

Tradition and the Constitution in the Context of the Korean Family Law

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Abstract

Reform of Korean family law was marked by struggles between the constitutional principles and tradition. The movement to conform family law to the Constitution was retarded by the resistance of conservative groups, whose main argument was that family law ought to be rooted in tradition. But tradition alone cannot be a defense for an otherwise unconstitutional law. In the reform process, the Korean Constitutional Court played a significant role in upholding the primacy of the Constitution, as evident in the decisions regarding the common surname marriage ban and the hoju system.

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I. Introduction

Until its amendment in March 2005, the Korean Civil Code (“the Code”) employed the *hoju* (meaning “Master of the Family”) system, which conferred privileges upon each family’s respective *hoju*, including certain enumerated powers over members of his family. The last pronoun, i.e. his, is used deliberately; the *hoju* system and its rules, including those which identify that title-bearer in each family, were based upon the domestic supremacy of the male. In February 2005, the Constitutional Court of the Republic of Korea declared the *hoju* system incompatible with the Constitution.¹⁾ Accordingly, in March 2005, the National Assembly of the Republic of Korea passed a bill reforming the Code which, among others, abolished the *hoju* system. It also lifted the ban on marriage between couples bearing the same surnames and permitted mothers to pass on their surnames to their children.²⁾ These events represent the culmination of the latest stage of development towards gender equality in Korean family law.

The process leading to the above developments represented the struggle between tradition and the Korean Constitution.³⁾ The main thrust of the movement to reform Korean family law was the desire to conform that law to the Constitution. The main argument against such reforms was that the *hoju* system, as a deeply rooted element of Korean culture, ought to be left intact. One of the dissenting opinions in the above decision of the Constitutional Court held that guarding Korean tradition was a constitutional prerogative, and that institutions such as the *hoju* system that were deeply rooted in tradition were, by the Constitution’s own provisions, not unconstitutional. Other places where Korea’s traditions crop up in its family law include the previous ban on marriage between a man and woman with a common surname (*sōng*) and ancestral seat (*pon’gwan*) (hereafter, common surname marriage ban)⁴⁾ and the practice of children inheriting their surnames from their fathers only.

In this paper I will discuss whether special consideration should be given to the fact that certain rules are supported by tradition in determining their

1) The Korean Constitutional Court decision of February 3, 2005 (case no. 2001heonga9 et al.).

2) The Law amending the Civil Code, promulgated on March 31, 2005.

3) Hereafter, the Constitution means the Korean Constitution.

4) See, the Constitutional Court’s decision on July 16, 1997 (case no, 95 heonga 6 et al).

constitutionality. The first part of the paper will explain the historical background of Korean family law, followed by an exposition of the major characteristics of family law in the original Code, and the changes made thereto by the later enactments. Subsequently, the decisions of the Korean Constitutional Court on this point will be analyzed in some detail, followed by a discussion of relevant theory. My conclusion is that tradition in and of itself does not bestow constitutionality on an otherwise unconstitutional law.

II. The Historical Background of Korean Family Law

A. The Influence of Confucianism on Korean Family Law

The *Chosŏn* Dynasty was established in 1392, replacing the *Koryŏ*. The founders of the *Chosŏn* adopted Confucianism⁵⁾ as their dynastic ideology, rejecting *Koryŏ* Buddhism. The Confucian principle directly governing family relations is *Chongppŏp* (agnatic principle), whose main features are that: (1) all descendants of one common male ancestor belong to one family, no matter how distant their mutual degree of consanguinity is; and (2) the family lineage is succeeded by the eldest son of the male ancestor and his primary wife. The eldest son (*Chŏkchangja*) is also the master of the *Chesa* (ancestor worship ritual), and thus his inheritance extends further than mere property. One corollary of *Chongppŏp* is that marriage between a man and a woman with a common surname (*sŏng*) and ancestral seat (*pon'gwan*) is prohibited as incestuous because the two belong to the same "family." This ban could be interpreted as an extended form of the Western prohibition of endogamy. These new family-related rules, originally imposed by the government, were gradually accepted by the people and became pervasive social norms from the 17th century on.

In sum, the family law of the *Chosŏn* was based upon patrilineal and patriarchal principles, e.g. a child's surname should be that of her father, if a

5) Strictly speaking, what *Chosŏn* had adopted is the so-called Neo-Confucianism formed in China during the era of Southern Sung (1127-1279). The most notable representative of the Neo-Confucianism is *Chu Hsi* (1130-1200).

daughter marries her surname does not change and she retains her father's surname, etc.

B. The Influence of Japanese Colonization on Korean Family Law

Korea became a Japanese colony in 1910. The official position of Japan regarding Korean family law was that family law matters should be governed according to Korean customs and not by the Japanese law. The actual practice was to the contrary; the Japanese government and courts imposed Japanese family laws upon the Koreans on the pretense that the same rules existed in Korean custom.⁶⁾ One important example is the above-mentioned *hoju* system, originally a part of the Japanese Civil Code of 1898. Under *hoju*, all individuals are organized into families (in Japanese, *Ie*)-not actual households but abstract, ideal entities composed of relatives, whether living together or not. The heads of these families, the *hoju*, have certain powers over other members of the family. *Hoju* status itself and its inheritance are reserved for males in principle.

Such an abstract, ideal entity as the *hoju* and family in the sense of the Japanese *Ie* never previously existed in Korean law or custom. Yet the Japanese government and courts persisted in asserting that such a system was in fact a Korean tradition and nevertheless imposed it upon the Koreans, substituting the inheritance of ritual ancestor worship with the inheritance of *hoju*.

III. The Korean Civil Code of 1958

Korea was liberated from Japan in 1945 and the new Korean Civil Code was promulgated thirteen years later. For the drafters of the Code, Part 4 of the Code codifying family law was the subject of a heated debate, whose central theme was the relationship between the Constitution and tradition. The Korean Constitution guaranteed equal protection under the law, prohibited gender discrimination, and declared that marriage and family life had to be established and maintained on the basis of the dignity of the individual and gender equality. Three theories

6) See, Hyunah Yang, *Envisioning Feminist Jurisprudence in Korean Family Law at the Crossroads of Tradition/Modernity*, Ph. D. dissertation, New School for Social Research, 1998.

were advanced about what the relationship between the Constitution and tradition/custom ought to be.⁷⁾

The first theory was the “custom deference theory.” The main proponent of this position was Chief Justice Byung-Ro Kim, the chairman of the Codification Committee. Kim asserted that the Korean culture was highly advanced and that the patrilineal system rooted therein was reasonable. He went on to say that Korean family law should be based on the patrilineal system and that gender equality had no room in family matters.

The second theory was the “Constitution deference theory.” The main proponent of this position was Professor Kwang-hyun Chung of Seoul National University, who argued that the new family laws should be based upon the spirit of the Constitution and that traditional family law rules incompatible with the Constitution should be abolished.

Kyung-Keun Chang, chairman of the judiciary committee of the National Assembly and the chief architect of the draft of the new family and inheritance laws, advanced a third, intermediate position. Chang asserted that gradual reform was appropriate, reasoning that laws become ineffective if they depart too far from social realities and traditions, but that laws should lead society nonetheless. Gradual reform was, according to Chang, the best way to achieve the ultimately desired goal.

The actual issue was whether the common surname marriage ban should be sustained, the most debated theme in the drafting stage of the Civil Code.⁸⁾ The original bill included a provision containing the ban, which was deleted by the judiciary committee. Finally, the National Assembly decided to adopt the ban and revived the government’s bill.

Another point of dispute was the “master of the family” system, which was provided for in the final version of the Code. Ironically, those who imposed the system in the first place, the Japanese, abolished the system in 1947 under the pressure of the Allied Occupation Army.

The first battle over the common surname marriage ban was won by tradition.

7) For an overview, see, Hyunah Yang (Fn. 7), pp. 118 ff.; Jinsu Yune, Der Einfluss der Verfassung auf die Reform des Familienrechts (in German), Seoul Law Journal Vol. 45 No. 1, pp. 437 ff.

8) For materials, see Chung, Kwang-hyun, *Han’kuk kajokppŏp Yonku* (Studies on Korean Family Law), Appendix, Seoul National University Press, Seoul, 1967.

The *hoju* system was never, until forcefully imposed, part of Korean tradition but its reinforcement of the extant patrilineal and patriarchal systems was accepted without reservation by the Korean populace.

IV. The Transition of Family Law after the Enactment of the Civil Code

The Civil Code was enacted on January 1, 1960. From the time of its enactment, the Code’s family and inheritance laws were heavily criticized because of their incompatibility with the Constitution, especially with regard to their unequal treatment of women. The major reforms of the family and inheritance laws in 1977 and 1990 were the fruits of this criticism.

However, the common surname marriage ban and the *hoju* system survived the reforms. The National Assembly did not pass any bills abolishing these provisions, due to the political campaigning of the conservative groups, especially proponents of Confucianism. These groups’ principal argument against reform was the “custom deference theory”: family law should defer to tradition.

Nevertheless, these two institutions were not exempt from change. First, the common surname marriage ban was temporarily lifted by special acts three times in 1978, 1988, and 1996. These exemptions lasted only about a year each, but they indicated a changing social atmosphere.

Second, the privileges of the *hoju* were gradually weakening. Originally, the *hoju* had the authority to consent to entrance into and departure from the family, to order departure from the family, to designate the family’s place of residence, etc. Since the 1977 and 1990 reforms, however, the powers of the *hoju* were diminished significantly. The ones that remained were the power to request incompetence declarations of family members from courts (Civil Code, Art. 9, 12), to consent to the departure of a family member from the family in the case of his/her mother’s marriage (Civil Code, Art. 784 sec. 2), to order the entrance of a lineal ascendant or descendant of the *hoju* into the *hoju*’s family (Civil Code, Art. 785), to request the court to summon the family council (Civil Code, Art. 966), etc.

V. The Constitutional Court's Decisions on the Common Surname Marriage Ban and the Hoju System

Two decisions of the Korean Constitutional Court have dealt with the relationship between tradition and the Constitution in the context of family law. One was the July 16, 1997 decision on the common surname marriage ban (case no, 95 heonga 6 et al). The other was the February 3, 2005 decision on the *hoju* system (case no. 2001heonga9 et al.).

A. The July 16, 1997 Decision on the Common Surname Marriage Ban⁹⁾

As previously mentioned, the common surname marriage ban was one of the main features of Confucianism-based Korean family law. The ban was codified as Article 809 (1) of the Korean Civil Code, and was the most controversial issue at the time the present Civil Code was first legislated in 1957.

Even after the Code's enactment, family law scholars and feminist groups made repeated petitions to abolish the provision. As a consequence, proposals for amendments were submitted to the National Assembly on several occasions. These efforts failed due to strong opposition, especially from staunch proponents of Confucianism. However, as a compromise, as previously mentioned, the common surname marriage ban was temporarily lifted by special acts three times.

In the Constitutional Court's decision, five Justices declared that the provision was "decidedly unconstitutional," while two Justices contended that the statute was "incompatible with the Constitution." The remaining two Justices maintained that Civil Code Article 809 (1) was constitutional. However, the Constitutional Court ruled the statute "incompatible with the Constitution" rather than "decidedly unconstitutional" because of the lack of a quorum of six Justices, which is required for a declaration of unconstitutionality under Constitution Article 113 (1).

The majority opinion and the first dissenting opinion both agreed that the freedom of marriage and the freedom to choose a marriage partner were

9) See, Jinsu Yune, Recent Decisions of the Korean Constitutional Court on Family Law, *Journal of Korean Law*, Vol. 1, Nr. 1, 2001, pp. 145 ff.; Mi-Kyung Cho, Violation of the Constitution in Korean Family Law, in: Andrew Bainham (ed.), *The International Survey of Family Law 2002 Edition*, Jordan Publishing, 2002, pp. 244 ff. for more about this decision.

fundamental rights guaranteed under Article 10¹⁰⁾ or Article 36 (1) of the Constitution, but differed completely on other points.

The majority opinion emphasized the individual's freedom of marriage, which is the right of every citizen to marry or not to marry freely, and to choose his or her marriage partner and time of his or her marriage. This right 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,' reflecting the respect for a person's free will."

On the other hand, the first dissenting opinion emphasized that marriage should be publicly recognized through social norms such as customs, morals, and religion, and dismissed individual freedom as relatively unimportant. In this context, the dissenting opinion stressed the duty of the state to preserve and further develop traditional culture prescribed in Article 9 of the Constitution.

The majority opinion stated that the common surname marriage ban originated in tribal times, when patriarchy, based on the caste system and the idea of male dominance, was the organizing principle. As is prescribed in Article 10 of the Constitution, our society has become more liberal and democratic, putting the principles of "freedom" and "equality" forth as essential, and has done away with the old caste system and the idea of male dominance underlying the common surname marriage ban. The majority opinion also stated that conceptions of marriage and the family have changed, although the first dissenting opinion claimed that even if there were fundamental changes in the social environment and people's way of thinking, such changes did not necessitate the conclusion that the Korean people's general consciousness had changed as well.

The majority opinion and the first dissenting opinion both acknowledged the fact that the special laws concerning marriage were enacted on three separate occasions after enactment of the Code. According to the majority, the fact that 44,827 married couples were given legal relief through the special laws was strong evidence that the common surname marriage ban was inappropriate. In contrast, the first dissent argued that the special laws did not support the argument against the rationality of Article 809 (1) of the Civil Code, but merely accomplished the singular aim of granting specific relief to the parties concerned.

10) Art. 10 of the Korean Constitution: "Every citizen has human dignity, self-worth, and the right to pursue happiness. The state confirms the inviolable fundamental human rights and has the duty to protect those rights."

These differences of opinion resulted in the use of different criteria in examining the constitutionality of Article 809 (1) of the Civil Code. The first dissent asserted that the 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, the ban was a law peculiar to the regulation of marriage that should not be examined by strict reason. Therefore, the extent to which customs pertaining to family relationships could be regulated by law was within the realm of legislative discretion. Hence, in the first dissent's view, unless the judgment of the legislature was clearly irrational, the legislature's discretion should not be ruled unconstitutional.

The first dissent applied a rational basis standard with minimal judicial scrutiny. In its view, the objective of the common surname marriage ban was to enforce traditional marriage customs and to maintain and preserve the existing social order. The first dissent argued that this objective was proper, and the balancing of interests by the legislature in its enactment of Article 809 (1) of the Civil Code did therefore not pose any problems. Thus, the first dissent did not view the objective as violative of the minimal scrutiny principle that the least restrictive means be used to further a governmental interest. Further, the first dissent rejected the contention that women's rights were infringed, stating that because Article 809 (1) of the Civil Code merely codified the traditional custom relating to family law, it could not be argued that the clause discriminated based on gender. Also, the traditional patrilineal familial/kinship system could not be reasonably changed within a span of days.

To counter the above arguments, the majority stated that a new perspective and value system based upon the spirit of the Constitution and its relevant provisions should determine whether there existed any valid reasons for maintaining the common surname marriage ban. Although the majority took a position closer to a strict scrutiny standard, this is not obvious from the opinion. According to the majority, because Article 809 (1) of the Civil Code restricted a person's right to marry a person with a common surname (a criterion determined according to the patrilineal system), such a restriction amounted to gender-based discrimination. The majority then stated that Article 809 (1) of the Civil Code lacked both rationality and appropriateness in the current social context and at the same time collided directly with the spirit of the Constitution and its relevant provisions,

which required 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 such a restriction, which depended solely upon the male lineage. In the majority opinion's view, Article 809 (1) of the Civil Code amounted to gender-based discrimination in contravention of the constitutional principle of equality of the sexes.

The second dissent also declared that the clause at issue in Article 809 (1) of the Civil Code was unconstitutional, but 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 thus: 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 marriage custom but also have become ethical norms; 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 dissent continued, saying that even if Article 809 (1) of the Civil Code were found unconstitutional, the National Assembly should carefully consider whether the common surname marriage ban 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 revocation of such marriages needed to be revised in line with the current state of national tradition and concepts pertaining to family relations. Through this examination, the second dissent raised the possibility of establishing a new marriage system with the threshold requirement that Article 809 (1) of the Civil Code be declared "incompatible with the Constitution."

In sum, the majority based its ruling on the Constitution while the backbone of the first dissent was a recourse to tradition. The second dissent took the middle position, the compromise between the majority and the first dissent, and between the Constitution and tradition.

*B. The February 3, 2005 (case no. 2001heonga9 et al.)
decision on the hoju system*

The issue in this case was whether the three provisions of the Korean Civil Code which comprised the *hoju* system were constitutional. Article 778 of the Code defines *hoju*, providing that a person who has succeeded to the family lineage, or set up a branch family, or who has established a new family or has restored a family for other reasons, shall become the master of the family or *hoju*. Article 781 (1), first sentence, provided that a child shall have its name entered in its father's family register; Article 826 (3) does the same for a man's wife.

The key issue in this case was once again, the relationship between tradition and the Constitution. The majority and dissenting opinions dealt with this problem in detail.

The majority opinion of six justices held these three provisions unconstitutional and incompatible with the Constitution. The opinion understood the tenets of family composition and the succession of the *hoju* as the core elements of the *hoju* system. Every citizen belongs to a family as a *hoju* or a member. This family is an ideal entity, different from an actual household. What is important to note is that the composition of this ideal "family" is predetermined; the identity of the *hoju* and the identities of everyone else are set by law rather than by the "family's" will. Under this system, the *hoju* is considered the heart of the family while members are considered peripheral. The succession order of the *hoju* is: ① the male descendent of the former *hoju*, ② the female descendent of the *hoju* who was a member of the family, ③ the wife of the former *hoju*, ④ the female ascendant of the former *hoju* who was the member of the family, ⑤ the wife of a member of the family who was also the member of the family. The basic principle organizing the succession of the *hoju* is patrilinealism, i.e., favoring males.

The majority opinion discussed the relationship between family law and tradition. First, it stressed the point that the Constitution was the highest law of the state and that the institution of the family and its corresponding laws were under the Constitution's rule. Although the family is a product of history and society, it is not immune from the Constitution's precepts. Otherwise, the legislative power in the field of family law would not be bound by the Constitution, a paradox for a self-proclaimed constitutional democracy. The opinion opined that family law should not be a mere reflection of social realities or legal sentiments of the people.

Rather, family law should actively disseminate the spirit of the Constitution which alone embodies the highest values of the community. If a law becomes an impediment to the dissemination of the Constitution's spirit, such a law should be modified.

Regarding the relation between Article 9 of the Constitution, which emphasizes the importance of tradition, and Article 36 (1) of the Constitution, which provides that marriage and family life must be established and maintained on the basis of the dignity of the individual and gender equality, the majority reasoned that Article 36 (1) best answered the issue at hand, and expressed the constitutional decision that the patriarchal marriage system of the past should not be tolerated in the future. On the other hand, tradition in the Constitution should be understood, according to the majority, as a historical and time-bound concept, meaning that tradition should be reinterpreted in the context of the Constitution according to contemporary sensibilities. In this process, the spirit and values contained in the Constitution should be among the primary benchmarks. Thus, in the realm of the family, tradition and traditional culture should not be contrary to the dignity of the individual and gender equality. As a result, if a certain tradition contravenes the dignity of the individual and gender equality, it cannot be justified on the ground of Article 9.

Based on the foregoing analysis, the majority opinion ruled that all three provisions comprising the *hoju* system were unconstitutional because they resulted in unjustifiable gender discrimination and violated the dignity of the individual. But the majority opinion chose to classify the relationship as "incompatible" rather than "decidedly unconstitutional" because the declaration of "decided unconstitutionality" could create a vacuum in the family register system. In contrast, a decision of "incompatibility" would allow the temporary application of the *hoju* system for as long as needed to reform the family register system.

There were three dissenting opinions. The dissenting opinion by Justice Seong Kwon and Justice Young-Il Kim regarded the *hoju* system as constitutional. This opinion held that the meaning of the *hoju* system lay in the fact that the construction of the family and the succession of the *hoju* were based upon patrilineal principles and that the *hoju* had a symbolic status as the successor of the family. Against the criticism that the *hoju* system was not a traditional institution but one implanted by Japan, the opinion stated that after the family law reform of 1990, the *hoju* system was totally removed from Japanese influences. According

to this opinion, the then current system embodied traditional, rational patrilineal principles.

Concerning the relationship between tradition and the guarantee of marriage and family life according to Article 36 (1) of the Constitution, this opinion held that the guarantee of marriage and family life was based on the tradition of the national culture, because family law should have traditional, conservative and ethical characteristics, and that the interpretation of a constitutional provision regarding marriage and the family life should take into account the traditional character of the family law. This understanding was supported by Article 9, which provided that the State should endeavor to inherit and develop the traditional culture and to promote the national culture, and thus, there ought to have been a way to fulfill the requirement of gender equality and maintain respect for tradition at the same time.

In the process of deciding whether the *hoju* system was compatible with gender equality by applying the “least intrusive test”, this dissent regarded the preservation of the patrilineal principle as a legitimate purpose. This opinion held that although the system had many shortcomings, it strengthened the mutual relationships within the family and contributed to the preservation and integration of the family by enhancing the father’s sense of responsibility to his children. In addition, the adverse effects of the *hoju* system for women were not so great as to negate the positive effects of the system, that is, the preservation and integration of the family and kinship ties, and preventing the vices of materialist thought and individualism.

But Justice Seong Kwon and Young-II Kim each advanced a contrary result. Justice Seong Kwon regarded all three provisions as constitutional, while Justice Young-II Kim regarded the first sentence of Article 781 (1), which provided that a child shall have its name entered in its father’s family register, as unconstitutional. Justice Kim opined that the *hoju* system itself could not be unconstitutional, and that the principle that a child should have its name entered in its father’s family register was in itself constitutional but that there should be room for more exceptions, i.e. to allow a child to have its name entered in its mother’s family register, the mother being the person who actually rears the child, married or single. In this sense, the first sentence of Article 781 (1) should be declared unconstitutional because it does not allow exceptions in such cases, possibly contrary to a child’s wishes and discriminating against the mother.

Finally, the dissenting opinion of Justice Hyo-Jong Kim regarded the first sentence of Article 781 (1) and Article 826 (3) as unconstitutional but Article 778 as constitutional. According to his opinion, the *hoju* system in itself could not be considered a means to achieve patrilinealism. He held that the family provisions of the Code could be understood as a manifestation of the family in private law that is guaranteed by the Constitution. That the law requires an individual to belong to a family compulsorily could not be said to violate one’s dignity because family relations, an individual’s social roots, may be reflected in legal concepts and the law can order an individual to belong to a family granted constitutional protection. Additionally, Article 778 lost much of its force because it provided that a person should belong to a family but did not provide for any legal consequences in cases of its violation. This made the provision, and its limit on freedom, more symbolic than real and thus less objectionable. Justice Hyo-Jong Kim held the *hoju* itself to be a traditional concept. There was in fact tension between Articles 36 (1) and 9 of the Constitution in that the balance of power between the *hoju* and other members of the family was not equal. In this respect, Kim held that the recognition of the *hoju* in itself lay within the legislative discretion because the *hoju* system enhanced the efficiency of the family register system and was supported by tradition.

But Justice Hyo-Jong Kim held the other provisions comprising the system unconstitutional as incompatible with Article 36 (1) of the Constitution, especially with respect to gender equality. In this sense, he concurred with the majority opinion.

VI. Discussion

Should the fact that such legal rules as family laws are rooted in tradition be given special consideration in deciding their constitutionality? This question is the basic concern of this paper. There are some opinions in the literature supporting this position.

Professor Young Huh asserts that marriage and family life are traditional and customary in origin and existence and not constitutional phenomena, thus the Constitution must respect the traditional meaning and existence of marriage and family life by making room for them in the realm of the Constitution. As a result,

he regards the *hoju* system as not unconstitutional because it can exist separately as a decision of the legislature in order to effectuate the patrilineal principle.¹¹⁾ The dissenting opinion of Justices Seong Kwon and Young-II Kim in the Constitutional Court's *hoju* system decision seemed to be influenced by this opinion as it stressed that the interpretation of constitutional provisions regarding marriage and family life should take into account the traditional character of family law.

But this assertion cannot be accepted in its entirety. As the majority opinion of the Constitutional Court's *hoju* system decision emphasized, although the family is a historical and social product formed and developed with the history of the nation, it is not immune from the rule of the Constitution. Otherwise, legislation in the field of family law would not be constitutionally bound, an intolerable result in a constitutional democracy.

Other scholars emphasize the tradition mentioned in Article 9 of the Constitution. One of these scholars asserts that respect for tradition is a duty imposed on the state by Article 9, so the Constitutional Court should take tradition into account in deciding the constitutionality of a legal rule supported by tradition. In deciding whether such a tradition is to be preserved or abolished, the Court should seek the opinions of scholars and experts.¹²⁾ Another scholar asserts in the same vein that, if a traditional rule is supported by a majority of the people, this rule amounts to "customary law" in the terminology of anthropologist Leopold Pospisil and falls into the category protected by Article 9, whereas, if a traditional rule is not supported by a majority of the people, it becomes authoritarian law and does not deserve Constitutional protection.¹³⁾

In my own opinion, that something is part of tradition cannot be grounds for justifying traditional legal rules from a constitutional perspective. Law exists for mankind, not vice versa. Law also cannot be a purpose in and of itself. If a certain

11) Young Huh, *Hunbubkwa Gajeokbub* (Constitution and the Family Law), in: *Yonsei University Bubyulyeongu* Vol. 3, 1983, pp. 419 ff. But it seems that he has changed his position afterwards. See, Young Huh, *Hangukhumbubron* (Treatise on the Korean Constitution), 4th ed., Seoul, Pakyoungsa, 2004, p. 164.

12) Dai-Kwon Choi, *Hunbubeui Yeosokseonggua Byeonhwaee Guanhan Damron* (Continuity and Change in Constitution), *Seoul National University Law Journal*, Vol. 44 No. 1, 2003, pp. 97 ff.

13) Ji-Bong Lim, *Hunbubjaepangwa Sahoibyeondong* (Constitutional Adjudication and Social Change), *Gosigye*, 2001, No. 12. pp. 4 ff.

rule should be preserved because it is supported by tradition, the desire to preserve the rule and tradition themselves becomes the purpose for the rule's existence, and not the well-being of mankind. This is a case of the tail wagging the dog.

Tradition in the sense of Article 9 can be meaningful if, for example, the state seeks to protect a traditional building to preserve traditional architecture. In such a case, the protection of the traditional culture can be a just cause in restricting property rights. But the preservation of traditional laws cannot be a just reason for restricting human rights. In other words, we must distinguish between two types of rules, namely, the rule whose purpose is to protect tradition or traditional culture, and the rule that is supported by tradition, but whose purpose is not the protection of the tradition. In the former case, the protection of culture can be a just and legitimate reason that should be accorded weight in deciding the constitutionality of the rule, but in the latter case, that the rule is supported by tradition cannot cure its otherwise unconstitutionality.

The solution supported by some scholars, i.e., a traditional rule is constitutional if supported by a majority of the people, cannot be sustained because the *ratio legis* of judicial review lies in the protection of minorities. If a rule supported by the majority of the people is executed without any restraint, minorities are left vulnerable, especially by rules under which the losses of minorities far exceed the gains of the majority. Judicial review was established to prevent such results and protect minorities by permitting independent court(s) to overrule decisions of the legislature representing unbridled majority will.¹⁴⁾

The reasoning of the dissenting opinions of the *hoju* system decision of the Korean Constitutional Court that the *hoju* system should be sustained under the protection of Article 9 of the Constitution was thus misrouted from the start. On the other hand, the majority opinion of that decision is not completely satisfactory on this point: it implicitly assumes that in some cases Article 9 can be grounds for affirming the constitutionality of tradition-supported laws. Whether a rule is supported by tradition is immaterial in the context of Article 9 of the Constitution.

Then is tradition meaningless in the context of judicial review? The answer to this question is that in some circumstances the fact that a legal rule is supported by

14) See, for example, Erwin Chemerinsky, *Constitutional Law, Principles and Policies*, New York, Gaithersburg, Aspen Law & Business, 2nd ed., 2002, p. 7.

tradition should be considered relevant. If some provisions of the Constitution were based upon certain traditions, these traditions must be considered in the interpretation of such provisions. For example, there is a general consensus that property guaranteed by the Article 23 (1) of the Constitution means property in the traditional sense.

Then, does marriage and family life protected by Article 36 (1) mean traditional marriage and family life, that is, the patriarchal and the patrilineal form of marriage and family life? The dissenting opinions of the *hoju* system decision answered this question in the affirmative. But, as the majority opinion of that decision explained, Article 36 (1) should be understood as the expression of the constitutional decision that the patriarchal and patrilineal marriage and family lifestyle of the past should not be tolerated, for it provides that marriage and family life must be established and maintained based upon the dignity of the individual and gender equality, which was not the case in the traditional patriarchal family.

This debate in Korean law can be compared with the debate on substantive due process precedents in the U. S. Supreme Court. It is well known that the Supreme Court precedents protect privacy and family-related liberties as constitutionally guaranteed fundamental rights under substantive due process.¹⁵⁾ But the Constitution itself provides only for procedural due process, not substantive due process—so the legitimacy of these precedents is fiercely debated.

One influential approach to finding and articulating substantive due process rights is to define these rights by way of tradition. The dissenting opinion of Justice Harlan in *Poe v. Ullman*, 367 U. S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961) asserted that the right to use contraceptives was a constitutionally protected substantive due process right. Harlan opined that “Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of

¹⁵⁾ See, for example, *Roe v. Wade*, 410 U. S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U. S. 833 (1992), protecting the right of abortion.

necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.”

Quoting Justice Harlan, the majority opinion of *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), written by Justice Powell, stated that “Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”¹⁶⁾

But the invocation of tradition is a two-edged knife. At times, tradition has been invoked to deny substantive due process rights that were found to be thereby unsupported. In *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91, 57 USLW 4691 (1989), the opinion of the court, delivered by Justice Scalia, denied that the power of a biological father to assert parental rights over a child born into a woman’s existing marriage with another man was a protected substantive due process right because such a power was not sufficiently rooted in the traditions and conscience of the American people as to qualify as fundamental.

Then should the issue of whether certain activities, not protected by the Constitution explicitly, are supported by tradition or not, be conclusive in deciding whether people have a fundamental right to such activities? The answer should be never. Traditional support for a certain activity can be grounds for acknowledging such an activity as constitutionally protected by right, but the lack of support of a specific tradition does not mean that it should not be protected by the Constitution.

In *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), the majority opinion, written by Justice Kennedy, held that the Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual acts was unconstitutional, overruling *Bowers v. Hardwick*, 478 U.S. 186,

¹⁶⁾ Footnotes omitted.

106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), although sodomy was not supported by tradition. On this point, the majority opinion opined that “[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”¹⁷⁾

VII. Conclusion

Reform of Korean family law was marked by struggles between the Constitutional principles and tradition. The movement to conform family law to the Constitution was retarded by the resistance of conservative groups, whose main argument was that family law ought to be rooted in tradition. But tradition alone cannot be a defense for an otherwise unconstitutional law. In the reform process, the Korean Constitutional Court played a significant role in upholding the primacy of the Constitution, as evident in the decisions regarding the common surname marriage ban and the *hoju* system.

17) 123 S.Ct. 2480.

Securities Enforcement in Pre-1997 South Korea: An Analysis of the Korea Securities and Exchange Commission (KSEC)

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Abstract

This paper focuses on the role and delegated authority of the Korea Securities and Exchange Commission (KSEC) regarding securities regulation and enforcement during the period up to the 1997 Asian financial crisis period. Securities regulation, at this time in Korea, was generally administered under the combined auspices of several government agencies. These agencies included the KSEC, the Securities Supervisory Board (SSB), Ministry of Finance and Economy (MOFE), Korean Securities Depository (KSD) and the Korean Stock Exchange (KSE). The Korean SEC, specifically, acted under the conferred authority of the Securities and Exchange Act (SEA), enacted in 1962.

Since Korea's recent democratic emergence in 1945, the government has incorporated facets of American, Japanese, and German law into its own legal system. For this reason, it is of interest to investigate the KSEC, acting under the provisions set forth in the SEA, with some comparison to its American counterpart, the U.S. Securities and Exchange Commission (SEC). To accomplish this, a compilation of primary government sources, related articles, and scholarly texts will be used.

To date, very little work exists regarding the KSEC and its role in the Korean securities market and economy during the pre-1997 period. Because of this omission within the current academic literature, the current topic has been undertaken.

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