world. Therefore, most information is entitled to be enforced only against a person, the enforcement cost of which is relatively cheap. If the value of a certain type of information, which is being protected by right *in personam*, increases or the cost to monitoring and enforcement decreases, due to changes of circumstances such as technological developments, or if the entitlement itself can reduce measurement costs, the information becomes worth a right *in rem*. Then the society can afford the property right to the information, such as a patent right. The more technologies develop, the more propertizable information is available, to which a right *in personam* is currently granted. However, the fact that the society can afford a right against the world does not necessarily lead to the grant of it. There are still other necessary conditions for the creation of such entitlement. The entitlement against the world, and also against a person, should both have the effect of increasing incentives to create information, and the incentive to create information should be necessary for there to be any entitlement at all. If the amount of the information created is already optimal, or even over-productive, the entitlement is not necessary and should not be given.

COMMENTS

Recent Decisions of the Korean Constitutional Court on Family Law

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I. Introduction

Until quite recently it was the generally-accepted view in Korea that the Civil Code, considered to fall under the realm of "private law," had little to do with Constitutional law, which was considered a part of "public law". But this view has begun to change as constitutional adjudications have begun to flourish with the inauguration of the Constitutional Court in 1988. Despite the recent developments, the Constitutional Court has rarely directly declared any provisions of the Civil Code as unconstitutional. Before 1997 there were only two Constitutional Court cases dealing with the constitutionality of provisions of the Civil Code, and in both such cases it was declared that the provisions were not unconstitutional.[1)]

However, the Constitutional Court has since declared in three separate cases during 1997 and 1998 that certain provisions of the Civil Code pertaining to family law and

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1) The Constitutional Court Decision, July 29, 1993, 92 heonba 20, Constitutional Court Report [heonbeopjaepanso panryejip], Vol.5 No.2 36 ff., found Civil Act Art. 245 (1) on the adverse possession of immovable property not unconstitutional; August 29, 1996, 93 heonba 6, Constitutional Court Report [heonbeopjaepanso panryejip], Vol. 8, No.2, 32 ff. found Civil Act Art. 440 on the interruption of prescription against surety as constitutional.

inheritance law, in particular, were indeed unconstitutional. The Constitutional Court's decision on March 27, 1997, 95 heonga 14, 96 heonga 7[2] held the Civil Code Article 847 (1) unconstitutional, which restricted the period for exercising one's right to bring an action denying paternity to a one year window. Further, the Constitutional Court's decision on July 16, 1997, 95 heonga 6~13[3] ruled the Civil Code Article 809 (1) unconstitutional, which prohibited marriages between parties with surnames of common geographical origin. Moreover, the Constitutional Court's decision on August 27, 1996, 96 heonga 22, 97 heonga 2 · 3 · 9, 96 heonba 81, 98 heonba 24 · 25[4] ruled the Civil Code Article 1026 (2) unconstitutional to a limited degree, which deemed an heir to have effected an absolute acceptance of his/her succession rights if the heir had failed to either make a qualified acceptance or a renunciation of rights within three months after he/she had knowledge of the commencement of an inheritance proceeding.

These Constitutional Court decisions have had an important and profound impact on the general Korean public. For example, the prohibition of marriages between parties with surnames of common geographical origin had been extremely controversial not only among lawyers but also within the general public since enactment of related provisions in the Civil Code in 1957. The Constitutional Court, by its recent decision, settled the lingering debate once and for all. Besides their social and political significance, these rulings have been significant for theoretical reasons such as providing new bases for resolving the lingering debate on the relationship between Constitutional law and civil law, in general. Previous debates over these clauses were carried out at only the level of interpreting the civil law and its related legislative policies, while few such debates were actually related to constitutional questions.[5] But owing to the decisions above, vigorous constitutional debate

2) Constitutional Court Report [heonbeopjaepanso panryejip], Vol. 9, No. 1, pp. 193 ff.

3) Constitutional Court Report [heonbeopjaepanso panryejip], Vol. 9, No. 2, pp. 1 ff.

4) Constitutional Court Report [heonbeopjaepanso panryejip], Vol.10, No.2, pp. 339 ff.

5) However, on the prohibition of marriages between parties with surnames of common origin, Moon-Hyun Kim, 'Study on Unconstitutional Clauses' Research on Interpretation of the Constitution [heonbeophaeseok-e guanhan yeongu], Constitutional Court, 1994, pp. 256 ff. stated that the above clause is unconstitutional. On the absolute acceptance of succession by law, Jin-Su Yune, 'The Protection of Heirs Who Belatedly Discover Existence of Inheritance Liabilities [sangsokchaemu-rul duinutgae balgyeonhan sangsokin-ui boho]', Seoul Law Journal [seouldaehakgyo beophak], Vol. 38, No. 3-4, 1997, p. 208 f. discussing the constitutional aspects of the problem.

concerning these issues should undoubtedly unfold.

On the other hand, it is worth noting that such decisions were focused primarily on interpreting provisions of the Civil Code related to family law and inheritance law, which are generally regarded as conservative in comparison with other areas of the law. Among the three decisions mentioned above, two of the decisions on family law declared on March 27, 1997 ("Decision No. 1") and July 16, 1997 ("Decision No. 2"), respectively, will be the main focus of this review. This article will briefly discuss the background and contents of the decisions, the reactions toward the results and their significance to the overall debate concerning the issues.

The decisions are also significant in that the statutes examined were not declared "simply unconstitutional," which is the Constitutional Court's usual form for declared decisions of unconstitutionality, but were instead declared "incompatible with the Constitution". In the case of a statute declared "simply unconstitutional", the statute loses its validity at the time the decision is handed down. However, in the case of a statute declared "incompatible with the Constitution," the result is somewhat different. In the latter case, although the statute is found unconstitutional (there is no difference between a ruling of "simply unconstitutional" and "incompatible with the Constitution" in that both are, in essence, decisions of unconstitutionality), it is distinguishable from the former in that the statute in the latter case is not invalidated at the time of the ruling, but actually remains a valid provision of law while only its application is suspended. Moreover, in such a case the Constitutional Court sometimes establishes a time limit for the National Assembly (the legislature) to revise the statute that has been declared "incompatible with the Constitution". Accordingly, with the lapse of such time limit, the statute becomes invalid. In Decision No. 1, the Constitutional Court did not actually establish a time limit, but in Decision No. 2, the Constitutional Court declared that if the National Assembly did not revise the provision by December 31, 1998, the statute would become invalid beginning January 1, 1999.

The dissenting opinions in the two decisions are evidence of the controversy surrounding a statute ruled "incompatible with the Constitution", and, in particular, the crux of the controversy surrounds whether such a ruling should, in general, even be permitted under Korean law. To counter the majority's opinion in Decision No. 2. critics have gone so far as pointing to the possibility of political considerations playing a role in the decision-making process.

The following discussion will examine these controversial decisions in more detail.

II. Decision No.1

A. Background of Decision

The Civil Code Article 844 (1) prescribes that "A child conceived by a wife during the marriage shall be presumed the child of the wife's husband." Civil Act Article 844 (2) further declares that "A child born two hundred days after the day on which the matrimonial relation was established or within three hundred days from the day the matrimonial relation was terminated shall be presumed conceived during the marriage." In other words, a child born two hundred days after the day on which the marriage was formed or within three days from the day on which the marriage was terminated by divorce or death is presumed conceived during the marriage, and the child whom the wife has conceived during the marriage is presumed the child of the wife's husband. From a legal standpoint, such presumption is necessary as, unlike the mother - child relationship, which can be easily determined by the birth event itself, the father - child relationship is more difficult to determine objectively. Therefore, the provisions of the Civil Code just mentioned presume, under the circumstances enumerated, that the husband is the father of a child borne by the husband's wife.

The presumption in the Civil Code Article 844 (1) and (2), unlike other circumstances in which a presumption can be rebutted by contrary evidence,[6] cannot be rebutted with such contrary evidence. In order to rebut the presumption, however, the Civil Code does provide for a special procedure prescribed in Article 846 to bring an 'Action for Denial of Paternity'. Under the Civil Code Article 846, the husband is deemed the father of a child borne by his wife, unless the husband receives a judgment of the court declaring that he is not the father of such child. Therefore, unless a court judgment can be obtained, the husband must perform the duty of continuously supporting the child.

In order to rebut the presumption of paternity, the husband can file a lawsuit in accordance with the Civil Code Article 846. The problem, however, is that the husband

6) For example, Civil Act Art. 197 (1) presumes that a possessor is in possession with the intention of holding as owner. However, the Supreme Court Decision (en banc), August 21, 1997 (95 ta 28625), The Supreme Court Decision Gazette [panrye gongbo], 1997 II, 2501, declared that the presumption that a possessor of another's real property had the intention of holding as owner was rebutted, if it was proved that the possessor began its possession without fulfilling the necessary conditions for obtaining valid title and had knowledge of the lack thereof.

only has a very limited time period during which the lawsuit can be brought. the Civil Code Article 847 (1) prescribes that the "Said action for denial of paternity shall be brought against the child or the mother of parental authority within one year from the day on which the husband becomes aware of the child's birth". The interpretation of the clause "the day on which the husband becomes aware of the child's birth" has been rather controversial. Some claim that the "day" should be in reference to the day that the husband discovers that the child is not his own.[7] The general opinion, however, is that the "day" should be in reference to the day the husband has knowledge of the child's birth, with the husband's knowledge that the child was not his own as irrelevant to the inquiry.[8] The Supreme Court has adopted the latter position in previous decisions.[9]

Particularly on this issue of the husband's knowledge, there have been many cases in which the husband became aware that the child was not his after the prescribed one year period in the Civil Code Article 847 (1), precluding the husband from bringing a lawsuit for denial of paternity. Hence, much criticism has centered around the unreasonableness of such a limitation. As a result, the Supreme Court in 1983 decided to limit the extent of the presumption as prescribed under the Civil Code Article 844. In particular, the Supreme Court's decision on July 12, 1983 (82 mu 59) (en banc)[10] declared that "Article 844 applied to situations in which the couple had lived together, providing for an opportunity for the wife to conceive the husband's child. In cases where it is evident that the wife could not have conceived the child due to the lack of cohabitation (for example, where one party had gone abroad for a long period of time or where the couple did not live together because of a de facto divorce), the presumption will not control. The reasoning is that the intent of Article 844, along with the intent of Article 846's limitation on bringing an action for denial of paternity, is to

7) For example, Hwa-Sook Lee, "Presumption of Husband's Child and Action for Denial of Paternity' [chinsaengjachujeong-gwa chinsaengbuin-ui so]," Judicial Administration [sabuphaengjeong] Vol. 376, April 1992, p. 81; Hae-Ryong Kang, "From the Day When the Husband Became Aware of Child's Birth [chulsaeng-eul an nal-robuteo]," Law Times [beobryulshinmun], March 13, 1995, p. 4.

8) For example, Ju-Soo Kim, Family · Inheritance Law [chinjoksangsokbeop], 4th Revised Edition (Seoul, Beopmunsa, 1996), p. 255 etc.

9) Supreme Court Decision, April 25, 1988 (87 mu 73), The Supreme Court Gazette (beopwon gongbo), 1988, 911 and others.

10) The Supreme Court Gazette (beopwon gongbo) 1983, pp.1259 ff.

maintain the unity of the family, which is based on the presupposition that a couple had maintained a normal marital life. Thus application of the above article to cases that lack similar premises would bring about unreasonable results in contravention of the article's underlying intent of promoting the establishment of father - child relationship not necessarily corresponding to blood relationship." By its decision, the Supreme Court had effectively overruled precedents that did not limit the scope of the presumption in the Civil Code Article 844.[11]

Although precedent cases had established that the presumption of paternity would not apply when circumstances provided evidence that the wife could not have conceived of her husband's child, the problem remained in circumstances where no such evidence was available. For example, the Supreme Court Decision on December 11, 1990 (90 muh 637)[12] held that, although a husband had cohabited with another woman apart from the husband's wife, because the wife had lived with the husband's parents in the parents' home, providing an opportunity for the husband and wife to meet approximately once a year during the husband's visits to his parents' home, such evidence was insufficient to rebut the presumption that a conjugal relationship could not have been established by which the wife could not have conceived of her husband's child. Therefore, the child conceived by the wife during the marriage was presumed to be that of the husband.

B. Contents of Decision No. 1

1. Factual Background

The Constitutional Court consolidated two cases in which the ordinary courts requested certification to the Constitutional Court on the constitutionality of the Civil Code Article 847 (1). In both cases the husbands, who were presumed to be the father of the child by application of the Civil Code Article 844, had brought actions denying paternity after the one year period as prescribed. The petitioners asserted that the Civil

11) Supreme Court Decision, February 27, 1968 (67 muh 34), The Supreme Court Report [daebeopwon panryejip], Vol. 16, No. 1, Civil Cases [minsapyeon], pp. 120 ff. etc.

12) The Supreme Court Gazette [beopwon gongbo] 1991, p. 479.

Code Article 847 (1) was unconstitutional, and raised a motion for certification for constitutional review. The ordinary courts accepted the motions and requested certification to the Constitutional Court.

The decision of the Constitutional Court was a majority opinion comprised of seven Justices, with one concurring opinion and one dissenting opinion. All Justices agreed that the Civil Code Article 847 (1)'s time restriction for bringing an action for denial of paternity was unconstitutional. However, the majority and concurring opinions opined that the statute was "incompatible with the Constitution," whereas the dissenting opinion opined that the statute was "decidedly unconstitutional". Further, the difference between the majority and concurring opinions lay in their differing views on what should be the appropriate amendment to the Civil Code Article 847 (1).

2. Majority Opinion[13]

The majority opinion stated that the establishing a time limitation for bringing the action for denial of paternity should, in principle, be left to the discretion of the legislature. In the majority opinion's view, however, the Civil Code Article 847 (1)'s prescribed time limitation would be disadvantageous to the husband, as the provision did not establish a specific standard for determining when the husband would be deemed "aware" of the existence of his paternal obligation. The provision only prescribed a general standard that such time period would be determined "from the day on which the husband becomes aware of the child's birth." Moreover, the majority opinion stated that, as it is difficult to determine the existence of a paternal relationship, one year would be too short a time period for the husband to have any practical ability to bring such an action. Thus, according to the majority opinion, the Civil Code Article 847 (1) exceeded legislative discretion, and therefore violated Constitution Article 10, which prescribes the guarantee of human dignity and worth and the right to pursue happiness; and Constitution Article 36 (1), which prescribes that marriage and family life shall be entered into and sustained on the mutual basis of individual dignity and equality of the sexes.

13) The seven Justices representing the majority opinion were Yong-Joon Kim, Moon-Hee Kim, Do-Yeon Hwang, Jae-Hwa Lee, Kyung-Sik Chung, Joong-Seok Ko, Chang-Un Shin.

Although the majority opinion held that the time limitation in the Civil Code Article 847 (1) was unconstitutional, the opinion avoided declaring the limitation as "decidedly unconstitutional," opting for a judgment of "incompatible with the Constitution." The majority opinion explained its reasoning as follows. That the Civil Code Article 847 (1) is deemed unconstitutional does not necessarily mean that establishing a time limit for bringing an action for denial of paternity itself is wrong. What is unconstitutional is a uniform time limit making it very difficult, or almost impossible, to exercise the right to deny paternity. Therefore, if the Civil Code Article 847 (1) were deemed "decidedly unconstitutional," such a decision would create a temporary legal vacuum with no time limit for bringing an action denying paternity. Accordingly, this would result in legal chaos, because without prompt revision of the statute, even the existence of a father-child relationship, accepted by the parties concerned as finally determined through the adequate lapse of time since birth, would again be subject to dispute. Furthermore, as a general rule, the task of revising unconstitutional provisions to make them conform to constitutional requirements is within the formative discretion of the legislature. Hence, although the Constitutional Court's decision of "incompatible with the Constitution" suspended application and exercise of the time limitation provision in the Civil Code Article 847 (1), such provision formally remains a valid provision for the time being.

Furthermore, in order to provide some guidelines on how the National Assembly should revise the relevant clause in the Civil Code Article 847 (1), the majority opinion referred to the Swiss Civil Law's prescribed one year limitation for bringing an action for denial of paternity "from the day the husband becomes aware that the father-child relationship does not exist," but which also prohibits bringing such claims if five years have lapsed since the day of the child's birth without any special reasons for the failure to bring such suit.

3. Concurring Opinion

Justice Jin-Woo Kim, in his concurring opinion, agreed with the majority opinion's conclusion, but objected to the majority's presenting the Swiss Civil Law as a model for revising the Civil Code Article 847 (1). Justice Kim stated that, if the Civil Code Article 847 (1) prohibited a party from instituting a lawsuit, regardless of whether such party knew that the child was not his own, based on the lapse of a certain time period

since the birth of the child, this would nevertheless be in violation of the Constitution. Justice Kim, by his concurring opinion, emphasized Korean society's consciousness of the importance of family lineage, and added that, if institution of a lawsuit was made impossible after a certain period of time, this would prove excessively burdensome to the father and would also ultimately be unfavorable to the overall welfare of the child.

4. Dissenting Opinion

Although Justice Seung-Hyung Cho's dissenting opinion did not differ from the majority and concurring opinions' rendering the limitation in the Civil Code Article 847 (1) as unconstitutional, he insisted that the provision should have been declared "decidedly unconstitutional." The dissenting opinion began by stating that a decision declaring a certain provision as "incompatible with the Constitution" should not be permitted under Korean constitutional law. In Justice Cho's opinion, such decisions contravene relevant legal principles as stipulated in the Constitutional Court Act and the Constitution itself. By their decisions, in Justice Cho's view, prior precedents and the majority opinion in Decision No. 1 were accepting precedents handed down by the German Constitutional Court. According to Justice Cho, the flaw in the use of German case precedent was that the system of judicial review in Germany permitted retroactive applicability of a provision declared unconstitutional, whereas the judicial system in Korea only provided for prospective applicability. For Justice Cho, there are many other differences between the judicial systems in Korea and Germany that would make German judicial reasoning inapposite to a Korean context.[14)]

Even if a decision declaring a provision "incompatible with the Constitution" were legally possible under the Constitution, the dissenting opinion continued, the present case did not necessarily warrant such a ruling. In other words, even if the Civil Code Article 847 (1) were to be declared "decidedly (simple) unconstitutional," because of Constitutional Court Act Article 47 (2), the Civil Code Article 847 (1) would lose its

14) This is the opinion of Justice Seung-Hyung Cho, which was also repeatedly asserted in previous decisions. See the dissenting opinion of Justice Seung-Hyung Cho in Constitutional Court decision, September 28, 1995 (92 heonga 11, 93 heonga 8 · 9 · 10), Constitutional Court Report [heonbeopjaepanso panryejip], Vol. 7, No. 2, pp. 264-296; Constitutional Court decision, November 30, 1995, (91 heonba 1 · 2 · 3 · 4, 92 heonba 17 · 37, 94 heonba 34 · 44 · 45 · 48, 95 heonba 12 · 17), Constitutional Court Report [heonbeopjaepanso panryejip], Vol. 7, No. 2, pp. 562-597.

legal effect from the day its unconstitutionality was declared. Thus, for a child who was born before the Constitutional Court's rendering of unconstitutionality, the limitation on the period during which an action for denial of paternity could be brought would still apply; hence, a legal vacuum could not exist in such a context. Further, in the case where a child was born after the Constitutional Court's rendering the provision unconstitutional but before the appropriate amendment, a legal vacuum could exist, as there would be no limit on the period during which an action could be brought. As it is customary, however, for the legislature not to take an extended period of time for amending a statute declared either unconstitutional, incompatible with the Constitution or partly unconstitutional, a legal vacuum would, in practice, exist only for a limited period of time, which would not be serious enough to pose much of a threat to legal stability. There is, therefore, no need to declare the statute as "incompatible with the Constitution."

C. Reaction Towards Decision No.1

There have been many academic discussions over this decision, with the academic community's response mostly positive over the Constitutional Court's holding of unconstitutionality.[15] However, although most comment that the Constitutional Court came up with the right result, few have actually discussed the decision from a constitutional perspective. Up to now, only one article has discussed this issue from the perspective of a party's right of access to courts, which is procedurally a fundamental right guaranteed under the Constitution.[16]

Discussing the same issue from another point of view, another article, in line with the concurring opinion by Justice Jin-Woo Kim, criticized the majority opinion by

15) For example, Yong-Chul Kim, "The Rescission Period and Its Starting Point for Action for Denial of Paternity [chinsaenbuin-ui soaeseo jecheokgigan-gwa geu gisanjeom]", Korean Journal of Family Law Vol. 11, Korean Society of Family Law, 1997, pp. 133 ff.; Mi-Kyung Cho, "A Comparative Study on the Action Challenging Paternity [chinsaenbuin-ui soae guanhan bigyobeopjeok gochal]," ibid., pp. 155 ff.; Woan-Sik Lee, "The Unconstitutionality of the Restriction on the Exclusion Period for Action for Denial of Paternity, The Civil Code Art. 847 (1) (II)" [minbeop je847jo je1hang chinsaenbuin-ui so-e gwanhan gyujeong jung jesogigan jehan-e gwanhan bubun-ui uiheon yeoibu(ha)], Monthly Case Report [panrye weolbo], Feb. 2000, pp. 14 ff., etc.

16) Soo-Woong Han, "Fundamental Rights and Effective Protection of Rights [gibongueon-gwa hyoyuljeokin gueonriboho], Monthly Case Report [panrye weolbo], Sep. 1999, pp. 8 ff.

stating that the majority opinion would permit the imposition of an absolute time limit on the period for bringing a lawsuit much like the civil law of Switzerland, and that the period for bringing such lawsuit should not lapse without the husband's knowing that the child was not his own.[17] The explanation of the Ministry of Justice stated that despite such fact, according to the proposed amendment to the the Civil Code,[18] which it submitted to the National Assembly on October 16, 2000, the Civil Code Article 847 (1) would prescribe a one year exclusion period for bringing an action denying paternity starting from the day the husband became aware of the fact that there was no father-child relationship, and five years from the day the husband became aware of the child's birth, with such amendment in accord with the majority opinion.

On the other hand, the explanation of the Ministry of Justice stated that the proposed amendment it submitted would allow a right of action for denial of paternity not only to the husband, as in the present law, but also to the wife; there is a debate over whether it would be appropriate to allow for such right to be given to the child as well.[19]

D. Sub-conclusion

This decision was the first of its kind by the Constitutional Court to directly rule that a law regarding domestic affairs was unconstitutional. The decision also made clear that laws pertaining to the family were under the purview of the Constitution.[20] To explain this from another perspective, there is a limitation on how far the law can intervene on problems related to families, and, hence, the law should not impose parent - child relationships on people with no actual blood ties simply by way of a time limitation on the period during which a lawsuit for denial of paternity could be brought.

17) Mi-Kyung Cho, "The Principle of True Blood Ties [hyeolyeonjinsiljueui]", Korean Journal of Family Law Vol. 12, Korean Society of Family Law, 1998, pp. 385 ff., etc.

18) This can be found on the internet, homepage of National Assembly of South Korea. Refer to http://na6500.assembly.go.kr/cgi-bin/sublist? BILLNO=160214.

19) Mi-Kyung Cho (supra note 17), pp. 372 ff.

20) In fact, the first full-scale constitutional judgment on a family issue was rendered in the Constitutional Court decision, September 10, 1990, (89 heonma 82), Constitutional Court Report [heonbeopjaepanso panryejip], Vol. 2, pp. 306-331, ruling on the constitutionality of the crime of adultery. Here, the majority opinion held that punishing the crime of adultery was constitutional.

Also, the decision's majority opinion was exceptional in that, while stating that it was up to the legislature to decide the length of the exclusion period, the majority opinion advised the legislature to amend (like the Swiss Civil Law) the law to prescribe that an action for denial of paternity be litigated within one year from the day the father becomes aware of the fact that there is no such father-child relationship; but if five years had lapsed from the day of the child's birth, the bringing of such action should not be permitted, unless special circumstances indicated otherwise. This ruling was in the form of a typical advisory opinion, and the Korean Constitutional Court was formerly reluctant to give such advisory opinions.

On the other hand, Justice Jin-Woo Kim's concurring opinion is worth noting, which stated that the law should not provide for an absolute exclusion period. As the concurring opinion pointed out, adoptions are still rare in our country, and to many Koreans, lineage is still regarded with great importance. Despite such fact, the overwhelming majority opinion of the Constitutional Court held that there should be an absolute exclusion period, and the proposed amendment by the Ministry of Justice was within this same line of reasoning.

Regarding this point, one argues as follows. There are primarily four ways to view the family from the perspective of the Constitution: (i) as a community of lineage, (ii) as an economic community, (iii) as a community of love, and (iv) as a social community. The concurring opinion is an example of emphasizing lineal homogeneity as an essential component in a familial relationship, understanding the family primarily as a community of lineage. The majority opinion, however, emphasizes the family as having both the characteristics of a traditional community of lineage and of a social and functional community in accordance with the change of the *Zeitgeist*.[21]

According to Justice Seung-Hyung Cho, one reason why the statute should not have been declared "incompatible with the Constitution" is that the legislature would not have taken long to revise (not even 5 years) and amend the statute. But as three years have actually passed without any amendment, this goes to show how difficult it

21) Kwang-Seok Chun, "Constitutional Problems on the System of Prohibition of Marriages Between Parties With Surnames of Common Origin: Mainly on the Decision of the Constitutional Court [dongseongdongbonkeumhonjedo-ui heonbeopmunje; heonbeopjaepanso-ui gyeoljeong-eul jungsim-euro]", Kyung Won University Law Review [gyeongweondae beophaknonchong], Vol. 5, 1998, pp. 221 ff., especially p.222 note 14) and p.233 note 32) and the accompanying text.

is to actually predict the legislature's course of action.[22]

III. Decision No. 2

A. Background of Decision

Civil Act Article 809 (1) prescribes that "a marriage between parties with surnames[23] of common geographical origin is prohibited". In other words, marriage is prohibited between men and women with the same surnames (e.g., originating from the same male ancestors) no matter how distant the actual blood relationship. The prohibition is akin anthropologically to a prohibition on endogamy. The provision prohibiting endogamy is characterized by its broad scope. There are different opinions on the historic origins of such a provision. The first dissenting opinion in Decision No. 2 claimed that the prohibition stemmed from a custom indigenous to Korea. Generally, however, as the majority opinion explained, it is believed that the prohibition was recognized from the Koryu period (a former Korean state from 918-1392 A. D.) and was influenced by China's clan ruling system.[24] To protect against endogamy, people with surnames of common geographical origin belonged to the same "clan", and thus were prohibited from inter-marrying one another. This principle has been steadfastly preserved since the Chosun times, during which people were even punished for violating the rule.

22) See infra III. C. 3 for reasons why the amendment was delayed.

23) In Korea, a child succeeds his or her father's surname and origin of surname {Civil Act Art. 781 (1)}. Therefore all descendents of a certain man should have the same surname. However, there are people with common surnames even though their male ancestors are different. To distinguish this, the geographical origin of the surname is decided according to the hometown or the place where the male ancestor lived. For example, the author's surname is Yune (Yoon) and the origin is Pa-Pyung, but there are people with the same surname, Yune (Yoon), but with different origins such as Hae-Pyung, Hae-Nam, etc.

24) Ju-Soo Kim, Family · Inheritance Law [chinjoksangsokbeop], 5th Revised Edition (Seoul, Beopmunsa, 1998), p.98. The clan system encompasses a system based on a principle known as the lineage of the "head family- · collateral family" or the position of the eldest son of the "head family". The former principle is unique to the organizing of blood relations, which binds together many "collateral relatives" around one "head family." The latter principle is a kind of primogeniture law where the eldest son of a man's lawful wife succeeds to the lineage of the "head family · -collateral family." Cf. Young-Chun Lee, "The Principle of Clan Rules and Traditions of Korean Society [jongbeop-eui ueonri-wa hanguk sahoi-eseoeui jeontong], Social History of Family and Legislative System [gajok-gwa beopje-ui sahoisa] (Seoul, Moonhakgwa Jisungsa), 1995, p. 11.

This was the most controversial issue at the time the present the Civil Code was first legislated in 1957.[25] The original draft of the the Civil Code, which the government submitted at that time to the National Assembly in the form as it is currently in effect, prohibited such marriages.[26] The Legislation-Judiciary Committee of the National Assembly, however, deleted the provision prohibiting such marriages, which set off a fiery discussion, prompting even the then President Seung-Man Rhee to express his support for the prohibition. The provision prohibiting marriages between parties with surnames of common geographical origin was finally adopted by the National Assembly's plenary session and was promulgated as the present the Civil Code Article 809 (1).[27]

Even after enactment of the the Civil Code there were many calls made by family law scholars and feminist groups to abolish the provision. As a consequence, proposals for amendments were submitted to the National Assembly on several occasions.[28] But these efforts did not succeed due to strong opposition especially from staunch proponents of Confucianism.[29] However, as a compromise, three laws, referred to as "special laws concerning marriage [honin-e gwanhan tuekryebeop]", were subsequently passed by the legislature.[30] As a result, the previously prohibited marriages were permitted for a limited period during validity of the "special laws". The passage of such exceptions became the primary bases for the Civil Code Article 809 (1)'s later unconstitutionality.

25) The appendix of Kwang-Hyun Chung, Research on the Family Law of Korea [hangukgajokbeopyeongu] (Seoul, Seoul National University Press, 1968), contains detailed materials on this controversy.

26) Art. 802 of the draft. On this, Byung-Ro Kim, the chairman of the codification committee, who was Chief Justice of the Supreme Court at that time, explained the basic purport of the government's bill by stating that the Korean race was a unique and advanced culture without parallel and that the prohibition of marriage between parties with surnames of common geographical origin was the result of the most advanced culture known to mankind, claiming that western nations would someday follow this same system. Kwang - Hyun Chung, supra note 25, appendix pp. 276 f.

27) Cf. Tae-Young Lee, 37 years of Family Law Revision Movement [gajokbeop gaejeongundong 37nyeonsa] (Seoul, Hangukgajeongbeopryulsangdamso Press, 1992), pp. 91 ff.

28) Cf. Proposal of 1974, ibid. at 529; proposal of 1986, ibid. at 644; proposal of 1988, ibid. at 679.

29) For more information, see Tae-Young Lee, supra note 27, pp. 165 ff., 322 ff., 332 ff.

30) Law no. 3052, December 31, 1977; Law no. 3971, November 28, 1987; Law no. 5013, December 6, 1995.

B. Contents of Decision

1. Process of Decision-Making

All of the respective petitioners in the case wanted to marry persons with surnames having a common geographical origin. As the government officials did not accept the marriage reports filed by the respective petitioners, a complaint was filed with the Seoul Family Court, which subsequently requested certification to the Constitutional Court on May 17, 1995 on the issue of the constitutionality of the Civil Code Article 809 (1). In the Constitutional Court's decision, five Justices declared that the statute was "decidedly unconstitutional," whereas the other two Justices contended that the statute was "incompatible with the Constitution." The remaining two Justices did maintain that the Civil Code Article 809 (1) was indeed constitutional. The Justices, however, ruled the statute "incompatible with the Constitution", because of the lack of a quorum of six Justices as required for a declaration of unconstitutionality under Constitution Article 113 (1) .

2. The Majority Opinion[31] and the First Dissenting Opinion[32]

The majority opinion and the first dissenting opinion both agreed that the freedom of marriage and the freedom to choose a marriage partner were fundamental rights guaranteed under Constitution Article 10 or Article 36 (1). But the two opinions completely differed on other points.

First of all, the majority opinion, unlike the first dissenting opinion which saw the prohibition of marriage between parties with surnames of common geographical origin as indigenous to Korean culture without any influence by Chinese culture,[33] stated that such prohibition originated from China's clan system and was not indigenous to Korea.[34]

The majority opinion emphasized the individual's freedom regarding marriage. In

31) Young-Joon Kim, Moon-Hee Kim, Do-Yeon Hwang, Chang-Un Shin, Young-Mo Lee.

32) Judge Jae-Hwa Lee, Seung-Hyung Cho.

33) Constitutional Court Report [heonbeopjaepanso panryejip], Vol. 9, No. 2, p. 11.

34) Ibid. p. 23.

other words, on the basis of human dignity and equality of the sexes, every citizen should have the freedom to marry or not to marry, and if one decides to marry, he or she should have the freedom to choose the partner and the time for his/her marriage.[35] This is best expressed by the majority opinion's assertion that the "majority of the public's concept of marriage has changed from one of 'a union between families' to one of 'a union between persons', which reflects the respect for a person's freewill."[36]

On the other hand, the first dissenting opinion emphasized that marriage should be publicly recognized through social norms such as customs, morals and religion,[37] de-emphasizing individual freedom as a relatively unimportant factor. In this context, the dissenting opinion stressed the succession of traditional culture prescribed in Constitution Article 9.[38]

The majority opinion stated that the prohibition of marriage between people with surnames of common geographical origin originated from and was established during tribal times with its emphasis on patriarchal society, which was further based upon the caste system and the idea of male dominance. As is prescribed in Constitution Article 9, our society has become more of a liberal democratic society that puts forth the principle of 'freedom and equality' as the most essential ideology, doing away with a society dominated by the caste system and male dominance. The majority opinion also stated that conceptions of marriage and the family have changed,[39] while the first dissenting opinion rejected such a view, claiming that even if there were fundamental changes in the social environment and in people's way of thinking, this did not necessarily require a conclusion that the Korean people's general consciousness had also changed.[40]

The majority opinion and the first dissenting opinion both acknowledged the fact that the "special law concerning marriage" was enacted on three separate occasions even after enactment of the Civil Code. According to the majority opinion, the fact that 44,827 married couples were given legal relief through enactment of the special laws

35) Ibid. p. 17.
36) Ibid. p. 14.
37) Ibid. p. 22.
38) Ibid. p. 29.
39) Ibid. p. 13.
40) Ibid. p. 24.

was strong evidence that prohibiting marriages between people with surnames of common geographical origin was not an appropriate law.[41] In contrast, the first dissenting opinion argued that the significance of the special laws should not be seen as one of providing weight to the argument against the rationality of the Civil Code Article 809 (1), but as merely accomplishing the sole purpose of giving specific relief to the parties concerned.[42]

These differences of opinion resulted in the use of different criteria in examining the constitutionality of the Civil Code Article 809 (1). The first dissenting opinion asserted that constitutionality of this provision should be examined on the premise that, while taking into consideration such factors as the origin of the law, the degree of customary acceptance, appropriateness in making the law customary and changes to present circumstances, it was primarily a law peculiar to the regulation of marriage and that it should not be examined on the sole basis of such strict measures as rationality and logic.[43] Therefore, to what extent customs pertaining to family relationships ought to be regulated and enforced by law was within the realm of legislative policy. Hence, in the first dissenting opinion's view, unless the judgment of the legislature was clearly irrational, the result of legislative discretion should not be ruled unconstitutional.[44]

The first dissenting opinion applied a rational basis standard under minimal scrutiny, and, in its view, the objective behind enactment of the prohibition against marriage between parties with surnames of common geographical origin was to enforce traditional marriage customs and to maintain and preserve the existing social order. The first dissenting opinion argued that this objective was a proper one, viewing as unproblematic the balancing of interests by the legislature in its enactment of the Civil Code Article 809 (1). Thus, the first dissenting opinion did not view the objective as violating the guiding principle under minimal scrutiny that a less restrictive means be used.[45] Further, the first dissenting opinion rejected the contention that the female's rights were infringed upon by stating that, because the Civil Code Article 809 (1) relied on legislation of traditional customs related to family law, it could not be argued that the clause was discriminating based upon gender. Also, the traditional

41) Ibid. p. 15.
42) Ibid. p. 26.
43) Ibid. p. 23.
44) Ibid. p. 26.
45) Ibid. p. 28.

familial/kinship system, the determining element of which is the male line of descendants, could not logically be completely changed within just a few days.[46]

To counter such arguments, the majority opinion stated that, whether there were any valid reasons for maintaining the prohibition against marriages between parties with surnames of common geographical origin should be determined and judged with a new perspective and value system based upon the spirit of the Constitution and its relevant provisions.[47] Although the majority opinion seems to have taken a position closer to a standard of strict scrutiny, this is not obvious from the opinion. According to the majority opinion, because the Civil Code Article 809 (1) restricted a person's right to choose one's spouse with a surname of common geographical origin, (a criterion determined according to the male lineage), such a restriction was gender-based discrimination. The majority opinion continued by stating that the Civil Code Article 809 (1) lacked both rationality and appropriateness to the current social context and at the same time collided directly with the spirit of the Constitution and its relevant provisions, which ensured that every person be afforded "human dignity and self-worth and the right to pursue happiness" and also the right to "enter into and sustain a marriage and family life on the basis of individual dignity and equality of the sexes." According to the majority opinion, there was no rational basis for justifying a restriction, which was solely dependent upon the male lineage. In the majority opinion's view, the Civil Code Article 809 (1) was gender-based discrimination in contravention of the constitutional principle of equality of the sexes.[48]

3. Second Dissenting Opinion; Incompatibility With the Constitution

The second dissenting opinion also declared that the clause at issue in the Civil Code Article 809 (1) was unconstitutional, but the opinion did not express any definite grounds for its determination. Rather, the opinion only claimed that the clause should not have been declared "decidedly unconstitutional." The opinion set forth its reasoning as follows: certain prohibitions against marriages have been handed down for hundreds of years and, as a result, such prohibitions have not only become part of the

46) Ibid. p. 30.

47) Ibid. p.16.

48) Ibid. pp. 16 ff.

marriage custom but also have become part of the ethical norm; family law, especially the institution of marriage, is a discretionary matter best left for the legislature, which should take into consideration factors such as tradition, custom, ethical consciousness, concept of blood relations and eugenics.

The second dissenting opinion continued that, even if the Civil Code Article 809 (1) were found unconstitutional, the National Assembly should carefully consider whether the prohibition of marriage between parties with surnames of common geographical origin had altogether lost its social appropriateness and whether such prohibition could in any way be reformed to better reflect our Constitution. Further, the opinion raised the question of whether the current prohibition of marriage between relatives and the nullifying and revocation of such marriage needed to be revised in line with the current state of national tradition and concepts pertaining to family relations. Through this examination process, the second dissenting opinion stated that perhaps a new marriage system could be established, requiring that the clause in the Civil Code Article 809 (1) be declared "incompatible with the Constitution."[49]

In this commentator's view, the second dissenting opinion should be understood as an outcome of a compromise between the majority opinion and the first dissenting opinion.

C. Reactions Toward Decision No.2

1. Academic Debate

Many commentators have published viewpoints on this particular decision, and most of the discussions have supported the majority opinion.[50] One particular article that dealt with the issue in detail from the constitutional perspective stated as follows.[51] The apparent rationale for prohibiting marriages between parties with surnames of common geographical origin was that such marriages would prove genetically harmful. Further, the prohibition was necessary to preserve good morals and a

49) Ibid. p. 21.

50) Cf. Jin-Su Yune, "Freedom of Marriage [honin-ui jayu]", 50 Years of Jurisprudence in Korea-Past · Present · and Future (II) [hanguk beophak 50nyeon-gwageo · hyeonje · mirae (II)], Seoul, The Association of Korean Law Professors [hangukbeophakgyosuhoi], 1998, pp. 75-76, and the bibliography referred to at note 63 of p. 76.

51) Kwang-Seok Chun, supra note 21, pp. 211 ff., esp. pp. 224 ff.

traditional culture. However, the article pointed out that there have been no evidence to support the claim that such marriages would be genetically harmful, while the use of a standard such as "good morals" could not be included to fall within the purview of the constitutionally-prescribed limitation on an individual's fundamental rights-the 'maintenance of social order'-hence, the stated objectives for the prohibition would not have any constitutional legitimacy. Moreover, the argument continued, because the sanction under the Civil Code did not satisfy the standard that the prohibition be tailored so that, when applied, it would invoke minimal infringement on the rights of the parties concerned, the prohibition could not be said to satisfy the principle of "least restrictive means" as required under the Constitution. Furthermore, the prohibition discriminated on the basis of gender by focusing on the male lineage, which also could not be justified on reasonable grounds.

On the other hand, there is criticism, which points to the fact that the decision was not declared as "simply unconstitutional," but "incompatible with the Constitution," because the case did not present an exceptional circumstance whereby it warranted such a declaration. In other words, the case was neither one where a decision of "simply unconstitutional" would have caused a legal state of affairs, which would have detracted from the maintenance and furtherance of constitutional order and principles, nor one in which a decision of unconstitutionality would have infringed upon the formative discretion of the legislature to determine how the unconstitutional state could be corrected.[52] What is more, as the above decision had ordered that "the court, other state agencies and local governments cease application of the above law until it was revised,"[53] this would mean that, in practice, any marriage report by parties with surnames of common geographical origin before effectiveness of the time limit, as set forth in a revised law, would be accepted as long as the report did not infringe upon any other applicable provisions of the Civil Code. This would then, in result, have had the same effect as a decision of "simple unconstitutionality."

There is also a view which asserted that the following explanation was possible; a

52) Yong-Seop Yoon, "Unconstitutionality of Prohibition Between Parties With Surnames of Common Geographical Origin [dongseongdongbon keumhonjedo-eui uiheon yeobo]," The Committee for Collection in Commemoration of the 60th Birthday of Yong-Joon Kim, Chief Justice of the Constitutional Court ed., One Way of Judgment [jaepan-ui han gil] (Seoul, Pakyoungsa, 1998), pp. 219 ff.

53) Constitutional Court Report [heonbeopjaepanso panryejip], Vol.9, No.2, p. 21.

characterization of the decision of "incompatible with the Constitution" not as an independent form of decision, but only as a supplemental device used under exceptional circumstances to eliminate the validity of unconstitutional clauses-in that regard, the number of Justices rendering the provision as unconstitutional were six, compared with the number of Justices agreeing to a rendering of "incompatible with the Constitution" (as applied to an "exceptional circumstance" under this view), which was half the number of Justices rendering the decision of "simple unconstitutionality."[54]

Recently, an article was published that vehemently criticized the opinions in the decision.[55] The author of this article asserted that even though the right to choose a marriage partner was a fundamental right under the Constitution, certain freedoms and rights could be restricted through Article 37 (2) of the Constitution. Therefore, the Civil Code Article 809 (1) could be deemed unconstitutional when examined under Article 37(2) of the Constitution. However, the majority opinion consisting of five Justices failed to argue this point, taking the position that the rationale for the Civil Code Article 809 (1)'s prohibition of marriages could not be considered a valid purpose for restriction of a fundamental right as prescribed in Article 37(2) of the Constitution. A judgment that denied the legitimacy of a purpose behind a restriction was, however, possible only in extremely exceptional circumstances, and the majority opinion made this bold judgment without providing sufficient reasoning. Moreover, the article also criticized the other dissenting opinions as lacking persuasive reasoning.

2. Practical Application of the Decision

This decision, which declared the Civil Code Article 809 (1) as "incompatible with the Constitution," ordered the courts, state agencies and local government authorities to cease application of the unconstitutional clause until revised. Therefore, immediately after the above decision, there was some confusion over whether a marriage reported by parties with surnames of common geographical origin would be

54) Yong-Seop Yoon, supra note 52, p. 220.

55) Jong-Seop Chung, "Declaration of Incompatibility with the Constitution on the Clause Prohibiting Marriages Between Parties with Surnames of Common Geographical Origin [dongseongdongbonkeumhongyujeong-e daehan heonbeopbulhapchigyeoljeong], Constitutional Decisions Research [heonbeoppanrye yeongu] (I) (Seoul, Pakyoungsa, 1999), pp. 23 ff.

accepted. However, the Supreme Court, which supervises matters pertaining to the family register, enacted regulations on July 20, 1997 related to the family register as Rule No. 535, which states that despite the Civil Code Article 809 (1), reported marriages between parties with surnames originating from the same male line would be accepted. As a result, from a practical standpoint, the problem has been resolved.

3. Attempts at Legislative Revision

The proposed amendment to the family and inheritance laws [chinjoksangsokbeop gaejeongan], which the Ministry of Justice submitted to the National Assembly on November 13, 1998, was supposed to abolish the clause prohibiting marriages between parties with surnames of common geographical origin in accordance with the above decision. However, conservative groups, such as staunch proponents of Confucianism, strongly opposed any such revision.[56] Due to such external pressure, the Legislation-Judiciary Committee prepared a proposed amendment on December 17, 1999, which did not incorporate any changes to the controversial clause in the Civil Code Article 809 (1).[57] In the end, however, the National Assembly's plenary session did not examine the proposed amendment. It appears that this was due to the fact that the terms of the existing members of the 15th National Assembly had nearly expired, with handling such sensitive issues right before the elections generally not seen as helpful to election prospects.[58] In the end, the proposed amendment as submitted by the Ministry of Justice was abandoned as the term for members of the 15th National Assembly expired on May 29, 2000.[59]

After commencement of the 16th National Assembly, the Ministry of Justice submitted to the National Assembly on October 16, 2000 new proposals for amending

56) For example, there are statements given by lawyers, Jin-Woo Kim, former Justice of the Constitutional Court, and Sang-Jin Ku at the Public Hearing on the proposed amendment of the Civil Act bill organized by the Legislation-Judiciary Committee of the National Assembly on March 11, 1999. Cf. the Secretariat of the National Assembly, 202nd Legislation-Judiciary Committee of the National Assembly records [je202hoe gukhoebeopjesabeopuiyeonhoe hoeeuirok] no.1 (This can also be found at http://node3.assembly.go.kr:5005/).

57) The Secretariat of the National Assembly, 208th Legislation-Judiciary Committee assembly reports no. 16 (cited from the National Assembly reports service).

58) Dong-a Ilbo, December 21, 1999, p. 5.

59) Constitution Art. 51.

the family and inheritance laws, which were almost identical to the former proposals.[60] The fate of the proposed amendments is uncertain at this time.

D. Sub-conclusion

In Korean society, the controversy over prohibiting marriages between parties with surnames of common geographical origin is not just a theoretical issue discussed by lawyers and academics, but a debate involving the entire country. This controversy has taken on, in one sense, the characters of an ideological struggle, with the Civil Code Article 809 (1) representing, for better or for worse, the ideological symbol of Confucianism and patriarchy. Thus, proponents favoring the preservation of the prohibition against such marriages fear that core Confucian and patriarchal beliefs and ideology would be all together jeopardized if the controversial clause of the Civil Code Article 809 (1) were abolished.

The decision's two dissenting opinions can be better understood if certain background information is considered. For instance, the dissenting opinions emphasized tradition, custom and traditional culture in reference to traditional Confucian and patriarchal beliefs and ideology. The prohibition of marriages between parties with surnames of common geographical origin can be considered a symbol or representation of such ideology. On the other hand, progressive critics argue that the majority opinion, which rendered the problematic clause in the Civil Code Article 809 (1) as "incompatible with the Constitution," was a way of avoiding a decision of "simple unconstitutionality."

Despite the problems surrounding the decision's reliance on non-legal considerations and its, theretofore, dubious legal result, the decision does bear much significance.

First, the decision has made clear that the freedom of marriage is a fundamental right guaranteed by the Constitution.[61] In this regard, the significance of the decision can be compared with that of the decision in Loving v. Virginia rendered by the U. S. Supreme Court,[62] which declared that a ban on interracial marriage was unconstitutional.

60) It can be found at the homepage of the Korean National Assembly (http://na6500.assembly.go.kr/cgi-bin/sublist? BILLNO=160214. last visit: November 23, 2000).

61) See Jin-Su Yune, supra note 50.

62) 388 U. S. 1 (1967).

Second, the decision has brought an end to the long-lasting political controversy surrounding the problem of judicial review, resulting in a profound political impact.

IV. Conclusion

As the debate on the institution of family law, as shown in this article, relates to the basic structure of Korean society, the surrounding controversy has not been restricted to a discussion among lawyers or academics. The controversy has become a concern for all of society. A legal institution prohibiting marriages on the basis of the geographical origins of the respective parties' surnames has proved highly controversial due to the history surrounding the issue and its origins in traditional ideology.

In the past, such debates were only carried out within the realm of legislative policy-making. Therefore, no particular view could necessarily surpass or prevail over another. However, the Constitutional Court has conclusively resolved some of the problems surrounding the controversy under the authoritative measure of the Constitution, settling the debate from a legal perspective. Despite such result, the controversy is yet unsettled in the social and political realms. In a sense, although the result is indicative of the conservative nature of family law, in general, the lingering debate may, in particular, be evidence of the lack of authority of the Constitutional Court.

MATERIALS

Lawsuit for Invalidating the Issuance of ConvertibleDebentures by Samsung Electronics

Translated by Alfredo Eum and Steven Choi***

Editor's Note

Equity-linked securities such as convertible bonds (CBs) and bonds with warrant (BWs) have been widely issued by Korean companies. On some occasions, CBs and BWs have been issued to those close to the controlling shareholder on unduly favorable terms. In recent years, investors have become less forgiving of such practices and have sometimes resorted to legal recourse. A public interest organization known as the People's Solidarity for Participatory Democracy is at the center of this new trend. The following decision is the most recent, and perhaps the most controversial, of the lawsuits initiated by this NGO.

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