

Matrimonial Property System of Past, Present and Future in Korea: Focused on the Role of Tradition and Culture in Family Law Reform*

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Abstract

This paper is to introduce the matrimonial property system of past, present and future in view of the role of tradition and culture in family law reform and matrimonial property system. The separate property rule which is a statutory marital system looks impartial and reasonable between married couples at a glance; however, it has serious problems. Since the system belongs to a pure separation of property system, related provisions and Supreme Court's decision do not consider the joint property during marriage different from the so-called deferred community which most of the other countries of separation of property adapted. As a result, a spouse who has the title of property can dispose his/her property without the other party's consent even though it was acquired with help of the other spouse by homemaking. The reasons are related to the patriarchal tradition and culture in the society. This paper examines historical review of family law reform and discusses the problems of the separate property system and causes of the problems to find out the role of tradition and culture in family reform including matrimonial property system. Reform bill of separate property related systems will be introduced as a future aspect.

I. Introduction

Matrimonial property system in Korean Civil Code (CC) seems to be equal or impartial between husband and wife in the eyes of the law; the prospective husband and wife may enter into a marital property contract prior to their marriage according to the Article (Art.) 829 CC¹⁾; if they do not make the

* This paper was presented at the workshop "The Role of Culture and Tradition in Family Law Reforms" held at the University of Emory on Jan. 30, 2009.

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1) For details about problems of the matrimonial property contract system, see Eun-Hee Cho, *Gender Equality and the Matrimonial Property System under the Family Law in Korea*, 5-2 JOURNAL OF FAMILY LAW 31-32 (2006).

contract prior to their marriage register, the separate property rule which is statutory property system is applicable during their marriage life.

Separate property rule is that a property acquired in the name of husband or wife during the marriage shall constitute his or her peculiar property (Art. 830 paragraph 1, CC), while any property of which ownership is uncertain shall constitute their co-ownership (Art. 830 paragraph 2, CC). A spouse who has no title of property may claim division of the property against the other party at the time of divorce according to the Art. 839-2 CC, on the reason that the properties were acquired during the marriage. When a spouse dies, the inherited portions of survival spouse shall be increased by fifty percent over the inherited portion of his or her joint inheritors, who are lineal descendants or lineal ascendants of the predecessor. Therefore, the matrimonial property related system looks impartial between married couples in the eyes of law.

However, the separate property system which is the center of gravity in marital property related provisions has serious problems, since a spouse who has the title of property (mostly husband) can dispose his/her property without the other party's consent even though it was acquired with help of the other spouse (mostly wife) by homemaking. As a result, a spouse who does not have the title of property can not cancel the transfer contract of the property by the entitled spouse.

The reasons are summarized as follows; first, as for the general rule of the separate property system, a spouse who has the title of property acquired during marriage is presumed to have the legal right of the property; second, husbands usually have the title of real property in most cases, especially concerning a matrimonial home in Korea,²⁾ which is the most important and valuable estate; third reason is related to the decision on the provision by the Supreme Court. The Korean Supreme Court has decided that the contribution of homemaker is not valued economically unless she/he contributed by money or financially to the improvement of real or personal property owned by the other spouse.³⁾ Therefore, family law scholars, feminist groups and lawyers have asserted to revise the separated property system for a long time.

2) According to a research made by Korean Legal Aid Center for Family Relation in 2001, 66.3% of the couples registered their real estate in husband's name. Couples who registered in wife's name were 26.4%, couples registered in joint name were 6.7%.

3) See Decision of December 11, 1992, 92da21982 [Korean Supreme Court].

Four amendment bills were submitted to the National Assembly, three out of four were to revise the separate property system and one bill submitted by feminist group was to change the community property system.

This paper tries to introduce matrimonial property system of past, present and future in Korea from the viewpoint of the role of tradition and culture in family law reform including matrimonial property system. It will examine historical review of family law reform to find out the role of culture and tradition in reform of the family law (past). It will discuss the problems of the separate property system and causes of the problems (present). Finally the reform bill of separate property related systems will be introduced as a future aspect.

II. Historical Review of Family Law Reform: The History of Controversy on Patriarchal System between Confucianism and Feminist Movement

The Korean family has been characterized by a large patriarchal family during the Chosun Dynasty (A.D. 1392-1910)⁴⁾ influenced by Confucianism. The Confucianism which has influenced Korean society the most has taught people about family life that children should respect and obey their parents: husband is superior to his wife; only a son can succeed his father; and a married daughter must respect her husband and her parents- in-law under any circumstances.

As long as 100 years Chosun Dynasty⁵⁾ has educated and encouraged their people to accept the Confucianism as a political philosophy, it became a tradition and a culture. However, it was neither a part of a law, nor in a legal sphere.

In the beginning of the nineteenth century, the Capitalism changed Korean society; the family has been changed to be more equal between family

4) Chosun Dynasty is called as Lee Dynasty or Yi Dynasty too. Chosun was the name of the Nation and the kingdom was ruled by Lee (or Yi) Family.

5) Chosun Dynasty was lasted more than 500 years. It took more than 100 years that the Confucianism to be rooted in Korean family life. See JEASUK CHOI, HISTORICAL STUDY ON KOREAN FAMILY, 522 (1983).

members. Nevertheless, at the time of the civil code enacted in 1958,⁶⁾ family law was rooted in a men-centered patriarchal system, represented by two systems, which were the family-head system and marriage prohibition rules between individuals with common surnames and common origins on the paternal side regardless of the degrees of relationship.

The family-head system is known as an institution transplanted in colonial Korea, originated in Japanese old civil code. Meiji Imperial of Japan was known as invented and established the system in Japanese family law to accomplish its political ideology.⁷⁾ The political purpose included in family-head system in Japanese family law was to link family and the emperor. It means that family members had duty to obey the family-headship who had strong powers over his family members with his duty to support them by the family law and the family-head should be loyal to the emperor like his family members were loyal to him. As a next step, Japanese Imperial had imposed Chosun Dynasty to accept their family-head system in Korean family law to compel Korean people's loyal to the Japanese emperor by the family law. Therefore, patriarchal family-head system became a part of family law in Korea during Japanese Imperialism Period.⁸⁾

While the marriage prohibition rule between male and female who have the common surname and the origin was accepted as a tradition in Korean society for more than 500 years through instruction of Confucianism from the beginning of Chosun Dynasty: it was included in family law established in 1958.⁹⁾

The conservative group represented by the Confucianism and the progressive group represented by the feminist group had disputed whether these two patriarchal systems should be existed or abolished in family law for more than 45 years from the time when the two systems were included in

6) It was enforced from Jan. 1, 1960.

7) See Hyunah Yang, *Vision of Postcolonial Feminist Jurisprudence in Korea: Seen from the "Family-Head System" in Family Law*, 5-2 JOURNAL OF KOREAN LAW, 20-24 (June 2006); Yune Jinsu, *Tradition and Constitution in the context of the Korea Family Law*, a paper presented at the International Society of Family Law (2005); Whasook Lee, *Marriage and Divorce Regulation and Recognition in Korea*, 29-3 FAMILY LAW QUARTERLY, 603-604 (Fall 1995)

8) Family-head system was known as introduced in 1939 which is 2nd reform since Japanese civil code was applied in 1911. See Hyunah Yang, *supra* note 7, op. cit., at 23-24.

9) See Whasook Lee, *supra* note 7, op. cit., at 605-606.

Civil Code (1958) to the two systems were abolished in 2005 Reform: Confucians insisted to maintain the systems on the reason that the systems have been a good virtue as well as fine customs, while feminist group claimed to abolish the systems which has been discriminating female by the law. Accordingly, the patriarchal systems have been an obstacle for a long time in reforming family law. In other words, the history of family law reform was known as a history of controversy between Confucians and feminist groups on the existence of patriarchal systems which are family-head system and the marriage prohibition system.

In 1977 reform, some provisions were reformed,¹⁰⁾ but the two systems were determined to be existed in spite of strong feminist movement abolishing the systems. Family law was reformed revolutionary in 1990, of which most of the inequitable and unequal rules were reformed to appropriate rules or established a new provision.¹¹⁾ However, the patriarchal systems were determined to be existed as a result of compromise between conservative and progressive members of the National Assembly as follows: In family-head system, the head of family's duty to support his family was eliminated and his power over the family members was weakened, however, the system itself continued to exist in family law;¹²⁾ the marriage prohibition rule was determined to be existed without any amendment.

In the view of feminist movement to amend the family law discriminating male and female, they became stronger before and after the 1990 Reform, on the reason that they realized their ascertain was supported by the prevailing views including legal professions, in addition to that numbers of feminist groups were increased and had stronger voices. However, they realized that Confucianism was stronger than feminist group in a patriarchal-rooted society, they began to submit lawsuit claiming that the patriarchal systems

10) For example, mothers could have parental authority over her children during the marriage in 1977 Reform. But still she could not exercise it after divorce.

11) For example, mothers could have parental authority over her children even after divorce in 1990 Reform: The claim right for division of property on divorce was established in 1990 Reform too.

12) It has important meaning that the family-head system exists in family law whether the family head has strong power over the family members or not, because family law provides that family-head should be the center of family register in consisting family and in succeeding the status of family-headship.

were unconstitutional since they violated Korean Constitution Article 10 which protects human dignity and value, the pursuit of happiness and Article 11 paragraph 1 and Article 36 paragraph 1 which declare freedom of family and marital life based upon individual autonomy, and gender equality and Article 37 paragraph 2 which is on the prohibition from the over-restriction of the fundamental rights.

The Korean Constitutional Court decided that 6 provisions regarding family law was unconstitutional or incompatible with that the Constitution during 1997-2006; the prohibition of marriage between parties who have the same surname and origin of surname was decided as incompatible with the Constitution in 1997;¹³⁾ the Court also declared that the family-head system is incompatible with the Constitution in 2005.¹⁴⁾

Two provisions of succession law which were decided as unconstitutional (Article 999, CC) or incompatible with the Constitution (Article 1026 subparagraph 2, CC), were reformed in 2002. The amendment of family law provisions pursuant to the decision of incompatibility with the Constitution were amended in 2005 Reform, however, the family-head system was deleted from Jan. 1st in 2008 for the preparation of new family registration system.

Family Law was reformed again in 2007¹⁵⁾ of which contents were mainly to protect children from parents' careless divorce by agreement in reforming the procedure; however, the reform bill on the separate property system was not passed in National Assembly.

Ever since separate property system came into force from 1960, the system was reformed once; according to the previous law which was established in 1958, any property, of which title is uncertain between the husband and wife, shall be presumed as a property of husband. The Art 830 paragraph 2 was reformed in 1977 as current law that the property of which title is uncertain is presumed to be the couple's co-ownership.

13) See Decision of March 27, 1997, 95 heonga 14 et al. [Korean Constitutional Court].

14) See Decision of February 3, 2005, 2001 heonga 9 et al. [Korean Constitutional Court]. The 'family-head' system, which was mainly regulated in Chapter 2 of the Part IV CC was deleted on Jan. 1, 2008 according to the 2005 Reform.

15) See WHASOOK LEE, TRANSFORMATION OF KOREAN FAMILY LAW, THE INTERNATIONAL SURVEY OF FAMILY LAW 239-253 (2008).

III. Problems of Separate Property System and Causes of the Problems

1. Problems of the Separate Property System

Since married couples who register their contract on marital property are very rare in Korean society,¹⁶⁾ majority of married couples are subject to the Art. 830, which regulates the matrimonial property as separate property system.

According to the Art. 830 paragraph 1, "Inherent property belonging to either husband or wife from the times before the marriage and the property acquired during the marriage in his or her own name shall constitute his or her peculiar property." But "any property, of which title is uncertain between the husband and wife, shall be presumed to be in their co-ownership" by the paragraph 2.

There are three kinds of properties that conform to the provision. One is the inherent properties which belonged to a spouse before the marriage. Properties, however, presented by a third person or inherited from his/her parents are under this category even they were acquired during marriage. Spousal inherent properties including presented by a third party or inherited from the parents in principle, are not subject to division or claim of division by the other spouse when divorcing,¹⁷⁾ because these properties are not acquired with the assistance of the other spouse.

Other kinds are the properties which were acquired with one spouse's name during marriage. According to Art. 830 paragraph 1, the title holder is the owner of property acquired during marriage, even though a spouse who does not have the title can claim for the division of property at the time of

16) Married couples who have registered their contact on marital property were known only about 12 couples since the provision came into force in 1960.

17) Sometimes court decided to divide his/her inherent property to the other spouse in property division in the time of divorce; for example, Supreme Court Decided that a spousal inherent properties should not be divided in principle, however, the inherent properties could be divided when the other spouse assisted in preserving the property or prevented the property from being reduced or helped the property being increased. See Decision of May 25, 1993, 92mu501 [Korean Supreme Court].

divorce. Real estate, savings account, stocks come under this category. Marital home among them is the most disputable property between couples, because it is the most hi-priced property.

Third category is the properties acquired during marriage, of which ownership is uncertain. Most of the personal estates acquired during the marriage are included in this category, which constitute co-ownership regardless who bought them or whose income was used to buy them. Even real property that a spouse has no title, however, actually contributed in cash or substantial increase on the real estate also belongs to this category.¹⁸⁾

The most disputable issue is the second type of property of which the name of owner is registered or indicated. Among the others, disputes on matrimonial home have serious problem, since it is presumed as title holder's ownership by Art. 830 paragraph 1 and the Supreme Court interpret the provision literally, even though there are some exceptions.¹⁹⁾ Furthermore, homemaker's activity is not economically valued by Supreme Court decision in application of the Art. 830. As a result, if a title holder disposes the home without consent of the non-entitled spouse, the non-titled spouse can be evacuated from the house, since non-titled spouse (mostly wife) doesn't have any right to claim invalidity or cancellation of the contract if she is a homemaker, and has not contributed in money or in substantial material. Undoubtedly, a spouse who has no title of property can claim for property division to the other spouse who has the title when the couple divorce. However, if the entitled spouse disposes property before they divorce to avoid the other party's claim for property division, the claim can be meaningless whether the petitioner won the lawsuit or not.

Marital home should be treated as co-ownership regardless of the title if it was acquired with a help of the other spouse. Besides, it is inconsistent that the homemaker's activity is economically valued by court's decision in application of Art. 839-2, however, it is not estimated by the same Court in

18) See, e.g., Decision of Nov. 25, 1986, 85nu677 [Korean Supreme Court]; Decision of September 9, 1986, 85daka1337 [Korean Supreme Court]; Decision of Nov. 23, 1990, 90daka5624 [Korean Supreme Court]; Decision of Nov. 12, 1995, 95da25695 [Korean Supreme Court].

19) For example, when the marital home was registered in the name of wife who is homemaker, it was decided as co-ownership by the Art. 830 paragraph 2. See Decision of June 9, 1988, gahab3317 [Civil District Court].

interpretation on Art. 830. Above of all, non-entitled spouses should have been protected by law from being evacuated from the matrimonial home by a disposition of entitled spouse.²⁰⁾ Actually, wives who have no title were reported as victims of property division disputes, since in many cases husbands have the title of property.

As a general rule of Civil Code, an obligee may cancel the contract of disposal by sale between obligor and the third party if the obligor has performed any juristic act which has a property right for its subject with the knowledge that it would prejudice the obligee by Art. 406. When a spouse who is not a title holder claims revocation of the contract of disposal by sale or gift between the entitled spouse and the third party according to Art. 406 on the ground that he/she has a right of claim for property division at the time of division and the entitled spouse has malicious intent avoiding the claim for division of property, it may not be accepted by the Court because the petitioner in marriage cannot have a right to claim for property division until divorce is determined.

When the petitioner is a homemaker, the Court will reject the claim on the ground that homemaking is not economically valuable contribution, although it is a noble sacrifice.²¹⁾ The only way petitioners can protect her/his property is to attach the entitled spouse's property as a creditor who has a right to claim for property division at the time of divorce when he/she found out the entitled spouse's attempt to dispose his/her property at the time of divorce proceedings according to the Family Litigation Act Article 63, such cases are limited as exception.

On the contrary Korean Supreme Court also decided that homemaking activities are valued as economical contribution in marital property division at the time of divorce, according to the Article 839-2.²²⁾

20) For example, in English law, a non-owing spouse has matrimonial home rights under Part IV of the Family Law Act 1996; Civil Code of French Article 215 protects also spousal right of residence; Swiss Civil Code Article 169 provides limitation of a spouse's disposition right on matrimonial home; German Civil law Article 1366 provides when a spouse disposes his/her whole property, he/she should have consent of the other spouse. See WHASOOK LEE, *COMPARATIVE STUDY ON MATRIMONIAL PROPERTY RELATED SYSTEM* 161-256 (2000).

21) See Decision of Feb. 3, 1995, 94da51338 [Korean Supreme Court]

22) See Decision of May 11, 1993, 93su6 [Korean Supreme Court].

2. What Causes the Problems of the Separate Property System?

Couple of very critical issues about the separate property system can be brought up. That is: 1. why married couples don't enter into the marital property contract before marriage, if the separate property system has serious problems? 2. why married couples don't register their marital home as a joint title instead of husband's name, even though the most of women were highly educated in Korea? 3. why does the Supreme Court decide the homemaker's contribution as not having an economical value in separate property disputes, while the Court acknowledges as having an economical value in property division dispute on divorce? 4. why does the Court estimate the value of homemaker's contribution only 30-50% of the total property which acquired during the marriage, even with the Court acknowledgement? 5. why the separate property system has not amended, if there has been serious problems for homemakers and if the feminist movement was so strong?

In a word, the answers concerning question 1 and 2 are that Korean society is still ruled by patriarchal consciousness and tradition even though patriarchal systems were abolished in family law in 2005 Reform and women are highly educated. Since Korean women were educated and taught to be wise mothers and good wives during Chosun Dynasty for more than 500 years and ruled by patriarchal systems in family law, men-centered consciousness and tradition would not be easily disappeared. It would be easy if men who are husbands, fathers and sons to give their vested right to the women who are wives, mothers and daughters, but it is not always easy. With all these problems, Korean society is changing rapidly now in view of the fact that the right of women especially related in managing the household economy is respected in a home and educated females can easily get jobs in a society.

Question 3 is related to both on the separate property clause itself and interpretation on the clause. Art. 830, paragraph 1, CC which provides separate property system is known as a genuine separate system different from the legislation of other countries which has separate property rule. For example, German Civil Code (BGB) has a separate property system during the marriage, but the entitled spouse's disposition right is restricted when he/she disposes without other spouse's consent.²³⁾ Scandinavian countries have a

similar separate property rule which means during the marriage separate property rule is applicable, but entitled spouse's disposition is restricted under some conditions.²⁴⁾ As a result, such systems are called as a deferred community, even though it comes under separate system during marriage.

Concerning interpretation on the clause of separate property, Korean Supreme Court interprets the clause literally in a strict way, different from other countries of which have separate property rules. For example, judges of English court use 'Trust' in interpretation of separate property rule for protecting homemaker's contribution.²⁵⁾

Question 4 is related what the judgment's way of thinking, because judges determine how the property acquired during marriage is divided between couples and how much of the homemaker's contribution would be acknowledged. It is his/her discretion. That's the reason justices of Supreme Court who seemed to have patriarchal consciousness have decided homemaker's contribution as 30%-50% on average, but judges of family court who seem to have progressive thinking have decided as average 40% or more. Therefore, the decision heavily depends on the judge's way of thinking.

Question 5 is on the reform. Four reform bills were submitted to the National Assembly in 2007, but there were not passed.²⁶⁾

3. Problems of the Claim for Division of Property at the time of Divorce

Art. 839-2 of right to claim for division of property at the time of divorce was established in 1990 Reform. Family law scholars have insisted to establish the clause in family law by articles for a long time, while feminist groups²⁷⁾ have acted the idea by having symposium or by movement of signing for legislation on the street etc. Finally the right of property division claim was established owed by the family law scholars and feminist groups in family law.

23) See Dieter Schwab, *Familienrecht*, 13 Aufl. S.111ff (2005).

24) For more, see Peter Lodrup, *Norway: The New Marriage Act*, 31 JOURNAL OF FAMILY LAW, 411(1993).

25) See NIGEL LOWE & GILLIAN DOUGLAS, *BROMLEY'S FAMILY LAW* Ninth Edition, 153-163 (1998).

26) See *infra* Part IV.

27) For example, Women's Friends, Women's Telephone, Korean Women Union etc.

However some problems were revealed as soon as the provision came into force; the one is that the homemaker's contribution to the accumulation of entitled spouse's property was judged by the court only about 1/3 of the entire properties owned by husband's name. The main reason was inherent in the Art. 839-2 paragraph 2 itself, which confers broad discretion and powers to the court, by providing "If no agreement is made for a division of property as referred to in paragraph (1), or if it is impossible to reach an agreement, The Family Court shall, upon request of the parties, determine the amount and method of division, considering the amount of property acquired by cooperation of both parties and other circumstances." Nowadays, it is reported that Family Court has decided the properties acquired in the name of a spouse with the help of the other spouse to be divided to the homemaker petitioner more than 40% of couple's property. However, in property division cases by the Supreme Court homemaker petitioner is to be divided her share from 30% (average) to 80% depending on the couple's family circumstances.

Another problem is originated from the separate property system as mentioned above. That is, when the entitled spouse disposes the matrimonial home in advance to avoid the claim for division of property at the time of divorce, the right to claim for division can be meaningless. Therefore, disputes on properties between couples in marriage or at the time of divorce are originated from separate property system itself.

The contents of the Reform Bill are to amend the separate property system including some related provisions, as follows (IV).

IV. Reform Bill²⁸⁾ of Matrimonial Property System and Some Related Provisions²⁹⁾

1. Limitation on Disposition Right of Matrimonial property by Entitled Spouse: Establishing Art. 831-2 (Reform Bill)

The main contents of the reform bill are to limit the disposition right of

28) Reform Bill means a Government Bill, hereafter, out of four bills submitted to the National Assembly.

29) Whasook Lee, *Reform Bill on the Matrimonial Property System in Korea*, presented at the Vienna Conference of International Society of Family Law 2008.

entitled spouse to protect the spouse who has no title of the marital home.³⁰⁾

Among the four reform bills on matrimonial property system, three of them including Government Bill were to amend the separate rule, while the one bill submitted by a feminist group is to change the matrimonial property into community property rule. Bill made by Government which this paper is to introduce is to revise the separate property rule, because the Commission for Family Law Reform in Ministry of Justice thinks that the community property system has some difficult points to be adopted in CC; separate property rule was regulated in CC for more than 48 years; community property system has some difficulties in managing the community properties between couples, moreover, it can cause disputes between the couples or between couples and the third parties; all properties acquired during marriage, in principle, should be liable to the third party creditors by the community property system, however, it could threat whole family economically; it is not easy to distinguish one spouse's inherent property with the community property when they divorce or when one spouse dies, since the system is not used to Korean. Therefore, the Bill made by Government, like other two bills which were made by members of National Assembly, is to maintain the separate property system and to amend by adopting some strong points of community property system.

However, it was strongly discussed about how to protect a non-entitled spouse, to what extend its limit the disposition right of entitled spouse and how to protect a third party whose contract with a spouse was cancelled. Government Bill was made to protect the non-titled spouse's right of resident, while, at the same time, to consider the safety of transaction, which means the third party in transaction should be protected also. Other two bills were made to protect the share of property division at the time of divorce, which means the extents of limitation are wider than the Government Bill.

The most important Reform in the Bill as a result is to establish Art. 831-2, which is to limit the entitled spouse's right of disposition, since serious problems were mainly originated from the principle that title holder can

30) Other bills submitted by the members of the National Assembly are similar in contents but different in details, except the bill which is on community property system made by Choi Soon Young.

dispose his/her entitled matrimonial home without the other spouse's consent. The content of the Reform Bill in detail is summarized as that one spouse can not dispose of other spouse's dwelling house without consent of other spouse or the court decision replacing it.

Properties that one spouse needs to get the consent of other spouse when he/she disposes according to Art. 831-2 paragraph 1 of the Bill, are as follows.

1. Dwelling house where other spouse reside or a legal right of that dwelling house and the land of the dwelling house or legal right of the land.
2. Claim for return of the deposit money for lease where other spouse resides.

According to paragraph 2 of the Bill, one spouse should get the consent of the other spouse, when he/she establishes lease or mortgage or pledge of the deposit money or extinguish such rights that are mentioned above.

When one spouse can't get the consent from the other spouse or the other spouse doesn't consent without any proper reason, he/she can claim for the determination of the consent to the Family Court according to paragraph 3 of the Bill.

If one spouse, however, disposed the property without consent of the other spouse, the other spouse can cancel the contract between one spouse and a third party within 6 month from the day when the other spouse knew the act of disposition or within 2 years from when the act was performed according to paragraph 4 of the Bill.

Also it was discussed about how to protect the third party who had the deal with an entitled spouse. Because the third party can suffer from the cancellation regardless of whether he/she has a good faith (*bona fides*) or not, by the Reform Bill. Government Bill determined to limit the dwelling house which needs to get the consent of the other spouse where the non-entitled spouse has her/his resident registered, to protect the third party in a transaction, instead of protecting all the third parties who are in good faith.³¹⁾ If a third party of good faith is protected by the law, non-entitled spouse can't be protected, since mostly third parties seem to have a good faith.

31) Two bills other than Government Bill are to protect the third party when they are in good faith.

It is expected for the non-entitled spouse to be protected at least from being evacuated from the house where he/she lives according to the Reform Bill.

2. Claim for Division of Property during Marriage: Establishing Art. 831-3 (Reform Bill)

Claim for division of property during marriage, by nature, is known to originate from community property regime to protect the spouse who fears the common property being reduced by other spouse's unreasonable act. Therefore the claim for division of property is not needed in separate property regime, as each spouse can have his/her separate property during marriage. Though, the claim for division during marriage is determined to be established in the Bill by demand of feminist groups. According to the feminist groups, there are some women, who don't want to divorce but would like to have property in their name for bringing up their children.

According to the Art. 831-3 established in the Reform Bill, one spouse may claim for the division of the property even during the marriage, when there is one of the following reasons.³²⁾

1. When a spouse disposed his/her dwelling house without consent of other spouse (according to Art. 831-2) or court decision replacing it.
2. When a spouse did not carry out his/her support duty to the other spouse in due time.
3. When it is worried that the claim for division of property at the time of divorce might be greatly threatened by some difficult situation.
4. When a couple lived apart more than 2 years.

3. Stipulation of Equal Division of the matrimonial Property: CC Art. 839-2 (Reform Bill)

As mentioned above,³³⁾ homemaker's contribution to the accumulation of

32) Other two bills also have similar contents of claim for division during marriage.

33) See *supra* Part II.

property acquired during marriage is estimated by the Court as economic valuable labor in application of Art. 839-2, but the value has been judged only about average 30% of the property owned by husband's name. One of the reasons is that the court which seems to be conservative has broad discretion and powers in determining property division at the time of divorce by the Art. 839-2 paragraph 2.

Therefore, the Bill determined to stipulate a principle of equal division of the matrimonial property at the end of the Art. 839-234: the phrase which will be added at the end of the Art. 839-2 is that "in this case, the property which was acquired with the assistance of the both parties shall be divided equally in principle." 'In principle' means that equal division is a general principle; however, court can increase or reduce the share of the property according to the detailed situation.

4. Right of Revocation to preserve the Claim for Division of Matrimonial Property: established in Art. 839-3

As above mentioned,³⁵⁾ an obligee has the right of revocation for the contract for disposal between obligor and the third party if the contract would prejudice the obligee according to Art. 406. However, Korean Supreme Court did not acknowledge the right of revocation by a spouse who has a right to claim for property division at the time of divorce on the ground that the petitioner in marriage under the separate property system cannot be a obligee until divorce is determined. Besides, if a petitioner who claims revocation of the contract by entitled spouse is a homemaker, the Court did not acknowledge it also on the reason that homemaking is not estimated as having economical value although it is a noble sacrifice.³⁶⁾

As serious problems in application of the separate property rule focused on the fact that a spouse can dispose his entitled property without consent of other spouse to avoid the claim for division of property in divorce, the Bill which was passed by the National Assembly Dec. 22, 2007 and is in force now,

34) Two other bills and the bill of community property system include equal division clause too.

35) See *supra* Part III.A

36) See Decision of Feb. 3, 1995, 94da51338 [Korean Supreme Court].

established revocation right by one spouse in Art. 839-3 as follows:

Art. 839-3 (Right of Revocation against prejudiced Act for Protection of the Claim for Division of Property): If a spouse has performed any juristic act which has a property right for its subject with the knowledge that it would prejudice the other spouse's performing the claim for division of property, the other spouse may apply to the Family Court for its revocation and restitution of its original status in application of CC Art. 406 paragraph 1.

According to paragraph 2, the action shall be brought within one year from the time when the other spouse became aware of the cause for revocation, or within five years from the time when the juristic act was done.

5. Increment the Inherited Portion of Survival Spouse:

Art. 1009 paragraph 2 (Reform Bill)

Current Art. 1009 provides that the inherited portion of spouse to be increased by 50% over the inherited portion of his or her lineal descendant where he or she inherits jointly with his or her descendants or 50% over the inherited portion of his or her lineal ascendant where he or she inherits jointly with his or her lineal ascendants. But the problem is that the inherited portion of spouse is too small and flexible in comparison with the property division at the time of divorce, of which property acquired during marriage shall be divided in principle when the Reform Bill is passed by the National Assembly. Therefore, the Reform Bill changed the inherited portion of spouse to 50% of the inherited estates in Art. 1009 paragraph 2 as follows.

Art. 1009 paragraph 2: The inherited portion of survival spouse shall be 50% of the inherited estates. However, the spouse who already received his or her property division during marriage according to Article 831-3 shall be inherited equal portion with the joint inheritors who are in same rank.

That the inherited portion of spouse should be increased was strongly discussed at the public hearing on Reform Bill. Large number of debaters asserted that the inherited portion of spouse should be increased when he or she has contributed to the property as in case of property division at the time on divorce, however, the Bill did not adopt the opinion, because it will cause a

disputes between a spouse and the other joint inheritors.

V. Conclusion

This paper tried to find out the role of tradition and culture in reforming matrimonial property system. To find the role of tradition and culture, this paper examined the historical review of controversy on the existence of patriarchal systems between Confucians and feminist movement. As introducing the problems of separate property systems some serious questions were asked 1-5. To answer these questions, it was revealed that the patriarchal consciousness and tradition in Korean society was an obstacle in solving the problems.

This paper introduced the Bill made by Government and submitted to the National Assembly in 2007 after examining the problems of separate property system including some related provisions and the reason. Only a provision included in the Bill was passed by the National Assembly and now it is enforced. The provision is that one spouse can claim the revocation of disposition by other spouse or status quo ante to the Family Court when the other spouse disposed the property which is entitled in his or her name even though acquired during marriage to prevent from claiming for property division (Art. 839-3, paragraph 1) .

It is true that the economical status of women will be increased by the Reform Bill if it is passed someday, however, there are problems and worries; how to protect the third party who had a deal with entitled spouse, how to secure family stability when there is claim for property division during marriage, what is the solution of disputes between the surviving spouse who is a step mother and descendants inheritors, when it is forced. These problems should be studied and revised more.

Family Law in Korea is changing now in parallel with the change of the family, the society, and especially the status of women. As for the change of family and society, revisions of divorce by agreement, provisions for the interest of the children were already amended in 2007 Reform:³⁷⁾ the fact that a

37) See Whasook Lee, *supra* note 15, at 246-248.

Reform Bill on the matrimonial property system was proposed by feminist groups will be a good example of women power in Korea.

As a next step, provisions on divorce by judgment and on protecting children's interest more details in qualitative after parents' divorce including support is expected to be reformed.

KEY WORDS: confucianism, patriarchal system, feminist movement, matrimonial property system, separate property, homemaker's contribution, claim for division of property at the time of divorce, entitled spouse, restriction of disposition right, unconstitutional, right of revocation