

# A Journey of Family Law Reform in Korea: Tradition, Equality, and Social Change\*

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## Abstract

*This article reviews fifty years of history of family law reform in Korea with particular emphasis on the most recent and a large-scale revision in March 2005. For this purpose, this article overviews three previous revisions in 1962, 1977, and 1989 from a feminist point of view. History of family law has been tantamount to the history of feminist legal movements, and the feminist legal movements for family law mark the longest history in the legal feminism in Korea. The essay then discusses the revision in 2005, its main bodies, political and social situation. As seen, diverse social sectors of citizens' movements were mobilized and public sectors such as legislature, administration, and Constitutional Court made this huge change in law, particularly deletion of the family-head system possible. It also discusses the social environment such as rapid changes in birth rate, numbers of family members, rates of divorce and remarriage in South Korea that shaped social context of the legal change.*

*Based upon this analysis, the essay discusses several points about law and society seen through the family law and revision movement. It discusses largely three issues: 'tradition' and colonialism embedded in the law; state's concern on the 'normalization' of the family, nature of feminism(s) emerging in the process of revision of the law. Overall, the process of family law revision reveals the uniqueness of feminism and feminist jurisprudence in Korea, and its possibility to be a viewpoint to understand law's history as well as history through the law.*

## I. Introduction

As I begin this essay, I have almost written 'labyrinth' of family law reform in Korea as a title. As far as labyrinth designated the historical location where the law has been evolved, its reform would amount to finding the way to get out of the complex terrain. This essay will try to review the historical process of family law revision in Korea. It will particularly focus on the revision taking

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place in 2005 through discussing how and why this change has been possible. In the revision in 2005, nearly entire bill of family law was rewritten including the complete deletion of 'family-head system'. As the latter system has been the most central as well as difficult agenda of all for the last fifty years' history of revision, this revision marks a closing and opening of the new era in Korean family law.<sup>1)</sup>

After revising the history of family law in Korea with particular emphasis on 2005 revision, I will discuss the meaning of this history in terms of tradition, gender equality, and social change. The notion of 'tradition' has been the main rationale for preserving the status quo, and gender equality was another principle for the revision. I will also examine the features of the feminism that was emerged and presented in the course of revision movements in Korea. Lastly, social changes such as rapid changes in birth rate, numbers of family members, rates of divorce and remarriage in South Korea that shaped a large social context of the legal changes will be discussed.

## II. History of Family Law Revision

History of family law in Korea is a history of women's movements. The social movement for revision of the law during last five decades has been a critical site for legal feminism in Korea, whereas most legal changes to improve women's social conditions took place during the 1990s.<sup>2)</sup> Even before the bill of Civil Code was passed on December 17, 1957, women lawyers and feminists have proposed their own bill after reading the original governmental bill. Family law that was chapters IV and V of Korean civil code enacted on January 1, 1960 soon elicited calls for revision. Throughout the 1970s and 1980s, the efforts for revising the law never ceased. During 1990s, the agenda of abolition of family-head system has been revitalized and finally came into fruit in 2005.

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1) I have elsewhere reviewed specifically on abolition of family-head system. See Hyunah Yang, *Vision of Postcolonial Feminist Jurisprudence in Korea: Seen from the 'Family-head System' in Family Law*, JOURNAL OF KOREAN LAW, Vol. 5, No. 2, at 12-28 (2006).

2) See EUN YOUNG YI, *POPYŎSONGHAK (LEGAL FEMINISM)* (Seoul: Pakyongsa, 1999).

### 1. First revision, 1962<sup>3)</sup>

Korean society witnessed tenacious feminist efforts for legal reform, which came to fruition in the first revision in 1962, the second revision in 1977 and the third revision in 1989.<sup>4)</sup> Whereas reformists affirmed the value of gender equality, democracy, and social development, confucian groups, faithful to the beautiful 'tradition,' vehemently resisted revision of the law. Meanwhile, the Korean state, which monitored the social movements, made a final decision about the revision.<sup>5)</sup> 'Tradition' continued to be the most persistent theme in the process of revision, while the ideals of legal modernity such as democracy, individualism, and gender equality were increasingly called upon to legitimize the revisions. The traditionalists, mostly Confucians (*Yulim*; 儒林), who claimed the modern Korean family law has been positively grounded on the family institution in the historical past, however, has seldom identified the elements of the modern family law with the concrete historical facts. Even if historical traces of the modern family could be found in the Chosun (1392-1910) or Koryo Dynasty (918-1392), why and how such economically, politically, and socially different societies' family should be imposed in the modern law has never been persuaded. More seriously, the essence of the family institution what the Confucians affirmed has been unambiguously male-centered; gender discriminatory provisions could securely be legitimized by the rationale of 'tradition.' As will be discussed, time-space in this 'past' was the one in imagination, in which Korea and Koreans in the thousands years ago carried same and pure essence with modern Korea and Koreans.<sup>6)</sup>

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3) This part is based upon my earlier work on the revision process of family law. See Hyunah Yang, *Gender Equality vs. 'Tradition' in Korean Family Law: Toward a Postcolonial Feminist Jurisprudence*, THE REVIEW OF KOREAN STUDIES, Vol. 6, No. 2, at 85-118 (2003).

4) See Mi-Kyung Cho, *Korea: The 1990 Family Law Reform and the Improvement of the Status of Women*, 33 UNIVERSITY OF LOUISVILLE JOURNAL OF FAMILY LAW 431-446 (1994); Rosa Kim, *The Legacy of Institutionalized Gender Inequality in South Korea: the Family Law*, 14 BOSTON COLLEGE THIRD WORLD LAW JOURNAL 145-162 (1994); Id.

5) Moon Seungsook, *Economic Development and Gender Politics in South Korea (1963-1992)* (Ph.D. Dissertation, Brandeis University, 1994); Oh Jiyoung, *A Woman's History* (Ph.D. Dissertation, New York University, 1993).

6) While 'tradition' of Korean family law has been rooted in the sentiment of nationalism,

The first revision took place on December 31, 1962 and only one article has been revised.

Article 789 (Legal division of family, Mandatory division of family):

(1) A member of a family shall establish rightly a branch family when he gets married.

(2) The family-head shall permit a male adult family member to establish his own family when he can support it.<sup>7)</sup>

Paragraph (1) was created in this revision. Even though the revision made only this change, its effect was not trivial.<sup>8)</sup> This revision represented the state's effort to streamline family life for efficient administration by making every husband in every household the head of a family (*hoju*). With the dawn of rapid industrialization and mobility among the population in the early

legal feminists who tried to abolish the status quo were destined to be challenger of the tradition and culture. I tried to interpret this binary framework in terms of the heritage of colonialism. See Yang, *supra* note 3. Since national elites in the post-colonial era struggled to recuperate from the distorted or wounded identity of the nation, they tried to preserve and put together the nationalist elements of the culture. Family, the private area, and women have been the last or the least area for this nationalist purpose. For this, refer to the following. Partha Chatterjee, *The Nationalist Resolution of the Women's Question*, in *RECASTING WOMEN—ESSAYS IN INDIAN COLONIAL HISTORY* (KumkumSangari & Sudesh Veid eds., Delhi: Kali for Women 1988); Alexander, M. Jacqui, *Redrafting Morality: The Postcolonial State and the Sexual Offences Bill of Trinidad and Tobago*, in *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* (Chandra Talpade Mohanty, Ann Russo & Lourdes Torres eds., Indianapolis: Indiana University Press 1991).

7) Throughout this essay, English translation of Korean family law is the one by the Korean Legislation Research institute.

8) The reasons for the revision presented by the Supreme Council for National Reconstruction were as follows: (1) a changing life-style in which the extended family system shifted to the couple-centered small family system; (2) correspondence between the conceptual family in the family register and the real family; (3) the public's lack of attention to the voluntary division of family [in Article 788]; (4) simplification of the administration of the family register; (5) relief from local prejudice that had been enforced through the permanence of the original family register (ponchok). See Yong-han Kim, *Kajokpöp ui kejöng kwa ku wuntong ui jesang* [Revision of Family Law And Various Aspects of the Revision Movement], in *HYONDAE KAJOKPÖP KWA KAJOK JÖNGCH'EK* [MODERN FAMILY LAW AND FAMILY POLICY] 411 (The Committee of Publication for Commemoration of the Sixtieth Birthday of Professor Kim Ju-soo, Seoul: Samyoungsa 1988); Bong-hee Han, *Han'kuk kajokpöp kejongsa* [The History of Revision of Korean Family Law], in *HYONDEPÖP UI YIRON KWA SILCHE* [THEORY AND REALITY OF MODERN LAW] 732 (The Committee of Publication for Commemoration of Sixtieth Birthday of Professor Kim Chul-soo, Seoul: Pakyongsa 1993).

1960s, the family-head system needed to be modified without transforming its basic frame, even at the cost of undermining the authority of the former family-head.<sup>9)</sup>

## 2. *Second Revision, 1977*

Second revision took place in December 1977. For this change, reformist women's organization such as Pan Women's Group for the Revision of Family Law (PGR) was made and family law scholars contributed to the changes. At the same time, Confucians who wished for the preservation of the law under the belief of the 'tradition' raised their voice very strongly in this period. The state, having largely remained in silence, suddenly accommodated the demands of the change in a very compromising mode. The state's main concern lay in the 'population policy' that was far from women's cause. It included the following provisions.

(1) The legal portion of the succession of property for women increased: A spouse's portion increased three times. An unmarried daughter's portion became as same as that of the son's, which used to be half. A married daughter's portion remained constant at one-quarter of the son's (Article 1009).

(2) In the succession of property, a system of reserve [legally secured portion] was introduced.<sup>10)</sup> Half of the legal portion was to be ensured for the lineal descendants and the spouse [of the deceased]. One third of the legal portion was to be ensured for the lineal ascendants and siblings (Articles 1112-1118).

(3) Legal adults (over twenty years old) no longer needed their parents' consent for marriage. Men under twenty seven and women under twenty three years of age formerly were required to ask for consent (Article 808).

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9) Before this provision of the mandatory division of the family concomitant with a man's marriage, family-head used to represent the extended family for the families of married siblings or married sons who were not going to succeed the family-head.

10) Through the system of reserve, legal inheritors could inherit at least the legally secured portion in spite of the deceased's will.

(4) When a person under the legal adult age marries, the person was to be treated legally as an adult (Article 826 [2]).

(5) The father and mother were to share parental authority over the children, but when the father and mother's opinions were not in accord, the authority was to be granted to the father (Article 909).

(6) When the ownership of property was disputed (such ownership was formerly assumed to be the husband's property), property was to be commonly owned by husband and wife (Article 830).

(7) For divorce by consent, the parties were to receive the recognition of the Family Court in order to report the divorce to the Office of the Family Register. No such procedure previously existed (Article 836).

Special provision of marriage proclaimed on December 31, 1977 was another expedient law. The provision was abnormal, since it permitted the legally prohibited marriage of the same surname and ancestral seat (*dongsŭng dongpon*) to be registered until the end of 1978. It should be noted that suspending the effect of Civil Code—Articles 809 and 815—during a given period by a subsidiary law alone.<sup>11)</sup>

### 3. Third Revision, 1989

The third Revision in 1989 brought many changes to the law, but did not abolish the family-head system nor the boundary of exogamy of the same surname and ancestral seat, two the main agendas of the revision movement at the time. International factor such as ratification of UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in 1984 by Korean government, and domestic factor such as democratization in 1987 when Korean Constitution was amended for direct election of the president made this revision possible. The major areas of revision were as follows, and the bill went into effect on January 1, 1991.

(1) The scope of relatives (*ch'injok*) was rationalized, equalizing the

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11) Yong-han Kim, *supra* note 8, at 458.

scope of maternal and paternal relatives, and of the wife's and husband's relatives (Articles 768, 769, and 777).

(2) The system of family-head was revised without abolishing.

(3) The mandatory legal relationship between mother and stepchildren (*chōkmo-sōja* and *kemo-sōja*) was abolished (deleted Articles 773 and 774).<sup>12)</sup>

(4) The acceptable reasons for dissolution of matrimonial engagement were revised (Article 804 [3, 6]).

(5) The married couple's place of living was to be determined by mutual consent (Article 826 [2]).

(6) Living expenses of the family were to become the joint responsibility of husband and wife (Article 833).

(7) Child custody upon parent's divorce was introduced and the parental right to visit the children was granted to the parent who does not have a custody (Articles 837 and 837-2).

(8) The spouse had the right to claim for the division of property that belonged to the other spouse upon divorce (Article 839-2).

(9) The system of adoption was revised and adoption for the continuation of family lineage abolished (Articles 871, 872, 874; deleted Articles 867, 875, 876 and 880).

(10) Parental authority over the children was to be determined by mutual consent of the parents in case of divorce or when a child born out of wedlock is recognized (Article 909 [4]).

(11) The order in guardianship over a married person who is declared incompetent or as quasi-incompetent was revised (Article 934).

(12) Succession of property was revised by abolishing inequality among descendants and a special portion for the successor of the

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12) The former relationship (*chōkmo-sōja*) indicated the relationship between the father's current wife and the husband's out of wedlock children. The latter relationship (*kemo-sōja*) was that of the father's current wife and children whose biological mother is the father's previous wife. These relationships have been defined as the legal relationship of parent-children by law, the same as the biological one, without having consent of the mothers (biological and legal mothers) or the children (no mandatory relationship existed between father and his stepchildren). Although these relationships have changed into relatives by affinity through the revision, the father-centered model in the parent-children relationship remained in this revision.

family-head, and by introducing a contributory portion (Articles 1000 [1], 1003 [1], 1009 [1, 2], 1008-2 [1] and 1057-2 [1]).

Overall, gender equality was proceeded in the area of property; introduction of property division upon divorce, elimination of gender discrimination against women in the legal portion of the succession of the property; bestowal of the parental right (*ch'inkwon*) to mother and introduction of the right to visit the children after divorce. Whereas the skeleton of the laws of status, that is, family-head system and boundary of exogamy of same surname/ancestral seat, have remained. This predication of the law represented as the result of negotiation between reformists and Confucians, state and civil society, and even different generations of feminists.<sup>13)</sup> Revision of the property relations toward gender equality was much easier to that of the status relations. On the day the amendment bill was passed, President Lee of the WUR publicly stated, "Today, thirty-seven years of tenacious women's struggles have abolished the long and high barriers of human discrimination! [However] It is very regrettable that heritages of the marriage ban of *dongsung dongpon* and the system of family-head remain in law."<sup>14)</sup>

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13) It is notable in this context that the women's movement groups were divided into two, the one emphasized the importance of 'symbolic interest' i.e. abolition of family-head system and the scope of marital ban, the other put emphasis on the 'substantive interest' i.e. equal division of property and child custody upon divorce, and equal share of legal inheritance of property of the family members. Young feminists tended to emphasize importance of the right in property and children, while older generation feminists adhered to the significance of the status law. See Yu-mee Kim, *Yösong jongch'ek kwajöng yonku—1989 nyon kajokpöp kejöng ul chungsim ulo* [A Study On the Feminist Policy-Making Process—Case Study On the Process of Family Law Reform in 1989] 68 (M.A. Dissertation, Seoul National University, 1994). During the 1990s, however, it became visible for young generations of feminists to participate with enthusiasm in the area of status laws such as surname, family-head, and family register system.

14) LEE TAE YOUNG, *KAJOKPÖP KEJONG UNDONG SAMSIP CH'ILLYON SA* [THE HISTORY OF THIRTY SEVEN YEARS OF THE MOVEMENT FOR FAMILY LAW REVISION] 379 (Seoul: Korean Legal Aid Center for the Family Press 1992).

### III. The Revision, 2005

#### 1. *New Tides for the Change*

There are many clauses revised or deleted in 2005, but no one would argue about the fact that the most critical change in revision the abolition of family-head in the statute. In this section, I will discuss the revision in 2005 with focus on abolition of family-head system. After the third revision in 1989, family law revision movements seemed to be in an inactive period. But from the late 1990s, abolition of the family-head system movement was revitalized. It was unprecedented that ordinary women citizen initiated the cause of family law revision.

##### 1) *Social Changes and Women's Movements*

Two events were regarded as ignition for this belated move.<sup>15)</sup> In 1997, succession of both paternal and maternal surname was proposed after the gathering of the International Women's Day as criticizing the strict patrilineal surname system mandated in family law. Either every child born from marital couple or any children who was recognized by one's biological father should follow the father's surname and register one's family identity into father's family register (*hojök*) without any choice of each child or the family. Although surname is different from the system of family-head, both systems share the commonality in their total ignorance of maternal sides in one's familial identity. It was notable that only late 1990s feminist movements reach to a realization that surname and familial identity have critical importance for the women's 'existence. Second inducement can be found in the Constitutional Court's decision in 1997 that the marriage bans between the parties with same surname and ancestral seat was incompatible with Constitution in Korea. The Court's decision obliged the National Assembly to revise the law (Article 809).

Still another factor could be found in the ubiquitous spread of internet among the ordinary citizens in Korea, and utilization of cyberspace for social

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15) Ki-young Shin, *The Politics of Family Law Reform Movement in Contemporary Korea: A Contentious space for Gender and Nation*, THE JOURNAL OF KOREAN STUDIES, Vol. 11, No. 1, at 104 (2006).

cause.<sup>16)</sup> 'Citizens' Alliance for Abolition of Family-head System,' for instance, organized themselves as an on-line community where the cases of discrimination and information were exchanged. It was a grass-root movement consisting of the ordinary citizens including those who experienced absurdity of the system. This contrasts with the previous movement that was led mostly by elites, celebrities, and scholars who thought that they represented the ordinary people's need. Indeed, divorced and remarried women were central forces to raise the issue of family-head system highly at this time.

With sharp increase in the rate of divorce and remarriage during 1990s in South Korea, the problems such as discrepancy between family-head system and 'real family,' and the social stigma stamped on the divorced and remarried families and the children who lived with divorced (and remarried) mothers attracted the social attention. Those families and women were the main bodies who petitioned the case of the family head-system to the Constitutional Court in Korea. In addition, from 2000 and forward, leading women's movements networks such as Korea Legal Aid Center for Family Law, Korean Women's Association United, Koran Women's Hot Line employed the abolition of family-head system as the top-priority political agenda.<sup>17)</sup> Ordinary citizen's interest has been actively mobilized through the internet site such as <http://no-hoju.women21.or.kr> (2000. 7), academic conference, lectures, surveys and researches, demonstration, and artistic play, etc. They were a very educational process for most of the citizens in Korea about family-head, discrimination against women, and colonialism.

## 2) Political Environments

Another essential aspect to explain the atmosphere in 1990s can be found in the political ecology. National Assembly and administration in Korea especially Ministry of Justice that have been against or sometimes indifferent in or overly cautious for abolishing the family-head institution, changed their attitude. After military dictatorship, civil administration was established during President Kim Dae Jung (1998-2002) and President Roh Moo Hyun

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16) Shin also points out importance of the internet in spreading the ideas about family-head system from mid-1990s. Debates about the system such as "Pros and Cons of the Family-head System" were offered at the cyberspace. *See id.* at 110.

(2003-2007) regimes. With progressive sectors of civil society as strong support groups, both regimes were sympathetic with the causes of feminism. This leadership was reflected in the legislators of the political party in power (Democratic Party) and leadership in the administration. Within this context, Ministry of Gender Equality was founded in 2000 and a woman human rights attorney, as the first woman head, was appointed as a Minister of the Ministry of Justice in 2003. In this situation, alternative bills that deleted all the provision for the family-head system were proposed both by legislators and Ministry of Justice (governmental bill). In final, the governmental bill was passed on March 2, 2005.

### 3) *Support from Professionals*

Supports from the professionals such as the members of "Lawyers for Democratic Society" were also critical. They were the ones who supported the citizens for filing the lawsuit against the constitutionality of the family-head system. The attorneys proposed the ideas of the Constitutional lawsuit, recruited the petitioners (mobilized over sixty people), and represented them at the Constitutional Court. Particularly Articles 778 & 781 Paragraph 1 were examined in a great detail and the attorneys provided the reasoning of the unconstitutionality. In the end on February 3, 2005, after four years' deliberation, Constitutional Court in Korea made a decision that family-head system was incompatible with the Constitution of Korea mainly in its violation of gender equality (Constitution Article 36 Paragraph1).<sup>17)</sup>

As having discussed, the process of the abolition of family-head was multiple and a thorough one. Diverse sectors of society and citizens were participated and interacted with each other. Ordinary women citizens' initiative mobilized the attention of professionals, legislators and judges and administrators. Perhaps no Koreans were exempt from the discourses, campaigns (from both sides), and opinions about the family-head system at the time. It should not be forgotten, however, that it was early 1950s the abolition movements were ignited by the feminist pioneers. Abolition of Family-head system also signaled the uniqueness of the legal feminism in Korea that has been rooted in her history and collective experiences.

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17) Jin-Su Yune, *Tradition and Constitution in the Context of the Korean Family Law*, JOURNAL OF KOREAN LAW, Vol. 5, No. 1, at 194-212 (2005).

## 2. Major Changes

Major changes in the bill that passed on March 2, 2005 were as follows:

- (1) Entire Articles of family-head system was deleted.
- (2) Definition of 'family' was revised (Article 779).
- (3) Institution of surname and ancestral seat was revised (Article 781): Although the principle of patri-lineal surname system is sustained, the children can inherit mother's surname when a married couple agreed upon it; in the case of the child out of wedlock recognized by one's biological father, he or she could sustain one's original surname (mostly mother's surname) once both parents agreed upon it; for the children's welfare, children can change one's surname according to the requests of father, mother and the child.
- (4) New boundary of exogamy was introduced from the same surname and ancestral seat to the boundary of close relatives (Article 809).
- (5) The right to denial of paternity (*ch'inseng*) was bestowed to mother. This was formerly the father's right only (Articles 846 & 847).
- (6) The ban of women's remarriage period (formerly six months) was abolished (Article 811)
- (7) New adoption system such as *ch'inyangja* (親養子) was introduced. As this new adoption nullifies previous family relationships, adopted child can follow adopted parent's surname and ancestral seat as if he or she were a natural child (Articles 908-2 & 908-8).
- (8) In inheritance of the property, the special portion for the contributors who supported (扶養) the inheritee (Article 1008-2).

## IV. Discussion: Society, Culture and History Seen through the Law

### 1. Colonialism and Tradition embedded in the Law<sup>18)</sup>

After Korean family law was legislated in 1957, the law has been criticized for its patriarchal nature. Throughout the 1960s, 70s, and 80s, progressive scholars of the family law and feminist activists had put enormous energy for the revision of the law. As mentioned earlier, the Confucians have been a main opponent group against the changes of the law including the family-head system. They are not a very socially salient group otherwise. Under the name of 'tradition,' they defended the system in terms of 'good and beautiful custom (美風良俗)' for decades. The 'tradition' of Korea has indeed been the central concept, spirit, and jurisprudence for the conservation of the family law throughout the history of Korean family law. According to the logic that the family law needed to be grounded in 'authentic tradition', the category of gender, not to mention the gender discrimination, has been securely blocked from view. Thus, specific gender allocation in, for, and by the lineage does not even appear in the discourse. The claim about gender equality in this discursive context is only contra-traditional, as if Korean family has been exempt from any kind of social analysis and examination. As a patriarchal family has been affirmed as a 'tradition' of the nation, as if it were a trans-historical culture, specific historical deployment of the institution becomes invisible, especially those parts pertaining to colonialism.

The family-head system cherished as 'the tradition' as such would an excellent example, which indeed originated from the the old Japanese Civil Code during Meiji Restoration. The institutions of family-head (戶主), succession of family-headship (家督相續), and family register (戶籍) in Korea were imposed by the Japanese colonial government, based upon their own family institution, the *ie* (家) institution especially during 1910s.<sup>19)</sup>

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18) For more detailed discussion about colonial influences on family law, refer to my previous article, *see supra* note 1.

19) KWANG-HYUN CHUNG, HAN'KUK CH'INJOK SANGSOKPÖP YONKU [KOREAN LAW OF FAMILY RELATIONS AND SUCCESSION—A STUDY OF ITS HISTORY AND INTERPRETATION] (Seoul: Seoul National

If this is such a clear fact, why and how did the Confucians and many Koreans think that the family-head system 'traditional'? It is an irony to see the strong belief in the cultural authenticity of the patriarchal system, yet silencing about the colonial influences and traces in it. The irony of the colonial influences seems to have been embedded in the colonial policy on family law itself.

According to Article 11 of the Civil Ordinance during colonial rule, tantamount to the Civil Code in colonial Korea in the field of relatives and succession the central principle was "to follow Korean custom." 'Custom' was an area in which the colonial government had deeply intervened to. For the purpose of knowing and ruling Koreans, Japanese legal scholars and related committees investigated, interpreted, and 'determined' the Korean customs. The items and organization of inquiry of the investigation of Korean custom exactly followed those of the Japanese Civil Code. The 'custom' of Korea was destined to be framed by the Japanese law as the standard and eyes for interpreting the customs in Korea.<sup>20)</sup> As 'custom' was the central principle of the colonial family law, Korean family institutions including the family-headship (家長權) were studied in the process of the legal imposition. In the process of the imposition, Korean family-headship was interpreted from the view of, tailored by, and even mutated with the Japanese family-headship.

The colonial bureaucrats made decisions regarding Korean customs, incessantly rewritten during the colonial rule. It was a curious principle that seemed to respect the autonomy of the Korean culture and family life, and yet it was the Japanese officials and scholars who filled the content of the 'custom.' In the process of definition of the 'custom,' political arbitrariness and Japan-centeredness were profound and serious. In almost every court decision, the phrase such as 'it is the Korean custom' became a cliché.<sup>21)</sup>

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University Press 1967); Dong-ho Chung, *Han'kuk kajokpöp ea issoso ui kesu* [A Study of Reception of Foreign Law In the Korean Family law] (J.D. Dissertation, Korea University 1978); BYUNG-HO PAK, *KAJOKPÖP* [FAMILY LAW] (Seoul: Korea National Open University Press 1992); GUNG-SIK CHUNG, *KUKYUK KWANSUP CHOSA POGOSEO* [KOREAN TRANSLATION OF REPORT OF THE INVESTIGATION OF CUSTOM] (Korea Legislation Research Institute 1992).

20) Hyunah Yang, *Sikminchi han'kuk kajokpöp ui kuansup munche* [Colonial Invention of Korean 'Customs' during Japanese Colonialism: Lost Temporality in the Customs], 58 SAHOE WA YÖKSA (SOCIETY AND HISTORY) 35-70 (2000).

21) KWANG-HYUN CHUNG, *supra* note 19, at 7.

After decolonization in 1945, the customs of family underwent even more complex situation. The legislators whose orientation was predominantly nationalist, would like to repudiate any traces of Japanese influence on Korean family law on the one hand, but the sources and knowledge of 'authentic Korean culture' have already been colored by the Japanese colonial gaze on the other. The grammar employed at the court after decolonization that declared the Korean custom as the rationale for judgment was the heritage of colonial courts. State officials' discourse sounded like a repetition of colonial officials' claims such as "family law should be based on her custom." At that moment the family issue in question was homogenized with, and frozen into, 'the custom.' It was through this practice that the rules for Korea's present were confused with those for the nobility in the Chosun dynasty and its five hundred years of dynamic history. More importantly, it was the amnesia and apathy of colonial legacies that allowed colonialism to continue.

## *2. State's Interest in 'Normality' of Family*

Based on the discussions above, the general idea that the conservative group against the revision of the law has been the Confucians needs to be rethought. In my view, the group seems to 'embody' rather than 'initiate' the postcolonial social condition. The stronger agency in declaring the custom and tradition belongs to the state officials than to Confucians. As viewed in the history of revision, the revision was very much dependant on political expediency. Both the second and the third revisions occurred during the last day of the session at the National Assembly and just before an election. The legislators voted according to the direction of the party rather than their own free will, although this would not exclusively true in the area of family law.

Korean state and the state officials seldom seemed to consider the patriarchy and gender inequality as the compelling cause for revision of the law. The state's parameters of revision were shaped by a couple of other factors—international pressure such as the UN Convention (CEDAW) and the national prosperity. For the latter, 'family plan,' imbalance in sex ratio, and economic development were taken into account. Outside of these parameters, the state's politics regarding family law can be that of disinterest and silence, that of allowing the current order to continue. Even more, the family head-system, for example, had functioned as a useful tool for social order and

national security under militarism and dictatorship such as the regimes of President Park (1962-1979) and President Chun (1980-1987).

In the assumption of family as a separate from and interconnected entity with the state, state's responsibility of welfare and wellbeing of the people was transformed as a familial concern. The turning point made in 1987 illustrated the importance of the politics in changing the family law that was conveniently regarded as the 'private' area. Conspicuous increase in the diverse forms of families during 1990s such as divorced and remarried, and single-person household, etc. made it difficult for the state to ignore the need of the family members in these not very 'normal' families. The democratic regimes could not but revise family law especially family-head system and following welfare policy. In this context, Lynn Hunt's discovery that the French revolution took place at the level of family romance as well, i.e. cutting the head of 'father,' as the condition of the birth of the individual citizen is insightful.<sup>22)</sup>

### *3. Feminisms in the Revision of Family Law*

Was then the disguised 'tradition' effectively challenged in the process of revision of the law? What kinds of feminist reasoning have been created and unfolded? It could be too simple to assume the feminism in family law revision in Korea as one and homogeneous. As mentioned earlier, abolition movement of family-head system, for instance, revealed and constituted a historically-grounded feminism in Korea. With the impact of international feminism, indigenous situations have been very conditions for the feminism. There were at least three streams of feminism that were often overlapped and fused with each other.

Firstly, feminism as enlightenment: during the 1960, 70, 80s, the reasons for legal revision were found in gender equality, democracy, national development, and congruency with modern times. In this feminist thought, tradition was identified with patriarchy and shackle for the women. In this respect, feminism in this reasoning can be better fitted into the binary logic of tradition versus modernity. In sum, feminism was a modern philosophy to

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22) LYNN HUNT, *THE FAMILY ROMANCE OF THE FRENCH REVOLUTION* (Cho Han-uk trans., Seoul: Sae mul kyul 1992) (1999).

emancipate Korean women.

Secondly, in the history of student and labor movement during 1970s and 80s, the idea of feminism as a basic class (*minjung*) movement emerged. Women as lower class, this feminism put their great attention to female workers and their economic conditions. As mentioned earlier, the discourse of the 'symbolic interests' that emphasizes in the revision of status law and that of 'substantive interests' that emphasizes in the women's right for property emerged during 1980s. The first generation (such as Lee Tae Young's) was persistent in emphasizing the revision of 'status,' while the younger generation focused on most women's urgent material needs. Although feminism as a class movement was not as conspicuous as the former, the internal tension between symbolic and substantive interests signaled that there was a viewpoint to see the feminism in terms of equality between men and women and the different classes.

Thirdly, feminism as a method to interpret history and society: during 1990 and after, feminist discourses were formed that were not clearly aligned with modern ideals of equality and democracy but to investigate historical conditions where patriarchal family has been evolved. With influence of postcolonialism,<sup>23)</sup> this feminism tried to construct the feminism based upon the collective experiences of women and men in the Korean soil, yet overcoming the signifier of 'Korea' already prevailing in every nationalist ideals created by male elites. Kim Hee-Kang,<sup>24)</sup> for instance, presented the idea that the feminism emerging in the process of family-head system abolition is a

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23) According to Ashcroft and Griffiths, post-colonialism can be defined as the study and analysis of European territorial conquests, the various institutions of European colonialism, the discursive operations of empire, the subtleties of subject construction in colonial discourse and the resistance of those subjects and differing responses to such incursions and their contemporary colonial legacies in both pre- and post-independent nations and communities. See BILL ASHCROFT, GRIFFITHS GARETH & HELEN TIFFIN, *POSTCOLONIAL STUDIES—THE KEY CONCEPTS* 187 (New York: Routledge 2000). In the field of legal feminism, however, 'postcolonial feminist jurisprudence' viewpoints are difficult to find. Feminist legal thought along a critical race theory vein can be found in the volume edited by Wing and seems to have some affinity with postcolonial viewpoint. See *GLOBAL CRITICAL RACE FEMINISM—AN INTERNATIONAL READER* (Wing, Adrienne Katherine ed., New York: New York University Press 2000).

24) Hee-Kang Kim, *Beyond Gender and Culture: The Location of Korean Feminism*, presented paper at the Conference of BK 21 Research Center for Political Science at Seoul National University, February 24, 2007.

kind of 'global feminism' that utilizes her own culture. Rather than repudiation of the culture under the name of backward tradition, the feminism in Korea now reinterprets Confucians, the meaning of ancestors differently. Although I do not agree with Kim entirely, I do agree with her claim in that the feminism for abolition of the system was not simply denying one's culture. Her short-sightedness, however, lied in the ignorance of historicity in the notion of 'culture' or 'Confucianism.' As discussed above, the law's history before and after 1945 was not freed from colonial lens and knowledge construction. The customary practices and rules especially in the area of family and kin were colored by Japanese laws, culture, and political interests. What made overcoming Japanese colonial influences difficult was the similarity in culture between Korean and Japanese including Confucianism. Interestingly, it was not nationalist traditionalists who criticized the colonial influences in the law and culture in the area of family, but it was the feminist intervention that identified the colonialism in the law. In this sense, feminism was a method to rewrite history of colonial law and society. As abolition of family-head system has been an effort to decolonize its law and society, the feminism for abolition of the system can be understood as 'postcolonial feminist jurisprudence.'<sup>25)</sup>

The discussion so far designates the differences between problematic of feminisms in Korea and that of the West. Division of the public and private could be one of them. While women's citizenship has been the ideal of the first generation of the Western feminism, the 'family institution' has been the main ground of struggle until 2005 of Korea after having the right to vote half a century ago. The family has been a private arena in Korea, but it was also the arena where interests of preservation of national culture, colonial policy have been intersected, and women's desire and agony hinged upon. Through the history of family law, we have travelled the complex terrain of the private, tradition, and colonialism in Korea and disentangled some nodes in it.

KEY WORDS: family law, revision of family law, tradition, colonialism, postcolonialism, legal feminism

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25) See Yang, *supra* note 3; Yang, *supra* note 1.