

## Pursuit of Happiness Clause in the Korean Constitution

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### Abstract

*Korean Constitutional Court has played a fairly active role as the last resort for the protection of Korean people's right since its establishment in 1988. Korean people applauded the Court for its epochal decisions that could hardly have been found in the past decisions by the general courts in Korea. However, as nobody is perfect, some repeated problems are found in the Court's decision. I believe its frequent reliance on the pursuit of happiness clause in the Korean Constitution could be one of them. Can the pursuit of happiness clause be used as a ground to declare a law or a legal provision unconstitutional? To have an answer for that, we will search for the origin of pursuit of happiness clause in the United States because Korean Constitution adopted the clause in 1980 from the constitutional documents in the United States such as Declaration of Independence and Virginia Declaration of Rights by way of Japanese Constitution of 1946. In addition, we will examine court decisions on the pursuit of happiness clause in the U.S. federal courts as well as state courts. Through these explorations, we will delve into whether pursuit of happiness clause has a specific right with real force in it or is just a declaratory political rhetoric.*

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## I. Introduction

Art. 809 Sec. 1 of Korean Civil Code provided “The kin of same surname and family origin<sup>1)</sup> cannot marry each other.” This provision has existed since the Korean Civil Code was enacted on February 2 in 1958. It was regarded as the incorporation of the Korean custom prohibiting the marriage between persons with same surname and family origin that had existed in Korea for hundreds of years at least. Although there were several attempts to abolish the marriage limitation by Korean Congress led by feminist groups, the various forms of pressures from conservative groups such as Confucianist groups frustrated them each time. Korean Congress had been at a loss what to do for the provision and taken no action, which eventually meant to give victory to Confucianist groups by maintaining *status quo*. However, in 1995, Korean Constitutional Court did abolish the provision incorporating longtime Korean custom that neither Korean Congress nor the Executive had dared to do, by declaring it “being in disagreement with the Constitution,”<sup>2)</sup> practically a judgment admitting the unconstitutionality of the provision.<sup>3)</sup>

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1) “Family origin” means the place where the progenitor of the family established the family for the first time. Thus, it is usually a name of town or city. In the same family name, there could be several family origins. Accordingly, family origin is subcategory under the family name. For example, in the surname “Lim,” there are three different family origins - *Pyungtaek*, *Najoo* and *Yecheon*. That means three progenitors whose surname was “Lim,” - they could be brothers or relatives who lived long time ago - established and started the Lim family in the three different places. Therefore, among the Lims, there are three different kinds - Lim from *Pyungtaek*, Lim from *Najoo*, and Lim from *Yecheon*. The persons with same surname but different family origin can marry each other. Thus, for example, although a man and a woman are Lims, if the man is Lim originated from *Pyungtaek* and the woman is Lim originated from *Najoo*, they can marry each other. Only the persons with same family origin among same surname cannot marry each other by Art. 809 Sec. 1 of Korean Civil Code.

2) Besides “the Decision of being Simply Constitutional” and “the Decision of being Simply Unconstitutional,” Korean Constitutional Court adopted the variational types of decision from German Constitutional Court as its decision types, which included “Decision of Limited Constitutionality,” “Decision of Disagreement with the Constitution” “Decision of Urging Legislation” and “Decision of Limited Unconstitutionality.” For details on the variational types of decision, refer to Jibong Lim, “A Comparative Study on the Judicial Activism Under the Separation of Power Doctrine” 242 - 48 (JSD dissertation U.C. Berkeley School of Law, 1999).

3) Marriage Limitation case, 95 heonga [constitutional case in file ‘a’] 6-13 byunghap [a case from #6 to #13 combined] (Korean Constitutional Court, July 16, 1995). For foreign readers’ convenience, “heonga [constitutional case in file ‘a’]” means a case dealing with the constitutionality of a law or a legal provision referred by general courts. For the English translation of the decision in full text, see Ji bong Lim, *supra* note 2, at 62-92.

The decision by Korean Constitutional Court raises some controversial issues in itself developing its argument in majority opinion as well as in dissenting opinion.<sup>4)</sup> Among the issues, let's focus on examining constitutional bases on which the majority opinion and the dissenting opinions stand. The majority opinion says, "The concerned provision is against Art. 10, Art. 11 Sec.1 and Art. 36 Sec. 1 of Korean Constitution. In addition, it is also against Art. 37. Sec. 2 of the Constitution in that the legislation aim cannot now belong to the category of social order and public welfare that can restrict the right and freedom of the citizen." Art.10 is about the personal right of an individual and the right to pursue happiness, Art. 11 is about equal protection, Art. 36 Sec.1 is about individual dignity and gender equality in marriage and family life, and, in the end, Art. 37 Sec. 2 is about the restriction on the right and freedom of the citizen. The dissenting opinion refutes each and every constitutional base that the majority opinion raised.

Most of all, I am doubtful of the appropriateness raising the right of pursuit of happiness provided in Art. 10 of Korean Constitution as one of the constitutional bases for declaring unconstitutionality of Art. 809 Sec.1 of Korean Civil Code. The way I see it, the right of pursuit of happiness clause is just a declaratory provision having no contents in it rather than that from which any substantial right with really forcible normative power can be derived. Nonetheless, Korean Constitutional Court has interpreted Art. 10 of the Constitution on the pursuit of happiness as having so substantial contents in it that the right of pursuit of happiness is 'a right' that has normative power in real world. Further, the right of pursuit of happiness is frequently used - even seemingly abused - by the Court when it confronts difficulty in raising constitutional bases in many other decisions. From now, we will examine the meaning and function of the pursuit of happiness clause in Korean Constitution focusing on whether it presents a substantial right that has normative force in the adjudication or it is just a political rhetoric that declares an idea in Korean Constitution.

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4) For the background and contents of the decision and the reactions toward the decision, refer to Jin-Su Yune, *Comments: Recent Decisions of the Korean Constitutional Court on Family Law*, 1 *Journal of Korean Law* 133, 145-56 (Seoul National University College of Law BK Law 21, 2001).

5) The whole first sentence of Art. 10 is, "All citizens shall be assured of human worth and dignity and have the right to pursue happiness." Thus, the first sentence prescribes 'human worth and dignity' as well as 'pursuit of happiness.' The second sentence of the article prescribes the duty of government to guarantee fundamental human rights by providing "It shall be the duty of the government to confirm and guarantee the fundamental and inviolable

## II. Theories and Precedents Interpreting the Pursuit of Happiness Clause in Korea

The latter part of the first sentence of Art. 10 of Korean Constitution provides “All citizens shall have the right to pursue happiness,”<sup>5)</sup> besides its former part on the human worth and dignity. This part has appeared in Korean Constitution since the constitutional revision in 1980 in Korea. At that time, the military regime represented by the President Chun wanted to justify their regime by adopting many apparently-democratic provisions in Korean Constitution and the part on the pursuit of happiness was one of them. It was imitating Art. 13 of Japanese Constitution of 1946 that had adopted ‘the pursuit of happiness’ in Art. 1 of the Virginia Declaration of Rights and Art. 2 of the Declaration of Independence in U.S. dating back to 1776. Thus, in other words, the pursuit of happiness clause in Korean Constitution adopted that of Virginia Declaration of Rights and Declaration of Independence in the U.S. in 1776 by way of Japanese Constitution of 1946. The current Korean Constitution has been still succeeding this provision since Korean Constitution of 1980 did. Because the provision was adopted in such a political and historical reason at that time without considering the position of the provision in the Constitution and relationship with the other constitutional provisions on fundamental rights,<sup>6)</sup> there are many criticisms on this provision by Korean constitutional law scholars.<sup>7)</sup>

So far, there is no clearly established theory in Korea on what the right of pursuit of happiness in Korean Constitution concretely means. Particularly, each scholars have

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human rights of individuals.”

6) Korean Constitution has provisions on the fundamental rights of the citizen from Art. 10 to Art. 37.

7) Prof. *Young-Sung Kwon* at *Seoul* National University writes in his constitutional law textbook, “The adoption of the pursuit of happiness clause gives rise to confusion in the system and structure of fundamental right provisions in the Korean Constitution, but, as long as it is prescribed in the Constitution, it should be interpreted in the direction of being in harmony with the other provisions on the fundamental rights in the Constitution,” and “The adoption of the pursuit of happiness provision in the Korean Constitution of 1980 was the example of the irresponsibility and ignorance of constitutional revision proposal aiming only at catering to public popularity if we consider the whole system of Korean Constitution and the fact that the substance of the pursuit of happiness is vague.” *Young-Sung Kwon*, *Constitutional Law: A Textbook* 360 (Seoul: Bubmoonsa, 2001). Prof. *Young Huh* at *Yonsei* University writes in his book, “This provision has been causing many unnecessary controversies due to its vagueness since it was adopted in the Korean Constitution in 1980.” *Young Huh*, *Korean Constitutional Law* 318 (24th ed. Seoul: Bakyoungsa, 2001).

different opinions on how to understand the interrelationship between the human worth and dignity and right of pursuit of happiness that are prescribed in the same provision, and how to estimate the contents and character of the right of pursuit of happiness in connection with the other fundamental right provisions. Only on the character of the right of pursuit of happiness as a natural law and comprehensive provision, there seems to be an agreement among the scholars. Roughly speaking, the different opinions by the constitutional law scholars in Korea on the pursuit of happiness clause could be classified in three categories.

Prof. *Young-sung Kwon* at *Seoul National University* in Korea sees the pursuit of happiness as a forcible personal ‘right’ rather than a general principle on the guarantee of fundamental rights. As the reason, he picks up the fact that the Korean Constitution stipulates in the text of Art. 10 “the RIGHT to pursue happiness.” However, he distinguishes the right of pursuit of happiness from the other constitutional rights and positions it to a higher status than the other constitutional rights setting the hierarchical structure to the system of fundamental right provisions. On its relation to ‘the human worth and dignity’ in the same provision, he explains the right of pursuit of happiness is a means to achieve ‘human worth and dignity’ that is not a right but a declaration of the aim that all the fundamental rights prescribed in Korean Constitution should pursue. Such a view of his is revealed in the part explaining that the right of pursuit of happiness is not an independent right guaranteeing the right of privacy and environmental right that is separate from the other fundamental rights but a ‘comprehensive’ right that covers all the fundamental rights needed to pursue the happiness although they are not enumerated in the Korean Constitution. For this reason, when the guarantee of a specific individual fundamental right composing the contents of the comprehensive ‘right of pursuit of happiness’ is in issue, there comes a problem whether to apply the right of pursuit of happiness or the specific right. He insists the right of pursuit of happiness be applied only in the case there is no constitutional right to be directly applied because the specific right should be applied at its maximum at first in order to keep the specific right from being lack of contents and prevent the idle escape to the general provision-the pursuit of happiness clause. Besides, he sees it as natural right declaring the rights from natural law that is the basis of each fundamental rights prescribed in Korean Constitution, rather than a right from positive law because the right of pursuit of happiness is an indigenous right that is inherent in human being. In the end, he sees it as both a passive and defensive right

like freedom of conscience and an active and claimable right like labor rights because ‘happiness’ means the substance of a right like the concept of life and conscience but ‘the pursuit’ implies a means to realize the right.<sup>8)</sup>

Professor *Tcheol-Su Kim* at *Seoul* National University acknowledges the pursuit of happiness as a forcible right. At this point, his position is same as that of *Prof. Young-Sung Kwon* we have seen just above. However, if we examine his position more closely, there is a big difference in the relationship between ‘the human worth and dignity’ and ‘the pursuit of happiness’; he does not divide ‘the human worth and dignity’ with ‘the pursuit of happiness.’ He combines ‘the human worth and dignity’ with ‘the pursuit of happiness’ part, and insists that the fundamental right from Art. 10 of Korean Constitution be a comprehensive one combining the two. He classifies the right from Art. 10 in three categories; in the broad meaning, narrow meaning and narrowest meaning. In the broad meaning, he calls the fundamental right from Art. 10 a ‘principal’ fundamental right in distinction from the ‘derivative’ fundamental rights. According to him, each fundamental rights prescribed in from Art. 11 to Art. 36 are the derivative rights that are just the subdivisions of the ‘principal’ fundamental right, the right from ‘the human worth and dignity’ and ‘the pursuit of happiness’ in Art. 10 of Korean Constitution.<sup>9)</sup> In other words, he also tries to set hierarchy in the system of fundamental rights, but in a different way with *Prof. Young-Sung Kwon*. *Prof. Tcheol-Su Kim* continues that in the narrow meaning the fundamental right from Art. 10 is divided into the right of dignity that is from ‘the worth and dignity’ and the right of pursuit of happiness. Again, in the narrowest meaning, he explains that the right of dignity means ‘the personal right’<sup>10)</sup> that includes right of fame, right of name, and right of portrait as well as right to know, right to read, right to hear and right for life. Besides, in the narrowest meaning, ‘the right of pursuit of happiness’ covers the right not to be injured in body, the right of self-decision on his/her fate,<sup>11)</sup> and right to live peacefully. Finally, he also sees the fundamental right from Art. 10 as the declaration

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8) For the details of his argument on the character of the pursuit of happiness clause, refer to *Kwon, supra* note 7, at 361-63.

9) Classifying fundamental rights with ‘principal fundamental right (in Germany, *das Hauptgrundrecht*)’ and ‘derivative right’ is originated from the decisions of German Constitutional Court. *Prof. Tcheol-Su Kim* borrows this method in explaining the system and structure of Korean constitutional rights and their provisions.

10) German original word is *Persönlichkeitsrecht* for ‘the personal right.’

11) German original word for ‘the right of self-decision on his/her fate’ is *Selbstbestimmungsrecht*.

of right from natural law that commonly preexists beyond the nation rather than a positive law that is prescribed by the nation.<sup>12)</sup>

Different from the two positions above, Prof. *Young Huh* at *Yonsei* University in Korea denies the character of the right of pursuit of happiness as an independent forcible right with normative power. As to ‘the human worth and dignity’ in the same provision, he does not regard it as a ‘right’ as well but a declaration of the supreme value that all the fundamental right provisions pursue. Coming back to the pursuit of happiness, he regards the provision as the most problematic provision among the constitutional provisions in terms of the system and structure of the fundamental right provisions. He diagnoses that is because it yields unnecessary questions by prescribing such a matter of course. His argument is based on the reasons as follows.

First, ‘the human worth and dignity’ has necessity to be prescribed in the Constitution as the ideological basis of the fundamental rights that follow Art. 10 because of its character as a value implied in its concept. However, it is difficult that we easily acknowledge the pursuit of happiness as a value because of the relativeness and secularness of the word, ‘happiness.’ Accordingly, the fact in itself that the pursuit of happiness is prescribed together with ‘human worth and dignity’ in the same provision has problem in the provision structure of the Constitution.

Second, because ‘the pursuit of happiness’ is the matter that should be dealt with as a human instinct rather than a fundamental right, it cannot be the object of a norm. Thus, ‘the pursuit of happiness’ in Korean Constitution could be not the guarantee of an independent fundamental right but the declaration of the directing post of the Korean citizen’s life that pursues the realization of ‘human worth and dignity’ at its maximum. In the context, the character of the pursuit of happiness as a comprehensive and inclusive norm - not an independent forcible norm-could be emphasized. Accordingly, although the pursuit of happiness is prescribed in the form of a fundamental right, we should understand it not as a concrete fundamental right but as putting emphasis on the character of ‘human worth and dignity’ as an ethical and practical norm.<sup>13)</sup>

Prof. *Dai-Kwon Choi* at *Seoul* National University forms the third opinion with

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12) For details of his position, refer to Tcheol -Su Kim, *An Introduction of Constitutional Law* [Heonbeophak Kaeron] 369-80 (Seoul: Bakyongsaa, 2001).

13) For the details of his interpretation on the pursuit of happiness, refer to Young Huh, *supra* note 7 at 318-21.



Prof. *Young Huh* in the interpretation of pursuit of happiness clause in Korean Constitution. The uniqueness of his position is that he sees ‘the pursuit of happiness’ combined with ‘the human worth and dignity,’ both of them are prescribed in Art. 10 of Korean Constitution as shown above, as one. In other words, he does not put dividing line between ‘the pursuit of happiness’ and ‘the human worth and dignity’. He insists that the combined ‘human worth and dignity’ and ‘pursuit of happiness’ be the fountainhead and aim of the following individual human rights rather than a concrete human right whose remedy for the violation could be sought through the constitutional procedures such as constitutional complaint. Accordingly, each of the individual rights is the embodiment and realization of ‘human worth and dignity’ combined with ‘pursuit of happiness.’ In the context, ‘the human worth and dignity’ and ‘pursuit of happiness’ is the ultimate aim of human rights and the individual human rights are means to realize it.<sup>14)</sup>

Korean Constitutional Court seems to raise the hand of Prof. *Tcheol-Su Kim*. The Court does not see Art. 10 of Korean Constitution as just a declaration of fundamental principle and value with no normative power. It acknowledges both the pursuit of happiness from “right to pursue happiness” and the personal right from “the human worth and dignity” in Art. 10 of Korean Constitution as a forcible right although it does not use the terminology of a ‘principal’ fundamental right and ‘derivative’ fundamental right as Prof. *Tcheol-Su Kim* does.

Such a position of Korean Constitutional Court has been so firm that it has been shown in the precedents of the Court consistently and frequently. The case concerning the marriage prohibition between the persons with same surname and family origin could be a remarkable example. As shown above, the majority opinion raises ‘the personal right (*Persönlichkeitsrecht* in German) and right of pursuit of happiness’ as a constitutional right that is intruded by Art. 809 Sec. 1 of Korean Civil Code prohibiting the marriage between those with same surname and family origin by saying “In this provision, the Constitution guarantees the personal right and the right of pursuit of happiness that could be the ultimate aim of all fundamental rights as well as nature and indigenous value of human being.” Further, the Court got more specified the intruded rights by explaining the narrower meaning of the right of pursuit of happiness; “The

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14) For the details of his position, refer to Dai-Kwon Choi, Lecture on Constitutional Law [Heonbeophak Kangui] 226-27 (Seoul: Bakyoungsa, 1998).

personal right and right of pursuit of happiness of an individual from Art.10 premises the right of self-decision on his/her fate(*Selbstbestimmungsrecht* in German). The right of self-decision on his/her fate again includes the right of self-decision of sexual partner, especially the right to decide marriage partner, as its sub-factor.” According to this, examined step by step, Art. 809 Sec. 1 of Korean Civil Code intrudes the right to decide marriage partner that is another name of ‘the right of self-decision of sexual partner.’ The right of self-decision of sexual partner is covered by the right of self-decision on his/her fate that is included in the right of pursuit of happiness.

Besides this case, the Korean Constitutional Court has used in many cases the right of pursuit of happiness as a forcible right on which they reviewed the constitutionality of a legal norm. The famous case having dealt with the constitutionality of Art. 241 in Korean Criminal Code punishing the adultery as a crime in criminal code could be the example.<sup>15)</sup> In the case, the Constitutional Court extracted the character of a right from the pursuit of happiness clause by saying, “the pursuit of happiness premises the right of self-decision on his/her faith and the right of self-decision on the faith includes the right of self-decision in sex on whether he/she will have sex and with whom.” Thus, the right of pursuit of happiness of the defendants in adultery case could be intruded by the criminal law provision, and that was exactly what the applicants<sup>16)</sup> of the judicial review insisted. However, the Court declared the adultery provision constitutional by saying “Art. 241 of Criminal Code punishing adultery is a reasonable limitation of the right of pursuit of happiness because the provision was made in order to maintain good sexual morality and the monogamy system, secure a duty of sexual loyalty in the couple, and protect family life from social evils.” Accordingly, the adultery provision was acknowledged as a legitimate limitation of the right of pursuit of happiness.

In addition, on the decision of the constitutional complaint regarding the suspension of indictment by military prosecutor, the Court adduced the right of pursuit of happiness as a constitutional basis of its decision; “the decision of ‘suspension of indictment’ by the military prosecutor for the suspect intruded the right of pursuit of happiness of the suspect who might clear himself of the stain by a final decision of ‘not

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15) Adultery case, 89 heonma 82 [constitutional case in file ‘e’] (Korean Constitutional Court, September 10, 1990).

16) They were defendants in the criminal case that was the main case asking the constitutionality of the adultery provision in criminal code.

guilty' by the court...because the prosecutorial decision of 'suspension of indictment' is made when the prosecutor does not indict the suspect at his discretion considering various circumstances although there exists suspicion enough to prosecute the case."<sup>17)</sup> In this case, the concept and scope of the right of pursuit of happiness is not articulated but vague.

The pursuit of happiness clause in Korean Constitution was also invoked in Korean Constitutional Court's decision on the so-called Billiard Hall case in 1993.<sup>18)</sup> The Ordinance of the Sports Installation and Utilization of Sports Facilities Act was passed by the Ministry of Sports on July 12, 1989, and revised on February 27, 1992, to enforce the Sports Installation and Utilization of Sports Facilities Act that regulated the establishment and the maintenance of the sports facilities in its equipments such as scale and sanitary standards. Art. 5 of the Ordinance contained a provision requiring each billiard hall business to post a notice at the entrance door notifying that minors under age 18 are not allowed to enter. The applicant who had recently opened a billiard hall business, filed a constitutional complaint on April 18, 1992, arguing that Article 5 of the Ordinance violated his constitutional rights. The Court unanimously held for the applicant that Art. 5 of the Ordinance was unconstitutional because it infringed upon the applicant's freedom of occupation and right of equality and, further, the right of pursuit of happiness of the minors under age 18. The Court articulated that prohibiting minors under age 18 from entering Billiard Hall would intrude the minors' right to pursue happiness who wanted to cultivate his/her talent for sports including billiard. In this part of the Court's decision, the meaning and character of the right to pursue happiness is so equivocal that the Court seems to regard the pursuit of happiness clause as a cure-all for the constitutional adjudication.

Besides, in the Constitutional Court's decision on Liquor Tax Act in 1996,<sup>19)</sup> the Court used the pursuit of happiness clause with other constitutional provisions in its judicial review. Art. 38-7 of Liquor Tax Act prescribed that Director of the Office of National Tax Administration must order wholesalers of *soju* [a strong Korean spirituous liquor popular in Korea] to purchase more than 50% of the total purchase

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17) Suspension of Indictment by Military Prosecutor case, 89 heonma 56 (Korean Constitutional Court, October 27, 1989).

18) Billiard Hall case, 92 heonma 80 (Korean Constitutional Court, May 13, 1993).

19) Liquor Tax Act case, 96 heonga 18 (Korean Constitutional Court, Dec. 26, 1996).

amount from a producer located in the same province as the wholesaler's business region, and Art. 18 provided the suspension of their liquor sales in case that the above provision was violated. The applicant who was compelled to suspend his liquor sales due to the violation of Art. 38-7 of Liquor Tax Act put in question the constitutionality of the two provisions to refer them to the Constitutional Court. In the majority opinion by 6 Justices, the Court held that Art. 38-7 and Art. 18 Sec.1 item 9 of Liquor Tax Act were unconstitutional in that the provisions intruded not only *soju* wholesalers' freedom of occupation but also *soju* manufacturers' freedom to fairly compete in the market. Further, the Court emphasized that the provisions in question infringed upon the customers' right to self-decision which is included in the right to pursue happiness. Here, Korean Constitutional Court understood the right to pursue happiness as a general right from which the right to self-decision by the customers could be derived.

Except for the cases enumerated above, Korean Constitutional Court has been incessantly using the pursuit of happiness clause in Korean Constitution so often in the constitutional review as a constitutional clause from which "a constitutional right" with a normative power could be extracted. The way I see it, the Court seems to escape so easily to the general provision - pursuit of happiness clause-whenver it encounters controversial topics and it's hard to find a constitutional provision suitable to the specific case as its standard of judicial review. The more developed the society gets, the more complex and diversified the legal relationship among the members of the society becomes. The more complex and diversified the legal relationship becomes, the more new fundamental rights should appear to protect the citizens from getting legally mistreated due to the complexity of the legal relationship. The Constitutional Court should do this job unless the Constitution is not revised to get more detailed provisions adopting new fundamental rights into the constitutional provisions. However, in Korea, the Constitutional Court does not make efforts to give birth to new fundamental rights by interpreting the existing constitutional provisions creatively and logically. Rather, the Court is relying on the general provision - the right of pursuit of happiness clause - as if it is a cure-all. In my opinion, the pursuit of happiness clause is just a declaratory one that no concrete right is directly coming from. It is just the guiding post in interpreting the fundamental right provisions that follow just right after it. That is why using the word, pursuit of "happiness," as a basic right from which normative power declaring a law unconstitutional directly comes, sounds harsh to my ear.

In order to support my argument, I will examine the origin of pursuit of happiness clause in the United States. That is because if we look over the original meaning and usage of the pursuit of happiness in the U.S. from which this Korean constitutional provision was derived, we can get what it originally meant and how we should interpret and use it. That is how the comparative study is useful for this topic.

### **III. Pursuit of Happiness Clause in the U.S.**

#### *A. Pursuit of Happiness in Constitutional Documents in the U.S.*

Before, the phraseology, “pursuit of happiness” appeared in the Virginia Declaration of Rights by Mason and Declaration of Independence by Jefferson in 1776 in America, the terms such as “pursuing” and “happiness” were used in many historical literatures on philosophy and politics in many countries such as England.<sup>20)</sup> Between the two, in particular, defining ‘happiness’ had been a hot issue in ethics and philosophy until the term, ‘happiness,’ appeared in the American constitutional literatures. The happiness principle is not easy to trace. However, it was a common assumption of Greek political thought generally that ‘happiness’ was a desirable end. Since there is no reference to Epicurus in Jefferson’s book and no mention of Jefferson in the letters until the Jefferson’s old age, it is probable that Jefferson was not acquainted with the Epicurean doctrine at the time the Declaration of Independence was written.<sup>21)</sup> The phrase, “pursuit of happiness,” occurs to the letter in John Locke’s philosophical writings.

Among the great thinkers, John Locke (1623-1704) was the one who directly influenced Fathers of American Constitution including Jefferson and Mason, and, more specifically, the one who gave birth to the phrase of ‘pursuit of happiness’ in a

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20) Happiness has established itself as a term of widest yet most precise meaning. Of course, the word prevailed all discussions of politics, ethics and psychology. It was as important yet shifting in its sense as the more studied term “nature.” It could tend toward a psychic invisibility, as the mental air men breathed. Yet more technical senses were always recoverable in the ongoing debate, particularly when men made narrow claims upon happiness as the basis of political sovereignty. For the details on the happiness principle, see Garry Wills, *Inventing America: Jefferson’s Declaration of Independence* 250 (Garden City/New York: Doubleday & Company Inc., 1978).

21) In Greek philosophy, “flourish, prosper” meant “happy,” so the former were different names of “happiness.” On these issues, Prof. Samuel Scheffler at U.C. Berkeley has several researches in terms of philosophy.

full scale. Locke's thought could not be told without explaining his natural law principle. Locke's natural law is the law of reason. Its only compulsion is an intellectual compulsion. The relations that it prescribes would exist if men should follow reason alone. Since reason is the only sure guide that God has given to men, reason is the only foundation of just government. Since governments exist for men, not men for governments, all governments derive their just powers from the consent of the governed. If the philosophy of Locke seemed to Jefferson and his compatriots just the common sense of the matter, it was not because Locke's argument was so lucid and cogent that it could be neither misunderstood nor refuted. Locke did not need to convince the colonists because they were already convinced by the type of government conforming to the kind of government for which Locke furnished a reasoned foundation.<sup>22)</sup> In America in late eighteenth century, the concept of natural law like Locke's were very prevalent and it became the basis of the Declaration. Actually, scanning the "Two Treaties on Government"<sup>23)</sup> which is Locke's most famous production in the field of political thought, many scholars have pointed out the similarity of thought and expression many times.

The happiness principle is started to come up in connection with government principle in natural law principle above. The phraseology of pursuit of happiness is undoubtedly the most significant feature of Jefferson's theory of rights because it raises government above the mere negative function of securing the individual against the encroachments of others. By recognizing a right to the pursuit of happiness, the state is committed to aid its citizens in the constructive task of obtaining their desires, whatever they may be. The state is to secure, not merely the greatest happiness of the greatest number, but so far as possible the greatest happiness of all its citizens, whatever their condition. Accordingly, it may well mean that many will be restrained from achieving the maximum of happiness, that others less fortunate may obtain more than the minimum.

Conclusively, we could say that the pursuit of happiness clause has its roots in natural law idea of England in eighteenth century that could be represented by John

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22) Carl Becker, *The Declaration of Independence: A Study in the History of Political Ideas* 71-73 (New York: A.A. Knopf, 1953).

23) 'The Two Treaties on Government' was published in the year 1690 in which he brought forth his equally famous contribution to psychology, his "Essay on the Human Understanding."

Locke although happiness principle could trace back further as much as to Greek philosophy.

Influenced by the philosophical legacies above, the first American document that articulates ‘the pursuit of happiness’ appeared at last. It is ‘The Virginia Declaration of Rights’ in 1776. Written by George Mason, the Declaration was adopted by the Virginia Constitutional Convention on June 12 in 1776. The section 1 of the Declaration contains the pursuit of happiness principle. It writes, “That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”

The influence of John Locke is discernible in Mason’s writing in the years just prior to 1776. However, Mason was able to apply those principles to local politics and to give them a new meaning in their American application.<sup>24)</sup> There is difference between the Mason proposal and the final draft. A comparison of the Mason proposal with the final draft of this far-reaching document indicates the harmony between his thinking and that of the articulate leaders of Virginia in 1776. Mason’s original draft contained fourteen articles. In the final plan, only two were added, neither of which Mason himself considered “of a fundamental nature.” The preamble declared that this list of rights was set down for the people of Virginia “and their posterity, as the basis and foundation of government.” All men are created equally free and independent with certain inherent rights, “namely, the enjoyment of life and liberty with the means of acquiring and possessing property and pursuing and obtaining happiness and safety.”<sup>25)</sup> Accordingly, the pursuit of happiness principle was not touched by correction. It was there from Mason’s first draft to the final corrected version. As to the pursuit of happiness principle, the idea was Locke’s, but the felicitous expression was Mason’s. A comparison of the statement with Jefferson’s wording of the Declaration of Independence that we will look over below suggests that Mason exerted an influence

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24) Like many other revolutionary leaders who were his associates, Mason did not seek a host of offices but rather served when his health, his conscience, and his constituents permitted. His career as a public servant reached a pinnacle with the adoption of the Virginia Declaration of Rights. Robert Allen Rutland, *The Birth of the Bill of Rights 1776-1791* (Chapel Hill: Univ. of North Carolina Press, 1955) at 35.

25) *Id.* at 38.

upon the final phraseology of that document.<sup>26)</sup>

As the most powerful of the American colonies, Virginia amiably had taken a leading role in guiding the passive resistance to England until the abandonment of that strategy for an active rebellion. The Virginia Declaration of Rights broadened the conception of the personal rights of citizens as no other document before its adoption had done. The Virginia Declaration of Rights was widely copied by the other colonies and became the basis of the federal Bill of Rights.

One month later, the pursuit of happiness principle was drawn on by Thomas Jefferson for the opening paragraphs of the Declaration of Independence; “We hold these truths to be self-evident, that all men are created equal. That they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.” Jefferson was chosen to draft the Declaration because he was known to possess a “masterly pen.”<sup>27)</sup> The phrase, “the pursuit of happiness,” is seen from the rough draft and it is kept intact all during the three stages although many other parts of the Declaration had to be cut out or replaced. According to a historian named Garry Wills, Jefferson’s use of the “pursuit of happiness” as the natural right to rank with life and liberty is not a vague or “idealistic” or ill-defined action, but one consistent with everything else he wrote in the Declaration of Independence and outside of it.<sup>28)</sup> Besides, Chares Maurice Wiltse put emphasis on the importance of Jefferson’s happiness principle by saying “In a sense all the natural rights are subsumed by Jefferson under his happiness principle, because the right to pursue happiness presupposes the guarantee of life and liberty. But it is not assumed that the rights named in the Declaration of Independence exhaust the list, except in so far as the last named is inclusive. These form the starting point of Jefferson’s political creed because they are the rights it was necessary to assert in order to establish the argument for separation from England.”<sup>29)</sup> There is somewhat different point of view by Herbert Lawrence Ganter who confesses the ambiguity of the meaning of happiness principle

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26) *Id.* at 35-36.

27) Carl Becker, *supra* note 22 at 194.

28) Garry Wills pointed out that only when we realize this can we bridge the great disjunction that has haunted all Jeffersonian studies of recent years. Garry Wills, *supra* note 20 at 255.

29) Herbert Lawrence Ganter, *Jefferson’s Pursuit of Happiness and Some Forgotten Men*, 16 William and Mary College Quarterly Historical Magazine 422, 559.



with 'life' and 'liberty' by saying "No attempt was made to define precisely, nor in the order of their comparative merit, just what these rights were believed to be; but a sufficiently comprehensive field of human activities and aspirations was embraced within the compass of the three which Jefferson selected - that is life, liberty and the pursuit of happiness."<sup>30)</sup>

Comparing with the Mason's phraseology of the pursuit of happiness, many noted the difference between Jefferson's language and Mason's; where Mason referred to "pursuing and obtaining happiness," Jefferson mentioned only "the pursuit." This is said to make Jefferson both more realistic and more idealistic than his model. He is realistic because he knows man cannot arrive at perfect happiness, only aspire to it. He is idealistic because he puts that aspiration among the basic rights.<sup>31)</sup> Jefferson uses "pursuit" as Locke does, even when refining Locke's doctrine on freedom.<sup>32)</sup> This gives us material enough to remove one misapprehension about Jefferson's phrase. So far as the 'Fathers' were directly influenced by particular writers before 1776, the writers were English rather than French, and notably Locke who is famous for 'treatise on civil government' rather than Rousseau who is represented by 'social contract theory.' Most Americans had absorbed Locke's works as a kind of political gospel, and the Declaration of Independence follows closely certain sentences in Locke's second treatise on government in its phraseology as well as in its form.<sup>33)</sup> Jefferson copied Locke and Locke quoted his forebears such as Hooker. In political theory and in political practice the American Revolution drew its inspiration from the parliamentary struggle of the seventeenth century. The philosophy of the Declaration was not taken from the French<sup>34)</sup> and it was not even new.<sup>35)</sup>

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30) *Id.* at 423.

31) Garry Wills, *supra* note 20 at 245.

32) The Declaration of Independence is essentially of Lockian origin, but it does not ensue that Jefferson had memorized Locke, nor even that he was conscious, when he wrote the document, that he was using a Lockian phraseology. Thomas Jefferson, *The Apostle of Americanism* 72 (Boston: Little Brown and Co., 1929).

33) This is interesting, but it does not tell us why Jefferson, having read Locke's treatise, was so taken with it that he read it again and again so that afterwards its very phrases reappear in his own writing. Carl Becker, *supra* note 22 at 27.

34) Rather, as is commonly known, the philosophy and phraseology of the Declaration of Independence was taken by the French. The pursuit of happiness phrase is one of them. By the time of Lafayette's draft Declaration of Rights (1788), a further refinement was added. The phrase normally translated as "pursuit of happiness" is "*la recherche du bien-être.*"

35) Carl Becker, *supra* note 22 at 79.

Later, Americans came to have their federal Bill of Rights separate from the Declaration of Independence. However, because the federal Bill of Rights was unembellished by assertions of men's original equality or their unalienable rights or the fundamental power of the people or their right to change or replace their government, individuals who found it useful to cite those old revolutionary principles on behalf of some cause in national politics had to turn to the Declaration of Independence.<sup>36)</sup> Especially, the pursuit of happiness was excluded in the final version of federal Bill of Rights as a result.

What attracts my attention most of all while I examine the constitutional documents containing pursuit of happiness phrase is that the 'property' and the 'pursuit of happiness' is interchangeably used with 'life and liberty' substituting each other. At first, the property was used following 'life and liberty.' The first Continental Congress in its resolutions of October 14, 1774 declared that the colonists were "entitled to life liberty and property." Less than two months previously, a Boston Committee of Correspondence had stated, "We are entitled to life liberty and the means of Substance." The Massachusetts Council on January 25, 1773, had asserted, "Life, liberty, property, and the disposal of that property, with our own consent, are natural rights." Samuel Adams and other followers of Locke had been content with the classical enumeration of life, liberty, and property. However, in Jefferson's hands the English doctrine was given a revolutionary shift. The substitution of "pursuit of happiness" for "property" marks a complete break with the Whiggish doctrine of property rights that Locke had bequeathed to the English middle class, and the substitution of a broader sociological conception. It was this substitution that gave to

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36) Compared to the bills or declarations of rights in state such as Virginia or Massachusetts, the federal Bill of Rights was a sorry specimen, a lean summary of restrictions on the federal government, tacked onto the end of the Constitution like the afterthought it was, with no assertion of fundamental revolutionary principles. At first, James Madison proposed on June 1789, the federal Bill of Rights would have looked more like those of the states. Madison moved that a declaration be "prefixed to the constitution" in the traditional manner, and there was the phrase of pursuit of happiness in it coexisting with right of property; "with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety." The first Congress was dominated by Federalists, so it was even less convinced than Madison that the Constitution needed to be amended so soon after it went to effect and cut back and redefined his proposals if at all. It eliminated the "prefix" and sent to the states for ratification twelve amendments that were to be listed at the end of the Constitution. Of those twelve, the states accepted ten by December 15, 1791. At last, those ten amendments are the Federal Bill of Rights.

the document the note of idealism that was to make its appeal so perennially human and vital. The words were far more than a political gesture to draw popular support. They were an embodiment of Jefferson's deepest conviction, and his total life thenceforward was given over to the work of providing such political machinery for America as should guarantee for all the enjoyment of those inalienable rights.<sup>37)</sup> Or, based on natural law principle that deeply affected him, possibly, Jefferson used the phrase 'pursuit of happiness' rather than 'property' because he regarded property as a right derived from the state, whereas he was enumerating in the Declaration only "natural" rights, and "it is moot question whether the origin of any kind of property is derived from nature at all."<sup>38)</sup>

However, the pursuit of happiness is substituted by 'property' again. The Fifth and Fourteenth Amendments to the Constitution of the United States prohibit deprivation of "life, liberty, or property" without due process of law. Namely, Fifth Amendment of the U.S. Constitution provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger... nor be deprived of life, liberty or property, without due process of law." Besides, the second sentence of the Fourteenth Amendment prescribes, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

The reason that the pursuit of happiness and the property have shown up alternatively in many constitutional documents could be explained connected with slavery system in early America. As shown above, the 'property' was used with 'life and liberty' in England and American colonies. By the way, in early America, slavery was a 'property' in Southern states, so 'property' was a word proving that they have slavery system. Jefferson seems to have refused to use 'property' in this reason. Instead, he used 'pursuit of happiness' borrowing from natural law principle in

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37) If the fact that he set the pursuit of happiness above abstract property rights is to be taken as proof that Jefferson was an impracticable French theorist, the critic may take what comfort he can from his deduction. Herbert Lawrence Ganter, *supra* note 29 at 428-29.

38) Edward Dumbauld, *The Declaration of Independence and What It Means Today* 60-61 (Norman: Univ. of Oklahoma Press, 1950).

England of Eighteenth century. What Jefferson wanted to provide in the Declaration of Independence was not advocacy of slavery. Rather, it was declaration of pursuit of the happiness as the inalienable right to all people regardless of their skin color; Concerned with slavery system and pursuit of happiness, many scholars point out that drafting the Declaration of Independence Jefferson meant to set up a standard maxim for free men which should be familiar to all, and revered by all; constantly looked to, and constantly labored for, and even though never perfectly attained, constantly approximated and thereby constantly spreading and deepening its influence, and augmenting the “happiness” and value of life to all people of all colors everywhere.<sup>39)</sup> However, Jefferson’s ‘pursuit of happiness’ was replaced by ‘property’ again due to the political and historical reason connected with slavery system at that time. In state level, the ‘property’ and ‘pursuit of happiness’ was replaced by each other according to the politics on slavery at each time.

If so in federal constitutional documents, what would be the situation in the state level? After the final break with England, most of the new commonwealths gradually fell into line with the Virginia example. By 1784 the sweep of constitution-making had covered every section of the Republic.<sup>40)</sup> Besides the protection that the Fifth and Fourteenth Amendment to the Constitution of the United States give to “life, liberty, and property,” it should be noted that many states have expressly incorporated in their constitutions to the substance of the Declaration’s recognition of the citizen’s right to “life, liberty, and the pursuit of happiness.” Moreover, the acts of Congress providing for the admission of some ten states to the Union contain provisions requiring that the state constitutions shall not be repugnant to the Declaration of Independence.<sup>41)</sup>

Generally speaking, in the long run, no less than thirty-one states<sup>42)</sup> of the Union

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39) Pauline Maier, *American Scripture* 203-204 (New York: Alfred A.Knopf, 1997).

40) In the spring of 1784 the New Hampshire convention proclaimed its bill of rights adopted at last among the commonwealths. Robert Allen Rutland, *supra* note 24 at 41.

41) Thus the act of April 19, 1864, for the admission of Nebraska provides “That the constitution, when formed, shall be republican, and not repugnant to the Constitution of the United States and the principles of the Declaration of Independence.” Edward Dumbauld, *supra* note 38 at 62-63.

42) The thirty-one states are Alabama, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming. Everett V. Abbot, *Inalienable Rights and the Eighteenth Amendment* 20 Colum. L. Rev. 183, 187 (February, 1920).

have inserted the substance of that passage from the Declaration of Independence - the pursuit of happiness phrase - with occasional individual modifications of phraseology into their state constitutions and have therefore made it the written law of almost two-thirds of our federated republics.<sup>43)</sup> Finally, when concepts like life, liberty, property, reputation, safety and security are enumerated in conjunction with happiness, the inference seems plain that those who wrote these constitutions felt it necessary to enumerate and distinguish happiness from a variety of other general nouns. As an example having the pursuit of happiness phrase in its State Constitution, the state of Ohio could be called. Art. 1 of Ohio State Constitution on inalienable rights provides, "All men are, by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

### *B. Court Decisions on the Pursuit of Happiness Clause in the U.S.*

So far, we overviewed the meaning of the pursuit of happiness clause in the U.S. referring to the constitutional documents and its expositions by many thinkers and scholars. In as much as the right to happiness is guaranteed by the fundamental documents, we shall have to turn to the courts if we desire to comprehend the 'legal' meaning of the phrase. Generally speaking, the courts' interpretation of the pursuit of happiness clause has come and gone between two pivots.

The first pivot could be that judges have been frequently content to leave the idea in convenient obscurity and haven't given any vivid and specific legal meaning to it. Of course, it is not the business of the law to write a critical history of philosophy or of morals, nor is the duty of a judge to reason like a trained metaphysician. When court decisions have turned on the meaning of the pursuit of happiness, judicial dicta have therefore been confined to the common sense of the matter on the whole. Unfortunately, in law as in epistemology, the common sense of the matter is frequently

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43) In other words, approximately two-thirds of the state constitutions adopted by the American people from the beginning of their independence to the beginning of the 20<sup>th</sup> century have solemnly stated a right to happiness, or to pursue happiness, or to pursue and obtain happiness, or to pursue and obtain happiness and safety, or to pursue happiness in some other connection is a remarkable fact. It is likewise notable that many constitutions declare there is a popular right to alter or abolish a government that fails to secure happiness for the people.

a screen for a whole series of difficulties, and, as if conscious of this truth, some judges have spoken as if they wished the wretched thing would quietly go away in pronouncing on the right to happiness. In this position, the common sense of the matter is so different according to the judges and so vague in its meaning that we cannot say that a specific legal right with a normative power could come from the pursuit of happiness clause. The pursuit of happiness clause is not a provision prescribing a specific right that can be the standard of judicial decision and have normative power in a real case but just a declaration of political philosophy on which the nation is standing. Namely, the pursuit of happiness is not legal but political and philosophical. In this position, the pursuit of happiness clause is not vividly introduced in the legal decisions by courts. That is why I cannot find appropriate examples from cases by courts.

The other pivot is the courts' position to give normative power and legal meaning to the 'pursuit of happiness' and interpret it to be same as a 'property' right. As we have seen above, the 'pursuit of happiness' and 'property' was interchangeably used substituting each other in many constitutional documents. Such kind of history in constitutional documents became one of the grounds of this position of the American courts.

Let's see the state court decisions on this position first because there are more state court cases concerning the pursuit of happiness than federal court cases. In the light of this observation, it may be surmised that I have not surely discovered when the problem of defining happiness first appeared in an American state courts. However, as seen above, different from the federal Constitution that substituted 'pursuit of happiness' with 'property', no less than thirty-one states have inserted the pursuit of happiness phrase with occasional individual modifications of phraseology into their state constitutions and have therefore made it the written law of almost two-thirds of the federated republics. Accordingly, in state court level, there have been much more decisions using the pursuit of happiness in real cases identifying the pursuit of happiness with a property right than federal courts.

The two cases from the first half of the nineteenth century, though they are a good many years apart, illustrate the possible extremes of definition, since the first decided in 1810, turns upon the problem of happiness in the world to come, and the second, which dates from 1855, is a vigorous explication of happiness here and now. The former was the opinion of the court as delivered in 1810 by Mr. Chief Justice Parsons of the Supreme Judicial Court of Massachusetts that equated happiness with

Christianity, and not merely with Christianity but with Protestant Christianity, and not merely with Protestant Christianity but with the support of that church by Massachusetts.<sup>44)</sup>

The latter that understands the pursuit of happiness as a property right was as follows. In 1855, the Supreme Court of Indiana flatly declared that a state prohibition law was a gross violation of the right to pursue happiness.<sup>45)</sup> Asserting that the rights to life, liberty and the pursuit of happiness existed anterior to the constitution, and, as it were, splitting the right to happiness into two parts—a right to enjoyment and a right to acquire and enjoy property. In Kentucky in 1909, this spirit reappeared in *Commonwealth v. Campbell*, when Court of Appeals voided a municipal ordinance forbidding the bringing of liquor into Nicholasville, Kentucky. A typical utterance in this regard is a decision of the Wisconsin Supreme Court in an inheritance tax case of 1906, when the bench remarked that “the inherent rights here referred to are not defined, but are included under the very general terms of life, liberty and pursuit of happiness. It is relatively easy to define life and liberty but it is apparent that the term, pursuit of happiness, is a very comprehensive expression that covers a broad field.”<sup>46)</sup> However, in later years, there has been a tendency not to confine the inalienable right to happiness to the pursuit of one’s calling, but to take a wider range. In *Terr. Washington v. Ah Lim* (24 Pac 588), Ah Lim sued on the ground that a territorial statute—then Territory of Washington—depriving him of the right to smoke opium was an unwarrantable violation of his right to life, liberty and pursuit of happiness through a limitation upon the means and ways of enjoyment. The majority opinion went against Ah Lim saying, “It is common to indulge in a great deal of loose talk about natural rights and liberties, as if these were terms of a well defined and unchangeable meaning. There is no such thing as an absolute or unqualified right or liberty guaranteed to any member of society.” This case was standing on the side against individual rights implying that the state has a moral duty to protect itself against its enemy, the individual.

On the contrary, there have been many state court decisions that stand against the

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44) *Thos Barnes v. First Parish, Falmouth*, 6 Mass. 334 (1810).

45) *Herman v. The State*, 8 Indiana 545 (1855). For the analysis of the case, see Howard Mumford Jones, *The Pursuit of Happiness* 36-38 (Cambridge: Harvard Univ. Press, 1953).

46) *Nunnenmacher, Trustee v. The State*, 108 NW 627 (Wisconsin, 1906).

position above. They insist the pursuit of happiness have neither legal meaning nor normative power to be applied in real cases. The following could be an example. The court cited the Old Testament to prove that Mosaic law bristled with provisions recognizing the right of inheritance. The court presumably had in mind the King James Bible. According to Young's Concordance, the word "happy" or "happiness" occurs in the Old Testament seventeen times, but in no case does happiness refer to property but to life wisely lived according to the precepts of Almighty.<sup>47)</sup>

Let's see the federal court decisions on this position next. Although the Virginia Declaration of Rights and Declaration of Independence has the pursuit of happiness in it, as shown above, the U.S. Constitution has not the 'pursuit of happiness' but the 'property' instead of it in its text. Accordingly, in federal courts which mainly interpret federal Constitution, the life, liberty and property in the Fourteenth Amendment are not the same thing as life, liberty and pursuit of happiness, or at least they were not the same thing until the federal judges made them interchangeable by drawing the Fourteenth Amendment under the shadow of the Declaration of Independence and then inferring a definition of happiness as constitutional under a constitution which never mentions happiness.<sup>48)</sup> For this legislative reason, as there is no phrase of 'pursuit of happiness' in the U.S. Constitution in a strict sense, the federal cases saying the pursuit of happiness in their decisions are very rare.

Loving case<sup>49)</sup> could be the appropriate example on using the pursuit of happiness clause in federal court level in 1960s that is comparatively recent. Particularly, the Loving case has similar facts with the Korean case concerning marriage prohibition between persons with same surname and family origin because both of them are dealing with the issue of prohibition of a certain type of marriage by law.

The fact of this case could be summarized as follows. In 1958, two residents of Virginia, Mildred Jeter, a black woman, and Richard Loving, a white man got married in the District of Columbia pursuant to its law and just after their marriage they returned to Virginia and established their marital residence there. A county grand jury issued an indictment charging the couple with violating Virginia's ban on

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47) For instance, Psalm 146:15 reads, "Happy is he that hath the God of Jacob for his help, whose hope is in the Lord his God." Howard Mumford Jones, *supra* note 45 at 58.

48) *Id.* at 47.

49) *Loving v. Virginia* 388 U.S.1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).



miscegenation. In 1959, the couple meekly pleaded guilty to the charge to be sentenced to one year in jail. However, the trial judge suspended the sentence for 25 years on the condition that the couple leave the state of Virginia and never return there together for 25 years. After their convictions, the couple held their residence again in the District of Columbia. In November in 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence based on the fact that the violated statutes were against the Fourteenth Amendment and in October in 1964, the couple instituted a class action in the United States District Court for the Eastern District of Virginia requesting the court to declare the Virginia statutes unconstitutional and to enjoin state officials from enforcing their convictions. After passing through many courts in both state level and federal level that denied the couple's motion and affirmed the conviction, the case came to be before the U.S. Supreme Court. The majority opinion delivered by Chief Justice Warren held that the miscegenation statutes adopted by Virginia to prevent marriages between people solely based on the racial classification violate equal protection and due process clauses of Fourteenth Amendment.

After reviewing many issues concerning a facet of the Fourteenth Amendment, an equal protection clause,<sup>50)</sup> the Court started to deal with the other facet of the Fourteenth Amendment, due process clause, in which the phraseology of 'pursuit of happiness' is included by saying "These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth

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50) Actually, the court devoted much more pages to equal protection argument than due process. However, because I am focusing on the issue of 'pursuit of happiness,' I position this part in footnote rather than the text. The issues on the equal protection in this case could be summarized into three issues. First, the Court clarified the meaning of equal protection; the equal protection means more than the equal "application." A Virginia statute prohibits marriage between a white and non-white. The state rebuts an equal protection attack by asserting that the statute "applies equally" to whites and blacks because members of race are punished to the same degree. The Court refuted this as follows. The statute violates equal protection. The statute contains a racial classification and the fact that it has equal "application" does not immunize it from strict scrutiny. Since the legislative history shows that the statute was enacted to preserve the racial integrity of whites, the statute has only an invidious and discriminatory purpose and has no legitimate overriding one. Second, the Court considered whether the statutory classification constitutes invidious and arbitrary discrimination and belongs to the category of strict scrutiny. Racial classifications, particularly in criminal statutes like this case, are subject to the most rigid scrutiny-strict scrutiny-and must be essential to the accomplishment of some permissible state objective to be permitted. Third, to pass through the strict scrutiny, the racial discrimination should be necessary to a compelling state interest. However, the state has failed to show any legitimate overriding purpose for the distinction between one-race and interracial marriages other than invidious racial discrimination, so the statute cannot be upheld.

Amendment.” And then, the Court articulated the phraseology, the pursuit of happiness; “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free man. Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.” In these most important sentences, the Court is declaring ‘pursuit of happiness’ not as a fundamental right from which a normative power comes, but as the aim that the “life” and “liberty” pursues and as a principle that helps to interpret and limit<sup>51)</sup> the meaning of the “life” and “liberty.” Here, it is clear that the Court does not understand the ‘pursuit of happiness’ as a right. Rather, it understands the ‘freedom to marry’ as a “liberty” which is interpreted by the principle and its aim, the pursuit of happiness, because the Court says “The freedom to marry has long been recognized as one of the vital personal rights essential to the pursuit of happiness by free man.” Here, we can tell the clear position of the Court on the pursuit of happiness. The U.S. Supreme Court never acknowledged the pursuit of happiness that was substituted by “property” in some state courts and does even not appear in the U.S. Constitution, as a right but as the principle or aim.

Just after these sentences, the Court continues to explain commingling the due process clause with the equal protection clause of the Fourteenth Amendment; “To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.” Finally, the Court ends the part concerning the due process clause of the Fourteenth Amendment by saying that the freedom to marry, one of the “liberty,” cannot be limited and intruded by the State

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51) As fundamental concept in Constitution, “liberty” broadly encompasses interests more far-reaching than mere freedom from bodily restraint, but does not extend limitlessly to every conceivable individual interest that might impinge upon one’s pursuit of happiness in free society. About the scope of the meaning of “liberty” limited by the pursuit of happiness of others, refer to *Hodge v. Carroll County Dept. of Social Services*, D. Md. 1992, 812 F. Supp. 593 (1992). The term, “liberty” denotes the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. *State v. Louise B. Williams*, N.C. 1960, 117 s.e. 2d 444, 253 N.C. 337 (1960). As we could tell from all these cases, the pursuit of happiness is not a right but a principle to draw the boundary of the meaning of “life” and “liberty.”

because it is the “liberty” that cannot be deprived without due process of law of the Fourteenth Amendment; “The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.”

Tracing back to the stream of the time, we can meet some more precedents invoking the power of pursuit of happiness clause in the U.S. Constitution. However, many of them were just mentioning ‘pursuit of happiness’ as a part of introducing the Declaration of Independence as a whole to their argument. For instance, in *Bute v. People of State of Illinois*,<sup>52)</sup> Supreme Court of the United States said, “The Constitution was conceived in large part in the spirit of the Declaration of Independence which declared that to secure such ‘unalienable rights’ as those of life, liberty and the pursuit of happiness.” However, they did neither focus on the pursuit of happiness nor acknowledge the pursuit of happiness in the Declaration of Independence as an enforceable right.

All the way back to 1920s, there were two important federal cases invoking the power of pursuit of happiness that has been frequently cited in the following federal cases concerned with the phraseology of pursuit of happiness.<sup>53)</sup> Those are *Olmstead v. United States*<sup>54)</sup> in 1928 and *Meyer v. State of Nebraska*<sup>55)</sup> in 1923.

In *Olmstead v. U.S.*, the majority opinion gained weak position because the Justices divided 5 to 4.<sup>56)</sup> Roy Olmstead, Charles S. Green, Edward H. McInnis, and others were convicted of a conspiracy to violate the National Prohibition Act and those convictions were affirmed by the Circuit Court of Appeals<sup>57)</sup> and they brought certiorari. Judgments of Circuit Court of Appeals were affirmed and mandate was directed under rule 31 by the majority of the Court.<sup>58)</sup> However, the famous part of this

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52) *Bute v. People of State of Illinois*, 333 U.S. 640, 68 S. Ct. 763 (1948)

53) According to search in Westlaw, there have been 90 Supreme Court cases that use the phraseology of “pursuit of happiness” in its decision since *Green v. Biddle* (21 U.S. 1, 5 L.Ed. 547, 8 Wheat. 1) in 1821. However, most of the cases since 1920s have used the phrase not in their own argument but just citing these two cases.

54) *Olmstead et al. v. United States*, 277 U.S. 438, 48 S. Ct. 564 (1928)

55) *Meyer v. State of Nebraska*, 262 U.S. 390, 43 S. Ct. 625 (1923)

56) Justice Brandeis, Justice Holmes, Justice Butler, and Justice Stone dissented.

57) *Olmstead et al. v. United States*, 19 F. 2d 842, 53 A. L. R. 1472 (1927)

58) To summarize the fact of this case, the defendants were convicted in the District Court for the Western District

decision is not the majority opinion delivered by Chief Justice Taft but the dissenting opinion of Justice Brandeis. He rejected the evidence obtained by wire tapping applying to the Fourth and Fifth Amendments and Fourteenth Amendment the established rule of construction. In the argument applying the Fourteenth Amendment, he understood the pursuit of happiness not as an enforceable right but as a “condition” the right to be let alone pursued by saying, “The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.” He continues to paraphrase the meaning of the pursued condition, “happiness”, by saying “They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things.” And, finally, he draw out the right to be let alone from the Fourteenth Amendment and conclude that the right to be let alone is intruded by the government in this case; “They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.” It is clear from this that Justice Brandeis did understand as a right not the pursuit of happiness but the right to be let alone derived from “liberty” in the Fourteenth Amendment. He even eulogized the right to be let alone as “the most comprehensive of rights and the right most valued by civilized men” in relation to the government.

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of Washington of a conspiracy to violate the National Prohibition Act by unlawfully possessing, transporting and importing intoxicating liquors and maintaining nuisances, and by selling intoxicating liquors. Olmstead was the leading conspirator and the general manager of the business. Of the several offices in Seattle for their business, the chief one was in a large office building. In this, there were three telephones on three different lines. There were telephones in an office of the manager in his own home, at the homes of his associates, and other places at the city. The information that led to the discovery of the conspiracy and its nature and extent was largely obtained by intercepting messages on the telephones of the conspirators by four federal prohibition officers. Small wires were inserted along the ordinary telephone wires from the residences of four of the defendants and those leading from the chief office. The insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses. The gatherings of evidence continued for many months.

Few years ago from the *Olmstead* case, the pursuit of happiness had spotlight from *Meyer v. State of Nebraska* case. In the case, Robert T. Meyer was convicted of an offense,<sup>59)</sup> and his conviction was affirmed by the Supreme Court of Nebraska<sup>60)</sup> and he appealed to the U.S. Supreme Court. In this case, the Supreme Court invalidated a state law that prohibited the teaching of foreign languages to young children. The Court held that the term, “liberty” in the Fourteenth Amendment, included many academic rights as well as non-academic rights. The right of teachers to teach and the right of students to acquire knowledge were among these. Accordingly, the right of Meyer to teach German, the right of students to learn German and the right of parents to engage him were within that zone of constitutionally-protected liberty. The Court applied what appears to have been a “mere rationality” test rather than any kind of strict scrutiny, but nonetheless concluded that the statute was “arbitrary and without reasonable relation to any end within the competency of the State of Nebraska.”

In more details, the Court focused on the Fourteenth Amendment concerned with this case after considering the religious freedom in the First Amendment.<sup>61)</sup> Here, the Court focuses on the “liberty” rather than “the pursuit of happiness” in the Fourteenth Amendment and enumerated the denotation of the “liberty”; “Under 14th Amendment of U.S. Constitution, providing that no state shall deprive any person of liberty without due process of law, ‘liberty’ denotes, not merely freedom from bodily restraint, but also the right of the individual to contract to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children, to worship God according to the dictates of his own conscience.” And it continues that the pursuit of happiness is the guideline that helps to interpret and limit the scope of “liberty” recognized at common law; “and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”

Conclusively and generally speaking, based on the research above, we could say that, in federal court, the pursuit of happiness or happiness itself has been understood

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59) Meyer, a parochial school language teacher had been convicted of violating a law prohibiting the teaching of any subject in a language other than English in the first eight grades of public and private schools.

60) *Meyer v. State*, 107 Neb. 657, 187 N. W. 100 (1922).

61) In the long reasoning, the Court denied the application of the religious freedom in the First Amendment to this case.

as an aim that constitutional rights should pursue as a condition to attain as well as a limit interpreting the meaning of “life” and “liberty” in the Fourteenth Amendment in U.S. Constitution, and, in state court, the pursuit of happiness has been understood either of two pivots; the one is to understand it as a political and historical term rather than legal term by interpreting it vaguely, and the other is to interpret it same as ‘property right.’ Therefore, by and large, the pursuit of happiness has been understood and interpreted by American courts as a declaratory political rhetoric rather than a legal terminology from which normative force directly comes from in federal level as well as in majority of state level.

*C. Pursuit of Happiness as a Declaratory Political Rhetoric in the U.S.*

As we have seen above, in the United States where ‘the pursuit of happiness’ appeared at constitutional documents for the first time in the world, the term, whether ‘happiness’ or ‘pursuit of happiness,’ has been used by the drafters of the documents and interpreted by the courts as a declaratory political rhetoric rather than legal term that has specific enforceable right in it. Some could bring forth a counter-argument on my position saying that some state courts in the U.S. have extracted property right from it. I want to refute this based on the reasons as follows. First, that is just because, the states that such courts belong to, have the pursuit of happiness in their state constitution different from the federal Constitution that doesn’t have it because U.S. Constitution used “property” instead of “pursuit of happiness” after “life” and “liberty.” Second, furthermore, even in those states that have pursuit of happiness in its state constitution, more precedents by the state courts interpret it to have no legal meaning; the trend could belong to the first pivot I mentioned before that judges have been frequently content to leave the idea in convenient obscurity and haven’t given any vivid and specific legal meaning to it. That trend has been the main stream even in state court level. The theory of happiness as an unalienable right antedates the American judicial system. If the courts have struggled to adapt an eighteenth-century concept to modern times, it may be that their confusion has in part been caused by their failure to study the history of the ways by which this influential concept became central in American political and cultural thinking.

There are some more positions that are on the same side with mine. Howard Momford Jones writes in his book, “In some sense, the norm of happiness being no

longer determined by an elite like Mason and Jefferson, one can say that the concept of happiness has been democratized in proportion as the causes of unhappiness has been popularized, but that this concept has not yet acquired legal or constitutional force.”<sup>62)</sup> He diagnoses the pursuit of happiness clause as not having legal or constitutional effect yet. Herbert Lawrence Ganter also concludes in his two long articles in the *William and Mary Quarterly* which was cited above that the phrase was widely and rather vaguely used and that Jefferson was correct when he called his declaration a mere voicing of the age’s common sense. Judging from this, even Jefferson, the drafter of the Declaration of Independence which introduced ‘pursuit of happiness’ to the constitutional documents for the first time in a full scale, did not intend to give it a legal or constitutional force. Besides, Robert Allen Rutland’s remark that denied giving legal force not only to the pursuit of happiness clause but also to the whole of Declaration of Independence, draws our attention. He insists in his book, “The Declaration of Independence was an indictment of England’s misdeeds, an instrument of propaganda, and the clearest statement of the philosophy behind the American Revolution. However, it was not a bill of rights since it provided not a single legal assurance of personal freedom.”<sup>63)</sup>

Even though we make maximum concession and admit the legal or constitutional force of the pursuit of happiness clause, it still has problem in itself because of its vagueness. We could not help hesitating to answer if we would be asked, “What constitutes the pursuit of happiness?” There is no standard in applying the pursuit of happiness clause to real cases.<sup>64)</sup>

#### **IV. Conclusion: Interpretation of Declaratory Constitutional Provisions**

It is not true that each and every provision in the Constitution includes judicially enforceable individual constitutional right for each. In the Constitution, there are some

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62) Howard Mumford Jones, *supra* note 45 at 163.

63) Robert Allen Rutland, *supra* note 24 at 41.

64) The other country in the world which has pursuit of happiness clause in the Constitution is Japan. Japan adopted pursuit of happiness clause from the U.S. in Art. 13 of its Constitution in 1946. However, I am confident that Art. 13 of Japanese Constitution could not be the object of comparison with Korean and American ones because it is

provisions that just declare the basic principle and spirit which go through the whole constitution. Also, there are some provisions that declare the ideal the constitution pursues, but its realization should take some time. The framers of the Constitution did not set up those general provisions to enable us to draw some specific right that has enforceable force and normative power in it. The general provisions are made to present the ideal that the whole Constitution should pursue and the standard in interpreting the other provisions that have specific constitutional rights in it. There are many examples of that kind of declaratory constitutional provisions. Usually, preambles of the Constitution belong to this. Many of general provisions in international human right statutes are the declaratory provisions, too. In addition, the constitutional provisions that proclaimed the principle of welfare right are usually declaratory provisions that wait for the time the spirit of welfare could be realized when national finance permits it.

Like these, the pursuit of happiness clause in Korean Constitution is a declaratory provision with no enforceable force and normative power in it. Therefore, the Korean Constitutional Court could not say that the pursuit of happiness prescribed in Art.10 of Korean Constitution is a right that is intruded by the Civil Code provision prohibiting the marriage between the couples with same surname and family origin.

The Korean Constitutional Court's attitude invoking declaratory constitutional provision neglecting the more appropriate and suitable provision for the case, should be criticized. Why are they making vain efforts laying aside an easy and clear way? If the Court unnaturally and unreasonably counts on that kind of declaratory provisions by exaggerating it as a provision with a specific right and it happens on and on without being corrected, the Court could lose the persuasive power to its audiences. Further, it would undermine the dignity of the judiciary and give harmful effect to the development of judicial activism that is, in my opinion, most desirable in Korean judiciary.<sup>65)</sup> That is because legitimate judicial activism is based on the persuasive and

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recognized and interpreted by Japanese legal scholars and judges as a general provision that includes non-enumerated rights declaring the spirit that the rights that are not expressly enumerated in the Constitution should not be neglected. Therefore, Art. 13 of Japanese Constitution is not just like the pursuit of happiness clause in Korean Constitution and American constitutional documents in spite of its same phraseology, the pursuit of happiness, but just like Art. 37 Sec. 1 of Korean Constitution and Ninth Amendment of the U.S. Constitution that represent the natural law idea opposite to the legal positivism. For the details on this argument of mine, *see*, Jibong Lim, *supra* note 2 at 138-56.

65) For the reasons that Korean judiciary should be more active, *see id.* at 322-24.



exact development of the logic in decision by picking up and counting on the most suitable provisions for the case in a smooth and reasonable way. Only then, the active conclusion by the judiciary could have trust and support from the people and make the predictable resistance from the administrative branch and legislature silent.