Adultery Case

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

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

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

Petitioners: Park O-Soon, et al.

Underlying Cases: listed in the Appendix

Decided: February 26, 2015

Holding

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

Reasoning

I. Introduction of the Case

The petitioners, who were prosecuted on a charge of adultery or fornication, filed the motion to request for the constitutional review on Article 241 of the Criminal Act, alleging the unconstitutionality of the aforementioned provision. After the motion was denied, the petitioners

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

II. Subject Matter of Review

The petitioners of 2012Hun-Ba255 and 2013Hun-Ba161 and the requesting court of 2014Hun-Ka4 filed the constitutional complaints or requested the constitutional review on Article 241 Section 1 of the Criminal Act. Nonetheless, Article 241 Section 2 of the Criminal Act is inseparable from Article 241 Section 1 of the Criminal Act in that Section 2 of the provision provides that adultery is a crime subject to victim's complaint and a spouse who condones or pardons the adultery cannot accuse his/her spouse of adultery. Accordingly, the subject matter of review is the constitutionality of Article 241 of the Criminal Act (enacted as Act No. 293 on September 18, 1953) and its contents are listed below:

Provision at Issue

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

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

same shall apply to the other participant.

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

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

A. Arguments of Petitioners

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

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

The Provision at Issue has legitimate purposes that are the protection of good sexual culture and practice and the promotion of marital fidelity between spouses. Nonetheless, it fails to achieve the appropriateness of means and least restrictiveness for considering the reality where the public recognition has changed along with the propagation of individualism and sexual liberalism; the nature of sexual life which

should not be subject to criminal punishment, but subject to sexual morality for self-governing of society; and little efficiency of criminal punishment against adultery. While the Provision at Issue hardly serves the public interests of protecting marriages and spousal obligation of faithfulness, it excessively restricts the right to sexual self-determination and to privacy through the punishment on the private sexual life, thereby loosing the balance of interests and violating the Constitution.

IV. Comparative Law and Precedents

A. Comparative Law

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

B. Discussion for Revision

The Ministry of Justice suggested the abolishment of adultery crime in its revision draft of the Criminal Act preannounced on April 8, 1992, reflecting the global trend of decriminalization of adultery, the inappropriateness for law to intervene the individual sexual life belonging to the intimate domain of private life, the possibilities of misusing the accusation of adultery for threatening and alimony, the weakened effects as a means of criminal punishment as accusations are mostly canceled in the investigation or trial proceeding, little efficiency for deterrence or re-socialization, or the protection for family and women. Afterwards, the Minister of Justice finalized the Criminal Act Revision composed of 405 articles on May 27, 1992, embracing the opinion that it is premature to abolish the adultery crime. Instead, it suggested to reduce the statutory punishment by lowering the terms of

imprisonment to 1 year or less and by adding fines less than 5,000,000 Won. Nevertheless, this final revision was not legislated.

C. Precedents

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

V. Judgment

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

(1) Article 10 of the Constitution promotes the right to personality and right to pursue happiness, assuming the right to self-determination. The

right to self-determination connotes the right to sexual self-determination that is the freedom to choose sexual activities and partners, implying that the Provision at Issue restricts the right to sexual self-determination of individuals. In addition, the Provision at Issue also restricts the right to privacy protected under Article 17 of the Constitution in that it restricts activities arising out of sexual life belonging to the intimate private domain.

(2) Legitimacy of Legislative Purpose

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

(3) Appropriateness of Means and Least Restrictiveness

① Change in Public's Legal Awareness

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

Accordingly, there is no longer any public consensus regarding the

appropriateness of criminalization of adultery, which means the criminal punishment against sexual activities with a person except his/her spouse, along with the change of public recognition on social structure, marriage, and sex and the spread of an idea to value sexual self-determination.

② Appropriateness of Criminal Punishment

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

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

The tendency of modern criminal law directs that the State should not exercise its authority in case an act, in essence, belongs to personal privacy and is not socially harmful or in evident violation of legal interests, despite the act is in contradiction to morality. According to this tendency, it is a global trend to abolish adultery crimes.

③ Effectiveness of Criminal Punishment

The interest to be protected by the Provision at Issue is the marital

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

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

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

The rate of punishing adultery has been dramatically decreased. The statistic suggest that the filing and accusation of adultery have been

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

There is a view to concern the disorder in sexual morality or increase of divorce due to adultery in case of abolition of adultery. Nonetheless, any statistics to support the disorder of sexual morality or the increase of divorce after the abolition of adultery is not found in countries where adultery is repealed. Rather, the degree of social condemnation for adultery has been reduced due to the social trend to value the right to sexual self-determination and the changed recognition on sex, despite of the punishment of adultery. Accordingly, it is hard to anticipate a general and special deterrence effect for adultery from the perspective of criminal policy as it loses the function of regulating behavior.

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

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

It is true that the existence of adultery crimes in the past Korean society served to protect women. Women were socially and economically underprivileged, and acts of adultery were mainly committed by men. Therefore, the existence of an adultery crime acted as psychological adultery deterrence for men, and, furthermore, enabled female spouses to

receive payment of compensation for grief or divided assets from the male spouse on the condition of cancelling the adultery accusation.

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

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

Today's prohibition of adultery has come to punish only a very small number of adulterers, so it only massively produces potential criminals and restricts their basic rights but has become ineffective in protecting the marital system and duty to remain sexually faithful. The maintenance of marriage and family should depend on the free will and affection of individuals, which should not be controlled by criminal punishment. Therefore, the Provision at Issue would be not an effective means to achieve the purpose to protect the marriage system based on monogamy and family orders.

④ Side Effects of Criminal Punishment

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

⑤ Sub-Conclusion

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

(4) Balance of Interests

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

(5) Conclusion

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

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

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

(1) Case of a Person Who Committed Adultery

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

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

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

The Provision at Issue intends to protect the marriage system based on

monogamy through the promotion of sexual faith between spouses.

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

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

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

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

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

Constitution. Most criminal law scholars support the abolishment of adultery crime.

The modes of adultery can be roughly classified into three cases: a liable spouse to have extramarital intercourse merely for sexual pleasure despite his/her spouse (mode 1), a spouse falling in love with a person more attractive than his/her spouse, being skeptical about his/her current marriage (mode 2), and a sexual relationship with new love under circumstances where the existing marriage is *de facto* dissolved, such as separation for a long time, despite the existing marriage has not been dissolved actually or a law suit/complaint for divorce has not been filed (mode 3).

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

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

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

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

the economically underprivileged.

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

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

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

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

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

the marriage is *de fact* dissolved.

(2) Case of a Participant of Adultery

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

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

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

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

will.

Considering the essence of adultery, an unmarried person who fornicated with a married person (including unmarried, divorced, or separated by death) would not assume the existence and violation of sexual fidelity between spouses and the duty regarding such fidelity with regard to a person who committed adultery and his/her victimized spouse. Therefore, the State should refrain from the control and regulation over the exercise of the right to sexual self-determination regarding whom and how to have sexual activities of an unmarried participant of adultery for the nature of the right and freedom. The right to sexual self-determination of an unmarried participant of adultery should be protected more broadly, compared to a married person who committed adultery.

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

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

(3) Conclusion

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

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

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

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

(1) Constitutionality of Prohibition and Criminalization of Adultery

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

It has been more than 60 years since the Provision at Issue was enacted. The general perception of sexual morality has dramatically

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

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

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

(2) Principle of Clarity

The elements of crime should be clearly stated in a provision of the Statute, which is the formal law. If a provision stating elements of crime is excessively abstract or vague and it is excessively broad or ambiguous in terms of substances and application, the principle of clarity is violated

in that arbitral exercise of criminal punishment of the State would not guarantee the freedom and right of the people (2011Hun-Ba75, February 26, 2004). The circumstances precluding wrongfulness and prosecution conditions as well as the elements of crime shall be clearly stated in terms of meanings and requirements under the principle of clarity, providing the ground that the people subject to laws can predict the scope and limitation of the exercise of state authority.

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

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

sexual relationship with a spouse of the dissolved marriage. The legal relationship would be also applicable for a case that a divorce suit is not filed yet (Supreme Court 2011Meu2997 en banc decision, November 20, 2014).

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

On the other hand, the Supreme Court, expressing that exterior express of forgiveness or mere promise for forgiveness would not be admitted to the term of 'pardon' of adultery, explains the reasons as below: The term of 'pardon' of adultery means a unilateral expression to indicate that a spouse would not call his/her spouse who committed adultery responsible for adultery, presuming the maintenance of marriage, while he/she knows that his/her spouse committed adultery, as the post-forgiveness stated in Article 841 of the Civil Act. The term of 'pardon' can be expressed implicitly, without any restriction in expressing, while it should be expressed to show the true mind to maintain the marital relationship while certainly knowing that adultery is committed, in a clear and reliable way (Supreme Court 91Do2049, November 26, 1991; Supreme Court 2007Do4977, November 27, 2008).

Nonetheless, it is not possible to understand the degree of assurance that adultery was committed by a partner spouse. It is also difficult to

figure out how the will to maintain the marital relationship can be expressed in a clear and reliable way. Accordingly, the citizens would not be able to predict whether the adultery is pardoned or not, before the court decides each case.

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

(3) Principle of Proportionality between Responsibility and Criminal Punishment

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

The Provision at Issue exclusively imposes imprisonment as statutory sentence. In order to justify the imprisonment as a sole statutory punishment, the gravity and illegality should be substantial so that pecuniary punishment, lighter than imprisonment, is not appropriate and

it has to be rationally predictable that the offender, in practice, will not be sentenced to criminal punishment beyond his responsibility in individual cases. Among the offenses regarding sexual culture and practice, only the adultery provision states imprisonment as statutory punishment exclusively. It suggests that the Legislature presumed that illegality of adultery is substantial and the types of adultery are not various, thereby adultery should be punished by imprisonment exclusively.

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

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

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

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

As a result, the Provision at Issue providing a short-term imprisonment exclusively for various types of adultery, whose gravity of illegality is different, is against the principle of rule of law by losing the balance between crime and punishment. Also, it does not correspond to the legal sense of the people as well as the global trend of legislation. Therefore, the Provision at Issue violates the principle of proportionality between responsibility and punishment in that it excludes or restricts the possibility to consider the individuality and distinctiveness of individual

cases by providing all adultery and fornication shall be punished by imprisonment less than 2 years.

VI. Conclusion

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

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

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

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

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

The right to self-determination protected under our Constitution means the personal autonomy to decide one’s matter by his/her own will in

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

Nonetheless, the act of adultery committed by a married person is not included in the realm of the protected individual right to sexual self-determination, because such an act would violate the marital fidelity despite he/she chose marriage as a social system and thereby damages the social and legal system, which is marriage based on monogamy, having a destructive impact on the family community. It would be hardly agreeable to protect such an act under the right to sexual self-determination, as the majority opinion does. The right to sexual self-determination would protect love and sexual activities with the opposite sex. Nevertheless, an act of adultery or fornication that infringes on the legal interests of others or community, beyond his/her own boundary, would depart from the inherent limitation of the right to sexual self-determination.

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

Article 36 Section 1 of the Constitution, which provides that "Marriage and family life shall be established and sustained on the basis of individual dignity and equality of the sexes, and the State shall do

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

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

B. Criminal Punishment of Adultery and Legislative Discretion

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

2001).

The Provision at Issue has been criticized in that it intervenes and enforces the issue of ethics or morality of individuals. Nonetheless, it is beyond the mere issue of ethics and morality in that adultery or fornication committed by a married person and his/her participant is a major threat to the dissolution of marriage and family life, deviating from the reasonable social ethics.

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

The majority opinion suggests that the legal perception of the general public has changed. Nonetheless, there is no empirical evidence to prove the change of the legal perception of the general public. A survey conducted by the Korea Legal Aid Center for Family Relations with regard to the abolition of adultery in 2005 presented that 7,721 people (about 60% of the poll) agreed the retention of adultery crimes among 12,516 people. A survey conducted by a public opinion survey institution in 2009 showed that 64.1% of the poll agreed the retention of adultery crimes among 1,000 people aged 19 and above with regard to the abolition of adultery crimes. A survey conducted by the Korean

Women's Development Institute in 2014 also indicated that 60.4% of the poll agreed the retention of adultery crimes among 2,000 people aged 19 and above. It clearly suggests that the general public, including women who are economically and socially underprivileged, still supports the idea that the nation should protect family by criminally punishing adulterous acts. In these terms, our criminal law has aggravated punishment provision for injury or murder of ascendants in that it serves the protection of the least ethical morality of our society, instead of the enforcement of the filial duty or morality by law.

We cannot deny the role of criminal punishment in maintaining the good sexual morality of the society. Korea has prohibited adultery and punished a person who committed adultery or fornication since the law prohibiting 8 conducts in the era of *Kojoson*. Thenceforth, a perception that adultery is prohibited by law and adulterous acts are punished by criminal punishment is deeply rooted in our society. A provision to punish adulterous acts has had a general deterrence effect to prevent the general public from committing adultery. It also has served the protective function for the sound sexual morality of the society as well as the marital relationship and precious family. The abolition of adultery might lower the sexual morality of our society by demolishing a threshold of 'the least sexual morality'; cause disorder of sexual morality of our society by repealing the criminal awareness against adultery; and stimulate, accordingly, dissolution of marriage and family community. It implies that the fundamental system of community of human beings, which is 'family-society-nation' stated by the German philosopher George Wilhelm Friedrich Hegel, could be infringed. It suggests that the legislature's judgment to criminally punish adultery, in addition to the autonomous reflection of ethical principles of individuals and the society, would not be arbitrary.

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

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

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

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

Provision at Issue, unlike other sexual custom-related crimes under the Criminal Act, would not violate the balance of criminal punishment (*see* 2007Hun-Ka17, etc., October 30, 2008).

C. Implication of Retention of Adultery

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

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

delinquency of children coming from broken families, including a case of divorce or separation, is higher than ones coming from parents families.

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

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

D. Sub-Conclusion

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

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

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

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

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

The reason why imposing criminal punishment on adultery is expected to have no actual and fundamental preventive effect is that marital fidelity is not what can be regulated through coercion by law; failure to specify a fine as statutory punishment for adultery is not the reason. Imposing a minor fine against acts of adultery will hardly have a

deterrent effect on a person committed adultery, who desires to avoid responsibility to support the family and pay monetary compensation incurred by dissolution of a marital relationship (*see* 2007Hun-Ka17, October 30, 2008). Also, it may result in offering a way out of what he or she had done, if the person is financially well-off. On the other hand, while one of the consequences of imposing a heavy fine is to diminish one's property, under the current system in which property owned by husband and wife is assumed to be common property unless it is the separate property owned by one spouse, a heavy fine imposed on a single spouse may result in disturbing the property of both spouses.

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

As examined above, a fine or qualification punishment cannot serve as an appropriate means of punishment for adultery. Given this, maintaining the offense of adultery and including a fine or qualification punishment as statutory punishment for adultery in order to pursue the principle of proportionality between responsibility and punishment are not in the best interest of protecting a good-faith spouse and children.

The crime of adultery, once prosecution begins and unless a charge is dropped, inevitably causes social problems generated by a breakup of family regardless of the type of acts of adultery. The dissenting opinion asserts retention of the crime of adultery for the reason that no proper protection measures for women and children who are economically

disadvantaged in the process of dissolution of family are yet in place. However, I do not believe that resolution of civil and family lawsuits generated by misconduct of a single spouse should resort to criminal proceedings by maintaining the crime of adultery.

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

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

[Appendix]

(*intentionally omitted*)