

The Crime of Adultery in Korea : Inadequate Means for Maintaining Morality and Protecting Women

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Abstract

The crime of adultery is a good example of the moralist tradition under Korean criminal law. Moralism aims to serve as a guardian of a social ethos through the use of state authority and severe penal sanctions. Although the crime of adultery would certainly be considered a morally reprehensible act, the use of criminal law seems neither desirable nor effective as a means to advocate the moral tenet of spousal fidelity. As such, the crime of adultery should be dealt with in a divorce court setting and not in a criminal court, and adulterers should be handed civil sanctions and moral reprehension, not imprisonment. Further, the usefulness of penalizing the crime of adultery goes no further than branding the criminal with a "Scarlet Letter," which operates as a severe intrusion into the privacy of the individuals involved all in the guise of maintaining sexual morality. Such stigmatization fails to actually deter the crime of adultery and only produces counterproductive effects. Such negative effects are evidence that the law against criminal adultery should be placed under stricter constitutional review. Although some feminists propound that adultery should be criminalized in order to protect women's interests, the effect of criminalizing adultery may have the unintended consequence of acting as a fetter and not as a shield for women rights, especially considering the rapid growth in Korean women's consciousness of their fundamental rights to privacy and freedom over sexual decisions..

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I. Introduction

Adultery can be a morally reprehensible act as it involves deception, betrayal, the breaking of promises, and the causing of emotional pain.¹⁾ Under Korean law, other than warranting moral reprehension and the institution of a divorce suit, adultery entails criminal prosecution. As such, Korean criminal law is given the difficult task of encouraging spousal fidelity through the use of state authority. The crime of adultery is prohibited under Article 241 of the Korean Penal Code (KPC), which provides for a maximum two-year prison sentence to married persons as well as their partners if found to have committed adultery.²⁾ Adulterers may only be prosecuted upon the accusation of a spouse,³⁾ and the accusation can only be made after the marriage has been dissolved or a divorce action has been filed.⁴⁾ Approximately 150,000 persons have been prosecuted annually for the crime of adultery since the 1980s.⁵⁾

From a comparative legal perspective, Article 241 of the KPC can be viewed as a unique legal provision found in contemporary democratic societies. Only two western countries, Austria and Switzerland, criminalize adultery.⁶⁾ In contrast, Denmark (in 1930), Sweden (in 1937), Japan (in 1947), Germany (in 1969) and France (in 1975) have all abolished the crime of adultery, and although adultery remains a crime in

1) Adultery is defined as the “[v]oluntary sexual intercourse of a married person with a person other than the offender’s husband or wife, or by a person with a person who is married to another.” See Black’s Law Dictionary 51 (6th ed. 1990).

2) The Korean Penal Code [hyeongpeop], (Law No. 293, September 18, 1953, last revised on December 13, 1997 as Law No. 5454), Art. 241(1). For an introduction to the Korean Penal Code, see Kuk Cho, *Korean Criminal Law: Moralism Prima Ratio for Social Control*, Journal of Korean Law, Vol.1, No.1 (Seoul National University College of Law, 2001).

3) *Id.* Art. 241 (2).

4) The Korean Criminal Procedure Code [hyeongsa sosongpeop], (Law No. 341, September 23, 1954, last revised on December 13, 1997 as Law No. 5454), Art. 229. For a basic introduction to Korean criminal procedure, see Kuk Cho, *The Reform of Korean Criminal Procedure after Democratization*, in *Recent Transformations in Korean Law and Society* 135-49 (Dae-Kyu Yoon ed., 2000).

5) Shin Dong-Woon, *A Study on the Adultery and the Abortion from the Viewpoint of Criminal Law Reform in Korea* [naktajoe mit kantongjoe e kwanhan yeonku] 182 (1991).

6) See Austrian Penal Code, Art. 194; Swiss Penal Code, Art. 214. Austrian Code limits the period of accusation when spouses have lived separately for more than one year. See Austria Penal Code, Art. 194 (2).

twenty-four states within the United States,⁷⁾ the laws are a dead-letter statute rarely enforced and seldom prosecuted.⁸⁾ In 1955, the American Law Institute eliminated the crime of adultery from the Model Penal Code.⁹⁾ None of the of the other Far Eastern countries that share the Confucian tradition, such as China, Japan and North Korea, criminalize adultery.

Most Korean legal scholars argue today that adultery should not be criminalized, maintaining that adultery should be a matter dealt with under divorce law and not under criminal law.¹⁰⁾ In three separate decisions, however, the Korean Constitutional Court has repeatedly confirmed constitutionality of Article 241 of the KPC.

This article is a critical examination of the rationale underlying the criminalization of adultery. The discussion will begin with a brief overview of the history of the crime of adultery, followed by a discussion of the main rationale for criminalization,-focusing on the theories of leading scholars in the field and the decisions of the Korean Constitutional Court. Finally, this discussion will end with a critical examination of the legitimacy and efficacy of the crime of adultery, arguing for its de-criminalization.

II. A Brief History of the Criminalization of Adultery in Korea

Several ancient kingdoms and unified feudal kingdoms in Korea, such as the *Koryo* Dynasty (918-1392) and the *Chosun* Dynasty (1392-1910), punished persons found

7) See Ala. Code 13A-13-2 (1994); Ariz. Rev. Stat. Ann. 13-1408 (West 1989); Colo. Rev. Stat. Ann. 18-6-501 (West 1997); D.C. Code Ann. 22-301 (1996); Fla. Stat. Ann. 798.01 (West 1992); Ga. Code Ann. 16-6-19 (1996); Idaho Code 18-6601 (1997); 720 Ill. Comp. Stat. Ann. 5/11-7 (West 1993); Kan. Stat. Ann. 21-3507 (1995); Mass. Ann. Laws ch. 272, 14 (Law. Co-op. 1992); Mich. Comp. Laws Ann. 750.30 (West 1991); Minn. Stat. Ann. 609.36 (West 1987); Miss. Code Ann. 97-29-1 (1994); N.H. Rev. Stat. Ann. 645:3 (1996); N.Y. Penal Law 255.17 (McKinney 1989); N.C. Gen. Stat. 14-184 (1993); N.D. Cent. Code 12.1-20-09 (1997); Okla. Stat. Ann. tit. 21, 872 (West 1983); R.I. Gen. Laws 11-6-2 (1994); S.C. Code Ann. 16-15-60 (Law. Co-op. 1985); Utah Code Ann. 76-7-103 (1995); Va. Code Ann. 18.2-365 (Michie 1996); W. Va. Code 61-8-3 (1997); Wis. Stat. Ann. 944.16 (West 1996).

8) See Model Penal Code, 213.6, at 434 (1980).

9) *Id.* at 435-37 (1980).

10) Bae Jong Dae, Criminal Law (Specific Part) [hyeongpeop kakron] 670-72 (3rd ed., 1999); Baek Hyong Koo, Criminal Law: Specific Part [hyeongpeop kakron] (1999); Lee Jae Sang, Criminal Law (Specific Part) [hyeongpeop kakron] 595-96 (4th ed., 2000); Park Sang Ki, Criminal Law (Specific Part) [hyeongpeop kakron] 527-28 (1999); Yim Woong, Criminal Law: Specific Part [hyeongpeop kakron] (2001).

guilty of adultery. The following briefly discusses the crime of adultery in the *Chosun* Dynasty.

The *Chosun* Dynasty, which maintained Confucianism as the official state ideology, strictly maintained its moralist position on sex. The Codes of the *Chosun* Dynasty, including the *Daemyeongryul Chikhae* [Commentary of the Great Ming Dynasty Codes] and the *Kyeongkukdaecheon* [the Great Codes of State], punished both male and female adulterers, but imposed heavier penalties on the latter. The *Chosun* Dynasty not only punished adulterers, but even placed sanctions on the offspring of female adulterers (e.g., prohibition against holding government office). Husbands were even permitted to kill the adulterous spouse and her partner if the husband had caught them engaged in adultery. The *Chosun* Dynasty's Codes were male-centered, as can be seen in the difference in the penalties levied on male and female adulterers following the crime of adultery. The differences are even more pronounced when considering that males were even allowed to have concubines. Besides the crime of adultery, the *Chosun* Dynasty Codes punished such crimes as incest, consensual sex between unmarried persons, and consensual sex between engaged couples prior to marriage.¹¹⁾

Although the *Hyeongbeop Daecheon* [The Great Penal Code] of 1905 was enacted after the Kabo Reforms of 1894-which aimed at the institutional "modernization" of Korean society-adultery was still criminalized under *Hyeongbeop Daecheon* in accordance with previous *Chosun* Dynasty Codes. In contrast, the revised *Hyeongbeop Daecheon* of 1908, which was instituted with the help of Japanese scholars, criminalized adultery committed only by married females in line with the Japanese Penal Code. Under Japanese rule (1910-1945), the Japanese Penal Code took effect in Korea, and accordingly married female adulterers and their partners could be punished based on the husband's accusations.¹²⁾

The Korean Penal Code of 1953 enacted after liberation from Japan made both male and female married adulterers equally punishable upon the accusations of their spouses. In the legislative process surrounding the 1953 Code, the Committee for

11) See Jung Gung-Sik, Historical Review on the Crime of Adultery in Korea [hankuk eui kantongchoe eui byeopjesajeol kochal], A Study on the Adultery and the Abortion from the Viewpoint of Criminal Law Reform in Korea, *supra* note 5, at 213-233.

12) *Id.* at 233-237.

Legal Institution and Administration of the National Assembly submitted a draft for de-criminalizing adultery, to which twenty assemblymen answered with a draft of their own. However, neither of the two drafts could be passed as the eleven votes required for passage could not be obtained. Consequently, another proposed draft criminalizing adultery was passed after obtaining one more vote than the required number of votes.¹³⁾

In 1985, the Special Review Committee for the Revision of Criminal Law was established as a special governmental committee to draw up guidelines for revising the entire Korean criminal legal system.¹⁴⁾ Although the Petit Committee under the Special Review Committee submitted its opinion for abolishing the crime of adultery, the Special Review Committee decided to maintain the crime, but with a lesser penalty. The crime of adultery remains intact in the 1995 revised version of the KPC.

III. The Incidence of Adultery and the Public Attitude towards Adultery

In 1991, Professor Shim Young-Hee and her colleagues produced an excellent empirical study on the incidence of adultery in Korean society, the public's attitudes toward adultery and the criminal law against adultery.¹⁵⁾ Some of these findings are summarized below.

As to the incidence of adultery in Korean society, 10.8% of the respondents stated that they had engaged in at least one adulterous act in their lifetime. 20.2% of males and 2.9% of females had committed adultery at least once, and more than 60% of males that had committed adultery had committed it more than twice.¹⁶⁾ The incidence of adultery shown in this study was purported to be lower than that actually occurring in society, as Professor Shim and her colleagues narrowed the scope of their study by excluding incidences of adultery involving male/female prostitutes.¹⁷⁾ It is worth noting, however, that under Article 241 of the KPC, the act of a married persons

13) Shin Dong-Woon, *supra* note 5, at 151.

14) Presidential Order, No. 11601.

15) Shim Young-Hee, Et. Al., *An Empirical Study on Adultery in Korea: Focusing on the Extent and Attitude* [kantong eui siltae mit euisik e kwanhan yeonku] (1991). Their survey was conducted toward 1,200 Seoul residents 15 years and older, 545 men and 655 women (Id. at 14).

16) *Id.* at 98-114.

17) *Id.* at 97.

engaging in sexual intercourse with a prostitute is part of the definition of adultery.

As to the public's attitudes toward adultery, more than 60% of the respondents replied that adultery was unacceptable, although the responses tended to vary-showing a double standard in terms of sexual morality-depending on the gender of the adulterer. Respondents tended to be more lenient in terms of their views when the adultery was committed by a male as opposed to a female. 77.8% of the respondents reportedly would never tolerate the female's engaging in adultery, while 53.4% of the respondents would never tolerate the male engaging in the same.¹⁸⁾

As to attitudes toward the crime of adultery, 83.4% of the respondents recognized the existence of the crime of adultery,¹⁹⁾ and 73.2% of the respondents supported criminalizing adultery, offering such reasons as preventing family breakups and negative impact on family members. 61.9% of the respondents favored maintaining the current provision criminalizing adultery on an indefinite basis, while 22.5% of the respondents favored maintaining it for only a limited time.²⁰⁾

On the topic of deterrence, 74.3% of the respondents believed that adultery would increase without the crime of adultery, and more than half responded that male adultery would certainly increase. When asked if the respondents themselves would resort to criminal procedures upon discovering their spouse's infidelity, only 12.3% responded positively.²¹⁾

Based on this study, Professor Shim and her colleagues concluded that although adultery was widespread throughout Korean society in spite of the criminalizing of adultery, the public's view was that, due to a lack of other viable means, criminal law is expected to play a role in promoting sexual morality.

IV. The Rationale for Criminalization of Adultery

A. A Tool for Maintaining Spousal Fidelity

A minority opinion within the scholarly community exists which argues for

18) *Id.* at 69-70.

19) *Id.* at 117.

20) *Id.* at 149-150.

21) *Id.* at 160.

maintaining the crime of adultery. From the viewpoint of adamant moralists, academic proponents are in favor of criminal adultery under Article 241 of the KPC by propounding the tenet that criminal law should not be ignored as a potentially effective tool for maintaining social ethics. Although these proponents accept the view that the basic role of law in society is different from that of social ethics, they argue that the societal roles played by law and ethics can be overlapping, with criminal law often playing the role of enhancing social mores.

Former Prime Minister Lee Soo-Sung firmly espoused his moralist position as a law professor by stating that “Criminal law should not be simply a “dead law,” which merely establishes standards and the limits of criminal sanctions, but should go further to be a “living law,” which enhances the order of values and moral standards of a community.”²²⁾ Criticizing that absorption of western ideas and deviation from oriental ethics has led to the decay of morals within society,²³⁾ Dr. Lee asserts as follows:

“The intemperate abuse of divorce and the negation of our traditional concept of fidelity are in violation of our traditions. Therefore, the crime of adultery is in accord with our concept of tradition, and it is an example of legitimate legislation that should be maintained for the present or perhaps even forever.”²⁴⁾

Professor Kim Il-Su is also a strong proponent of criminalizing adultery. He argues that acceptable sexual mores need to be protected under criminal law in order to stabilize the order of a community and that the crime of adultery is necessary to protect the institutions of marriage and family.²⁵⁾

B. A Shield for Protecting Women

Two colliding opinions currently exist regarding the crime of adultery within

22) Lee Soo Sung, *Cultural Tradition of Korea and Criminal Law* [hankuk eui munhwa cheontong kwa hyeongbeop], Korean and Japanese Jurisprudence Study [han il beophak yeonku] 21, 38 (1994).

23) Lee Soo Sung, *The Limits of Morality in Criminal Law* [hyeongpeop cheol dodeokseong eui hanke e kwanhayeo], 18 Seoul National University Jurisprudence 112 [seouldae peophak] (June 1977).

24) *Id.*

25) Kim Il Su, Korean Criminal Law [hankuk hyeongpeop], Vol. 4, 373 (1997).

Korean feminist circles, whereas only one viewpoint in favor of maintaining the crime was prevalent in the past. The majority opinion at present, however, appears to be in favor of maintaining the crime of adultery, and proponents of this view espouse that criminal adultery plays an important role in protecting women against the double standard prevalent within Korean society today.

In Korean society, a married man's adulterous activities are often considered excusable, tolerable, and "manly", and further his one-night-stand or hiring of a prostitute is not considered reprehensible, often attracting little public attention. In contrast, a married woman's adulterous activities are looked upon severely and is not likely to be tolerated by the husband. Further, if a woman is caught for hiring a male prostitute, the mass media is likely to immediately bring the incident to public light. Wives are also often under socio-cultural pressure to endure their husband's infidelity for the sake of family peace.²⁶⁾

Considering the state of the social environment, Kwak Bae-Hee, a leading women's rights activist, contends as follows:

"The crime of adultery has been considered a symbolic and psychological shield for protecting the lives of women who are a social and economic minority. ... Some feminist activists argue that the crime of adultery has already lost its function of protecting women. It could be that abolishing criminal adultery would be considered a matter of urgency with respect to those women who find themselves prosecuted for committing adultery. However, the majority of women who are in agony over their husband's infidelity still depend upon and regard the right to accuse their adulterous husbands as the last resort to relieving their suffering."²⁷⁾

26) See Lee Young-Ja, *Sexual Deviation and Women* [seong iltal kwa yeoseong], 5 Korean Women's Study: Sex 101 (1989).

27) Kwak Bae-Hee, *Urgent to Abolish the Family Head System, not the Crime of Adultery* [kantongjoe boda hojuje pyeji ka keubseonmu], Women's Newspaper [Yeoseong Shinmoon] (November 9, 2001). See also Kwak Bae-Hee, *It is too Early to Abolish the Crime of Adultery* [kantongjoe peji ajik tdae iruda], Women [Yeoseong] (March 1989).

Dr. Yang Jung-Ja focuses on the role which the enforcement of criminal adultery plays in protecting women's economic interests in divorce actions. Pointing out the difficulty in women receiving their fair share of marital property or consolation awards from their adulterous husbands who often hide the marital property or change its ownership prior to the divorce suits, Dr. Yang argues that accusing an adulterous husband is a very effective and necessary means for women to protect their economic rights.²⁸⁾

Accordingly, the majority of Korean feminist groups argue that the crime of adultery should be maintained until the biased sexual standard prevalent against females today is abolished and the equality between the sexes is accomplished in every sphere of Korean society.

C. The Majority Opinions of the Decisions of the Korean Constitutional Court

The constitutionality of Article 241 of the KPC has been challenged three times in the past for its alleged violations of the right of sexual freedom, the “dignity and value of human beings” and the “right to pursue happiness” as protected under the Korean Constitution.²⁹⁾ In agreement with the arguments in the previous two chapters, the Korean Constitutional Court has declared Article 241 of the KPC as not unconstitutional in each of its three previous decisions. The following focuses mainly on the majority opinions in the 1990 and 2001 decisions (with a brief discussion of the 1993 decision).³⁰⁾

The decision declared in December 10, 1990 was the very first time the Constitutional Court had declared its position regarding the constitutionality of the crime of adultery.³¹⁾ Although admitting that the crime of adultery might restrict the right of sexual freedom,³²⁾ the six-to-three majority opinion held that such a restriction could be justified. The opinion stated as follows:

28) Yang Jung-Ja, *Why is it too Early to Abolish the Crime of Adultery?* [kantongjoe pyeji wae sikisangjo inka?], Women's Newspaper[Yeoseong Shinmoon] (September 8, 2000).

29) The Korean Constitution [Honbop], Art. 10.

30) The minority opinions of the 1990 and the 2001 decisions are reviewed in the following chapter four.

31) Decision of Sept. 10, 1990, the Korean Constitutional Court, 89 Heon Ma 81.

32) *Id.*

“It is inevitable that adultery committed by married persons would be punishable for the purpose of maintaining sound sexual morality and a system of monogamist marriages, for ensuring family life, for protecting the duty of sexual fidelity between spouses, and for preventing social ills caused by adultery. ... Article 241 is a necessary and minimum restriction on the right of sexual freedom and does not violate the essential contents of the liberties and rights found in the Constitution.”³³⁾

Though recognizing that the crime of adultery may apply in practice as a disadvantage to women, the majority opinion stated that Article 241 of the KPC did not violate the constitutional principle of “equality before the law” as it equally bestows the right to accuse to both the husband and the wife.³⁴⁾

In their concurring opinion, Justices Cho Kyu-Kwang and Kim Moon-Hwee added that the legal conscience of the public does not yet regard the criminalization of adultery as a violation of the individual’s right of sexual freedom, and such determination of whether criminal sanctions should apply to adultery belongs in the realm of “legislative policy.” Thus, the concurring opinion rendered Article 241 of the KPC as not unconstitutional.³⁵⁾

Eleven years later, on October 25, 2001 the Constitutional Court reconfirmed its previous position, reiterating the main rationale behind its 1990 decision.³⁶⁾ However, the majority opinion rendered a new noteworthy statement. The eight-to-one majority opinion paid close attention to the following factors: (1) that the legal conscience of the public regarding the issue of sex had rapidly changed; (2) the crime of adultery was sometimes abused as a means of obtaining consolation awards; and (3) the 1990 revision of the Korean Civil Code had recognized the wife’s right to share in the marital property after divorce, even if the property was registered under her husband’s name.³⁷⁾ The majority opinion then offered a suggestion to the legislature that it should survey the trends in the legal conscience of the public and that it should seriously

33) *Id.*

34) *Id.*

35) *Id.* (Justices Cho Kyu-Kwang and Kim Moon-Hwee, concurring opinion).

36) Decision of Oct. 25, 2001, the Korean Constitutional Court, 2000 Heon Ba 60.

37) Korean Civil Code [minpeop], (lastly revised on December 13, 1997 as Law No. 5454), Art. 839-2.

consider the arguments in favor of abolishing the crime of adultery.³⁸⁾ Although the majority opinion recognized the problems posed by the crime of adultery, it concluded that it was nevertheless too early to abolish the law concerning adultery, stating that the decision to abolish or amend the law was a matter to be decided by the legislature.

V. Maintaining Spousal Fidelity and Protecting Women through Criminal Adultery

The majority opinion in the 2001 Constitutional Court decision very briefly summarized the arguments in favor of abolishing criminal adultery as follows: (1) the general trend in the world was towards abolishing criminal adultery; (2) legal intervention into an individual's private life was improper; (3) criminal adultery was very often used as a means to intimidate or obtain some monetary gain; (4) most accusations levied by the spouse were retracted during the criminal proceedings; (5) the effectiveness of the crime in deterring recidivism was next to none; (6) the role of the crime in helping to protect the family and the rights of women was doubtful.³⁹⁾

This chapter reviews critically and explores the kinds of theoretical and practical problems in instituting criminal adultery.

A. Excessive State Intervention into Private Matters

First, are criminal sanctions necessary to promote spousal fidelity? Although criminal law and social morality certainly overlap each other in certain respects, the basic role of criminal law is different from that of social morality. Once criminal law fancies itself as a protector of social mores, it will tend to intervene in and make uniform the private lives of individuals. Such intervention is certainly undesirable in a modern society that adheres to 'moral pluralism' as one of its fundamental principles. In brief, criminal law should take the minimalist approach to moral issues and play its role as *ultima ratio*, not *prima ratio*.⁴⁰⁾

38) *Id.*

39) *Id.*

40) See Kuk Cho, *Aggravated Punishment on the Homicide of Lineal Ascendants in the Korean Penal Code: Maintain Filial Piety by Criminal Law?*, International Conference on Criminal Law: Protection of Life in Criminal Law (Seoul, 2001).

Such reasons are why some behaviors that are labeled “immoral,” such as incest, bestiality, perverted sexual behaviors and group sex, are not criminalized in the KPC. It would not be easy to claim that such behaviors are any less immoral than adultery. In this context, I agree with Justice Kwon Sung’s statement in his dissenting opinion in the 2001 Constitutional Court decision stated as follows:

“Adultery is an object of ethical reprehension and moral remorse, not criminal sanctions. ... Sexual relationships essentially belong in the realm of the most private and secret spheres of an individual’s life, and thus fidelity should never be forced upon and should not be the object of state supervision and conditioning through criminal punishment.”⁴¹⁾

Affirming that “fidelity guaranteed through criminal punishment would not be genuine fidelity,” Justice Kim Yang-Kyoon in his dissenting opinion in the 1990 Constitutional Court decision also emphasized that the crime of adultery violates the “right of privacy” by exposing an individual’s sexual life to the criminal process.⁴²⁾

It is also worth noting the following the statement found in the Commentaries of the U.S. Model Penal Code:

“[A]ssigning criminal punishment to instances of private immorality can justly be regarded as an invasion of personal liberty. Coercive state action against a particular individual may be necessary to prevent injury to other persons, to guard them in the secure possession of their property, and to further the interest of all citizens in the unobstructed workings of their government. The extension of penal sanctions to perceived sexual misconduct between consenting adults cannot be defended on such grounds. ...[P]rivate immorality should be beyond the reach of the penal law.”⁴³⁾

41) Decision of Oct. 25, 2001, the Korean Constitutional Court, 2001 Heon Ba 60 (Justice Kwon Sung, dissenting opinion).

42) Decision of Sept. 10, 1990, the Korean Constitutional Court, 89 Heon Ma 81 (Justice Kim Yang-Kyoon, dissenting opinion).

43) Model Penal Code, 213.6, at 437, 439 (1980).

In contrast, besides the moral reprehension of a non-legal nature imposed on adulterers, civil sanctions are already readily available. Adulterers are responsible for paying consolation awards to their spouses and may be disadvantaged when obtaining child custody through divorce proceedings. Therefore, I contend that sanctions against adultery should be through civil or non-legal means and not through criminal measures. Article 241 of KPC is an overtly moralist piece of legislation that is unconstitutional.

B. Minimal Deterrent Effect and Counterproductive Consequences

Second, it should be remembered that in contrast to popular belief, criminal adultery is not primarily aimed at maintaining marital union, as the crime of adultery can only be prosecuted upon the accusation of the offender's spouse,⁴⁴⁾ which in turn can only be initiated after the marriage has been dissolved or a divorce suit has been filed.⁴⁵⁾ Therefore, proceedings to prosecute the crime of adultery would be brought only after spousal love and family bonds had already been shattered. Even an adamant proponent of Article 241 of the KPC admits that "the punishment of adultery does not have any purpose of repairing broken marriages" and its purpose is to simply further "dissolve the already broken marriage upon retribution."⁴⁶⁾

Accordingly, the crime of adultery reduces the marital union to a vengeful battlefield. The Korean Supreme Court held that a wife-who did not condone her adulterous husband and his partner-was permitted to accuse her husband and partner of criminal adultery even though the wife had recognized their cohabitation and adultery for years without expressing her objection or taking any particular action.⁴⁷⁾ The crime of adultery may also lead to use of the legal process for purposes of revenge by the family of the betrayed spouse. The Korean Supreme Court has held that even if the spouse of the adulterer had died after the occurrence of adultery, the adulterer could still be accused by the brothers or sisters of the deceased spouse.⁴⁸⁾

As to its deterrent value, Article 241 of the KPC appears to add little to the practical

44) The Korean Penal Code, Art. 241(2).

45) The Korean Criminal Procedure Code Art. 229.

46) Kim Il-Su, *supra* note 25, at 368.

47) Decision of May 14, 1990, the Korean Supreme Court, 99 Do 826.

48) Decision of Oct. 29, 1967, the Korean Supreme Court, 67 Do 878.

deterrence available through the possibility of the spouse detecting the adulterous activities. To cite the Commentaries of the Model Penal Code:

“[A]dultery may be a symptom of marital breakdown rather than its cause. ... [T]he criminal law is an exceedingly blunt instrument with which to attempt to monitor such[marital] relationship.”⁴⁹⁾

In their empirical study, Professor Shim and her colleagues admitted that the crime of adultery rarely deterred adultery in practice.⁵⁰⁾ Their conclusion concurs with the official commentary of the Alabama Penal Code of the United States as follows: “The conclusion is clear that existing criminal law has been notoriously unsuccessful in stamping out adultery, and it is unlikely that anyone will ever launch a program of enforcement on a scale sufficient to make criminal penalties a significant risk in philandery.”⁵¹⁾ It is also unrealistic to expect people to not engage in sex if their marriage has virtually broken down and are living separately from their spouses without having actually divorced them.⁵²⁾

With little deterrent value, however, the crime of adultery is counterproductive in that arrests, public prosecutions, and imprisonments completely abolish the possibility of reconciliation between married couples and are detrimental to the lives of children. Therefore, the conclusion can be summed up in that the moralist basis for instituting the crime of adultery appears to have failed to produce any deterrent effect and has simply produced unwanted counterproductive results.⁵³⁾

49) Model Penal Code, 213.6, at 438 (1980).

50) Shim Young-Hee, *supra* note 15, 142-143, 161.

51) *See* Ala. Code Art. 13A-13-2 official commentary (1982).

52) Yim Woong, the Theory of Decriminalization [bibeomjoechwa eui iron] 80 (1999).

53) In the United States, there is an argument that even if effective, the law of adultery is not sufficiently tailored to meet constitutional mandates by being overinclusive or underinclusive. Adultery statutes are criticized as being overinclusive by punishing not only deceitful and harmful extramarital affairs, but also benign and constructive ones, such as those occurring in “open” marriages. They are also criticized as being underinclusive by failing to punish other acts that also destroy the marital union. Examples include a spouse who is a habitual liar, a complete deplete on financial resources, or even engages in dinners or dates with individuals capable of posing a threat to the marriage. *See* Note, *Constitutional Barriers to Civil and Criminal Restriction on Pre-and Extramarital Sex*, 104 Harv. L. Rev. 1660, 1677-78 (1991); Melissa Ash Haggard, *Note: Adultery: A Comparison of Military Law and State Law and the Controversy this Causes under our Constitution and Criminal Justice System*, 37 Brandeis L.J. 469, 480 (1998).

C. A Tool for Women

There remain two functions of the crime of adultery to which some feminist groups strongly adhere. These include the retributive and economic functions in the enforcement of criminal adultery on behalf of women betrayed by adulterous spouses.

The mental agony and suffering of a betrayed spouse may be ameliorated by the punishing of an unfaithful spouse through the use of criminal measures, although it is rather unclear whether criminal law should even be used for such purposes. In contravention of some feminist expectations, however, retribution is not always effective in promoting the interests of women.

As referred to previously, because of the bias against women in Korean society that is perpetuated by the double standard, women betrayed by their spouses are put under socio-cultural pressures to not accuse their husbands of adultery, although betrayed husbands are often quick to accuse their adulterous wives willingly and without hesitation.⁵⁴⁾ As a result, criminalization of adultery is more likely to serve the purposes of husbands seeking retribution, rather than facilitating the taking of revenge by wives. Thus, it might be nothing more than an unconfirmable assumption that married women would be protected by the criminalizing of adultery.

In Korean society, on the other hand, accusing husbands of adultery will in many cases be a powerful means by which wives can obtain better consolation awards, as husbands detained for criminal adultery would be more readily willing to settle their cases through the payment of higher sums than in instances where they were not so detained.

As Justice Kim Yang-Kyoon pointed out, however, the enforcement of criminal adultery may encourage payoffs by adulterers and insulate them from potential prosecution while punishing only those that are adulterers who are indigent.⁵⁵⁾ Such side-effects could not be justified since the results of criminal prosecutions in theory should not depend upon the assets of the accused individuals. Feminists would not find such results satisfactory if the indigent adulterers happened to be female.

Second, the rationale for enforcement of criminal adultery should be reexamined in

54) See the text accompanying with *supra* note 18.

55) Decision of Sept. 10, 1990, the Korean Constitutional Court, 89 Heon Ma 81 (Justice Kim Yang-Kyoon, dissenting opinion).

consideration of the question of whether criminal law should be used to intervene in monetary disputes. A minimalist approach to enforcement of criminal laws should be adhered to in a democratic society, and accordingly the pursuit of monetary interests should be furthered in a divorce court, not in a criminal court setting. The 1990 reform of the Korean Civil Code significantly improved the financial status of women affected by divorce.⁵⁶⁾ Besides consolation awards, a wife is entitled to a share of the marital property upon divorce, even if the property was registered under the husband's name, and more importantly, even when the wife is found responsible for the divorce (i.e., the wife can bring a claim for division of the marital property even in such case).⁵⁷⁾ Further, on May 11, 1993, the Korean Supreme Court held that even wives found to have committed adultery had the right to claim one half of the marital property.⁵⁸⁾ Such changes in the legal rights of women would appear to make questionable the rationale behind the use of criminal law to intervene on behalf of women in the case of adultery.

D. Disproportionate Penalty

Although monetary sanctions are not prescribed for criminal adultery, they may be levied against other crimes classified as crimes in violation of sexual morality under the KPC such as brokering of obscene conduct, manufacture or distribution of obscene materials, and public indecency.⁵⁹⁾ In the case of the crime of brokering obscene conduct, in particular, its anti-social effects are much stronger than that in the case of adultery, and its maximum penalty in the former case, which is three-years imprisonment, is heavier than the maximum penalty for the crime of adultery. It should be noted, however, that a monetary sanction is prescribed for the crime of brokering obscene conduct.

56) See Mi-Kyung Cho, *Korea: The 1990 Family Law Reform and the Improvement of the Status of Women*, 33 U. of Louisville J. of Fam. L. 431, 439-440 (1995).

57) The Korean Civil Code [minpeop], (lastly revised on December 13, 1997 as Law No. 5454),. Art. 839-2. This article provides: "(1) One of the parties who has been divorced . . . may claim a division of property against the other party; (2) If no agreement is made for a division of property as referred to in Paragraph (1), or if it is impossible to reach an agreement, the Family Court shall, upon request of the parties, determine the amount and method of division taking into consideration the amount of property realized by the co-operation of both parties and other circumstances."

58) Decision of May 11, 1993, the Korean Supreme Court, 93 Seu 6.

59) The Korean Penal Code, Arts. 241-245.

In this context, the penalty for the crime of adultery seems disproportionate to the severity of the crime, raising the question of the penalty's constitutionality.⁶⁰⁾

E. Public Legal Consciousness

It is true that the majority of the public is in support of maintaining the crime of adultery, and this view is due to the belief that adultery will increase if the crime of adultery is abolished.⁶¹⁾ As Professor Shin Dong-Woon sharply pointed out, however, such a view may be as a result of a “false belief” that the committing of adultery is generally pervasive throughout society and is committed without much guilt on the part of the offenders while moral blame against it expressed in the survey.⁶²⁾ Professor Shim Young-Hee's study also shows that although most of the respondents were aware that adultery was a crime, more than half did not know that adultery could only be charged after the filing of a divorce action and were also not aware of the types of penalties involved. Further only 34.3% of the respondents were aware that a married individual's having sexual intercourse with a prostitute could be criminally punished as adultery.⁶³⁾ Such figures tend to show that the public does not seem to understand the exact implications of the debate surrounding this issue.

On the other hand, in principle, although the popular views on morality held by the general public certainly would play a substantial role in devising and enforcing criminal laws, criminal legal jurisprudence should not be shackled by such sentiments. Rather, criminal legal jurisprudence should adhere to “critical morality,”⁶⁴⁾ which espouses the view that the aim of criminal legal jurisprudence should be to constantly test for it's a law's applicability, consistency, and responsiveness to relevant social goals.

60) Justices Han Byeong-Chae, Lee Si-Yoon and Kwon Sung also pointed out this unproportionateness of in their dissenting opinions of the 1990 Constitutional Court decision. *See* Decision of Sept. 10, 1990, the Korean Constitutional Court, 89 Heon Ma 81(Justices Han Byeong-Chae, Lee Si-Yoon and Kwon Sung, dissenting opinions).

61) *See* the text accompanying with *supra* note 20; Shim Young-Hee, *supra* note 15, at 160.

62) Shin Dong-Woon, *supra* note 5, at 191-192.

63) *Id.* at 118.

64) *See* H.L.A. Hart, *Law Liberty, and Morality* 19-20 (1963). *See also* the “discriminatory conception” of morality developed in Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, in *Morality and the Law* 55 (Richard Wasserstrom ed., 1971).

VI. Conclusion: The Undesirable and Ineffective “Scarlet Letter”

The crime of adultery is a good example of the manifestation of the moralist tradition in Korean criminal law. It aims to serve as a guardian for maintaining a certain ethos of socially acceptable behavior through the means of state authority and enforced sanctions. However, one’s decision to engage in sex with a loved one is one of the most fundamental liberties of individuals. This view is aptly espoused by Professor John Witte, Jr. who states, citing Nietzsche, that “contractual freedom and sexual privacy reign supreme, with no real role for the state, church, or broader civil society to play.”⁶⁵ Although the exercise of sexual liberty may often result in adultery and certainly the consequential breaking of a spouse’s heart, the use of criminal sanctions would be neither desirable nor effective in maintaining spousal fidelity. The issue of adultery should be dealt with in a divorce court setting, not in criminal court, and adulterers should be handed civil sanctions and imputed moral blame, not imprisonment. The crime of adultery is no more than a “Scarlet Letter” that is an excessive infringement of the privacy of individuals in the name of maintaining sexual morality, and fails to deter adultery. Further, it only produces undesirable and counterproductive effects. Such factors warrant a stricter constitutional review of criminal adultery. Although some feminists promote the criminalization of adultery as a means to promote women’s interests, criminal adultery may work as a fetter and not as a shield, especially since Korean women are becoming more and more conscious of their fundamental rights to privacy and sexual freedom.

65) John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* 215 (1997) (citing Letter of August 1886, in *Friederich Merzbacher, Liebe, Ehe, und Familie* 214 (1958)).