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# Gender Equality and the Matrimonial Property System under the Family Law in Korea

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## Abstract

*Article 36 of the Korean Constitution stipulates that marriage and family life should be entered into and sustained on the basis of individual dignity and gender equality. It is important, however, to consider how this constitutional idea is truly implemented within family law. Issues examined here relate to the matrimonial property system under the Korean family law from a viewpoint of gender equality in order to provide an insight into the way in which matrimonial property is divided. This paper goes on to suggest recommendations for improving the current matrimonial property system. The suggestions are laid out in light of the matrimonial property contract system, statutory property system, property distribution claim, and other matters. The author argues, among others, for the introduction of an optional matrimonial property contract system, a type of statutory property system allowing couples to retain freedom concerning their own property and guaranteeing joint possession of the matrimonial property, a readjustment of the distribution ratio of the property to one half of the total property in case of divorce.*

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## I. Introduction

In real life, women's economic activity is not possible under the same social conditions as men. Married women in particular are likely to suffer various disadvantages, since they may have to quit their jobs or give up opportunities for promotion due to household responsibilities and childcare. However, this unfair treatment and inequality were often covered up in the name of love, and many countries still underestimate the value of household work or childcare by women.

Taking a historical look at the matrimonial property system, it can be said that women were not entitled to family assets, including family land. Women could claim their legal rights through inheritance, but when a woman got married, property rights were legally transferred to her spouse and the husband could even dispose of these rights. With the implementation of the gender equality law, women could ascertain their legal rights to acquire, maintain, and dispose of property during the marriage.<sup>1)</sup> Through the separation of property system, women could finally secure full property rights. It was a great leap forward from a gender equality point of view. With that, they could dispose of property at their discretion, but this right was confined to those who owned property. Accumulating property was difficult for women responsible for household work and childcare; therefore, women were bound to remain economically weak in a society where the labor value of household work and childcare was not highly recognized. Against all odds, many women succeeded economically under these circumstances. Some gave up marriage and childbirth to achieve their goals.

Currently, a diverse set of statutory property systems is in place in European countries that equally recognize the labor value of economic activity, household work, and childcare. Gender equality in matrimonial property systems is a basic principle not only in Europe but also around the world.

Article 36 of the Korean Constitution law stipulates marriage and family life should be entered into and sustained on the basis of individual dignity and gender equality. Under this system, the government will do everything in its power to achieve that goal. It is important, however, to consider how this constitutional idea is truly implemented within family law. In light of this reality, does the current family

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1) Ju-Soo Kim, *A Study of New Marriage Law*, Korean Research Library, 1958, p. 60; Kyung-Suk Bae, *History of Korean Woman Private law*, In Ha University Publication, 1995, pp. 178, 260.

law provide fair provisions on matrimonial property issues?

I will examine the issues related to the matrimonial property system under the Korean family law from a viewpoint of gender equality.

## **II. Problems of the matrimonial property system in the Korean family law**

### *A. Problems of the matrimonial property contract system*

Current Korean civil law has a matrimonial property contract system (Korean Civil Law, Article 829)<sup>2)</sup> and a statutory property system. Prior to a marriage, the prospective husband and wife may enter into an agreement in which they agree on the respective rights that each will have to the property that they bring into the marriage. However, if the prospective husband and wife did not make a contract, the Korean family law imposes the statutory property system (KCL, Article 829 (1)).<sup>3)</sup>

In principle, the matrimonial property contract cannot be changed or modified during marriage. However, if there is a justifiable reason, spouses may make a change in the contract with the court's approval (KCL, Article 829 (2)). In accordance with the contract, either spouse can request the division of joint property when the spouse taking care of the matrimonial property threatens its economic value by inadequate management. In such a case the other spouse may ask the court to grant him or her power to manage the marital property and a share of the division of the joint property (KCL, Article 829 (3)). Only if the contract is registered shall it be effective in respect to third parties (KCL, Article 829 (4)).<sup>4)</sup>

However, in practice the matrimonial contract system has hardly ever been executed in Korea. Originally, Korea had only the statutory matrimonial property system and does not have any tradition regarding the matrimonial property contract.<sup>5)</sup> This is possibly due to the reality that few people are aware of the right to make a

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2) Korean Civil Law Article 829 = KCL Article 829.

3) The matrimonial property contract system in Korean Civil Law is derived from France civil law.

4) The procedures of registration of the contract follows the non-contentions litigation case procedure law under the provisions of Article 68 or 71, and a registration should be made in the matrimonial property agreement registry at a competent registry office.

5) Ju-Soo Kim, *Family Inheritance Law*, 2001, p. 141.

matrimonial property contract before marriage.<sup>6)</sup> It becomes clear that what happens in practice is that many couples do not actually understand that they are entering into a matrimonial property contract when they marry, let alone the nature and the consequences of the contract. As a result, couples do not understand their rights and obligations in terms of the contract when entering marriage. Further, due to the fact that the formation of the content of the matrimonial contract depends entirely on the prospective spouses themselves, it seems that some couples who do not have sufficient information about the financial situation of the other tend to avoid making a contract.

### *B. Problems of the separation of property system*

The statutory property system in Korea is a separation of property system. It apparently achieves some degree of equality between men and women, but in fact it creates a number of problems. Under the system, most women are put into an unfair situation during their marriages as well as in their divorces when dividing up assets.

Article 830 of the KCL states that each spouse is allowed to retain his or her own property that was acquired before and during the marriage through inheritance or donation. However, in Korea these properties are usually registered under the husband's name and the wife cannot restrain her husband in any way, even when he unilaterally disposes of property. Moreover, the wife can neither inquire into the financial assets nor is she entitled to rights to a share of the property when the creditor carries out compulsory execution of the whole estate under the husband's name.<sup>7)</sup>

Consider a common scenario in which a wife is responsible for household work and a husband is economically active outside the home. Under this arrangement, it is almost impossible for women to accumulate their own property while also taking care of the household. Unless a husband lets his wife know that he acquired property

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6) Whee-Seong Jin, "An investigation of the present condition of matrimonial property possession and awareness of the matrimonial property contract system", When the study investigated a matrimonial property contract system in a survey asking if married couples are aware of the contract system, they (600 married men and women in Korea in 2000) answered Yes 64%, No 33.4%, in <http://root.or.kr/equality/jaesam/jaesam3-1.htm>.

7) Hye-Sun Kim, "An analysis of the present condition of matrimonial property possession and couples' awareness of the contract" in <http://root.or.kr/equality/jaesam/jaesam3-1.htm>.

in his name, she may not even know when her husband buys land or whether he keeps a certain parcel of shares. Inquiring into her husband's property is not allowed under the separation of property system. Even if a woman knows the status of all family assets, her consent is not needed when disposing of property for any reason. Eventually, women cannot claim a legal right to the property despite the fact that their household work contributed to accumulating the property.<sup>8)</sup> This means that women have a potential portion of the property when they are divorced. If the marriage comes to an end, the husband can gradually stash away the property in such a way prior to divorce that his wife is prevented from getting any. In this case, no restrictions are applicable to protect the rights of the wife before the divorce.

Since property distribution between the spouses in an existing marriage is prohibited, the wife may be forced to divorce in order to preserve her share of matrimonial property. In a divorce, the property may be distributed upon the wife's request, but the value of housework is valued at a lower rate than most social labor according to specific instances as demonstrated in judicial precedents.

I have briefly looked at the issue of distribution of property upon divorce. Separation of property systems apparently promote some form of gender equality, but it can be said that a true system of gender equality has not been implemented and characteristics of married spouses with a family have not been taken into consideration. Furthermore, a housewife cannot ascertain specific rights on property or take legal measures in disposing of her potential property. Even at crucial moments when the economic condition of a family is threatened, property rights are not granted to a woman. In this regard, the current family property system should be revised.

### *C. Problems of the right of claim for matrimonial property division*

According to KCL Article 839 (2), when a marriage is dissolved through a divorce, either of the former spouses may request the distribution of the matrimonial property (his or her share of the matrimonial property) by the court. If no consensus is reached or is possible between the parties with respect to the distribution of property, either of the parties may apply to the family court for the division of the

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8) Ju-Soo Kim, *A Commentary on Civil Law (I)*, p.518.

property and a court will specify the amount and method of the division of their marital property by considering the sum of the jointly accumulated property and other circumstances such as contributions by non-earning wives in cases where the women's household work contributed to accumulating property. In this way the provision of Article 839 (2) acknowledges the division of jointly accumulated property. It means that the court acknowledges not only a spouse's financial ability, but also a spouse's contributions made to the welfare of the family through unpaid work at home and care of children and also values the spouse's household work as the collaboration of a partnership in the family.

According to judicial precedent, not only joint property but also "a spouse's own property to which the other spouse made a contribution can be divided."<sup>9)</sup> Also in cases where household labor directly or indirectly has increased the value of the property as well as contributions made to the welfare of the family through unpaid work at home and care of children,<sup>10)</sup> or where labor contributed to maintaining and accumulating property, then the accumulated property can be divided. The distribution of the matrimonial assets can be carried out either so that the parties carry out the distribution themselves in accordance with a mutual agreement or the distribution is carried out by an estate distributor appointed by the court. Upon property distribution in the event of divorce, the judge considers how much each spouse contributed to accumulating property when she or he determines the proportion of property to be distributed. However, since the current law on property distribution in a divorce heavily relies on the judge's discretion as to the method of the distribution and the amount of assets for each spouse, there is a possibility that a judge might pronounce different rulings in similar cases and can be criticized for undermining legal stability.<sup>11)</sup> Therefore, a specific method is needed for calculating each spouse's share of the gains or wealth accumulated through their combined effort in the distribution of marital assets.

From courts, in most cases, housewives received only one third of the couple's

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9) Supreme Court, 1993. 5. 11. 93seu6; An official report of the court, 1993. 6. 1(945), 1400.

10) Kyung-Suk Bae and Kum-Soon Choi, *Family Inheritance Law*, 2001, p.181; Mi-Keung Cho, "Acquired property during marriage and household work," *Monthly Report of Case*, Volume 240, p.38; Supreme Court, 1995. 10. 12, 95da25695 decision; Supreme Court, 1995. 2. 3, 94da42778 decision; Supreme Court, 1992. 8. 14, 92da16171 decision.

11) Yu-Suk Min, "The Desirable Form of Legislation on Property Division at Divorce", *A Study of Family Law*, 2001, p.93.

marital assets that were jointly accumulated. In cases where both spouses worked outside the home, the court has acknowledged the division based on about one half of the matrimonial property.<sup>12)</sup> This particular finding may reflect the fact that the contribution of household labor has been consistently undervalued compared to the value of financial activities outside the home. In this regard, Korean property division has failed to show equal or adequate consideration of the indirect contributions to the marriage economy by women and therefore discriminates against women.

Therefore, under the present legal circumstances, fair evaluation of each spouse's contribution to the accumulated matrimonial assets should be made in order to provide for and ensure full gender equality between the wife and husband in the marriage relationship. Also, because a precedent of the Supreme Court held that the main purpose in dividing marital property was "to dispose of marital assets that were acquired during marriage and distribute the accumulated property,"<sup>13)</sup> retirement allowances already received are included in the pool of the division. However, increased earning capacity or power of the other party, the relative ability of each party for future acquisition of capital assets and income, a spouse's pension rights acquired during marriage, and a spouse's retirement benefits that the spouse will receive after divorce, are not included in the pool for division on divorce.

Courts should consider that the pension belongs to the participant and his or her spouse jointly and decide whether or not an ex-spouse is to share in the participant's pension.<sup>14)</sup> In practice, however, most Korean courts show a passive attitude in

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12) As a number of women who work outside home increases, the divisional proportion of matrimonial property for women has also increased compared to that of the precedent cases of/in 1998.: Zoo-Hye Jeon, *An Analysis of the Precedent Cases of Matrimonial Property Division in 2005*, Kon Kuk University, A master's Thesis, 2005; More specific data on matrimonial property division follows as in; Yu-Suk Min, *A Study of the System of Matrimonial Property Division Between Spouses in the Event of Divorce*, Seoul National University, A Master's Thesis, p. 62.; Sik-Chan Kim, *A Corroborative Study on Property Division and Alimony at Divorce*, A doctoral dissertation, Myung Ji University, p.152.; Bo-Young Park, *Research on the Actual State of Property Division at Divorce: A Study of Actual Affairs. IV*, p.129.; Young-A Jang, *A Study of the Evaluation on the Contributions of Women's Labour that Appeared in the Matrimonial Property Relationship*, Korean Women's Development Institute, 1998, etc.

13) Supreme Court, 1998. 4. 10. 96meu1434 decision.

14) Supreme Court, 2002. 8. 28. za 2002seu36 decision. A court, however, determined the sum of paid insurance money as a claimant's estimated value and made the insurance money as a item of matrimonial division in case the amount of insurance is a small amount of money.: Seoul High Court, 2004beu3; First Instance Court, Seoul Family Court, 2003. 12. 18. sa 2003neuhab38.

stating that in cases where there is increased earning capacity or power of each party, the court may take them into consideration the relative prospect of each party for future acquisition of capital assets and income, a spouse's retirement benefits expected to be received after divorce, and pension rights acquired during marriage in deciding certain proportions of distribution, but these are not required to be included in the total asset pool of the division of marital property in the event of divorce.<sup>15)</sup> It seems that the courts may have overlooked the fact that although property might be divided 50:50, it might comprise a minimal amount of tangible assets, and more significant may be the loss of earning capacity that a spouse faces because of his or her selfless commitment to a marriage relationship.

In Korea, most women acquire their matrimonial property under the husband's name. There are many cases in which a husband who was the title holder disposed of the property before divorce, exploiting the fact that he was the title holder of the property. In such cases, the wife could not restrain him in any way even when he had unilaterally disposed of the property and there was not much possibility that the disposed property would be included in the items for division. Therefore, an appropriate regulation that can ensure effectiveness in property division should be considered in order to protect the spouse of an owner who is able to obtain a certain portion of the property by exercising his or property rights.

At the present time, Korean family law can only ensure the effectiveness of the claim for division of property by exercising a preservative measure, in which it uses the claim for division of property as a defendant preservative measure.<sup>16)</sup> The law, however, does not consider the exercising of a subrogation right of a creditor or a creditor's right of revocation as a defendant preservation measure in the claim for division of property. As a result, there are many cases where a spouse is unable to exercise his or her claim for the division of the matrimonial property vis-à-vis the other spouse. To resolve the problem, it is necessary to recognize the right of claim

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15) Supreme Court, 1998. 6. 12. 98meu213 decision. In this precedent, the court stated that it was enough to consider a spouse's relative ability for future acquisition of capital assets and income or earning capacity of an Economics professor who has a Ph.D degree in Economics as 'the other circumstances' in deciding the amount of share of division between the parties.

16) Seoung-Won Jang, "A preservative measure which is an original bill to the case of the claim for division of matrimonial property", *The many problems of a domestic relations court. A judgment data of the Office of Court Administration.* (edition 62), p. 371.

for division of property in the case of divorce, even before the claim is settled upon divorce by a court's verdict.

*D. Problems of inheritance of the matrimonial property*

In dividing marital property as a result of divorce, the court recognizes certain rights of spouses in the division of all the property that both parties acquired during marriage and (the spouses are guaranteed certain rights to obtain the joint family property) this implies the principle that the property is both spouses' joint asset. When a marriage is dissolved through the death of a spouse, the inheritance of the surviving spouse is calculated by adding 50% of the share of other heirs to his or her share (Article 1009). Therefore, the amount of inheritance share a surviving spouse receives is relatively quite low<sup>17)</sup> and also, the surviving spouse's claim to the distribution of matrimonial property is not authorized while a spouse is entitled to have such a right in the event of divorce. Therefore, after the distribution of the matrimonial property under the provision of inheritance, the surviving spouse cannot further claim his or her right for the distribution of the matrimonial property, even though either spouse is entitled to the right upon divorce. The legal precedent requires the court to consider the general contribution of household work as a duty of partnership to the marriage.<sup>18)</sup> Therefore, Park Joung-Yong asserts that since there is a limit to strengthening the spouses' inheritance rights through interpretative theory on a judge's discretion, it is necessary to resolve the problem by enhancing legislation which allows the surviving spouse to claim the division of the matrimonial property.<sup>19)</sup>

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17) Hwa-Suk Lee, *Law of Couple (Matrimonial) Property Relationship*, Sechang Press. 2000, p.365.

18) Supreme Court, 1986. 9. 9. 85daca1338 decision.

19) Joung-Yong Park, "A study of strengthening the spouse's inheritance rights", *A Study of Family Law*, 2002, Volume 16(2), p. 245.

### **III. Recommended solutions for improving the current matrimonial property system**

#### *A. The matrimonial property contract system,*

##### **1. The optional matrimonial property contract system or a basic form of matrimonial property contract**

Korean civil law has the matrimonial property contract system, however in practice only a few people use the system so the actual situation is that the contract system is largely moot. Therefore, it is desirable that the contract system is amended to introduce an optional matrimonial property system as an alternative plan for the current Korean matrimonial property contract system.<sup>20)</sup> The optional matrimonial property system would allow a type of matrimonial property contract system to gain the force of law and make it an option so that couples could easily choose a suitable property system for themselves. It may be an alternative plan for the current Korean matrimonial property contract system .

As for the optional matrimonial property contract system, couples may choose a separate property and joint ownership of property system. In accordance with the implementation of the optional matrimonial property contract system, the current Korean statutory property system will change from a separate property system to an optional matrimonial property system. Even though only a small number of couples may choose the optional matrimonial property system, to do so, it is necessary to make it easy for the couples to choose from various matrimonial property systems. The law should provide a basic form of matrimonial property contract in order to allow couples to make a contract easily through other methods and publicize it to encourage the activation of the matrimonial property contract.

##### **2. The option of making and modifying the matrimonial property contract during marriage**

According to KCL Article 829, (1) and (2), two people who are about to be

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<sup>20)</sup> German, France, and Switzerland provide the optional matrimonial property contract system.

married can make a legal contract and the prospective husband and wife may agree upon their rights pertaining to the property that they bring into the marriage or acquire during the marriage, including ownership in or division of property. The law also stipulates that the rules of the matrimonial property contract cannot be modified during marriage. However, it may be difficult for the prospective husband and wife to make a matrimonial property contract and register it prior to marriage. Also, it is not reasonable that the rules of the matrimonial property contract cannot be modified during marriage. Therefore, it is desirable to amend the current Korean matrimonial property contract system to allow couples to make a contract during marriage and modifications in the chosen matrimonial property contract system should be allowed during marriage.<sup>21)</sup>

### *B. The statutory property system*

#### 1. The statutory property system or the supplement of separate property system

In general, it is important to acknowledge the fact that the statutory property system is applied to most of couples, since the statutory property system applies if a couple does not enter into any matrimonial property contract, which is usually the case. Even though the differences between each country's statutory property system are minimal, the matrimonial property system, categorizes property into two categories: separate and joint or communal.

In the separate property system, both parties have equal powers of management of

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21) Countries like Germany ( § 1408), France ( § 1396), Switzerland ( § 182 I) allow couples to make or change a matrimonial contract during marriage. Like current Korean law, until 1965 French Civil Law was under the principle that the matrimonial property contract could not be changed. However, it is determined that the principle of impossibility of changing marriage contract is no longer reflected reality of contemporary society, since couples' social, economical, or occupational statuses may be changed due to marriage and reached to a conclusion that it is necessary to provide a flexibility to the contract in order to adjust to transformed environments well. Consequently, the law has allowed a marriage contract to be changed during marriage.(F. H. Lawson/A. E. Anson/Brown, *Introduction to French Law*, 3rd. ed. (Oxford: the Clarendon Press, 1966, p.388). However, the law has limited that the contract cannot be changed until the beginning of minimum of 2 years after a marriage became effected. In case 2 years have passed after the marriage contract implemented (the day of the marriage became effective), under the provision of French law, it is allowed parties to be able to reach an agreement that the contract can be modified partially or changed entirely in the scope of a family's interests according to a notarial letter which received an approval of a court that exercises jurisdiction where the couple domiciled. (French Civil Law 1397).

their own property and may independently perform any legal transactions without consent from his or her spouse. Although the separate property system allows couples to retain control of their own property, the court must acknowledge a spouse's rights in the management and disposal of the property. Certain transactions, however, require the written consent of the other spouse. For example, under this type of statutory system, a spouse's ability to disposal of property at risk to the family's economic interests is limited and is only granted with the consent of the other spouse.

In the case of Germany, each spouse can manage their own property or dispose of it (German Civil Law Article 1363 (2)). Marriage does not change the spouses' ownership of their property. However, ownership does not mean that a spouse is free to undertake any legal transaction as each spouse will need the other spouse's consent in disposing of one's entire property or certain household items central to the marriage (German Civil Law Article 1369 (1)).<sup>22)</sup>

In Switzerland,<sup>23)</sup> each spouse also owns his or her separate property and each spouse's respective assets and liabilities are kept separate; therefore the party can manage his or her property freely and dispose of it independently during marriage (Switzerland Civil Law Article 201 (1)). However, a spouse cannot dispose of their joint property without the other spouse's consent unless there is an agreement between the husband and wife (Switzerland Civil Law Article 201 (2)). In the disposition of property upon separation, marital dissolution, or death, property which is consequently confined from the disposal are matrimonial homes or those concerning which there is a dispute related to the family's interests (Switzerland Civil Law, Article 169 (2)). In such cases the court can deprive a spouse's disposition right for certain values of property (Switzerland Civil Law, Article 178).

In Germany and Switzerland, the law ensures each spouse the freedom of management of his or her own property, while also limiting the disposal of each spouse's own property for the sake of protecting the family's interests from a spouse's intentional or reckless depletion of his or her property. The court also restricts spouses' property rights because at a later stage a spouse's own property may be treated as communal assets. Upon divorce, with the exception of each

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22) Eun-Hee Cho, "A study of the disposal of surplus or gains upon divorce and its problem in German law", *A Study of Family Law*, 2002, Volume16(1), pp. 299-335.

23) Switzerland Civil Law= <http://www.gesetze.ch/inh/inhsub210.htm>.

spouse's own property, earnings or profits made during the marriage are treated as the spouses' communal assets. Parties may retain separate legal ownership of the communal assets during the marriage but in the event the marriage ends in divorce, communal property is treated as joint and divided between the parties.

In terms of the claim of matrimonial property distribution, the statutory property system in Korea is similar to that in the above European countries. However, in practice the Korean separate property system can be devastating to a spouse who neglects her career to raise children as she will be without a salary and therefore unable to acquire property in her name while her husband is able to do so. As a result, the pure separate property system creates a problem of inequity and cannot actualize the equal distribution of matrimonial property; therefore, it should be made more equitable

## 2. Division of matrimonial property during marriage

According to current Korean civil law, property distribution between spouses in an existing marriage is prohibited and is only allowed upon divorce. Thus, a husband and wife might be forced to divorce in order to divide their property or preserve their share of matrimonial property even if they do not want to divorce.

Article 1384 of the German Civil Law provides for the division of matrimonial property while the spouses are separated. In the case where the spouses are separated for a minimum of three years, a court can grant or order the disposal of the property or gains from their property or surplus of their property that would include movables brought into the marriage, everything acquired through their industry during the marriage and the beneficial interest of any immovables.<sup>24)</sup> It is presumed that all accumulated assets fall into the common fund. In other cases, such as when a spouse fails to fulfill a financial obligation that arose from the marriage in a relatively extended period of time and besides this liability there is also an assumption that he or she might not fulfill his or her financial obligation, then a court can order the disposal of the gains of their property (German Civil Law, Article 1386 (1)).

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24) Dieter Henrich und Dieter Schwab(Herausgeber), *Eheliche Gemeinschaft, Partnerschaft und Vermögen im europäischen Vergleich*, Verlag Ernst und Werner Gieseking, Bielefeld, 1999.; Henrich, *Zur Zukunft des Guterrechts in Europa*, FamRZ, 2002, p.1521; Eun-Hee, Cho, & Keong-Keun Jeon, *A study of recommended solutions for improving current Korean matrimonial property system*, Korean Women's Development Institute, 2004, p. 55.

It seems to me that the current Korean law should be amended to require the court to have the marital property disposed of upon each spouse's application to the court in the cases when the spouses are separated and there is no reasonable prospect of the resumption of cohabitation, or if there is a serious danger that one spouse may cause disadvantages to the other.

### *C. The right of claim for division of matrimonial property*

#### 1. A method of the division of matrimonial property

Europe's statutory property systems, except for the United Kingdom, divide the matrimonial property according to principles of equitable distribution rather than rely on a judge's discretion in deciding how to divide matrimonial assets. In addition, a judicial decision can be supplemented at a judge's discretion in a case where there were extraordinary circumstances that would have made the divisional proportion by the principles of equitable division repugnant to justice.

In terms of traditional systems of laws, unlike other countries using the common law, a country under the civil law system tries to ensure the stability of law through statute provisions. In the United States of America, a common law country, however, there has been a noteworthy change in the range of discretion of family law. As one examines current laws and regulations and judicial precedents in each state, it is clear that American family law has shifted from the form that empowered a judge with unlimited discretion to fixed principles, namely those concerning objects of the division through legislative restriction and principles of equal distribution.<sup>25)</sup>

In German law, when the court calculates the net value of the matrimonial property at the date of separation, it excludes the property that was acquired prior to marriage from total marital assets pool and consequently this method of distribution is a way of bringing forth each spouse's increased net value of the property at the date of separation. In this method of division, the small amount of increase in net value is subtracted from the larger one and that will be divided between the

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25) Yu-Suk Min, "The Desirable Form of Legislation on Property Division at Divorce", *A Study of Family Law*, 2001, Volume 15 (2), p. 94.

spouses. This represents a fairly genuine division of the matrimonial assets on divorce.<sup>26)</sup>

Current Korean family law, however, relies entirely on a judge's discretion in deciding the amount and method of distribution. The Korean courts generally have exclusive jurisdiction involving matrimonial property. In that context, it is necessary to prescribe a specific method of division under law and eventually ensure legal stability. In doing so, before attempting to formulate some guidelines, I propose to review in some detail the history of the scope of the relevant provisions of other countries' family laws. Because the method of calculating the amount of division by a fixed formula may in some cases result in some extraordinary circumstances that are repugnant to justice, in cases where there is a claim obligator's request, it would be necessary to leave the court with the discretion to reduce the amount of distribution or reject the claim.

## 2. A proportion of the division of matrimonial assets

One of the main issues in the division of matrimonial property is how all the property that was jointly accumulated by the couple can be divided. Despite the importance of property division to parties, under Korean family law there are no specific provisions that regulate the method and proportion of division, therefore a more specific method of division is needed.

In German law, when the court calculates the net value of the matrimonial property at the date of separation, it excludes the property that was acquired prior to marriage from the total marital assets pool, and consequently this method of distribution is the way of calculating the gain that each spouse's made to the net value of the property. In this method of division, the small amount of net value increase is subtracted from the larger one and that will be divided between the spouses and that is a fairly genuine division when allocating the matrimonial assets on divorce.

Although there are some differences, some European countries divide all the property that brought some gains or earnings during marriage between the parties. Under the KCL, spouses' own property that they had acquired before marriage is

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26) Henrich/Schwab, *Gleichheit im Familienrecht*, Verlag Ernst und Werner Gieseking, Bielefeld, p.115.

excluded from the division of matrimonial property (KCL, Article 830 (1)), while joint property that is co-owned is included in the division pool. Among the various types of marital assets, peculiar property would create some problems. The property would be treated as a communal asset and divided between the parties in particular cases.<sup>27)</sup> However, there is no automatic right to an equal division of jointly accumulated property and the division is left to the discretion of the court. In practice, there is an opinion that the division of peculiar property is possible only in cases where a claimant did not have other assets and a creditor actively contributed to maintain the property.<sup>28)</sup>

Although Korean law acknowledges the division of a spouse's peculiar property between parties, a discussion about how to divide the gains or increased earnings from one spouse's peculiar property has not taken place yet. As for a proportional division of property, it seems that courts do not value household work equally to other economic activity. The way women and men divide their property on divorce primarily reflects financial contributions to the marriage and concern for the future welfare of the children. It seems that discrimination against women based on the fixed gender roles still exists in male-dominated Korean society. As a result, there are some perceptions that women are inferior to men, or the roles of women are not important compared to those of men within the family. However, it is necessary to recognize that childcare, household management, and financial support are the joint responsibilities of the spouses. Inherent in the marital relationship is the expectation of equal contribution, whether financial and otherwise, by the spouses, and the assumption of these responsibilities entitle each spouse equally to the net family assets.

It is necessary to provide for the orderly and equitable settlement of the affairs of the spouses upon the termination of a marriage relationship. For this reason, discrimination between roles within the family by gender should be overcome. Toward that end it is necessary to recognize the contribution made to a marriage by each spouse, and the marriage should be viewed as a partnership contributing to the financial estate. Consequently, a fair amount of credit should be to the jointly accumulated property during marriage and all the property accumulated through the joint efforts and contributions of the parties should be divided between the parties.

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27) Supreme Court, 1994. 5.13. 93meu1020, 1998. 2.13. 97meu1486, 1493.

28) Yu-Suk Min, "The specific scope of recognition in the division of matrimonial property", Judgment data. (63 edition), p. 422.

*D. Provisions of the division of matrimonial home and household contents*

Some European countries like France, Germany, and the United Kingdom have specific protective provisions on the matrimonial residence and household contents, restricting disposal of the matrimonial residence during the marriage, or allowing the other spouse or other unregistered owners to use the matrimonial home or leased housing, regardless of the actual ownership of these buildings.

According to Article 215 of the French Civil Law, certain provisions regulate a spouse's ability to sell the family home without the other spouse's consent, and prohibit disposal of the family's household contents in order to protect the rights of those living in the family home. Only in a case when one of the couples disposed of his or her personal estate, since the party has rights of disposal of the property, it shall be effective in respect of third parties. If the matrimonial home is leased to a third party, the home and the spouse will both be protected by Article 215 and Article 1751 of French Civil Law. Article 1751 of the French Civil Law addresses both spouses' lease rights to the matrimonial house, although the lease right of a spouse to the home is an aspect of the matrimonial property system, belonging to both parties even if the home was leased before marriage.<sup>29)</sup>

German civil law does not have the provision on the matrimonial home; however, according to *Hausratsverordnung*,<sup>30)</sup> the matrimonial home is excluded from the division of gains or surplus items so that the court's discretion may allow a spouse to continue to live at the matrimonial home. The court can allocate the residence to a spouse and the majority share of the matrimonial home and furnishing are generally allocated to the resident parent (usually wife), in recognition of her and the children's financial needs and in case the home is leased, the resident parent can still live in that home rather than the legal owner or tenant. For example, if a husband leases or sells the matrimonial home to a third party, a wife has the right to continue to occupy it and the third party cannot occupy the matrimonial home while the wife is still living there.<sup>31)</sup>

In British cases, the principles that determine the ownership of the matrimonial

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29) Hwa-Suk Lee, *The matrimonial property system and the financial effect upon the dissolution of a marriage relationship*, *A Study of Family Law*, Volume 5, 1991, p. 126.

30) A decree which provides for the division of household contents between spouses upon divorce.

31) Wilfred Schleuter, *BGB-Familienrecht*, C.F. Mueller Verlag Heidelberg, 2003, pp. 65-68.

home are not so certain; thus, British law permits the courts broad power. Upon the court's decision regarding the owner of the matrimonial home, it follows that where a spouse paid money for the purchase of the matrimonial home or where the spouse held the title, the spouse becomes the owner of the matrimonial home. However, if a spouse who did not contribute to the purchase of the matrimonial home held a single ownership of the home, or jointly owned the property, then the other spouse can also have a share in the matrimonial home depending on the will of the spouse who paid for the home. However, if the husband and wife both had contributed directly or indirectly to buying the matrimonial home or paying the mortgage, spouses will equally divide the rights of ownership of the matrimonial home regardless of whether the title of the matrimonial home was under one spouse's name or held jointly. However, if a spouse proves the other spouse's unfair distribution of the property, then a fair division is instituted by the courts.

Besides the problem regarding the ownership of the matrimonial home, a problem might arise regarding the right of lease. In the case of rented matrimonial homes, the tenancy is in the name of one of the spouses or both of the spouses. The spouses can keep the possession of the tenancy under the Rent Act.

Article 7 of the Matrimonial Homes Act provides the judge with extensive discretion for possible disputes over the matrimonial homes. In addition, the court can grant or make an order in certain cases that enables a spouse to continue living in the matrimonial home despite the relationship breaking down, and irrespective of whether it was the former husband or wife who was the resident parent. It gives some protection where the relationship starts to break down, and it is also used to protect the children and the wife who live at the matrimonial home while the divorce case is still pending, otherwise she would not have any protection if the entitled spouse were to sell or lease the property to a third party.<sup>32)</sup>

Like the European countries above, some provisions that regulate property transactions involving the matrimonial home or the system that allows a non-entitled spouse to live in or use the matrimonial home or treat the home as a communal property regardless of whether one spouse owns the property should be considered

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32) *Wilson v. Wilson*(1963), 1 W.L.R.601(C.A); *Mayes v. Mayes*(1969), 20E.G 935; *Niven v. Niven*(1970), 1 W.L.R.955; Hwa-Suk Lee, *Law of Couple Property Relations*. p.111.

to improve the current Korean matrimonial property system.<sup>33)</sup>

*E. Inheritance of the surviving spouse and  
the matrimonial property division*

The aging of industrial societies has created several new issues concerning matrimonial property. Life expectancies have increased considerably, and given the much longer life expectancy of women, the inclination of women to marry older men, and the general concentration of wealth in male hands, distribution under the matrimonial property system is of particular importance to women in terms of ensuring their welfare after the marriage is terminated by the death of a spouse.

Under the existing Korean law, the property inheritance resulting from the death of a spouse is different from the property distribution due to a divorce. More specifically, the current Korean law allows a surviving spouse to inherit a share that only exceeds by 50% the share of the other heirs of the assets that the couple worked together to accumulate. When a spouse dies in Germany, the surviving spouse receives one-fourth of the matrimonial property distribution and one-fourth of the inheritance; therefore it comes to one-half of the entire estate of the decedent.<sup>34)</sup>

The existing Korean laws should be revised so that the surviving spouse is entitled to receive one-half of the total estate of the deceased spouse through a combination of matrimonial property distribution and inheritance. In most cases, it would be more reasonable to calculate both matrimonial property distribution and inheritance together. However, it is also possible that the court will make an order for division based on rules of matrimonial property distribution first, and then make a further application under the rules of inheritance. When it becomes a problem, it would be better to leave the matter up to the surviving spouse's decision.

Like German family law, an alternative way would be for the courts to distribute matrimonial property first and then provide the surviving spouse with appropriate inheritance of the property thereby making a ruling in favor of the surviving spouse's

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33) Eun-Hee Cho, "Suggestions of the European matrimonial property systems for Korean matrimonial property system", *Comparative Judicature*, 2005, pp. 35-65.

34) German Civil Law § 1371, § 1913.

needs. In that case, the surviving spouse will have the choice of either having the concerned property divided under the rules of matrimonial property division, or receiving whatever that spouse is entitled to under the inheritance rules.

#### **IV. Conclusion**

In conclusion, marriage is an equal partnership with both social and economic dimensions. When a couple gets married, the husband and wife try to make an all-out effort within their ability to ensure the happiness of the family. Whether the man is economically active or the woman is responsible for household work or childcare is not important. That is the best choice they can make, and their contributions should be equally recognized.

Family law in Korea has made great strides, but the issue of the separation of property system and other related laws also should be addressed. Selling property owned by a couple during the marriage should be restricted, and the property that they worked together to acquire should be distributed equally.

The nature of these revisions of law will ensure the rights of each spouse in a family and recognize the equality of men and women in a marriage. Moreover, it will guarantee the economic safety of the family as a whole. It is expected that these revisions of law will contribute not only to property issues between spouses, but also to the welfare of the children.

**KEYWORDS** : matrimonial property, distribution of property on divorce, gender equality, matrimonial property contract