

Adultery and the Constitution: A Review on the Recent Decision of the Korean Constitutional Court on 'Criminal Adultery'

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Abstract

The Korean Constitutional Court (KCC) recently ruled in 27-1(A) KCCR 20, 2009HunBa17 · 205 (Consolidated), February 26, 2016 (hereinafter the "2015 Decision"), that Article 241 of the Criminal Act related to adultery is unconstitutional due to its abuse of sexual autonomy and the freedom and privacy of personal life. It was a change of stance from the previous constitutional interpretations upheld in over four judicial rulings.

In Korea, the legislature and executive are often criticized for their lack of contribution to decriminalization. They are in fact responsible for an increase in the criminal law. Therefore, the significance of this recent additional 'decriminalizing' decision by the Constitutional Court must be highlighted, providing a crucial step towards decriminalization.

This 2015 Decision on unconstitutionality reflects the trend of the rest of the world where many countries are banning the criminal regulation of adultery and the fact that some doubts are cast on whether the regulation is helpful for maintaining household integrity and marriage purity. The decision also reflects the criticism that the criminal law intervenes in the privacy of the individual and represents an abuse of the state's punishment power. It also reflects a weakening of the justification in the recent era for protecting women as a socially vulnerable class. There are still various opinions regarding the appropriateness of abolishing the criminal regulation of adultery, but the most important fact is that it has been abolished in Korea by this landmark decision of the KCC.

KEY WORDS: Adultery, Constitutional Court of Korea, right to privacy, sexual self-determination, proportionality, 2009HunBa17, Protection of Marriage and Family System

Manuscript received: May 4, 2016; review completed: June 7, 2016; accepted: June 20, 2016.

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I. Introduction

1. Prologue

The Korean Constitutional Court (KCC) has recently made the decision (Decision of Feb. 26, 2015, 2009Hun-Ba17 · 205 (Consolidated) (hereinafter the “2015Decision”)¹⁾) that Article 241 of the Criminal Act related to adultery goes against the constitution due to its abuse of sexual autonomy and the freedom and privacy of personal life. It was a change of stance from the previous constitutional decisions ruled over four times.

Adultery is defined generally in legal academia and praxis as the “[v]oluntary sexual intercourse between a married person and someone other than the person’s spouse.”²⁾ In the meantime, the criminal regulation of adultery³⁾ has been deemed constitutional by the Constitutional Court four times, where six Justices provided constitutional opinions for the 1990Decision⁴⁾ and the 1993Decision⁵⁾ and eight Justices gave constitutional opinions for the 2001Decision.⁶⁾ However, in the most recent decision, known as the 2008Decision,⁷⁾ four Justices ruled it as constitutional, four Justices ruled it as unconstitutional, and one Justice provided constitutional discordance adjudication that aroused interest from the public about the decision from the Constitutional Court.

1) This “2015Decision” has not yet (as of March 2016) been translated officially by the KCC. It is expected that the official translation will be published in printed form by January 2017 at the latest. And in this article, I will use “YYYYDecision” (i.e. without gap) as abbreviation of the specific frequently mentioned decisions.

2) See BLACK’S LAW DICTIONARY 62 (10th ed., 2014).

3) For a historical perspective about adultery, see, e.g., Gung-Sik Jung, *Hankuk-eui-kantongchoe-eui Beopjesajeok Kochal* [Historical Review on the Crime of Adultery in Korea], in DONG-WOON SHIN, NAKTAEJOE MIT KANTONGJOE E KWANHAN YEONKU [A STUDY ON THE ADULTERY AND THE ABORTION FROM THE VIEWPOINT OF CRIMINAL LAW REFORM IN KOREA] (1991); Kuk Cho, *The Crime of Adultery in Korea: Inadequate Means for Maintaining Morality and Protecting Women*, J. KOREAN L. 2, 2002, at 84-86.

4) Constitutional Court of Korea, 89Hun-Ma82, Sep. 10, 1990.

5) Constitutional Court of Korea, 90Hun-Ga70, Mar. 11, 1993.

6) Constitutional Court of Korea, 2000Hun-Ba60, Oct. 25, 2001.

7) Constitutional Court of Korea, 2007Hun-Ga17, Oct. 30, 2008.

In fact, after the unconstitutional ruling in 2015, the illegality of adultery outside of the criminal law continues to be approved. It was demonstrated in the case involving an ex-trainee of the Judicial Research and Training Institute (JRTI),⁸⁾ who was expelled for adultery and filed a suit against the president of the institute due to the invalidity of the expulsion. He lost at both the original and appellate trials, and furthermore, the civil liability of the trainee was acknowledged.

2. Background

Since the 1960s, there has been an international tide of decriminalization (in order to prevent the abuse of over-criminalization). Decriminalization is the repeal or amendment (undoing) of statutes which made certain acts criminal, so that those acts no longer are crimes or subject to prosecution, though perhaps regulatory fines or permits might still apply. After the Second World War ideologies of liberalization of criminal law or demoralization were disseminated.⁹⁾ The idea of “decriminalization,” that ‘actions that are unethical yet do not violate the benefit and protection of the law should not be criminalized’, has been widespread internationally. South Korea is also engaged in discussions on decriminalization.

According to criminal policy studies, “criminalization” refers to the conditions in which new types of violations of the benefit and protection of the law occur due to changes in the social structure. In order to deal with the rise of potential situations, new legislation is passed to regulate criminal justice, and this is the first step in “criminalization.” On the other hand, due to changes in legal strategy to reduce the range of the states’ administrative justice, there are cases in which what was considered a crime is now permitted. This is called “decriminalization.” It mainly emerged due to

8) Under the then judiciary exam (as of around 2010), the number of new lawyers admitted each year was limited to 1,000. Then, successful candidates had to complete the mandatory two years of training courses at the Judicial Research & Training Institute (JRTI) in order to join the bar in Korea. The JRTI is managed by the Supreme Court.

9) And nation-states around the world revised their criminal laws on sexual activities. For more information about this, for example, *see* D. J. Frank, B. J. Camp & S. A. Boutcher, *Worldwide trends in the criminal regulation of sex, 1945 to 2005*, *AMERICAN SOCIOLOGICAL REVIEW*, vol. 75 no.6, 867-893 (2010).

criticism against the hypertrophy of criminal law, stigma theory, and the failure of the national public execution system.

In terms of constitutional theory, this is directly related to the topic of ‘equal individual freedom’¹⁰⁾ or ‘the right to pursue one’s happiness’¹¹⁾. Because decriminalization reflects changing social and moral views about whether an individual act, which has been claimed as one’s freedom or pursuit of happiness, is still to be punished or not. A society may come to the view that an act is not harmful, should no longer be criminalized, or is otherwise not a matter to be addressed by the criminal justice system.

In relation to “decriminalization,” detailed discussion of the unconstitutionality of laws that have been ruled unconstitutional by the Constitutional Court, such as “sex under false promises of marriage” or “adultery,” now seems practically insignificant in South Korea. However, in this writing, the chronological order and rationale of the several constitutional decisions made on the same topic will be discussed.

This analysis is meaningful, in that one can now determine suitable constitutional decisions on similar moral-related topics (such as banning prostitution, homosexual marriage, etc.) in South Korea. This can also serve as comparative data¹²⁾ for other countries.

3. About this paper

There are already several advanced research studies published in Korean on the “2015Decision.”¹³⁾ The previous studies cover the meaning

10) Constitution of the Republic of Korea, Article 11 Section 1.

11) Constitution of the Republic of Korea, Article 10 (first sentence) “All citizens shall be assured of human worth and dignity and have the right to pursue happiness.”

12) For comparative legal perspective about adultery, for example, see Kuk Cho, *The Crime of Adultery in Korea: Inadequate Means for Maintaining Morality and Protecting Women*, J. KOREAN L. 2, 83-84 (2002).; A. Black, & K. S. Jung, *When a Revealed Affair Is a Crime, but a Hidden One Is a Romance: An Overview of Adultery Law in the Republic of Korea*, Int’l Surv. Fam. L., 275 (2014) ; J. Corrin, *It Takes Two to Tango, But Three to Commit Adultery: A Survey of the Law on Adultery in Post-Colonial South Pacific States*, INT’L. J. OF LAW, POLICY AND THE FAMILY, 26(2), 187, 219 (2012) ; ANTHONY R. BESSETTE, REGULATING AND PUNISHING ADULTERY IN KOREA AND EAST ASIA, University of Richmond School of law (2009).

13) See Shi-Myon Ko, *Heonbeobjaepansoui Hon-inbingjagan-eum Mit Gantong Deung-ui Wiheongyeoljeong Deung-e Natanan Bibeomjoehwau Heuleum* [De-criminalization trend in

and limitations of the decision of the case as well as the possibility of the reenactment of the adultery law due to public sentiment, the retroactive effect of the decision of the case, securing the evidence and realizing the alimony, and other subsequent work.

Likewise, as there are various advanced studies related to the “2015Decision,” I would like to focus on the difference in the logic of the written verdict of each judge on the topic of adultery. Additionally, I would like to point out the main difference in the logic of the “2015Decision” from those of the other four previous decisions that deemed the “adultery provision” of the Criminal Act(Hyeongbeob) as constitutional and provide reasons that back up the argument. Moreover, the trend is becoming stronger in society for decriminalizing controversial behavior (adultery, obtaining sex under false promises of marriage, gay men dating in the military, prostitution), and topics related to the ‘free and equal status of the individual’ or the ‘pursuit of happiness’ brought out in the constitution are controversial in Korean society. Thus, the meaning of the Constitutional Court’s decision on unconstitutionality will be discussed.

II. The former status of the adultery regulations

According to the adultery regulations in Criminal Act Article 241,¹⁴⁾ the

Unconstitutional Decisions about the Crime of Sexual Intercourse under Pretence of Marriage and Adultery], 57 SABEGBHAENGJEONG, no. 1, 2016 ; Hie-Houn Lee, *Heonbeobjaepansoui Gantongjoe Wiheon Gyeoljeong-e Daehan Pyeongseog* [The Annotation of the Unconstitutional Decision against Criminal Conversation of the Constitutional Court], vol. 71 PUBLIC LAND L. REV. (2015) ; Jong-Hyun Kim, *Gantongjoe Wiheongyeoljeong-e Daehan Yeongu* [A Study on Decision on Unconstitutionality of Adultery], 50 LAW AND SOCIETY (2015) ; Rae-Young Kim, *Gantongjoe Wiheongyeoljeong(Heonjae 2015. 2. 26. 2009 Heonba17 deung)ui Hyolyeog* [A Review of the Constitutional Court’s Unconstitutional Decision on the Adultery Clause(2009Hun-Ba17 etc.(consolidated), Feb 26, 2015)], 39 DANKOOK UNIVERSITY LAW JOURNAL, no. 3, 2015 ; Hyunah Yang, *Poseuteu Gantongjoe Pyeji: Deuleonan Seongjeog Jayujuui Damlongwa Mudhyeojin Pihae Baeujai Sonhae* [Post-Adultery Law in Korea: A Feminist Law and Society Approach], 56 SEOUL-DAEHAKGYO-BEOPHAK [SEOUL LAW JOURNAL], no.3, 2015.

14) 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

subject of criminal adultery included both a married person and a person who had sex with the married person (though not that person's spouse).

Therefore, in order to be considered as criminal adultery, at least one married person had to be involved, which means adultery was based on the subject's status. "Married person" referred to a legal spouse, which excluded those in unregistered marriages, cohabitants.

However, as long as the subject was legally married, it did not matter whether the person lived with the spouse.¹⁵⁾ The subject was not considered a married person if the marriage was invalid,¹⁶⁾ but on the other hand, though the request for marriage cancellation had occurred, the subject was considered a married person until the marriage was cancelled.¹⁷⁾ In addition, it was considered that a person who was legally married according to foreign law was still a valid subject here.¹⁸⁾

Besides, according to Criminal Act Article 241 Section 2, it was impossible to accuse a spouse of adultery if there had been consent in advance ["connivance (jong-yong)"] or an excuse following the act ["condonation (yu-seo)"]. First, in terms of connivance, the Supreme Court ruled, "[I]f there had been consent on divorce between the married couple, the consent includes willingness to connive at the spouse's sexual relationship with a third person."¹⁹⁾ In other words, the Supreme Court ruled, "[I]f the married couple are unwilling to continue marital status and consent on divorce had been made, the consent includes expression of connivance with adultery of either spouse regardless of their legal marital status."²⁰⁾

Moreover, regarding connivance with adultery, the Supreme Court ruled, "[T]he consent on divorce between the married couple does not have

victimised spouse. If the victimised spouse condones or pardons the adultery, accusation can no longer be made.

15) Supreme Court of Korea, 79Do1848, Apr. 8, 1980.

16) Supreme Court of Korea, 82Do826, Jun. 22, 1982.

17) Supreme Court of Korea, 82Do826, Jun. 22, 1982.

18) Supreme Court of Korea, 83Do41, Dec. 13, 1983.

19) Supreme Court of Korea, 68Do859, Feb. 25, 1972 ; Supreme Court of Korea, 77Do2791, Oct. 11, 1977.

20) Supreme Court of Korea, 71Do2259, Jan. 31, 1972; Supreme Court of Korea, 90Do1188, Mar. 22, 1991.

to be in the form of a written document. Based on several circumstances such as the speech and action of either spouse, when both members of the couple have been recognized for their unwillingness to continue marital status, and when the spouse truly agrees to divorce upon the other spouse's request, it is considered that there had been expression of future connivance in case either spouse commits adultery."²¹⁾ If there had not been such consent, connivance is invalid even if the married couple expressed tentative, temporary, or conditional intention to divorce.²²⁾

Furthermore, in terms of condonation, the Supreme Court ruled, "[C] ondonation of adultery can be done both explicitly and implicitly, which has no defined form of act. In order for behaviors or expressions reflecting emotions to be considered condonation, it requires the following. First, it requires that the person knows that the spouse had committed adultery and has done such investigation voluntarily. Second, regardless of knowing that there had been adultery of the spouse, true effort to continue the marital status has to be clear and be done in trustful ways."²³⁾

However, the precedent cases by the Supreme Court involving condonation of adultery had several problems. For example, there had been a lack of criteria to judge whether true willingness to continue the marital status was expressed in clear and trustful ways. The definition of knowing the exact date, place, and number of sexual encounters in order to be recognized as condonation was also unclear.

III. Evaluating the decision of the Constitutional Court ("2015Decision")

Taking into account that most of current Constitutional Court Justices are considered to possess a 'strong tendency to be conservative,'²⁴⁾ it

21) Supreme Court of Korea, 2006Do1759, May. 11, 2006.

22) Supreme Court of Korea, 97Do2245, Nov. 11, 1997; Supreme Court of Korea, 90Do1188, Mar. 22, 1991.

23) Supreme Court of Korea, 99Do2149, Aug. 24, 1999; Supreme Court of Korea 2000Do868, Jul. 7, 2000.

24) It has been mentioned by various authors that the judges of the Constitutional Court of Korea are to be appointed by the President or the ruling party under the current legal and

seemed quite surprising that seven among nine Justices decided in favor of unconstitutionality.

Several Justices reasoned that it is difficult to realize the common good of protecting the social marriage system through punishing adultery as a crime, while constitutional rights such as the right to sexual decision and freedom of privacy are over-regulated, thus the equilibrium has been lost.

1. *Evaluating the majority opinion*

1) *Specifying restricted constitutional rights: to sexual self-determination and to privacy*

In the “2015Decision”, the majority opinion contained rulings by five Constitutional Court Justices: Han-Chul Park, Jin-Sung Lee, Chang-Jong Kim, Ki-Seog Seo, and Yong Ho Cho.²⁵⁾

At the beginning, the majority opinion of “2015Decision” had to find which specific constitutional rights were restricted by the provision at issue. And it pointed out that the provision at issue restricts the rights to sexual self-determination (derived from Korean Constitution Article 10) and the right to privacy (Article 17). In the previous four decisions related to adultery, it had been pointed out that the adultery provision restricts mainly these two constitutional rights. And this right to sexual self-determination, which is derived from the constitutional right to human dignity and the right to pursue happiness (Korean CONST. Article 10 Section 1), has already been recognized by the Constitutional Court as a fundamental right for a long time: “Self-determination is the premise of the

factual conditions and therefore the judges with conservative tendencies often acquire overwhelming majorities in the court. One of the authors who has consistently pointed this out is Prof. Han. See, e.g., Sang-Hie Han, *Dangerous lawyers domination: Reform the Constitutional Court of Korea!*, *Jugan-Gyeonghyang* vol. 1108 (2015) <http://weekly.khan.co.kr/khnm.html?mode=view&artid=201412291812241&code=113> (last visited Dec. 16, 2015). See also, e.g., Jong-Cheol Kim, *Heonbeopjaepansokuseuonje Kwanhan Gaesunbangalm [A Proposal for Reform in the Composition of the Constitutional Court]*, HEONBEOPHAK-YEONKU [STUDIES ON CONSTITUTIONAL LAW], Vol.11 No.2 9-48, 2005 (in Korean).

25) For the English spellings of the name of the judges, see <http://english.court.go.kr/cckhome/eng/decisions/majordecisions/majorDetail.do> (last visited Dec. 19, 2015). I followed the example of the English version of [*Case on Prohibition of Nighttime Access to Online Games by Juveniles*], Constitutional Court of Korea, Apr. 24, 2014, 2011Hun-Ma659, 683 (Consolidated)).

personality right and the individual's right to pursue happiness. And this includes sexual self-determination to determine whether to have sex or not and which sexual partner to have sex with"²⁶⁾

1) *Regarding the majority opinion made by the Constitutional Court that criminal adultery regulations violate the Principle of Proportionality*

Any restriction on the fundamental rights and the legitimate interest which is to be protected by such restriction shall be subjected to the proportionality test. The principle of proportionality was first established in German law,²⁷⁾ and today it is generally accepted by many constitutional courts in the world,²⁸⁾ including Korean one. In Korea, it is generally agreed that proportionality test as the constitutional principle is included in the Article 37 Section 2 of the Korean Constitution.²⁹⁾ According to the wording of Article 37 Section 2, this is a principle that can be applied to any restriction of fundamental rights.³⁰⁾ The principle means that any restriction on the fundamental rights and the legitimate interest which is to be protected by such restriction shall be proportionate in the following

26) Constitutional Court of Korea, 89Hun-Ma82, Sep. 10, 1990; Constitutional Court of Korea, 99Hun-Ba40, Oct. 31, 2002; Constitutional Court of Korea, 2008Hun-Ba58, Nov. 26, 2009.

27) In the late 19th century, the proportionality test was first developed in the High State Administrative Courts (*Oberlandesgericht*) in Germany, to review actions by the police. The German Constitutional Court (*Bundesverfassungsgericht*), which was established in 1951, transferred this test into constitutional law and applied it to laws limiting fundamental rights. The first decision that mentions the principle of proportionality concerns an election law of the state of North Rhine Westphalia, *see* Decision of the German Constitutional Court, BVerfGE 3, 383 at 399 (1954).

28) *See* e.g. Bernhard Schlink, *Proportionality in Constitutional Law: Why everywhere but here*, 22 Duke J. Comp. & Int'l L., 2011 at 291; Dieter Grimm, *Proportionality in Canadian and German constitutional jurisprudence*, 57.2 U. of Toronto L. J., 2007 at 383-384.

29) About the Proportionality Test of Korean Constitutional Court, *see* e.g. Chee-Youn Hwang, *Critics on the Constitutional Complaint against the Ordinary Courts' Judgments in Terms of Balancing and Proportionality Test in Korean Constitutional Review*, 18(2) MIGUCKHEONBEOB-YEONKU[STUDIES ON AMERICAN CONSTITUTION] 2007 at 271, 292 (especially, chapter IX: "Proportionality Test as the Rule against Excessive Restriction").

30) In Germany, it took until 1963 for the German Constitutional Court to recognize the applicability of the principle in all cases where fundamental freedoms are infringed (BVerfGE 16, 194 at 201 (1963)). Another two years passed before the Court explained where it finds the textual basis for the principle. *See* Grimm, *supra* note 28, at 385.

manner: (1) The purpose should be legitimate(Legitimacy of Purpose), (2) the means should be appropriate(Appropriateness), (3) the restriction should be minimized (Minimal Restriction) and (4) legal interests should be balanced(Balance of Legal Interest).

As to the 'Legitimacy of Purpose', the majority opinion of "2015Decision" ruled, "The provision at issue intends to promote the marriage system based on good sexual morality and monogamy and to preserve marital fidelity between spouses, and its legislative purpose is legitimate."³¹⁾ And in terms of this 'legitimate purpose examination', there seems no clear objection among other judges to the majority opinion of the "2015Decision" that the legislative purpose was legitimate.

As to the other three sub-principles, the majority opinion argued quite in detail as following. It argued that the "recent rapid dispersal of individualism and sexual openness has caused changes of awareness about marriage and sex. Sex and love should not be controlled by criminal sanctions, they should rather be the responsibility of the individuals. Although the act of abandoning the responsibility to be virtuous is immoral, it is hardly something to be punished by law. Furthermore, meeting and engaging in sexual intercourse at free will pertains to individual freedom. Though immoral, it belongs to individual life and the negative effect on the society is not so critical. Therefore the modern trend in the Criminal Act is that without definitive violation of the specific benefit and protection of the law, intervention by national authorities should not occur."³²⁾ The majority opinion made a further important point: "Besides the fact that adultery requires a complaint from the victim for prosecution, exercising the right to accuse someone is possible only after the marriage has been dissolved or a divorce suit has been filed. This would eventually lead to the breakdown of the affected family."³³⁾ The opinion mentioned that even if the accusation was recanted, it is unlikely that the couple would ever recover emotionally. Therefore, adultery does not contribute to the

31) *See* the majority opinion ("unconstitutional") of the five judges in the "2015Decision"(Constitutional Court of Korea, 2009Hun-Ba 17, 205 (consolidated), Feb.,26, 2016).

32) *Id.*

33) *Id.*

protection of the marital system nor promote the concept of family. “Moreover it is unlikely that the offender would want to reunite with the spouse, and due to the worsened spousal relationship the family bond would be shattered. There has been a lack of research showing the preventive effect of adultery criminalization by analyzing the realities of law enforcement, and no statistical data has demonstrated that the countries that have abolished adultery criminalization have more corruption of sexual morality or higher divorce rates than before.”³⁴⁾

Thus, according to this major opinion, adultery criminalization is unconvincing as a preventive measure to keep families together, which in terms of criminal policy suggests that general and special prevention effects cannot be expected such measures. Moreover, according to this major opinion, “Also following the accusation of a spouse for adultery, future divorce would be assumed, meaning that women who cannot support themselves economically would feel rather uncomfortable with the outcome of the accusation. Therefore, nowadays adultery criminalization itself has largely lost its function of protecting married women. It now penalizes only a handful of those who actually commit adultery, rather producing potential criminals as it restricts their basic rights and losing its effectiveness in protecting the marital system and spousal fidelity.”³⁵⁾

In conclusion, this opinion argues the following: “Marriage and the family bond should depend on the free will and love of the individuals rather than being forced through punishment. The regulation on criminal adultery, which punishes the act of adultery in order to protect good sexual customs and marital monogamy and facilitate spousal fidelity, violates the Appropriateness and Minimal Restriction Principle within the Principle of Proportionality. Based on the criminal adultery punishment regulation, protection of marital monogamy and spousal fidelity for the common benefit cannot be fulfilled, while the criminal adultery punishment regulation assumes individual privacy as punishable by law. This exceedingly limits individual rights to sexual decision making, privacy, and freedom, and ultimately the criminal adultery punishment regulation

34) *Id.*

35) See the majority opinion of the five judges in the “2015Decision”(Constitutional Court of Korea, 2009Hun-Ba 17, 205 (consolidated), Feb., 26, 2016).

violates the Balance of Legal Interest principle within the Principle of Proportionality.”³⁶⁾

1) *Review*

(1) Regarding the legitimacy of the legislative purpose of criminal adultery regulations

It seems that the legitimate purpose examination in balancing and proportionality test of Korean Constitutional Court is criticized as superficial. If one could put aside that criticism, and so far as one follow the existing legitimate purpose examination’s logic of the court, the purpose of adultery “...to promote the marriage system based on good sexual morality and monogamy and to preserve marital fidelity between spouses”³⁷⁾ might be legitimate. And one can admit that the punishment of criminal adultery serves its own legitimate purposes.³⁸⁾

(2) Regarding other sub-principles of the Principle of Proportionality

In addition, based on the “2015Decision,” in which five Constitutional Court Justices ruled that the criminal adultery punishment regulation violates the Principle of Proportionality, adultery is an act of immorality. According to a recent survey, it is no longer clear whether the majority of Koreans support the idea that criminal adultery should be punishable by law.³⁹⁾ Nowadays, it is clear that Koreans have become more open-minded towards sex and that they do not consider the act of adultery to arouse anger or repulsion, promoting the idea that adultery is no longer an evil act to be punishable by the Criminal Act.

In addition, according to the Constitution of Korea, the limitation of

36) *Id.*

37) *Id.*

38) For reference, the decision which struck down the Criminal Act Article to punish ‘obtaining sex under false promises of marriage’ denied also the legitimacy of the purpose of the legislation. It was one of those rare cases in which the Constitutional Court denied the legitimacy of the purpose of the act. *See* Constitutional Court of Korea, 2008 Hun-Ba58 2009Hun-Ba191, Nov. 26, 2009.

39) A recent survey of Korea Women’s Development Institute (KWDI) showed 60.4% of those questioned were in favour of maintaining the punishment of adultery, and it shows that about 60% of adult citizens appeared to be in favour of maintaining the punishment.

fundamental rights should comply with the conditions of Article 37 Section 2.⁴⁰⁾ It has been pointed out that, as to regulating adultery by the Criminal Act, maintaining the order of “sexual morality” as a purpose to regulate sexual decisions made by individuals is an invalid point based on the Constitution Article 37 Section 2, since it arguably does not fall within the specified categories of this constitutional provision.⁴¹⁾

Furthermore, “sexual morality” can become either more conservative or more liberal, meaning that it is flexible and changeable depending on the times. As long as the sexual customs and culture do not go against positive norms of human rights, members of the society should be able to freely decide and voluntarily comply at the level of common morality and ethics. Such customs and culture should not be regulated by law.⁴²⁾ Rather than viewing it as punishable by criminal law, it is more appropriate to view it as an area of moral criticism.

Besides, according to the German Federal Constitutional Court, taking state measures to advance the morality of the citizens is irrational.⁴³⁾ Moreover, the traditional family structure and the role/position of each family member have changed, and our country today is experiencing a rapid growth of individualism and greater sexual openness, which in return changes the awareness about marriage and sex. Sex and love cannot be regulated by punishment; it has to be the responsibility of individuals. Violating the responsibility of spousal fidelity is immoral, yet it is not punishable by law.

In terms of the pursuit of happiness, today’s society increasingly values the ability to freely exercise rights to sexual decision making more than it values the maintenance of traditional sexual morality and protection of spousal fidelity. This shows the changes in the structure of our society, changes in the awareness of the people about marriage and sex, and the

40) Hunbeop [Constitution of the Republic of Korea] Article 37 Section 2 : “Freedoms and rights of citizens may be restricted by the Act only when necessary for national security, maintenance of law and order or for public welfare. Even when such restriction is imposed, essential aspects of the freedom or right shall not be violated.”

41) *See* KWANG SEOK CHEON, HEONBEOBPANLYEYEONGU 226 (2000); Lee, *supra* note 13, at 431.

42) *See* Cho, *supra* note 12, at 92.

43) BVerfGE 22, 180.

tendency to value rights to sexual decision making. These all demonstrate that it is hard to judge whether a married person having sexual intercourse with a person other than his/her spouse should be punished by criminal law and that there has been little consensus among the people. Based on the above reasons, it is more legitimate to treat adultery as a matter of morality than a matter that can be regulated by criminal law, and the criminal law imposing a penalty on the act of adultery is unsuitable.

Moreover, assuming that the purpose of criminal adultery regulations is to “maintain spousal fidelity,” criminal punishment by the country, which is a form of physical power, should not be used, but the free decision has to be fundamentally given to the married couples themselves. The former imposes exceedingly strict regulations on the rights to sexual decision making, such as sexual intercourse and the right of decision, and thus, criminal punishment for spousal fidelity is inappropriate.

When comparing punishing and not punishing a married person who is involved in adultery, it is questionable whether punishment improves spousal fidelity, prevents the act itself due to the fear of punishment, reunites spouses and increases sexual faithfulness, and serves to protect the marriage and family system. It is hard to prove its effectiveness, because it relies heavily on sentimental arguments, idealism, common sense, and intuition.⁴⁴⁾

Most cases of adultery are left undiscovered by the spouse, and even if it is discovered, the rate of criminal suits is quite low. Based on recent statistics, the number of incidents being reported or prosecuted has decreased. The rate of imprisonment is less than 10% of the total suits filed. During the inspection and the process of hearing, many cases are dropped, as authorities end up refusing to prosecute. This shows how the role of criminal punishment has been greatly weakened, and based on this, the five constitutional Justices ruled in the “2015Decision” that the criminal adultery punishment regulation violates the Method Appropriateness in the Principle of Proportionality, and the case was legitimate in terms of the Constitution.

44) See Chan-hee Shinlee, *gantongjoe, yeoseong-ui gwon-ig-eul bohohaneun beob-i anida* [Adultery is not the law that protects women], vol.422 National Assembly Rev. [gughoebo] 84 (2001).

In addition, when any spouse commits adultery, rather than punishing the person for criminal adultery, which would only cause more damage, it would be more beneficial to require them to compensate the victim for lost property and pain and suffering and grant a divorce based on the civil law. Such civil penalties imposed on the person who committed adultery would encourage spousal fidelity, unlike the criminal adultery punishment regulation that violates the Principle of Minimal Restriction.

Moreover, according to the Constitution Article 36 Section 1, the marriage and family system needs to be established and maintained based on individual dignity and gender equality, which is guaranteed by the country. The criminal procedure against the person who committed adultery would prevent the recovery of the relationship between the married couple and cause early breakdown of the marital relationship. It would make reunion impossible and worsen the marital relationship due to the need to investigate the adultery in order to accuse the spouse.⁴⁵⁾ It would also have detrimental effects on the lives of children,⁴⁶⁾ increase the number of marriages that end in divorce, and punish those who attempt to form new marriage relationships and do not file for divorce ahead of time while prematurely involved in sexual intercourse. This only creates husbands/wives or fathers/mothers with criminal records.⁴⁷⁾

The affected persons would not be protected by the marriage and family system guaranteed by the Constitution Article 36 Section 1. Instead, they would experience more obstacles and even face the dissolution of new marital and family relationships. Therefore, criminal adultery regulations violate the Constitution Article 36 Section 1 by failing to guarantee the marital and family system, and they do not protect spousal fidelity. They rather subject individuals' private sexual lives to criminal punishment and limit their basic rights to individual sexual decision making. In these aspects, it is constitutionally legitimate in the "2015Decision" that the five Justices ruled that the criminal adultery punishment regulation violates the Principle of Minimal Restriction in the Principle of Proportionality.

In addition, the criminal adultery punishment regulation is unlikely to

45) Cheon, *supra* note 41, at 288; Lee, *supra* note 13, at 433.

46) Shinlee, *supra* note 44, at 83.

47) Lee, *supra* note 13, at 433.

effectively inhibit the act of adultery, which was thought to be the function of the regulation, if the reason that a married person commits adultery is based on love with a person other than the spouse. On the other hand, when the reason that a married person commits adultery is based on something other than love (e.g., engaging in prostitution to satisfy curiosity, keep up with the entertainment routine prevailing in one's social life, or satisfy sexual desire),⁴⁸⁾ many feel that such behavior is acceptable as long as it remains hidden.⁴⁹⁾ The criminal punishment of adultery when applied to a relationship not based on love can neither be expected to prevent the act of adultery nor be effective in terms of general and special prevention.

Due to the preceding reasons, on the "2015Decision," one could disagree with the claim made by Justice Yi-Su Kim that "there are three types of adultery." These include "those involving sexual intercourse outside of marriage for basic sexual pleasure (type 1); those involving individuals who met persons more attractive than their current spouse, became skeptical about the current marriage, and fell in love with the new person (type 2); and those involving the practical breakdown of the marriage by living separately followed by having sexual intercourse with someone other than the spouse (type 3). Among the three types of adultery, the first two are different from the third, in that the third is more prone to moral criticism and shows a greater need to keep the marital status intact. Therefore, criminal regulations on such cases are still needed. Types 1 and 2 have proven to be preventable through the power of law enforcement, such as imprisonment, which is the only type of court penalty, followed by the procedural burdens coming from inspections and court trials and the fear of losing one's job. The adultery regulation for types 1 and 2 can be an effective tool to bring forth the true regret and self-reflection of the person

48) Korea's Ministry of Gender Equality and Family(MOGEF) Korea surveyed 1,632 adults (age of 20's~50's and M/F) about culture and notion of sex in 2008. According to the survey report, the motive of sex buyers is alcohol(54.4%), curiosity(33.1%), sexual desire(21.8%), colleague's solicitation(16.8%), entertaining custom(14.4%), stress relief(3.7%), army enlistment(1.5%).

49) From August 1. 2006 till September 5. 2006, MOGEF surveyed 1,573 citizens about sex purchase experience. According the survey report, 44.3% had never purchased sex, 40% had ever purchased less than 3 times, 8.8% had ever purchased 4~6 times, 2.5% had ever purchased 7~9 times, and 4.4% had ever purchased more than 10 times. Compared to the sex purchase non-experienced group, sex purchase experienced group is bigger (56.7%).

who committed adultery, after which, in some cases, legal proceedings are cancelled in the process. This would possibly allow the recovery of the scarred marital relationship.”

Moreover, in relation to the “2015Decision” that the criminal regulation of adultery is unconstitutional, one could disagree with the claim made by Justice Ilwon Kang that “the acts of adultery and incest occur due to individual sexual decisions, which belong to the area of private life. Nevertheless, if such behaviors have destructive effects on the marital relationship, they do not simply belong to the ethical and moral level but gain the rationale for regulation by law.” Actually, these two opinions are not consistent with the logical flow of the major opinion. Thus, it seems that each of the two Justices had to write their own separate (concurring) opinions.

One would also disagree with the claims of the dissenting opinion made by Justices Jung-Mi Lee and Chang-Ho Ahn that “the act of adultery between a married person and the other party not only deviates from the social ethical suitability but also nearly dissolves marriage and family or puts it at risk. Therefore, it is difficult to perceive the act only at the level of ethics and morality.” Therefore, in this regard, this dissenting opinion claims that contrary to the majority opinion, “It is hard to completely disagree with the function of criminal law when it comes to maintaining good social sexual morality. Moreover, when it comes to protecting ordinary housewives who have little social experience and are economically and socially disadvantaged members in the family, often times due to the concealed property of their spouses, property division law is ineffective, and the amount of consolation money is nearly insignificant. Our society still needs to punish adultery because the current civil law system or court service cannot support them, and various systems to protect economically and socially disadvantaged people are missing. In particular, issues remain to be resolved, such as recognizing property division during marriage, regulating one-sided residential property sellouts, ensuring the right to rescind fraudulent acts in order to protect the right to property division requests, guaranteeing inheritance following the divorce, and many more.”

2. Regarding concurring opinion

Despite the fact that seven Justices commonly concluded that adultery is unconstitutional at last, two among the seven (Yi-Su Kim and Ilwon Kang) had different reasons to back up the conclusion.

1) *Regarding Yi-Su Kim's opinion*

Justice Yi-Su Kim claimed that "the majority of general public still feel that punishment regulation against adultery is needed,"⁵⁰⁾ articulating a different view from the other five Justices who mentioned the changes in social awareness. He admitted that adultery punishment regulation has preventive benefits and allows recovery of the marital relationship. Furthermore, he believed such measures can be useful for socially disadvantaged women when they request for alimony after the divorce.

However, in Kim's view, it is unconstitutional because of the following. First, it is totally unnecessary to punish various types of adulterers and the other party in a uniform way. In particular, adultery in the case of a legally married couple undergoing long-term separation should be considered differently since their marriage has been already practically shattered.⁵¹⁾

Second, in this case, it is also problematic when it comes to punishing the other party for adultery. If the other party is legally single, not only must individual rights be protected, but also no such responsibility for spousal fidelity exists in the first place. Punishment of such person is considered the abuse of the state's administrative power.⁵²⁾

2) *Regarding Kang's opinion: the point that criminal adultery regulations violate the Void-for-Vagueness Doctrine, and if punished solely by imprisonment it is unconstitutional*

Justice Ilwon Kang backed up his conclusion of unconstitutionality with arguing that the applicable range of adultery is ambiguous. He explained that "during the initiation of the criminal adultery punishment regulation,

50) See Kim's concurring opinion in the same 2015Decision.

51) *Id.* (Justice Yi-Su Kim, concurring opinion).

52) *Id.* (Justice Yi-Su Kim, concurring opinion).

when a married person connives or condones the adultery of the spouse, a lawsuit cannot be filed against the spouse nor can the spouse be punished. However, the criteria with which to judge whether connivance or condonation has been made are unclear. On the other hand, based on the Supreme Court's ruling on March 22, 1991 regarding the 90-do 1188 case, on July 10, 2008 regarding the 2008-do 3599 case, on September 12, 1989 regarding the 89-do 501 case, on July 9, 2009 regarding the 2008-do 984 case, and on November 20, 2014 regarding the 2011-mu 2997 case, it is difficult to judge when unambiguous and complete consent on divorce has been made or when tentative or conditional willingness to divorce has been expressed."⁵³⁾

He also claimed the following: "If one argues that adultery does not apply when cohabitation of the married couple is at an unrecoverable state, most of the general public that have less expertise in law would have little idea on the true degree of the unrecoverable state, nor would they be able to estimate to what extent they would have to know about the details of adultery. Moreover, it would be difficult to grasp to which extent the willingness to sustain the marital relationship should be expressed."⁵⁴⁾

Ultimately, in this flow of logic, it is hard for the general public to clearly determine whether condonation has been made on adultery until each element is reviewed based on the precedent cases. Therefore, what constitutes criminal adultery is clear, yet the passive accusation requirement of connivance and condonation is unclear, in which the latter violates the Void-for-Vagueness Doctrine, according to Justice Kang.

Moreover, he argued that even with various forms of adultery, imprisonment as a sole punishment violates the Principle of Proportionality. He had pointed out that imposing only imprisonment on various types of criminal adultery eliminates the balance between the degree of the crime and the weight of the punishment, as it deviates from the practical Principle of the Constitutional State. Once found guilty of adultery, as long as the case does not conclude as a "stay of execution" or "suspension of sentence," the majority of the cases impose short-term punishments of restrictions of physical freedom. This raises issues such as the brand effect and malignant

53) See Kang's concurring opinion in the same 2015Decision.

54) *Id.* (Justice Ilwon Kang, concurring opinion).

infection during the process of law enforcement, yet it has little reforming effects. "For such reasons Austria now prefers a monetary penalty over a punishment of restricting physical freedom. Likewise, England has replaced the punishment of restricting physical freedom with a social volunteering and probation system. In our case, requiring imprisonment for up to two years is out of the international legislative trend while it violates the Principle of Proportionality between responsibility and punishment."⁵⁵⁾

3) *Review*

First, the constitutional "Void-for-Vagueness Doctrine" means that the basic laws for the people are to be drafted in language such that when it is unclear for the average person to comprehend, the law should be voided. Due to this doctrine, the crime composition requirement subject to criminal punishment needs to be precisely defined with a literal meaning, according to the principle of *nulla poena sine lege*.

However, the crime composition requirement being clearly defined does not imply that in the process of implementing the law, judgment of value should be completely excluded nor does it require it to be a colorless descriptive concept. Even if the concept would need additional interpretation by the judge, by ordinary means of interpretation prohibiting arbitrariness, it implies that the content can be written in a way that it is easy to comprehend.

In light of this Void-for-Vagueness Doctrine, regarding the "2015Decision," the Constitutional Court Justice Ilwon Kang ruled that the criminal adultery punishment regulation violates the Void-for-Vagueness Doctrine, explaining that the lexical definition of "connivance" is "to explain thoroughly, appease and suggest," while the lexical definition of "condonation" is "to generously forgive" or "to express feelings of overlooking an offense."

The Supreme Court ruled that "if the married couple does not intend to continue their marital relationship and has fully shown agreement on divorce, even if they are still legally married, prior consent is implied."⁵⁶⁾

55) *Id.* (Justice Ilwon Kang, concurring opinion).

56) Supreme Court of Korea, *77Do2701*, Oct. 11, 1977 ; Supreme Court of Korea,

Moreover, the Supreme Court ruled, “If the divorce agreement has been made internally, such as when the married couple wants to divorce by mutual agreement and live separately, or when the declaration of divorce has been signed, regardless of whether the couple is legally married, they have expressed that sexual intercourse with a third party would be connived.”⁵⁷⁾

Lastly, it was ruled that “although the couple has not divorced yet, if the communal life has practically been destroyed and become unrecoverable, if there was a third party sexually involved with one of the spouses, it cannot be considered infringement or interruption of communal life. Furthermore, there is no rationale to claim that there had been infringement of the right to communal life, upon which it can be reasoned that no illegal act has been done.”⁵⁸⁾ If the marriage has reached the point where practical communal life is nonexistent, adultery does not violate social common standards that are generally accepted in terms of social ethics, as it is prone to being seen as illegal. Nevertheless, in the case where there is little possibility of social criticism, it does not violate social common standards.⁵⁹⁾ Thus, regarding various types of adultery, it is possible that the judge can interpret the concepts of connivance and condonation appropriately so that they can be applied in order to rule the defendant innocent, or they can be alleviated so that only a suspended sentence or probation can be imposed.

Therefore, in order to punish the adulterer by criminal punishment, it is necessary to widen the definition of connivance and condonation. Even if the concepts of connivance and condonation in the criminal adultery punishment regulation requires additional interpretation by the judge, by a general method of interpretation that excludes arbitrariness, the content of connivance and condonation can be easily comprehended.⁶⁰⁾ Therefore, in relation to the “2015Decision,” the claim made by Constitutional Court Justice Ilwon Kang that the criminal adultery punishment regulation

2006Do1759, May. 11, 2006.

57) Supreme Court of Korea, 95Do2819, Feb. 25, 1997.

58) Supreme Court of Korea, 71Do2259, Jan. 31, 1972.; 2006Do1759, May. 11, 2006; 2011Meu2997, Nov. 20, 2014.

59) In the same decision (“2015Decision”), the dissenting opinion of two judges (Jung-Mi Lee and Chang-Ho Ahn) pointed this out, too.

60) See Lee, *supra* note 13 at 438.

violates the Void-of-Vagueness Doctrine is disagreeable.

As to whether the adultery regulations in Criminal Act Article 241 having imprisonment as its sole means of punishment violate the Principle of Proportionality between responsibility and punishment, the upper bound of criminal adultery punishment is up to two years of imprisonment. It has been pointed out that this is relatively less burdensome, taking into account that the less serious act of adultery can even be probated. In addition, if a monetary penalty were implemented, this would still be ineffective at general and special prevention through legal threatening, especially if the married person committed adultery in order to avoid the duty of support or compensation for damages.

In addition, it had been pointed out that a monetary penalty, which is relatively less burdensome than imprisonment, has been recognized as a form of indemnity or conscience money. Adultery is more of an unethical crime rather than one based on profit acquisition. Therefore, a monetary penalty is unsuitable for penalizing adultery, and it can be abused by those who are economically well off by allowing them to indulge.⁶¹⁾

By following these logical flows, one would eventually at least disagree with the claim made by the Constitutional Court Justice Ilwon Kang that imprisonment as the sole means of punishment violates the Principle of Proportionality between responsibility and punishment.

3. Regarding the dissenting opinion

Although unexpectedly many Justices ruled the criminalization of adultery as unconstitutional, Jung-Mi Lee and Chang-Ho Ahn still argued views to the contrary. They refuted the claim that adultery violates the right to sexual decision, by explaining that “it is hardly agreeable because adultery is an act of violating spousal fidelity by a married person who chose to take such responsibility to start with, and it denies the community that protects the marriage.”⁶²⁾ According to their explanation, adultery is beyond the act concerning one’s own domain. It is an invasion of others’ benefits.

61) *Id.*

62) See Lee and Ahn’s dissenting opinion in the same 2015Decision.

They also reasoned that adultery can severely threaten marital monogamy, which serves as a basis for marital system, and that it causes various social problems. The Justices emphasized that “From Ancient Chosun’s Eight Article Law until now adultery has been prohibited and punished, and consequently the general public has recognized adultery as punishable. This general notion has resulted in preventive effects for adultery.”⁶³⁾

As to the imprisonment as a sole punishment, they considered it valid in that “the upper bound of legal penalty is relatively less burdensome, and less serious act of adultery can even be probated.”⁶⁴⁾

We can easily find that this dissenting opinion mainly follows the rationale of the majority opinions of the previous four decisions that had ruled the criminalization of adultery as constitutional. The rationale had been ‘maintaining spousal fidelity’ and ‘protecting women through criminal adultery.’⁶⁵⁾ The majority opinions of the past decisions have, however, dwindled to become the opinion of the minority(dissenting opinion) in the 2015Decision.

We should also notice a small controversial issue that, though this dissenting opinion of the 2015Decision mentioned that adultery had been prohibited and punished in Ancient Chosun’s Eight Article Law, only three of these articles have been clearly recognized by the mainstream of historians and the adultery article is not included in this three.⁶⁶⁾

4. Interim Conclusion

My consequent opinion on this decision is the following. The rationale underlying the criminal adultery punishment regulation that it protects good sexual customs and marital monogamy and moreover facilitates spousal fidelity is agreeable. However, our country today has witnessed an

63) *Id.*

64) *Id.*

65) *See* the majority opinion of 1990Decision, the 1993Decision, 2001Decision and the 2008Decision.

66) The other five can be only found in “Hwandangogi”, which has been regarded as a forgery by mainstream of historians.

expansion of individualism and sexual openness, believing that sex and love should not be regulated by the state but be left within the responsibility of the individual. Although adultery is immoral, ultimately it belongs within the realm of individual privacy. Therefore, the country should not be prosecuting criminal adultery in order to secure spousal fidelity, but rather, based on individual freedom, leave the issue to the free will of the married couple. In this respect, criminal adultery regulation exceedingly invades freedom of privacy and therefore is unconstitutional.

Furthermore, when either spouse commits adultery, according to the divorce conditions based on the Civil Act Article 840 Section 1, the adulterer has to compensate for the resulting property and mental loss based on the Civil Act Article 843 and Article 804, and the court would restrict child custody and visitation rights in order to protect the welfare of the child so that these civil disadvantages would be given to the adulterer who would then feel more responsible for spousal fidelity based on the Civil Act Article 843, Article 837 Section 3 and 4, Article 837 Section 2.

Despite the common benefit of protecting spousal fidelity, the majority of people believe that adultery barely harms society, and thus rather than the state's power of imposing criminal punishment in order to inhibit or prevent adultery, it is more reasonable to let the free will and love of the married couple decide whether to maintain the marriage and family. Such benefit and protection of the law has to be considered at the level of morality.

According to the report by Korean Women's Policy Research Organization, a survey was taken in June 2014 targeting 2000 adults from both genders regarding adultery, in which the analysis revealed that 36.9% of the male respondents had experienced adultery during marriage, while 65.6% of female respondents had experienced adultery during marriage. Of the total, 23.6% of the respondents had experienced adultery that can be punished by law, which corresponded to 32.2% of male respondents and 14.4% of female respondents. In sum, the organization concluded that based on the survey results adultery is no longer a rare phenomenon. Such recent survey data and reports reveal that in fact adultery is prevalent in our society while a very low percentage had been penalized, thus leading to the conclusion that criminal punishment of the act of adultery and incest generates little general or special preventive effect.

Thus the regulation no longer fulfills its intended function of protecting marriage and family and facilitating spousal fidelity, while conversely the punishment tears apart marital relationships, leading to divorce and the breakdown of the family, and unnecessarily increases the number of criminals, which violates the Constitution Article 36 Section 1, the protection of marriage and family system. In addition, since divorce constitutes a precondition for accusing one's spouse of adultery, criminal punishment in fact fosters the dissolution of families, and therefore arguably violate the constitutional protection of marriage and the family system. Criminal adultery regulation violates the principle of proportionality and the individual right to sexual decision-making and invades the right to privacy. Therefore it is unconstitutional.

For the preceding reasons, the '2015 Decision' that adultery regulation is unconstitutional is thus constitutionally legitimate.

5. Consequences of the Decision and Retroactivity

1) Consequences

The decision of the case has brought enormous impact to Korean society, and currently, the arguments for and against the decision are being debated. If one wants to know the opinions of persons who may represent different positions by way of example, they are as follows. Park, a civil activist and president of the cooperative office in the People's Solidarity for Participatory Democracy, claimed that the state should not intervene in the problems of couples by means of penalty.⁶⁷⁾ Moreover, the United Women's Association provided the following opinion through reviews: "[T]he decision from the Constitutional Court to rule the criminal regulation of adultery as unconstitutional should be respected since it lacked actual effect until now."⁶⁸⁾ Professor Young-Su Chang of the Korea University law

67) He stated that it is rather more righteous for the state to ask for civil liability, and he commented, "[I]t is justified from the viewpoint of the judicial perspective and the flow of the times." See Sejun Park et al., (*gantongjoe wiheon*) "*sidae byeonhwa injeonghaeya*" "*gajeong haechegigang bung goe [(Adultery is Unconstitutional) "Era's change to admit" "Demolition of family and collapse of discipline"]*", World Daily [segyeilbo], Feb. 26, 2015, <http://www.segye.com/content/html/2015/02/26/20150226004864.html> (last visited Aug. 16, 2015).

68) *Id.* (United Women's Association, in its comment) The association also stated, "[E]ven

school also advised that “in the long-term, it is right to deem the criminal regulation of adultery unconstitutional” and that “setting the case study of developed countries as a model for solving the adultery problem through civil law would be a desirable way toward a solution.”⁶⁹⁾ However, Sungkyunkwan University’s Confucian scholar Seo-Chan Ryu responded differently, arguing, “[I]t is desirable that the state should be the arbitrator for penalizing the adultery crime.”⁷⁰⁾ Conversely, Dr. Ha from the Christian Association (Korea Association of Christian Family Counseling) mentioned that “abolishing the adultery crime has a considerable relationship with social and domestic problems, and therefore, there is a higher possibility that abolishment of the criminal regulation of adultery may lead to negative results, such as less attention for dysfunctional family problems.”⁷¹⁾

On the other hand, in order to analyze the changes in the perceptions of the general public based on gender after the decision on the case, one recent poll⁷²⁾ conducted a comparison of male and female respondents after the abolishment of the criminal regulation of adultery.⁷³⁾ At the executive level, the National Assembly or the Ministry of Justice did not show any tangible movement or discussion on any measures related to the gap created from the abolished space. In addition, if it was abandoned the consequence of weakening marriage ties had been worried, and the retrial case from the decision triggered debate on human rights issues as private information of the involved person and the related people leaked out during the process. Finally, issues had been raised from the decision of the case regarding the

though the adultery law is abolished, the moral and ethical responsibility agreed to by the couple does not necessarily disappear, and there should be an amendment requiring the partner to bear the civil liability from imputation.”

69) *Id.* (Young-Su Chang, in his comment)

70) *Id.* (Seo-Chan Ryu, in his comment)

71) He further added, “[R]ather than complete dissolution of the adultery law, an alternative method of amendment should be employed according to the times.” *Id.* (Hyeon-Cheol Ha, in his comment)

72) Jinho Shin, [2015 Adultery Report], Seoul News [seoulsinmun], Sep. 16, 2015, <http://www.seoul.co.kr/news/newsView.php?id=20150916500037> (last visited Dec. 16, 2015).

73) *Id.* The results showed that 24.2% of married people had experienced extramarital affairs, which was 2.8% higher than when the Korean Women’s Development Institute researched the same topic eight months before the abolishment of the criminal regulation of adultery. <http://www.fnnews.com/news/201502261520510963> (last visited Aug. 16, 2015).

wider scope for the Korean court to select the breakdown principle, but recently, the Supreme Court maintained the principle of liability with a unanimous vote.⁷⁴⁾ In addition, a study argued⁷⁵⁾ that we should move henceforth the discussion centered on not ‘criminal characteristic’ of adultery but illegal breach of marriage contract. In other words, adultery is just one type of breach, as he pointed out. This argument seems proper and reasonable.

2) *Retroactive Effect Issue*

As the decision concluded, the crime of adultery (Criminal Act Article 241) is now unconstitutional. The criminal law clause lost its effect retroactively. But the past judgments of the criminal court based on the clause, which were decided until October 30, 2008, remain valid. In other words, only the defendants who were convicted by the criminal courts after October 30, 2008 (the day when the clause was last held by the Constitutional Court as constitutional) could be found innocent through retrial. This is because the proviso of Article 47 Section 3, which limits the retroactive effect of decisions on unconstitutionality to a certain time, stipulating the cut-off point as the latest date when the Constitutional Court last upheld the same challenged statute as constitutional. The proviso was newly enacted on May 20, 2014.

The aim to legislate the proviso was to avoid an excessive burden on legal stability and on the judicial branch. Criminal courts had experienced overwhelming numbers of retrial cases as a result of unconstitutionality before. That experience was caused by the decision of the Constitutional Court which struck down Criminal Act Article to punish ‘obtaining sex under false promises of marriage’. After November 2009, the day the relevant provision was declared as unconstitutional, all persons who had been convicted by the criminal clause until that time had made appeals to have a retrial, and criminal indemnity was to be given to each one of them, too. To avoid such congestion and burden on the judiciary, the proviso was

74) Supreme Court of Korea, 2013Meu568, Sep. 15, 2015.

75) Do-Jin Og, *wiheongyeoljeong hu gantong-e daehan minsu chaeg-im* [*Civil liability after decision of constitutional violation on adultery punishment*], Vol. 450 INGWONGWA JEONG-UI [Human Rights and Justice] 19 (2015).

legislated to limit the scope of the retroactive effect. In virtue of the proviso the Constitutional Court no longer has to worry much about the burden of unlimited retrials and indemnities whenever some criminal law clause is struck down. In other words, thanks to the proviso the Constitutional Court has been able to focus on the constitutionality issue without any consideration of the potential social burden which might be caused by its decision.

IV. Conclusion

(1) In Korea, the legislature and executive are often criticized for their lack of contribution to decriminalization. They are in fact responsible for an increase in the criminal law. Therefore, 'decriminalizing' decisions by the Constitutional Court are of particular importance. The decisions include that of 2009, holding that punishing sex under false promises of marriage was unconstitutional, as well as this "2015Decision", also holding that punishing adultery was unconstitutional. Thanks to these preceding decisions, problems with strong decriminalization claims of several types of crimes have been resolved to a certain extent. However, one must admit that there remain many obstacles to overcome.

In Korea, punishment for homosexual acts in the military and punishment for the act of prostitution are still under debate. Moreover, in terms of administrative law, numerous cases involve disproportionate levels of punishment. In order to estimate the possibility of resolving such issues, it is important to recognize the current subject and criteria that would make it practically feasible. In the process of examining such subjects and criteria, the preceding cases, especially the adultery case of 2015, involved the KCC as an organization that makes constitutional decisions based on general constitutional rights and values, and enjoys the relative trust of the people. Its contributions towards decriminalization are thus to be encouraged.

Understanding these cases by putting emphasis on the criteria and subjects more deeply and in more detail is highly important. Because this understanding is essential since it could be used for predicting and realizing the future of the decriminalization movement in South Korea or

other countries, which have similar social issues. In this article, I tried to explain and emphasize such criteria and subjects, especially related to the “2015Decision”.

(2) The decision on unconstitutionality reflects the trend in other parts of the world, where many countries are banning the criminal regulation of adultery and thus casting some doubt over whether criminal regulation is helpful for maintaining household integrity and marriage purity. The decision also reflects the criticism that the criminal law intervenes in the privacy of the individual and represents an abuse of the state’s punishment power. It also reflects a weakening of the justification in the recent era for protecting women as a socially vulnerable class. There are now various opinions regarding the appropriateness of abolishing the criminal regulation of adultery, but the most important fact is that it has now been abolished in Korea by this landmark decision of the KCC.

