penal Code, disagreed with Lord Macaulay's view. Placing heavy reliance upon the status of women in India, they concluded that:

[50] Abhinav Sekhri, The Good, The Bad, And The Adulterous: Criminal Law And Adultery In India, Socio-Legal Review (2016), at page 52
[51] Ibid.
[52] Macaulay's Draft Penal Code (1837), Note Q

> "While we think that the offence of adultery ought not to be omitted from the code, we would limit its cognizance to adultery committed with a married woman, and considering that there is much weight in the last remark in note Q, regarding the condition of the women, in this country, in deference to it, we would render the male offender alone liable to punishment. We would, however, put the parties accused of adultery on trial "together", and empower the Court in the event of their conviction to pronounce a decree of divorce against the guilty woman, if the husband sues for it, at the same time that her paramour is sentenced to punishment by imprisonment or fine."[53]

The Law Commissioners' decision to insert Section 497 into the IPC was rooted in their concern about the possibility of the "natives" resorting to illegal measures to avenge the injury in cases of adultery:

> "The backwardness of the natives to have recourse to the courts of redress in cases of adultery, [Colonel Sleeman] asserts, "arises from the utter hopelessness on their part of ever getting a conviction in our courts upon any evidence that such cases admit of;" that is to say, in courts in which the Mahommedan law is observed. "The rich man…not only feels the assurance that he could not get a conviction, but dreads the disgrace of appearing publicly in one court after another, to prove…his own shame and his wife's dishonor. He has recourse to poison secretly, or with his wife's consent; and she will generally rather take it than be turned out into the streets a degraded outcast. The seducer escapes with impunity, he suffers nothing, while his poor victim suffers all that human nature is capable of enduring…The silence of the Penal Code will give still greater impunity to the seducers, while their victims will, in three cases out of four, be murdered, or driven to commit suicide. Where husbands are in the habit of poisoning their guilty wives from the want of legal means of redress, they will sometimes poison those who are suspected upon insufficient grounds, and the innocent will suffer."[54]

[53] Second Report on the Indian Penal Code (1847), at pages 134-35, cited from, Law Commission of India, Forty-second Report: Indian Penal Code, at page 365

[54] A Penal Code prepared by The Indian Law Commissioners (1838), The Second Report on the Indian Penal Code, at page 74

Section 497 and Section 198 are seen to treat men and women unequally, as women are not subject to prosecution for adultery, and women cannot prosecute their husbands for adultery. Additionally, if there is "consent or connivance" of the husband of a woman who has committed adultery, no offence can be established. In its 42nd Report, the Law Commission of India considered the legislative history of Section 497 and the purported benefit of criminal sanctions for adultery. The Committee concluded that, "though some of us were personally inclined to recommend repeal of the section, we think on the whole that the time has not yet come for making such a radical change in the existing position."[55] It recommended that Section 497 be retained, but with a modification to make women who commit adultery liable as well.

23 In its 156th Report, the Law Commission made a proposal which it believed reflected the "'transformation' which the society has undergone," by suggesting removing the exemption from liability for women under Section 497.[56] In 2003, the Justice Malimath Committee recommended that Section 497 be made gender-neutral, by substituting the words of the provision with "whosoever has sexual intercourse with the spouse of any other person is guilty of adultery."[57] The Committee supported earlier proposals to not repeal the offence, but to equate liability for the sexes:

> "The object of the Section is to preserve the sanctity of marriage. Society abhors marital infidelity. Therefore, there is no reason for not meting out similar treatment to the wife who

[55] Law Commission of India, 42nd Report: Indian Penal Code (1971), at page 326
[56] Law Commission of India, 156th Report: Indian Penal Code (1997) at page 172
[57] Report of the Committee on Reforms of Criminal Justice System (2003), at page 190

> has sexual intercourse with a man (other than her husband)."[58]

Neither the recommendations of the Law Commission nor those of the Malimath Committee have been accepted by the Legislature. Though women are exempted from prosecution under Section 497, the underlying notion upon which the provision rests, which conceives of women as property, is extremely harmful. The power to prosecute lies only with the husband (and not to the wife in cases where her husband commits adultery), and whether the crime itself has been committed depends on whether the husband provides "consent for the allegedly adulterous act."

24 Women, therefore, occupy a liminal space in the law: they cannot be prosecuted for committing adultery, nor can they be aggrieved by it, by virtue of their status as their husband's property. Section 497 is also premised upon sexual stereotypes that view women as being passive and devoid of sexual agency. The notion that women are 'victims' of adultery and therefore require the beneficial exemption under Section 497 has been deeply criticized by feminist scholars, who argue that such an understanding of the position of women is demeaning and fails to recognize them as equally autonomous individuals in society.[59] Effectively, Indian jurisprudence has interpreted the constitutional guarantee of sex equality as a justification for differential treatment: to treat men

[58] Ibid.
[59] Abhinav Sekhri, The Good, The Bad, And The Adulterous: Criminal Law And Adultery In India, Socio-Legal Review (2016), at page 63

and women differently is, ultimately, to act in women's interests.[60] The status of Section 497 as a "special provision"[61] operating for the benefit of women, therefore, constitutes a paradigmatic example of benevolent patriarchy.

25 Throughout history, the law has failed to ask the woman question.[62] It has failed to interrogate the generalizations or stereotypes about the nature, character and abilities of the sexes on which laws rest, and how these notions affect women and their interaction with the law. A woman's 'purity' and a man's marital 'entitlement' to her exclusive sexual possession may be reflective of the antiquated social and sexual mores of the nineteenth century, but they cannot be recognized as being so today. It is not the "common morality" of the State at any time in history, but rather constitutional morality, which must guide the law. In any democracy, constitutional morality requires the assurance of certain rights that are indispensable for the free, equal, and dignified existence of all members of society. A commitment to constitutional morality requires us to enforce the constitutional guarantees of equality before law, non-discrimination on account of sex, and dignity, all of which are affected by the operation of Section 497.

[60] Brenda Cossman and Ratna Kapur, Subversive Sites: Feminist Engagements with Law in India (1996)
[61] Yusuf Abdul Aziz v. State of Bombay, 1954 SCR 930
[62] The 'Woman Question' was one of the great issues that occupied the middle of the nineteenth century, namely the social purpose of women. It is used as a tool to enquire into the status of women in the law and how they interact with and are affected by it; See Katherine T. Bartlett, Feminist Legal Methods, Harvard Law Review (1990)

D Across frontiers

26 The last few decades have been characterized by numerous countries around the world taking measures to decriminalize the offence of adultery due to the gender discriminatory nature of adultery laws as well as on the ground that they violate the right to privacy. However, progressive action has primarily been taken on the ground that provisions penalising adultery are discriminatory against women either patently on the face of the law or in their implementation. Reform towards achieving a more egalitarian society in practice has also been driven by active measures taken by the United Nations and other international human rights organizations, where it has been emphasized that even seemingly gender-neutral provisions criminalising adultery cast an unequal burden on women:[63]

> "Given continued discrimination and inequalities faced by women, including inferior roles attributed to them by patriarchal and traditional attitudes, and power imbalances in their relations with men, the mere fact of maintaining adultery as a criminal offence, even when it applies to both women and men, means in practice that women mainly will continue to face extreme vulnerabilities, and violation of their human rights to dignity, privacy and equality."

The abolishing of adultery has been brought about in equal measure by legislatures and courts. When decisions have been handed down by the judiciary across the world, it has led to the creation of a rich body of transnational jurisprudence. This section will focus on a few select comparative decisions emanating from the courts of those countries where the provision criminalizing adultery has been struck down through judicial action. The decisions of these

[63] U N Working Group on Women's Human Rights: Report (18 October, 2012), available at: http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&LangID=E

courts reflect how the treatment of the law towards adultery has evolved with the passage of time and in light of changing societal values.

27 In 2015, the South Korean Constitutional Court,[64] by a majority of 7-2 struck down Article 241 of the Criminal Law; a provision which criminalized adultery with a term of imprisonment of two years as unconstitutional. In doing so, South Korea joined a growing list of countries in Asia and indeed around the world that have taken the measure of effacing the offence of adultery from the statute books, considering evolving public values and societal trends. The Constitutional Court had deliberated upon the legality of the provision four times previously[65], but chose to strike it down when it came before it in 2015, with the Court's judgement acknowledging the shifting public perception of individual rights in their private lives.

The majority opinion of the Court was concurred with by five of the seven judges[66] who struck down the provision. The majority acknowledged that the criminal provision had a legitimate legislative purpose in intending "to promote the marriage system based on good sexual culture and practice and monogamy and to preserve marital fidelity between spouses." However, the Court sought to strike a balance between the legitimate interest of the legislature in promoting the

[64]Case No: 2009Hun-Ba17, (Adultery Case), South Korea Constitutional Court (February 26, 2015), available at http://english.ccourt.go.kr/cckhome/eng/decisions/majordecisions/majorDetail.do

[65] Firstpost, South Korean court abolishes law that made adultery illegal, (February 26, 2015), available at https://www.firstpost.com/world/south-korean-court-abolishes-law-saying-adultery-is-illegal-2122935.html

[66] Opinion of Justice Park Han-Chul, Justice Lee Jin-Sung, Justice Kim Chang-Jong, Justice Seo Ki-Seog and Justice Cho Yong-Ho (Adultery is Unconstitutional)

institution of marriage and marital fidelity vis-à-vis the fundamental right of an individual to self-determination, which included sexual-self-determination, and was guaranteed under Article 10 of their Constitution.[67] The Court held:

> "The right to self-determination connotes the right to sexual self-determination that is the freedom to choose sexual activities and partners, implying that the provision at issue restricts the right to sexual self-determination of individuals. In addition, the provision at Issue also restricts the right to privacy protected under Article 17 of the Constitution in that it restricts activities arising out of sexual life belonging to the intimate private domain."

The Court used the test of least restrictiveness, and began by acknowledging that there no longer existed public consensus on the criminalization of adultery, with the societal structure having changed from holding traditional family values and a typeset role of family members to sexual views driven by liberal thought and individualism. While recognizing that marital infidelity is immoral and unethical, the Court stated that love and sexual life were intimate concerns, and they should not be made subject to criminal law. Commenting on the balance between an individual's sexual autonomy vis-à-vis societal morality, the Court remarked:

> "…the society is changing into one where the private interest of sexual autonomy is put before the social interest of sexual morality and families from the perspective of dignity and happiness of individuals."[68]

[67] Article 10 of the South Korean Constitution "All citizens are assured of human worth and dignity and have the right to pursue happiness. It is the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals."

[68] Supra, note 64, Part V- A (3)(1) ('Change in Public's Legal Awareness' under the head of 'Appropriateness of Means and Least Restrictiveness')

Next, the Court analysed the appropriateness and effectiveness of criminal punishment in curbing the offence of adultery. Addressing the question of whether adultery should be regulated, the Court stated that modern criminal law dictated that the State should not seek to interfere in an act that is not socially harmful or deleterious to legal interests, simply because it is repugnant to morality. Moreover, it held that the State had no business in seeking to control an individual's actions which were within the sphere of his or her constitutionally protected rights of privacy and self-determination.

Moving on to the effectiveness of the provision at hand, the Court remarked that criminalizing adultery did not help save a failing marriage. The Court remarked that it was obvious that once a spouse was accused of adultery, the consequence was generally intensified spousal conflict as opposed to the possibility of family harmony:

> "Existing families face breakdown with the invoking of the right to file an accusation. Even after cancellation of the accusation, it is difficult to hope for emotional recovery between spouses. Therefore, the adultery crime can no longer contribute to protecting the marital system or family order. Furthermore, there is little possibility that a person who was punished for adultery would remarry the spouse who had made an accusation against himself/herself. It is neither possible to protect harmonious family order because of the intensified conflict between spouses in the process of criminal punishment of adultery."[69]

[69] Supra, note 64, Part V- A (3)(3) ('Effectiveness of Criminal Punishment', under the head of 'Appropriateness of Means and Least Restrictiveness')

Addressing the concern that an abolition of a penal consequence would result in "chaos in sexual morality" or an increase of divorce due to adultery, the Court concluded that there was no data at all to support these claims in countries where adultery is repealed, stating:

> "Rather, the degree of social condemnation for adultery has been reduced due to the social trend to value the right to sexual self-determination and the changed recognition on sex, despite of the punishment of adultery. Accordingly, it is hard to anticipate a general and special deterrence effect for adultery from the perspective of criminal policy as it loses the function of regulating behaviour."[70]

The Court also analysed the argument that adultery provisions protected women:

> "It is true that the existence of adultery crimes in the past Korean society served to protect women. Women were socially and economically underprivileged, and acts of adultery were mainly committed by men. Therefore, the existence of an adultery crime acted as psychological deterrence for men, and, furthermore, enabled female spouses to receive payment of compensation for grief or divided assets from the male spouse on the condition of cancelling the adultery accusation.
>
> However, the changes of our society diluted the justification of criminal punishment of adultery. Above all, as women's earning power and economic capabilities have improved with more active social and economic activities, the premise that women are the economically disadvantaged does not apply to all married couples."

Finally, the Court concluded its analysis by holding that the interests of enforcing monogamy, protecting marriage and promoting marital fidelity, balanced against

[70] Ibid.

the interference of the State in the rights to privacy and sexual autonomy were clearly excessive and therefore failed the test of least restrictiveness.[71]

28 In 2007, the Ugandan Constitutional Court in **Law Advocacy for Women in Uganda** v **Attorney General of Uganda**[72], was called upon to rule on the constitutionality of Section 154 of the Penal Code, on, the grounds that it violated various protections granted by the Ugandan Constitution and meted out discriminatory treatment between women and men. The law as it stood allowed a married man to have a sexual relationship with an unmarried woman. Moreover, only a man could be guilty of the offence of adultery when he had sexual intercourse with a married woman. The same provision, however, penalized a married woman who engaged in a sexual relationship with an unmarried or married man outside of the marriage. The penalties for the offence also prescribed a much stricter punishment for women as compared to their male counterparts.[73] The challenge was brought primarily under Article 21 of the Ugandan Constitution, which guaranteed equality under the law, Article 24 which mandates respect for human dignity and protection from inhuman treatment and Article 33(1), which protected the rights of women under the Constitution. [74]

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[71] Supra, note 64, Part V- A (5) ('Balance of Interests & Conclusion')

[72] Constitutional Petitions Nos. 13 /05 /& 05 /06 in Law Advocacy for Women in Uganda v. Attorney General of Uganda, (2007) UGCC 1 (5 April, 2007), available at https://ulii.org/ug/judgment/constitutional-court/2007/1

[73] Reuters: 'Uganda scraps "sexist" adultery law', (April 5, 2007), available at https://www.reuters.com/article/us-uganda-adultery/uganda-scraps-sexist-adultery-law-idUSL0510814320070405

[74] Constitutional Petitions Nos. 13 /05 /& 05 /06 in Law Advocacy for Women in Uganda v. Attorney General of Uganda, [2007] UGCC 1 (5 April, 2007), available at https://ulii.org/ug/judgment/constitutional-court/2007/1

The Respondent prayed that the Court consider making the provision of adultery equal in its treatment of men and women, instead of striking it down completely. However, in its holding, the Court denied this request, holding it could not prescribe a punishment under penal law to change the statute. The Court held that Section 154 of the Penal Code was wholly unconstitutional as being violative of the provisions of the Constitution, and remarked:

> "...the respondent did not point out to us areas that his Court can or should modify and adapt to bring them in conformity with the provisions of the Constitution. The section is a penal one and this Court in our considered opinion cannot create a sentence that the courts can impose on adulterous spouses.
>
> Consequently, it is our finding that the provision of section 154 of the Penal Code Act is inconsistent with the stated provisions of the Constitution and it is void."[75]

29 In 2015, in **DE** v **RH**,[76] the Constitutional Court of South Africa held that an aggrieved spouse could no longer seek damages against a third party in cases of adultery. Madlanga J poignantly remarked on the preservation of marriage:

> "…although marriage is 'a human institution which is regulated by law and protected by the Constitution and which, in turn, creates genuine legal duties . . . Its essence . . . consists in the readiness, founded in morals, of the parties to the marriage to create and to maintain it'. If the parties to the marriage have lost that moral commitment, the marriage will fail and punishment meted out to a third party is unlikely to change that."[77]

[75] Ibid.
[76] DE v RH, [2015] ZACC 18
[77] Ibid, at para 34

The decisions of the US Supreme Court bearing on the issue of privacy have been analysed in an incisive article, titled "For Better or for Worse: Adultery, Crime and The Constitution"[78], by Martin Siegel. He presents three ways in which adultery implicates the right to privacy. The first is that adultery must be viewed as a constitutionally protected marital choice. Second, that certain adulterous relationships are protected by the freedom of association and finally, that adultery constitutes an action which is protected by sexual privacy.[79] A brief study is also undertaken on whether action penalizing adultery constitutes a legitimate interest of the State.

The first privacy interest in adultery is the right to marital choice. The U.S. Supreme Court has upheld the values of 'fundamental liberty', 'freedom of choice' and 'the 'right to privacy' in marriage. With this jurisprudence, the author argues, it would be strange if a decision to commit adultery is not a treated as a matter of marriage and family life as expressed in **Cleveland Board**[80], 'an act occurring in marriage', as held in **Griswold**[81] or a 'matter of marriage and family life' as elucidated in **Carey**.[82]

[78] Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol.30, (1991) 45
[79] Ibid, at page 46
[80] Cleveland Board of Education v. LaFleur, 414 U.S. 623 (1973)
[81] Griswold, 381 U.S. 1 (1967)
[82] Carey, v. Population Serv. Int'l, 431 U.S. 678

Siegel posits that a decision to commit adultery is a decision 'relating to marriage and family relationships' and therefore, falls within the domain of protected private choices. He observes that the essence of the offence is in fact the married status of one of the actors, and the mere fact that the commission of the act consisted of a mere sexual act or a series of them is legally irrelevant. If the argument that adultery, though unconventional, is an act related to marriage and therefore fundamentally private is accepted, then it deserves equal protection. Siegel cites Laurence Tribe, on accepting the 'unconventional variants' that also form a part of privacy:

> "Ought the "right to marriage," as elucidated by Griswold, Loving v. Virginia, Zablocki, Boddie v. Connecticut and Moore, also include marriage's "unconventional variants"-in this case the adulterous union?"[83]

The mere fact that adultery is considered unconventional in society does not justify depriving it of privacy protection. The freedom of making choices also encompasses the freedom of making an 'unpopular' choice. This was articulated by Justice Blackmun in his dissent in **Hardwick**[84]:

> "A necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices."[85]

Siegel concludes that the privacy protections afforded to marriage must extend to all choices made within the marriage:

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[83] Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol.30, (1991) 70
[84] Hardwick, 478 U.S.205
[85] Ibid, at page 206

> "The complexity and diversity among marriages make it all the more important that the privacy associated with that institution be construed to include all kinds of marriages, sexually exclusive as well as open, 'good', as well as 'bad'."[86]

Siegel then proceeds to examine the next privacy interest in adultery, that of the right to association. The right to freedom of association he states is 'a close constitutional relative of privacy'[87], and they often interact in an intertwined manner. Siegel proceeds to explain that adultery must not simply be looked at as an act of consensual adult sexual activity, as sexual activity may simply be one element in a continuum of interactions between people:

> "Sexual activity may be preliminary or incidental to a developing association, or it may be its final culmination and solidification. In either case, it is simply one more element of the relationship. Two people may have sex upon first meeting. In this case, associational interests seem less important, although "loveless encounters are sometimes prerequisites for genuine love relationships; to forbid the former is, therefore, to inhibit the latter."' [88]

Next, Siegel examines the plausible protection of adultery through the lens of the freedom of expression. Since the act of engaging in sexual activity can be interpreted as being expressive, Siegel claims adultery might also implicate First Amendment rights. In support he cites a body of case law[89],where courts have held that First Amendment rights are not limited to merely verbal expression but also encompass the right to 'expressive association'.

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[86] Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol.30, (1991) 74
[87] Ibid, at page 77
[88] Ibid, at, page 78
[89] Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984)

In concluding his section on the right to associate, Siegel warns against the dangers of classifying adultery solely as a sexual activity, as doing so would be akin to protecting a part of the relationship and criminalizing the other. This would be manifestly unjust:

> "It is difficult, both theoretically and practically, to single out the sexual contacts two people may have from the rest of their relationship- to criminalize the one and constitutionally protect as fundamental the other". [90]

Lastly, Siegel discusses the connection between adultery and the right to sexual privacy. It is accepted that a right to privacy safeguards an individual's deeply personal choices which includes a recognition accorded to the inherently private nature of all consensual adult sexual activity.[91] This understanding of sexual privacy found favour with the U.S. Supreme Court, which in **Thornburgh** v **American College of Obstetricians and Gynaecologists**[92] quoted Charles Fried with approval:

> "The concept of privacy embodies the moral fact that a person belongs to himself and not to others nor to society as a whole."[93]

Siegel reiterates the underlying intangible value of adult consensual sexual activity:

[90] Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol.30, (1991) 78
[91] Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol.30, (1991) 82
[92] Thornburgh v. American College of Obstetricians and Gynaecologists, 476 U.S. 747 (1986)
[93] Ibid, at Page 777

> "The real importance of sexuality to humans, more so in today's world of effective birth control than ever, lies in the possibilities for self-realization and definition inherent in sexual choices. Sexual experience offers "self-transcendence, expression of private fantasy, release of inner tensions, and meaningful and acceptable expression of regressive desires to be again the free child - unafraid to lose control, playful, vulnerable, spontaneous, sensually loved."[94]

Reflecting on the relationship between marital privacy and associational freedom, Spiegel remarks the "heterogeneity of experience", resulting in a variety of choices, necessarily include the adulterous union which must be protected since it is unrealistic to expect all individuals to conform to society's idea of sexuality:

> "Because sex is so much a part of our personhood, we should not expect that people different in so many other ways will be identical sexually. For some, adultery is a cruel betrayal, while for others it is just comeuppance for years of spousal neglect. In some marriages, sex is the epitome of commitment, while in others spouses jointly and joyfully dispense with sexual monogamy."[95]

In concluding the author states that the foregoing three-layered analysis left no room for doubt that adultery was a matter of marriage. It therefore deserved to be protected like all other affairs occurring in marriage and implicated routine privacy-based freedoms, and it was imperative to treat is as such. Spiegel concludes by quoting the U.S. Supreme Court in **Eisenstadt** v **Braid**, on the importance of protecting the power to make a 'bad' choice in a marriage:

> "A marriage's privacy and autonomy are the best routes to safeguarding liberty and pluralism. This is no less true when

[94] Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol.30, (1991) at page 85
[95] Ibid, at Page 86

> the power to choose, as it inevitably will, results in bad choices. It is a confidence in nothing less than the theory underscoring our entire political order: Our system of government requires that we have faith in the ability of the individual to decide wisely, if only he is fully appraised of the merits of the controversy."[96]

While acknowledging the interest that the State has in preserving the institution of marriage, Siegel precisely points out the inefficacy of attaching criminal sanctions to adultery in the following words:

> "Even if we accept that a state is trying to foster the interests of specific deceived spouses by its laws criminalizing adultery, it is impossible to believe that a criminal penalty imposed on one of the spouses would somehow benefit a marriage instead of representing the final nail in its coffin. And if deterrence of adultery is the goal, then the state's failure to arrest and prosecute offenders has long since removed any fear of legal sanction."[97]

Deborah L Rhode in her book titled "Adultery" argues that "intermittent idiosyncratic invocations of adultery prohibitions do little to enforce marital vows or reinforce confidence in the rule of law. There are better ways to signal respect for the institution of marriage and better uses of law enforcement than policing private, consensual sexual activity."[98]

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[96] Eisenstadt v. Baird , 405 U.S. 438, 457 (1972)
[97] Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, Journal of Family Law, Vol.30, (1991) 89
[98] Deborah Rhode, Adultery: Infidelity and the Law, (Harvard University Press, 2016)

E Confronting patriarchy

> "Norms and ideals arise from the yearning that it is an expression of freedom: it does not have to be this way, it could be otherwise."[99]

30 The petitioner urged that (i) The full realisation of the ideal of equality enshrined in Article 14 of the Constitution ought to be the endeavour of this Court; (ii) the operation of Section 497 is a denial of equality to women in marriage; and (iii) the provision is manifestly arbitrary and amounts to a violation of the constitutional guarantee of substantive equality.

The act which constitutes the offence under Section 497 of the Penal Code is a man engaging in sexual intercourse with a woman who is the "wife of another man". For the offence to arise, the man who engages in sexual intercourse must either know or have reason to believe that the woman is married. Though a man has engaged in sexual intercourse with a woman who is married, the offence of adultery does not come into being where he did so with the consent or connivance of her husband.

These ingredients of Section 497 lay bare several features which bear on the challenge to its validity under Article 14. The fact that the sexual relationship between a man and a woman is consensual is of no significance to the offence, if the ingredients of the offence are established. What the legislature has

[99] Iris Marion Young, Justice and the Politics of Difference, Princeton University Press, 1990

constituted as a criminal offence is the act of sexual intercourse between a man and a woman who is "the wife of another man". No offence exists where a man who has a subsisting marital relationship engages in sexual intercourse with a single woman. Though adultery is considered to be an offence relating to marriage, the legislature did not penalise sexual intercourse between a married man and a single woman. Even though the man in such a case has a spouse, this is considered to be of no legal relevance to defining the scope of the offence. That is because the provision proceeds on the notion that the woman is but a chattel; the property of her husband. The fact that he is engaging in a sexual relationship outside marriage is of no consequence to the law. The woman with whom he is in marriage has no voice of her own, no agency to complain. If the woman who is involved in the sexual act is not married, the law treats it with unconcern. The premise of the law is that if a woman is not the property of a married man, her act would not be deemed to be 'adulterous', by definition.

31 The essence of the offence is that a man has engaged in an act of sexual intercourse with the wife of another man. But if the man to whom she is married were to consent or even to connive at the sexual relationship, the offence of adultery would not be established. For, in the eyes of law, in such a case it is for the man in the marital relationship to decide whether to agree to his spouse engaging in a sexual act with another. Indeed, even if the two men (the spouse of the woman and the man with whom she engages in a sexual act) were to connive, the offence of adultery would not be made out.

32 Section 497 is destructive of and deprives a woman of her agency, autonomy and dignity. If the ostensible object of the law is to protect the 'institution of marriage', it provides no justification for not recognising the agency of a woman whose spouse is engaged in a sexual relationship outside of marriage. She can neither complain nor is the fact that she is in a marital relationship with a man of any significance to the ingredients of the offence. The law also deprives the married woman who has engaged in a sexual act with another man, of her agency. She is treated as the property of her husband. That is why no offence of adultery would be made out if her husband were to consent to her sexual relationship outside marriage. Worse still, if the spouse of the woman were to connive with the person with whom she has engaged in sexual intercourse, the law would blink. Section 497 is thus founded on the notion that a woman by entering upon marriage loses, so to speak, her voice, autonomy and agency. Manifest arbitrariness is writ large on the provision.

33 The test of manifest arbitrariness is rooted in Indian jurisprudence. In **E P Royappa** v **State of Tamil Nadu**[100], Justice Bhagwati characterised equality as a "dynamic construct" which is contrary to arbitrariness:

> "85…Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose. J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. **Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed,**

[100] (1974) 4 SCC 3

> **cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14**..."[101]
> (Emphasis supplied)

The Constitution Bench in **Shayara Bano** v **Union of India**[102] held the practice of Triple Talaq to be unconstitutional. Justice Rohinton Nariman, in his concurring opinion, applied the test of manifest arbitrariness to hold that the practice does not pass constitutional muster:

> "87. **The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14.** Further, there is an apparent contradiction in the three-Judge Bench decision in *McDowell* [*State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709] when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution."[103]
> (Emphasis supplied)

[101] Ibid. at page 38
[102] (2017) 9 SCC 1
[103] Ibid. at pages 91-92

On the application of the test of manifest arbitrariness to invalidate legislation, the learned Judge held thus:

> " 101…there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."[104]

34 The decision in **Shayara Bano**, holds that legislation or state action which is manifestly arbitrary would have elements of caprice and irrationality and would be characterized by the lack of an adequately determining principle. An "adequately determining principle" is a principle which is in consonance with constitutional values. With respect to criminal legislation, the principle which determines the "act" that is criminalized as well as the persons who may be held criminally culpable, must be tested on the anvil of constitutionality. The principle must not be determined by majoritarian notions of morality which are at odds with constitutional morality.

[104] Ibid. at page 99

In **Navtej Singh Johar** v **Union of India**, (**"Navtej"**)[105] Justice Indu Malhotra emphasized the need for a "sound" or "rational principle" underlying a criminal provision:

> " …Section 377 insofar as it criminalises consensual sexual acts between adults in private, is not based on any sound or rational principle…
>
> Further, the phrase "carnal intercourse against the order of nature" in Section 377 as a determining principle in a penal provision, is too open-ended, giving way to the scope for misuse against members of the LGBT community."

35 The hypothesis which forms the basis of the law on adultery is the subsistence of a patriarchal order. Section 497 is based on a notion of morality which fails to accord with the values on which the Constitution is founded. The freedoms which the Constitution guarantees inhere in men and women alike. In enacting Section 497, the legislature made an ostensible effort to protect the institution of marriage. 'Ostensible' it is, because the provision postulates a notion of marriage which subverts the equality of spouses. Marriage in a constitutional regime is founded on the equality of and between spouses. Each of them is entitled to the same liberty which Part III guarantees. Each of them is entitled to take decisions in accordance with his and her conscience and each must have the ability to pursue the human desire for fulfilment. Section 497 is based on the understanding that marriage submerges the identity of the woman. It is based on a notion of marital subordination. In recognising, accepting and enforcing these notions, Section 497 is inconsistent with the ethos of the Constitution. Section 497 treats a woman as but a possession of her spouse. The

[105] Writ Petition (Criminal) No. 76 OF 2016

essential values on which the Constitution is founded – liberty, dignity and equality – cannot allow such a view of marriage. Section 497 suffers from manifest arbitrariness.

36 While engrafting the provision into Chapter XX of the Penal Code – "of offences relating to marriage" – the legislature has based the offence on an implicit assumption about marriage. The notion which the law propounds and to which it imposes the sanctions of penal law is that the marital tie subordinates the role and position of the woman. In that view of marriage, the woman is bereft of the ability to decide, to make choices and give free expression to her personality. Human sexuality is an essential aspect of identity. Choices in matters of sexuality are reflective of the human desire for expression. Sexuality cannot be construed purely as a physiological attribute. In its associational attributes, it links up with the human desire to be intimate with a person of one's choice. Sharing of physical intimacies is a reflection of choice. In allowing individuals to make those choices in a consensual sphere, the Constitution acknowledges that even in the most private of zones, the individual must have the ability to make essential decisions. Sexuality cannot be dis-associated from the human personality. For, to be human involves the ability to fulfil sexual desires in the pursuit of happiness. Autonomy in matters of sexuality is thus intrinsic to a dignified human existence. Human dignity both recognises and protects the autonomy of the individual in making sexual choices. The sexual choices of an individual cannot obviously be imposed on others in society and

are premised on a voluntary acceptance by consenting parties. Section 497 denudes the woman of the ability to make these fundamental choices, in postulating that it is only the man in a marital relationship who can consent to his spouse having sexual intercourse with another. Section 497 disregards the sexual autonomy which every woman possesses as a necessary condition of her existence. Far from being an equal partner in an equal relationship, she is subjugated entirely to the will of her spouse. The provision is proffered by the legislature as an effort to protect the institution of marriage. But it proceeds on a notion of marriage which is one sided and which denies agency to the woman in a marital tie. The ability to make choices within marriage and on every aspect concerning it is a facet of human liberty and dignity which the Constitution protects. In depriving the woman of that ability and recognising it in the man alone, Section 497 fails to meet the essence of substantive equality in its application to marriage. Equality of rights and entitlements between parties to a marriage is crucial to preserve the values of the Constitution. Section 497 offends that substantive sense of equality and is violative of Article 14.

37 The procedural law which has been enacted in Section 198 of the Code of Criminal Procedure 1973 re-enforces the stereotypes implicit in Section 497. Cognizance of an offence under Chapter XX of the Penal Code can be taken by a Court only upon a complaint of a person aggrieved. In the case of an offence punishable under Section 497, only the husband of the woman is deemed to be aggrieved by the offence. In any event, once the provisions of Section 497 are

held to offend the fundamental rights, the procedure engrafted in Section 198 will cease to have any practical relevance.

38 Section 497 amounts to a denial of substantive equality. The decisions in **Sowmithri** and **Revathi** espoused a formal notion of equality, which is contrary to the constitutional vision of a just social order. Justness postulates equality. In consonance with constitutional morality, substantive equality is "directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society."[106] To move away from a formalistic notion of equality which disregards social realities, the Court must take into account the impact of the rule or provision in the lives of citizens.

The primary enquiry to be undertaken by the Court towards the realisation of substantive equality is to determine whether the provision contributes to the subordination of a disadvantaged group of individuals.[107] The disadvantage must be addressed not by treating a woman as 'weak' but by construing her entitlement to an equal citizenship. The former legitimizes patronising attitudes towards women. The latter links true equality to the realisation of dignity. The focus of such an approach is not simply on equal treatment under the law, but

[106] Kathy Lahey, Feminist Theories of (In)equality, in Equality and Judicial Nuetrality (S.Martin and K.Mahoney (eds.) (1987)

[107] Ratna Kapur On Woman, Equality and the Constitution: Through the Looking Glass of Feminism in Gender and Politics in India (Nivedita Menon ed.) (1993)

rather on the real impact of the legislation.[108] Thus, Section 497 has to be examined in the light of existing social structures which enforce the position of a woman as an unequal participant in a marriage.

Catherine Mackinnon implores us to look more critically at the reality of this family sphere, termed ''personal,'' and view the family as a "crucible of women's unequal status and subordinate treatment sexually, physically, economically, and civilly."[109] In a social order which has enforced patriarchal notions of sexuality upon women and which treats them as subordinate to their spouses in heterosexual marriages, Section 497 perpetuates an already existing inequality.

39 Facially, the law may be construed to operate as an exemption from criminal sanctions. However, when viewed in the context of a social structure which considers the husband as the owner of the wife's sexuality, the law perpetuates a deeply entrenched patriarchal order. The true realisation of the substantive content of equality must entail an overhaul of these social structures. When all visible and invisible forms of inequality- social, cultural, economic, political or sexual- are recognised and obliterated; a truly egalitarian existence can be imagined.

[108] Maureen Maloney, An Analysis of Direct Taxes in India: A Feminist Perspective, Journal of the Indian Law Institute (1988)

[109] Catherine A Mackinnon, Sex equality under the Constitution of India: Problems, prospects, and 'personal laws', Oxford University Press and New York University School of Law (2006)

F 'The Good Wife'

Article 15 of the Constitution reads thus:

> "15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, **sex**, place of birth or any of them."
> (Emphasis supplied)

40 Article 15 prohibits the State from discriminating on grounds only of sex. The Petitioners contend that (i) Section 497, in so far as it places a husband and wife on a different footing in a marriage perpetuates sex discrimination; (ii) Section 497 is based on the patriarchal conception of the woman as property, entrenches gender stereotypes, and is consequently hit by Article 15.

From a joint reading of Section 497 of the Indian Penal Code and Section 198(2) of the Code of Criminal Procedure, the following propositions emerge:

i. Sexual relations by a married woman with another man outside her marriage without the consent of her husband is criminalized;

ii. In an 'adulterous relationship', the man is punished for adultery, while the woman is not (even as an abettor);

iii. Sexual relations by a married man with an unmarried woman are not criminalized;

iv. Section 497 accords primacy to the consent of the husband to determine whether criminality is attached to the man who has consensual sexual

relations with the spouse of the former. Consent or willingness of the woman is irrelevant to the offence;

v. A man who has sexual relations with the spouse of another man is relieved of the offence only if her spouse has consented or, even connived; and

vi. Section 497, IPC, read with Section 198, Cr.PC, gives the man the sole right to lodge a complaint and precludes a woman from initiating criminal proceedings.

41 The operation of Section 497, by definition, is confined to the sexual relations of a woman outside her marriage. A man who has sexual intercourse with a married woman without the consent or connivance of her husband, is liable to be prosecuted under the Section. However, a married man may engage in sexual relations outside marriage with a single woman without any repercussion in criminal law. Though granted immunity from prosecution, a woman is forced to consider the prospect of the penal action that will attach upon the individual with whom she engages in a sexual act. To ensure the fidelity of his spouse, the man is given the power to invoke the criminal sanction of the State. In effect, her spouse is empowered to curtail her sexual agency. The consent of the husband serves as the key to the exercise of the sexual agency of his spouse. That the married woman is in a consensual relationship, is of no consequence to the possible prosecution.

A married man may engage in sexual relations with an unmarried woman who is not his wife without the fear of opening his partner to prosecution and without the consent of his spouse. No recourse is provided to a woman against her husband who engages in sexual relations outside marriage. The effect of Section 497 is to allow the sexual agency of a married woman to be wholly dependent on the consent or connivance of her husband. Though Section 497 does not punish a woman engaging in adultery as an abettor, a married man and a married woman are placed on different pedestals in respect to their actions. The effect of Section 497, despite granting immunity from prosecution to the married woman, is to attach a notion of wrongdoing to the exercise of her sexual agency. Despite exempting her from prosecution, the exercise of her sexual agency is contingent on the consent or connivance of the husband. A husband is considered an aggrieved party by the law if his wife engages in sexual intercourse with another man, but the wife is not, if her husband does the same. Viewed from this angle, Section 497 discriminates between a married man and a married woman to her detriment on the ground of sex. This kind of discrimination is prohibited by the non-discrimination guarantee in Article 15 of the Constitution. Section 497 also places a woman within marriage and the man with whom she shares a sexual relationship outside marriage on a different footing.

42 Section 497 criminalizes the conduct of the man who has sexual intercourse with the wife of another without his consent. It exempts women from criminal liability. Underlying this exemption is the notion that women, being

denuded of sexual agency, should be afforded the 'protection' of the law. In criminalizing the accused who engages in the sexual relationship, the law perpetuates a gender stereotype that men, possessing sexual agency are the seducers, and that women, as passive beings devoid of sexual agency, are the seduced. The notion that a woman is 'submissive', or worse still 'naïve' has no legitimacy in the discourse of a liberal constitution. It is deeply offensive to equality and destructive of the dignity of the woman. On this stereotype, Section 497 criminalizes only the accused man.

43 Pertinent to the present enquiry, is that the provision allows only the husband to initiate a prosecution for adultery. The consent or connivance of the husband precludes prosecution. If a husband consents, his spouse is effectively granted permission to exercise her sexual agency with another individual. This guarantees a degree of control to the husband over the sexual agency of his spouse. As a relic of Victorian morality, this control over the sexual agency of the spouse, views the wife as the property of the husband. Fidelity of the woman, and the husband's control over it, is seen as maintaining the 'property' interest of a husband in his wife.[110] In this view, a woman is confounded with things that can be possessed. In construing the spouse as a passive or inanimate object, the law on adultery seeks to punish a person who attempts theft on the property of the husband. Coontz and Henderson write that the stabilization of property rights and

[110] Phyllis Coleman, Who's Been Sleeping in My Bed? You and Me, and the State Makes Three, Vol. 24, Indian Law Review (1991)

the desire to pass on one's property to legitimate heirs, were what motivated men to restrict the sexual behavior of their wives.[111]

44 Underlying Section 497 is a gender stereotype that the infidelity of men is normal, but that of a woman is impermissible. In condemning the sexual agency of the woman, only the husband, as the 'aggrieved' party is given the right to initiate prosecution. The proceedings once initiated, would be geared against the person who committed an act of 'theft' or 'trespass' upon his spouse. Sexual relations by a man with another man's wife is therefore considered as theft of the husband's property. Ensuring a man's control over the sexuality of his wife was the true purpose of Section 497.

Implicit in seeking to privilege the fidelity of women in a marriage, is the assumption that a woman contracts away her sexual agency when entering a marriage. That a woman, by marriage, consents in advance to sexual relations with her husband or to refrain from sexual relations outside marriage without the permission of her husband is offensive to liberty and dignity. Such a notion has no place in the constitutional order. Sexual autonomy constitutes an inviolable core of the dignity of every individual. At the heart of the constitutional rights guaranteed to every individual is a primacy of choice and the freedom to determine one's actions. Curtailing the sexual autonomy of a woman or

[111] Women's Work, Men's Property: The Origins of Gender and Class (S Coontz and P Henderson eds.) (1986)

presuming the lack of consent once she enters a marriage is antithetical to constitutional values.

45 A provision of law must not be viewed as operating in isolation from the social, political, historical and cultural contexts in which it operates. In its operation, law "permeates and is inseparable from everyday living and knowing, and it plays an important role in shaping (legal) consciousness."[112] A contextual reading of the law shows that it influences social practices, and makes "asymmetries of power seem, if not invisible, natural and benign".[113] Section 497 has a significant social impact on the sexual agency of women. It builds on existing gender stereotypes and bias and further perpetuates them. Cultural stereotypes are more forgiving of a man engaging in sexual relations than a woman. Women then are expected to be chaste before and faithful during marriage. In restricting the sexual agency of women, Section 497 gives legal recognition to socially discriminatory and gender-based norms. Sexual relations for a woman were legally and socially permissible when it was within her marriage. Women who committed adultery or non-marital sex were labeled immoral, shameful, and were criminally condemned.

[112] Rosemary Coombe, Is There a Cultural Studies of Law?, *in* A Companion to Cultural Studies, Toby Miller (ed.), Oxford, (2001)

[113] Austin Sarat, Jonathan Simon, Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship, Yale Journal of Law & the Humanities, (2001), at page 19

In **Anuj Garg** v **Hotel Association of India**,[114] this Court struck down Section 30 of the Punjab Excise Act, 1914 which prohibited the employment of women in premises where liquor or other intoxicating drugs were consumed by the public. Holding that the law suffered from "incurable fixations of stereotype morality and conception of sexual role", the Court took into account "traditional cultural norms as also the state of general ambience in the society" and held that "no law in its ultimate effect should end up perpetuating the oppression of women."

In **Navtej**, one of us (Chandrachud J.) held thus:

> "A discriminatory act will be tested against constitutional values. A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate. Such a discrimination will be in violation of the constitutional guarantee against discrimination in Article 15(1)."

46 Section 497 rests on and perpetuates stereotypes about women and sexual fidelity. In curtailing the sexual agency of women, it exacts sexual fidelity from women as the norm. It perpetuates the notion that a woman is passive and incapable of exercising sexual freedom. In doing so, it offers her 'protection' from prosecution. Section 497 denudes a woman of her sexual autonomy in making its

[114] (2008) 3 SCC 1

free exercise conditional on the consent of her spouse. In doing so, it perpetuates the notion that a woman consents to a limited autonomy on entering marriage. The provision is grounded in and has a deep social effect on how society perceives the sexual agency of women. In reinforcing the patriarchal structure which demands her controlled sexuality, Section 497 purports to serve as a provision envisaged for the protection of the sanctity of marriage. In the context of a constitutional vision characterized by the struggle to break through the shackles of gender stereotypes and guarantee an equal citizenship, Section 497 entrenches stereotypes and existing structures of discrimination and has no place in a constitutional order.

F.1 The entrapping cage

47 Section 497 exempts a woman from being punished as an abettor. Underlying this exemption is the notion that a woman is the victim of being seduced into a sexual relationship with a person who is not her husband. In assuming that the woman has no sexual agency, the exemption seeks to be justified on the ground of being a provision that is beneficial to women and protected under Article 15(3) of the Constitution. This is contrary to the remedy which Article 15(3) sought to embody. In **Government of A P v P B Vijayakumar**,[115] a two judge Bench of this Court dealt with a challenge to sub-rule (2) of Rule 22-A of the Andhra Pradesh State and Subordinate Service

[115] (1995) 4 SCC 520

Rules, which gave women a preference in the matter of direct recruitment. Speaking for the Court, Justice Sujata V Manohar held thus:

> "7. The insertion of Clause (3) of Article 15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women…"[116]

In **Independent Thought** v **Union of India**,[117] Justice Madan B Lokur, speaking for a two judge Bench of this Court, adverted to the drafting history of Article 15(3) and held thus:

> "55. The response given by Dr. Ambedkar suggests that he certainly favoured special provisions for women and children with a view to integrate them into society and to take them out of patriarchal control…[118]
> 56. What clearly emerges from this discussion is that Article 9(2) of the draft Constitution [now Article 15(3)] was intended to discriminate in favour of women and children – a form of affirmative action to their advantage."[119]

48 Article 15(3) encapsulates the notion of 'protective discrimination'. The constitutional guarantee in Article 15(3) cannot be employed in a manner that entrenches paternalistic notions of 'protection'. This latter view of protection only serves to place women in a cage. Article 15(3) does not exist in isolation. Articles

[116] Ibid. at page 525
[117] (2017) 10 SCC 800
[118] Ibid. at page 837
[119] Ibid. at page 837

14 to 18, being constituents of a single code on equality, supplement each other and incorporate a non-discrimination principle. Neither Article 15(1), nor Article 15(3) allow discrimination against women. Discrimination which is grounded in paternalistic and patriarchal notions cannot claim the protection of Article 15(3). In exempting women from criminal prosecution, Section 497 implies that a woman has no sexual agency and that she was 'seduced' into a sexual relationship. Given the presumed lack of sexual agency, criminal exemption is then granted to the woman in order to 'protect' her. The 'protection' afforded to women under Section 497 highlights the lack of sexual agency that the section imputes to a woman. Article 15(3) when read with the other Articles in Part III, serves as a powerful remedy to remedy the discrimination and prejudice faced by women for centuries. Article 15(3) as an enabling provision is intended to bring out substantive equality in the fullest sense. Dignity and autonomy are crucial to substantive equality. Hence, Article 15(3) does not protect a statutory provision that entrenches patriarchal notions in the garb of protecting women.

G Denuding identity – women as sexual property

49 Charles Jean Marie wrote in 1911[120] about the central forms of adultery as an offence. The criminalisation of adultery came at a social cost: of disregarding the agency of a woman as a sentient being.

[120] Charles Jean Marie Letorneau, The Evolution of Marriage (2011)

> "In all legislations the married woman is more or less openly considered as the property of the husband and is very often confounded, absolutely confounded, with things possessed. To use her, therefore, without the authority of her owner is theft...But adultery is not a common theft. An object, an inert possession, are passive things; their owner may well punish the thief who has taken them, but him only. **In adultery, the object of larceny, the wife, is a sentient and thinking being- that is to say, an accomplice in the attempt on her husband's property in her own person;** moreover he generally has her in his keeping..."

The law on adultery is but a codified rule of patriarchy. Patriarchy has permeated the lives of women for centuries. Ostensibly, society has two sets of standards of morality for judging sexual behaviour.[121] One set for its female members and another for males.[122] Society ascribes impossible virtues to a woman and confines her to a narrow sphere of behaviour by an expectation of conformity.[123] Raising a woman to a pedestal is one part of the endeavour. The second part is all about confining her to a space. The boundaries of that space are defined by what a woman should or should not be. A society which perceives women as pure and an embodiment of virtue has no qualms of subjecting them to virulent attack: to rape, honour killings, sex-determination and infanticide. As an embodiment of virtue, society expects the women to be a mute spectator to and even accepting of egregious discrimination within the home. This is part of the process of raising women to a pedestal conditioned by male notions of what is right and what is wrong for a woman. The notion that women, who are equally entitled to the protections of the Constitution as their male counterparts, may be

[121] Nandita Haksar, Dominance, Suppression and the Law in Women and the Law: Contemporary Problems (Lotika Sarkar and B. Sivaramayya eds.), Vikas Publishing House (1994)
[122] Ibid
[123] Ibid

treated as objects capable of being possessed, is an exercise of subjugation and inflicting indignity. Anachronistic conceptions of 'chastity' and 'honour' have dictated the social and cultural lives of women, depriving them of the guarantees of dignity and privacy, contained in the Constitution.

50 The right to privacy depends on the exercise of autonomy and agency by individuals. In situations where citizens are disabled from exercising these essential attributes, Courts must step in to ensure that dignity is realised in the fullest sense. Familial structures cannot be regarded as private spaces where constitutional rights are violated. To grant immunity in situations when rights of individuals are in siege, is to obstruct the unfolding vision of the Constitution.

The opinion delivered on behalf of four judges in **K S Puttaswamy** v **Union of India**[124] has recognised the dangers of the "use of privacy as a veneer for patriarchal domination and abuse of women." On the delicate balance between the competing interests of protecting privacy as well dignity of women in the domestic sphere, the Court held:

> "The challenge in this area is to enable the state to take the violation of the dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women grounded in the identity of gender and liberty."

[124] (2017) 10 SCC 1

51 In "Seeing like a Feminist", Nivedita Menon has recognized the patriarchal family as the "basis for the secondary status of women in society."[125] Menon notes that 'the personal is political'.[126] Her scholarly work implores us to recognise spaces which may be considered personal such as the bedroom and kitchen. These spaces are immersed in power relations, but with ramifications for the public sphere.[127]

Control over women's sexuality is the key patriarchal assumption that underlies family and marriage.[128] When it shifts to the 'public' as opposed to the 'private', the misogyny becomes even more pronounced.[129] Section 497 embodies this. By the operation of the provision, women's sexuality is sought to be controlled in a number of ways. First, the husband and he alone is enabled to prosecute the man with whom his wife has sexual relations. Even in cases where the relationship is based on the consent of the woman, the law treats it as an offence, denying a woman who has voluntarily entered into a consensual relationship of her sexual agency. Second, such a relationship would be beyond the reach of penal law if her husband consents to it. The second condition is a telling reflection of the patriarchal assumption underlying the criminal provision: that the husband is the owner of the wife's sexual agency.

[125] Nivedita Menon, Seeing like a Feminist, Zubaan Books (2012) at page 35
[126] Ibid.
[127] Ibid.
[128] Ibid.
[129] Ibid.

52 In remedying injustices, the Court cannot shy away from delving into the 'personal', and as a consequence, the 'public'. It becomes imperative for us to intervene when structures of injustice and persecution deeply entrenched in patriarchy are destructive of constitutional freedom. But, in adjudicating on the rights of women, the Court is not taking on a paternalistic role and "granting" rights. The Court is merely interpreting the text of the Constitution to re-state what is already set in ink- women are equal citizens of this nation, entitled to the protections of the Constitution. Any legislation which results in the denial of these Constitutional guarantees to women, cannot pass the test of constitutionality.

Patriarchy and paternalism are the underpinnings of Section 497. It needs no iteration that misogyny and patriarchal notions of sexual control find no place in a constitutional order which has recognised dignity as intrinsic to a person, autonomy being an essential component of this right. The operation of Section 497 denotes that 'adulterous women' virtually exercise no agency; or at least not enough agency to make them criminally liable.[130] They are constructed as victims. As victims, they are to be protected by being exempt from sanctions of a criminal nature.[131] Not only is there a denial of sexual agency, women are also not seen to be harmed by the offence.[132] Thus, the provision is not simply about protecting the sanctity of the marital relationship. It is all about protecting a husband's interest in his "exclusive access to his wife's sexuality".[133]

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[130] Ratna Kapur and Brenda Cossman, Subversive Sites: Feminist Engagements with Law in India, Sage Publications (1996) at page 119
[131] Ibid.
[132] Ibid.
[133] Ibid. at page 120

53 Section 497 chains the woman to antediluvian notions of sexuality. Chief Justice Dipak Misra in **Navtej** emphasised the importance of sexual autonomy as a facet of individual liberty, thus protected under Article 21 of the Constitution:

> "The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an insegregable facet of individual liberty. When the liberty of even a single person of the society is smothered under some vague and archival stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercises his/her liberty despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly, the fundamental right of liberty of such an individual is abridged."

In **Navtej**, one of us (Chandrachud J.) held that the recognition of the autonomy of an individual is an acknowledgement of the State's respect for the capacity of the individual to make individual choices:

> "The right to privacy enables an individual to exercise his or her autonomy, away from the glare of societal expectations. The realisation of the human personality is dependent on the autonomy of an individual. In a liberal democracy, recognition of the individual as an autonomous person is an acknowledgment of the State's respect for the capacity of the individual to make independent choices. The right to privacy may be construed to signify that not only are certain acts no longer immoral, but that there also exists an affirmative moral right to do them."

To characterise a woman as a passive object, denuded of agency, is a denial of autonomy. The same judgment in **Navtej** has recognized sexual choices as an essential attribute of autonomy, intimately connected to the self-respect of the individual:

> "In order to understand how sexual choices are an essential attribute of autonomy, it is useful to refer to John Rawls' theory on social contract. Rawls' conception of the 'Original Position' serves as a constructive model to illustrate the notion of choice behind a "partial veil of ignorance." Persons behind the veil are assumed to be rational and mutually disinterested individuals, unaware of their positions in society. The strategy employed by Rawls is to focus on a category of goods which an individual would desire irrespective of what individuals' conception of 'good' might be. These neutrally desirable goods are described by Rawls as 'primary social goods' and may be listed as rights, liberties, powers, opportunities, income, wealth, and the constituents of self-respect. **Rawls's conception of self-respect, as a primary human good, is intimately connected to the idea of autonomy. Self-respect is founded on an individual's ability to exercise her native capacities in a competent manner**."
> (Emphasis supplied)

G.1 Exacting fidelity: the intimacies of marriage

54 Marriage as a social institution has undergone changes. Propelled by access to education and by economic and social progress, women have found greater freedom to assert their choices and preferences. The law must also reflect their status as equals in a marriage, entitled to the constitutional guarantees of privacy and dignity. The opinion delivered on behalf of four judges in **Puttaswamy** held thus:

> "130...As society evolves, so must constitutional doctrine. The institutions which the Constitution has created must adapt flexibly to meet the challenges in a rapidly growing knowledge economy. Above all, constitutional interpretation is but a process in achieving justice, liberty and dignity to every citizen."[134]

[134] Ibid. at page 414

In **Navtej**, Justice Rohinton Nariman countered the assertion that the Court must "not indulge in taking upon itself the guardianship of changing societal mores" by holding thus:

> "...The very purpose of the fundamental rights chapter in the Constitution of India is to withdraw the subject of liberty and dignity of the individual and place such subject beyond the reach of majoritarian governments so that constitutional morality can be applied by this Court to give effect to the rights, among others, of 'discrete and insular' minorities.One such minority has knocked on the doors of this Court as this Court is the custodian of the fundamental rights of citizens. **These fundamental rights do not depend upon the outcome of elections. And, it is not left to majoritarian governments to prescribe what shall be orthodox in matters concerning social morality. The fundamental rights chapter is like the north star in the universe of constitutionalism in India. Constitutional morality always trumps any imposition of a particular view of social morality by shifting and different majoritarian regimes."**
> (Emphasis supplied)

55 Section 497 seeks the preservation of a construct of marriage in which female fidelity is enforced by the letter of the law and by the coercive authority of the state. Such a conception goes against the spirit of the rights-based jurisprudence of this Court, which seeks to protect the dignity of an individual and her "intimate personal choices". It cannot be held that these rights cease to exist once the woman enters into a marriage.

56 The identity of the woman must be as an 'individual in her own right'. In that sense, her identity does not get submerged as a result of her marriage. Section 497 lays down the norm that the identity of a married woman is but as the wife of her spouse. Underlying the norm is a notion of control over and subjugation of the woman. Such notions cannot withstand scrutiny under a liberal

constitution. Chief Justice Dipak Misra in **Navtej** has drawn on the interrelationship between 'identity' and 'autonomy':

> "…Autonomy is individualistic. Under the autonomy principle, the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person's nature. The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual. This dignity is special to the man/woman who has a right to enjoy his/her life as per the constitutional norms and should not be allowed to wither and perish like a mushroom. It is a directional shift from conceptual macrocosm to cognizable microcosm. When such culture grows, there is an affirmative move towards a more inclusive and egalitarian society."

This Court in **Puttaswamy** has elucidated that privacy is the entitlement of every individual, with no distinction to be made on the basis of the individual's position in society.

> "271.Every individual in society irrespective of social class or economic status is entitled to the intimacy and autonomy which privacy protects. It is privacy as an intrinsic and core feature of life and personal liberty which enables an individual to stand up against a programme of forced sterilization. Then again, it is privacy which is a powerful guarantee if the State were to introduce compulsory drug trials of non-consenting men or women. The sanctity of marriage, the liberty of procreation, the choice of a family life and the dignity of being are matters which concern every individual irrespective of social strata or economic well being. The pursuit of happiness is founded upon autonomy and dignity. Both are essential attributes of privacy which makes no distinction between the birth marks of individuals."[135]

57 It would be useful to refer to decisions of this Court which have emphasised on the freedoms of individuals with respect to choices in relationships. In **Navtej**, Chief Justice Misra highlighted the indignity suffered by

[135] Ibid. at page 484

an individual when "acts within their personal sphere" are criminalised on the basis of regressive social attitudes:

> "An individual's choice to engage in certain acts within their private sphere has been restricted by criminalising the same on account of the age old social perception. To harness such an essential decision, which defines the individualism of a person, by tainting it with criminality would violate the individual's right to dignity by reducing it to mere letters without any spirit."

The Chief Justice observed that the "organisation of intimate relations" between "consenting adults" is a matter of complete personal choice and characterised the "private protective sphere and realm of individual choice and autonomy" as a personal right:

> "It is true that the principle of choice can never be absolute under a liberal Constitution and the law restricts one individual's choice to prevent harm or injury to others. **However, the organisation of intimate relations is a matter of complete personal choice especially between consenting adults. It is a vital personal right falling within the private protective sphere and realm of individual choice and autonomy. Such progressive proclivity is rooted in the constitutional structure and is an inextricable part of human nature."**
> (Emphasis supplied)

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In **Shakti Vahini**, this Court has recognised the right to choose a partner as a fundamental right under Articles 19 and 21 of the Constitution. In **Shafin Jahan**, "intimate personal choices" were held to be a protected sphere, with one of us (Chandrachud J) stating:

> "88.The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual.

> Intimacies of marriage lie within a core zone of privacy, which is inviolable."

58 In **Navtej,** one of us (Chandrachud J) held that the right to sexual privacy is a natural right, fundamental to liberty and a soulmate of dignity. The application of Section 497 is a blatant violation of these enunciated rights. Will a trial to prove adultery lead the wife to tender proof of her fidelity? In **Navtej**, the principle was elucidated thus:

> "In protecting consensual intimacies, the Constitution adopts a simple principle: the state has no business to intrude into these personal matters."

In so far as two individuals engage in acts based on consent, the law cannot intervene. Any intrusion in this private sphere would amount to deprivation of autonomy and sexual agency, which every individual is imbued with.

In **Puttaswamy**, it was recognised that a life of dignity entails that the "inner recesses of the human personality" be secured from "unwanted intrusion":

> "127.The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfil the liberties and freedoms which are the cornerstone of the Constitution."[136]

[136] Ibid. at page 413

59 In criminalizing adultery, the legislature has imposed its imprimatur on the control by a man over the sexuality of his spouse. In doing that, the statutory provision fails to meet the touchstone of Article 21. Section 497 deprives a woman of her autonomy, dignity and privacy. It compounds the encroachment on her right to life and personal liberty by adopting a notion of marriage which subverts true equality. Equality is subverted by lending the sanctions of the penal law to a gender biased approach to the relationship of a man and a woman. The statute confounds paternalism as an instrument for protecting marital stability. It defines the sanctity of marriage in terms of a hierarchical ordering which is skewed against the woman. The law gives unequal voices to partners in a relationship.

This judgment has dwelt on the importance of sexual autonomy as a value which is integral to life and personal liberty under Article 21. Individuals in a relationship, whether within or outside marriage, have a legitimate expectation that each will provide to the other the same element of companionship and respect for choices. Respect for sexual autonomy, it must be emphasized is founded on the equality between spouses and partners and the recognition by each of them of the dignity of the other. Control over sexuality attaches to the human element in each individual. Marriage – whether it be a sacrament or contract – does not result in ceding of the autonomy of one spouse to another.

60 Recognition of sexual autonomy as inhering in each individual and of the elements of privacy and dignity have a bearing on the role of the state in regulating the conditions and consequences of marital relationships. There is a fundamental reason which militates against criminalization of adultery. Its genesis lies in the fact that criminalizing an act is not a valid constitutional response to a sexual relationship outside the fold of marriage. Adultery in the course of a subsisting marital relationship may, and very often does question the commitment of the spouse to the relationship. In many cases, a sexual relationship of one of the spouses outside of the marriage may lead to the end of the marital relationship. But in other cases, such a relationship may not be the cause but the consequence of a pre-existing disruption of the marital tie. All too often, spouses who have drifted apart irrevocably may be compelled for reasons personal to them to continue with the veneer of a marriage which has ended for all intents and purposes. The interminably long delay of the law in the resolution of matrimonial conflicts is an aspect which cannot be ignored. The realities of human existence are too complex to place them in closed categories of right and wrong and to subject all that is considered wrong with the sanctions of penal law. Just as all conduct which is not criminal may not necessarily be ethically just, all conduct which is inappropriate does not justify being elevated to a criminal wrongdoing.

61 The state undoubtedly has a legitimate interest in regulating many aspects of marriage. That is the foundation on which the state does regulate rights,

entitlements and duties, primarily bearing on its civil nature. Breach by one of the spouses of a legal norm may constitute a ground for dissolution or annulment. When the state enacts and enforces such legislation, it does so on the postulate that marriage as a social institution has a significant bearing on the social fabric. But in doing so, the state is equally governed by the norms of a liberal Constitution which emphasise dignity, equality and liberty as its cardinal values. The legitimate aims of the state may, it must be recognized, extend to imposing penal sanctions for **certain** acts within the framework of marriage. Physical and emotional abuse and domestic violence are illustrations of the need for legislative intervention. The Indian state has legitimately intervened in other situations such as by enacting anti dowry legislation or by creating offences dealing with the harassment of women for dowry within a marital relationship. The reason why this constitutes a legitimate recourse to the sovereign authority of the state to criminalize conduct is because the acts which the state proscribes are deleterious to human dignity. In criminalizing certain types of wrongdoing against women, the state intervenes to protect the fundamental rights of every woman to live with dignity. Consequently, it is important to underscore that this judgment does not question the authority and even the duty of the state to protect the fundamental rights of women from being trampled upon in unequal societal structures. Adultery as an offence does not fit that paradigm. In criminalizing certain acts, Section 497 has proceeded on a hypothesis which is deeply offensive to the dignity of women. It is grounded in paternalism, solicitous of patriarchal values and subjugates the woman to a position where the law

disregards her sexuality. The sexuality of a woman is part of her inviolable core. Neither the state nor the institution of marriage can disparage it. By reducing the woman to the status of a victim and ignoring her needs, the provision penalizing adultery disregards something which is basic to human identity. Sexuality is a definitive expression of identity. Autonomy over one's sexuality has been central to human urges down through the ages. It has a constitutional foundation as intrinsic to autonomy. It is in this view of the matter that we have concluded that Section 497 is violative of the fundamental rights to equality and liberty as indeed, the right to pursue a meaningful life within the fold of Articles 14 and 21.

62 The hallmark of a truly transformative Constitution is that it promotes and engenders societal change. To consider a free citizen as the property of another is an anathema to the ideal of dignity. Section 497 denies the individual identity of a married woman, based on age-old societal stereotypes which characterised women as the property of their spouse. It is the duty of this Court to break these stereotypes and promote a society which regards women as equal citizens in all spheres of life- irrespective of whether these spheres may be regarded as 'public' or 'private'.

H Towards transformative justice

63 Constitutional values infuse the letter of the law with meaning. True to its transformative vision, the text of the Constitution has, time and again, been interpreted to challenge hegemonic structures of power and secure the values of

dignity and equality for its citizens. One of the most significant of the battles for equal citizenship in the country has been fought by women. Feminists have overcome seemingly insurmountable barriers to ensure a more egalitarian existence for future generations. However, the quest for equality continues. While there has been a considerable degree of reform in the formal legal system, there is an aspect of women's lives where their subordination has historically been considered beyond reproach or remedy. That aspect is the family. Marriage is a significant social institution where this subordination is pronounced, with entrenched structures of patriarchy and romantic paternalism shackling women into a less than equal existence.

64 The law on adultery, conceived in Victorian morality, considers a married woman the possession of her husband: a passive entity, bereft of agency to determine her course of life. The provision seeks to only redress perceived harm caused to the husband. This notion is grounded in stereotypes about permissible actions in a marriage and the passivity of women. Fidelity is only expected of the female spouse. This anachronistic conception of both, a woman who has entered into marriage as well as the institution of marriage itself, is antithetical to constitutional values of equality, dignity and autonomy.

In enforcing the fundamental right to equality, this Court has evolved a test of manifest arbitrariness to be employed as a check against state action or legislation which has elements of caprice, irrationality or lacks an adequate

determining principle. The principle on which Section 497 rests is the preservation of the sexual exclusivity of a married woman – for the benefit of her husband, the owner of her sexuality. Significantly, the criminal provision exempts from sanction if the sexual act was with the consent and connivance of the husband. The patriarchal underpinnings of Section 497 render the provision manifestly arbitrary.

65 The constitutional guarantee of equality rings hollow when eviscerated of its substantive content. To construe Section 497 in a vacuum (as did **Sowmithri Vishnu**) or in formalistic terms (as did **Revathi)** is a refusal to recognise and address the subjugation that women have suffered as a consequence of the patriarchal order. Section 497 is a denial of substantive equality in that it re-inforces the notion that women are unequal participants in a marriage; incapable of freely consenting to a sexual act in a legal order which regards them as the sexual property of their spouse.

66 This Court has recognised sexual privacy as a natural right, protected under the Constitution. To shackle the sexual freedom of a woman and allow the criminalization of consensual relationships is a denial of this right. Section 497 denudes a married woman of her agency and identity, employing the force of law to preserve a patriarchal conception of marriage which is at odds with constitutional morality:

> "Infidelity was born on the day that natural flows of sexual desire were bound into the legal and formal permanence of marriage; in the process of ensuring male control over

> progeny and property, women were chained within the fetters of fidelity."[137]

Constitutional protections and freedoms permeate every aspect of a citizen's life - the delineation of private or public spheres become irrelevant as far as the enforcement of constitutional rights is concerned. Therefore, even the intimate personal sphere of marital relations is not exempt from constitutional scrutiny. The enforcement of forced female fidelity by curtailing sexual autonomy is an affront to the fundamental right to dignity and equality.

67 Criminal law must be in consonance with constitutional morality. The law on adultery enforces a construct of marriage where one partner is to cede her sexual autonomy to the other. Being antithetical to the constitutional guarantees of liberty, dignity and equality, Section 497 does not pass constitutional muster.

We hold and declare that:

1) Section 497 lacks an adequately determining principle to criminalize consensual sexual activity and is manifestly arbitrary. Section 497 is a denial of substantive equality as it perpetuates the subordinate status ascribed to women in marriage and society. Section 497 violates Article 14 of the Constitution;

[137] Nivedita Menon, Seeing like a Feminist, Zubaan Books (2012) at page 135; quoting Archana Verma, Stree Vimarsh Ke Mahotsav (2010)

2) Section 497 is based on gender stereotypes about the role of women and violates the non-discrimination principle embodied in Article 15 of the Constitution;

3) Section 497 is a denial of the constitutional guarantees of dignity, liberty, privacy and sexual autonomy which are intrinsic to Article 21 of the Constitution; and

4) Section 497 is unconstitutional.

The decisions in **Sowmithri Vishnu** and **Revathi** are overruled.

.....J
[Dr Dhananjaya Y Chandrachud]

New Delhi;
September 27, 2018.

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 194 OF 2017

Joseph Shine ...Petitioner

Versus

Union of India ...Respondent

J U D G M E N T

INDU MALHOTRA, J.

1. The present Writ Petition has been filed to challenge the constitutional validity of Section 497 of the Indian Penal Code (hereinafter referred to as I.P.C.) which makes 'adultery' a criminal offence, and prescribes a punishment of imprisonment upto five years and fine. Section 497 reads as under:

> *"**497. Adultery** — Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not*

> *amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor."*

2. The Petitioner has also challenged Section 198(2) of the Code of Criminal Procedure, 1973, (hereinafter referred to as "Cr.P.C"). Section 198(2) reads as under:

> *"For the purpose of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code.*
> *Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf."*

3. The word 'adultery'[1] derives its origin from the French word '*avoutre*', which has evolved from the Latin verb '*adulterium*' which means "to corrupt." The concept of a wife corrupting the marital bond with her husband by

[1] The New international Webster's Comprehensive Dictionary of the English Language, Deluxe Encyclopedic Edition, Trident Press International (1996 Edn.) at page 21.

having a relationship outside the marriage, was termed as 'adultery'.

This definition of adultery emanated from the historical context of Victorian morality, where a woman considered to be the 'property' of her husband; and the offence was committed only by the adulterous man. The adulterous woman could not be proceeded against as an 'abettor', even though the relationship was consensual.

4. THE DOCTRINE OF COVERTURE

Adultery, as an offence, was not a crime under Common Law, in England. It was punishable by the ecclesiastical courts which exercised jurisdiction over sacramental matters that included marriage, separation, legitimacy, succession to personal property, etc.[2]

In England, coverture determined the rights of married women, under Common Law. A *'feme sole'* transformed into a *'feme covert'* after marriage. *'Feme covert'* was based on the doctrine of 'Unity of Persons' – i.e. the husband and wife were a single legal identity. This was

[2] Outhwaite, R.B. (2007). *The Rise and Fall of the English Ecclesiastical Courts, 1500–1860.* Cambridge, UK: Cambridge University Press

based on notions of biblical morality that a husband and wife were 'one in flesh and blood'. The effect of 'coverture' was that a married woman's legal rights were subsumed by that of her husband. A married woman could not own property, execute legal documents, enter into a contract, or obtain an education against her husband's wishes, or retain a salary for herself.[3]

The principle of 'coverture' was described in William Blackstone's Commentaries on the Laws of England as follows:[4]

> *" By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French a feme-covert; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquires by the marriage. I speak*

[3] Fernandez, Angela "*Tapping Reeve, Nathan Dane, and James Kent: Three Fading Federalists on Marital Unity.*" Married Women and the Law: Coverture in England and the Common Law World, edited by Tim Stretton and Krista J. Kesselring, McGill-Queen's University Press, 2013, pp. 192–216.

[4] *Blackstone's Commentaries on the Laws of England,* Books III & IV (8th Edn.), 1778

> *not at present of the rights of property, but of such as are merely personal. For this reason, a man cannot grant anything to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all contracts made between husband and wife, when single, are voided by the intermarriage."*
>
> (Emphasis supplied)

On this basis, a wife did not have an individual legal liability for her misdeeds, since it was legally assumed that she was acting under the orders of her husband, and generally a husband and wife were not allowed to testify either for, or against each other.

Medieval legal treatises, such as the Bracton[5], described the nature of 'coverture' and its impact on married women's legal actions. Bracton (supra) states that husbands wielded power over their wives, being their 'rulers' and 'custodians of their property'. The institution of marriage came under the jurisdiction of ecclesiastical courts. It made wives live in the shadow of their husbands, virtually 'invisible' to the law.

[5] *Bracton: De Legibus Et Consuetudinibus Angliæ* (Bracton on the Laws and Customs of England attributed to Henry of Bratton, c. 1210-1268) Vol III, pg. 115 *Available at* http://bracton.law.harvard.edu/index.html

The principle of coverture subsisted throughout the marriage of the couple. It was not possible to obtain a divorce through civil courts, which refused to invade into the jurisdiction of the church. Adultery was the only ground available to obtain divorce.

The origin of adultery under Common Law was discussed in the English case *Pritchard* v. *Pritchard and Sims*[6], wherein it was held that:

> *"In 1857, when marriage in England was still a union for life which could be broken only by private Act of Parliament, under the common law, three distinct causes of action available to a husband whose rights in his wife were violated by a third party, who enticed her away, or who harboured her or who committed adultery with her...In the action for adultery, known as criminal conversation, which dates from before the time of BRACTON, and consequently lay originally in trespass, the act of adultery itself was the cause of action and the damages punitive at large. It lay whether the adultery resulted in the husband's losing his wife's society and services or not. All three causes of action were based on the recognition accorded by the common law to the husband's propriety which would have been hers had she been feme sole."*
>
> (Emphasis supplied)

[6] [1966] 3 All E.R. 601

In the Victorian Era[7], women were denied the exercise of basic rights and liberties, and had little autonomy over their choices. Their status was *pari materia* with that of land, cattle and crop; forming a part of the 'estate' of their fathers as daughters prior to marriage, and as the 'estate' of their husband post-marriage.[8]

Lord Wilson in his Speech titled "*Out of his shadow: The long struggle of wives under English Law*"[9] speaks of the plight of women during this era:

> *"8. An allied consequence of the wife's coverture was that she was not legally able to enter into a contract. Apart from anything else, she had no property against which to enforce any order against her for payment under a contract; so it was only a small step for the law to conclude that she did not have the ability to enter into the contract in the first place. If, however, the wife went into a shop and ordered goods, say of food or clothing, which the law regarded as necessary for the household, the law presumed, unless the husband proved to the contrary, that she had entered into the contract*

[7] 1807 – 1901 A.D.

[8] Margot Finn (1996). Women, Consumption and Coverture in England, c. 1760–1860. The Historical Journal, 39, pp 703-722

[9] The High Sheriff of Oxfordshire's Annual Law Lecture given by Lord Wilson on 9 October 2012
Available at: https://www.supremecourt.uk/docs/speech-121009.pdf

> *as his authorised agent. So the shopkeeper could sue him for the price if the wife had obtained the goods on credit.*
>
> *9. In the seventeenth century there was a development in the law relating to this so-called agency of necessity. It was an attempt to serve the needs of wives whose husbands had deserted them. The law began to say that, if a deserted wife had not committed adultery, she could buy from the shopkeeper all such goods as were necessary for her and, even if (as was highly likely) the husband had not authorised her to buy them, he was liable to pay the shopkeeper for them. But the shopkeeper had a problem. How was he to know whether the wife at the counter had been deserted and had not committed adultery? Sometimes a husband even placed a notice in the local newspaper to the effect, true or untrue, that his wife had deserted him or had committed adultery and that accordingly he would not be liable to pay for her purchase of necessaries....."*

The remnants of 'coverture' sowed the seeds for the introduction of 'Criminal Conversation' as an actionable tort by a husband against his wife's paramour in England.

Criminal Conversation as a tort, gave a married man the right to claim damages against the man who had entered into a sexual relationship with his wife. The

consent of the wife to the relationship, did not affect the entitlement of her husband to sue.

The legal position of matrimonial wrongs underwent a significant change with the passing of the Matrimonial Causes Act, 1857 in England.[10] Section 59 of this Act abolished the Common Law action for "criminal conversation".[11] Section 33 empowered the Courts to award damages to the husband of the paramour for adultery.[12] The claim for damages for adultery was to be tried on the same principles, and in the same manner, as actions for 'criminal conversation' which were formerly tried at Common Law.[13]

The status of the wife, however, even after the passing of the Matrimonial Causes Act, 1857 remained as

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[10] Matrimonial Causes Act 1857; 1857 (20 & 21 Vict.) C. 85

[11] LIX. No Action for Criminal Conversation:
"After this Act shall have come into operation no Action shall be maintainable in England for Criminal Conversation."

[12] XXXIII. Husband may claim Damages from Adulterers:
"Any Husband may, either in a Petition for Dissolution of Marriage or for Judicial Separation, or in a Petition limited to such Object only, claim Damages from any Person on the Ground of his having committed Adultery with the Wife of such Petitioner, and such Petition shall be served on the alleged Adulterer and the Wife, unless the Court shall dispense with such Service, or direct some other Service to be substituted; and the Claim made by every such Petition shall be heard and tried on the same principle, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversations are now tried and decided in Courts of Common Law; and all the enactments herein contain with reference to the hearing and decision of Petitions to the Courts shall, so far as may be necessary, be deemed applicable to the hearing and decision of Petitions presented under this enactment.."

[13] *Id.*

'property of the husband', since women had no right to sue either their adulterous husband or his paramour.

Gender equality between the spouses came to be recognised in some measure in England, with the passing of the Matrimonial Causes Act, 1923 which made 'adultery' a ground for divorce, available to both spouses, instead of only the husband of the adultrous wife. The right of the husband to claim damages from his wife's paramour came to be abolished by The Law Reform (Miscellaneous Provisions) Act of 1970 on January 1, 1971. In England, adultery has always been a civil wrong, and not a penal offence.

5. SECTION 497 – HISTORICAL BACKGROUND

5.1. The Indo-Brahmanic traditions prevalent in India mandated the chastity of a woman to be regarded as her prime virtue, to be closely guarded to ensure the purity of the male bloodline. The objective was not only to protect the bodily integrity of the woman, but to ensure that the husband retains control over her sexuality,

confirming her 'purity' in order to ensure the purity of his own bloodline.[14]

5.2. The first draft of the I.P.C. released by the Law Commission of India in 1837 did not include "adultery" as an offence. Lord Macaulay was of the view that adultery or marital infidelity was a private wrong between the parties, and not a criminal offence.[15]

The views of Lord Macaulay were, however, overruled by the other members of the Law Commission, who were of the opinion that the existing remedy for 'adultery' under Common Law would be insufficient for the 'poor natives', who would have no recourse against the paramour of their wife.[16]

5.3. The debate that took place in order to determine whether 'adultery' should be a criminal offence in India was recorded in 'Note Q' of '*A Penal Code*

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[14] Uma Chakravarti, *Gendering Caste Through a Feminist Lens*, STREE Publications (2003) at page 71.

[15] 156th Report on the Indian Penal Code (Vol. I), Law Commission of India at para 9.43 at page 169
Available at: http://lawcommissionofindia.nic.in/101-169/Report156Vol1.pdf

[16] *A Penal Code prepared by The Indian Law Commissioners*, (1838), The Second Report on the Indian Penal Code

prepared by the Indian Law Commissioners' [17]. The existing laws[18] for the punishment of adultery were considered to be altogether inefficacious for preventing the injured husband from taking matters into his own hands.

The Law Commissioners considered that by not treating 'adultery' as a criminal offence, it may give sanction to immorality. The Report[19] states:

> *" Some who admit that the penal law now existing on this subject is in practice of little or no use, yet think that the Code ought to contain a provision against adultery. They think that such a provision, though inefficacious for the repressing of vice, would be creditable to the Indian Government, and that by omitting such a provision we should give a sanction to immorality. They say, and we believe with truth, that the higher class of natives consider the existing penal law on the subject as far too lenient, and are unable to understand on what principle adultery is treated with*

[17] *A Penal Code prepared by The Indian Law Commissioners*, (1838), Notes of Lord Thomas Babington Macaulay, Note Q

[18] The laws governing adultery in the Colonial areas were laid down in Regulation XVII of 1817, and Regulation VII of 1819; the Law Commissioners observed that the strict evidentiary and procedural requirements, deter the people from seeking redress.

[19] *A Penal Code prepared by The Indian Law Commissioners*, (1838), The Second Report on the Indian Penal Code

more tenderness than forgery or perjury.

...That some classes of the natives of India disapprove of the lenity with which adultery is now punished we fully believe, but this in our opinion is a strong argument against punishing adultery at all. There are only two courses which in our opinion can properly be followed with respect to this and other great immoralities. They ought to be punished very severely, or they ought not to be punished at all. The circumstance that they are left altogether unpunished does not prove that the Legislature does not regard them with disapprobation. But when they are made punishable the degree of severity of the punishment will always be considered as indicating the degree of disapprobation with which the Legislature regards them. We have no doubt that the natives would be far less shocked by the total silence of the penal law touching adultery than by seeing an adulterer sent to prison for a few months while a coiner is imprisoned for fourteen years."

(Emphasis supplied)

The Law Commissioners in their Report (supra) further stated:

".....The population seems to be divided into two classes – those

> *whom neither the existing punishment nor any punishment which we should feel ourselves justified in proposing will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honour are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances we think it best to treat adultery merely as a civil injury.*
>
> *...No body proposes that adultery should be punished with a severity at all proportioned to the misery which it produces in cases where there is strong affection and a quick sensibility to family honour. We apprehend that among the higher classes in this country nothing short of death would be considered as an expiation for such a wrong. In such a state of society we think it far better that the law should inflict no punishment than that it should inflict a punishment which would be regarded as absurdly and immorally lenient."*
>
> (Emphasis supplied)

The Law Commissioners considered the plight of women in this country, which was much worse than that of women in France and England. 'Note

Q' (surpa) records this as the reason for not punishing women for the offence of adultery.

The relevant extract of 'Note Q' is reproduced herein below:

> *" There is yet another consideration which we cannot wholly leave out of sight. Though we well know that the dearest interests of the human race are closely connected with the chastity of women, and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is unhappily very different from that of the women of England and France. They are married while still children. They are often neglected for other wives while still young. They share the attention (sic) of a husband with several rivals. To make laws for punishing the inconstancy of the wife while the law admits the privilege of the husband to fill his zenana with women, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking by law an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain operation of education and of time. But while it exists, while it*

> *continues to produce its never failing effects on the happiness and respectability of women, we are not inclined to throw into a scale already too much depressed the additional weight of the penal law. We have given the reasons which lead us to believe that any enactment on this subject would be nugatory. And we are inclined to think that if not nugatory it would be oppressive. It would strengthen hands already too strong. It would weaken a class already too weak. It will be time enough to guard the matrimonial contract by penal sanctions when that contract becomes just, reasonable, and mutually beneficial."*
>
> (Emphasis supplied)

Colonel Sleeman opposed the reasoning of the Law Commissioners on this subject. The 'backwardness of the natives' to take recourse to the courts for redress in cases of adultery, arose from 'the utter hopelessness on their part of getting a conviction.' He was of the view that if adultery is not made a crime, the adulterous wives will alone bear the brunt of the rage of their husbands. They might be tortured or even poisoned. In his view, offences such as adultery

were inexcusable and must be punished. Colonel Sleeman observed:

> " *The silence of the Penal Code will give still greater impunity to the seducers, while their victims will, in three cases out of four, be murdered, or driven to commit suicide. Where husbands are in the habit of poisoning their guilty wives from the want of legal means of redress, they will sometimes poison those who are suspected upon insufficient grounds, and the innocent will suffer.*
>
> *...Sometimes the poorest persons will refuse pecuniary compensations; but generally they will be glad to get what the heads of their caste or circle of society may consider sufficient to defray the expenses of a second marriage. They dare not live in adultery, they would be outcasts if they did; they must be married according to the forms of their caste, and it is reasonable that the seducer of the wife should be made to defray these expenses for the injured husband. The rich will, of course, always refuse pecuniary compensation, and for the same reason that they would never prosecute the seducer in a civil court. The poor could never afford so to prosecute in such a court; and, as I have said, the silence of the Penal Code would be a solemn pledge of impunity to the*

> *guilty seducer, under the efficient government like ours, that can prevent the husband and father from revenging themselves except upon the females."*[20]
>
> (Emphasis supplied)

This debate along with the recommendation of the Law Commissioners was considered by the Indian Law Commissioners while drafting the Indian Penal Code.

5.4. The relevant extract from the discussion on whether to criminalize adultery was as follows:

> *"We have observed that adultery is recognised as an offence by the existing laws of all the Presidencies, and that an Act has been lately passed by the Governor-General of India in Council for regulating the punishment of the offence in the Bombay territories. Adultery is punishable by the Code Penal of France. It is provided for in the Code of Louisiana. The following are Mr. Livingston's observations on the subject. "Whether adultery should be considered as an offence against public morality, or left to the operation of the civil laws, has been the subject of much discussion. As far as I am informed, it figures in the penal law of all nations except the English; and some of their most celebrated lawyers have considered the omission as a defect.*

[20] *A Penal Code prepared by The Indian Law Commissioners*, (1838), The Second Report on the Indian Penal Code

Neither the immorality of the act, nor its injurious consequences on the happiness of females, and very frequently on the peace of society and the lives of its members, can be denied. The reason then why it should go unpunished does not seem very clear. It is emphatically one of that nature to which I have just referred, in which the resentment of the injured party will prompt him to take vengeance into his own hands, and commit a greater offence, if the laws of his country refuse to punish the lesser. It is the nature of man, and no legislation can alter it, to protect himself where the laws refuse their aid; very frequently where they do not; but where they will not give protection against injury, it is in vain that they attempt to punish him who supplies by his own energy their remissness. Where the law refuses to punish this offence, the injured party will do it for himself, he will break the public peace, and commit the greatest of all crimes, and he is rarely or never punished. Assaults, duels, assassinations, poisonings, will be the consequence. They cannot be prevented; but, perhaps, by giving the aid of the law to punish the offence which they are intended to avenge, they will be less frequent; and it will, by taking away the pretext for the atrocious acts, in a great measure insure the infliction of the punishment they deserve. It is for these reasons that the offence of adultery forms a chapter of this title."

Having given mature consideration to the subject, we have, after some

hesitation, come to the conclusion that it is not advisable to exclude this offence from the Code. We think the reasons for continuing to treat it as a subject for the cognizance of the criminal courts preponderate.....

...While we think that the offence of adultery ought not to be omitted from the Code, we would limit its cognizance to adultery committed with a married woman, and considering that there is much weight in the last remark in Note Q, regarding the condition of the women of this country, in deference to it we would render the male offender alone liable to punishment. We would, however, put the parties accused of adultery on trial together, and empower the Court, in the event of their conviction, to pronounce a decree of divorce against the guilty woman, if the husband sues for it, at the same time that her paramour is sentenced to punishment by imprisonment or fine. By Mr. Livingstone's Code, the woman forfeits her 'matrimonial gains', but is not liable to other punishment.

We would adopt Colonel Sleeman's suggestion as to the punishment of the male offender, limiting it to imprisonment not exceeding five years, instead of seven years allowed at present, and sanctioning the imposition of a fine payable to the husband as an alternative, or in addition."[21]

(Emphasis supplied)

[21] *A Penal Code prepared by The Indian Law Commissioners*, (1838), The Second Report on the Indian Penal Code

5.5. It was in this backdrop that Section 497 came to be included in the I.P.C.

6. THE QUEST FOR REFORM

6.1. In June 1971, the 42nd Report of the Law Commission of India[22] analysed various provisions of the I.P.C. and made several important recommendations. With respect to the offence of 'adultery', the Law Commission recommended that the adulterous woman must be made equally liable for prosecution, and the punishment be reduced from 5 years to 2 years. This was however, not given effect to.

6.2. In August 1997, the Law Commission of India in its 156th Report[23] noted that the offence of adultery under Section 497 is very limited in scope in comparison to the misconduct of adultery in divorce (civil proceedings). The section confers only upon the husband the right to

[22] 42nd Report on the Indian Penal Code, Law Commission of India
Available at: http://lawcommissionofindia.nic.in/1-50/report42.pdf
[23] 156th Report on the Indian Penal Code (Vol. I), Law Commission of India, pages 169 - 172
Available at: http://lawcommissionofindia.nic.in/101-169/Report156Vol1.pdf

prosecute the adulterous male, but does not confer any right on the aggrieved wife to prosecute her adultererous husband. It was recommended to introduce an amendment to incorporate the concept of equality between sexes in marriage *vis-à-vis* the offence of adultery. The proposed change was to reflect the transformation of women's status in Indian society.

However, the recommendation was not accepted.

6.3. In March 2003, the Malimath Committee on Reforms of Criminal Justice System[24], was constituted by the Government of India, which considered comprehensive measures for revamping the Criminal Justice System. The Malimath Committee made the following recommendation with respect to "Adultery":

> "*16.3.1 A man commits the offence of adultery if he has sexual*

[24] *Report of the Committee on Reforms of Criminal Justice System*, Government of India, Ministry of Home Affairs, chaired by Justice V.S. Malimath, (2003) *Available at:*https://mha.gov.in/sites/default/files/criminal_justice_system.pdf

> *intercourse with the wife of another man without the consent or connivance of the husband. The object of this Section is to preserve the sanctity of the marriage. The society abhors marital infidelity. Therefore, there is no good reason for not meting out similar treatment to wife who has sexual intercourse with a married man.*
>
> *16.3.2 The Committee therefore suggests that Section 497 of the I.P.C. should be suitably amended to the effect that "whosoever has sexual intercourse with the spouse of any other person is guilty of adultery....."*
>
> (Emphasis supplied)

The recommendations of the Malimath Committee on the amendment of Section 497 were referred to the Law Commission of India, which took up the matter for study and examination. The same is pending consideration.

7. CONTEMPORARY INTERNATIONAL JURISPRUDENCE

Before addressing the issue of the constitutional validity of Section 497 I.P.C., it would be of interest to review how 'adultery' is treated in various jurisdictions around the world.

Adultery has been defined differently across various jurisdictions. For instance, adultery charges may require the adulterous relationship to be "open and notorious,"[25] or be more than a single act of infidelity, or require cohabitation between the adulterer and the adulteress. Such a definition would require a finding on the degree of infidelity.[26] In other instances, the spouses may also be punishable for adultery. Such a provision raises a doubt as to how that may secure the relationship between the spouses and the institution of marriage. Another variation, in some jurisdictions is that cognizance of the offence of adultery is taken only at the instance of the State, and its enforcement is generally a rarity.

7.1. Various legal systems have found adulterous conduct sufficiently injurious to justify some form of criminal sanction. Such conduct is one, which the society is not only unwilling to approve, but also attaches a criminal label to it.

- United States of America

[25] Illinois Criminal Code, 720 ILCS 5/11-35, Adultery
"*(a) A person commits adultery when he or she has sexual intercourse with another not his or her spouse, if the behavior is open and notorious,...*"
[26] Martin Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 Journal Of Family Law 45, 51-52 (1991)

In the United States of America, 17 out of 50 States continue to treat 'adultery' as a criminal offence under the State law.[27] The characterization of the offence differs from State to State.

In the case of *Oliverson* v. *West Valley City*[28], the constitutionality of the Utah adultery statute[29] was challenged. It was contended that the statute offends the right to privacy and violates substantive due process of law under the U.S. Constitution. The U.S. Court held that adultery is a transgression against the relationship of marriage which the law endeavors to protect. The State of Utah had an interest in preventing adultery. Whether to use criminal sanction was considered a matter particularly within the ambit of the legislature. Given the special interest of the State, it was considered rational to classify adultery as a crime.

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[27] Abhinav Sekhri, *The Good, The Bad, and The Adulterous: Criminal Law and Adultery in India,* 10 Socio Legal Review 47 (2014)

[28] 875 F. Supp. 1465

[29] Utah Code Ann. 76-7-103, *"(1) A married person commits adultery when he voluntarily has sexual intercourse with a person other than his spouse. (2) Adultery is a class B misdemeanour."*

A similar provision exists in the State of New York, wherein adultery is treated as a Class B misdemeanor.[30]

By way of contrast, in the State of North Carolina, it was held in the Judgment of *Hobbs* v. *Smith*[31], that adultery should not be treated as a criminal offence. The Superior Court of North Carolina, relied on the judgment of the U.S. Supreme Court, in *Lawrence* v. *Texas*[32] wherein it was recognized that the right to liberty provides substantial protection to consenting adults with respect to decisions regarding their private sexual conduct. The decision of an individual to commit adultery is a personal decision, which is sufficiently similar to other personal choices regarding marriage, family, procreation, contraception, and sexuality, which fall within the area of privacy. Following this reasoning in *Lawrence*, the Superior Court of the State of

[30] New York Penal Laws, Article 255.17-Adultery, "*A person is guilty of adultery when he engages in sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse. Adultery is a class B misdemeanour.*"
[31] No. 15 CVS 5646 (2017) [Superior Court of North Carolina)
[32] 539 US 558 (2003)

North Carolina held that the State Law criminalizing adultery violated the substantive due process, and the right to liberty under the Fourteenth Amendment to the U.S. Constitution, and the provision criminalizing adultery was declared unconstitutional.

- Canada

In Canada, the Criminal Code of Canada under Section 172 imposes criminal sanctions for adulterous conduct. This provision was introduced in 1918[33], and continues to remain on the Criminal Code.

The Criminal Code of Canada prohibits endangering the morals of children in a home where one "participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice."

[33] Criminal Code of Canada, 1985, Section 172, "*(1) Every one who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.*
(2) For the purposes of this section, "child" means a person who is or appears to be under the age of eighteen years."

Furthermore, Canada has a provision for granting divorce in cases of "breakdown of marriages", and adultery is a ground for establishing the same.[34]

- Malaysia

In Malaysia, adultery is punishable as a crime under the Islamic Laws. However, the Law Reform (Marriage and Divorce) Act, 1976 made it a civil wrong, for all non-Muslims. Similar to the position in Canada, this Act makes adultery a ground for granting divorce, as it is a proof of "Breakdown of Marriage".[35] Interestingly though, the Act also allows either spouse, to be an aggrieved party and claim damages from the adulterer or adulteress.[36]

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[34] Divorce Act, 1968, *"Section 8 (1) A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage.*
(2) Breakdown of a marriage is established only if:
(a) .....
(b) the spouse against whom the divorce proceeding is brought has, since celebration of the marriage,
(i) committed adultery, or ....."

[35] S. 54(1)(a), Law Reform (Marriage and Divorce) Act, 1976. [Malaysia] states,
"54. (1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say:
(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent....."

[36] S. 58, Law Reform (Marriage and Divorce) Act, 1976. [Malaysia] states,

- Japan

In Japan, the provision for adultery was somewhat similar to the present Section 497 of I.P.C.; it punished the woman and the adulterer only on the basis of the complaint filed by the husband. In case the act of adultery was committed with the consent of the husband, there would be no valid demand for prosecution of the offence[37]. This provision has since been deleted.[38] Adultery is now only a ground for divorce in Japan under the Civil Code.[39]

- South Africa

"58. (1) On a petition for divorce in which adultery is alleged, or in the answer of a party to the marriage praying for divorce and alleging adultery, the party shall make the alleged adulterer or adulteress a co-respondent, unless excused by the court on special grounds from doing so.
(2) A petition under subsection (1) may include a prayer that the co-respondent be condemned in damages in respect of the alleged adultery.
(3) Where damages have been claimed against a co-respondent— (a) if, after the close of the evidence for the petitioner, the court is of the opinion that there is not sufficient evidence against the co-respondent to justify requiring him or her to reply, the co-respondent shall be discharged from the proceedings; or (b) if, at the conclusion of the hearing, the court is satisfied that adultery between the respondent and co-respondent has been proved, the court may award the petitioner such damages as it may think fit, but so that the award shall not include any exemplary or punitive element."

[37] S. 183, Penal Code, 1907 [Japan], "*Whoever commits adultery with a married woman will be punished by prison upto two years. The same applies to the other party of the adultery. These offences are only prosecuted on demand of the husband. If the husband has allowed the Adultery, his demand is not valid."* [as translated by Karl-Friedrich Lenz, in History of Law in Japan since 1868, ed. Wilhelm Rohl, published by Brill, 2005, at page 623]

[38] H. Meyers, *"Revision of Criminal Code of Japan"* Washington Law Review & State Bar Journal, Vol. 25, (1950) at pp. 104-134

[39] Article 770, Civil Code, 1896. [Japan], *"Article 770 (1) Only in the cases stated in the following items may either husband or wife file a suit for divorce: (i) if a spouse has committed an act of unchastity; ...."*

In South Africa, in the case of *DE* v. *RH*[40] The Constitutional Court of South Africa struck down adultery as a ground for seeking compensation by the aggrieved persons. The Court relied on an earlier judgment of *Green* v. *Fitzgerald*[41] wherein it was held that the offence of adultery has fallen in disuse, and *"has ceased to be regarded as a crime"*.[42] The Court noted that even though adultery was of frequent occurrence in South Africa, and the reports of divorce cases were daily published in the newspapers in South Africa, the authorities took no notice of the offence.

- Turkey

In Turkey, the decision of the Constitutional Court of Turkey from 1996[43] is another instance where the Court struck down the provision of adultery as a criminal offence from the Turkish Penal Code of 1926. The Court noted that the provision was violative of the Right to Equality, as

[40] *RH* v. *DE* (594/2013) [2014] ZASCA 133 (25 September 2014)
[41] 1914 AD 88
[42] *Id.*
[43] Anayasa Mahkemesi, 1996/15; 1996/34 (Sept. 23, 1996)
See also, Anayasa Mahakemsi, 1998/3; 1998/28 (June 23, 1998) and Anayasa Mahakemsi, 1997/45. 1998/48 (July 16, 1998)

guaranteed by the Turkish Constitution since it treated men and women differently for the same act.

- South Korea

In South Korea, adultery as a criminal offence was struck down by the Constitutional Court of Korea in, what is popularly known as, the *Adultery Case of February 26, 2015*[44]. The Constitutional Court of Korea held that Article 241, which provided for the offence of adultery, was unconstitutional as it violated Article 10 of the Constitution, which promotes the right to personality, the right to pursue happiness, and the right to self-determination. The right to self-determination connotes the right to sexual self-determination that is the freedom to choose sexual activities and partners. Article 241 was considered to restrict the right to privacy protected under Article 17 of the Constitution since it restricts activities arising out of sexual

[44] Adultery Case, 27-1 (A) KCCR 20, February 26, 2015

life belonging to the intimate private domain. Even though the provision had a legitimate object to preserve marital fidelity between spouses, and monogamy, the court struck it down as the provision failed to achieve the "appropriateness of means and least restrictiveness" The Court held as follows:

> *"In recent years, the growing perception of the Korean society has changed in the area of marriage and sex with the changes of the traditional family system and family members' role and position, along with rapid spread of individualism and liberal views on sexual life. Sexual life and love is a private matter, which should not be subject to the control of criminal punishment. Despite it is unethical to violate the marital fidelity, it should not be punished by criminal law....*
>
> *.....*
>
> *...The exercise of criminal punishment should be the last resort for the clear danger against substantial legal interests and should be limited at least. It belongs to a free domain of individuals for an adult to have voluntary sexual relationships, but it may be regulated by law when it is expressed and it is against the good sexual culture and*

> *practice. It would infringe on the right to sexual self-determination and to privacy for a State to intervene and punish sexual life which should be subject to sexual morality and social orders.*
>
> *The tendency of modern criminal law directs that the State should not exercise its authority in case an act, in essence, belongs to personal privacy and is not socially harmful or in evident violation of legal interests, despite the act is in contradiction to morality. According to this tendency, it is a global trend to abolish adultery crimes.*
>
> (Emphasis supplied)

The Court concluded that it was difficult to see how criminalization of adultery could any longer serve the public interest of protecting the monogamy-based marriage system, maintain good sexual culture, and the marital fidelity between spouses. A consideration of Article 241 which punishes adultery failed to achieve the appropriateness of means and least restrictiveness. Since the provision excessively restricted a person's sexual autonomy and privacy by criminally punishing the private and

intimate domain of sexual life, the said penal provision was said to have lost the balance of State interest and individual autonomy.

8. PREVIOUS CHALLENGES TO ADULTERY IN INDIA

This court has previously considered challenges to Section 497 *inter alia* on the ground that the impugned Section was violative of Articles 14 and 15 of the Constitution.

8.1. In *Yusuf Abdul Aziz* v. *State of Bombay*[45], Section 497 was challenged before this Court *inter alia* on the ground that it contravened Articles 14 and 15 of the Constitution, since the wife who is *pari delicto* with the adulterous man, is not punishable even as an "abettor." A Constitution Bench of this Court took the view that since Section 497 was a special provision for the benefit of women, it was saved by Article 15(3) which is an enabling provision providing for protective discrimination.

[45] 1954 SCR 930

In *Yusuf Aziz* (supra), the Court noted that both Articles 14 and 15 read together validated Section 497.

8.2. Later, in *Sowmithri Vishnu* v. *Union of India & Anr.*[46], a three-judge bench of this Court addressed a challenge to Section 497 as being unreasonable and arbitrary in the classification made between men and women, unjustifiably denied women the right to prosecute her husband under Section 497.

It was contended that Section 497 conferred a right only upon the husband of the adulterous woman to prosecute the adulterer; however, no such right was bestowed upon the wife of an adulterous man. The petitioners therein submitted that Section 497 was a flagrant violation of gender discrimination against women. The Court opined that the challenge had no legal basis to rest upon. The Court observed that the argument really centred on the definition, which

[46] (1985) Supp SCC 137

was required to be re-cast to punish both the male and female offender for the offence of adultery.

After referring to the recommendations contained in the 42nd Report of the Law Commission of India, the Court noted that there were two opinions on the desirability of retaining Section 497. However it concluded by stating that Section 497 could not be struck down on the ground that it would be desirable to delete it from the statute books.

The Court repelled the plea on the ground that it is commonly accepted that it is the man who is the 'seducer', and not the woman. The Court recognized that this position may have undergone some change over the years, but it is for the legislature to consider whether Section 497 should be amended appropriately so as to take note of the 'transformation' which the society has undergone.

8.3. In *V. Revathi* v. *Union of India*[47], a two-judge bench of this court upheld the constitutional validity of Section 497, I.P.C. and Section 198(2) of the Cr.P.C. The petitioner contended that whether or not the law permitted a husband to prosecute his disloyal wife, a wife cannot be lawfully disabled from prosecuting her disloyal husband. Section 198(2) Cr.P.C. operates as a fetter on the wife in prosecuting her adulterous husband. Hence, the relevant provision is unconstitutional on the ground of obnoxious discrimination.

This Court held that Section 497 I.P.C. and Section 198(2) Cr.P.C. together form a legislative package. In essence, the former being substantive, and the latter being largely procedural. Women, under these provisions, neither have the right to prosecute, as in case of a wife whose husband has an adulterous

[47] (1988) 2 SCC 72

relationship with another woman; nor can they be prosecuted as the *pari delicto*.

8.4. The view taken by the two-judge bench in *Revathi* (supra), that the absence of the right of the wife of an adulterous husband to sue him, or his paramour, was well-balanced by the inability of the husband to prosecute his adulterous wife for adultery, cannot be sustained. The wife's inability to prosecute her husband and his paramour, should be equated with the husband's ability to prosecute his wife's paramour.

9. In the present case, the constitutionality of Section 497 is assailed by the Petitioners on the specific grounds that Section 497 is violative of Articles 14, 15 and 21.

9.1. Mr. Kaleeswaram Raj learned Counsel appearing for the Petitioners and Ms. Meenakshi Arora, learned Senior Counsel appearing for the Intervenors *inter alia* submitted that Section 497 criminalizes adultery based on a classification made on sex alone. Such a classification bears no

rational nexus with the object sought to be achieved and is hence discriminatory.

It was further submitted that Section 497 offends the Article 14 requirement of equal treatment before the law and discriminates on the basis of marital status. It precludes a woman from initiating criminal proceedings. Further, the consent of the woman is irrelevant to the offence. Reliance was placed in this regard on the judgment of this Court in *W. Kalyani* v. *State*[48].

The Petitioners submit that the age-old concept of the wife being the property of her husband, who can easily fall prey to seduction by another man, can no longer be justified as a rational basis for the classification made under Section 497.

An argument was made that the 'protection' given to women under Section 497 not only highlights her lack of sexual autonomy, but also ignores the social repercussions of such an offence.

[48] (2012) 1 SCC 358

The Petitioners have contended that Section 497 of the I.P.C. is violative of the fundamental right to privacy under Article 21, since the choice of a partner with whom she could be intimate, falls squarely within the area of autonomy over a person's sexuality. It was submitted that each individual has an unfettered right (whether married or not; whether man or woman) to engage in sexual intercourse outside his or her marital relationship.

The right to privacy is an inalienable right, closely associated with the innate dignity of an individual, and the right to autonomy and self-determination to take decisions. Reliance was placed on the judgment in *Shafin Jahan* v. *Asokan K.M. & Ors.*[49] where this Court observed that each individual is guaranteed the freedom in determining the choice of one's partner, and any interference by the State in these matters, would

[49] 2018 SCC Online SC 343

have a serious chilling effect on the exercise of the freedoms guaranteed by the Constitution.

The Petitioners placed reliance on the judgment of *K.S. Puttaswamy* v. *Union of India*[50] wherein a nine-judge bench of this Court held that the right to make decisions on vital matters concerning one's life are inviolable aspects of human personality. This Court held that:

> *" 169. ..... The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action...."*
>
> (Emphasis supplied)

[50] (2017) 10 SCC 1

The Petitioners and Intervenors have prayed for striking down Section 479 I.P.C. and Section 198(2) of the Cr.P.C. as being unconstitutional, unjust, illegal, arbitrary, and violative of the Fundamental Rights of citizens.

9.2. On the other hand, Ms. Pinky Anand, learned ASG forcefully submitted that adultery must be retained as a criminal offence in the I.P.C. She based her argument on the fact that adultery has the effect of breaking up the family which is the fundamental unit in society. Adultery is undoubtedly morally abhorrent in marriage, and no less an offence than the offences of battery, or assault. By deterring individuals from engaging in conduct which is potentially harmful to a marital relationship, Section 497 is protecting the institution of marriage, and promoting social well-being.

The Respondents submit that an act which outrages the morality of society, and harms its

members, ought to be punished as a crime. Adultery falls squarely within this definition.

The learned ASG further submitted that adultery is not an act that merely affects just two people; it has an impact on the aggrieved spouse, children, as well as society. Any affront to the marital bond is an affront to the society at large. The act of adultery affects the matrimonial rights of the spouse, and causes substantial mental injury.

Adultery is essentially violence perpetrated by an outsider, with complete knowledge and intention, on the family which is the basic unit of a society.

It was argued on behalf of the Union of India that Section 497 is valid on the ground of affirmative action. All discrimination in favour of women is saved by Article 15(3), and hence were exempted from punishment. Further, an under-inclusive definition is not necessarily discriminatory. The contention that Section 497

does not account for instances where the husband has sexual relations outside his marriage would not render it unconstitutional.

It was further submitted that the sanctity of family life, and the right to marriage are fundamental rights comprehended in the right to life under Article 21. An outsider who violates and injures these rights must be deterred and punished in accordance with criminal law.

It was finally suggested that if this Court finds any part of this Section violative of the Constitutional provisions, the Court should read down that part, in so far as it is violative of the Constitution but retain the provision.

DISCUSSION AND ANALYSIS

10. Section 497 is a pre-constitutional law which was enacted in 1860. There would be no presumption of constitutionality in a pre-constitutional law (like Section 497) framed by a foreign legislature. The provision would

have to be tested on the anvil of Part III of the Constitution.

11. Section 497 of the I.P.C. it is placed under Chapter XX of "*Offences Relating to Marriage*".

The provision of Section 497 is replete with anomalies and incongruities, such as:

i. Under Section 497, it is only the male-paramour who is punishable for the offence of adultery. The woman who is *pari delicto* with the adulterous male, is not punishable, even as an 'abettor'.

The adulterous woman is excluded solely on the basis of gender, and cannot be prosecuted for adultery[51].

ii. The Section only gives the right to prosecute to the husband of the adulterous wife. On the other hand, the wife of the adulterous man, has no similar right to prosecute her husband or his paramour.

[51] *W Kalyani* v. *State*, (2012) 1 SCC 358; at para 10.

iii. Section 497 I.P.C. read with Section 198(2) of the Cr.P.C. only empowers the aggrieved husband, of a married wife who has entered into the adulterous relationship to initiate proceedings for the offence of adultery.

iv. The act of a married man engaging in sexual intercourse with an unmarried or divorced woman, does not constitute 'adultery' under Section 497.

v. If the adulterous relationship between a man and a married woman, takes place with the consent and connivance of her husband, it would not constitute the offence of adultery.

The anomalies and inconsistencies in Section 497 as stated above, would render the provision liable to be struck down on the ground of it being arbitrary and discriminatory.

12. The constitutional validity of section 497 has to be tested on the anvil of Article 14 of the Constitution.

12.1. Any legislation which treats similarly situated persons unequally, or discriminates between persons on the basis of sex alone, is liable to be struck down as being violative of Articles 14 and 15 of the Constitution, which form the pillars against the vice of arbitrariness and discrimination.

12.2. Article 14 forbids class legislation; however, it does not forbid reasonable classification. A reasonable classification is permissible if two conditions are satisfied:

i. The classification is made on the basis of an 'intelligible differentia' which distinguishes persons or things that are grouped together, and separates them from the rest of the group; and

ii. The said intelligible differentia must have a rational nexus with the object sought to be achieved by the legal provision.

The discriminatory provisions in Section 497 have to be considered with reference to the classification made. The classification must have

some rational basis,[52] or a nexus with the object sought to be achieved.

With respect to the offence of adultery committed by two consenting adults, there ought not to be any discrimination on the basis of sex alone since it has no rational nexus with the object sought to be achieved.

Section 497 of the I.P.C., makes two classifications:

i. The first classification is based on who has the right to prosecute:

It is only the husband of the married woman who indulges in adultery, is considered to be an aggrieved person given the right to prosecute for the offence of adultery.

Conversely, a married woman who is the wife of the adulterous man, has no right to prosecute either her husband, or his paramour.

[52] *E.V. Chinnaiah* v. *State of A.P.*, (2005) 1 SCC 394 (A legislation may not be amenable to a challenge on the ground of violation of Article 14 of the Constitution if its intention is to give effect to Articles 15 and 16 or when the differentiation is not unreasonable or arbitrary).

ii. The second classification is based on who can be prosecuted.

It is only the adulterous man who can be prosecuted for committing adultery, and not the adulterous woman, even though the relationship is consensual; the adulterous woman is not even considered to be an "abettor" to the offence.

The aforesaid classifications were based on the historical context in 1860 when the I.P.C. was enacted. At that point of time, women had no rights independent of their husbands, and were treated as chattel or 'property' of their husbands.

Hence, the offence of adultery was treated as an injury to the husband, since it was considered to be a 'theft' of his property, for which he could proceed to prosecute the offender.

The said classification is no longer relevant or valid, and cannot withstand the test of Article 14, and hence is liable to be struck down on this ground alone.

12.3. A law which deprives women of the right to prosecute, is not gender-neutral. Under Section 497, the wife of the adulterous male, cannot prosecute her husband for marital infidelity. This provision is therefore *ex facie* discriminatory against women, and violative of Article 14.

Section 497 as it stands today, cannot hide in the shadows against the discerning light of Article 14 which irradiates anything which is unreasonable, discriminatory, and arbitrary.

13. A law which could have been justified at the time of its enactment with the passage of time may become out-dated and discriminatory with the evolution of society and changed circumstances.[53] What may have once been a perfectly valid legislation meant to protect women in the historical background in which it was framed, with the passage of time of over a century and a half, may become obsolete and archaic.

[53] *Motor General Traders* v. *State of Andhra Pradesh*, (1984) 1 SCC 222; *See also Ratan Arya* v. *State of Tamil Nadu*, (1986) 3 SCC 385

A provision previously not held to be unconstitutional, can be rendered so by later developments in society, including gender equality.[54]

Section 497 of the I.P.C. was framed in the historical context that the infidelity of the wife should not be punished because of the plight of women in this country during the 1860's. Women were married while they were still children, and often neglected while still young, sharing the attention of a husband with several rivals.[55] This situation is not true 155 years after the provision was framed. With the passage of time, education, development in civil-political rights and socio-economic conditions, the situation has undergone a sea change. The historical background in which Section 497 was framed, is no longer relevant in contemporary society.

It would be unrealistic to proceed on the basis that even in a consensual sexual relationship, a married woman, who knowingly and voluntarily enters into a sexual relationship with another married man, is a 'victim', and the male offender is the 'seducer'.

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[54] *John Vallamattom* v. *Union of India*, (2003) 6 SCC 611

[55] *'A Penal Code prepared by The Indian Law Commissioners*, (1838), Notes of Lord Thomas Babington Macaulay, Note Q

Section 497 fails to consider both men and women as equally autonomous individuals in society.

In *Anuj Garg* v. *Hotel Assn. of India*,[56] this Court held that:

> *"20. At the very outset we want to define the contours of the discussion which is going to ensue. Firstly, the issue floated by the State is very significant, nonetheless it does not fall in the same class as that of rights which it comes in conflict with, ontologically. Secondly, the issue at hand has no social spillovers. The rights of women as individuals rest beyond doubts in this age. If we consider (various strands of) feminist jurisprudence as also identity politics, it is clear that time has come that we take leave of the theme encapsulated under Section 30. And thirdly we will also focus our attention on the interplay of doctrines of self-determination and an individual's best interests.*
>
> *.....*
>
> *26. When a discrimination is sought to be made on the purported ground of classification, such classification must be founded on a rational criteria. The criteria which in absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in early 20th century, may not be a rational criteria in the 21st century. In the early 20th century, the hospitality sector was not open to women in*

[56] (2008) 3 SCC 1

> *general. In the last 60 years, women in India have gained entry in all spheres of public life. They have also been representing people at grassroot democracy. They are now employed as drivers of heavy transport vehicles, conductors of service carriages, pilots, et. al. ...”*
>
> (Emphasis supplied)

The time when wives were invisible to the law, and lived in the shadows of their husbands, has long since gone by. A legislation that perpetuates such stereo-types in relationships, and institutionalises discrimination is a clear violation of the fundamental rights guaranteed by Part III of the Constitution.

There is therefore, no justification for continuance of Section 497 of the I.P.C. as framed in 1860, to remain on the statute book.

14. Article 15(3) of the Constitution is an enabling provision which permits the State to frame beneficial legislation in favour of women and children, to protect and uplift this class of citizens.

Section 497 is a penal provision for the offence of adultery, an act which is committed consensually

between two adults who have strayed out of the marital bond. Such a provision cannot be considered to be a beneficial legislation covered by Article 15(3) of the Constitution.

The true purpose of affirmative action is to uplift women and empower them in socio-economic spheres. A legislation which takes away the rights of women to prosecute cannot be termed as 'beneficial legislation'.

This Court in *Thota Sesharathamma and Anr.* v. *Thota Manikyamma (Dead) by Lrs. And Ors.*[57] held that:

> *"Art. 15(3) relieves from the rigour of Art. 15(1) and charges the State to make special provision to accord to women socio-economic equality. As a fact Art. 15(3) as a fore runner to common code does animate to make law to accord socio-economic equality to every female citizen of India, irrespective of religion, race, caste or religion."*

In *W. Kalyani* v. *State*[58] this Court has recognised the gender bias in Section 497. The court in *Kalyani* (supra) observed that "*The provision is currently under criticism from certain quarters for showing a string gender bias for it*

[57] (1991) 4 SCC 312
[58] (2012) 1 SCC 358

makes the position of a married woman almost as a property of her husband."

The purpose of Article 15(3) is to further socio-economic equality of women. It permits special legislation for special classes. However, Article 15(3) cannot operate as a cover for exemption from an offence having penal consequences.

A Section which perpetuates oppression of women is unsustainable in law, and cannot take cover under the guise of protective discrimination.

15. The Petitioners have contended that the right to privacy under Article 21 would include the right of two adults to enter into a sexual relationship outside marriage.

The right to privacy and personal liberty is, however, not an absolute one; it is subject to reasonable restrictions when legitimate public interest is involved.

It is true that the boundaries of personal liberty are difficult to be identified in black and white; however, such liberty must accommodate public interest. The freedom to

have a consensual sexual relationship outside marriage by a married person, does not warrant protection under Article 21.

In the context of Article 21, an invasion of privacy by the State must be justified on the basis of a law that is reasonable and valid. Such an invasion must meet a three-fold requirement as set held in Justice *K. S. Puttaswamy (Retd.) & Anr.* v. *UOI & Anr.* (supra): (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State interest, and (iii) proportionality, which ensures a rational nexus between the object and the means adopted. Section 497 as it stands today, fails to meet the three-fold requirement, and must therefore be struck down.

16. The issue remains as to whether 'adultery' must be treated as a penal offence subject to criminal sanctions, or marital wrong which is a valid ground for divorce.

16.1. One view is that family being the fundamental unit in society, if the same is disrupted, it would impact stability and progress. The State,

therefore, has a legitimate public interest in preserving the institution of marriage.

Though adultery may be an act committed in private by two consenting adults, it is nevertheless not a victim-less crime. It violates the sanctity of marriage, and the right of a spouse to marital fidelity of his/her partner. It impacts society as it breaks the fundamental unit of the family, causing injury not only to the spouses of the adulteror and the adulteress, it impacts the growth and well-being of the children, the family, and society in general, and therefore must be subject to penal consequences.

Throughout history, the State has long retained an area of regulation in the institution of marriage. The State has regulated various aspects of the institution of marriage, by determining the age when an adult can enter into marriage; it grants legal recognition to marriage; it creates rights in respect of inheritance and succession; it provides for remedies like judicial separation,

alimony, restitution of conjugal rights; it regulates surrogacy, adoption, child custody, guardianship, partition, parental responsibility; guardianship and welfare of the child. These are all areas of private interest in which the State retains a legitimate interest, since these are areas which concern society and public well-being as a whole.

Adultery has the effect of not only jeopardising the marriage between the two consenting adults, but also affects the growth and moral fibre of children. Hence the State has a legitimate public interest in making it a criminal offence.

16.2. The contra view is that adultery is a marital wrong, which should have only civil consequences. A wrong punishable with criminal sanctions, must be a public wrong against society as a whole, and not merely an act committed against an individual victim.

To criminalize a certain conduct is to declare that it is a public wrong which would justify

public censure, and warrant the use of criminal sanction against such harm and wrong doing.

The autonomy of an individual to make his or her choices with respect to his/her sexuality in the most intimate spaces of life, should be protected from public censure through criminal sanction. The autonomy of the individual to take such decisions, which are purely personal, would be repugnant to any interference by the State to take action purportedly in the 'best interest' of the individual.

Andrew Ashworth and Jeremy Horder in their commentary titled '*Principles of Criminal Law*'[59] have stated that the traditional starting point of criminalization is the 'harm principle' the essence of which is that the State is justified in criminalizing a conduct which causes harm to others. The authors opine that the three elements for criminalization are: (i) harm, (ii) wrong doing, and (iii) public element, which are required to be

[59] Oxford University Press, (7th Edn.) May 2013

proved before the State can classify a wrongful act as a criminal offence.

John Stuart Mill states that *"the only purpose for which power can be rightly exercised over the member of a civilized community against his will is to prevent harm to others."* [60]

The other important element is wrongfulness. Andrew Simester and Andreas von Hirsch opine that a necessary pre-requisite of criminalization is that the conduct amounts to a moral wrong.[61] That even though sexual infidelity may be morally wrong conduct, this may not be a sufficient condition to criminalize the same.

17. In my view, criminal sanction may be justified where there is a public element in the wrong, such as offences against State security, and the like. These are public wrongs where the victim is not the individual, but the community as a whole.

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[60] Mill, John S., Chapter I: Introductory, *On Liberty,* Published London: Longman, Roberts, & Green Co. 1869, 4th Edn.

[61] A P Simester and Andreas von Hirsch, *Crimes, Harms, And Wrongs: On The Principles Of Criminalisation,* Oxford: Hart Publishing (2011)

Adultery undoubtedly is a moral wrong *qua* the spouse and the family. The issue is whether there is a sufficient element of wrongfulness to society in general, in order to bring it within the ambit of criminal law?

The element of public censure, visiting the delinquent with penal consequences, and overriding individual rights, would be justified only when the society is directly impacted by such conduct. In fact, a much stronger justification is required where an offence is punishable with imprisonment.

The State must follow the minimalist approach in the criminalization of offences, keeping in view the respect for the autonomy of the individual to make his/her personal choices.

The right to live with dignity includes the right not to be subjected to public censure and punishment by the State except where absolutely necessary. In order to determine what conduct requires State interference through criminal sanction, the State must consider whether the civil remedy will serve the purpose. Where a

civil remedy for a wrongful act is sufficient, it may not warrant criminal sanction by the State.

18. In view of the aforesaid discussion, and the anomalies in Section 497, as enumerated in para 11 above, it is declared that :

(i) Section 497 is struck down as unconstitutional being violative of Articles 14, 15 and 21 of the Constitution.

(ii) Section 198(2) of the Cr.P.C. which contains the procedure for prosecution under Chapter XX of the I.P.C. shall be unconstitutional only to the extent that it is applicable to the offence of Adultery under Section 497.

(iii) The decisions in *Sowmithri Vishnu* (supra), *V. Rewathi* (supra) and *W. Kalyani* (supra) hereby stand overruled.

.....J.
(INDU MALHOTRA)

New Delhi
September 27, 2018

司法院大法官審理會台字第 12664 號解釋案

法務部書面意見

109.3.31

壹、 刑法第 239 條之立法目的為何？其係為保障何種法益或基本權利而設？又因此限制或侵害人民何種基本權利？其審查基準為何？

一、 有關刑法第 239 條之立法目的、保障之法益或權利部分：

（一）大院第 554 號解釋業已說明：

第554號解釋認為，婚姻與家庭為社會形成與發展之基礎，受憲法制度性保障。婚姻制度植基於人格自由，具有維護人倫秩序、男女平等、養育子女等社會性功能，國家為確保婚姻制度之存續與圓滿，自得制定相關規範，約束夫妻雙方互負忠誠義務。性行為自由與個人之人格有不可分離之關係，固得自主決定是否及與何人發生性行為，惟依憲法第二十二條規定，於不妨害社會秩序公共利益之前提下，始受保障。是性行為之自由，自應受婚姻與家庭制度之制約。

婚姻關係存續中，配偶之一方與第三人間之性行為應為如何之限制，以及違反此項限制，應否以罪刑相加，各國國情不同，應由立法機關衡酌定之。刑法第 239 條對於通姦者、相姦者處 1 年以下有期徒刑之規定，固對人民之性行為自由有所限制，惟此為維護婚姻、家庭制度及社會生活秩序所必要。

（二）憲法保障之基本權及社會法益

憲法第 22 條規定，凡人民之其他自由及權利，不妨害社會秩序公共利益者，均受憲法之保障。而上開

自由與權利，雖未於憲法中一一列明，仍為歷來大院大法官解釋予以肯認者，例如釋字第 242、362、399、535、552、554、576、580、585、587、603、626、643、 656、664、689、712、716、748、749 等號解釋曾指明之婚姻自由、姓名權、一般行為自由、性行為自由、契約自由、身體權、隱私權、人格權、受國民教育以外教育之權利、名譽權、收養子女自由等[1]。其中，釋字第 554 號解釋，即對於刑法第 239 條所維護之婚姻家庭制度及社會秩序有所闡釋，業如前述。

我國憲法雖未如德國基本法對婚姻與家庭之保障有特別規定，但大院已作成多號解釋，以保護婚姻與家庭，例如釋字第 362 號、第 552 號、第 554 號、第 696 號、第 712 號等。而釋字第 712 號亦提出「婚姻與家庭為社會形成與發展之基礎，受憲法制度性保障。家庭制度植基於人格自由，具有繁衍、教育、經濟、文化等多重功能，乃提供個人於社會生活之必要支持，並為社會形成與發展之基礎。」之觀點；釋字第 554 號亦為相同說明。

關於婚姻家庭制度，本諸憲法第 22 條等關於自由權利應受保護之基本價值理念，大院另作成若干關於婚姻家庭之重要解釋，其主要者如：肯定父母行使親權之平等原則（釋字第 365 號），強調人格尊嚴、人身安全為婚姻關係及家庭生活之基礎（釋字第 372 號），保障夫妻間選擇住所之自由（釋字第 452 號）等。大

[1]清華大學科技法律研究所教授陳仲嶙著，我國憲法上未列舉權利之發展，司法院大法官 106 年度學術研討會報告

院歷年解釋建構了婚姻與家庭制度之憲法規範，確認婚姻與家庭係一種基本權，應受憲法制度性之保障，得對抗公權力之侵害，並使國家負有保護義務，影響及於法院對憲法及民法相關規定之解釋適用，具體形成關於婚姻、家庭、子女之法律關係[2]。

刑法於第十七章設有妨害婚姻及家庭罪章，亦即，立法者為落實憲法第 22 條所保障之其他自由及權利，基於國家保護義務，採取立法裁量，將侵害上開自由及權利之行為予以處罰，所保護者即為婚姻家庭及社會秩序之社會法益，基於權力分立原則，對此立法權之行使宜予尊重。

二、有關刑法第 239 條限制或侵害人民何種基本權利部分：

(1)隱私權

論者多謂刑法第 239 條限制人民隱私權，然配偶之一方與配偶以外之人合意性交為裁判離婚之原因，並負損害賠償責任，隱私權在面對民事上之法律效果，與通姦罪之處罰相同，須適度限縮。因此，隱私權與婚姻家庭權衡後，隱私權並非完全不被限制。

(2)自由權

論者亦謂刑法第 239 條限制人民性自由權，然人民選擇進入結婚及建立家庭後，所謂性自由權即應受到節制，此也表示自由選擇進入婚姻及家庭制度者，同時也接受國家所規範之婚姻與家庭制度，在我國規範之婚姻與家庭制度中，性自由權並非全無限制。

[2] 釋字第 552 號解釋大法官王澤鑑協同意見書

(3)平等權

本條條文本身並未對男女有差異性規定，男性女性均在處罰範圍，無違反憲法第7條及釋字第485號解釋意旨。縱使聲請書所指女性起訴有罪判決確定人數高於男性，亦係法律規定罪名及執行之效果；況多種犯罪類型之行為人性別多為男性，例如酒駕、殺人等，是難以此項法律執行之結果，遽論條文本身違反平等原則。

三、刑法第239條之審查基準

依釋字第578號解釋許宗力大法官協同意見書：「參酌外國釋憲經驗，關於對立法事實判斷之審查，約可粗分三種寬嚴不同審查基準：如採最寬鬆審查標準，只要立法者對事實的判斷與預測，不具公然、明顯的錯誤，或不構成明顯恣意，即予尊重；如採中度審查標準，則進一步審查立法者的事實判斷是否合乎事理、說得過去，因而可以支持；如採最嚴格審查標準，司法者對立法者判斷就須作具體詳盡的深入分析，倘無法確信立法者的判斷是正確的，就只能宣告系爭手段不符適合原則之要求。何時從嚴，何時從寬審查，應考量許多因素，例如系爭法律所涉事務領域，根據功能最適觀點，由司法者或政治部門作決定，較能達到儘可能「正確」之境地，系爭法律所涉基本權之種類、對基本權干預之強度，還有憲法本身揭示的價值秩序等等，都會影響寬嚴不同審查基準之選擇。」

再者，釋字第554號解釋理由書已說明刑法第239條之審查基準，亦即，婚姻關係存續中，配偶之一方與第三人間之性行為應為如何之限制，及違反此項限制，應否以

罪刑相加，因各國國情不同，立法機關於衡酌如何維護婚姻與家庭制度而制定之行為規範，如選擇以刑罰加以處罰，倘立法目的具有正當性，刑罰手段有助於立法目的達成，又無其他侵害較小亦能達成相同目的之手段可資運用，而刑罰對基本權利之限制與立法者所欲維護法益之重要性及行為對法益危害之程度，亦處於合乎比例之關係者，即難謂與憲法第 23 條規定之比例原則有所不符。又婚姻共同生活基礎之維持，原應出於夫妻雙方之情感及信賴等關係，以刑罰手段限制有配偶之人與第三人間之性行為自由，乃不得已之手段。然刑法所具一般預防功能，於信守夫妻忠誠義務使之成為社會生活之基本規範，進而增強人民對婚姻尊重之法意識，及維護婚姻與家庭制度之倫理價值，仍有其一定功效。立法機關就當前對夫妻忠誠義務所為評價於無違社會一般人通念，而人民遵守此項義務規範亦非不可期待之情況下，自難謂無法以刑罰手段達到預防通姦、維繫婚姻之立法目的。

是此號解釋已說明刑法第 239 條之審查基準，並於該號解釋作成時，亦已依該審查基準審查之，亦即立法目的正當性、刑罰手段有助於立法目的達成、無其他侵害較小亦能達到相同目的之手段可資運用等，而審查後認為並無違反憲法比例原則，更進一步闡釋於違憲審查時，所應採取尊重立法權行使之分際。

貳、 刑法第 239 條處罰婚外性行為之手段，是否有助於所揭目的之達成？手段與目的間是否存有一定關聯性？

釋字第 554 號解釋已經說明，刑法具一般預防功能，本條

於信守配偶忠誠義務使之成為社會生活之基本規範，進而增強人民對婚姻尊重之法意識，及維護婚姻與家庭制度之倫理價值，仍有其一定功效。

次參照釋字第509號解釋在闡述言論自由之限制時，說明限制之手段究應採用民事賠償抑或兼採刑事處罰，應就國民守法精神、對他人權利尊重之態度、現行民事賠償制度之功能、媒體工作者對本身職業規範遵守之程度及其違背時所受同業紀律制裁之效果等各項因素，綜合考量。以此延伸，如通姦或相姦行為得以金錢賠償而了卻責任，豈非享有財富者即得任意為之，此應非憲法保障人民權利之本意。雖聲請意旨有認，刑法第239條因舉證困難，而難以達成其立法目的，應以侵害較小之民事損害賠償制度，即可達到目的。惟不可否認，配偶之一方有經濟或社會地位居於弱勢者，其在民事賠償制度中，因舉證責任問題，欲獲得保護，顯有困難。因此，刑法第239條之刑罰手段與立法目的間，仍具有相當程度之關聯性。

參、 大院釋字第554號解釋有無變更解釋之必要？

司法院解釋憲法，並有統一解釋法律及命令之權，為憲法第七十八條所明定，其所為之解釋，自有拘束全國各機關及人民之效力，各機關處理有關事項，應依解釋意旨為之，違背解釋之判例，當然失其效力，此有釋字第185號解釋在案。因此，大院大法官所為解釋具有與憲法相當之效力。如無情事變更，應無輕易更易前所為解釋之正當理由。

再以大院歷次解釋觀之，大法官前有變更解釋之情形，首見於因第一屆立法委員行使職權問題而變更解釋，即第261號變更第31號解釋；次者，為保障訴訟權，將原認限制行政訴

訟要件之法令為合憲之解釋予以變更，例如釋字第 684 號變更第 382 號、第 439 號變更第 211 號；再者，就解釋已廢止之法令之條文定義予以變更，例如第 556 號變更第 68 號有關懲治叛亂組織之「參與」定義；末查，將原解釋雖認合憲，但已說明相關規定應隨時檢討修正者，予以變更，例如第 581 號變更第 347 號。

分析上述變更之解釋，不外乎就已不合時宜之制度(第一屆立法委員)、已廢止法令之解釋(懲治叛亂條例)、原解釋即認應隨時檢討修正之法令(自耕能力證明申請及核發注意事項)、以及為行政訴訟權之保障，而變更解釋，反之，若社會現狀或法令規定均無變更，即不宜輕易推翻先前解釋。而釋字第 554 號就刑法第 239 條解釋以後，我國婚姻與家庭制度並未改變，自無變更該解釋之因素存在。

再以大法官對於刑罰之解釋而言，除第 551 號解釋認為，肅清煙毒條例第 16 條規定栽贓誣陷或捏造證據誣告他人犯本條例之罪者，處以其所誣告之罪之刑，以所誣告罪名反坐，罪刑不相當，違反憲法第 23 條比例原則，而認為違憲並予以變更解釋以外，其餘有關刑罰應罰性之違憲審查，均認委由立法者衡酌定之，未有宣告某刑罰規定之「存在本身」為違憲者，可知大法官向來對法律是否違憲之審查，均相當謹慎與節制，並嚴守權力分立之界線。因此，釋字第 554 號解釋已就刑法第 239 條為違憲審查並為解釋，其對於該條為立法形成自由，亦符合大法官對於刑罰之解釋所為之一貫立場。

又大法官釋字第 748 號雖認婚姻制度應保障同性婚姻，而為劃時代之解釋，然該號解釋亦已說明，僅係就民法婚姻章規定，未使相同性別二人，得為經營共同生活之目的，成立具有

親密性及排他性之永久結合關係，認違反憲法第 22 條保障之婚姻自由及第 7 條保障之平等權，作成解釋，不及於其他；並說明，若容許相同性別二人得依婚姻章實質與形式要件規定，成立法律上婚姻關係，且要求其亦應遵守婚姻關係存續中及終止後之雙方權利義務規定，不影響現行異性婚姻制度所建構之基本倫理秩序(詳解釋理由書)。可見，釋字第 748 號之作成，亦未改變釋字第 554 號所欲維護之婚姻、家庭制度及社會生活秩序；更何況，社會情勢並無重大更迭，異性或同性配偶間同樣互負忠誠義務，仍為社會共識，因此，釋字第 554 號並無變更解釋之必要。

肆、 有關刑事訴訟法第 239 條但書部分

關於刑事訴訟法第 239 條但書部分，本部尊重司法院之職權，惟該條但書對於配偶撤回告訴者，其效力不及於相姦人之規定，參照日本 1907 年舊刑法第 183 條僅處罰有夫之婦通姦（不處罰夫通姦），其 1922 年刑事訴訟法仍規定夫對妻撤回告訴，對相姦人亦發生撤回告訴之結果，亦即，從比較法制而言，通姦罪可單獨對配偶撤回告訴，並非法理之必然。因此，立法上容有再予酌量之空間。

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MINISTRY OF JUSTICE

司法院大法官

審理會台字第12664號聲請解釋案

法務部陳述意見·次長蔡碧仲

釋字第554號解釋無變更解釋之必要

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1. 解釋文及理由書已清楚說明審查基準及立法目的
2. 是否以罪刑相加，由立法機關衡酌定之。
3. 婚姻及家庭並無重大變革

司法院解釋有拘束全國各機關及人民之效力
變更解釋之情形其例甚少

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第261號變更第31號	就不合時宜之制度變更解釋 (第一屆立法委員行使職權之問題)
第556條變更第68條	就已廢止法令之定義變更解釋 (有關懲治叛亂組織之「參與」定義)
第581號變更第347號	就原解釋即認應隨時檢討修正之法令變更解釋(自耕能力證明申請及核發注意事項)
第684號變更第382號 第439號變更第211號	就原認限制行政訴訟要件之法令為合憲之解釋予以變更

司法院就刑罰之解釋，甚少就刑罰存在本身宣告違憲

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1. 除釋字551號解釋就肅清煙毒條例第16條反坐規定認為違憲外，無就刑罰之存在本身宣告違憲者

2. 釋字第554號已說明刑法第239條為立法形成自由

釋字第748號解釋，不足認為可變更第554號之重大更迭

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- 釋字第748號解釋係就容許相同性別二人得依婚姻章實質與形式要件規定，成立法律上婚姻關係。

- 該號解釋對於其應遵守婚姻關係存續中及終止後之雙方權利義務規定仍有所要求，不影響現行異性婚姻制度所建構之基本倫理秩序。

除罪之刑罰規定，未必違憲

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- 釋字第204號就票據法之刑罰規定認為與憲法第15條及第22條尚無牴觸。
- 但其後票據法廢除刑罰規定，可見除罪之刑罰規定，未必違憲。

民意潮流

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本部曾多次民意調查，**反對**除罪者分別有**八成二、七成七**，在公共政策網路參與平台參與問卷而**反對**者高達**八成五**，據瞭解，民間機構所做民意調查，**反對**者亦為**六成九**。本部對於民意應予尊重，而在民調之外，本部亦會持續請聽民意，廣納意見，並順應潮流。

刑事訴訟法第239條但書部分：為司法院之權責，本條立法上有酌量空間

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日本1907年舊刑法第183條縱僅處罰有夫之婦通姦（不處罰夫通姦），惟其1922年刑事訴訟法仍規定夫對妻撤回告訴，對相姦人亦發生撤回告訴之結果，以比較法而言，我國刑事訴訟法第239條但書立法上容有再予酌量之空間。

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司法院大法官

審理會台字第12664號聲請解釋案

法務部陳述意見·檢察司司長林錦村

刑法第239條之立法目的、保障法益及基本權

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立法目的：夫妻相互間忠誠義務，維護婚姻及家庭制度。

釋字第554號揭示-婚姻與家庭為社會形成與發展之基礎，受憲法制度性保障(釋字第362號、第552號解釋)。

婚姻制度植基於人格自由，具有維護人倫秩序、男女平等、養育子女等社會性功能，國家為確保婚姻制度之存續與圓滿，自得制定相關規範，約束夫妻雙方互負忠誠義務。

保障之權利或法益

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大法官王澤鑑曾於釋字第552號解釋協同意見書闡釋有關婚姻家庭制度，本諸憲法第22條關於自由權利應受保護，已作成關於婚姻家庭之釋字第372號等解釋。足見建構婚姻與家庭制度之憲法規範，國家負保護義務。

本條規定於刑法第17章妨害婚姻及家庭罪章，且釋字第554號解釋所述之社會生活秩序，或釋字第748號解釋所提及之基本倫理秩序，均屬社會法益。此為立法者為落實憲法第22條所保障之其他自由及權利，係國家保護義務之立法裁量，基權力分立，對立法權應予尊重。

限制或侵害人民何種基本權

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- 可能干預或限制人民之性自由權、隱私權
- 第554號解釋性自由權與個人之人格有不可分離之關係，固得自主決定是否與何人發生性行為，惟依憲法第22條規定，於不妨害社會秩序公共利益之前提下，始受保障。
- 基於婚姻自由而選擇進入婚姻制度後，為維護婚姻、家庭制度及社會生活秩序所必要，因此有刑法第239條規定，對人民之性自由權與隱私權適度限縮，第554號解釋亦認與憲法第23條比例原則無違。

刑罰手段與目的：仍具有相當關聯性

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- 釋字第554號解釋說明刑法具一般預防功能，本條配偶忠誠義務成為社會生活之基本規範，增強人民對婚姻尊重之法意識，及維護婚姻與家庭制度之倫理價值，仍有一定功效，故二者仍具有相當關聯性。
- 釋字第509號解釋有關言論自由之誹謗罪
- 有認通(相)姦行為得以民事賠償，惟反而對經濟上弱者不利，自非憲法保障人民權利之本意。另有聲請意旨認本條因舉證困難，應以侵害較小之民事訴訟，即可達目的。惟舉證困難之性侵害罪亦有此情形，則性侵害能否因舉證困難即認違憲？

釋字第554號解釋，有無刑事處罰，刑法第239條之審查基準：立法機關衡酌定之

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應否論以罪刑，因各國國情不同，立法機關衡酌如何維護婚姻與家庭制度而制定之行為規範，如選擇以刑罰加以處罰，倘

立法目的具有正當性

刑罰手段有助於立法目的達成又無其他侵害較小亦能達成相同目的之手段可資運用

而刑罰對基本權利之限制與立法者所欲維護法益之重要性及行為對法益危害之程度，亦合乎比例

難謂與憲法第23條規定之比例原則有所不符。

釋字第748號理由書再次提及釋字第554號解釋通姦罪合憲性。

多數國家並未宣告通姦罪為違憲：是立法廢除

法務部
MINISTRY OF JUSTICE

- 美國：目前有18州保留通姦罪之處罰規定(含紐約州)。
- 歐陸：均未以通姦罪係違憲。
  - 德國1969年刪除刑法第172條
  - 法國1975年刪除刑法通姦罪
  - 奧地利1997年廢除
- 日本：1947年廢除刑法第183條僅就有夫之婦與人通姦者之處罰規定，亦未認為違憲。

足證多數國家認通姦罪非違憲，而係立法機關衡酌定之

司改國是會議決議及兩公約結論

法務部
MINISTRY OF JUSTICE

- 司改國是會議第5組決議「廢止刑法第239條，若因故無法立即廢止，應即刻刪除刑事訴訟法239條但書之規定，回歸刑事訴訟法告訴不可分原則之適用。」
- 司改國是會議決議或兩公約結論性意見與建議—廢除通姦罪， 均未提及違憲問題
- 本部認應依554號解釋：是否罪刑，各國國情不同，應由立法機關衡酌如何維護婚姻與家庭制度而定之。

刑事訴訟法第239條但書部分

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MINISTRY OF JUSTICE

- 比較法：日本1907年舊刑法第183條
  - 僅處罰有夫之婦通姦（不處罰夫通姦，現已廢除）
  - 1922年刑事訴訟法第238條規定夫對妻撤回告訴，對相姦人亦發生撤回效力。
  - 通姦罪可單獨對配偶撤回告訴，並非比較法及法理之必然性。

刑事訴訟法第239條但書部分

- 近15年起訴之通(相)姦罪，男女起訴比例約差3-4%，95、96年男較女略多。

94年至108年	48.4 (男)	51.6(女)
95年	50.6 (男)	49.4 (女)
96年	52.4	47.6

- 本條並無違憲，惟立法上有再研求餘地。

地方檢察署辦理刑法第239條案件起訴及緩起訴處分人數

項目別	通常程序提起公訴		簡易判決處刑		偵查終結緩起訴處分	
	男	女	男	女	男	女
人數(人)						
94年至108年	2,246	2,391	1,927	2,356	11	21
94年	74	89	166	189	-	2
95年	123	120	181	205	-	5
96年	122	111	178	198	3	2
97年	108	110	157	187	-	-
98年	121	123	145	174	1	2
99年	130	146	165	180	2	1
100年	155	161	122	125	1	1
101年	193	204	112	135	-	1
102年	145	160	104	105	-	1
103年	201	217	108	129	-	-
104年	171	200	98	106	-	1
105年	187	193	113	124	2	-
106年	174	201	96	101	-	-
107年	174	186	92	105	-	2
108年	168	170	90	93	2	3
比率(%)						
94年至108年	48.4	51.6	47.2	52.8	34.4	65.6
94年	45.4	54.6	46.8	53.2	-	100.0
95年	50.6	49.4	46.9	53.1	-	100.0
96年	52.4	47.6	47.3	52.7	60.0	40.0
97年	49.5	50.5	45.6	54.4	-	-
98年	49.6	50.4	45.5	54.5	33.3	66.7
99年	47.1	52.9	47.8	52.2	66.7	33.3
100年	49.1	50.9	49.4	50.6	50.0	50.0
101年	48.6	51.4	45.3	54.7	-	100.0
102年	47.5	52.5	49.8	50.2	-	100.0
103年	48.1	51.9	45.6	54.4	-	-
104年	46.1	53.9	48.0	52.0	-	100.0
105年	49.2	50.8	47.7	52.3	100.0	-
106年	46.4	53.6	48.7	51.3	-	-
107年	48.3	51.7	46.7	53.3	-	100.0
108年	49.7	50.3	49.2	50.8	40.0	60.0

資料提供：法務部統計處

法務部 MINISTRY OF JUSTICE

通姦罪，一無是處

紀惠容

荒謬的案例，第一次認識通姦罪

師大狼師案: 1994 年社會矚目的師大老師性侵女學生案，受害學生鼓起勇氣公開教授犯行，希望不要有下一個同學受害，引發許多婦女團體聲援。最後女學生卻被老師的配偶提告通姦罪，1997 年高等法院判決確定該名女學生通姦罪成立。最後，臺北地方法院還判決確定女學生需賠償狼師之家屬五十萬元。

當時，我們婦運團體非常非常錯愕與挫敗，知道學生已身心俱疲，沒有工作，根本付不起這筆錢，我們還一起募款籌措罰金，湊錢幫忙女學生給付。

我終於知道，通姦罪保護了被指控性侵害或性騷擾的配偶，它成為權勢性侵加害者的幫兇。

通姦罪「懲罰女性」，無助婚姻美滿

先看民間團體的一個統計，通姦罪提出告訴階段，被告是男性多於女性，性別比約 111:100，但最終判決有罪或無罪，卻性別大逆轉，每處罰

100 位通姦罪女性，就只有 81 位男性受罰。女性在訴訟中常被迫、無奈對丈夫撤告，但撤回效力不及於相姦人，也就是說小三或小王仍須受刑罰懲處。最終追溯結果傾向「懲罰女性」，造成男女性別不平等。

通姦罪是以「刑罰恐嚇」維護婚姻

說穿了，通姦罪的存在是以「刑罰恐嚇式」的在維護婚姻。他鞏固了我們對婚姻的不信任與恐懼，誤以為「刑罰恐嚇式」的婚姻手段，就可以維繫了婚姻，但事實上，通姦行為從未真正遏阻，通姦罪的案量也未下降，可見通姦罪無法真正達到宣稱之刑事預防作用。我們還需要通姦罪的存在

通姦罪違反國際人權公約

從國際人權角度檢視，我國在 2009 年簽屬兩公約並內國法化後，兩人權公約委員分別在 2013 年、2017 年連續對台灣審查報告都指出：刑事手段(通姦罪)處裡婚外性行為，會對人民私生活造成無理干擾，它違反「公

民與政治權利國際公約」第 17 條之隱私權保障。其實，「世界人權宣言」、「公民與政治權利國際公約」及「歐洲人權公約」都著重於結婚與組成家庭的權利、家庭生活及私生活不受國家侵犯，完全沒有提到國家有什麼義務立法來維繫配偶忠誠。可見在國際潮流中的普世人權價值，國家權力及法律應保障婚姻之內涵，僅止於結婚與組成家庭等制度條件，而婚姻家庭的經營，是國家不得侵犯的隱私權範圍。

僅有少數國家保留通姦罪

放眼亞洲國家，除了伊斯蘭教國家外，只剩下台灣還用刑法處罰婚外性行為，連一般認為民風相對保守的印度、韓國，也都在幾年前將婚外性行為除刑法化，台灣現在若將婚外性行為回歸民法處理，只不過是搭上人權的末班車，不是標新立異，為廢除而廢除。

殺雞焉用牛刀?

通姦罪讓台灣耗掉太多資源了。使用刑法定罪通姦行為是很傷神的，這不只要花大錢請律師，有些人為了找證據，還違法找秘密徵信社，對簿公堂，傷感情啊。殺雞焉用牛刀?誠心建議跳過「刑法」冗長的司法訴訟，直接從「民法」訴請損害賠償、或訴請離婚。把錢、把力氣省下來，重新思考、處理婚姻關係，說真的，婚姻裂痕，獲得實際的賠償可能最給力的手法，何須非得定罪對方，走入你死我活的胡同裡?

國家權力到哪裡?

國家權力不能承諾免於配偶出軌，憲法保障婚姻制度，但憲法無法保障結婚可以取得「婚姻之圓滿」或「免於配偶出軌」之權利啊。「婚姻制度之存續」與「婚姻之圓滿」是兩件事，國家不應介入婚姻與家庭關係是否經營圓滿，也不應介入個人給予配偶的忠誠許諾是否實現，這都是屬於私人經營生活之領域，和憲法有否保障人民之基本權應是兩件事。婚姻圓滿與否真的只能由配偶共同經營，不可能由國家以任何方

式提供「圓滿不受第三者介入的婚姻」。

婚姻的美滿與否，皆繫於人，國家可以保障婚姻制度條件，但不能承諾婚姻的美滿，更不能介入私領域定罪不忠誠的婚姻關係。所以，當婚姻一方不忠時，當冷靜思考婚姻關係的存續，而非動用刑法定罪，那對婚姻關係經營不但無濟於事，且勞民傷財，想想實際的訴請損害賠償或要訴請離婚，還比較務實。

司法院憲法法庭言詞辯論筆錄

聲 請 人　臺灣苗栗地方法院苗栗簡易庭快股法官等

指定代表　吳志強法官

何効鋼法官

張淵森法官

林孟皇法官

關係機關

法務部

指定代表　蔡碧仲政務次長

林錦村司長(檢察司)

林麗瑩司長(綜合規劃司)

朱富美檢察官(最高檢察署)

司法院刑事廳

指定代表　彭幸鳴廳長

張道周法官

吳元曜法官

鑑 定 人

本庭指定　張文貞教授

李念祖教授

王皇玉教授

薛智仁副教授

法務部推薦　蔡聖偉教授

黃士軒副教授

法庭之友　許幸惠女士

紀惠容女士

本院會台字第 12664 號臺灣苗栗地方法院苗栗簡易庭快股法官等

聲請解釋案，於中華民國 109 年 3 月 31 日上午 9 時在憲法法庭公開行言詞辯論，出庭人員如下：

審判長大法官　許宗力

大法官　蔡烱燉

黃虹霞

吳陳鐶

蔡明誠

林俊益

許志雄

張瓊文

黃瑞明

詹森林

黃昭元

謝銘洋

呂太郎

楊惠欽

蔡宗珍

書記官　高碧莉

楊靜芳

通　譯　吳奕林

賴俐君

審判長諭知：請書記官朗讀案由。

書記官朗讀案由：臺灣苗栗地方法院苗栗簡易庭快股法官等為審理妨害婚姻案件，認應適用之刑法第 239 條及刑事訴訟法第 239 條但書之規定，有違憲之疑義，聲請解釋案。

審判長　本案共有 18 位法官聲請，今日有 12 位法官出席，分別

為吳志強法官、施育傑法官、謝欣宓法官、何効鋼法官、何一宏法官、廖晉賦法官、林孟皇法官、蔡英雌法官、林怡君法官、張淵森法官、張博鈞法官及陳愷璘法官，由吳志強法官、何効鋼法官、林孟皇法官及張淵森法官 4 位代表發言。今日出席的關係機關，法務部代表是蔡碧仲政務次長、林錦村司長、林麗瑩司長及朱富美檢察官，司法院刑事廳出席代表為彭幸鳴廳長、張道周法官及吳元曜法官。今日邀請出席的鑑定人，本庭指定有臺灣大學張文貞教授、東吳大學李念祖教授、臺灣大學王皇玉教授、臺灣大學薛智仁副教授；另外，由法務部推薦，經大法官同意的有臺北大學蔡聖偉教授、中正大學黃士軒副教授。本庭邀請出席的法庭之友有許幸惠女士及紀惠容女士。

現在進行言詞辯論程序。

先向各位簡單說明今天程序的流程：

本次言詞辯論實施全程錄音錄影，並在本院及大法官網站直播開庭影音。

程序進行流程是：

1.請聲請人代表及相關機關代表人於座位陳述辯論要旨，時間各不超過 20 分鐘。

2.法庭之友陳述意見（一人 5 分鐘，共不超過 10 分鐘）。

3.聲請人及相關機關交互詢答（詢問及答辯共不超過 10 分鐘）。

4.詢答完畢後，審判長認為必要時，得再為下一輪次詢答，時間由審判長酌定之。

5.聲請人方或相關機關若需鑑定人、法庭之友提供意見，經審判長許可後發問，再由鑑定人、法庭之友答覆；詢問與答覆均不逾 5 分鐘。

6.詢答程序完畢後，休庭 20 分鐘。

7.由大法官詢問聲請人、相關機關代表人或鑑定人、法庭之友，答覆時間各不超過 5 分鐘。

8.最後，請聲請人方及相關機關，最後陳述，聲請人方、法務部及本院刑事廳各不超過 5 分鐘。

於發言時間屆滿前 1 分鐘，響鈴 1 聲警示，時間屆至，響鈴 2 聲，請結束發言。

審判長諭知：請書記官朗讀本案言詞辯論題綱。

書記官朗讀言詞辯論題綱：

（一）刑法第 239 條部分

1、刑法第 239 條之立法目的為何？其係為保障何種法益或基本權利而設？又因此限制或侵害人民何種基本權利？其審查基準為何？

2、刑法第 239 條處罰婚外性行為之手段，是否有助於所揭目的之達成？手段與目的間是否存有一定關聯性？

3、本院釋字第 554 號解釋有無變更解釋之必要？

（二）刑事訴訟法第 239 條但書部分

1、刑事訴訟法第 239 條但書之立法目的為何？其係為保障何種法益或基本權利而設？又因此限制或侵害人民何種基本權利？其審查基準為何？

2、刑事訴訟法第 239 條但書之手段，是否有助於所揭目的之達成？手段與目的間是否存有一定關聯性？

審判長

在請各位開始發言前，提醒各位席位上有計時器，請務必注意時間的掌握。

現在請聲請人方及相關機關陳述辯論要旨，時間各不超過 20 分鐘，均請在自己的席位上發言。

先請聲請人方陳述。

聲請人指定代表吳志強法官

審判長、各位大法官及與會先進，大家好，本人是臺北地院的吳志強，關於刑法第 239 條及刑事訴訟法第 239 條但書規定的意見，均已送大法官及各位先進參考，今日簡要以 ppt 向各位說明。首先關於爭點一，通姦罪的立法目的及保護法益，從 17 年前的釋字第 554 號解釋所提到的維護婚姻、家庭制度及社會生活秩序的概念，學理及實務均圍繞這兩個概念說明，進一步看其闡述的內容，實務見解提到，其實在保護夫妻婚姻之圓滿不可侵犯性，所要強調的是婚姻之神聖性，但還是無法清楚的發現其具體輪廓，如果這樣的概念是抽象社會善良風俗或傳統道德觀感，很有可能過於模糊，而無法通過比例原則之目的合憲性檢視。

假設立法者制定通姦罪的想法是，一旦有通姦行為，夫妻失和，子女教養成了問題，家庭功能受損，進而導致社會有危險的情況，但若爬梳實務見解，會發現並非所有通姦案件都是如此，有些通姦行為是因為婚後有家暴的情況，延伸後續有通姦行為，也可能婚後夫妻雙方爭吵，長期失和，甚至分居，而後有通姦行為。其實通姦行為並非動搖婚姻關係之原因，而係已無法維繫之婚姻關係所產生之結果，通姦行為其實欠缺反社會性及可非難性，也因此可反思，並不是每個類型都有國家介入之必要。

通姦罪為告訴乃論之犯罪，但釋字第 569 號解釋提及，一旦提告，夫妻關係反有不利之影響。協同意見書也提及，婚姻制度之存續與圓滿，無法由國家背書或應由國家強制，因此，立法者所制定之通姦罪並無法通過比例原則之適當性的檢驗。

人民作為憲法權利保障之主體，不因其進入婚姻或家庭生活

而有異。要證明通姦的犯行，不論捉姦在床或勘驗錄音（影），都嚴重侵害個人隱私權。更何況因為婚外性行為而受胎生下未成年子女時，該未成年子女將成為訴訟攻防的客體，種種理由的加總，都認為無法符合侵害最小原則、狹義比例原則，因此認為通姦罪違反比例原則。

關於爭點二，刑訴法第 239 條但書之規定，係立法者特別制定撤回告訴主觀可分之例外設計，但前段關於告訴主觀不可分部分，其實是保障檢察官行使公訴權時，不會因告訴權人對共犯之一人有私人情誼，而在追訴犯罪時有不當的差別對待。而主觀可分之例外規定，制度設計上必然會導致國家刑罰權運作上不公平、不平等之缺陷。再看刑訴法第 239 條但書之立法目的，立法者係想以迂迴的制度，讓夫妻可早日脫離訴訟關係，重修舊好、破鏡重圓。但以實務案例觀之，遭到背叛的配偶可能擔心被認定為宥恕，而先向配偶提告再撤告，對照釋字第 569 號解釋，提告時，雙方關係就受理影響，先傷己、再傷人的迂迴制度，果能讓夫妻重修舊好？第二個問題是，有些遭到背叛的配偶，不想告通姦的一方，而只想追究相姦人，但按照實務見解，發現對「前配偶」撤回告訴，不能離婚，一旦離婚，撤告效力就會及於相姦人，也無法告小王、小三，變相地要求導致無意維繫婚姻者被迫維持假面夫妻關係，對夫妻雙方、子女養育成長果真是最好考量嗎？

從學者實證研究來看，刑法第 239 條及刑訴法第 239 條但書，看不出差別的文字運用，但實際上在法的適用上，存在間接之性別差別對待。人與人之間情感的處理，每個人價值觀點不同，有人認為短暫相遇就是浪漫，有人認為活到老、攜手相伴才是真正的美好，但刑罰制裁無法改善人與人之間的情感關係，迂迴的制度設計無法確保維繫婚姻之期望會不會帶來更大的失

望。因此，這兩條規定的結合運用，其實已侵害隱私權，違反比例原則及平等原則，審查基準應該提升到「中度」或「嚴格」審查基準，手段與目的間也欠缺實質關聯性。

回顧17年來，社會已有多元的思辯與溝通，早在102年，法務部陳明堂次長就在國家人權報告國際審查會議中提到，我們也思考，這種法律是不是不合時宜？日本在二次大戰後已修改法律，今天在此也誠摯邀請法務部，與我們站在同一陣線，一起為此憲法時刻努力。韓國在2015年宣告通姦罪違憲，民風比我們純樸的印度在2018年宣告通姦罪違憲。刑法既係憲法之執行法、刑訴法是憲法之測震儀，宣告通姦罪違憲，不僅是迎頭趕上國際思潮，更重要的是同時宣達刑罰具有最後手段性，刑事制裁不是解決任何問題之萬靈丹。此時此刻，作為具有民主、自由、法治的我國，再次徘徊在保守與自由之十字路口，懇請作為憲法守護者之大法官們，變更釋字第554號解釋，宣告刑法第239條、刑訴法第239條但書違憲。

聲請人指定代表何効鋼法官

因為時間因素，僅口頭強調4點，就刑法第239條違反自由權部分為補充。一、關於通姦罪侵害權利部分，通姦罪作為行為規範干涉人民之性自主權，或在某些法律稱為隱私權，而作為制裁規範干涉憲法第8條保障人民之人身自由，其中性自主權之部分，已經庭上以釋字第554號解釋肯認，釋字第554號解釋並未審酌通姦罪作為制裁規範已限制人民之人身自由，但在庭上歷次關於刑法的解釋可看出，自由刑之存在本身已構成憲法第8條人身自由之侵害。解釋字號在ppt及聲請書上均已列出，刑法通姦罪是以自由刑作為法定刑，按照庭上過往的解釋，自然會構成人身自由的侵害。

第二個問題是，要以何種審查基準審查這兩種權利的侵害？

就性自主權部分，庭上在釋字第 554 號解釋中顯然是較低度的審查基準進行檢驗，但性自主權的侵害應可區分為國家的積極侵害與消極侵害。

所謂積極侵害，係指國家要求人民應為性行為或與特定對象為性行為之義務；消極侵害是指國家禁止人民於特定情況或與特定對象為性行為。積極干涉應是對於人民自主發展非常嚴重的干預，若不是全面的禁止，也應予以嚴格的審查。消極干涉廣泛存在法律之中，例如刑法第 227 條（與 16 歲以下之人性交罪）、第 230 條（血親性交罪）、社維法第 80 條（性交易管制規定），或許因為如此，庭上對於性自主決定權的消極侵害是採以較低度的審查標準。但我們認為，較低度審查標準的採用，其實忽略了通姦罪本身的性質，通姦罪不論是要件或立法目的，都在禁止人民與配偶以外的所有人為性交行為，故通姦罪其實是給予人民兩個選項，一是指定對象即配偶為性交，另一是完全不能進行性行為，如此的禁止雖然形式上是一種消極的干涉，但禁止的範圍非常廣大，已達到類似積極干涉的效果，已接近國家強制人民必須與特定對象為性行為，如此的干涉不應只以低度的審查標準審查，縱然不是嚴格的標準，至少應採取中度以上的審查基準檢驗。

至於人身自由部分，庭上過去在諸多刑罰解釋已有相當穩定的見解，我們也援用庭上過去的解釋先例，認為刑罰應作為限制人民基本權利最後不得已的手段，應通過嚴格比例原則的檢驗，且依庭上在釋字第 646 號解釋所提出的見解，立法機關必須提出合乎事理且具可支持性的預測，而負擔舉證責任。

第三點，關於通姦罪能否通過適當性及必要性審查部分，許多聲請人及鑑定人都有詳盡的闡述，本人在此只補充兩點特別的說明。一是關於通姦罪欠缺適當性部分，並非認為一切輕罪

均無一般預防效果，而係通姦行為本身的特性，讓其預防效果特別薄弱。通姦行為主要阻力來源來自於人民對通姦行為後果的擔憂，通姦行為若曝光，對人民的婚姻家庭必然會產生劇烈的衝擊，對於其原有在社會上的連結會產生重大的破損，預防效果與通姦罪是否存在全然沒有關係。

另外，關於民事賠償取代性部分，也並非認為一切輕罪均得以民事賠償替代。其實絕大多數的財產犯罪，損害賠償都無法取代刑罰，因為我國民事採取損害填補原則，所以從財產犯罪時，犯罪得利的期待值必然高於民事應賠償的數額，但此狀況並不存在於通姦罪，從本人提供的資料可看出，全國自 101 年度開始，只有 1 件案件是不得易科罰金的刑罰確定，其他全部通姦罪的判決都是得易科罰金，通姦罪在民事賠償金普遍超過 10 萬、20 萬元，已是相當常見的數額，在民事賠償金普遍高於刑事易科罰金之金額，故在通姦罪，民事賠償的嚇阻效果與刑事的處罰，特別具有替代性，並非所有輕罪都有一樣的特質。

上述二點關於通姦罪欠缺一般嚇阻效果的說明，並非理論上的說明，可從臨近的韓國在廢除通姦罪後的經驗檢驗。本人有提出韓國統計廳的相關數據，韓國在 2010 年以來，離婚率大致維持穩定，2015 年憲法法院廢除通姦罪之後，韓國離婚率並未產生任何顯著的變化，甚至可以說是微幅的下降，可見通姦罪對於通姦行為的嚇阻效果非常輕微，縱然將通姦罪移除，對原有社會上與民事上的嚇阻效果，依然可以維繫婚姻家庭的維持，可以認為通姦罪一般的嚇阻效果在統計上是不存在的，所謂廢除通姦罪會導致婚姻家庭的破壞，乃至於道德淪喪，都是沒有統計基礎，流於直觀的想像。

另外對於相當性部分，縱然庭上認為通姦罪可以通過上述檢驗，通姦罪本身作為行為規範都是過苛的處罰規定。通姦罪處

罰對象包含所有有配偶之人，並未排除婚姻關係已有重大破綻，甚至已別居的配偶，在現實的狀況下，因為通姦罪，其實國家是完全剝奪其性自主權，因為我國離婚採取消極的破綻主義，所以現實上可能會有有意離婚的配偶，無法在法院得到裁判離婚的判決，全面剝奪其性自主權，可能永無終期。通姦罪對於婚姻家庭維繫功能如此可疑，但所侵害效果卻是如此巨大，顯然不可能通過相當性狹義比例原則的檢驗。以上為本人補充說明，請庭上認定刑法第 239 條違反憲法第 8 條及第 22 條之保障，宣告刑法第 239 條違憲，並立即失效。

張淵森法官

審判長，各位大法官好，我是臺中地院張淵森，多位法官的聲請書都有詳列許多認為通姦罪、相姦罪違憲的理由，本人的聲請書就試圖從比例原則兩階段審查中的第一階段，來說明通姦罪與相姦罪追求的目的並沒有合憲性。刑法的目的必然有它要保護的法益，通姦罪要保護的法益，第一種可能是要維護婚姻的存續與家庭的保護，目前我國的法律，兩個人是不是要結婚，是不是要離婚，國家都尊重，這是兩個人的私事。同樣地，配偶彼此之間要不要忠誠，也是兩個人的私事，國家不應該用刑法恫嚇人民，要對配偶忠誠，不要通姦，要維持婚姻的存續。其實危及婚姻存續的原因非常多，連擠牙膏要從中間擠或從後面擠，都可能危及婚姻，難道我們要一一入刑嗎？有一種說法認為通姦罪會造成離婚，對未成年子女有不利情況，所以要處罰，但是如果這種說法成立，國家應該禁止人民離婚才對。離婚的時候，未成年子女的親權行使，法律都已經有配套，不能把責任推給通姦，所以維護婚姻的存續與家庭保護的目的，這個目的並不具有合理性。第二個可能的目的是善良風俗。通姦行為其實對國家、社會

並不會有任何實際上損害。隔壁老王通姦，對我有損害嗎？當然沒有，何況善良風俗是非常籠統的概念，所以我認為善良風俗也不是值得保護的法益。第三種可能保護的法益是痛苦，說實在的，婚姻中痛苦的事情非常多，有可能是精神上外遇、經濟上因素、子女的教養、婆媳關係等，通姦只是其中一種。我們可以瞭解發現配偶通姦時，心理所造成的痛苦，但並不是一個人有痛苦，就要用刑法處罰另外一個人。處罰通姦罪只是滿足報復的心態而已，所以這種目的也通不過合理性的審查。

綜上，刑法第 239 條通姦罪要保護的法益，並不存在合理性，所以在比例原則的第一階段就應該是違憲的。聲請人所聲請的案件是相姦罪，對相姦人來說，性的忠誠義務是存在配偶之間，並不是存在相姦人與配偶之間。配偶之間有沒有違反忠誠義務，那是他們的事情，與相姦人無關，所以第三人不應該因為他人是否存有婚姻關係，而限制到自己的性自主權，所以我認為處罰相姦罪也不具有合理性。另外，就刑事訴訟法第 239 條但書部分，本人提出不同想法。本人並沒有對刑事訴訟法第 239 條但書聲請解釋，在決定撤回告訴不可分的例外，我指的是主觀不可分，是不是違反平等原則的前提，要先決定撤回告訴不可分這個規定是不是有合理性。目前我國對告訴乃論的罪，要提出告訴或撤回告訴，國家都尊重告訴人，為何在有共犯的情形下，就要限制告訴人不可一部撤回？我想不出來有任何合理性存在，而且撤回告訴不可分會造成體系上矛盾、和解上困難，及超乎告訴人的合理預期。本來甲、乙共同毆打丙，丙只想對甲撤告，但對甲撤告同時，卻同時對乙撤告，已經超乎丙的合理期待，這部分我在補充意見有舉例，請各位參照。所以，如果撤回告訴不可

分是合理的，反過來反而是，更正，如果撤回告訴不可分是不合理的，通姦罪的撤回告訴不可分的例外反而是合理的，為何刑事訴訟法沒有規定可單獨對相姦人撤告？這反而是不合理的規定。但因為聲請人的案件並沒有涉及這部分，所以對這部分並未聲請。大法官如果認為通姦罪合憲，也請考量這部分，可不可以對相姦人單獨撤回。以上，謝謝。

審判長

法官聲請方還有 1 分半鐘，如果林法官不發言，接著就請關係機關方代表發言，先請法務部代表陳述 10 分鐘。

法務部指定代表蔡碧仲政務次長

審判長，各位大法官，感謝就今天讓我們以相關機關的身分出席說明，我們認為大院就刑法第 239 條已經作成解釋，就是釋字第 554 號解釋，該解釋文及理由書已詳載審查基準及刑法第 239 條的立法目的，也說明是否這樣的行為要以罪刑相加，應該要尊重立法機關來衡酌定之。剛才聽了聲請人諸多論述，重點就是釋字第 554 號解釋之後，婚姻、家庭、社會情勢變遷了嗎？如果沒有重大改革，釋字第 554 號解釋就刑法第 239 條部分，就沒有變更解釋的必要。我們一向都尊重司法院大法官的解釋，因為大法官解釋依照憲法第 78 條的規定，有拘束全國各機關、人民的效力，如果沒有情事變更，應該沒有變更解釋的正當理由。我們也詳列大法官變更解釋的情形，這樣的事例非常少。以釋字第 261 號解釋變更釋字第 31 號解釋來講，其實是就不合時宜的制度作變更解釋，也就是在第一屆立法委員行使職權的問題。釋字第 556 號解釋的變更是就已廢止法令之定義作變更解釋，就釋字第 68 號解釋有關懲治叛亂條例組織的參與定義的變更。釋字第 581 號解釋變更釋字第 347 號解釋，或釋字第 684 號解釋變更釋字

第 382 號解釋，釋字第 439 號解釋變更釋字第 211 號解釋，都是有就像自耕能力證明申請及核發注意事項這種法令解釋變更者，及就原認行政訴訟要件的法令為合憲解釋變更的事例。可見大法官變更解釋之事例甚少，如現狀並無變更，何以推翻先前解釋？釋字第 554 號解釋就刑法第 239 條解釋之後，我國婚姻及家庭制度並沒有崩解，應該沒有變更解釋的因素存在。再者，大法官就行為是否應刑罰性的解釋，甚少就應刑罰性的存在本身宣告違憲。釋字第 551 號解釋就肅清煙毒條例第 16 條這種反坐的罪名，認為違憲予以變更之外，沒有再宣告有某刑罰規定的存在本身是違憲的事例。可知司法解釋權的行使，相當謹慎與節制，也嚴守權力分立制度下立法權的界限，因此，釋字第 554 號解釋已就刑法第 239 條違憲審查並為解釋，也說明這條為立法形成自由，也符合大法官對刑法的解釋所為一貫的立場。再者，釋字第 748 號解釋事實上只是容許相同性別二人得依婚姻章實質與形式要件規定，成立法律上婚姻關係，所以這號解釋並沒有作為認定可變更釋字第 554 號解釋的重大更迭的事由。也有謂除罪的刑罰規定，像票據的除罪這個行為未必違憲，釋字第 204 號解釋就票據法的刑罰規定，認為這條是在防止發票人濫行簽發支票，確保支票流通與支付功能，所以施行以後有被不當使用，這條規定是否妥善，大法官認為沒有逾越立法裁量範圍，不認定這樣的除罪行為違憲。

剛才聲請人也提到希望藉由 102 年本部陳次長認為，我們是否認為刑法第 239 條的行為要依照世界各國潮流趨勢，跟他們站在同一陣線。其實本部一向採取開放立場，我們尊重立法權，尊重各界廣泛看法，對於這樣的行為是否除罪，我們歷次民意調查，反對者高達八成、七成，尤其在民意機構所

作的民意調查，反對者也有將近六成九，我們對於這樣的民意予以尊重，所以本部會跟廣大民意，會跟立法者根據民意作的合法性決定站在一起。對於有關刑事訴訟法第 239 條但書部分，當然這個立法技術在立法上有酌量空間，對於效力及於相姦人的規定，參照日本 1907 年舊刑法第 183 條僅處罰有夫之婦的通姦，不處罰夫的通姦，但是在 1922 年刑事訴訟法仍規定夫對妻撤回告訴，對相姦人也發生撤回告訴的結果。也就是從比較法的法制來看，通姦罪可以單獨對配偶撤回告訴，也不是法理的必然，因此本部認為這部分在立法上有再予酌量的空間，其他部分請司長補充。

法務部指定代表林錦村司長

審判長，各位大法官、法學先進，法務部除書面報告以外，以下擇要說明，本條的目的是維護夫妻的忠誠義務，及維護婚姻及家庭制度。釋字第 554 號解釋已充分說明婚姻與家庭是社會形成與發展的基礎，受到制度性保障。婚姻制度是基於人格自由，具有維護人倫秩序、男女平等等社會性功能，國家為確保婚姻制度，自得制定相關民事及刑事規範，約束雙方的忠誠義務。前大法官王澤鑑在釋字第 552 號解釋協同意見書提到相關婚姻制度，憲法雖然沒有明定，但本於憲法第 22 條自由權利應受保障，以及有相關大法官解釋，足見建構婚姻與家庭制度是憲法上規範，並使國家負有保護義務。本條規定在刑法第 17 章的罪章，以及釋字第 554 號解釋之社會生活秩序，及釋字第 748 號解釋之基本倫理秩序，都是屬於社會法益，這部分是立法者為了落實憲法第 22 條基於國家保護義務的立法裁量，對立法權的行使應予以尊重。這部分可能干預、限制人民的性自由權及隱私權。釋字第 554 號解釋也充分說明性自由權與個人的人格是不可分離的關係，固

然可以自由決定與何人發生性行為，但是基於婚姻自由而選擇進入婚姻制度後，當然為了維護婚姻、家庭制度及社會生活秩序所必要，所以有刑法第 239 條規定，對性自由權與隱私權適度限縮，該號解釋也認為與憲法第 23 條比例原則沒有違背。因為釋字第 554 號解釋也說明刑法具有一般預防功能，對於配偶的忠誠義務與增強對婚姻尊重的法意識，及維護婚姻與家庭制度的倫理價值，有一定功效，所以二者有相關關聯性。我們看一下釋字第 509 號解釋有關誹謗罪的解釋，雖然誹謗罪怎麼限制，有提到民事或兼採刑事處罰，也考量到他人權利的尊重與民事賠償等綜合因素考量，認為不違憲，可供本罪的審查的參考。誹謗罪的判決刑度與通姦罪的判決刑度，從 105 年至 108 年，通姦罪幾乎判 6 個月以下，法定刑判得比較輕。有認為通姦罪應該選擇侵害比較小，因為舉證比較困難，這樣反而對經濟上弱者比較不利，而且舉證困難不只通姦罪，性侵害也是同樣情形。釋字第 554 號解釋已經就第 239 條的審查基準，充分說明不違背比例原則。目前外國法制上，美國含紐約州等 18 個州都保留通姦罪的刑事處罰，歐陸的德國、法國、奧地利、日本，雖然廢除通姦罪，但不認為通姦罪違憲。司改國是會議的決議及兩公約的結論意見與建議雖然廢除通姦罪，但都沒有提及違憲問題。以上補充說明，謝謝。

審判長

請關係機關方司法院刑事廳代表發言，總共 10 分鐘。

司法院刑事廳指定代表彭幸鳴廳長

審判長，各位大法官，以及參與旁聽本次辯論的各位先進們，大家早安。就大法官審理本件由法官等人聲請關於通姦罪的解釋案，本廳因為主管刑事訴訟法，所以以關係機關的身分

參加今天的言詞辯論，本廳之前所提出的言詞辯論書狀，固然就題綱（一）、（二）有提出意見，但基於主管業務，以下先就與刑事訴訟法相關的題綱（二）部分進行說明。在討論刑事訴訟法第 239 條但書規定之前，必須先說明該條前段有關告訴效力的立法政策。刑事訴訟法第 239 條前段規定，告訴乃論之罪，對於共犯之一人告訴或撤回告訴者，其效力及於其他共犯。這就是學說與實務見解所稱的告訴主觀不可分原則，認為告訴與公訴是有區別的，告訴是在對於某一個犯罪事實的申告請求訴追，這是偵查的起因或訴訟條件，不得選擇特定犯人為告訴，以免限制公訴權的行使，本廳的書面資料也引用日本與德國的立法例，日本刑事訴訟法也採取告訴不可分原則，認為告訴或撤回的效力及於全部犯人。另外德國刑事訴訟法則沒有告訴不可分的規範，當告訴人明確指出僅就共犯某一人提出告訴時，告訴效力就僅及於該人，原則上是採取告訴主觀可分原則。由此可見，採取告訴制度並不當然指向告訴究竟主觀上應該以可分或不可分為原則，這是屬於不同國家立法政策上的考量。我國現行刑事訴訟法制度就此部分依立法機關政策的決定，是採取告訴主觀不可分原則。因此，關於題綱（二）的爭點，必須以一般共犯案件都要遵守告訴不可分原則，在這個前提下，唯獨就刑法第 239 條的通相姦罪採取對於配偶撤回告訴，效力不及於相姦人的特殊例外情形，是否顧全平等與比例原則，能否通過憲法審查，提出本廳的意見。該項撤回告訴效力的特殊例外情形，所要達成的立法目的，以及所要維護的法益，不論在民國 24 年或 56 年的相關修正，在立法院公報都查無立法理由，只能從學說與實務見解中加以推知。參考林永謀大法官或林山田老師所著的書都提到，在這個情形如果仍然採取告訴不可分

原則是有違人情之常。再參考釋字第 554 號解釋理由書，認為設定通姦罪為告訴乃論之罪，是為了使受害配偶得以兼顧夫妻情誼及隱私，避免通姦罪的告訴反而造成婚姻家庭的破裂。考量刑事訴訟法第 239 條但書同樣屬於訴訟要件的規範，兩者規範目的應該相同，所以認為該條但書的立法目的是希望達到顧全夫妻情誼、隱私及避免婚姻家庭破裂，也是為了這樣的法益。

接下來說明刑事訴訟法第 239 條但書創設的告訴不可分的例外規定，實質上是以性別作為基礎而為的差別待遇。首先，本條但書創設告訴不可分的例外，導致法院對於同為必要共犯的配偶及相姦人在判決上會產生不平等的結果，也就是依照告訴不可分原則及例外，告訴人如果撤回對相姦人的告訴時，效力可及於配偶被告。但告訴人如果撤回對配偶的告訴時，效力就不及於相姦人被告，使得同為必要共犯的相姦人被告，處於較配偶被告更為不利的地步，這是在判決上會產生的不平等結果。其實，該條但書表面上規範的相姦人包括男性及女性，是以與告訴人有無配偶關係作為例外規定，看起來是中性，也就是看起來好像不是以非屬人力能控制的生理狀態，也就是性別，作為分類基礎，但是實質上卻不是如此。

本廳的言詞辯論狀附註 49 引用美國最高法院在一則案件中所表示的意見，提到當法律表面上是性別中立，實際效果卻是不成比例的不利於特別性別，就必須探究法律的實質目的是不是出於歧視，實質目的與實質效果是不是有所關聯。如果我們對性別分類採取更為寬鬆的認定，由於刑法第 239 條規定的通相姦罪是規範男女間的姦淫行為，這是必要共犯，分屬男女不同性別，所以刑事訴訟法第 239 條但書區分配偶被

告與相姦人被告，而為不同待遇，就是以非屬人力所能控制的生理狀態，也就是性別來作分類，而且實質上是優厚男性配偶，不利女性相姦人的歧視狀態。本條但書規定是民國 20 年代傳統社會時空背景下所制定，當時社會男尊女卑，標榜女性要三從四德，女性婚外情為社會所鄙視，男性婚外情則未必會受到社會責難，而且男性為家庭經濟來源，女性通常必須要在家服侍公婆，教養子女，求職謀生不易。在男性配偶通姦的情形，女性告訴人如果不選擇原諒的話，下場不外是離開夫家，生活無以為繼，背負著拋家棄子的污名，難有再婚的機會，反而她如果選擇原諒男性配偶，不僅可繼續受到男性配偶的扶養，不會受到離婚的污名，雙方子女也不至於在破裂家庭中成長，同時還能單獨懲罰到破壞家庭的女性相姦人，滿足處罰的情感。至於女性配偶通姦的情形，由於男性告訴人掌握家庭經濟的來源，離婚不至於對他造成生活上負擔，他又較少有親身扶養子女的情感牽絆，加上他如果不追究到底，恐將顏面盡失，在社會上抬不起頭，所以男性告訴人少有對共犯為差異的處理。我們在觀察這一項制定時的時空背景的時候，可以發現是著眼於典型的規範對象，也就是將男性配偶與女性相姦人的情形，強化性別的刻版印象，而構成性別分類，縱使制定年代已經很久遠，但我們看近年來的統計資料，還是難以脫離性別因素的影響，就偵查的結果而言，依法務部的法務統計摘要所記載，105 年至 108 年的 4 月間，地檢署偵查通相姦罪終結的情形，起訴男性 913 人，女性 988 人，女性被起訴多於男性 8 個百分點，再看法院的資料，104 年到 108 年共 5 年間的刑事第一審統計結果，通相姦罪合計，男性被判有罪的是 713 人，女性被判有罪的是 826 人，女性在這個階段又多於男性 16 個百分比，如果將

統計期間拉長到 20 年，這個比例差距會更大。

整體而言，被依通相姦罪起訴或論罪科刑的人數與比例，女性顯然多於男性，可以佐證，這個案件隨著程序的進行有愈發不利於女性被告的傾向，所以由此實證結果，實質上是以性別作為基礎而為的差別待遇，在中華民國的人民，無分男女在法律上一律平等，而且國家應該消除性別歧視，促進兩性地位的實質平等，這是憲法與增修條文的明文規範。另外在國際公約，包括 CEDAW 公約與公政公約，也都一再揭示應該以法律或其他適當方法，保證實現男女平等原則，而且在法庭與法庭訴訟的各階段，都應給予平等待遇。憲法第 7 條所稱的平等原則，應該指實質上平等，本質上相同的事務應為相同處理，所以如果以性別作為分類基礎的差別待遇，應該採取較為嚴格的審查標準，檢視手段與目的間是否具有實質關聯性，來檢驗是否有違背平等原則的意旨。透過嚴格審查標準之後，我們認為雖然刑事訴訟法第 239 條但書在目的正當性的檢驗上是具有正當性，但在適合原則的檢驗方面，不論從正面分析或反面分析，都沒有辦法證明這樣的規定合於憲法平等原則。另外，配偶間的糾紛也不只一端，可能有傷害或妨害名譽等爭端。如果配偶與他人共同對告訴人為其他犯罪行為，他可能有同樣考量，也只願意原諒配偶一個人，可是法律卻必須回歸適用告訴不可分原則，所以在嚴格審查標準下，這一項告訴不可分的特殊例外，沒有辦法通過適合性的檢驗，因此沒有繼續以必要性原則與狹義比例性原則進行審查的必要。綜上，本廳就題綱（二）的結論認為，刑事訴訟法第 239 條但書實質上是以性別作為基礎而為差別待遇的規定，依照嚴格審查標準，手段與目的間欠缺實質關聯，無法通過適合原則的檢驗，因而違反比例原則及平等原則。

限於時間，關於題綱（一）的意見，本廳的結論與各聲請人的主張相同，只是論述方法有所不同，請參考書面意見並請指教，謝謝。

審判長　接著，請兩位法庭之友陳述意見，時間各 5 分鐘。先請許幸惠女士。

法庭之友許幸惠女士　審判長、各位先進，大家在這裡，我們真的是無私的為社會、為國家，雖然看起來這件事情好像是小事，通姦罪的檢討，還有釋字第 554 號有沒有變更的必要。剛才聲請人、法務部、刑事廳也都表示了意見。我個人覺得，以聲請人的立場，釋字第 554 號，憲法第 7 條、第 8 條、第 22 條、第 23 條都闡述的非常清楚，沒有違憲的問題。除非像聲請人說的，現在的社會已經不存在通姦刑罰化之通念之共識，在這個狀況下，才有可以變更的理由，這一點是事實問題。現在的社會到底對婚姻家庭的看法，還有結婚的價值，通姦罪是不是要用刑罰來處罰，真的有通念了嗎？這個通念是要廢除的通念嗎？法務部剛才也報告的很清楚，以民間的意思得到都是 70%、80%比例的反對。這件事實，其實我們在座的各位都沒有辦法擅自決定，現在的社會不是主張這樣，跟 18 年前第 554 號解釋當時大法官所認知的社會已經起了大變化。有沒有變化，應由最高立法機關代表民意，甚至要用公投來決定，不是我們在座的人說這個事實現在改變了，所以這件事情是很重要的。我們今天討論這件事，牽涉到的是婚姻的價值，家庭制度的價值，是不是有婚姻、家庭這件事，與通姦罪有關，所以刑法要介入？我們大家都曉得，如果不結婚，根本沒有通姦罪存在的餘地，就是因為結了婚就要受規範，如果破壞了結婚當時的互相信賴及忠誠義務，形同傷害了家庭。家庭是國家社會的基石，所以一定要用刑罰來保護，不能動搖社會國家的基石，這也是當初的立

法為何要這樣立法。把通姦罪放在妨害婚姻及家庭罪章中，是有其特別意義的。這一點各位一定要思考，是不是可以像聲請人將通姦罪抽離出，單純是兩個人的事情，是婚姻當事人的事情？還有說婚姻幸不幸福不是靠這一條刑法，當然不是靠這一條刑法，這是大家所認知的。

今天因為時間關係，我主張第一個重要的是，刑法第 239 條不是廢除的問題，情事的變更，釋字第 748 號已經承認同婚也是婚姻，所以刑法第 239 條應該要重新定通姦的定義，然後將同婚也納入，因為同婚更需要安定，才會麻煩大法官、立法院將同婚納入。他們既然要安定的經營共同生活，這樣的理念與異性婚一樣，為了整個社會安定，需要的是刑法第 239 條的修正或補充，而不是廢除，因為廢除事情很大條。

審判長　請紀惠容女士發言。

法庭之友紀惠容女士　審判長、各位大法官，還有各位先進大家好。站在民間組織的一個角度，我也想來發言。首先，我要講一個案例，這是我第一次遇到通姦罪，而且非常震撼。1994 年師大的一個狼師性侵女學生，女學生勇敢的想講出來，不要再有第二個受害者，當她講出來之後，婦女團體當然就去聲援她，支持她。可是沒想到狼師的配偶告她通姦罪，經過 2、3 年的訴訟，她不但成立通姦罪，而且女學生還要賠 50 萬元給他的家屬。當時所有的婦女團體非常的挫敗，我們覺得這個事情怎麼可以是這樣，而且要賠 50 萬。這個女學生已經身心俱疲，且已經有很大的精神狀態，所以她也沒有工作，後來婦女團體大家出錢，把它還掉了，我也是出錢之一的人。所以我對通姦罪非常的震撼，它居然可以幫助強勢、權勢性侵的人，讓他可以安全的下莊。

第二個我要講的是，通姦罪其實懲罰的大部分都是女性。剛

剛也有一個統計，在檢察官起訴時，男性被告多於女性，當定罪時，可以看得出來是女性多於男性。反而是小三、小王被懲罰，剛剛已經提到，因為有但書，所以撤告不及於相姦人。這裡面我們看到的大部分都是女性被懲罰。

第三個，其實通姦罪是一個刑法恐嚇，是在維持婚姻，不可以去外遇。但我們看到的是，小學生都已經不處罰了，因為我們不主張恐嚇小孩，小孩才會乖。我國還在用恐嚇式維持一個婚姻，但是無法維持一個美滿的婚姻。

第四點，一旦婚姻破裂，如果要走訴訟路線，耗時耗力又花錢。有很多我們服務的婦女，為了找證據，甚至違法去偷錄音，這都是違法的方式取得證據，甚至在法庭上這也不成為證據，我們看到的是非常的耗時耗力。為什麼我們不捨掉這個刑法的作法，而直接走民法，讓他在民法上得到賠償，這才是比較務實的做法。接下來，我要談的是，其實台灣還有通姦罪是全球中少數的幾個國家，看到通姦罪的國家，大概就是伊斯蘭教，在亞洲很多國家都已取消。我們還要維持在這樣的狀態嗎？

第五點，通姦罪違反國際人權公約，我們已經簽署兩公約，而且也看到 CEDAW 公約。審查委員來台灣的時候，都指出第 239 條就是違憲，違反國際人權公約。為什麼違反國際人權公約？因為變成國家介入家庭的隱私。特別講一個，國家的權力到底要到哪裡？國家的權力應該是要維持婚姻制度，但不能保證婚姻美滿，因為婚姻美滿是家庭個人要經營的，也不能保證沒有第三者的介入、出軌的可能性。所以我堅持希望能將第 239 條廢除，如果真的婚姻分裂，走民法就夠了。

審判長　現在繼續進行交互詢答程序。請問聲請人方有無問題詢問相關機關？

聲請人指定代表林孟皇法官問　剛剛看了法務部的書面意見，非

常佩服法務部對維護婚姻及家庭制度的用心。有個問題想請教，危害婚姻及家庭，實務上除了通姦、男女性器的結合外，精神外遇、男女間的愛撫，甚至像柯林頓總統的口交行為，基本上都是危害婚姻，甚至危害家庭。尤其司法院釋字第 748 號解釋通過後，法務部也依照解釋意旨制定了兩性可以結婚的法律制度。同性伴侶間的肛交行為，目前司法實務上，也不構成犯罪。實務界的法官因採性器結合，所以很多判決被批評為恐龍法官。請問法務部，既然主張不變更釋字第 554 號解釋，也不要除罪化，是否有什麼立法計畫，去處罰肛交、口交等行為？另外，如果本次釋憲案被大法官宣告通姦罪除罪化，不知法務部有何因應的立法計畫？如剛才法庭之友所說，可能必須在民事賠償、婚姻制度作一些強化。

第二個問題，看了司法院刑事廳提出的書面意見，其實刑事廳不管在刑法或是刑事訴訟法的意見都是有利於我方聲請人的，照道理我不應該提出這個問題。不過基於法律人對正當程序的堅持，我有一個疑問，希望大法官有機會在解釋中就此問題回應。中華民國的憲政制度蠻特別的，司法院享有法律提案權，甚至有規則制定權。以刑事廳出具的刑事訴訟法的意見，基本上就是代表司法院的意見，因為刑事廳只是司法院下的業務廳。司法院正、副院長作為司法院院會的當然委員，參與這樣的釋憲聲請案，不知有無迴避的問題？這是我困惑很久的問題。我希望藉此案，大法官在解釋時能就此問題作回應。

審判長　請問法務部代表有無回應？

法務部指定代表朱富美檢察官答　審判長、各位大法官、在座的各位先進大家好，非常感謝聲請方的提問。第一個問題，牽涉到性忠誠義務的違反，其實並不是現實實務所採的性器接合的問題，第 239 條通姦行為的發生要處罰，因為會影響配偶、子

女，影響非婚生子女的誕生。非婚生子女的誕生會影響到親屬關係、撫養、教養、繼承，還有可能發生墮胎、棄養、溺嬰等社會或犯罪問題。因此這裡討論的是一個制度，並不是一家一事，也不是個人幸福美滿不美滿，也不是情緒性的反應。我們談的國家設立的婚姻制度，對這個制度的保障。因此剛才法官的提問，我們可以講，婚外的性行為與婚內不與配偶為性行為，不能等同並論。釋字第 748 號解釋談的是婚姻的締結、開端，沒有影響到第三人，是不一樣的。性忠誠義務的違反，除了通姦以外，會產生其他人倫秩序的違反，重大有生育繁衍的問題。目前部裡沒有把性忠誠義務的違反擴張到其他領域。

第二個部分，就制度的設計，有沒有什麼樣的補強？這個問題牽涉比較大，也牽涉民事。目前就我們所知是沒有。本來婚姻制度的設計，依照各國國情有很大的差異，剛才次長及司長也有報告，各國沒有採通姦罪刑罰化的國家，大部分都不是透過違憲的審查來宣告違憲，大部分是國會透過立法的方式，表達大部分民意的表示，由國會修法或廢止法律。講韓國、印度及義大利，其實義大利原來被宣告違憲的法律就非常的離譜，裡面還有納妾的規定。印度更不用說，被宣告違憲的條文超級違反平等原則。韓國用性自主、隱私權。我覺得立法例當然可以參考好的，但國情不同就是國情不同。不要講其他很遠的部分，以目前防疫戴口罩來說，國內是多麼緊張，美國、歐洲等國家，看到電視畫面，大家還是不戴口罩，由這麼小的例子可以看到，什麼是國情的不同。我們認為這件事情應由立法機關盱衡全局定之。至於採民事或是刑事，本來就要看國內夫妻對配偶忠誠義務違反的容忍，對這個規定的依賴性。剛才部裡也提出統計數字，可以看到從 105 年到 108 年，一年受理的案件人數有 2,000 人，也就是說這就是社會的民情，文化的一部分。

有 2,000 人依賴刑事訴訟的處罰，不是檢察官喜歡辦這種案件，檢察官在證據的採擇也是非常嚴謹，一年以證據不足不起訴處分的將近五成。

制度與國情有很大的關係，以美國來講，美國在 2012 年，法務部舉辦公聽會的時候，我個人有參加，那時全美有 23 州採取通姦罪要刑罰化，8 年後的今天，只剩 18 州。也就是說，8 年內很多州的州民透過國會認為這個法律不是他們社會所需要的。像紐約、麻薩諸塞州、伊利諾州都有全世界最知名的法學院，難道沒有法律專家？芝加哥大學、哈佛大學、波士頓大學，哥倫比亞大學。為什麼沒有人去提，因為裡面牽涉太多複雜的因素，有宗教、文化、傳統、歷史，還牽涉國情、地域，當然也牽涉當地檢察官不喜歡用，檢察官不喜歡用，就涉及檢察官裁量的問題。

1983 年是全美保留通姦罪刑罰化唯一的州是麻州，它的最高法院受理了唯一一件通姦罪刑罰化合憲性的案件，麻州最高法院最後決定認為沒有違憲問題。判決結論很簡單，就是說這個牽涉公共利益，是公共政策形成的問題，如果百姓不喜歡把通姦罪定為犯罪，檢察官不喜歡起訴或偵辦，請跟立法機關反應，讓立法機關去修法或廢止，法院不能介入。

審判長　請問司法院代表有無回應？

司法院刑事廳指定代表彭幸鳴廳長答　就所詢第二個問題，作一簡單的意見提供。我們認為大法官的審判與一般的司法行政應是分開處理的。本次奉通知前來進行言詞辯論，相關文件往來，在司法院內均僅二層決行，由秘書長決行，並沒有送到副院長、院長做相關的處理。

審判長　相關機關有無問題詢問聲請方？

法務部指定代表朱富美檢察官問　請教聲請方，隱私權與家庭的

關係，牽涉的問題很多。從受孕、就學、家宅的搜索扣押等，都是隱私權與家庭婚姻的關係。當隱私權的保障對象涉及婚姻時，已婚者的性自主自由，是否應有更多公共利益的考量，應該與未婚者分別以觀？婚姻是國家規定的法律制度，婚姻有繁衍、教育、經濟、文化等多重功能，歷經多號的司法院大法官解釋的闡明。這些功能與維護人倫秩序的價值，是否構成憲法第 23 條維護社會秩序、增進公共利益的考量？這是第一個問題。第二個問題，如果聲請方認為結婚與沒結婚沒有什麼不同，是否主張擴張釋字第 554 號解釋，主張已婚者享有的是通姦決定、通姦行為，或婚姻外的合意性交的獨立憲法基本權？還是說這是個人憲法基本權的再解釋或再延伸？

審判長　聲請方哪一位法官代表發言？

聲請人施育傑法官答　各位大法官、各位先進好，我是桃園地院法官施育傑，簡單答復法務部的問題，第 1 個問題，關於性，在婚姻內、外、未婚或者一些狀況，有無差別？剛才林孟皇法官所提同性婚的問題，若法務部是站在繁衍的立場，我非常希望法務部訂定刑法第 239 條但書：「不孕、戴套或避孕者，不在此限。」因為這樣沒有繁衍的問題。第 2 個問題，關於隱私與婚姻外性交基本權的問題，不如從一般人格權或一般行為自由出發，不要界定為婚姻內外。

審判長　現在進行聲請人方或相關機關詢問鑑定人、法庭之友，詢問前應先經本庭許可，詢問與答覆均不逾 5 分鐘。

本次邀請的鑑定人較多，致未能一一陳述，希望藉由備詢來提供意見。請問聲請人方有無問題詢問鑑定人或法庭之友？

聲請人指定代表林孟皇法官問　請教薛智仁教授，鑑定意見第 5 頁提到基本上通姦罪不會限制隱私權，但第 18 頁卻也提到可能會二度傷害隱私權，認為「通姦罪之追訴在事實上潛藏過度侵

害當事人隱私權的危險」。薛教授是少數不認為通姦罪有侵害隱私權，但後面卻又這樣認為，立論上有無矛盾？再者，雖然通姦罪的制定看起來未對隱私權產生侵害，但既然制定成為一個犯罪，就會有追訴的問題。所以從本質上來看，通姦罪的制定當然就會對當事人進行直接的窺探與干預，基此，應否認為仍有侵害隱私權的問題？請薛智仁教授作進一步說明。

鑑定人薛智仁副教授答　謝謝林孟皇法官的提問。在干預基本權部分，之所以認為不會侵害隱私權，是著眼於刑法第 239 條本身只授權限制性行為自由，並不當然包含刑事追訴的手段。換言之，刑法第 239 條本身是規定在某個範圍內，國家可透過禁止通姦的方式來產生基本權干預的效果。在此層次上，我之所以認為沒有侵害隱私權，係因將隱私權理解成是對個人生活秘密空間的刺探，單純禁止通姦並不會造成此刺探。而我為何會在手段的狹義合比例性部分，將通姦行為之追訴所導致的隱私權侵害納入考慮？係因某種程度上我認為在進行狹義合比例性之審查時，應可將通姦行為間接所造成的其他損害，特別是透過刑事追訴所造成的影響，也可納進來考慮。基於以上考慮，所以在狹義合比例性的審查上，將通姦罪追訴所造成的隱私侵害，當成是一個間接效果，而納入考慮。簡單補充說明，若在狹義合比例性部分，不將通姦罪追訴所造成的隱私侵害納入考慮，則必須考慮現實上通姦罪追訴之所以能發生效果，或是說現實上能追訴到通姦，往往是因為在訴訟上我們採取某些過度侵害隱私權的調查方法，而使得我們可以證明通姦事實的存在，進而追訴。但如在程序上不採取過度侵害隱私的方式來調查通姦事實，會使得通姦事實變得更難被確認，以致於更進一步去弱化通姦罪所可能產生一般預防效果。總之，我的看法是在狹義合比例性的審查上，若將通姦罪追訴所額外造成之隱私

侵害危險納入考慮，因其負面效益比較大，而使得違反狹義合比例性；但若不將通姦罪追訴所額外造成之隱私侵害危險納入考慮，另一方面造成通姦罪追訴的效果，一般預防的作用變得更低，換句話說，正面效益也會下降，如此也會造成通姦罪的處罰違反狹義合比例性的結果。就結論而言，在狹義合比例性上，不論是否將通姦罪追訴造成之隱私侵害納入考慮，都不會改變通姦罪本身違反狹義合比例性的結果。

審判長　請問相關機關有無問題詢問鑑定人或法庭之友？

法務部指定代表林麗瑩司長問　同樣請問鑑定人薛智仁教授，第 1 個問題，薛教授在鑑定意見提到，特別在比例原則之必要性的衡量上，薛教授認為民事損害賠償與通姦罪要達到的目的不同，也就是在有效性的衡量上，將民事損害賠償的手段排除，但在狹義比例原則的衡量上，又認為通姦罪不符狹義比例原則。因薛教授在鑑定意見提到，婚姻制度之保障仍是一個重大法益，大法官歷來解釋認為婚姻制度具有憲法制度性保障位階，國家有保護義務。而這些手段都被薛教授排除，請問薛教授有無國家如何盡保護婚姻制度義務之建議？

第 2 個問題，延續剛才隱私權的問題，因薛教授在狹義比例原則的衡量上，提到通姦罪的負面效益，雖然通姦罪本身不侵害隱私權，但追訴程序上的手段可能會造成隱私權比較大的侵害，故薛教授亦承認這是一個間接的隱私權損害，在訴訟程序上造成一些負面效應。但薛教授的鑑定書上也提到，其實國家在追訴通姦罪上，刑事訴訟法對於國家行使強制處分權有很多重要的限制，在證據法則上刑事訴訟法有嚴格的證據禁止法則，甚至在行使強制處分，因通姦罪是屬於比較輕微的犯罪，國家不可用監聽、側錄或密錄等方式去取證，甚至通保法也禁止採取當事人的通聯紀錄，故對國家侵入隱私領域已作極大的

限制。而且薛教授也提到大部分通姦罪可能是透過私人的違法舉證來進行追訴。請教薛教授，在隱私權侵害部分，可否透過訴訟法來緩和？因為畢竟不是通姦罪本身侵害隱私權，舉例而言，刑事訴訟上有偵查不公開，將來也可在訴訟法上規定通姦罪之追訴轉成用不公開方式加以保障。另外，關於私人違法取證，也可透過個案的證據權衡法則來保護隱私，緩和對隱私權的侵害。

第 3 個問題，今天聲請人、鑑定人或法庭之友對於通姦罪的一般預防多所論述，也就通姦罪合目的性之審量上已有所論述，但大家對於通姦罪有無具備一般預防的效果，則是各說各話，大家採取的理論不一樣，見解不同。請問薛教授，關於刑罰的一般預防效果，是由立法者衡量各種因素決定比較好，或是由司法機關決定其預防效果比較好？

最後一個問題，鑑定人分別有美國法、德國法、日本法的背景，請教各位鑑定人，我國釋憲機關對於應刑罰性有非常自我自制的情況，基本上很少宣告一個刑罰全部違憲。請問德國聯邦憲法法院、美國最高法院或日本最高法院是否曾就國家的一個刑罰應刑罰性全部宣告違憲？不包括個案適用結果、要件不明確或刑度不合比例的違憲，而是就全部的應刑罰性宣告違憲的例子？請鑑定人賜教。

審判長　先請薛教授回答。

鑑定人薛智仁副教授答　謝謝林司長提問，先回答關於隱私的問題。鑑定意見之所以會在狹義合比例性部分，將追訴所帶來隱私侵害納入考慮，係因我觀察到實務上對於這種過度侵害隱私的追訴手段，事實上是採取相對比較容忍的態度，以致於對於所容忍的追訴手段本身對於隱私的危害程度，其實是有待商榷。若在程序上能就證據法則更加嚴謹，或是認定追訴手段合

法性的標準能更加嚴謹，當然是樂見其成。但如同剛才所言，越嚴謹的證據法則，相對的使得調查通姦事實的可能性變得越少，而使得通姦罪所產生的一般預防效果更加的下降，可能比目前我們所能追訴的通姦罪來的更少。因此，並不會改變違反狹義合比例性的結論。

第2、回答刑罰的一般預防效果，應由誰來認定比較洽當？我的鑑定意見可能跟其他聲請人或鑑定人最大的差別在於，我無法當然排除通姦罪帶有一般預防的效果，之所以這麼說是因為依照目前犯罪學的研究，雖然無法充分證實刑罰有一般預防作用，但到目前為止，也沒有任何研究否定刑罰的一般預防作用，所以在此現實之下，個人認為憲法法庭應尊重現實上的情況。再者，從比例原則手段適合性的審查上，基本上，手段適合性的審查所要求的門檻非常非常低，只要求手段並不是絕對無效、被證實為不可能達成目的，就可通過手段適合性的檢驗。基此，我認為的確無法排除通姦罪有可能對於潛在的行為人產生嚇阻力的效果，同時也對社會大眾宣示婚姻的價值或婚姻關係當中的忠誠是值得被維護。在此觀點之下，我認為通姦罪的一般預防效果，若立法處罰通姦行為，即表示立法者認為通姦罪有可能產生此作用，而立法者的這個判斷在沒有相反實證根據之下，憲法法院應予尊重。

至於在承認有適合性的前提之下，我又認為違反狹義合比例性，則立法者究應如何處理？我的看法是若可接受刑罰雖然不排除帶有一般預防效果，但所付出的代價特別是對人權侵害程度過重時，則必須接受一個結果，即放棄刑罰來達成一般預防效果。至於國家如何透過其他非刑罰手段達成一般預防效果？譬如可透過教育等方法。以上是我的看法。

審判長　剛才林司長提問不同留學背景的鑑定人，請兩位留美的

鑑定人張教授及李教授推派一位回應。

鑑定人李念祖教授答　我試著就不完全瞭解的問題回答，如同剛才關係機關所表達的，確實有不同國情的狀況。我的鑑定意見中也有提到，可能在其他國家未必存在，我們民法從開始建立婚姻制度以來，其實是改變一個非常大的傳統，以前我們是根據禮教社會建立婚姻制度、人倫秩序，按照父母之命、媒妁之言，由家戶長決定的不平等身分關係，而民法的婚姻制度建構一個性別平等、自主決定的身分契約關係，這是非常大的改變。但刑罰上繼續通姦成罪，受到傳統人倫秩序的影響，遠大於後來轉變成性別平等自主契約的影響，並未同步。其實傳統上的通姦罪是為維護夫權的存在，因為傳統上一夫多妻，一夫有妻有妾是長久的歷史事實，通姦只是為維護夫權存在。剛剛提到日本 1907 年的舊刑法規定，夫通姦不為罪，就是這個傳統的另外一個證明，這個傳統不只在我國，在日本可能也有同樣的影響，但我猜想在美國應該沒有這個影響。所以美國法院有沒有這樣判，跟我國要不要這樣做？其實並不當然可以相提並論。我們從這些統計數據可看出，至今觸犯通姦罪的男性，實務上其實多過於女性，但是受罰的女性遠多過於男性，照理說，既然同時處罰通姦與相姦，性別上的處罰效果應該一樣，可是剛才的統計數字可看出，觸犯通姦罪多的是男性，表示男性大部分或者說男性比女性，不曉得可否這樣說，更沈醉在過去通姦罪是為保護夫權，而不是限制夫權的這樣一個過去的假設中間存在。所以可見男人犯的比較多，但其結果受罰的卻是女人比較多，足以證明性別歧視的具體存在，而男尊女卑的男性優勢社會地位，也仍然長期存在，刑法及刑事訴訟法規定依附在這樣的社會意識中，繼續延伸且鞏固這樣一個性別差異的、應破除的性別不平等狀態。我必須提醒，根據憲法增修條文第 10 條

第 6 項，國家及國家所有的憲法機關都有義務主動積極的破除社會上的性別不平等，以促進性別實質平等。在座法官都在盡此義務，當然我們也很期待憲法法庭的大法官們也能體認到這條條文憲法責任的存在。

審判長　接著本席點名，請黃士軒教授以日本留學背景來回應。

鑑定人黃士軒副教授答　謝謝審判長，各位大法官好。關於剛剛林司長希望我就日本法的經驗，說明日本實務上是否會對一個刑罰規定以完全沒有刑罰必要為理由宣告全部違憲。以下分作幾點說明，提供各位大法官參考。1、就目前所知的日本實務以及向來日本實務傳統，確實非常少宣告整個規定尤其是刑法上面的處罰條款全部違憲，比較多採取的作法是，對於比較模糊而有不明確之虞的規定，透過條件的追加進行合憲性的限縮解釋。正如同朱富美檢察官所提國情不同的問題，茲就剛才提到為何日本實務對於這樣的規定有合憲性限縮解釋的空間，作一些說明。在採取合憲性限縮解釋時，個人粗淺的理解是前提必須是該規定有一定的模糊空間，且可以限縮。2、此問題若與我國通姦罪相比較，會發現稍有不同，我國通姦罪其實有兩個構成要件要素，第一個是有配偶之人，第二個是通姦行為。不論是有配偶之人的認定或是通姦行為本身，其構成要件要素涵義的範圍，其實並無非常不明確的問題。因此，在此構成要件要素內容下，還要如何限縮解釋？與日本實務採取的作法相比，會有一定的落差。3、日本學界對於日本最高裁判所或是更早以前的戰前大審院的態度，是否都贊成？就個人目前的瞭解，學說對於這樣的實務傾向並不是都認同，甚至也有相當多的批判。因此，能否將日本的實務經驗完全比附，認為我國有同樣參考的必要？有再斟酌的餘地。

審判長　還有兩位留德背景的王皇玉教授與蔡聖偉教授，先請蔡

教授發言。

鑑定人蔡聖偉教授答　謝謝審判長、各位大法官及各位先進。德國憲法法院是否曾針對刑罰制裁規範就應刑罰性部分直接宣告違憲？首先說明，這是一個純實然面的陳述，而能否從一個實然面的陳述導出一些應然的結論？這可以討論。即便我們侷限在實然面的陳述，比較近期的，德國憲法法院曾經討論過血親性交罪之合憲性，當時曾激烈討論過，憲法法院法官例如一些刑法學出身的法官直接表明支持違憲的結論，但最後還是作出合憲的決定。更近的，記得是去年年底，曾就第 217 條之 1 業務協助自殺罪宣告違憲。所以就實際運作狀況而言，其實是有先例。容我再補充一點，印象中日本也有先例，其殺害直系血親尊親屬罪也是宣告違反平等原則，這點可能再請黃老師補充。釋字第 554 號解釋有關應否以刑罰維護婚姻制度，認屬立法衡量的問題，但我目前的看法是，若屬立法衡量，由立法者決定，有一個前提，必須存在合憲的立法選項，譬如刑法第 239 條以刑罰維護，這樣的立法選項，若透過違憲審查的抽象判準，認其不符憲法秩序，則其就不應該是一個立法選項。先補充到此。

鑑定人王皇玉教授答

德國通姦罪根本走不到釋憲的程度，其實我在參與這次專家鑑定的時候，彷彿在進行法律考古學，因為整個歐洲是在1960年代到1970年代，整一波針對妨害善良風俗或婚姻家庭制度的刑法，幾乎各國全部都進行了非常多的刑法修正，其中有個非常重要的就是國家不能以一個特定或單一的性道德價值觀，藉以刑罰來型塑人民單一的價值觀。所以，在那一波的刑法修正中，像德國在1969年修正，除了廢除通姦罪之外，還廢除了人獸姦與同性戀，其實是刑法教授自覺要求國會立

法。為什麼會有這種自覺的立法，這要追溯到1964年代，在海牙曾經舉行過一次國際刑法會議，那次的國際刑法會議中，其實就針對通姦罪的廢除形成一個共識，即各國不應該再以通姦罪來聲稱是在維護婚姻家庭制度。在那次會議當中其實有很多歐洲國家都已經率先廢除通姦罪，比如當時的挪威、丹麥、瑞典、芬蘭、英國，均已經廢除通姦罪，但是從來不會讓它們的人民誤以為國家對婚姻制度的保護不再受到重視。所以，德國在1969年的刑法修正草案當中，大筆一揮就將我剛剛講的那些與單一性道德價值觀的法律，包括通姦罪等都廢除掉。針對通姦罪其實在當時的立法理由提到幾個重點，為什麼要廢除的理由，第一個就是案件量過低，第二個就是大多數提告的配偶，其實都是出於很卑劣的動機，比如出於報復或出於以金錢去勒贖對方，這種卑劣的動機基本上不太可能達到維護婚姻的目的，反而是在加速婚姻的破裂。所以，在1969年的刑法就直接將通姦罪整個廢除，在德國要到釋憲，幾乎是無法走下去，也不需要去走。最後我要講一件事情就是，為什麼要以通姦罪來維護婚姻制度，而且在當時民國初年制定法律的時候，把性當作是維繫婚姻的一個重大因素，但是現在已經面臨了新舊價值觀的一個衝突，因為目前在臺灣，各式各樣維繫婚姻的方式，其實非常的多，很多婚姻是有性無愛，有些婚姻是有愛無性，但是現在卻以婚姻的經營一定要有性的存在，來指導我們的人民，把性的出軌當成是破壞或使婚姻破裂的唯一原因，而且放在刑法裡面，這其實是非常不當的。目前在刑法上有四個條文與維護婚姻制度有關，第一個是重婚罪，第二個是詐術締結婚姻罪，第三個是通姦罪，最後一個是和誘有配偶之人脫離家庭罪，四個條文當中，其實只有通姦罪隱含了必須要有性在裡面，

但我剛才說過所有的婚姻，都不應該以一百年前農業價值觀、單一價值觀來衡量，一定要有性的存在，所以，今天還在認為性才是破壞婚姻的主因，其實這在今天年輕人的想法應該是不會贊同的。以上，謝謝。

審判長

請張文貞教授答詢。時間尚餘2分鐘，稍後大法官詢答時還有機會答復。

鑑定人張文貞教授答

就剛才關係機關的提問，美國相關法院有無對刑法違憲加以宣告無效，我想是有的，在鑑定意見書所提到的Griswold案件當中，事實上美國聯邦最高法院就對州法過度干涉人民的隱私權，認定相關刑法規定是違憲無效的，以上。其他的等後續階段再補充，謝謝。

審判長諭知：

詢答程序結束，現在休庭20分鐘，於11時10分續行言詞辯論程序。(10時48分)

現在續行言詞辯論，進行大法官詢問程序。(11時10分)

答詢時間各不超過5分鐘，答詢時請在席位上發言。

請各位大法官發問，並請先說要哪一位答詢。

請林大法官俊益詢問。

林大法官俊益問

主席各位大法官、各位先進，本席想請教司法院刑事廳代表，如剛才的報告，刑事訴訟法第239條但書有諸多違憲之處，如此肯定而嚴厲的批判，敬表佩服，請問主管刑事訴訟法的司法院，有無提案刪除該條但書的修法作為？

司法院刑事廳指定代表彭幸鳴廳長答

感謝林大法官對這部分的詢問，事實上有關這條規定，在總

統府司法改革國是會議2017年5月18日第6次會議，已經作成希望能夠刪除的方向。所以，前提是如因故沒有辦法立刻廢止刑法第239條之罪，就應該即刻刪除刑事訴訟法第239條但書規定，回歸刑事訴訟法告訴不可分原則的適用。因此，本院刑事訴訟制度研議委員會，已將這個決議納入議題，將適時進行研議，謝謝大法官的垂問。

審判長

先請黃大法官昭元詢問，再請呂大法官太郎詢問。

黃大法官昭元問

本席有個問題要請教張文貞教授及李念祖教授，因為二位的鑑定意見中，都有提到通姦罪適用的結果，有產生明顯的性別差別待遇，所以，進而主張通姦罪違反性別平等。本席的問題在於：這是刑法第239條的問題？還是刑事訴訟法第239條的問題？意即通姦罪如有造成性別不平等，是因為刑事訴訟法第239條容許告訴可分所造成的？還是刑法第239條本身就必然或明顯會造成此情形？本席的問題換個角度來問：假如刑事訴訟法第239條刪除，改成告訴不可分，要告就一定是二個一起告，如此刑法第239條是否還會出現適用結果的性別差異？

審判長

先請李念祖教授答詢。

李念祖教授答

謝謝黃大法官的發問，我的答案是刑法第239條與刑事訴訟法第239條，都有適用或效果違憲，也就是違反性別平等原則的問題，這個問題我猜想刑事訴訟法第239條比較明顯，刑法第239條在這個問題上，可能出現在不僅處罰配偶，而且處罰相姦者這個規定上。如果只處罰配偶，性別中立性與實施的效

果，會不會產生明顯的性別差異，這沒辦法試驗，只能推測。我覺得沒有效果差異的可能性比較大，但是現在有同時處罰相姦者的規定，已經在實際上產生適用效果差異的明白結果，這是我對這個問題的回答。

鑑定人張文貞教授答

審判長及各位大法官、提問的黃大法官，我的詮釋在意見書中與李念祖教授剛才的回答相同，我想刑法第239條的規定本身，與刑事訴訟法第239條但書規定本身，二者都有在適用上實質的性別平等的歧視。在刑事訴訟法第239條還是要回歸到婚姻關係當中，配偶間的實質權力結構、性別權利關係來看。所以，雖然搭配上刑事訴訟法第239條但書，會比較明顯的在男女性之間配偶關係當中，透過宥恕及撤回告訴之男女相關結果，剛才統計上都有看到，但是刑法第239條規定本身，在婚姻關係的權力結構當中，也可以看到事實上在男女配偶之間，不管是婚姻關係、親密關係、私密關係的維護上，與破毀之後司法訴訟管道的處理上，顯然有受到男女兩性在權力結構不同而有明顯不同的結果，這部分也有相關的實證數據可以支持，所以，我想就二個條文來說，都有實質性別平等的問題。以上。

審判長

請呂大法官太郎詢問。

呂大法官太郎問

上半場大家討論的焦點之一，就是通姦罪的維持，對於婚姻制度的維持有無幫助，甚至於有危害。本席想請教法務部，有無統計資料或研究，曾經有提出通姦告訴，甚至事後經判決確定之婚姻，最後是維持的多，還是不維持的多？比起沒有提起告訴或刑事追訴的一般婚姻狀況有無差異？本席的重

點在於假設沒有差異，前面一些假定這個制度存在與否，似乎就對婚姻沒有影響，倘若有此現象，則究係何種現象？

法務部指定代表林錦村司長答

謝謝呂大法官的提問，對於通姦罪與相姦罪起訴後、判決確定後，對於婚姻的維持有無幫助，事實上據我目前所獲得的資料中，沒有這方面實證的分析。

法務部指定代表朱富美檢察官答

要追溯到婚姻的維持，我覺得這可能是社會學、統計上比較繁重的工作，目前據我們所知，法務部沒有相關資料。但是，婚姻的維持可能有很多的面向，保持通姦罪，我舉一個很簡單的例子，對很多的弱勢，或者剛才鑑定人提到有些婚姻沒有性、有些婚姻沒有愛，也有一群民眾其實是沒有資力不懂民事訴訟，靠刑法所謂的預防功能擺在那裡。譬如曾經有個很簡短的例子，有一位本身是拾荒的工作者，他不懂也很窮，太太是比較稍微弱智，他去收垃圾，鄰居就來欺負太太，也不知道該怎麼辦。開始可能是有妨害性自主自由，到後來就變成和了，可是他也趕不走鄰居，因為他忙著要照顧生計，這發生在屏東地檢署，後來有其他鄰居告訴他可以提告，如果從這個面向來講，還是有一些被需要的功能。雖然沒有正面回答到大法官，提告之後的婚姻是否有繼續維持，這是因為社會婚姻狀況，實在太多樣，簡單向大法官報告，所以，在開端的時候，其實還是有一些人依賴所謂預防的、強制的、讓民眾產生畏怖的，或許有產生內在心理制約功能，簡短的報告，謝謝。

法務部指定代表蔡碧仲政務次長答

其實對於通姦行為的譴責，與刑法追訴這樣的行為，能否挽救行為人的婚姻關係，只是其中的一個功能，最主要是要來

嚇阻其他潛在行為人的實施，或者是在強化社會大眾對於禁止通姦的規範信賴，今天謝副教授書面意見也對這方面有多所論述，這是對於呂大法官的回應，謝謝。

審判長

請黃大法官虹霞詢問。

黃大法官虹霞問

大家好，本席接續黃大法官昭元及呂大法官太郎二位的提問，剛才黃大法官昭元提問時，在場非常多的女性，腦海中有無浮出一個影像，至少在本席的腦海浮出這樣的影像，在我們社會即便至現在，常常在相關的媒體上看到，當先生有些事情發生，尤其是關於性相關犯罪時，就會看到太太很認份的站在旁邊力挺先生，但是，我們也看到這些相關的幾項通姦罪，其實女性是配偶的通姦者也不少，好像本席從來沒看過女性被告旁邊先生站出來力挺的情形，這是否也某程度代表或反應，並不是那麼實質的平等。就從實質的平等來談，在很多鑑定人的意見書中，都顯現出來為何認違憲，很重要的理由是認為造成實質的不平等，針對此部分，有無造成很多鑑定人所認為實質不平等的現象存在？若有，又要從另外一個角度，今天討論的是刑法，刑法有最後手段性的必要性原則，剛才林孟皇法官詢問法務部一個問題，如果違憲，法務部有何因應之道，使本席想到假如法務部沒有因應之道，為什麼沒有？也就是說在刑法處罰是一回事，然後在民法上，本席認為法務部也盡了相當的努力，當然很多婦女團體也非常的努力，在民事上夫妻配偶之間的關係一直趨向比較平等化。這種狀況底下，目前民事的相關規定，從法務部的看法，認為若從民事補償的角度切入，是否還顯然不夠，而必須要用刑法來作為手段，亦即刑法作為手段的必要性部

分，希望能夠聽聽法務部的意見。

關於呂大法官太郎問到婚姻維持率部分，剛才法務部回答沒有實質資料，這部分本席想請李念祖教授再稍微說明，因為李念祖教授的書面意見中，有特別提到這部分希望法務部能提出寬恕配偶的再犯率及婚姻的維持率相關資料，甚至進一步認為，假設法務部無法提出相關資料，法務部應受到不利的結果。就這部分是否請再進一步稍微說明，也讓法務部有機會能夠加以回應。

本席手上有一份資料，是關於實質有無差別待遇的重要資料，除了剛才幾位包括張文貞教授、紀惠容女士等，很多鑑定人都已經有提到這部分，官曉薇教授有一篇文章，法務部可能沒有拿到，本席有這篇文章也將提供給法務部。本席需要法務部幫忙的是，官曉薇教授的資料，據說都是來自法務部或司法院的資料所作的演繹，希望法務部對於官曉薇教授文章中所用資料的正確性與法務部的看法，以及從這些數據所導出有實質差別待遇的結論，法務部的看法又如何。這部分法務部不用現在回答，但希望能儘快提出書面意見。以上是幾點希望法務部提供看法及回應。

審判長

請法務部代表答詢。

法務部指定代表蔡碧仲政務次長答

已經取得的數據，可以說明剛才李教授提到，很顯然是一個不平等的，也就是透過男女比對，起訴男少女多，實際上剛才也談到，這是刑法第239條造成的結果，還是刑事訴訟法第239條立法技術所衍生的事實。實際實務上運作的結果，也是黃大法官一直提到，為何站在旁邊的多是女性不是男性，其實社會的演進也會慢慢看到男性將來會站在旁邊，因為從諸

多的事實，反應出將來會是女男平等。還有緩起訴的運作，從94年直到108年，緩起訴對於女性是男性2倍，從105年到108年以檢方受理件數來說，通姦起訴反而是女多於男，但是相姦起訴反而是男多於女。所以，就男女性別在實務上的運作結果，事實上到底還是那個根源，是刑事訴訟法第239條但書造成的結果，還是刑法第239條所謂的實質不平等。本部對於刑法第239條規定，從來都沒有預設立場，但是我們認為刑法第239條人言言殊，每一位提出的看法，從年紀、社會歷練、婚姻生活，以我個人來講，我認為婚姻的存在，並不表示它一定幸福，對於這樣制度的維護，我們認為多過於所謂主觀上到底幸福與否。所以，我們持續的關注、傾聽，最重視、最能夠掌握民意的立法機關，我們認為如果透過多數的民意，匯集各界的意見，我們實際上每月都有刑法研修小組，不斷針對必須研修的議題都積極處理，這是我的回應，其他請同仁來回應。

法務部指定代表朱富美檢察官答　謝謝審判長及黃大法官的提問。可以很簡單地向各位大法官報告，這個牽涉到罪質的問題，因為通姦罪的嫌犯大部分是男性，不論是從身體的構造或主動方面，如果今天討論的是暴力犯罪、毒品犯罪，嫌犯也是男性比較多，因為是罪質的問題，男性的犯罪嫌疑人比較多，會站出來在電視前面懺悔，太太站在旁邊也跟這個有關係，再加上這些人大部分可能都是公眾人物，所以此與罪質有關係。我們認為刑法第239條本身無色無性，因為不論男性犯、女性犯，其實不會牽涉到誰會被起訴比較多，這是因為刑事訴訟法第239條但書的設計，今天如果刑事訴訟法第239條但書拿掉，要告一起告，要撤一起撤，怎麼還會有誰被告得比較多？美國的密蘇里州跟明尼蘇達州就有一個規定，男性通姦，不罰女性相姦犯，

立法設計就是這樣。

剛才有位法官聲請人提到現在民事損害賠償對通姦就是賠10萬、20萬，像這樣的金額是否也代表如果嫌犯是男性，也沒有辦法對其有預防或干預的功能？所以民事的設計，有時候在社會上真的有一些不足之處。簡短報告如上，謝謝。

法務部指定代表林錦村司長答　向黃大法官作說明，從民國94年到108年，整體來看，通姦罪與相姦罪起訴的比例，女比男約高百分之三到百分之四，但其中兩年，民國95年及96年，男性被起訴比女性還多，所以從統計數據來看，不是有明顯的男女差別。

審判長　請李念祖教授答詢。

鑑定人李念祖教授答　關於黃大法官的問題，我想講的是「效果」部分，立法之後能不能達到維繫婚姻的效果？所以要看的數據，不是有多少人被告，而是有無數據顯示，被告之後，婚姻仍然維持，與沒有被告，婚姻維持，二者之間有無差別？這是必須由社會學去做的統計，這樣才能驗證用刑罰手段處罰相姦行為，該手段能否合乎目的？亦即達到符合婚姻的目的？這件事情牽涉刑罰、牽涉人身自由，又牽涉到性別實質平等的破除，因此須採嚴格的審查標準。如採嚴格審查標準，根據過去大法官的解釋，此時應該由認為法律應該維持方來證明該規定的實質效果是存在的，亦即手段能達到目的之實質效果存在。但現在立法者說這樣的規定是為了維護婚姻，但是行使的結果，能否造成婚姻被維持的實際效果，是沒有統計數字顯示的，所以一直存在於預設、假設的狀態。從比例原則的角度來看，這應該是不合於「手段符合目的」的實質性要求。

審判長　請楊大法官惠欽詢問。

楊大法官惠欽問　關於刑法第239條通姦罪部分，本院曾經作過釋

字第554號解釋，這號解釋是在民國91年作成的，距離現在還不到20年，大概17年左右，法務部代表表示不到20年間，我們國內的情事並沒有發生很重大的變化，所以這號解釋似乎沒有予以變更的必要。司法院刑事廳提出的書面意見，關於這部分好像有不同的見解，但剛才口頭報告大概因為時間的關係，所以來不及說明，刑事廳是否要作口頭的補充？就此問題，也請問今天與會的聲請人及鑑定人，有無補充說明？如有，也歡迎提出說明。

司法院刑事廳指定代表彭幸鳴廳長答　刑事訴訟法第239條但書的手段，也就是容許部分的撤回告訴，效力可以不必及於另外一位必要共犯，是否有助於達成「顧全夫妻情誼、隱私及避免婚姻家庭破裂」之立法目的？在適合性原則的檢驗方面，剛才沒有時間可以報告完畢，就此部分，我們試圖從正面及反面分析，在正面的分析上，告訴人原諒了配偶，看起來是能夠顧及夫妻的情誼，可是相姦人部分也因為這項差別的規定，仍然必須進入法庭，所以相姦人在庭訊時的供述，或配偶以證人身分到庭作證，或其他相關的情形，可能對婚姻仍然會產生不利的影響。

審判長　針對剛才楊大法官的詢問，聲請人方有無補充說明？

聲請人指定代表何効鋼法官答　我的聲請書有提到關於事實變遷的部分，主要的立論來源是大法官兩號解釋對於婚姻的理解之轉變。在91年間釋字第554號解釋作成時，大法官對於婚姻制度的理解是「具有維護人倫秩序、男女平等、養育子女等社會性功能」，當時對於婚姻制度的理解，其實是一個相當社會制度上的理解，亦即其承載著社會上功能的制度，而不是一個單純個人權利的展現。但是這樣的理解，在106年釋字第748號解釋作成時，其實是有相當大的改變，當時大法官對於結婚自由的理

解是「攸關人格健全發展與人性尊嚴之維護」，婚姻已經從社會性責任承擔之單純性質，轉變成個人在社會中尋求一個可以共同維持生活、互信互愛、互相扶持的伴侶，建立一個密切連結共同人格發展的可能，已經從一個社會意義的概念，逐漸轉變成個人結婚的自由。這樣子的轉變，當然不代表婚姻的社會性意義完全消失，但這已經是一個典範的轉移，婚姻從傳統意義上，僅認為是一個社會上的單元，到現今的社會，認為婚姻其實是每一個個人在社會中生活，發展自己的人格，一個很重要的過程。從這樣子的轉變，回來看通姦罪，其實通姦罪的正當性相當程度是建立在婚姻作為社會性意義的價值上。如果今天我們認為婚姻的社會性意義已經相對淡化，認為婚姻比較重要的是個人在這個社會關係中如何建立其人格，在此情形之下，當然我們可以認為原本大法官在作成釋字第554號解釋時的社會狀態，對於婚姻的理解，還是從比較社會性意義下理解的狀態，已經在釋字第748號解釋，鈞院所認定的，婚姻是以結婚自由的方式來理解之後，這個社會事實已經有所轉變。

當然這個轉變，我們認為並不是單純只是大法官在個案上語言使用上的轉變，這有點過度低估臺灣社會價值上的轉變。司法終究不是一個脫離社會的制度，社會的變遷不是單純用一個單薄的問題的民調來決定。我想大法官在釋字第748號解釋對於社會變遷的觀察，反而才是精準的，我們社會在釋字第748號解釋作成之後，雖然有部分激烈的討論，但確實在108年5月24日大法官作成釋字第748號解釋的意旨，也在社會上獲得貫徹，有成千上百的同性配偶也都步入婚姻關係。依照大法官解釋所維繫的婚姻關係，也沒有造成社會的崩解，也沒有造成大量的仇恨犯罪，在在顯示，釋字第748號解釋當初對於結婚意義改變的觀察，才是符合社會上的現實，大法官當時所觀察到社會對於

婚姻制度改變的理解，其實已經可以佐證釋字第554號解釋當時所認定的社會現實，已經有所改變。

鑑定人張文貞教授答　審判長、各位大法官以及各位先進，我在我的鑑定意見書中有特別討論到釋字第554號解釋有無變更解釋之必要，我認為有，但論據其實不是來自於社會或任何情事事實上有變更，而是來自於我國透過大院的釋憲實務，現在已經對我國憲法所保障的重要基本權，與釋字第554號解釋當時有非常不同的進展及發展。其中最主要的進展有兩個，一是刑法第239條所涉及的隱私權的侵害，釋字第554號解釋作成之後，大院在釋字第603號解釋確認了隱私權是我國憲法保障的重要基本權，同時對於隱私權的侵害，必須提高審查標準來加以審查，這件事情是在釋字第554號解釋當時所沒有的。所以，大院非常有必要在今天就一貫的釋憲實務來重新檢討，才能建立我國從釋憲實務對於憲法重要基本權的認定、範圍與審查的穩定性。

剛才聲請解釋的法官也提到，在釋字第554號解釋當時，大院尚未對婚姻權作為憲法上的重要基本權有確定、穩定的實務見解。在今天，對於婚姻權作為憲法重要基本權的保障，也毫無疑問，所以我們面臨的是婚姻權與隱私權這兩個重要憲法基本權的衝突，大院顯然必須在目前我國釋憲實務對於基本權如此肯認的基礎上，對這兩個重要的基本權作權衡，再來重新判斷釋字第554號解釋，就今天釋憲實務對基本權的價值、規範與保障的範圍，有沒有必要作檢討。

另外一點，我的鑑定書沒有提到而必須加以補充的，當然就是實質的性別平等的保障，實質性別平等也是在大院作成釋字第666號解釋之後所加以確立的，也必須對於實質性別平等的差別待遇，作提高審查標準的審理，這點也是在司法院釋字第554

號解釋當時所沒有的釋憲實務。

綜合以上幾個在釋字第554號解釋之後釋憲實務的重要發展，大院都沒有任何的理由逃避，必須很嚴肅地面對我國憲法今天對於這些重要基本權的保障，與其價值的昂揚，如何從這裡來檢討刑法第239條及刑事訴訟法第239條但書的規定。以上。

謝大法官銘洋問　剛才聲請人及鑑定人都有提到平等權，甚至於實質平等的這些問題，通姦罪會被認為是懲罰女性的規範。看刑法第239條的規定，好像是要保障家庭或對婚姻的忠貞，但是很奇怪的是，該規定處罰的是：第一、通姦的配偶，第二、相姦者。相姦者對於通姦者的家庭維護或忠貞，其實並沒有忠貞義務，家庭也是由通姦者自己要去維護的事情，因此可否就教法務部，立法當時為何要將相姦者一併規範進去？剛剛法務部代表也有提到美國好像對於女性的相姦者，是不處罰的。如果刑法第239條刪除後段對相姦者的處罰規定，只處罰配偶通姦者，這樣是否就不違憲？是否還有可能認為以刑法處罰通姦者違背家庭的行為是不適當的？這點也請鑑定人稍微說明一下。

另外，剛剛鑑定人張文貞教授有提到對於隱私權的侵犯，問題是如果今天刑事上的處罰因為要蒐證，會造成對隱私權的侵犯，可是在民法上，通姦也是構成法定離婚事由，有無可能為了要能夠達成離婚的目的，還是必須充分蒐證，在這種情形之下，對於隱私權是否一樣會造成侵犯？

審判長　請法務部代表回答。

法務部指定代表蔡碧仲次長答　謝謝大法官。有關相姦人處罰與否，以及規範之後實效如何，其實更希望有一些數據，也就是有一些調查。我們不是一定以民意調查為依歸，事實上我們是要以合法的、專業的，經過考量後之民意調查，作為參酌。所以對於相姦人處罰與否，我們可以利用刑法研修來考量，也不

能因為有這樣的規定，就通盤認定刑法第239條係違憲。

審判長　再請張文貞教授回答。

鑑定人張文貞教授答　謝謝謝大法官的詢問。在我的鑑定意見書中提到，刑法第239條通姦罪所涉及的對隱私權的侵害，在配偶關係內的通姦人與配偶關係外的相姦人，其實不太一樣。因為我剛才提到刑法第239條所涉及者是隱私權與婚姻權的衝突與競合，事實上就隱私權的保障而言，任何個人有一個對其親密關係與私密關係不受國家任意侵害及自主決定的空間，而這個親密關係當然也包含排他性親密關係，所以一個人進入隱私權的保障，當然也會涉及婚姻權的保障，這是在婚姻關係的配偶，他對刑法第239條受限制的範圍。

剛才也有先進提到，一個人既然決定進入婚姻，事實上他進入了一個排他性的親密關係，這時候之所以處罰，係因只能維持排他性親密關係，而不能有其他的親密關係，何錯之有？問題是，這個排他性親密關係，與此親密關係的不受干涉跟自主決定，要落入國家刑法處罰的空間時，就必然會牽涉到區別與干涉，所以這裡就不是一個國家以刑罰手段可以介入的部分。可是對於相姦人的部分，當然他沒有一個排他性親密關係的承諾，但是就這個犯罪的處罰而言，會涉及對相姦人親密關係、私密關係的領域及其不受干涉，會有一樣的觸犯。這也是為什麼當要進行刑事訴追時，一定會涉及隱私權的侵犯。謝大法官提問，如果在刑事空間追訴上有這樣的問題，是否在民事追訴上，就沒有空間侵犯的問題？我們現在討論的是，國家以刑罰來干涉私密與親密關係，該規定之違憲審查問題，因為牽涉隱私權，所以涉及的就會是要提高審查標準來看背後是否有重大公益，以及手段與目的之間是否有實質關聯。在民事的關係上，顯然就不能透過國家公權力追訴的方式，必須用私人的方式來

取得相關證據，以進行相關的訴追。在這裡沒有國家公權力介入是一個非常大的差別待遇，所以我並不認為用民事的方式來處理這件事情，一樣會涉及隱私權的侵害上同等非難的評價。

再次要說明的是，在本件隱私權的處理，剛才也特別提到刑法第239條處罰通姦人與相姦人，在性別權力關係上，絕大多數案例的相姦人是女性。我剛才沒有回答到黃大法官比較細微的問題，事實上透過刑法第239條的處罰，對於相姦人的隱私權，因為相姦人不在這個婚姻關係內，是一個沒有作出在婚姻關係排他性親密關係承諾的人，所以他其實被刑法第239條作了一個更大幅度的、實質性的性別平等差別待遇，這是大院在審查刑法第239條要特別注意的部分。以上。

許大法官志雄問　對於刑法第239條的合憲性，究竟要採用何種審查基準，聲請人方及相關機關法務部的看法顯然不同，聲請人方主張採用較嚴格的審查基準，法務部則是秉持釋字第554號解釋之意旨，主張採較寬鬆的審查基準。請問雙方，何以不贊成對方的看法？對方的看法究竟有何不妥之處?如果鑑定人願意，也請提供意見。

審判長　請聲請人方回答。

聲請人指定代表吳志強法官答　謝謝大法官提問。關於這部分，我們當然知道負責實體法的修法專責機關是法務部，其實從釋字第554號解釋之後，直到現在這麼長的時間當中，也可以看到法務部作很多刑法的研修工作，但是一直到106年總統司法改革的國是會議中，都已經作出這樣的看法了，法務部也沒有進一步修法。這條規定與之前釋字第554號解釋的年代，其實不太一樣，剛才何　鋼法官有提到，張文貞老師、李念祖老師等幾位鑑定人也都有提到這件事情。在這樣的情況之下，侵害的權利部分已經影響到個人人格保障的隱私，隱私權是個人的基本權

利，同時也違反平等原則，所以我們認為審查基準已經不是單純屬於立法形成自由，而是必須提高到中度，中度是從嚴，甚至因為這是刑法的規範，其實應該提高到嚴格的審查標準。以上。

審判長　請相關機關法務部回答。

法務部指定代表林麗瑩司長答　法務部對於通姦罪是否合憲的審查基準，事實上也沒有採取一定的立場，只是依照司法院釋字第554號解釋來解釋，我們也不認為釋字第554號解釋是低度審查而已，至少是中度以上的標準。首先大法官特別肯定，通姦罪要保護的法益是婚姻家庭制度，它具有憲法上制度性保障的重大意義。特別在這次釋憲案大家都提到，釋字第748號解釋大法官再次肯定婚姻制度是「共同生活，成立具有親密性及排他性之永久結合關係」，特別擴大它的保護範圍，除了異性婚之外，同樣的婚姻制度也保障同性婚。所以在排他性的關係上，我們當然相信通姦罪並沒有因為釋字第748號解釋而產生不合時宜的狀況。在重大公益的審查方面，釋字第554號解釋也肯定重大公益保障的正當性。

另外在目的與手段之間的關聯性審查上，大法官除了作合理性說明之外，還作了一些具體的分析，甚至已經達到嚴格審查的程度，例如在手段適合性方面，肯定刑法具一般預防功能。在比例原則必要性的審查上，大法官特別提到性自由權是憲法第22條所保障的權利，有外在的一些界限，必須不妨害公共利益。釋字第554號解釋特別提到性自由必須受到婚姻與家庭制度性保障的限制，似乎大法官在這裡也暗示了性自由碰到婚姻制度的制度性基本保障時，它的位階應該是往下。當然，大法官也特別強調，對於性自由的限制，用到刑罰有沒有符合比例？這裡大法官也作了權衡，認為刑法第239條是低度刑度的，1年

以下有期徒刑，又透過告訴乃論或宥恕的緩和，讓其侵害性更小，也符合狹義比例原則的審查，所以我們認為釋字第554號解釋已經在中度的審查基準以上了。

至於，今天有很多聲請人或鑑定人提到是不是有審查不足的地方，譬如說在「手段有效性」，有沒有跟民事賠償制度加以作衡量，事實上，有效性的審查也有鑑定人認為民事訴訟的目的不在於保障婚姻，不適合在這裡作比較。也有人提到民事訴訟，本部的立場是認為，我們一貫在大法官也提到刑罰制裁跟民事訴訟之間哪一個手段有效的問題，在釋字第509號也作了很詳細的闡述，我們覺得這個解釋的理由在這裡有一體適用的情況，也就是說如果只有單純的民事賠償制度，可能會造成有錢的人就可以比較有能力，或者就可以恣意的去破壞這個法規，只要付了錢就可以通姦，造成保障的不平等，反而失去有效保障的手段。所以，我們認為刑事的制裁會比民事訴訟更有效達成保障婚姻制度的有效性。

另外，在「手段與目的權衡」上，今天也很多鑑定人提到「隱私權」的侵害，剛才我也請教薛智仁教授的時候特別提到「隱私權」的侵害是屬於訴訟法層面間接在追訴過程中間接產生侵害的效果，可以透過訴訟法上來緩和這個「隱私權」的侵害，包括證據法則的嚴謹。而且，事實上剛才也提到現在刑事訴訟法對於追訴輕罪，如通姦罪這樣的輕罪，在手段上有作嚴格的限制，基本上，國家不會去侵入這個私密的領域，最多現在實務上產生的都是「私人違法取證」，這也是可以透過個案在證據判斷上、證據使用上來加以權衡、緩和。

我再補充說明，通姦罪保障的法益是「婚姻制度」，而不是「婚姻完美」、「婚姻繼續維持」。婚姻制度在釋字第 748 號特別講到「排他性」的效果，它是在制裁破壞婚姻的「排他性」此點上，

它的保護目的在這，並不當然確保個別、個案的婚姻是否要繼續走下去。它保護的是這個婚姻制度值得的信賴性，還有進入婚姻者依自由意志，兩個人基於婚姻自由進入婚姻制度裡頭之後，兩個共同尊重雙方的人格發展、共同生活的承諾，若有破壞，也應該基於合意，或有可能去消解這個婚姻關係，這才是整個婚姻制度的意義與價值，而不是又透過法律強制，通姦罪也不必然一定要讓這個婚姻必須保持持續下去，才是對婚姻制度的保障，以上。謝謝。

審判長　時間已經到了，可以再延長一些，本席建請兩位憲法背景的鑑定人李念祖教授及張文貞教授，對於「審查標準」再為 2 分鐘之說明。

鑑定人李念祖教授答　謝謝。這次牽涉的標的基本權，包括憲法第 22 條，這裡頭包括釋字第 554 號解釋所講到的「性行為自由」或「性自主自由」，也可以把它理解為「隱私權」，也就是婚姻這個親密關係中間的「隱私權」問題，當然這裡還包括了「人身自由」，以及「實質性別歧視」的問題，不全然只是憲法第 22 條的條文。

我要在這邊特別想說一下，第 22 條裡面雖然文字上有「維持社會秩序、增進公共利益」的文字，但是，這個文字一定要跟第 23 條同樣的文字連結理解。換句話說，要限制第 22 條，仍然要回到第 23 條考慮，而不能單純從第 22 條的這兩句話就否定了「比例原則」的適用性，尤其是要適用到嚴格的比例原則的時候，不應該作這樣子的解釋。那本案中根據過去的解釋，包括第 666 號解釋，包括我們剛剛前面講到的第 603 號解釋等等，都需要發動「嚴格解釋」，因此對第 22 條的解釋是必須要作這樣子的理解。

最後加一句話，說民事賠償是給予富人金錢換取不法的說

法，這是一個很大的錯誤，這樣子的論據如果成立的話，民事賠償責任豈不盡在獎勵富人為侵權行為？而都應該改用刑法加以制裁？其實，民事法院是可以斟酌富人被告的財力，而判給與其財力相當的賠償，這跟刑事秩序是無關的，問題不只在於損害賠償不等於用金錢換取違法行為，也在於違約的公平法律救濟並不依賴施以刑罰嚇阻補充。謝謝。

主席　張文貞教授有無要回應？發言時間為 2 分鐘。

鑑定人張文貞教授答　為了維持釋憲實務的穩定性，我剛剛其實已經說過，因為本案涉及到釋字第 554 號解釋之後所發展出來的釋字第 666 號解釋性別的實質平等、釋字第 603 號解釋的隱私權跟釋字第 748 號解釋的婚姻權，而不管是相衝突的重要基本權，還是所設限制的重要基本權。其實，大院在過去這幾號解釋都是提高審查標準，所以，毫無疑問本案必須要提高審查標準。

主席　試問蔡大法官宗珍有無提問？提問時間要限制一下。

蔡大法官宗珍問　本席快快地請教兩位鑑定人李念祖教授及張文貞教授。請教李教授部分，李教授是有意地在論述中限縮在平等原則來作說明，但是，也有意地承認或者視之為前提，就是民事侵權行為損害賠償的這一部分，是被李教授視為前提。本席想請教的是，民事侵權行為損害賠償操作的結果，民法第 184 條第 1 項和第 185 條操作的結果也有可能會出現通姦罪告訴的問題，這個部分怎麼樣作論述？

同樣類似的問題也要請教張教授，也就是張教授的論述模式是不是、有無辦法處理，或者是避開民事侵權行為損害賠償的問題？這個問題，其實因為在座尤其是聲請人及在座各位先進的前談之中，似乎都已知，以民事的侵權行為損害賠償請求權的存在，是不必有太多的討論，是真的這樣嗎？本席想要追問

的是，到底婚姻忠誠義務所對應的權利，所謂的婚姻自由下的權利，是什麼樣的一種權利？那現在實務上又開始回頭使用「配偶權」，這個問題的討論與我們現在釋憲標的的討論關係如何？想要請教兩位鑑定人。

鑑定人李念祖教授答　非常謝謝蔡大法官宗珍一針見血的問題。回到蔡大法官宗珍的問題，我個人以為，我會很希望看到大法官在解釋的時候照顧到這個問題，也就是說在請求民事侵權行為賠償的時候，當事人仍然有可能基於復仇的意識，而針對特定的對象，特別是相姦人，來作損害賠償。這裡頭仍然可能有受到實質性別不平等觀念左右的影響，那這個時候牽涉到兩個問題，第一個，就是民法上要不要建立配偶的排他權作為侵權行為的內容，這是現行的司法實務上肯認的，但是，民法上沒有明文寫，那民法要不要寫或現在是不是有，這一件事情是不是應該讓諸立法者決定，還是只是當然的婚姻、社會制度的一環，這個其實是在憲法解釋中間可以處理的。但是，我覺得最少最少可以提醒法官在給予民事侵權行為，如果基於配偶權而給判決的時候，法官應該避免性別歧視的社會意識所造成的對性別的不利影響，在司法考慮賠償的時候加以納入，這個是在大法官解釋的時候是可以加以涵蓋。

鑑定人張文貞教授答　謝謝蔡大法官宗珍這個很細密跟精緻的問題。我特別要提到在我鑑定意見書的第 6 頁裡頭跟我剛剛的發言，我提到說：刑法第 239 條所要去落實憲法上保障婚姻權，是進入排他性親密關係的雙方。換句話說，如果今天真的有在民事關係上，有任何需要處理的對象，是這個進入排他性親密關係雙方的承諾的違反，跟第三人無關，因為第三人沒有進入這個排他性親密關係的承諾，這也是為什麼我剛剛建請大院在區別刑法第 239 條所侵害的主體的時候，在婚姻關係內跟婚姻

關係外要注意到基本權侵害的權利跟程度是不同的。所以，如果是這樣子，回到民事關係上，確實如蔡大法官宗珍所說，在民事關係處理這件事情上，是這個婚姻關係雙方他可能就他在承諾違反的部分有民事上的處理，並沒有及於第三人的部分。這個其實在南韓憲法法院的判決，在建議說，在民事上要如何處理這件事情，主要是就離婚，是在離婚的民事關係上就破綻離婚，就離婚的贍養費的處理以及離婚相關的金錢關係處理上，有這個部分的討論。那南韓的憲法法院也沒有及於對於第三人，最主要的原因就是第三人根本沒有進入這個在隱私權跟婚姻權交錯的排他性親密關係的承諾裏頭，那他當然不應該要成為如果憲法上要維護這個婚姻關係的落實、親密關係維護的處罰，更不要說是刑法上的處罰，以上。

審判長諭知：

大法官詢問程序到此，現在進行最後陳述。

請聲請人代表及相關機關最後陳述，發言不超過5分鐘。試問聲請人方指定何人為代表？

聲請人指定代表林孟皇法官　審判長、各位大法官以及在座各位先進，臺北地院林孟皇法官代表聲請方做最後陳述。

用簡單一句話陳述：國家不能為滿足情緒而動用刑法，以下簡單的說明。維繫一夫一妻的婚姻制度，確保夫妻間的忠誠義務，立法者制定的通姦罪目的正當，作為審判者的我多年來不曾懷疑，因而判了幾件通姦當事人有罪確定。一直到我承審某一件職棒明星案通姦案的時候，擺在我眼前的證據是告訴人夥同徵信業者侵入住宅，拍攝通姦人與相姦人全身裸體的影像，法院還必須依法勘驗，這個時候我才去懷疑究竟誰授予我自己這樣這麼大的權限，可以去公開觀看他人最私密的隱私，這個時候我才去省思到通姦罪有違憲的問題。

本庭臺北地方法院刑事第十庭據以聲請的釋憲個案，是一位通姦人跟配偶早就已經貌合神離，可是因為財產等等問題，一直沒有辦法離婚，那這個通姦人與相姦人也未婚生子，可以想見這一位未婚生子的小孩，未來勢必遭受汙名歧視，遑論這一對夫妻本來就生有小孩，他們面臨父母在提告這一件事情，也是情何以堪。傳統中國法僅課予妻子貞操義務，「通姦」其實是妻子出軌的同義詞，可見通姦罪它發軔自家戶長制思維，1935年修法並施行到今天的通姦罪，從處罰有夫之婦改為處罰有配偶之人的婚外性行為，看似貫徹了男女平等原則。可是按照剛剛有一份提到官曉薇教授他們研究團隊出具了一份法庭之友意見，用實際的數據指出經由偵查審判後，在處罰上不僅呈現明顯的性別不平等，也就是女性獲判有罪率明顯高於男性，而且通姦人跟相姦人的處罰也不平等，那從這個角度來看的話，就有違憲法平等原則，更罔顧憲法積極消除婦女歧視的保障意旨。

立法者想要藉由刑法的威嚇，懲罰所生痛苦，阻止婚外性行為對於婚姻關係的傷害，結果卻是對於個案中的人際關係有害無益，甚至導致夫妻離婚。像我剛剛提到我第一次面臨思考的職棒明星案，夫妻後來也離婚了。這裡就是有一個問題就是說，當臺灣多數民意支持通姦罪時，我們這一群法官為何不依法審判？仍要聲請大法官宣告通姦罪違憲？只因為中華民國不只是一個民主國家，更是一個共和國家，政府權力是分散由相對獨立的部門行使，如此政府權力才能受到節制，人民基本權利是可以獲得保障，在這個意義之下，議會多數決、公民投票固然彰顯民主，卻不能削弱被憲法保護的個人自由，而由不具直接民意基礎的大法官從事法律違憲審查工作，縱使大家都公認說這可能本質上是違反民主或多數決。

百餘年前，民意機構在審議「無夫姦」的時候，禮教派雖然

獲勝，卻不敵歷史洪流，現在已經沒有聽過什麼叫「無夫姦」。如今，面對多數民意所反對的通姦除罪化，改由大法官而不是由立法者來決定其存廢，彰顯的是臺灣的民主憲政更邁前一步，是真正的民主共和國。

最後，我們要強調的就是，除罪化不代表認可或鼓勵婚外性行為，也不是否定家庭或者婚姻，而是人類情感的尊重與體認必須發自內心，這是不能用刑法來逼迫因通姦而受害的焦慮與痛苦，也必須透過其他方式來紓解，因而，為了被害配偶和公眾情緒的滿足，以最具嚴厲性的刑法制裁單純違法道德、婚姻契約中性忠貞義務的通姦行為，不僅限制人民性行為自主權及隱私權，而且無助於目的達成，更有違比例原則，應屬違憲。請大法官們秉於憲法所負責的職責，一如在釋字第 748 號解釋中勇於承擔、肯認同性伴侶婚姻自由的作法，變更釋字第 554 號解釋意旨，宣告通姦罪規定違憲，向臺灣公民們宣示國家不介入人民親密關係的事務，自己的情感與婚姻得靠自己經營。謝謝各位。

審判長

請相關機關方法務部、本院刑事廳代表陳述，發言時間各5分鐘。

法務部指定代表蔡碧仲政務次長　18 年來，對於個人自由也就是婚前性自由有漸趨開放的趨勢，這是不可否認，但是，這樣的一個自由當你進入一個婚姻制度之後，這樣的自由因為沒有辦法分享，所以，這些必須限縮。那麼，尤其所謂大家一直認為好像第三人是無辜的，其實，事實上，通姦罪沒有第三人相姦是不可能成立，所以，這是一個必要的共犯。事實上，沒有第三人的誘引，通姦罪也很難成立。本件本部一直認為既然基於婚姻自由而選擇進入婚姻制度，那就必須有義務去維護婚姻、

家庭制度。而且，不是只有婚姻、家庭制度必須要維護，這還涉及到社會生活秩序所必要，因此，才有刑法第 239 條的規定，那麼，這個規定當然必須要對人民的性的自由權跟隱私權要有一個適度的限縮，這個就是釋字第 554 號所彰顯的，也認為這跟比例原則並沒有違誤。

18 年來，這樣的一個認知、肯認並沒有變化，所以，對於通姦行為的譴責跟刑罰，大家都誤以為本部是要把一個破碎的婚姻再把它挽救回來，當然這是一個希望，但是，這種希望常常是會違反我們的初衷。甚至，本部最重要的是強化社會大眾對於禁止通姦規範的信賴，希望一個破碎的家庭或許它可以維護，但是，如果沒有維護的話，也要給予處罰，讓配偶有一個重生空間。所以，對於通姦行為的譴責跟處罰，是能否嚇阻其他潛在行為的實施，或者是強化社會大眾對於禁止通姦規範的信賴，而不是在於追訴通姦能否挽救行為人的婚姻關係，你只要選擇婚姻才受限制。

那麼，數據可以告訴我們鑑定人所懷疑的有關違反男女平等的這些，剛剛本部已經陳述過，所以，司法院大法官歷來的解釋，對於刑罰存在的本身一向都是尊重立法權的行使，今天諸多包括聲請人、鑑定人的論述事實上也未推翻這樣的前提。釋字第 554 號解釋也是採取這樣的看法，請審判長、各位大法官也都能夠尊重富有洞察民意的立法者決定。今天時過境遷之後，對於婚姻、家庭透過刑法 239 條的規範、意義，跟它實施的效果若何，到目前來講，也沒有人提出一個任何說這條的存在，對於因為這條的規定受到若何的傷害，也沒有人去反對因為這一條的規定，讓很多人安於現狀，即便在一個大家都知道婚姻的存在不表示它一定會幸福，但是，婚姻的存在卻是社會安定的基石。所以，我們大家心裡有數，即便幾十年婚姻它的

存在，彼此之間或者愛意已退，但是，彼此之間為什麼還能夠在婚姻、家庭共同努力，有諸多的考量，所以，希望各位大法官能夠考量把這樣的一個難題，讓我們的立法者，雖然民意或許不一定能夠彰顯多大的價值，但是，這麼高的 7、8 成民意不能夠罔顧，希望各位大法官能夠重視。謝謝。

司法院刑事廳指定代表彭幸鳴廳長　釋字第 554 號解釋到現在，跟婚姻有關的法律修法，對於保護婚姻中的弱勢配偶已經大有進步，這也就是為什麼國人的觀念已有所轉變，因此，在 106 年的總統府改革國是會議第 5 分組第 6 次會議，在 106 年 5 月 18 日通過廢止刑法第 239 條及刪除刑事訴訟法第 239 條但書的決議。在理由中也提到刑法通姦罪的存在，對於性別平權意識尚未發展，我國性平法制多有缺漏的那個年代有其保護弱勢配偶的功能，但是，現今我國已經有家庭暴力防治法與性侵害防治法，在民法的親屬篇內就夫妻財產制、離婚有責與破綻主義、子女的監護，已經符合性別主流化的標準，並且，以子女的最佳利益為親權行使的依歸，所以，以國家刑罰權來介入私人關係的通姦罪，目前存在的正當性已經薄弱。

司法院釋字第 554 號解釋公布於民國 91 年 12 月 27 日，距離現在已經有 16 年的時間，時代變遷，國人對於婚姻及性的觀念也已經有所改變，重視性自主權，認為人是性自主權的主體，而非客體，至少社會變遷已經帶來多元的性價值觀。現行的規定是否足以因應多元的家庭狀況，而沒有產生在這個規定上不公平之處，這已經是值得可疑。在本廳的書狀註 53 部分提到，有關性別歧視的審查標準，我們引用美國聯邦最高法院在維吉尼亞州軍校限收男性學生是否構成性別歧視的案件中也採取相同標準，認為必須由軍校提出「非常具有說服性的正當理由」來證明這一項的性別分類，是為了達成重要的政府重要目的，

因此，維持通姦罪能達成對婚姻的保障情形如何，舉證責任應該在實體法的主管機關。

釋字第 554 號解釋到現在相關法律的規範已經歷經修正，讓遭受妨害婚姻的配偶可以請求高額的損害賠償，離婚剩餘財產分配、贍養費以及子女監護，使其在經濟上可以自立，已經足以保障弱勢配偶爭取權益，並且懲罰通、相姦者對於婚姻家庭的破壞，因此，本廳認為通姦罪已經沒有繼續存在必要。

另外，刑事訴訟法需要研議的部分很多，時程安排上並不是一蹴可幾。本廳已經將刑事訴訟法第 239 條但書排入本院的刑事程序制度研議委員會討論項目之中，原本就會適時地規劃研議好，但是，立法期程深受各種因素的影響，例如，本廳也必須要徵詢法務部的意見，必須要經行政院的會銜，還必須經過立法者的共議共決，是否能通過法案尚在未定之天，現在因為大法官進行憲法法庭的言詞辯論，所以，先將本廳的意見提供給大法官參酌，以上。

審判長諭知：

最後陳述程序完畢。

本案言詞辯論程序終結，本院將於一個月內指定期日公布解釋，退庭。

書記官　高碧莉

楊靜芳

審判長　許宗力

中　華　民　國　1　0　9　年　3　月　3　1　日

抄 本

發文方式：電子交換（第一類，不加密）

檔　　號：
保存年限：

司法院秘書長　函

地址：10048臺北市中正區重慶南路1段124號
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受文者：內政部
發文日期：中華民國109年4月7日
發文字號：秘台大二字第1090009166號
速別：最速件
密等及解密條件或保密期限：
附件：如文

主旨：本院大法官為審理會台字第12664號臺灣苗栗地方法院苗栗簡易庭快股法官等聲請解釋案，請於函到10日內，提供說明二所列事項，俾供審理之參考，請查照。

說明：

一、依司法院大法官審理案件法第13條第1項規定辦理。

二、請提供列於附件光碟內之身分證字號清單（包括103、104、105、106、107及108年度清單）目前婚姻狀態之統計：

(一)請勿提供個別之婚姻狀態，僅需提供目前婚姻狀態仍存續及已離婚之比例（下稱系爭統計）即可。

(二)各年度清單均請提供2個比對基準日之統計，比對基準日為該年度12月31日及5年前之12月31日，例如103年度清單之比對基準日為103年12月31日及98年12月31日。

三、各年度之清單僅為審理旨揭聲請解釋案而請貴部提供系爭統計之用，不得移作他用，並請於回復本院時，一併歸還附件光碟。貴部使用前開清單時請遵守個人資料保護相關規定。併予說明。

正本：內政部
副本：

郵　　寄：內政部

正本

檔　　號：
保存年限：

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受文者：司法院秘書長

發文日期：中華民國109年5月4日
發文字號：台內戶字第1090242357號
速別：普通件
密等及解密條件或保密期限：
附件：如說明四

主旨：有關貴院大法官為審理會台字第12664號臺灣苗栗地方法院苗栗簡易庭快股法官等聲請解釋案，請本部提供相關統計資料1案，復請查照。

說明：

一、復貴秘書長109年4月7日秘台大二字第1090009166號函。

二、經檢視來函提供之國民身分證統一編號清單計1,904筆（103年至108年，計6年），其中同年度重複者5筆，錯漏或屬居留證號者61筆無法比對，因此，實際比對及統計筆數計1,838筆。

三、查本案涉6個年度，統計需求邏輯複雜，經戶役政資訊系統轉錄比對資料及人工多次檢核等作業，分別提供前揭清單最新資料（截至109年4月21日）及各年度2個基準日（當年度12月31日及5年前之12月31日）之婚姻狀況（包含有偶、離婚及喪偶）統計，另各年度當事人已死亡不納入計算。

四、檢附「各清單年目前婚姻狀況統計表」（如表1）、「各

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清單當年年底婚姻狀況統計表」（如表2）及「各清單年之5年前婚姻狀況統計表」（如表3）等3份客製化統計表，並檢還來函附件光碟1片。

正本：司法院秘書長

副本：

裝

部長徐國勇

訂

內政部

線

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表1　各清單年目前婚姻狀況統計表

單位：人；%

清單年別	性別	總計	死亡	目前婚姻狀況						
				合計	未婚	有偶		離婚		喪偶
						人數	比率	人數	比率	
103年	計	297	7	290	58	95	32.76	129	44.48	8
	男	129	5	124	26	39	31.45	56	45.16	3
	女	168	2	166	32	56	33.73	73	43.98	5
104年	計	319	2	317	45	118	37.22	149	47.00	5
	男	156	1	155	19	67	43.23	68	43.87	1
	女	163	1	162	26	51	31.48	81	50.00	4
105年	計	313	5	308	55	104	33.77	147	47.73	2
	男	134	3	131	23	54	41.22	53	40.46	1
	女	179	2	177	32	50	28.25	94	53.11	1
106年	計	304	4	300	54	105	35.00	134	44.67	7
	男	146	3	143	21	60	41.96	59	41.26	3
	女	158	1	157	33	45	28.66	75	47.77	4
107年	計	312		312	65	118	37.82	127	40.71	2
	男	149		149	29	60	40.27	58	38.93	2
	女	163		163	36	58	35.58	69	42.33	
108年	計	293		293	65	95	32.42	128	43.69	5
	男	150		150	38	60	40.00	52	34.67	
	女	143		143	27	35	24.48	76	53.15	5

說明：1.來函提供資料計1,904筆，扣除當年度重複者5筆，以及因所提供資料錯漏致無法比對者61筆，各年度清單合計1,838筆。

2.當事人目前已死亡者計18筆，不列入當年度比率計算，合計**1,820**筆（其中103年290筆、104年317筆、105年308筆、106年300筆、107年312筆及108年293筆）。

內政部戶政司編製

表2　各清單當年年底婚姻狀況統計表

單位：人；%

清單年別	性別	總計	當年死亡	當年底婚姻狀況						
				合計	未婚	有偶		離婚		喪偶
						人數	比率	人數	比率	
103年	計	297		297	78	102	34.34	111	37.37	6
	男	129		129	33	52	40.31	42	32.56	2
	女	168		168	45	50	29.76	69	41.07	4
104年	計	319		319	67	124	38.87	124	38.87	4
	男	156		156	33	76	48.72	46	29.49	1
	女	163		163	34	48	29.45	78	47.85	3
105年	計	313	1	312	66	120	38.46	124	39.74	2
	男	134	1	133	28	66	49.62	38	28.57	1
	女	179		179	38	54	30.17	86	48.04	1
106年	計	304	1	303	66	111	36.63	118	38.94	8
	男	146	1	145	26	66	45.52	50	34.48	3
	女	158		158	40	45	28.48	68	43.04	5
107年	計	312		312	77	115	36.86	118	37.82	2
	男	149		149	32	66	44.30	49	32.89	2
	女	163		163	45	49	30.06	69	42.33	
108年	計	293		293	68	102	34.81	119	40.61	4
	男	150		150	40	61	40.67	49	32.67	
	女	143		143	28	41	28.67	70	48.95	4

說明：1.來函提供資料計1,904筆，扣除當年度重複者5筆，以及因所提供資料錯漏致無法比對者61筆，各年度清單合計1,838筆。

2.當事人當年度死亡者計2筆，不列入當年度比率計算，合計1,836筆（其中103年297筆、104年319筆、105年312筆、106年303筆、107年312筆及108年293筆）。

內政部戶政司編製

表3　各清單年之5年前婚姻狀況統計表

單位：人；%

清單年別	性別	總計	當年度5年前底婚姻狀況					
			未婚	有偶		離婚		喪偶
				人數	比率	人數	比率	
103年	計	297	105	138	46.46	51	17.17	3
	男	129	45	68	52.71	14	10.85	2
	女	168	60	70	41.67	37	22.02	1
104年	計	319	104	166	52.04	47	14.73	2
	男	156	55	82	52.56	17	10.90	2
	女	163	49	84	51.53	30	18.40	
105年	計	313	94	163	52.08	56	17.89	
	男	134	42	74	55.22	18	13.43	
	女	179	52	89	49.72	38	21.23	
106年	計	304	113	138	45.39	48	15.79	5
	男	146	53	74	50.68	17	11.64	2
	女	158	60	64	40.51	31	19.62	3
107年	計	312	114	152	48.72	45	14.42	1
	男	149	57	71	47.65	20	13.42	1
	女	163	57	81	49.69	25	15.34	
108年	計	293	102	140	47.78	48	16.38	3
	男	150	54	78	52.00	18	12.00	
	女	143	48	62	43.36	30	20.98	3

說明：來函提供資料計1,904筆，扣除當年度重複者5筆，以及因所提供資料錯漏致無法比對者61筆，各年度清單合計1,838筆（其中103年297筆、104年319筆、105年313筆、106年304筆、107年312筆及108年293筆）。

內政部戶政司編製