

The Price of Adultery: Evidence from Korean Judicial Decisions

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This study examines the determinants of compensation for pain and suffering (CPS) by using data extracted from divorce proceedings decisions of South Korean judges. Estimation results derived from the Heckman model indicate that adultery is responsible for a \$4,120 increase in CPS, which is approximately 14% of the average. Korean judges attempt to deter adultery by imposing large CPS on adulterous spouses. Another finding also indicates that women receive more CPS than men by \$5,837. Korean judges seem to consider that the mental suffering of women during marital breakups is greater than that of men. Additionally, a \$1 million growth in a defendant's wealth increases CPS by only \$3,800. Therefore, the defendant's ability to pay CPS is not a significant factor in assigning CPS value. Finally, CPS is unrelated to the division rate of marital property, which implies that Korean judges decide separately on the value of CPS and the division rates of marital property. Judges do not use their discretion to balance the two decisions during divorce proceedings.

Keywords: Divorce, Adultery, Compensation for pain and suffering, Judicial decisions

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I. Introduction

Although the legal definition of adultery differs by legal system, the commonality involves sexual relations outside marriage. Adultery breaks the commitment of fidelity between husband and wife; it often leads to divorce because it is a breach of marital contract. In most communities, an extramarital affair is considered a wrongful conduct, either legally or morally or both. Therefore, the law has traditionally punished violators of marital contract. Generally, three types of penalty are imposed, namely, self-help, criminal punishments, and civil damages (Rasmusen 2000).

Adultery is rarely considered as a ground for coercive self-help measures. Requesting a divorce is the most frequently used means of self-help. Particularly in a fault-based divorce system, one spouse can ask for a divorce because of the other spouse's violation of their marriage vows. Divorce is not a real punishment under a no-fault-divorce system, and numerous countries no longer punish adulterers criminally; hence, the criminalization of adultery is not greatly driven by the victim as by the public (Rasmusen 2000). Civil damages can lessen the harm that stems from divorce. If one spouse suffers psychologically because of the divorce and the other spouse is responsible for it, the injured spouse can demand compensation for pain and suffering (CPS). When marital torts involve negligent acts, CPS can be substantial (Yoo 2006). However, a number of countries have abolished CPS in divorce proceedings as no-fault-divorce systems gradually replace fault-based ones. Although adultery inflicts mental distress and creates apathy by deterring couples from investing in their marriage, most countries have no explicit legal sanctions for this act.

South Korean civil law applies the fault rule to divorce settlements. Under this rule, a spouse's faults are regarded as grounds for divorce. Article 840 of the Korean Civil Act sets out six grounds for divorce states:

A husband/wife may apply to the Family Court for a divorce in each of the following cases:

1. If the other spouse has committed adultery.
2. If one spouse has been maliciously deserted by the other.
3. If one spouse has been extremely maltreated by the other spouse or his/her lineal ascendants.
4. If one spouse's lineal ascendant has been extremely maltreated by the other spouse.

5. If the death or life of the other spouse has been unknown for three years.
6. If there exists any other serious cause that makes it difficult to continue with the marriage.

Until recently, Koreans could file separate cases against their adulterous spouse under civil and criminal laws. According to Article 241 of the Korean Criminal Act, the punishment for adultery is imprisonment of no more than two years. The rare occurrence of incarcerating adulterers did not prevent thousands of criminal proceedings each year. Criminal proceedings were a means of providing the plaintiff with bargaining power in divorce settlements. Article 241 states that:

- (1) A married person who commits adultery shall be punished by imprisonment for no more than two years. The same shall apply to the other participant.
- (2) The crime in the preceding paragraph shall be prosecuted only upon the complaint of the wronged spouse. If the wronged spouse condones or pardons the adultery, the complaint can no longer be upheld.

On February 26, 2015, the Korean Constitutional Court abolished Article 241. Seven judges in the Court, which ruled on the constitutionality of the Article, supported the ruling, whereas two others dissented. According to the Court, Article 241 excessively restricts citizens' basic rights, such as the right to determine sexual affairs. With the possibility of imprisonment, CPS could be considered an ancillary tool in deterring adultery. However, with the abolition of Article 241, CPS is the only measure by which wrongful extramarital conduct can be punished. As a result, the act of adultery can have a greater influence now than in the past on determining CPS in divorce proceedings.

This study primarily aims to estimate the effect of adultery on CPS in South Korean divorce proceedings.¹ The act of adultery is an important factor when a judge assigns CPS value in civil divorce lawsuits. If adultery is added as a ground for divorce, CPS increases by a significant

¹ No common law marriage is accepted in Korea; therefore, our empirical results are applied only to civil law systems. For common law marriage and divorce from a law and economics perspective, see Foster (1961); Probert (2012); Grossbarda, and Vernon (2015), among others.

amount. Such increase in CPS is interpreted as a pecuniary punishment for adultery, that is, punitive damages. We examine the determinants of CPS by using data extracted from Korean judicial decisions on divorce proceedings. With regard its legal nature, CPS is unanimously regarded as compensation for the mental distress caused by divorce. Additionally, CPS can be considered as punishment against the spouse who is liable for the divorce. If the punishment factor matters, then the reproachable fault (*e.g.*, adultery) is an important consideration in assigning CPS value. Few empirical studies focus on judges' discretion in divorce proceedings. In particular, to the best of our knowledge, the current study is the first to estimate the effect of adultery on CPS by using data from actual judicial decisions.

The remainder of this paper is organized as follows. Section II reviews existing research on topics similar to this study. Section III explains the model and methodology. Section IV presents the main results, along with descriptive statistics from the data set and the estimation results. Section V summarizes the findings and the contribution of this study to literature.

II. Literature Review

Most of the economic studies on the topic have examined the determinants of adultery. Fair (1978) developed the first theoretical model and tested how adultery is affected by age, length of marriage, presence of children, religion, occupation, education, and marital happiness. Assuming adultery is a normal commodity, he asserted that the effect of wages on infidelity was ambiguous, depending on the relative magnitude of income and the substitution effect of changes in the price of time. Furthermore, he used both occupation and education as proxy variables for the price of time. He found that the coefficient estimate of adultery is positive for occupation and negative for education. Neither of the results can be explained by time allocation model.

A series of follow-up studies revisited Fair's study. A number of studies tested Fair's results using different empirical methods (Pagan, and Vella 1989; Wells 2003; Li, and Racine 2004) and data (Elmslie, and Tebaldi 2008). Recent studies concerning adultery have also focused on its determinants. Smith (2012) revealed that the quality of occupation rather than education mattered with respect to adultery. He classified extramarital relationships in terms of regularity and illustrated that an individual with

a better job tends to have extramarital relations more regularly. The negative effect of education is greater in the case of casual encounters when occupational quality is held constant. Brooks, and Monaco (2012) considered the compatibility of husband and wife as the determinant of adultery; they proved that similarities between spouses reduce the probability of adultery. Kuroki (2013) used sex ratio in the workplace as a determinant of adultery; he noted that adultery increases when workplace sex ratio is high. Finally, Penney (2014) revealed that income disparity between a couple increases the probability of adultery.

Only a few economic studies have examined whether punishment deters adultery. Rasmusen (2000) presented two events that could occur in the absence of legal penalties for adultery. In the first event, a spouse might decide to invest in the marriage and monitor the other spouse's behavior carefully, and in the other event, a spouse might decide to abandon the investment because the cost of monitoring is expensive. In both cases, adultery does not occur because it is deterred either by precaution or a credible threat of divorce if the husband or wife has not invested in the marriage. However, welfare loss is incurred either because of monitoring costs or underinvestment. However, Liu (2008) used a dynamic optimization model and proved that the existence of punishment does not necessarily deter adultery unless the adulterer's marginal expected loss is larger than the marginal net benefit from adultery.

To the best of our knowledge, no previous empirical research has addressed whether adultery is penalized in a civil law system. Our study indicates that in Korea, adultery is punished on a pecuniary basis as part of CPS and the magnitude of said punishment is not trivial. Although this study deals with the cases of CPS that relate to divorce, its main findings are generalizable to cases involving non-monetary damages (NMD) that stem from tort or a breach of contract. The victim's monetary damages are recovered from the injurer's payment. A judge can easily assign a value to the monetary damages based on market price. However, estimating the value of a victim's NMD is difficult. Numerous countries provide judges with the discretion to decide on the value of NMD. Therefore, the analysis of judicial decisions is essential in examining the determinants of NMD. The most relevant previous study is that of Garrison (1995), who empirically investigated judicial decisions on property division, alimony, and child support in divorce settlements using the decisions made in New York from 1980 to 1990. She found that non-negligible discretion by judges existed in divorce decisions, which might have resulted in unpredictable outcomes for the parties involved.

Similar to our study, she also considered various factors, such as age, income, duration of marriage, and number of children, as the determinants of the decision. However, the possible penalties on the partner at fault were not accounted for in the judges' discretion.

III. Model and Methodology

We set a multiple regression equation to analyze the determinants of CPS in divorce proceedings. The dependent variable (y_i) in Equation (1) is CPS. \mathbf{Z}_i is a vector of the independent variables:

$$y_i = \mathbf{Z}_i \boldsymbol{\beta} + \varepsilon_i. \quad (1)$$

The mental distress caused by divorce is typically considered greater for women than for men and greater for the young population than for the old. Hence, the gender (*Male*) and age (*Age1*) of the plaintiff are considered in Equation (1). We assume that the fault of a spouse affects CPS value. The grounds for divorce (faults) are important if the punishment factor is emphasized when judges assign CPS value. Six grounds for divorce are listed in Korean civil law; four of these grounds are included in Equation (1) as possible explanatory variables.² For example, if the grounds for divorce are the act of adultery of a spouse and maltreatment of oneself, *Adultery* and *Maltreat1* each take a value of 1. *Wealth1* and *Wealth2* represent the economic capacity of the spouses.

CPS is large when the plaintiff's wealth (*Wealth1*) is small and the defendant's wealth (*Wealth2*) is large. The age of the defendant (*Age2*) indirectly indicates the defendant's ability to pay CPS. The duration of marriage (*Duration*) and the number of children (*Children*) represent the size of marital-specific assets. Korean civil law allows for the division of marital property after divorce;³ this system allows for the division of

² Adultery, desertion, and two kinds of maltreatment are included as explanatory variables. No case of a missing spouse exists in our sample. Most cases have other unspecified reasons. These two grounds for divorce are not considered in Equation (1).

³ Article 839-2 of the Korean Civil Act states: (1) One of the parties who has been divorced by agreement 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 concerning the amount of property acquired, by cooperation of both parties and other circumstances.

common wealth accumulated during marriage. If the division of marital property affects CPS, the coefficient estimates of the division rate of marital property (*DRMP*) are statistically significant:

$$x_i = \theta_i \gamma + \mu_i \quad (2)$$

To construct Equation (1), the CPS should be identified. As such, we excluded from the sample all cases wherein no CPS was claimed. If the sample is not selected randomly from the divorced, the simple estimation of Equation (1) can create bias. Equation (2) is added to estimate the probability of claiming for CPS. The dependent variable in Equation (2) (x_i) is equal to 1 if CPS is claimed, and 0 if it is not claimed. Equations (1) and (2) are estimated through the Heckman correction model. We estimate Equation (2) in the first stage. Sample selection bias is corrected by adding the transformation of the estimated probability to Equation (1).⁴ A vector of independent variables, θ_i , includes the number of children (*Children*), the duration of marriage (*Duration*), grounds for divorce (*Adultery*, *Desertion*, *Maltreat1*, *Maltreat2*), and *DRMP*.

IV. Estimation Results

The data used in this study are taken from Korean judicial decisions in divorce proceedings from 2009 to 2011.⁵ In addition to CPS, these decisions capture a considerable amount of information, such as gender, age, job status, the income of each spouse, the date of marriage, the grounds for divorce, and household wealth. Therefore, these data can be used to define several variables that can affect CPS value. The total number of judicial decisions in the given period is 1,001. However, certain cases are excluded because of missing data. The number of observations with CPS claims is 640.

According to *Statistics Korea*, only 25% of divorces are resolved by the Family Court; the remaining 75% are resolved by mutual consent of spouses. If the determinants of CPS between two types of divorce are different, another type of selection bias can exist within our sample.

⁴ Korean judges may compensate for an erroneous decision on *DRMP* by CPS. As *DRMP* cannot be exogenous to CPS, *DRMP* is dropped from Equation (1) in estimating the Heckman correction model.

⁵ If the CPS claimed by the plaintiff exceeds \$40,000, a panel of three judges makes the decision. The U.S. dollar/Korean won exchange rate is assumed to be 1:1,000.

TABLE 1
DEFINITION OF VARIABLES

Variables	Definition
<i>CPS</i> (\$1,000)	Amount of compensation for pain and suffering
<i>Male</i>	1 if the plaintiff is male, and 0 otherwise
<i>Age1</i>	Age of the plaintiff
<i>Age2</i>	Age of the defendant
<i>Children</i>	Number of children under 19 years of age
<i>Duration</i> (years)	Duration of the marriage
<i>Adultery</i>	1 if adultery exists, and 0 otherwise
<i>Desertion</i>	1 if desertion exists, and 0 otherwise
Grounds for divorce	
<i>Maltreat1</i>	1 if maltreatment of the spouse exists, and 0 otherwise
<i>Maltreat2</i>	1 if maltreatment of the spouse's family exists, and 0 otherwise
<i>Wealth1</i> (\$1 million)	Wealth of the plaintiff
<i>Wealth2</i> (\$1 million)	Wealth of the defendant
<i>Law firm</i>	1 if the plaintiff's attorney is corporate, and 0 otherwise
<i>DRMP</i>	Division rate of marital property for the plaintiff
<i>Region1-Region4</i>	Four dummy variables indicating five regions where the Family Court is located; the baseline is Seoul

Nonetheless, we do not expect such bias to be critical because a husband or wife consults with his or her lawyer or refers to precedents before reaching an agreement.

The summary statistics of the variables are presented in Table 2. The average amount of CPS is \$29,000. Given that more than 80% of the plaintiffs are women, plaintiff age and wealth, as well as the division rate of marital property, are, on average, smaller than those of the defendants. By comparing cases with CPS claim and those without, we found that the mean values of the grounds for divorce (*Adultery*, *Desertion*, *Maltreat1*, *Maltreat2*) and the number of children (*Children*) are larger in the former. These differences are statistically significant at the 1% level. From these statistics, the potential problem of sample selection bias is evident.

The estimation results of ordinary least squares (OLS) model and the

TABLE 2
SUMMARY STATISTICS OF VARIABLES

Variable	CPS not claimed				CPS claimed			
	Mean	Standard deviation	Minimum	Maximum	Mean	Standard deviation	Minimum	Maximum
<i>CPS</i>					28.86	27.57	0.84	300
<i>Male</i>					0.18	0.38		
<i>Age1</i>					50.02	10.81	28	90
<i>Age2</i>					51.73	10.61	26	82
<i>Children</i>	1.29	1.06	0	5	1.49	1.20	0	5
<i>Duration</i>	21.10	11.22	1	59	20.90	11.01	2	56
<i>Adultery</i>	0.10	0.30			0.31	0.46		
<i>Desertion</i>	0.07	0.25			0.12	0.32		
<i>Maltreat1</i>	0.34	0.48			0.61	0.49		
<i>Maltreat2</i>	0.02	0.13			0.02	0.13		
<i>Wealth1</i>					3.44	9.84		
<i>Wealth2</i>					11.07	41.20		
<i>Law firm</i>					0.35	0.48		
<i>DRMP</i>	0.47	0.18	0.00	0.90	0.45	0.15	0.00	1.00

Heckman correction model are presented in Table 3. The former is used solely to estimate Equation (1). The coefficient estimates of the two models are not significantly different. Among the grounds for divorce, adultery increases CPS, which is \$4,961 in OLS model, but only \$4,120 after correcting the sample selection bias. Korean judges attempt to deter adultery by imposing large CPS costs on adulterous husbands and wives. Another interesting finding is that women are paid more CPS than men by an average of \$5,837, likely because Korean judges perceive women's mental suffering in breakups as greater than men's.

A \$100,000 increase in a defendant's wealth increases CPS by only \$3,800. Therefore, a defendant's ability to pay CPS is not a significant factor in assigning CPS value. A poor plaintiff is not likely to receive a large amount of CPS. In addition, CPS is not related to the division rate of marital property, which implies that Korean judges separately decide on CPS and the division rate of marital property. Indeed, in divorce proceedings, Korean judges do not use their discretion to balance these two decisions. The age of the plaintiff, the number of children, and the duration of marriage do not affect CPS value.

Unlike the amount of CPS, the probability of claiming for CPS is positively affected by the number of children and maltreatment of spouse,

TABLE 3
ESTIMATION RESULTS

Independent variable	OLS model		Heckman correction model			
	Equation (1)		Equation (1)		Equation (2)	
	Estimate	Standard error	Estimate	Standard error	Estimate	Standard error
<i>Male</i>	-5.589 ^c	2.953	-5.837 ^b	2.871		
<i>Age1</i>	-0.037	0.267	-0.055	0.259		
<i>Age2</i>	-0.242	0.236	-0.217	0.228		
<i>Children</i>	-0.295	1.064	-0.488	1.062	0.153 ^b	0.074
<i>Duration</i>	0.447 ^a	0.163	0.431 ^a	0.159	0.005	0.007
<i>Adultery</i>	4.961 ^b	1.991	4.120 ^c	2.208	0.870 ^b	0.176
<i>Desertion</i>	3.549	3.149	2.925	3.107	0.456	0.285
<i>Maltreat1</i>	0.346	1.857	-0.649	2.189	0.896 ^a	0.130
<i>Maltreat2</i>	2.372	6.082	2.273	5.958	-0.182	0.471
<i>Wealth1</i>	0.167 ^c	0.097	0.147	0.092		
<i>Wealth2</i>	0.033 ^c	0.020	0.038 ^b	0.019		
<i>Law firm</i>	2.079	1.704	1.963	1.661		
<i>DRMP</i>	-5.982	5.758			-0.754 ^c	0.391
Constant	34.73 ^a	6.654	36.21 ^a	7.044	-0.092	0.234
R ² /Wald χ^2	0.121				43.74	
Sample size	365		507		507	

Notes: In Equation (1), CPS is a dependent variable. The coefficient estimates of four regional dummy variables in Equation (1) are not reported. In Equation (2), whether a CPS is claimed is a dependent variable.

^a significant at the 1% level

^b significant at the 5% level

^c significant at the 10% level

but is negatively affected by the division rate of marital property. Plaintiffs who have fewer children, are not being maltreated by their spouse, and are receiving a high proportion of the marital property are excluded from the sample of CPS-claimed cases. This result is supported by the fact that the coefficient estimate of *Adultery* becomes smaller in the Heckman correction model. Finally, a plaintiff who is suffering as a result of his or her spouse's adultery is likely to claim for CPS.

V. Conclusion

Two types of sample-selection bias arise in the course of this study.

First, our sample comprises CPS-claimed cases only. Cases in which no CPS was claimed are excluded from the sample. Therefore, we estimate the Heckman model to correct the inherent sample selection bias. Second, divorce by mutual consent in South Korea is significantly more popular than divorce by court proceedings. Nonetheless, husbands and wives refer to the precedents set by these proceedings. Consequently, findings derived from court decisions hold true for cases of divorce by mutual consent.

According to the estimation results, if a person is discovered to have an extramarital affair, his or her spouse is likely to demand compensation for his or her mental suffering. Adultery on the part of the spouse increases CPS value by \$4,120. The adulterous husband or wife pays an amount of CPS that is 14% higher than that paid by a non-adulterous spouse (*i.e.*, men: \$4,120; women: \$28,860). Another interesting finding is that women receive larger CPS than men by an average of \$5,800. This finding implies that judges consider women's mental suffering at the time of divorce as more serious than men's.

After the adultery law (*i.e.*, Article 241 of the Korean Criminal Act) was ruled unconstitutional and subsequently abolished, no legal sanction has been implemented against adultery for married couples apart from CPS. One interesting question is whether, in the wake of the abolishment of this law, the amount of CPS generally increases. By examining changes in the effects of adultery on CPS, we can determine which factor between punishment or compensation is more important when judges assign CPS value. Furthermore, the effects of change in the compensation scheme on both marriage and divorce rates can be investigated. These topics are open for future research.

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References

- Brooks, Taggart J., and Kristen Monaco. "Your Cheatin'heart: Joint Production, Joint Consumption and the Likelihood of Extramarital Sex." *Applied Economics Letters* 20 (No. 3 2013): 272-75.
- Dnes, Antony W., and Bob Rowthorn. *The Law and Economics of Marriage and Divorce*. Cambridge: Cambridge University Press, 2002.
- Elmslie, Bruce, and Edinaldo Tebaldi. "So, What Did You Do Last Night?"

- The economics of infidelity* 61 (No. 3 2008): 391-410.
- Fair, Ray C. "A Theory of Extramarital Affairs." *The Journal of Political Economy* 86 (No. 1 1978): 45-61.
- Foster Jr, H. H. "Common Law Divorce." *Minnesota Law Review* 46 (1961-62): 43-68.
- Garrison, Marsha. "How Do Judges Decide Divorce Cases: An Empirical Analysis of Discretionary Decision Making." *North Carolina Law Review* 74 (1995-96): 401-552.
- Shoshana Grossbard, and Victoria Vernon. "Common Law Marriage, Labor Supply, and Time Use: A Partial Explanation for Gender Convergence in Labor Supply." In Solomon W. Polachek, Konstantinos Tatsiramos, and Klaus F. Zimmermann (eds.), *Research in Labor Economics: Gender Convergence in the Labor Market*, Vol. 41, Bingley, UK: Emerald Group Publishing Limited, pp. 143-75, 2015.
- Kuroki, Masanori. "Opposite-Sex Coworkers and Marital Infidelity." *Economics Letters* 118 (No. 1 2013): 71-3.
- Li, Q. I., and Jeff Racine. "Predictor Relevance and Extramarital Affairs." *Journal of Applied Econometrics* 19 (No. 4 2004): 533-5.
- Liu, Xuemei. "An Effective Punishment Scheme to Reduce Extramarital Affairs: an economic approach." *European Journal of Law and Economics* 25 (No. 2 2008): 167-75.
- Pagan, Adrian, and Frank Vella. "Diagnostic Tests for Models Based on Individual Data: A Survey." *Journal of Applied Econometrics* 4 (1989): S29-59.
- Penney, Jeffrey. "Income Disparity and Married Men's Infidelity." Department of Economics, Queen's University, Kingston, 2014, Unpublished.
- Rasmusen, Eric Bennett. An Economic Approach to Adultery Law. Harvard Law and Economics Discussion Paper No. 322, 2000.
- Smith, Ian. "Reinterpreting the Economics of Extramarital Affairs." *Review of Economics of the Household* 10 (No. 3 2012): 319-43.
- Probert, Rebecca. "Marriage at the Crossroads in England and Wales." In Marsha Garrison and Elizabeth S. Scott (eds.), *Marriage at the Crossroads: Law, Policy, and the Brave New World of Twenty-First-Century Families*, Chapter 4, New York, USA: Cambridge University Press, pp. 73-86, 2012.
- Wells, Curt. "Retesting Fair's (1978) Model on Infidelity." *Journal of Applied Econometrics* 18 (No. 2 2003): 237-9.
- Yoo, Yoon-Ha. "Evidentiary Uncertainty and Negligence Rules." *Seoul Journal of Economics* 19 (No. 4 2006): 439-67.