Journal of Korean Law | Vol. 19, 177-190, August 2020

The Contemporaneity of the Non-contemporaneous: Divorce Law as a Reflection of the Social Changes in South Korea*, **

*Hyoung Seok Kim****

Abstract

In 2015, the plenary session of the Korean Supreme Court confirmed previous case law with a small majority. According to it, the spouse who culpably lets his or her marriage fail may not judicially enforce the divorce against the other. This interpretation seems to restrict the statutory principle of no-fault divorce. How can this case law be justified? What are the considerations behind it? Are there social circumstances that perpetuate it? This article tries to explain these questions. Answering them will show an aspect of the social changes in South Korea, especially gender equality.

KEYWORDS: divorce, no-fault divorce, property separation, distribution of matrimonial property, gender equality

Manuscript received: May 14, 2020; review completed: July 8, 2020; accepted: July 28, 2020.

* This article is supported by the research program (2020) of the Asia−Pacific Law Institute (Seoul National University), funded by the SNU Law Foundation.

** This text was translated from the author's German manuscript prepared for his presentation at the Department of the Korean Studies, University of Tübingen, on April 22, 2020. The lecture was canceled due to the surging COVID-19 pandemic and later held as an online seminar on June 24, 2020. Its original colloquial style was not altered.

*** Professor, Seoul National University School of Law, Korea

> […] *j'ai mes idées, peut-être justes, à coup sûr bizarres, sur certaines actions, que je regarde moins comme des vices de l'homme que comme des conséquences de nos législations absurdes, sources de mœurs aussi absurdes qu'elles, et d'une déprevation que j'appellerais volontiers artificielle.*[1)]

I. Introduction

Presumably, many of you from the Department of Korean Studies know more about Korean cinema than I do. Accordingly, you might have heard the news about the marital dispute of a famous Korean film director who is especially acclaimed in Europe. The facts are typical: He had an affair with an actress with whom he has worked in several films and demanded a divorce from his wife, who refused. He, therefore, filed a divorce suit with the family court. However, the claim was dismissed on the grounds that he culpably ruined the marriage for himself. He gave up the appeal.[2)]

Some of you might be wondering how the result should be understood. What sense would it make to maintain a broken marriage for which there is no hope of reconciliation anyway? Indeed, most Western European countries allow divorce due to a failed marriage regardless of whether the suing spouse is at fault. Compared to these legal systems, Korean divorce law appears to be moralistic. The spouses who culpably cause their marital union to go down are not allowed to enforce the divorce judicially. Considering this observation, the question arises: Where did this characteristic of Korean divorce law originate, not the least in a modern and dynamic country whose legal system basically distinguishes between law and morality? Answering this question leads us to an aspect of the social changes in South Korea, especially gender equality.

---

1) Denis Diderot, *Sur l'inconséquence du jugement public de nos actions particulières*, *in* Oeuvres de Denis Diderot: Romans et contes III, 420 (J.L.J. Brière 1821) (1772).

2) *See Director Hong Sang-soo not to challenge court's dismissal of divorce suit*, Yonhap News Agency, June 28, 2019, https://en.yna.co.kr/view/AEN20190628006700315 (last visited Aug. 22, 2020).

II. Grounds for divorce in legal history

First, however, I would like to explain the legal grounds for divorce developed thus far.

In classical Roman law, the marriage, unlike today's marriage influenced by Christianity, was not a legal relationship, but a social fact with legal consequences.[3] The marriage legally came about by realizing marital cohabitation with the couple's corresponding intent. Therefore, the unilateral dissolvability of marriage was its natural outcome. Leaving the marital cohabitation alone brought the marriage to an end. As the Romans said, *libera matrimonia esse antiquitus placuit*,[4] that is, a free marriage is acknowledged from time immemorial. Germanic law, conversely, knew several grounds for divorce, such as mutual agreement, adultery, female infertility, willful desertion, etc.[5]

However, the situation changed completely when the canon law began to have a decisive influence on the understanding of marriage.[6] Based on some verses of the gospel, such as Mark 10:9 and Luke 16:18, the Church argued that an effective and consummated marriage should under no circumstances be dissolved, whereas only the separation of table and bed (*separatio quoad thorum et mensam*) is permitted in the event of serious misconduct by a spouse. The indissolubility of marriage ruled for a very long time in Europe and is still effective in contemporary canon law (see, for example, *Codex iuris canonici*, cann. 1056, 1141). Therefore, the Reformation made divorce possible. For example, with reference to other passages in the Bible, Luther recognized the following as grounds for divorce: infertility (Gen. 1:28), willful desertion (1 Corinth. 7:4−5), and adultery (Math. 19:3).[7] Adultery and willful desertion particularly served in Protestant church law as the basic models that should enable an analogy. Then, in the 17th and 18th centuries, even in a Catholic country like France,

3) Heinrich Honsell et al, *Römisches Recht* 385 sqq., 388 sqq., 399 sqq. (4th ed. 1987).

4) Code Just. 8.38.2. (Alexander Severus 223).

5) Hans Planitz, Grundzüge des deutschen Privatrechts, 190 (3rd ed. 1949).

6) *Id.* at 190-191.

7) Martin Luther, *Vom ehelichen Leben, in* Werke III, 180 sqq. (Frankfurt:Insel 1983) (1522).

the dogma of indissolubility was questioned, for example, by Montaigne, Montesquieu, and Voltaire.[8] The natural law theory finally went a step further. It understood marriage as a civil law contract[9] and insisted on applying contract rules to it. As a party can in general break away from the contract if its two parties agree on it or the other party commits a breach of contract, so concluded Pufendorf, the marriage may be dissolved with mutual consent or by the other spouse's violating the marital duties.[10] Nevertheless, he followed Protestant divorce rules, because he rejected consensual divorce as indecent. However, in theory, two important divorce principles emerged in that way, that is, divorce by mutual consent and the fault principle. They were taken up by the Prussian General State Law (*Allgemeines Landrecht für die preußischen Staaten*) of 1794, which allowed a consensual divorce only in the case of a childless marriage and the French Civil Code (*Code civil*) of 1804.

Finally, the third element, that is, the principle of no-fault divorce, was also born out of the Enlightenment. No-fault divorce was justified at first by the consideration that an unhappy marriage would remain sterile, which would harm society's common good.[11] Therefore, Prussian General State Law has provided, besides numerous divorce grounds, that the judge "in special cases," that is, exceptionally, has the power to dissolve a hopelessly unhappy marriage (II 1 § 718a). Similarly, in French intermediary law (*le droit intermédiaire*), the Act of April 22, 1794, made possible divorce based on the "*incompatibilité d'humeur*," the incompatibility of spouses' characters.[12] This idea was, understandably, taken more cautiously in later codifications.[13] Rejecting consensual divorce, the German Civil Code (*Bürgerliches*

8) Jacques Brissaud, Manuel d'histoire du droit privé, 71-72 (1908).

9) Thomas Hobbes, De cive, Cap. VI, XVI (Clarendon Edition II, Oxford Univ. Press 1984) (1642).

10) Samuel Pufendorf, *De jure naturae et gentium libri octo, Liv. VI, Cap. I, XX*, *in* Gesammelte Werke, Band 4.2 (Akademie Verlag 1998) (1672).

11) Brissaud, *supra* note 8, at 72; Konstanze Röhrmann, Das Ehescheidungsrecht des ALR und die Reformvorschläge im 19. Jahrhundert, 45 sq. (2016).

12) Brissaud, *supra* note 8, at 73-75.

13) The cautionary turn was also to be seen in Prussia and France. The French Civil Code rejected the "*incompatibilité d'humeur*" as a divorce ground. The Prussian no-fault rule was later *de facto* invalidated by the case law, especially that of the German Imperial Court (*Reichsgericht*). Brissaud, *supra* note 8, at 75-76; Röhrmann, *supra* note 11, 221 sqq.

Gesetzbuch) of 1900 allowed, apart from fault-based divorce grounds, the breakdown (*Zerrüttung*) of marital life culpably caused by the other spouse as another ground for divorce (§ 1568 in its original version). The no-fault divorce was limited to mental illness. Similarly, the Swiss Civil Code (*Zivilgesetzbuch*) of 1907, which in general followed the fault principle, accepted a failed marriage as grounds for a divorce, but with the restriction that only the faultless spouse could request a divorce (art. 142 in its original version). Such a reluctance was a remnant of the fault principle. It would finally be overcome in time, with the idea of free marriage gradually coming to the fore. The German Marriage Act of 1938 introduced the no-fault breakdown as a grounds for divorce (§ 55 *Ehegesetz* in its original version, § 48 in its 1948 version) and in 1971 finally switched to the system in which the court grants a divorce only based on the failure of marital relationships. Largely identical rules can now be found in the German Civil Code (§§ 1564, 1565). Depending on the constitutional regime change, the French Civil Code, which sometimes abolished divorce and then allowed it again, recognized in 1975 the breakdown of marital relationships as grounds for divorce, in addition to mutual agreements and marital misconducts (art. 229). The Swiss Civil Code again in 2000 introduced consensual divorce (art. 111, 112), eliminated fault-based grounds, and carried out no-fault divorce consistently (art. 114, 115). In these countries, it is no longer important whether the spouse who is judicially demanding a divorce is to be blamed for the failed marriage, but only whether the marriage can be considered irreparably broken down.

III. The Korean Civil Code: Law in books and law in action

Which grounds for divorce does the Korean Civil Code, enacted in 1960, acknowledge?[14] It embraces all three principles developed in legal history.

14) *Cf.* Wha-Sook Lee, *Marriage and Divorce Regulation and Recognition in Korea*, 29 Family Law Quarterly 608-609 (1995); Dong-Jin Park, *Korean Divorce Law: Can a Spouse Guilty of Marital Misconduct Get a Divorce without the Consent of the Other Spouse*, 2010 International Survey of Family Law 318 sqq. (2010); Hyunjin Kim, Economic Consequences of Divorce in Korea, 20 sqq. (2016).

First, spouses can consensually dissolve their marriage if their agreement is confirmed by the family court and registered at the registry office (art. 834, 836).[15] Furthermore, one spouse is legally entitled to a judicial divorce if the other has committed serious marital misconduct. The law mentions (1) the other spouse's unchastity, (2) the other spouse's willful desertion, (3) the other spouse's as well as his or her lineal ascendants' ill treatment of the suing spouse, and (4) the other spouse's ill treatment of the suing spouse's lineal ascendants (art. 840, no. 1 to 4). Finally, (5) apart from the other spouse's three years of absence(art. 840, no. 5), (6) the no-fault divorce is expressed in the rule that the divorce may be judicially enforced if the spouses cannot be expected to continue their marital life (art. 840, no. 6). The last norm, it seems, is aimed at divorce grounds independent of any fault. Kyeong-Keun Jang,[16] who was in the Codification Commission and was responsible for the preliminary draft of family law, stated that the planned Civil Code should introduce a no-fault divorce, according to which marital discord between spouses might under circumstances result in a divorce.[17] In retrospect, in view of the historical and comparative overview presented above, one could say that the Korean Civil Code intended a progressive divorce law.[18]

---

15) The confirmation of the divorce agreement by the family court was not provided for in the original article 836 I. It was introduced in 1977 as a revision to the Civil Code in order to ensure that the spouses reach an agreement as voluntarily as possible. About the consensual divorce in detail *cf.* Jinsu Yune, *The Reform of the Consensual Divorce Process and the Child Support Enhancement System in Korea*, 11 J. OF KOREAN L. 249 (2012).

16) Kyeong-keun Jang, born in 1911, studied law at the Tokyo Imperial University and worked as a judge until the liberation of Korea. He played an important role in the creation of the Korean Civil Code, first as a member of the Codification Commission, then as Chairman of the Judicial Committee in Parliament. In 1960, however, he was deeply involved in manipulating the presidential election for the incumbent president, Syng-man Rhee, and fled abroad after the popular uprising on April 19. He died in 1978 shortly after having returned to South Korea. In my opinion, he also represents a curious example of the now-much-discussed "legal technicians" who, being very competent lawyers, voluntarily, diligently served the dictatorship regardless of the values enshrined in the legal system.

17) *Cf.* his *Explanations to the Outline of the Legislative Directives in the Family and Inheritance Law* (in Korean) *reprinted in* KWANG-HYEON JEONG, *HANGUKGAJOKBEOPYEONGU [STUDIES IN KOREAN FAMILY LAW]* 27-28 (1967).

18) One might question this understanding by asking the relationship between fault-based grounds (Article 840, Subpara.1-4) and no-fault divorce (Subpara. 6): If the faulty spouse could request the judicial divorce in general, why should there be the fault-based

However, it turned out that this legislative project could not prevail in practice. From very early on, the Supreme Court restricted the principle of no-fault divorce by allowing no divorce, even in the event of a failed marriage if the plaintiff had been at fault for its failure.[19] Otherwise, it would violate the morality underlying the marriage and lead to the unilateral expulsion of the other unwilling spouse from the marital relationship.[20] Then, for example, a husband who had destroyed his marital life through adultery was not permitted to demand a divorce even if there was obviously no hope of reconciliation, unless his wife agreed to it. Under certain circumstances, this interpretation could be strict and harsh. In one case, the spouses had lived together for six years, but for 28 years separately, and their children were already mature when one spouse who cohabitated for over 20 years in a marriage-like situation with another person demanded a divorce. The divorce claim was dismissed as unfounded.[21]

However, the Supreme Court allowed two exceptions to alleviate this rule's harshness. On the one hand, the culpable spouse could still enforce a divorce if it emerged from all circumstances that the other spouse also agreed to the divorce in his or her mind, but only pretended to maintain the marriage, say, to sabotage the suing spouse's "new life" and thereby to inflict emotional pain.[22] On the other hand, the marriage had to be dissolved if the responsibility for the marital failure was to be attributed to both spouses, because the Supreme Court only refused to grant a divorce

---

grounds in the Civil Code? However, this critique would be justified only if one would regard the no-fault divorce as the overarching principle in the Civil Code, which is of course not. The Civil Code received all the divorce principles which were developed at that time. They stand side by side and have different functions. Above all, the plaintiff, in order to achieve the judicial divorce, has to prove the breakdown of his or her marriage in Article 840, Subpara. 6, whereas he or she in Subparas. 1-4 only needs to prove the circumstances proscribed there. Without examining the failure of marriage, the fault-based grounds therefore make the divorce easier when there is a marital misconduct. The coexistence of these two principles was introduced in the German Marriage Act of 1938 (*see* II. above). It is very probable that the jurists involved in the Codification knew this legislation, especially considering the remarks from the Codification Commission (*see* note 17).

19) Supreme Court [S. Ct.], 65Meu37, Sept. 21, 1965 (S. Kor.). *See also* Kim, *supra* note 14, at 5, 32 sqq.; Park, *supra* note 14, at 5, 325 sqq.

20) Supreme Court [S. Ct.], 86Meu28, Apr. 14, 1987 (S. Kor.).

21) Supreme Court [S. Ct.], 2004Meu1033, Apr. 24, 2004 (S. Kor.).

22) Supreme Court [S. Ct.], 81Meu26, July 14, 1981 (S. Kor.).

for the spouse who could be accused of being "predominantly responsible" for the breakdown.[23] However, these exceptions were obviously intended as a kind of corrective measure that did not affect the case law's principle. The main rule, namely, no judicial divorce for the spouse at fault, remained unchanged and is largely intact to this day.

How can this interpretation be justified? The essence of the Supreme Court's argument is that the spouse who ruins his or her own marriage may not rely on the failed marriage as a grounds for divorce and, thus, unilaterally end the marital relationship. As an old legal maxim says, *turpitudinem suam allegans non auditur*, that is, whoever bases the alleged right on his or her own shameful act will not be heard by the court. In divorce cases, however, the argument that emphasizes the personal freedom of the culpable spouse is as important as well. Marital life only makes sense if it is carried out voluntarily. Therefore, it could be objectionable to legally force the culpable spouse to hold on to his or her already damaged marriage. From this perspective, the Supreme Court has sometimes been criticized, but has nonetheless enjoyed overall approval for a long time.[24]

To understand case law, therefore, one must look elsewhere. Among several possible causes that prompted the Supreme Court to make the interpretation described above, the matrimonial property regime in my opinion cannot be stressed enough. It seems to have been decisive that the Korean Civil Code not only chose the property separation between spouses as the default regime,[25] but also allowed neither the distribution of matrimonial property nor post-marital maintenance in case of a divorce. In the decades after the Civil Code came into force, Korean society was both traditional and patriarchal. In general, the husband worked for income and acquired matrimonial property (especially the family home) in his name, while the wife took care of the household and raised their children. If he had been able to unilaterally enforce a divorce in this situation, citing as grounds the broken marriage caused by no other than himself, it would have meant that she would have been forced into poverty against her will,

---

23) Supreme Court [S. Ct.], 85Meu85, Mar. 25, 1986 (S. Kor.).

24) *Cf.* Park, *supra* note 14, at 5, 324-325.

25) *See* Whasook Lee, *Matrimonial Property System of Past, Present and Future in Korea*, 8 J. OF KOREAN L. 95 sqq. (2008).

not to mention stigma in a still-conservative society. Therefore, Kyeong-Keun Jang, who was working on the preliminary draft of family law, actually planned to introduce the distribution of matrimonial property as a consequence of a divorce, not the least to guarantee the freedom of divorce: Otherwise, a divorce would lead women to "choose starvation instead of insult."[26] However, the government's final draft contained no provision in this regard, without the reasons found in legislative sources. Later in the parliamentary debate, an amendment aimed at introducing the distribution of matrimonial property was proposed, but to no avail.[27]

If this background is considered, it appears clear what the Supreme Court intended. It wanted to protect the spouses, especially females, at risk of falling into a precarious economic situation through their divorce, even if they could not be blamed for the failure of their marriage. Besides, with the case law as a kind of leverage, they were able to negotiate a more favorable division of matrimonial property with the culpable spouses who had no other choice but a consensual divorce.

IV. New challenges

Therefore, case law has begun to waver, as social and legal conditions have gradually changed. On the one hand, Korean society has modernized at a rapid pace, with the result that more and more women have become economically independent and simultaneously insist on equality in all areas of society. On the other hand, in 1990, the legislature introduced the distribution of matrimonial property in case of a divorce, according to which the family court has the power to distribute the matrimonial property with due regard for all circumstances if the spouses do not agree on it (art. 839−2).[28]

Against these changes, it is not surprising that case law no longer works as it did. As more women appear socially and economically active, the

26) *Cf.* Jang, *supra* note 17, at 6, 29-30.

27) *Cf.* the parliamentary debate reprinted in Jeong, *supra* note 17, at 6, 541 sqq.

28) *See* Mi-Kyung Cho, *Korea: The 1990 Family Law Reform and the Improvement of the Status of Women*, 33 Univ. of Louisville J. of Fam. L. 431, 439-41 (1994).

number of cases increases in which they want to dissolve their marriage on their own initiative but cannot judicially enforce it. The culpable spouse who is denied a divorce often intentionally makes their fractured marital cohabitation even worse to force the other spouse to an agreement. The experts repeatedly emphasized that the failed marriage could harm the children more than the divorced marriage.

Furthermore, the culpable spouse usually submits facts to the family court that often come from intimate marital life and are intended to prove the other spouse's breach of marital duties. It is because the marriage can now only be divorced if, according to the case law's second exception, the suing spouse succeeds in accusing the other of the same amount of faulty behaviors. The other spouse who will prevent this outcome then appears with more evidence against the suing spouse to make the plaintiff the "predominantly" culpable one. The divorce dispute becomes agony both for the spouses in dispute and for the family court. An amiable farewell is not to be expected. The situation also appears unsatisfactory because most divorce cases are resolved by mutual agreement (around 80%),[29] which indicates that the principle of no-fault divorce actually prevails in practice.

The misgiving mentioned above finally gives the lower family courts an incentive to be more open to a no-fault divorce.[30] It is observed that some family judges assess the facts submitted before them to ask whether a reconciliation between spouses would be possible. If they see any hope, they reject the divorce claim on the grounds that the culpable spouse sought the divorce. If, however, they find that the marriage has failed beyond repair, they apply the case law's second exception and dissolve the marriage. In the usual divorce cases, it is indeed rare that only one spouse is solely responsible for the broken marital life. Except for a few rare disputes where one spouse's fault is evidently predominant, one can practically circumvent the Supreme Court's main rule in this way.

The Supreme Court also had to face these challenges. The underlying facts of a 2009 ruling are as follows. The plaintiff and the defendant have had conflicts because of the latter's drinking and negligence. The former left

29) *See* Kim, *supra* note 14, at 5, 22.

30) *Cf.* Youngjoon Kwon, *Civil Law and Civil Procedural Law, in* Introduction to Korean Law 136 (Korean Legislation Research Institute ed. 2013).

the marital home afterwards. They were separated for 11 years. Meanwhile, the plaintiff bore a disabled child with another man, and the defendant raised their children (each 16 and 17 years old at the time of the last hearing) with the help of his mother. The Supreme Court accepted the divorce claim on the grounds that, although the plaintiff could be blamed for a willful desertion, her fault in this case was not entirely predominant to refuse the divorce.[31] Here, the Supreme Court added a new element to its previous arguments to loosen its rule: The culpable spouse's fault could dwindle over (a long) time, a legal *topos* that reminds one of the saying "time heals all wounds." With this ruling, the Supreme Court obviously did not break with its longstanding precedents. The decision, however, has made it possible for lower family courts to assess the spouses' responsibility more flexibly.

Then came, in 2015, the plenary decision of the Supreme Court. In that case, the plaintiff and the defendant had been married since 1976 with three children. The plaintiff left her in 2000 and, since then, has had a marriage-like cohabitation with another woman, having a daughter. The defendant had no job, so the plaintiff paid around $850 a month to support her and their children, but not after 2012. She raised the children alone. She was 63 years old and very ill at the time of the last hearing. Since she did not agree, he judicially asked for a divorce. Some justices of the Supreme Court who were engaged with this case saw an opportunity to critically review the previous case law. Therefore, the plenary session of the Supreme Court convened. Among the 13 participants, six justices, discarding the precedents, openly advocated for no-fault divorce, while seven justices wanted to stick to the present rules.[32] This small majority believed that, socially and legally, the faultless spouse would not be protected sufficiently if the plaintiff's responsibility for having ruined the marriage were not considered. The present case law, so it is said, is flexible enough to handle various divorce cases in a satisfying way. The precedents, therefore, have been upheld.[33]

---

31) Supreme Court [S. Ct.], 2009Meu2130, Dec. 24, 2009 (S. Kor.).

32) Supreme Court [S. Ct.], 2013Meu568 (*en banc*), Sept. 15, 2015 (S. Kor.).

33) In addition, it should be noted that the Supreme Court in this case expanded the factors justifying the no-fault divorce. The culpability of the suing spouse can especially dwindle if he or she provides the other spouse and children with sufficient protection and

No wonder that lively academic discussions with pros and cons are transpiring.[34)]

V. The contemporaneity of the non-contemporary

Consequently, a landmark was not set. It is inevitable here to ask why the slim majority of the Supreme Court justices adhered to the precedents. More concretely, where they saw the present case law still plays a meaningful role. They argue, for example, that an unrestricted no-fault divorce is not sufficient to protect innocent spouses because the Korean Civil Code does not provide for a hardship clause or a regime of post-marital maintenance. However, this argument does not seem that decisive. The hardship clause, which should enable the family court to reject a divorce claim that will bring an unreasonable hardship for the other spouse and the children, can be constructed by interpreting good faith (art. 2) without any serious problem. Post-marital maintenance is admittedly not regulated, but now, no one denies the maintenance need of the departing spouse should be considered when distributing matrimonial property.[35)]

Therefore, the majority opinion's concession that, despite the progress made, gender equality still has much to be desired seems more convincing. There is, indeed, no denying that women are often worse off economically than men.[36)] In addition, even though divorce has now largely been accepted by Korean society, divorced spouses are still burdened with several disadvantages, such as insufficient social support for raising children alone

---

care.

34) *See* Kim, *supra* note 14, at 5, 32 sqq.; Dongjin Lee, *Recent Developments in Korean Family Law: Divorce, Adoption, Parental Responsibility, and Familial Support*, 2015 Int'l. Surv. of Fam. L. 193, 195-97 (2015).

35) *See, e.g.*, Supreme Court [S. Ct.], 2000Da63516, Feb. 9, 2001 (S. Kor.). *See also* Kim, *supra* note 14, at 5, 40-41. Of course, it cannot be denied that the post-marital maintenance still plays a minor role in the distribution of matrimonial property. This circumstance is not, however, a decisive obstacle, because it is precisely up to the family court itself to consider it and develop the case law.

36) *See*, *e.g.*, OECD, Gender Wage Gap, https://data.oecd.org/earnwage/gender-wage-gap.htm (last visited Aug. 21, 2020), where South Korea stands at the bottom of the list.

or the inefficient enforcement of child maintenance claims.[37] Finally, I would like to draw your attention to a specific group of women who are often involved in divorce procedures.[38] They can be well illustrated by the defendant of the plenary decision. Being old now, they belong to previous generations. They married young and, even though their husbands left them, held on to the threatened family. They alone raised the children born out of the almost non-existent marriage, supported their parents-in-laws, and maintained the husbands' ancestral cult, not least very often without any financial support from their husbands. For them, the focus of their life was the family, whereas the failed marital relationship was only part of it. Very old-fashioned, sure, prisoners of the outdated patriarchal family ideology, maybe, but no one would underestimate their sacrificial life. However, after many years of separation, their husbands suddenly ask for a divorce to legitimize current partners and children, while depriving them of an inheritance. In this situation, the unilateral no-fault divorce would mean a destruction of their value system, an emotional death that would thoroughly deny their whole lives.

If such considerations really guided the plenary decision, the current state of Korean divorce law can be characterized by social contradictions. Despite successful modernization and democratization, there is still a deficit in the equality between women and men. Society accepts divorce but does not sufficiently support divorced spouses. Whereas many citizens consider a new beginning a better solution than an unhappy marriage, there live their aging grandparents, who accept their humiliation and want to protect their families. This convergence of contradictions can be explained by the fact that a traditional society has been modernized very quickly, in an extremely short time. Consequently, society has changed fundamentally, while the relics stay alive. These still have influence until the new structure takes hold.

At this point, I remember a concept from the philosopher Ernst Bloch,

37) *Cf.* Yune, *supra* note 15, at 16, 253 sqq.

38) This aspect was especially brought to my attention by my teacher Chang-Soo Yang, who, after many years of an academic career, served as Justice in the Supreme Court from 2008 to 2014. However, he did not take part in either of the Supreme Court decisions discussed above.

who was in his later years active here in Tübingen. Analyzing the victorious National Socialism in the 1930s, he pointed out that the traditional elements of the earlier society, which were deemed to be overcome in the end, nevertheless survived in modern Weimar Germany and played an important part in some social upheavals. He, therefore, spoke of the contemporaneity of non-contemporaneous conditions.[39] He said: "Not all people exist in the same Now. They do so only externally, through the fact that they can be seen today. However, they are thereby not yet living with the others. Rather, they carry an earlier element with them, which interferes. Depending on where someone stands physically and, above all, in terms of class, he has his times. Older eras than modern ones continue to affect the older strata."[40]

In this sense, it seems current Korean divorce law represents a legal compromise between the forces that are supposed to be non-contemporaneous in the abstract world, but in reality, interact with each other in this concrete society. This contemporaneity will partially dwindle with the previous generations' passing away, but the struggles for equality and social security must surely continue in the foreseeable future. If this contemporaneity of the non-contemporaneous largely disappears, the Supreme Court will certainly be faced again with the challenge to critically review its old rule—that is, no judicial divorce for the spouse at fault.

39) Some scholars of the political science in South Korea, e.g. Hyeok-Baek Im and Jeong-In Kang, also tried to analyze the Korean politics by using this concept. *See* Hyeok-Baek Im, Bidongsiseongui dongsiseong [The Contemporaneity of the Non-contemporaneity] (2014) and Jeong-In Kang, Hanguk Hyeondae Jeongchisasanggwa Bakjeonghui [Contemporary Korean Political Thought and Jeong-Hee Park] (2014).

40) Ernst Bloch, Heritage of Our Times 97 (University of California Press 1991) (1935).