
Vision of Postcolonial Feminist Jurisprudence in Korea: Seen from the ‘Family-Head System’ in Family Law

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Abstract

The family-head system as inscribed in the Family Law has had enormous significance since the system regulates virtually every legal relation within the family, for instance, through designating a ‘family-head’, usually an adult-male, or the eldest son of the previous family-head. Through this simple constellation, the institution has exerted strong and complex social effects: it defines the boundary of the family, endows a kind of ‘natural right’ to be the head to a family to every adult male in Korea, while it also naturalizes the inferior status as ‘member’ to almost every adult woman in Korea. Although the right of family-head was often conceived as a ‘symbolic’ one rather than a substantive one, the status of a family-head becomes real enough as it means headship in the family document, i.e. family register, which is the identification system of Korean people as well.

The history of family law in Korea is a history of women’s movements. This article tries to interpret the meaning of this change within the history of legal feminism in Korea. It will examine the critical articles that treat the women in the family in discriminatory way, and presents how the separate articles interrelate with each other as a system. Based upon this examination, it will introduce the constitutional case regarding this family-head system. From the analysis of the constitutional case, the essay will discuss the question of ‘tradition’ and colonialism. This will be a critical effort for not only interpreting legal history but also envisioning future change.

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I. Introduction

The spring of 2005 opens a new era for the Family Law in Korea. In early February, the Constitutional Court decided that the core articles of the family-head system were incongruent with Article 36 paragraph 1 of the Constitution, which protects the basic rights of human dignity and gender equality in marital and family life, after almost five years' scrutiny. Exactly one month later, the National Assembly has passed the alternative Bill for the Civil Code that eliminates the family-head system that will become effective on January 1, 2008.¹⁾

The family-head system is a family institution inscribed in the Family Law, which is comprised of Books 4 and 5 of the Civil Code of South Korea. This has enormous significance since the system regulates virtually every legal relation within the family, through designating a 'family-head', usually an adult-male, or the eldest son of the previous family-head, and the family-members who need to be represented by the family-head. Through this simple constellation, the institution has exerted strong and complex social effects: it defines the boundary of the family, endows a kind of 'natural right' to be the head to a family to every adult male in Korea, while it also naturalizes the inferior status as 'member' to almost every adult woman in Korea. Although the right of family-head was often conceived as a 'symbolic' one rather than a substantive one, the status of a family-head becomes real enough as it means headship in the family document, i.e. family register, which is the identification system of Korean people as well.

The present moment is a kind of interim period in which the old has finally been abolished, yet the new is still obscure. Particularly we need to invent new type of registration to identify the citizenship of a Korean. This change is an invaluable fruit of the long history of the law revision movement initiated by feminist lawyers, legal scholars and activists. Indeed, the history of family law in Korea is a history of women's movements. This article tries to interpret the meaning of this change within the history of legal feminism in Korea. It will examine the critical articles that treat the women in the family in discriminatory way, and presents how the separate articles interrelate with each other as a system. Based upon this examination, it will

1) The new bill for Book 4 and 5 became effective on 31 March, 2005. However, the part of the bill that relates to the family-head system, surname and adoption will enter into force on 1 January, 2008.

introduce the constitutional case regarding this family-head system. From the analysis of the constitutional case, the essay will discuss the question of 'tradition' and colonialism. This will be a critical effort for not only interpreting legal history but also envisioning future change.

Particularly, the essay interprets the meaning of the abolition of the family system as a process of postcolonialism i.e. the overcoming the colonial effects in law and society from a perspective of feminism. Through this effort, a postcolonial feminist jurisprudence is presented as a method to interpret the constellation of law and society in the past and present. If 'post' indicates "something like a conversion, a new direction from the previous one," as Lyotard puts,²⁾ postcolonialism would be a break from the past. The past, however, does not mean the time prior to the present, but the prolonged influences of unidentified effects of the past alive in the present.

II. Family-head System as System of Gender Discrimination

The family-head system is a systemic allocation of the places of man and woman in the family. In order to understand this, I will examine the articles in the family-head system in the Civil Code of Korea that typically discriminate women vis-à-vis men. Several articles among them are included in the Constitutional Court's deliberation in the case reviewed below. The problem is that those gender discriminatory articles are indeed the backbone of the system.

Article 778 A person who has succeeded to the family lineage or has set up a branch family, or who has established a new family or has restored a family for any other reason, shall become the head of a family.³⁾

This article articulates the way to become the family-head. Though this stipulation, it institutionalizes the indispensability of the family-head in every family(家), i.e., a family register. Thus, without a family-head the family in the legal sense is unthinkable. Article 781 paragraph 1 is about a child's mandatory registration of one's family identity in one's father's family register when one's

2) Lyotard, *The Postmodern Explained to Children: Correspondence 1982-1985*, Julian Pefanise & Morgan Thomas, London: Turnaround, 1992.

3) English translation of the Civil Code(amended by Act. No 4199, Jan.13, 1990) and the Constitution are provided by Korea Legislation Research Institute.

father, either legal and de facto, has become known. The father rather than the mother is usually the one who is also a head of a family according to Article 778 when it is read in conjunction with Article 826 paragraph 3.

Article 781 (1) A child shall assume its father's surname and the origin of surname and shall have the name entered in its father's family register.

Article 826 (3) The wife shall have her name entered in husband's family register [The latter part omitted].

Although Article 826 paragraph 3 looks very plain, it has been regarded as a very critical article supporting all the apparatuses of the patriarchy, through the institutionalization of the patri-local marriage in which wives' familial identity belongs to the husbands.'

Seen this way, these articles are interdependent so that they are able to be used to build the legal institution of the 'family.' The Article 778 is fully meaningful in its interrelation with Article 826 paragraph 3, and the latter effective in conjunction with Article 781 paragraph 1, etc. With the orchestrated effects of all these articles, the status of women in the family as a wife, a mother, a daughter, a daughter-in-law, is inferior and even supplementary to the male counterpart, i.e., a husband, a father, a son, and a son-in-law. This gendered status in the family would have appeared harmonious with the nature of men and women particularly in the 'normal' family, i.e. a family with a married couple often in their first marriage and their own children, since the status resides in the very 'normality' of the marriage and family.

The gendered status in the marriage and family, however, reveals itself when the marriage walks out from its normality, i.e. divorce, remarriage, and etc. With the rapid increase in divorce and remarriage in Korean society, the articles examined above are deeply detrimental to women and the children whose mother has their custody.

Since almost every child in Korea has their name registered on the father's family register, and their parent's divorce could not be a reason for the child to transfer one's family register, the child has no choice but to remain on the father's family register regardless of the custodian. Thus, it is impossible for a divorced mother to have her children's name in her own (or her natal family's register) even if she is a custodian of her children. In this way, the divorced mother's legal tie with her children becomes insecure as it is always mediated by the divorced father. The law treats the mother in a discriminatory way vis-à-vis the father, and this violates the rights of both mother and children. The divorced father, however, does not have to

worry about the status of his children regardless of his custodial status.

There are chances for children to transfer their familial registration to the mother's, that is, on their mother's remarriage. When their divorced mother again has a husband, the children may transfer their registration to the register of the mother's new husband, not her own, as stipulated in Article 784 paragraph 1.

Article 784 (1) If a wife has lineal descendants who are not her husband's blood relatives, she may, upon the consent of her husband, have their names entered in her husband's family register.

(2) If, in the cases mentioned in (1), the wife's lineal descendants are members of another family, their entry into her husband's register shall be subject to the consent of the head of such family.

When a child transfers his or her family register to her or his mother's husbands', the mother must, not may, obtain the two kinds of consent, one from the current family-head of the child, the other from the mother's current husband. Even if the child has obtained these two consent, the child still has the problem of the inconsistency of his or her surname from the stepfather's, since Korean law does not allow changes of one's surname by the cause of changes in family register or one's parental divorce. The family-head system also means the legal recognition of the unbalanced parental rights between father and mother. See the following articles

Article 782 (1) If a member of a family gives birth to a child out of wedlock, he may have his child's name entered in their family register.

Article 785 The head of a family may have the names of its own lineal ascendants or descendants who are not the head of another family register entered into its own family register.

Articles 782 and 785 indicate that a family-head, who is often a senior male in the family, i.e. father of children, does not need the consent of the child's current family-head or a mother for the registration of his biological child. This could violate the will of a 'biological' mother of the child who does not want to have her child's name on the father's family register and a stepmother who does not want to have a child out of the current marital relations in her family's register.

This skewed system of mother-and father-hood, including the legal institutions of wife and father, violates women's rights in many fundamental ways. The system perpetuates the wife's inferior status to the husband, and this is particularly detrimental to the divorced mother. Thus, the system hinders women's freedom to divorce and remarriage. With the envisagement of their disadvantage in the

marriage, the system also hinders women's freedom to marry as well. The system also has discriminatory effects on sexuality.

As seen in Articles 782 and 785, the institution of a family-head with its specific constellation of articles on fatherhood provides the men in Korea with the chance to put their offspring from extramarital relations on the register without any legal traces regarding their origin. In other words, the offsprings of the family-head who is usually an adult male from and out of the matrimonial relationship appear virtually identically in the document of the family register. This would indirectly give men the freedom to have extramarital sexual relationships compared with women in Korea. For women, let alone children out of wedlock, it is so difficult to put legitimate children from a previous marriage in her new husband's family register, as examined in relation to Article 784.

Compare the discriminatory treatment even between the father's child 'out of wedlock' and mother's child from 'the previous marriage.' The institutions of fatherhood, family name and family register are all included in the system of the family-head. The succession of the headship is a critical aspect for the survival of this institution that is also male-centered.

Article 984 With respect to succession to the family headship, it shall be given to a person in the following order:

1. A male person who is a lineal descendant of the person to be succeeded;
2. A female lineal descendant who is a member of the family of the person to be succeeded;
3. A wife of the inheritee;
4. A female lineal ascendant who is a member of the family of the person to be succeeded; and
5. A wife of a lineal ascendant who is a member of the family of the person to be succeeded.

Although the female descendants are given second priority in the succession and that four of the five candidates are women, second in priority is a status very far from first, because there are several types of male successors who have absolute priority. The eldest son, the second son, or adopted son and a stepson are all prior to the older, female, biological descendants of the family-head. Even the son out of wedlock has priority to older daughters in the succession of the headship. The specification attached to women, that they must be a "member of the family" of the family-head is also significant, since the women automatically change their family

register upon marriage. Thus, the headship that is rarely bestowed upon women is also a temporary one. Thus, it is a system that makes a son indispensable in every family register.

Examination of the system makes it clear that the system is not only about the family-head per se, but about the family institution that regulates every kind of family relation. It is also fair to say to be a woman and to be a man means to be located in a different position in this familial constellation from birth to death. This precisely marks the point where the Constitutional Court has deliberated the system's compatibility with the Constitution for more than four years.

III. The Constitutional Decision about Family-head System

In September 2000, the 113 women's organizations in Korea founded an organization, entitled 'The Citizens' Alliance for the Abolishment of the Family-head (*hoju*) System, hereafter, the Alliance.' By the support of 'the Alliance' and the lawyers who are the members of 'the Lawyers for a Democratic Society,' several appeals were filed to scrutinize the constitutionality of the pertinent articles within the family-head system in the Civil Code. Two local courts in Seoul accepted these appeals in March 2001, and forwarded the case to the Constitutional Court of Korea. In February 2005, the Constitutional Court handed down its decision.

Let us begin with an overview of the litigation. One suit was filed by a married woman who did not want to have a family-head(*hoju*; 戶主) in her and her partner's register(*hojok*; 戶籍). Since the status of the family-head has to be bestowed upon the couple's registration of marriage simultaneously as stipulated in Article 778 as seen above,⁴⁾ the couple could not register their marriage without having a family-head. The responsible family register office (*Kangso* district office) rejected such a demand based upon the Civil Code. The woman did not accept the office's decision and filed a lawsuit.

A local court in Seoul (the Northern) examined the appeal and decided that the pertinent article needed to be examined in terms of its compatibility with the

4) Article 778. 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 any other reasons, shall become the head of a family.

Constitution. The court found the article 778 to be incompatible with Constitution Article 10 (human dignity and value, the pursuit of happiness), Article 11 paragraph 1 and Article 36 paragraph 1 (freedom of family and marital life based upon individual autonomy and gender equality) and Article 37 paragraph 2 (prohibition from the over-restriction of the fundamental rights) of the constitution.⁵⁾

Although the claimant also appealed for the deliberation of the unconstitutionality of Article 826 paragraph 3 (the former part),⁶⁾ the court's opinion was that "the unconstitutionality of Article 826 paragraph 3 is irrelevant to this case, even if the article is unconstitutional." The Constitutional Court, however, included this Article in the scope of deliberation.

Another accepted appeal was raised by a divorced woman who was a mother of a five-year-old child. When the woman, main caretaker of the child, demanded the transfer of the child's name into her family register from his father's, the family register office (*Eunpyong* district office) did not accept the demand on the ground of Civil Code Article 781 paragraph 1.⁷⁾

The local court in Seoul (Western) decided that the latter part of this article had the potential to violate the Constitution, particularly Article 11 paragraph 1 and Article 36 paragraph 1, the articles to protect the fundamental rights of equality between men and women.⁸⁾ The court's opinion was that the former part of the article concerning the child's surname and the origin of surname was not relevant to this case. The latter part, however, perpetuated the violation of the fundamental rights of the mother and child, a real family unit.

Accordingly, the Constitutional Court has examined the constitutionality of the three articles above: Article 778; Article 781 paragraph 1 (latter part of the first sentence); Article 826 paragraph 3(main part). The majority opinion of six justices held that these three provisions were incompatible and incongruent with the Constitution.⁹⁾ The reasoning was mainly based upon Article 10 and Article 36 paragraph 1 of the Constitution that that protects human dignity and gender equality

5) Case no. 2000 hopa 1673.

6) Article 826 (3) The wife shall her name entered in husband's family register.

7) Article 781 (1) A child shall assume its father's surname and origin of surname and shall have its name entered in its father's family register.

8) Case no. 2000 hopa 988.

9) Case no. 2001 heonga et al.

in marriage and family life.¹⁰⁾

In this decision, clarification of the relationship between Article 9 and Article 36 paragraph 2 of the Constitution was one of the central tasks.¹¹⁾ According to the majority, tradition in the Constitution should be understood as a history-and time-bound concept, meaning that tradition should be interpreted in the context of Constitution. Thus, in the realm of family, tradition and traditional culture should not be contrary to the dignity of the individual and gender equality. Accordingly, if a certain tradition contravenes the dignity of the individual and gender equality, it cannot be justified on the ground of Article 9.¹²⁾

Although this reasoning is based upon the notion of fundamental rights that every Koreans must enjoy, with which I also agree, there are some unclear aspects. In the reasoning, the question if the family-head system is indeed tradition was not well answered. Is the family-head system incompatible with the Constitution mainly because of its gender discrimination, although it is indeed the age-old tradition of Korea? Perhaps the Constitutional Court's decision per se would not be bound by these questions. For the articulation of the genealogy of the family-head system including other legal areas, these questions are critical, however. For those who believe the family-head system as age-old tradition and for those who cast doubtful eyes on the system in its colonial legacy, the question of 'tradition' has been a black box in the fifty years of history of the family law revision. The Constitutional Court kept silent on the controversy of the colonial aspect of the system.

IV. Dubious 'Tradition' and Its Colonialist Origins

Since the family-head system was legislated into Korean family law in 1957, the

10) Constitution Article 10. All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.

Constitution Article 36 (1). Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal.

11) Constitution Article 9. The State shall strive to sustain and develop the cultural heritage and to enhance national culture.

12) Yune, Jinsu, "Tradition and the Constitution in the context of the Korean Family Law," a paper presented at the ISFL(International Society of Family Law), 2005.

system has been criticized for its patriarchal nature. Throughout the 1960s, 70s, and 80s, progressive scholars of the family law, women lawyers such as Yi Tae Young, and feminist activists had put enormous energy into the revision of the family law including the family-head system. Nonetheless, the family-head system has been the most enthusiastically defended institution in the family law, and the system remains in the law after the third revision of family law in 1989.¹³⁾ How could it be that the system is so resistant to change?

The Confucians (*Yulim*; 儒林) have been a main opponent group against the changes of the family-head system; they are not a very socially salient group otherwise. Under the name of ‘tradition,’ they defended the system in terms of ‘good and beautiful custom (美風良俗)’ for decades. The ‘tradition’ of Korea has indeed been the central concept, spirit, and jurisprudence for the conservation of the family law throughout the history of Korean family law.

According to the logic that the family law needed to be grounded in the ‘authentic tradition’, the category of gender, not to mention the gender discrimination, has been securely blocked from view. Thus, specific gender allocation in, for, and by the lineage does not even appear in the discourse. The claim about gender equality in this discursive context is only contra-traditional, as if Korean family has been exempt from any kind of social analysis and examination. As a patriarchal family has been affirmed as a ‘tradition’ of the nation, as if it were a trans-historical culture, specific historical deployment of the institution becomes invisible, especially those parts pertaining to colonialism.

The family-head system is known as an institution transplanted in colonial Korea, and which originated in Japan, in the old Japanese civil code and family registration codes.¹⁴⁾ The institutions of family-head (戶主; *hoju*), succession of family-headship,

13) Lee, Tae Young. *Kajokpop kejong undong samsip ch'illyon sa* (The History of Thirty Seven Years of the Movement for Family Law Revision), Seoul: Korean Legal Aid Center for the Family Press, 1992; Kim, Yong-han, “Kajokpop ui kejong kwa ku wuntong ui jesang (Revision of family law and various aspects of the revision movement),” In *Hyondae kajokpop kwa kajok jongch'ek* (Modern Family Law and Family Policy), ed. The Committee of Publication for Commemoration of the Sixtieth Birthday of Professor Kim Ju-soo, Seoul: Samyoungsa, 1988.

14) Chung, Kwang-hyun. *Hankuk ch'injok sangsokpop yonku* (Korean Law of Family Relations and Succession - A Study of its History and Interpretation), Seoul: Seoul National University Press, 1967; Chung, Dong-ho, “Hankuk kajokpop ea issoso ui kesu (A Study of Reception of Foreign Law in the Korean Family Law),” J.D. Dissertation, Korea University, 1978; Pak, Byung-ho, *Kajokpop* (Family Law), Seoul: Korea National Open University Press, 1992.

and family register(戸籍; *hojok*) in Korea were imposed by the Japanese colonial government, based upon their own family institution, the *Ie* (家; *ka*) institution. As *Ie* was not just a patriarchal family, but extended to the specific constellation of relationships between the state, family and the people, it also had political meanings. Given that the Meiji imperial state was itself modeled as a family form, the *Ie* family could be said to have been a living cell of the state, and the state, an extended form of the *Ie*. The family-head in this model was located as a link between the Emperor and family members (the people), in a kind of parent-child relationship.¹⁵⁾ In this light, imposition of the family system in Korea, especially the family register system and family-head system, was politically indispensable for the integration of Korea into Imperial Japan. The imposition of Japanese family names in 1939 through the third revision of the Ordinance concerning Civil Affairs in Korea (朝鮮民事令) Article 11 was an instance of the homogenization of the family system on Korean soil with that of the Japanese.¹⁶⁾

If this is such a clear fact, why and how can the Confucians and other Koreans think that the family-head system is ‘traditional’? It is an irony that those who have strong belief in the national authenticity of the system, have yet been incapable of identifying colonial influences and traces in it. This irony is very important to note. The family-head system remained in the law after decolonization without much discussion. Instead of how to deconstruct colonial law and reconstruct ‘modern’ law by accommodating new social relations, the dogma of ‘tradition’ prevailed at the National Assembly.

The irony of the colonial influences seems to have been embedded in the colonial policy on family law itself. As Article 11 of the Civil Ordinance, tantamount to the Civil Code in colonial Korea, stipulated the central principle of “following the Korean custom” in the field of relatives and succession, in Korea ‘custom’ was an area in which the colonial government had deeply intervened. For the purpose of

15) Watanabe, Yozo, “The Family and the Law: The Individualist Premise and Modern Japanese Family Law,” in *Law in Japan - The Legal Order in a Changing Society*, ed. Arthur Tylor von Mehren, Cambridge: Harvard University, 1963; Smith, Robert J. “The Japanese Confucian Family,” *Confucian Traditions in East Asian Modernity - Moral Education and Economic Culture in Japan and Four mini-Dragons*, Ed. Tu, Wei-Ming, Cambridge: Harvard University Press, 1996.

16) See more, Chung, Kwang-hyun op.cit. ; Yi, Sang-wook, “Ilche ha hoju sangsok kwansuppob ui chognip (Establishment of the Customary Law of Family-head Succession during Japanese Colonial Rule),” *Popsahak yonku* (Study of Legal History), vol 9, 1988.

knowing and ruling Koreans, the Japanese legal scholars and related committees investigated, interpreted, and ‘determined’ the Korean customs. The items and organization of inquiry for the investigation of Korean custom exactly followed those of the Japanese Civil Code. The ‘custom’ of Korea was destined to be framed by the Japanese law, as the standard and eyes for interpreting the customs in Korea.¹⁷⁾

The colonial bureaucrats made decisions regarding Korean customs, incessantly rewritten during the colonial rule. It was a curious principle that seemed to respect the autonomy of the Korean culture and family life, and yet it was the Japanese officials and scholars who filled the content of the ‘custom’. In the process of definition of the ‘custom’, political arbitrariness and Japan-centeredness were profound and serious. In almost every court decision, the phrase such as ‘it is the Korean custom’ became a cliché.¹⁸⁾

As there was no appropriate ‘custom’ in Korea, however, specific Articles in the Japanese Civil Code were applied(借用; *ch’ayong*), and the scope of the application expanded throughout the colonial period. The interaction between the applied Japanese codes and Korean custom was another phase of the custom’s coloniality. The family-head system in Korea was precisely a case in point. As ‘custom’ was the central principle of the colonial family law, Korean family institutions including the family-headship(家長權) were studied in the process of the legal imposition. In the process of the imposition, Korean family-headship was interpreted from the view of, tailored by, and even mutated with the Japanese family-headship. As a result, Korean family-headship became even more rigidly patrilineal than that of the original inventors in Japan based upon the ‘customs’ in Korea.

The colonial interpretation and judgment of the custom in Korean also left profound influences on the knowledge of law and society during the Chosun dynasty (1392-1910), the dynasty in Korea prior to colonial occupation. For the investigation of the custom in Korea, customs during the Chosun dynasty - its legislation and pertinent practices - were also studied and evaluated. In this process of colonial rule, the ‘customs’ in Chosun dynasty were renewed in the colonial imagining. The male-

17) Chung, Gung-sik, *Kookyok Kwansup chosa pogoseo* (Korean Translation of Report of the Investigation of Custom under Japanese Colonial Rule), Korea Legislation Research Institute, 1992.

18) Chung, Kwng-hyun, op cit; Yang, Hyunah. “Sikminji siki hankuk kajokpop ui kwansup munje [I] (Colonial Invention of Korean ‘Customs’ during Japanese Colonialism: Lost Temporality in the Customs [I]),” *Sahoe wa yoksa (Society and History)* vol. 58, 2000.

centered, noble class(兩班; *Yangban*) - centered customs were universalized and fossilized as Korean custom as such in the colonially 'modern' legal systems.¹⁹⁾ It is interesting to see in this context that postcolonial theorists in India have uncovered the process of legalization of 'customs' during the English colonial period, and have seen how the customs became rigid and even more feudalistic when they were translated within the system of 'modern' law than the customs remaining in the state of informal and local practices.²⁰⁾

The family-head system is a case in point. The rigid code of patri-lineage that must prevail in the imagined space of Chosun dynasty and the logic of the family-head inscribed the old Japanese Civil Code that was a 'modern' invention in the Japanese social environment were intertwined in the family-head system. Two institutions - the patri-lineage in the Chosun dynasty and the ie family system - were in a sense mutated. As for the interpretation of past in Korea in the application of Japanese Civil Code, however, Japanese colonial viewpoints were not exempt. As every small household became a pseudo-lineage to be continued, the necessity of a son has become indispensable to be 'a family' in Korea.

As the family-head system in Korea has been defended as 'tradition,' the colonialism embedded in the system has been able to continue silently. In order to save the dignity of national patriarchal subjectivity, the 'traditionalists' have not faced the colonialism. The production of 'customs' indicates to us that colonial influences on the 'tradition' were not just exogenous (oppression of the tradition), but also endogenous (production of the tradition). The Confucians who cherish ancestors, family genealogy, and the kinship mainly through the male-centered reckoning of the 'family' such as patri-lineage and patrilocal-marriage have been the main constituents who wish to preserve the system under the name of 'tradition.' This patriarchal orientation among Confucians and perhaps Korean national elites was the reason why they were blind to the colonality in the institution of family-head.

19) Yang, Hyunah, *ibid.*

20) Spivak, Gayatri Chakravorty, "A Literary Representation of Subaltern: A Woman's Text from the Third World," ed. Gayatri Chakravorty Spivak, *In Other Worlds*, New York: Routledge, 1988; Mani, Lata, "Contentious Traditions: The Debate on *Sati* in Colonial India," *Recasting Women - Essays in Indian Colonial History*, eds. Kumkum Sangari and Sudeshi Veid, New Delhi: Kali for Women, 1989,.

V. Boundaries of the Family and Korean People (國民)

The family-head system has been used as a way to register the family relationship at the family register, and the family register has been used as an official record of identification of the people in Korea. The main function of the family register is for public verification of the identity of a person.²¹⁾ Since the “relations with *hoju*” such as wife, child and I should be clarified at the family register, it is impossible to file a family register without accepting the family-head system. Further to this, the ‘family’ of the family-head system means the family register, as an official representation as discussed above.

The fact that this official verification of ‘the person’ in Korean society is always figured in the relationship in the family, particularly that of the family-head system, indicates the curious relationship between the family system and the definition of people (國民; *kookmin*) in Korea. Other than the family register, however, there are multiple I.D. systems in Korea: the residents’ register; serial number of the register; the card of the register. In the resident’s register, since resident’s status is again reckoned in terms of the family relationship, the family-head system again cannot be avoided. It is in this ‘inter-textuality’ between the ID systems that the identity of ‘the person’ in a society is inevitably defined.

All Koreans need to submit the family register and/or resident’s register upon getting a job, entering school, receiving social welfare, and for any kind of administrative and legal action. Moreover, the personal information about birth, death, marriage, divorce, and adoption pertaining to the entire family members is all integrated in a family register, which is again interrelated with other ID systems.²²⁾ The nature of ID systems in Korea amounts to the question of ‘people-hood’ and ‘citizenship’ of the society. In this respect, the abolishment and revision of the family-head system is tantamount to the struggle for citizenship in the West, to the

21) Chang, Young-ah, *Hojok chedo ui keson bangan ea kwanhan yonku* (A Study on the Revision of Family Registration System), Research Report 200-4, Seoul: Korean Women’s Development Institute, 1996.

22) These identification systems in Korea have increasingly been criticized from the light of human rights in Korea. Possession of too much information of the people by the state is now regarded as the heritage of cold war (division of the nation) and the colonialism. Refer to Kim, Ki-joon (“*kukga ui kukmin kwalli ch’ege wa inkwon* (Registration system of the People and the human rights),” a paper presented at the 50th Anniversary of Universal Declaration of Human Rights, 1999).

extent that one is no longer bound to status, private relationships and community. For the women who are systematically discriminated within the logic of the system, the issue of citizenship is more serious. Since almost every female adult in Korea is neither one who can represent herself in a family, nor one who can 'move' beyond a family boundary in order to set up or lead a family, she signifies a 'familial being.' This is why it is nearly impossible to think about woman in Korea without thinking about the specific family relations.

The discussion above indicates the real connection between family-head system and the state's interests in the system. The family registration system built upon the grammar of the family-head system would have fulfilled the administrative and political functions. Then, it was political elites with philosophical ties to Confucianism that wished to continue the family-head system by silencing its colonial and historical traces. It is notable in this context that the feminist lawyers uncovered the complex historical domain embedded in the family law and the women's legal movements opened the field to confront the state's politics of family registration. As the family-head system will be nullified in January 2008, an alternative family registration also needs to be invented. The Ministry of Justice and other political and civil bodies have proposed the alternative bill. From those bills, it is expected that the new registration system will be organized by each individual, not by the family.

VI. Postcolonial Feminist Jurisprudence?

As the system of family-head will be deleted, two of the most controversial and resilient areas in the family law will be abolished: the family-head system and the marriage prohibition between the same surname/place of origin²³⁾ As the issue is not confined to this, however, it is time to figure out what the abolishment of the family-head system means and what it entails. To interpret a situation amounts to construction of knowledge and discourse so that this change can initiate further changes and create further meanings. The present moment is a dawn when the

23) For the Constitutional case regarding the latter, refer to Yoon, Jin-Su ("Recent Decisions of the Korean Constitutional Court on Family Law," *Journal of Korean Law*, vol.1-1, 2001).

objects only begin to reveal their frames and phases.

In this essay, I interpret the abolition of the system from two veins: the feminist and postcolonist views. Whereas the former is a social criticism of patriarchy, the latter is a criticism of prolonged colonial legacies. I try to explain how the two perspectives can and needs to be interrelated to grasp the nature of the family-head system. The feminist historical analysis of the family-head system initiated the uncovering of the colonial aspects of the family-head system, rather than the criticism of colonialism uncovering the latter. The interesting thing here lies in the fact that the public recognition of the coloniality of the 'family' institutionalized in the family-head system came from the gender analysis of the system, not from the nationalist analysis of the system. That is quite different from the dominant way of criticism of the colonialism in Korean society, which has been seen through the nationalist gaze. monopolized by postcolonial male elites. This signifies importance of the subject position to speak about the colonial legacies.

Postcolonial feminist jurisprudence can be characterized as the jurisprudence that provides the logics to grape and overcome the male-centeredness and colonial legacies in law and society. The family-head in Korea exemplifies emerging necessity of the postcolonial feminist jurisprudence in the society. When the colonial traces are interconnected with patriarchal social arrangement, they could be the blind point for the male nationalist and even cherished as the 'tradition' As seen in the context of family-head system, postcolonial feminist legal analysis enables to identify the colonial legacies that have been seated in the deep and hegemonic layers in law and society.

The tasks for the future are in two veins: deconstruction and reconstruction. The major issue for these tasks would be as follows.

The first task lies in deconstruction. With the abolition of the family-head system from the law, the status and gender discriminatory systems and habits also need to be deconstructed. Now gender discriminatory practices in the society, especially prevailing in the private sphere, need to be problematized. Abolition of the family-head system would not end male and the male side family's dominance of women.

The social system of separation between woman and man in the family, workplace, and public space, and state would be also deconstructed. The family-head system has functioned as one of critical facilities for the gender system that allocates men and women in a very separating manner; the abolition of the system could initiate the creation of a society in which both women and men are equally

participating in a genuine sense. The notion of ‘normalcy’ of family also needs to be deconstructed. Instead, diversity in family and lifestyle needs to be respected.

The second and simultaneous task lies in creation. First of all, alternative public identification system needs to be created that will promote equality, protection of privacy, and diversity.

Reinvention of tradition based in the present is also expected. The postcolonial feminist jurisprudence would not deny that tradition is a feminist agenda. From the interior criteria of justice, i.e. criteria derived from the women and men in their own land as a historical entity, feminist postcolonial lawyers and thinkers will be engaged in the creation of the tradition that is suitable to the time. Ancestor veneration, the definition of ancestor, ancestor commemoration group(宗中; *chongjoong*), the places of women in it, maternal genealogy, etc., need to be reinvented from the feminist viewpoints and the standards of contemporary women and men. When postcolonial feminist jurisprudence becomes sharpened and shared in the society, it could initiate more fundamental changes in law and society. Feminist jurisprudence will become a method for social change through the gendered analysis about law, culture, and history.

KEYWORDS : family-head (*hoju*), post-colonialism, family register (*hojok*), reinvention of tradition, (*ka*), custom