
[Student Note]

The Role of Women in Korean Divorce Law

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Article 10 of the Korean Constitution guarantees that all citizens are equal in the eyes of the law and that discrimination based on sex is prohibited.¹⁾ However, traditional Confucian ideals that comprise the customs of South Korea often conflict with this Constitutional aim. Although family law has transformed greatly throughout the history of South Korea, the principle of sex equality in the law of divorce was disregarded for many centuries. This essay will examine the evolution of sex equality in South Korean Divorce Law.

Prior to the introduction of Confucianism, South Korean families were governed by matrilocal households. During the Three Kingdom Period, a newly married couple resided in the wife's home after the wedding. The husband joined the wife's family and the children of the marriage were reared in the maternal family home.²⁾ This system was considered to be practical for multiple reasons. First, both sons and daughters were entitled to equal share of the family inheritance. This required that the daughter be able to inherit land, since movable items often did not comprise an equitable share of the family assets.³⁾ Second, the husband received economic favors from the wife's family as a result of joining their family. Finally, the ability of the wife to inherit from her family equalized the power in the marriage and prevented her from being in a disadvantaged economic position.⁴⁾ These principles of equality among the sexes gave the woman a more secure position in marriage, divorce, and widowhood. By allowing a wife to inherit her family's property, she was economically capable of leaving her husband. A woman who sought to divorce her husband was not left to move out of her home, since her home had remained with her own family. Additionally, the matrilocal family setting ensured that she would not be

1) Erin Cho, *Caught in Confucius' Shadow: The Struggle for Women's Legal Equality in South Korea*, in 12 COLUM. J. ASIAN L. 125, 126 (Fall 1998). (Citing: "Article 10 of the Korean Constitution stipulates: 'All citizens shall be equal before the law, and there shall be no discrimination in political, economic, civil or cultural life on account of sex, religion, or social status'.")

2) *Id.* at 130.

3) *Id.* at 132-33 (Stating: "Many of the objections towards adopting the Confucian model not only stemmed from peoples' sentimental values, but also from their recognition of the potential practical problems it would raise, especially economic ones. Inheritance documents of the Dynasty clearly show that well into the seventeenth century daughters inherited the same share of property as their brothers regardless of whether they were married or not ... 'If the daughter moved into her husband's house, she could not take land but would have to be apportioned to her share of the inheritance in the form of slaves, clothes, daily utensils or perhaps some income from her family's land'.")

4) *Id.*

subject to mistreatment by her husband, since her male family members were there for her security.

Although there were many societal advantages to this matrilocal system, there was great political pressure placed on the South Koreans to adopt a male dominated Confucian family system. Yet the transition to a patrilocal marriage system, modeled on the Chinese system, was resisted for decades.⁵⁾ Finally, during the eighteenth century, the Chinese Confucian family system prevailed in South Korea.⁶⁾

The introduction of the Confucian family system in South Korea brought about many drastic changes in women's positions in marriage and divorce law. "According to Confucian tenets, a woman could be divorced for any one of seven reasons: 'failing to produce a son, gossiping, stealing, jealousy, loose conduct, disease, or unfiliality toward her parents-in-law' Only in cases where the woman had no place to go, had faithfully passed the three year mourning period for her parents-in-law, and had improved her in-law's household, could the husband not expel his wife."⁷⁾

The Confucian family law system implemented male family headship and a family register system that required a woman to leave her own family and join her husband's family legally as well as actually.⁸⁾ The family register system makes the male head of the family responsible for exercising the legal rights of the other family members. Therefore, women are not in an ideal position to bring their legal claims in the judicial sphere.

The Confucian system of law and societal norms modeled after the Ming Dynasty in China remained in place for centuries.⁹⁾ When Korea gained its independence from

5) *Id.* at 131.

6) *Id.* at 134.

7) *Id.* at 129.

8) Kay C. Lee, *Confucian Ethics, Judges, and Women: Divorce under the Revised Korean Law System*, in 4 PAC. RIM L. & POL'Y J. 479, 484 (May 1995) (Stating: "The family law still requires women to abandon their own family register upon marriage and enter into the husband's family register. Coupled with the Confucian male headship system which recognizes only the male head of the family as its legal representative, the registration law makes it nearly impossible for women to assert legal rights within the family and in their relations with the outside world. This patrilineal system significantly limits the women's right to property, since most property and business dealings are delegated to men, who tend to acquire the titles to property, which are exempt from division upon divorce.").

9) *Id.* at 485 (Koreans followed customary law handed down by the ancestors as examples of behavior until the

colonial Japan, it drafted a Constitution based on Western legal philosophies. “Article 10 of the Korean Constitution stipulates: ‘All citizens shall be equal before the law, and there shall be no discrimination in political, economic, civil or cultural life on account of sex, religion, or social status’. And Article 34 states: “Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes’.”¹⁰⁾ Additionally, “the constitution provides special protection to women by requiring the government to affirmatively promote the welfare and rights of women.”¹¹⁾

Although the more westernized Korean Constitution was adopted by the National Assembly in 1948, transitioning away from inequality among the sexes in the family law sphere was delayed.¹²⁾ Many of the inequitable Confucian principles regarding the family remained despite the new Constitutional Provisions to the contrary. However, movements to revise the family law system in Korea and gain conformity with the principles of equality outlined in the Korean Constitution led to the revision of the Korean Family Law system. This movement was brought about largely by Korea’s first female attorney, Dr. Lee Tai Young.¹³⁾ After the completion of her studies at the Seoul National University College of Law, Dr. Young organized multiple women’s groups in South Korea including “The Women’s Legal Counseling Center”, the “YWCA”, and the “Women’s Issues Research Center”.¹⁴⁾ In 1957, Dr. Young convinced her husband, National Assemblyman Chyung Yil Hyung to introduce a family law code she had drafted for the consideration of the National Assembly.¹⁵⁾ She gained the consideration of the National Assemblymen by publicly noting the importance of women voters to their election.¹⁶⁾ A few years later, in 1960,

Yi Dynasty (1392-1910 A.D.) imported a body of formal law from Ming China. The Ming Dynasty Code of China closely followed the basic tenets of Confucianism.).

10) Cho, *supra* note 1, at 126.

11) Lee, *supra* note 8, at 486.

12) Cho, *supra* note 1, at 126.

13) *Id.* (“The family law’s systematic discrimination of women has sparked a long protracted struggle to reform its contents. Largely under the vision of Korea’s first woman lawyer, Dr. Lee Tai Young, leaders of the family law revision movement have argued that Korea’s family law must be consistent with the principles of the Korean Constitution. Opponents of the revision, however, have maintained that the traditional Korean ways of governing man-woman relationships must not be discarded for Western-style innovations.”)

14) *Id.* at 145-46.

15) *Id.* at 146.

16) *Id.*

a family law code was passed.¹⁷⁾

Although the code predominantly reflected patriarchal principles of family law, there was some consideration for Dr. Young's proposals.¹⁸⁾ For example, a woman's consent was deemed to be requisite for a lawful marriage.¹⁹⁾ Additionally, women gained the right to bring legal disputes in a court of law without the permission of the male head of family.²⁰⁾ Further, women gained the right to own property free from their husband's management.²¹⁾ Most importantly, adultery on the part of the husband became grounds for a woman to petition for divorce.²²⁾ The earlier revision of the Criminal Code only allowed adultery to be considered criminal or grounds for divorce if committed by a woman.²³⁾

The movement towards equality in the Korean Family law had just begun. In 1962, the All Women's Federation proposed a change of the inheritance laws of South Korea.²⁴⁾ Additionally, the group petitioned for the establishment of a specialized family court, arguing that the sensitive nature of family law dictated a necessity for privacy of a specialized court.²⁵⁾ Shortly thereafter, the Family Court Procedure Act was revised to require all cases pertaining to domestic matters to be heard in the family court.²⁶⁾ "Its proclaimed purpose was to promote harmony and cooperation in the family based on individual dignity and equality between the sexes as mandated by the Constitution."²⁷⁾ In addition to the family court, a mandatory mediation service was established.²⁸⁾

17) *Id.*

18) *Id.*

19) *Id.* at 148.

20) *Id.*

21) *Id.*

22) *Id.*

23) *Id.* at 145.

24) Lee, *supra* note 8, at 486 ("In 1962, the All Women's Federation petitioned for an amendment of the inheritance laws and the establishment of a family court. The women representing the various organizations argued that 'family matter should be heard in secret hearings in which the parties may reconcile or reach an amicable settlement by appealing to the moral principles, compassion, and experience of the learned professionals in the educated, psychological, sociological, and medical fields.'").

25) *Id.*

26) *Id.* at 487.

27) Cho, *supra* note 1, at 151.

28) *Id.* ("As part of the procedure toward settling family disputes, a mandatory mediation process was enacted

The Women's Reform Movement was interrupted shortly thereafter by President Park, who disbanded all women's organizations and dismissed the National Assembly.²⁹⁾ However, a group called the Pan Korean Women's Group, remained intact despite the prohibition on women's organizations. This group drafted further revisions to the Family Code to be presented to the National Assembly when it was scheduled to reconvene.³⁰⁾ Due in part to the need to alter the preference for sons, since the desire to have sons rendered the two child per family limitation impracticable, the Government of South Korea decided that the family law needed alteration to reflect sex equality consistent with the Korean Constitution.³¹⁾ A revised version of the Family Law provisions of the Korean Civil Code was passed in 1977 based in part on the draft presented to the Assembly members by the Pan Korea Women's Group.³²⁾

Some of the changes presented in the 1977 revision included the requirement that the family court confirm that both parties agreed to a divorce, a widow's inheritance was increased to an amount equal to that of the eldest son, and unmarried daughters became entitled to receive a portion of the family inheritance equal to that of sons.³³⁾ Most importantly, property with an unclear title of ownership acquired after the marriage was required to be divided equally among the spouses in divorce.³⁴⁾ Prior to that revision, unclearly titled property was considered to be property of the husband.³⁵⁾ Additionally, both parents were given the right to make parental decisions and exert authority over the children.³⁶⁾ Prior to the revision, only the father was

and Lee was made one of the first members of the mediation committee.)

29) *Id.* at 151.

30) *Id.* at 153 (With President Park's prohibition of all discussions on constitutional reform and the Korean Central Intelligence Agency's declaration that the Pan Korea Women's Group activities violated that prohibition, the Pan Korea Women's Group decided to halt further formation of local branch organizations and the holding of campaigns in public. Yet, the Group's leaders continued to meet with legal scholars to complete a draft of an amendment to the family law by September 20, 1974, the date the National Assembly was scheduled to reconvene ... Because the Pan Korea Women's Group did not have the power to introduce a law on the floor of the National Assembly, leaders of the Group met privately with Assembly members to garner their support.)

31) *Id.* at 154.

32) *Id.* at 155.

33) *Id.* at 156.

34) *Id.*

35) *Id.*

36) *Id.*

allowed these rights.³⁷⁾

Although the American family law system varies from state to state, the trend is to divide any property purchased during the marriage equally between the parties without reference to the individual spouses contributions. Often, married women who are not members of the workforce are entitled to alimony, or spousal support payments from the husband, in a divorce. Additionally, child support payments are required in order to ease the financial burden on the parent who gets custody.

Following the 1977 revision to the family code, the divorce rate has steadily increased in South Korea.³⁸⁾ Women's groups continued to lobby for the elimination of the remaining discriminatory family law provisions.³⁹⁾ In 1989, Another Revision of the Family Law was adopted.⁴⁰⁾ This revision became effective on January 1, 1992 and is currently the version in practice in South Korea.⁴¹⁾ While it still contains many discriminatory provisions by Western standards, it is a vast improvement in the sphere of sex equality from the previous Confucian traditions of family law.⁴²⁾

The Korean Civil Code provides for two kinds of divorce. One is 'divorce by agreement' and the other is 'judicial divorce on grounds for divorce'. Article 834 of the Korean Civil Code provides, 'The husband and wife may divorce by mutual consent' Article 840 of the Korean Civil Code provides: Husband or wife may apply to the Family Court for a divorce in each case mentioned in the following Subparagraphs: (1) If the other spouse has committed an act of unchastity; (2) If he or she has been deserted maliciously by the other spouse; (3) If one spouse has been extremely maltreated by his or her lineal ascendants; (4) If one spouse's lineal ascendant has been extremely maltreated by the other spouse; (5) If the life or death of the other spouse has been unknown for three years; and (6) If there exists any other cogent reason for which it is difficult for him or her to continue the marriage."⁴³⁾

37) *Id.*

38) Lee, *supra* note 8, at 490.

39) Cho, *supra* note 1, at 163.

40) *Id.* at 164.

41) *Id.* at 164.

42) Mi-Kyung Cho, *Korea: the 1990 Family Law Reform and the Improvement of the Status of Women*, 33 U. LOUISVILLE J. FAM. L. 431, 431-32 (1994-1995).

43) *Id.* at 438-39.

Prior to the 1990 revisions, a judicial divorce was only granted to an innocent spouse. Only innocent spouses could claim damages in a divorce proceeding.⁴⁴⁾ Damages could be sought for both mental distress and division of property.⁴⁵⁾ Article 839-2 of the Korean Civil Code States:

“(1) One of the parties who has been divorced ... may claim a division of the property against the other party; (2) If no agreement is made for a division of property as referred to in Paragraph (1), or it is impossible to reach an agreement, the Family Court shall, upon request of the parties, determine the amount and method of division taking into consideration the amount of property realized by the co-operation of both parties and other circumstances.”⁴⁶⁾

However, only an innocent party can claim damages, so if a wife is not innocent of the marital default, then she is not entitled to compensation, division of property and may even be required to pay her husband damages.⁴⁷⁾ Yet the Family Court in Korea is transitioning toward equitable judgments in divorce law. For example, in the judgment rendered by the Seoul Gajong Bopwon, the Korean Family Court, awarded a wife fifty percent the marital property. Although this was an extremely rare outcome, the court found that since the husband was still in his medical training at the time of the marriage, all of the property accumulated during the marriage was to be divided.⁴⁸⁾ Again the court split the marital property evenly in a case where the wife had not only performed the domestic duties, but was the primary financial provider for the family.⁴⁹⁾ Yet the court has also determined that some mitigating circumstances may actually serve to reduce the award to the wife. In one case, the court held that the taking of family funds, frequently leaving the home and being unchaste was grounds for an award reduction.⁵⁰⁾

However, as the Court has progressed under the new revisions to the Civil Code,

44) *Id.* at 439.

45) *Id.* at 440.

46) *Id.*

47) *Id.*

48) Cho, *supra* note 8, at 498.

49) *Id.*

50) *Id.* at 499.

more equitable remedies have been issued by the courts. For example, the court has recently determined that, “even a wife who is at fault is entitled to some amount of marital property.”⁵¹⁾ Additionally, the court decided in one case that a wife’s homemaking services were worth as much as thirty percent of the marital property.⁵²⁾

Child Custody under the Korean Family Law is also an area that has seen some equitable revision. Prior to the revisions, the father was the always the recipient of the children following a judgment of divorce, unless the couple had come to an alternative arrangement by agreement.⁵³⁾ Additionally, regardless of the custodial parent of the child, the father remained the parental authority for any decisions to be made regarding the child.⁵⁴⁾

Another move towards a non-discriminatory family law system granted by the 1990 revision was the introduction of the idea of visitation rights. “Article 837-2 of the Korean Civil Code provides, ‘A father or mother, who does not bring up directly his or her own child or children, shall have the right to interview and negotiation’.” This concept is new in Korean Family law. Prior to the 1990 revision, a mother could not visit with or negotiate over the handling of her child.⁵⁵⁾

However, the 1990 revision amended this law. “Now when, ‘parents are divorced, the person who is to exercise the parental authority, shall be determined by an agreement between the father and the mother, and if it is impossible to reach an agreement, or they fail to reach an agreement, the Family Court shall determine it upon a request of the parties’.”⁵⁶⁾ Although the law has changed to allow the mother to attain custody in some circumstances, the determination of child custody is often determined by the economic status of the parent. This is a criterion that is difficult for

51) *Id.* at 498.

52) *Id.*

53) *Id.* at 501 (“The historic revision of Korean family law requires a couple to jointly determine the question of child custody upon divorce. Prior to the revision, the father automatically claimed child custody, unless he waived this right. Moreover, even if the father waived his right to child custody, he remained the sole parental authority “chinkwon”. Thus, the mother was compelled to defer to the remote father’s decision on all matters regarding the selection, registration, and transfer of the child’s school; a child’s marriage before reaching the legal age for marriage; management and disposal of the child’s property; and any other matters related to the child’s education, health and welfare.”).

54) *Id.*

55) Cho, *supra* note 42, at 442.

56) *Id.* at 443.

women to overcome based on the limited division of property and non-domestic job skills. For example, the Seoul Gajong Bopwon awarded a husband custody of the children regardless of the husband's fault causing the divorce. The court noted the decision as being based on the fact that the children had resided with the father during the separation and that he was more financially stable than his wife.⁵⁷⁾ In another case, the court held that a father possessing a greater economic capability was entitled to custody regardless of his fault in the divorce and his history of domestic violence.⁵⁸⁾

Additionally, children of divorce in South Korea are subjected to unfair social stigmatism. "Social stigma and discrimination against single mothers and nonmarital children has forced unmarried mothers in South Korea to relinquish their newborns for adoption."⁵⁹⁾ Although the changes to the Korean Family Law Code may have improved the situation for women seeking a divorce in South Korea, the increased frequency of divorce as a result of these changes leaves many children subjected to this type of labeling. In the United States, children are less stigmatized by divorce due to the increased social acceptance of single parenthood in American culture. However, until South Korean culture alters its outlook on single parenthood, children in South Korea will be victimized for their parents' mistakes.

In the United States, custody is commonly awarded to the mother of the children with the father having visitation rights or temporary custody. American courts occasionally diverge from this trend depending on the circumstances. For example, if a mother is deemed by the courts to be unfit, custody is more likely to be awarded to the father. However, proving a mother's unfitness is often a difficult task in American family law. Further, financial concerns pertaining to the maintenance of children are rarely considered by the American family law courts since the spouse not in custody of the children is required to make child support payments in order to mitigate these expenses.

57) *Id.*

58) *Id.*

59) Solangel Moldonado, *Discouraging Racial Preferences in Adoptions*, in 39 U.C. DAVIS L. REV. 1415, 1432 (April 2006); see also David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Buying, Trafficking, Kidnapping, and Stealing of Children*, in 52 WAYNE L. REV. 113, 127 (Spring 2006), (stating: "As South Korea has developed economically, the primary cause of relinquishments has become the social stigma associated with single motherhood.")

Additionally, the revision included the idea of prenuptial agreements. Article 829 of the Korean Civil Code states, “If a husband and wife have not, prior to the formation of marriage, entered into a contract.”⁶⁰⁾ This is particularly important since the acceptance of a prenuptial agreement gives a woman flexibility in determining the outcome in the event of a divorce. Prior to consenting to marry a man, a woman, in theory, could prearrange property settlements and custody issues if divorce resulted. Further, a woman no longer could be pressured into marriage by her family since the revised 1977 revision of the Civil Code provides that men and women over the age of twenty years no longer need parental consent to marry.⁶¹⁾ Also, “[a] marriage in Korea is formed by an expression of the common consent by the parties and a report submitted to the Family Register.”⁶²⁾ Therefore, a Korean woman can equalize her rights by refusing to marry in the absence of an equitable prenuptial agreement. Like the family law of the United States, prenuptial agreements can be used to ensure a particular outcome in the event of divorce.

Although many changes have been made to decrease sex discrimination in the Family law system of South Korea, there are still many issues that arise from the Confucian traditions harbored in the Korean society. The revision of the Korean Civil Code to increase its conformity with Article 10 of the Korean Constitution has greatly increased the status of women in Korea. The Family Court in Korea has made great strides to render judgments equitably, although Confucian tendencies still influence the rights of women in property settlement and child custody decisions.

60) Cho, *supra* note 42, at 437.

61) Cho, *supra* note 1, at 155.

62) Cho, *supra* note 42, at 438-39.