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# Imaginary Construction of the Mother's 'Empty Blood': Patrilineal Surname Law in Korea and its Significance*

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## Abstract

*This article begins with the question if the patrilineal surname system as the law in Korea is only 'symbolic.' If this is the case, what has this symbolic meant for? In order to address these questions, the article takes a look at the various layers of 'law' regarding the surname system in Korea, that is, provisions such as the old and current versions of Civil Code Articles 781, the constitutional review of this Article at the Constitutional Court in 2005, and the CEDAW provision regarding equal parental rights regarding children's surname, which has been reserved in Korea from its ratification in 1984 until today in 2018.*

*Then, it examines the meaning of maternal lineage and paternal lineage, and will demonstrate that the surname system is what rendered the mother's genealogy, blood, and symbolic value virtually 'empty.' Although the significance of the male-centered surname system to women tends to be underrepresented even in the feminist studies in Korea, the effects of male-centered surname has been fundamentally detrimental to women's existence. It restricts a woman's sexual freedom and choice, and thus affects her reproductive capabilities and initiation of family formation as well. This article conveys the very message that the lack of the maternal symbolic could be one of the most fundamental problems in feminist jurisprudence in Korea. Difficulties in developing an alternative surname system that protects both gender equality and 'tradition' suggest the unique tasks ahead for the feminist jurisprudence in Korea.*

Key Words: Surname system in Korea, civil law, maternal lineage, paternal lineage, motherhood, and fatherhood. CEDAW, Constitutional Court in Korea

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## I. Introduction

Would one's surname only be symbolic? If this is so, what does this 'symbol' mean? This notion of symbolism is rather familiar, since the reservationists have claimed that the family-head system deleted in Korean law in 2005 had only symbolic value without any real impact.[1] However, according to the well-known French psychoanalyst Jacques Lacan who extended the scope of psychoanalysis from psycho-drama to a discourse on the socio-linguistic order, 'the symbolic' is the very order wherein the *logos* resides.[2] Positive law and legal provisions would *be* an example *par excellence* of the symbolic as the social order.

When discussing the 'symbolic,' I cannot but look at Lacanian feminist philosopher Luce Irigaray. Interestingly, Irigaray happens to have put efforts into problematizing the lack of the symbolic for mother, motherhood, and maternal genealogy. "Mother has only remained in the flesh, blood, womb, placenta, and in the social role as the one to procreate."[3] This is a situation where the mother is relegated to insignificance in a phallus-centric social order and economy. According to her, thus, a sexual and feminine 'difference' is yet to arrive in this order, because there is only 'one' genealogy where maternal genealogy has been merged into the paternal one. She with other colleagues has searched for the rediscovery of the

1) For the discourses and reasoning for abolition of the family-head system in Korea, *see* Hyunah Yang, *Vision of Postcolonial Feminist Jurisprudence in Korea: Seen from the 'Family-Head System' in Family Law*, 5-2 Journal of Korean Law, 12-28 (2006).

2) In Lacan's theory, there are three registers of recognition such as the real, the imaginary, and the symbolic. Lacan emphasizes the mutual dependence of the registers on one another. Simply speaking, the Imaginary, the Symbolic, and the Real can be thought of as the three fundamental dimensions of psychical subjectivity *à la* Lacan. For an explanation on this, *see* Elizabeth Wright, Feminism and Psychoanalysis-A Critical Dictionary, (Cambridge: Blackwell, 1992).

3) Luce Irigaray, Sexes And Genealogies 1-23 (Gillian C. Gill, trans., New York: Columbia University Press, 1993).

maternal symbolic, representing women and women's subjectivity.

In doing so, Irigaray focuses very much on the lack of the symbolic representing the mother-daughter relationship, the most intimate and fused relationship that can exist.[4] Without proper representations of this fundamental relationship, Irigaray does not think that women can meaningfully constitute 'the other gender/sex.' It is fascinating to see the contrasts in the usage of the 'symbolic' between the Lacanian lexicon and Korean Constitutional Court. . The meanings of the symbolic are multi-layered from the beginning, and yet the symbolic designates a critically important layer according to both interpretations. While relying on and criticizing the Western psychoanalysis, Irigaray has been engaged with the issues of mother's genealogy, surname, and even the kin system.[5] Irigaray's psychoanalysis and imagination are heavily rooted in the mythology and religion of the West, and her analysis and search have been the sources of insights even for an article like this. The most critical source of insight for me, however, has been the very Korean law and society - Korean law and socio-historical reality we live in. As the surname in Korea connotes not just the name of 'the family' but the name of 'lineage, ' only the paternal lineage whereby, the surname issue brings us to the terrain of 'tradition', the accumulation of generations and time.[6] After the family-head abolition, the surname law again poses us the question of how the gender justice will face the issue of 'tradition.'

In another vein, do we know the significance of the male-centered surname system to women and men? In my view, the effects of male-

4) Margaret Whitford, *Maternal Genealogy and the Symbolic*, in Philosophy In The Feminine (Oxon: Routledge, 1991).

5) "Gender defined corresponds to race of men who reject the possibility of the other gender: the female. All that is left is the human race/gender in which the only real value of sex is to reproduce the species. From this point of view, gender is always subservient to kinship." *See supra* note 3, at 3-4.

6) For the overview of the family and kin with which the surname/place of origin have been intertwined during the Chosun dynasty, *see* Martina Deuchler, The Confucian Transformation Of Korea-A Study Of Society And Ideology (Cambridge: Harvard University Press, 1992); Junho Song, *An Interpretative History of Family Records in Korea*, Studies In The Social Hisotry Of Chosun Dynsity (Seoul: Iljogak, 1987) (in Korean); Kwang-kyu Yi, *Organization of Kinship and Ancestor Worship*, 9 Korean Cultural Anthropology (1977) (in Korean).

centered surname pervade women's social, sexual and legal existence. It restricts a woman's sexual freedom and choice. The influences of gender-bias contained in the father-centered surname system also seem to affect her reproductive capabilities and experiences. In this essay, I will attempt to reveal how multi-dimensionally detrimental the iron-cage of the patrilineal surname system[7] in Korea has been to women. This also conveys the very message that the lack of the maternal symbolic could be one of the most fundamental problems in feminist jurisprudence in Korea.

From this perspective, I will take a look at the various layers of 'law' regarding the surname system in Korea, that is, provisions such as the old and current versions of Civil Code Articles 781, the constitutional review of this Article at the Constitutional Court in 2005, and the CEDAW provision regarding equal parental rights regarding children's surname that has been reserved in Korea from its ratification in 1984 until today in 2018. Further, the meaning of maternal lineage and paternal lineage will be traced, and it will be demonstrated that the surname system is the point of origin that rendered the mother's genealogy, blood, and symbolic value virtually 'empty.' In the last section, other consequences of the social framework of this surname system will be analyzed.

Recently, interests on the issue of children's surname and accommodating diversity in the families law are emerging to our encouragement.[8] However, there have been only scarce interests in the issue of surname as a legal matter even in the family policy and legal studies in Korea.[9] With this

7) Patri-lineage is a concept putting emphasis on the continuation or succession of the family lineage, while patriarchy is a notion focusing on the 'headship' of each family or kin. There is also a notion of patri-local marriage, where married woman's physical and social place is designated into the husband's place. On the notion of lineage, see the following discussion.

8) On 7th December 2018, the Presidential Committee on Aging Society and Population Policy announced the new policy plan in which the surname policy will be changed as to the direction of 'child's surname shall be decided agreement between parents at the timing of the registration of child birth. *See* Hyein Lee, http://news.khan.co.kr/kh_news/khan_art_view.html?artid=201812072124005&code=940601.

9) There were social movements for the "joint use of parents' surnames" in early 1990s in Korea. This could be a significant sign of emerging awareness of gender inequality in surname, and a response to increasing diversity of families. However, this was the movement for the change of real practices in giving the right to choose the surname to the children with less concern about legal constraints.

changing terrain, this essay is not about developing an alternative surname system in the positive law. This study is an effort to dismantle the patrilineal surname system through the demonstration of how this system has been 'naturalized' in the law and court, and yet how gravely discriminatory it has been to women and mothers, and the children. It has restricted women's sexuality and capacity to initiate the family, and has made the children forget the maternal genealogies. Thus, before suggesting a new bill, or with such proposal, we need to put more attention to the reasoning for the change of thinking with regard to the rigid social order of-surname. Difficulties in developing an alternative surname system that protects both gender equality and 'tradition' suggest the tasks ahead.

## *1. Civil Provisions in Korea regarding the Surname and Motherhood*

### *1) Surname provisions*

The current Civil Code of Korea is largely a fruit of the tenacious half-a-century-long feminist legal movement to amend the law including the abolition of the system banning ~~on~~ the marriage between parties who have the same surname of the same origin (同姓同本禁婚制度; *dongseong dongpon geumhon jedo*),[10] and the family-head system (戶主制度; *hoju jedo*). Although the paragraph (1) of the Article 781 has not been the main concern for the

10) The ban on marriage between parties who have the same surname and place of origin was nullified in 1997. The Constitutional Court of Korea held that corresponding Article 809 paragraph 1 of Civil Code was incompatible with the Constitution of Korea and especially the mandate on equality of gender under the law. Through the notion of 'blood relative (血族; *hyulchok*), this Article had defined parties with the same surname and place of origin as relatives and specified that they should not marry each other since such marriage involved an incestuous relationship. The place of origin (本; *bon*) has been defined as the place of burial of the apical ancestor (始祖; *sijo*). However, this boundary of relatives has existed only at the level of imagination since the group who share the same surname and place of origin is a very huge group of people that this group could never ever meet all together. For instance, *Gimhe* (place) or *Kim* was more than three and a half million people in 1985, and *Gyungju Kim* was more than one and a half million. Thus, it can be said that it was not the 'blood' that defined the parties not to marry each other, but very 'notion' of the law that made the same surname/ place of origin feel of sharing the 'blood.' Although Article 781 of the Civil Code is discussed in this article, I only deal with the surname issue without the latter - the place of origin for the sake of simplification of the issue. Recently many suggestions has been made on obsoleteness of the 'place of origin' stipulated in the law.

reformists, the entire Article 781 also benefitted from the direction of the change.[11] In March 2005, the National Assembly of Korea adopted the bill amending the Civil Code provisions concerning the family-head system. In the same bill, Article 781 was revised as follows:[12]

> Article 781 (Surname and Origin of Surname of Child)
>
> (1) **A child shall succeed his or her father's surname and origin of surname: *Provided* That when the parents agree to have the child assume his or her mother's surname and origin of surname at the time of filing a report on their marriage, he or she shall succeed the mother's surname and origin of surname.**
>
> (2) When the father is a foreigner, the child may succeed the mother's surname and origin of surname.
>
> (3) A child whose father is not known shall assume the mother's surname and origin of surname.
>
> (4) A child whose father and mother are not known shall, with the approval of the court, establish a new surname and origin of surname: *Provided*, That if the father or mother is known after the child has established a new surname and origin of surname, the child may assume the father or mother's surname and origin of surname.
>
> (5) **Where a child born out of wedlock is affiliated, the child may continue to use the previous surname and origin of surname subject to the agreement of the parents**: *Provided*, That if the parents cannot make such an arrangement or fail to reach such an agreement, the child may continue to use the previous surname and origin of surname with the approval of the court.
>
> (6) **When there exists a need to alter the surname and origin of surname of a child for the welfare of the child, they may be altered**

11) Indeed, the surname issue was systematically correlated with the family-head or family-register, but should not be confused with them. It has different historical genealogy from the latter.

12) Minbeob [Civil Act], *amended by* Act No. 7427, Mar. 31, 2005, (S. Kor). The Korean Articles translated into English quoted in this study were done by the National Law Information Center available at http://www.law.go.kr/LSW/eng/engLsSc.do?menuId=2&section=lawNm&query=civil+act&x=0&y=0#liBgcolor22.

> **with the approval thereof which the court grants upon a request of the father or mother or the child itself**: *Provided*, That if the child is a minor and its agent by law may not make such a request, the request may be made by the relative provided for in Article 777 or a public prosecutor (Act No. 7427, 2005.03.31, partially amended).[13)]

This amendment contains various important changes.[14)] First, it is the first provision that permits the couple the 'choice' between the father's and mother's surnames for a child subject to the agreement they made at the time of registering their marriage. Prior to this amendment, a child could succeed the mother's surname only in cases where the father was a foreigner, was unknown, or had his name entered in his wife's family register under the family-head system. In this sense, the 'freedom' in choosing the child's surname was introduced for the first time even though in a very limited way.

Second, it permits continued use of the mother's surname even after the father becomes known especially in instances where the child has used the mother's surname for a long period of time. Prior to this amendment, once the child born out of wedlock with an unknown father registering his name into the father's family-register automatically assumed the father's surname without any choice. Under the current revised legal system, however, the practices are not very different. Although the child could continue to use one's previous surname, one needs to obtain the agreement of both parents which has not been easily attainable. Thus, when the child is 'affiliated with'(認知; *inji*) the father, the child's surname has to be changed to the father's surname and the child's identity in the school, hospital, etc. could be seriously discontinued and shattered. In this respect, the paragraph (5)

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13) Emphasis is added at the amended phrases in this revision. *See* the previous article 781 before 2005 amendment of Minbeob [Civil Act] (Entry into Family Register and Surname and Origin of Surname of Child):

> (1) **A child shall succeed his or her father's surname and origin of surname and shall have the name entered into his or her father's family register**: Provided, That when the father is a foreigner, the child may succeed the mother's surname and origin of surname and shall have the name entered into his or her mother's family register (emphasis added).

14) *See* Sang-yong Kim, Study Of Family Law II, (Seoul: Beopmunsa, 2006) (in Korean).

still defines the paternal surname as a principle, while the other choices, mostly the maternal surname, as a deviation from it.[15)]

Third, the new provision permitted the change of surname subject to a request by the father, mother, or child and approval of the court. This accommodates the need to alter a child's surname and origin of surname in the event of changes in the family structure, such as the father's death, divorce, remarriage, or adoption.[16)] This change is even more revolutionary since the patrilineal surname system in Korea had held the law of "un-changeability "of the surname an iron rule.[17)] Seen this way, a legal provision allowing a 'normal' couple to choose the mother's surname and origin of surname for their children is a major change, and the introduction of legal permission that allows the change of a child's surname is even more notable.

Amended Article 781 still has fundamental limits. First, mother's surname can be chosen only upon the marriage registration when the situation for the child-rearing is not foreseeable much, which lowers the chances for opting for the mother's surname.[18)] Future possibilities such as

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15) There is a bill calling for the amendment of Article 781 paragraph 5 proposed by Legislator Sanghee Kim (with 11 other legislators). In this bill, even though a child becomes affiliated with a father, a child shall maintain the previous surname in principle while it is necessary to obtain the agreement of both parents in order to change the child's surname (Bill 2014282, proposed on July 9, 2018).

16) Hyun Jai Lee, *A Study on the Child's Welfare in the Petition for Change of the Child's Surname*, 22 KOREAN JOURNAL OF FAMILY LAW 2(2008)(in Korean).

17) To understand the legal nature of surname and origin of the surname system in Korea, *see* Gwang Hyun Chung, SungSsiNonGo (姓氏論考—朝鮮家族法論考), [A Study On Kin And Surname: A Study Of The Chosun Family Law] (Seoul: Donggwangdang, 1940); Gwang-shin Lee, WooRiNaRa MinBeobSangEui SungSsiYeonGu [Study Of Civil Code's Surname System] (Seoul: Beopmunsa, 1973) (in Korean).

18) In the current marriage registration form in Korea, the question corresponding with this article reads as follows:

| | |
|---|---|
| (5) The surname and origin of surname | Have you discussed to give your child the mother's surname and place of origin? Yes ☐ No ☐ |

The question above seems a little misleading. A more appropriate wording would be: Have you agreed that your child will succeed the maternal surname and origin of surname? The current wording focuses on the fact of 'discussion' than the maternal surname.

the father's early death before the birth of the child, father's abandonment of the child, father's extramarital affairs, and the separation of the couple etc. cannot be predicted at the time of registration. Even if we consider that all children born to the same parents should have the same surname as the Ministry of Justice strongly claimed at the time of proposing this bill in 2003, it is not too late to select the surname when 'the first child is born.'[19)]

Second and the most importantly, the revised provision still maintains the patrilineal surname as the principle while mother's surname can be used only as an exception, which is the 'father's surname principle' problematized in this article.[20)] For the child borne within the parent's marriage, the father's surname is given to the child with a very strong assumption of the fatherhood as we will see in the following. For the child borne out of wedlock, the child could assume father's surname once a child is affiliated with the biological father. The system and the structure of the father's surname as the 'norm' remain intact in the current law. In relation, it is also notable that the typical cases of the demand for changing a child's surname arose when the mother was remarried and took care of the child from the previous marriage with her new husband.[21)] As long as the child would have carried the mother's surname, such turmoil would not be necessary.

Third, the continued use of the notion of 'a child borne out of wedlock'

19) There are many reasons why the timing of the choosing child' surname should be postponed until the first child is borne is more suitable than the timing of marriage registration. *See* Hyojin Song & Poksoon Park, *How to change the law for deciding the child's surname and child of wedlock*?, (presented paper at Symposium entitled 10 Years After The Family-Head Abolition And More Equality In The Family, sponsored mainly by Presidential Committee on Aging Society and Population Policy, held on 4th December, 2018 (Hereafter, 'Symposium on more equality in family 2018'). *See* also Hyunjeong Chung, Inkoo Bae for the same opinion presented at the 'Symposium on more equality in family 2018.' *See* https://www.betterfuture.go.kr/PageLink.do.

20) When the revision of the family law was underway at the Legislature in the early 2000s, there were bills that proposed gender-equality in choosing the child's surname. Legislator Lee, Mi-kyung of the Democratic Party(with 51 others), proposed a bill that stated that "a child shall assume its father's or mother's surname as agreed upon by them, and in a case where an agreement cannot be made or is not made, a family court shall decide upon request of the father or mother." A similar bill was proposed by Legislator No, Hoe-chan and nine others.

21) Lee, *supra* note 16; Song & Park, *supra* note 19.

(婚外子; *honoecha*) in the article 781 Paragraph 5 has also been criticized, since this notion normalizes the child borne within the boundary of the legal marriage only. This notion has discriminated a child and a person outside marriage.[22] The Korean law has classified every child for almost 70 years by criterion of being within and without the legal marriage. 'The father's surname principle' for a child has been rigid in conjunction with legal marriage as the only institution to be specially protected by the law and the family policy. This marriage-centeredness has not been weakened in the current law.

It is a global legislative trend for the married couple to decide their own child's surname such as mother's, father's or the combined name.[23] Including the decision to give different family names to each child, decisions has become more and more left to the parent's discretion.[24] As we will see in the next section, in spite of this revision of the Article 781 in Korea as we have discussed, the reservation of CEDAW Article 16, paragraph 1(g) has been held.

## III. Inconsistency between the Judgment of the Constitutional Court in Korea and the CEDAW Reservation

As we have discussed, Article 781 paragraph 1 still upholds the

22) Okjoo Shin, *A comparative law study for abolition of the discrimination against the children*, presented at 'Symposium on more equality in family 2018.' *See also* Song & Park, *supra* note 21.

23) Kim, *supra* note 14, at 106-174, Beom-chul Kim, *A Comparative Approach to the Provisions for Child's Surname*, 19-1 Journal Of Family Law (2005).

24) In the West, where it is customary for a married couple to use the same family name, there are cases where the use of the same family name is not coercively imposed by law (the USA), or the relevant law is amended in the direction of renouncing the use of the same family name upon marriage or retaining the birth names if no agreement can be reached (Germany). In France, while the husband and wife can use the respective surnames inherited from their respective parents after marriage, a child succeeds the father's family name according to the patrilineal family name principle. In response to the critique that this provision violates the principle of gender equality, the Civil Code in France was amended to allow both parents to decide the surname of the child by agreement (*See also* Song & Park, *supra* note 21).

patrilineal principle, and the chances for children to succeed the maternal surname are given only as an exception, in rare circumstances. Indeed, the Constitutional Court determined that Article 781 of the Civil Code before the amendment in 2005 was incompatible with the Constitution on December 22, 2005, i.e., prior to the amended Civil Code that was entered into force on January 1, 2008.[25)]

### *1. Constitutional Decision*

The opinion of the 8 judges on the constitutionality of the pertinent article was divided into 5(incompatible with Constitution): 2(incompatible with Constitution): 1(compatible with Constitution). Although the majority opinion converged on the article's incompatibility with Constitution, the former opinion that five justices (Justice Yoon Young-chul, Justice Kim Hyo-jong, Justice Kim Kyung-il, Justice Joo Sun-hoe, and Justice Lee Kong-hyun) supported was different from the latter opinion of the two other Justices. Whereas the latter held that the very unconstitutionality of the provision mattered in the patrilineal surname principle, the majority opinion in this decision did not matter the patrilineal principle itself. See what follows:

> Considering the difficulty of taking into account both maternal and paternal lines for the child's surname, and the general public's acceptance of the paternal surname as a part of life style, and **absence of influence of the use of the surname on concrete rights and obligations of individuals**, the provision of the patrilineal surname principle as expressed in the phrase 'A child shall succeed his or her father's surname and origin of surname' (hereinafter 'provision under review') contained in Civil Code Article 781, paragraph 1 (March 31, 2005 version, i.e., before the amendment pursuant to Law No. 7427) cannot be considered a departure from

25) Constitutional Court [Const. Ct.] 2003Hun-Ka5-6 (consol.) Dec. 22, 2005, (2005 DKCC 111) (S. Kor.) Case Book Of The Constitutional Court Of Korea, 17-2(2005). English translation of the decision is my own [hereinafter Case Book].

the scope of legislative discretion (emphasis added).[26)]

It is notable that the majority opinion did not deem the patrilineal surname interfered with individuals' rights and obligations.[27)] Three reasons were provided why the patrilineal principle itself was not unconstitutional: developing an alternative to represent both paternal and maternal genealogy was very difficult, and one's relatives might use different surnames thereby weakening the meaning of surname as a representation of blood relations, the surname had no direct impact on the individual's rights and duties, and the majority of Korean society accepted the paternal surname system as a natural way of life. Even though people's way of life could not replace the constitutional legitimacy, recent surveys tells that paternal surname principle is not people's dominant way of thinking any more.[28)] Instead of the patrilineal principle itself, however, the Court ruled that the previous provision was incompatible with the Constitution for the following reason:

> It is a violation of individual dignity and gender equality to coercively impose the father's surname on a child upon its birth, prohibiting the use of the mother's surname, even in such cases where the father has already died, the mother is expected to exercise parental rights and rear the child alone due to divorce, or the mother rears the child alone despite the father's recognition of a child born

26) *Id.*

27) Case Book, *supra* note 25, at 554-555. Similar opinion was made by the Ministry of Justice officials during the Family Law Committee established in 2003. There was a concern that the use mother's surname/origin of surname would become as arbitrary as driving on the left side of the road and lead to chaos. That is, "when all other cars keep to the right side of the road, if you insist on left-side driving, you shouldn't be surprised to find yourself bumping into every car across the center line." Another opinion was that "disheveling the rows neatly lined up over a long time can set back the history of mankind established by the surname system." Ministry of Justice, The Minutes if the Fifth Meeting of the Family Law Committee (Jul. 24, 2003) (unpublished).

28) Recent surveys conducted by Korea Legal Aid Center for Family Relations demonstrated that the public in Korea came to think that "the paternal surname principle is unreasonable" in 2013 (61.9% among 6873 respondents; "reasonable" was 38.1%). In 2018 survey, responses in "unreasonable" increased to 67.6%. The surveys (*See more on* Kyungae Cho, Presentation in 'Symposium on more equal family 2018').

out of wedlock.[29)]

As stated by this majority opinion, prohibiting a child from assuming his or her stepfather's surname in a changed family relationship such as adoption or remarriage was regarded as a violation of the child's rights in enforcing father's surname without a chance to change it. In this sense, the use of mother's surname was not a matter of choice but a remedy in those exceptional cases. This opinion had similar thought embedded in the previous law, which permitted a child to succeed the mother's surname such as when the father was unknown, a foreigner, and or registered as head of the wife's family. Moreover, in the majority opinion, the unconstitutionality of the current article did not lie exactly in the limited opportunities to adopt the mother's surname. The opinion seemed to pay attention to more the 'the surname of the step-father' to whom the mother remarried. In this respect, 'the father's surname principle' even if the father was not the 'blood' father but the 'social' one via the mother's remarriage was oddly re-affirmed and re-endorsed in the name of the child's welfare.

As seen this way, the judgment as to whether the patrilineal surname clause in the Civil Code 781 prior to the 2005 amendment was incompatible with Constitution was, on the surface, a judgment of incompatibility, but it was tantamount to that of constitutionality because it reaffirmed the previous patrilineal surname principle. Indeed, the timing of December 2005 was when the new Civil Code has already passed at the legislature in March and anticipated to be into force in January 2008, and the pertinent Article in the amended Code was supposed to resolve all the unconstitutional elements delivered in the majority opinion. No further amendment in the Article 781 paragraph 1 was made at the legislature after this Constitutional decision.

There were two other judges (Justice Song Injoon, Justice Jeon Hyosook) who addressed the Article's incompatibility with Constitution in terms of its patrilineal system. This opinion clearly articulates the gender discrimination in the surname provision of Article 781 paragraph 1 in the previous Civil Code. According to this opinion, the patrilineal surname

29) Case Book, *supra* note 25, at 544.

article put the father and the male at the center of the family and enforced only patrilineal succession of the family so that the status of women in the family was held "secondary and inferior to that of men."[30] The judges also pointed out that it was not clear what the substantial benefit has been that could legitimize this patrilineal provision. Especially, in the current society, freedom of the individual and equality of men and women have been the norm and the common value and the legal enforcement of the paternal surname would not be compatible with the current lifestyle and way of thinking. The opinion also reviewed the notion of 'tradition' that was addressed in the decision of 'family-head system' in 2003.[31]

> The fact that the institution of family has prevailed for a long time in history does not guarantee its constitutional legitimacy. The institution ought to be compatible with the values of the current society and those of the Constitution.[32]

They also pointed out that one's surname should be a matter of one's parents and the individual. "The parties who have a direct interest in a decision regarding the child's surname are the child's father and mother, and the individual who is going to use a specific surname […] Since the surname needs to be provided right after the birth of the child, when the agreement between the parents is made, it amounts to an agreement between the primarily interested parties." The two judges then declared that the surname issue belonged to the domain of 'private life' and changing the principle of the paternal surname would not disrupt the social order.[33] This way, the opinion emphasized on the meaning of surname as the issues of parent and the child oneself, and "private life" rather than that of relatives or kin. Recently, this reasoning in which the surname as the matter of individual identity and private life that the lineage and the blood

30) Case Book, *supra* note 25, at 563.

31) Constitutional Court [Const. Ct.], 2001Hun-Ka9 (consol.), Feb. 3, 2003, (2003 DKCC 101), (S. Kor.).

32) Case Book, *supra* note 25, at 563.

33) Case Book, *supra* note 25, at 565-566.

has become more broadly adopted than in 2003.[34)]

One dissenting opinion was delivered by Justice Kwon Sung.[35)] Justice Kwon argued that the patrilineal surname principle was a "cultural property that preceded the Constitution". This was in consonance with the logic for the 'preservation' during the fifty years' movement of Korean family law from 1952 to 2003. Justice Kwon also brought in the vulnerability of fatherhood in that the surname "publicly manifests the father-child blood tie, which is inherently uncertain in comparison with the mother-child blood tie that is evident through childbirth and breastfeeding, and strengthens the father-child unity and bond." Moreover, the surname, which is the "mere function of signifier," cannot influence women's "substantive legal status", and the disadvantages that an individual may suffer due to the use of the father's name in the case of remarriage or adoption arise from "social prejudice and stereotyping, and not the patrilineal surname principle." As such, the dissenting opinion further supported the constitutionality of the patrilineal surname principle and the provision of Article 781 of the pre-amendment Civil Code.

Interestingly, this decision was delivered on December 22, 2005, i.e., after the National Assembly has already passed the Civil Code Amendment Bill in which the choice of the mother's surname was proposed and change of surname within a limited scope was allowed as seen in the current Article 781 above. In the new bill, all the elements indicated as grounds for the of unconstitutionality in the majority opinion, i.e., those prohibiting the use of the mother's surname or change of a child's surname in exceptional circumstances such as adoption and the mother's remarriage, etc. were indeed taken into effect starting January 2008. Thus, the amended article should have been constitutional according to this decision.

### *2. Reservation of the CEDAW Article*

The Article 16 paragraph 1 (g) in CEDAW that stipulates the gender equality in choosing the family name and vocation, has been in a state of

34) Song & Park, *supra* note 19.

35) Case Book, *supra* note 25, at 569-571.

'reservation' by the government of Republic of Korea until today.[36] CEDAW indeed has exerted continuous influence on Korean Family Law.[37] When the Convention was ratified by the National Assembly, Article 9 and Article 16, paragraphs 1(c), (d), (f), and (g) of CEDAW were reserved.[38] Although there were oppositions against such reservations of the CEDAW in ratification, the proposal for reservations submitted by the Ministry of Foreign Affairs passed the National Assembly. The provisions in the Article 16 that have been reserved by Korean government are as follows:

> Article 16
>
> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
>
> (c) The same rights and responsibilities during marriage and at its dissolution.
>
> (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount.
>
> (f) The same rights and responsibilities with regard to

36) Reservation in international law allows the state to be a party to the treaty, while excluding the legal effect of that specific provision in the treaty to which it objects. States cannot take reservations after they have accepted the treaty. A reservation must be made at the time that the treaty affects the State.

37) International human rights norms have, in fact, exerted direct and lasting influence on the amendments of Korean family law since the 1970s. In 1976, when the drive to amend Korean family law began to fade, the debate was revived in the legislature, arguing that the preference for sons was at the origin of family planning, on the occasion of the "Year of the UN World Population." The revival was also in relation to the National Assembly's long-time inability to ratify the CEDAW after signing in 1983. Cf. Tae-young Lee, GaJokBeub GaeJungUnDong 37NyeonSa, [Thirty Seven Years Of Korean Family Law Revision] (Seoul: Korea Legal Aid Center for Family Relations, 1992).

38) CEDAW Article 9, paragraph 1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless, or force upon her the nationality of her husband. 2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

> guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount.
>
> (g) **The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation** (emphasis added).

Evidently, the conflicts that took place between Korean law and the CEDAW provisions, resulting in reservations, have primarily been in the area of 'family.' Although gender-based oppression and inequality in the "private sphere" have been questioned and thematized by the numerous Western feminist works,[39] I interpret that the 'family' in the Korean law and society has been the sphere far beyond 'the private' that is intertwined with the status via complex kin organization, and thus national culture of 'tradition.'[40] In that regard, the 'family' in Korea does not seem exactly 'the private' in the West but overlapping with the 'public' sphere in the sense that it is the sphere of politics and economy. This would be the one instance why and how achieving gender equality in the 'family' in Korea would require different reasoning from the Western feminist jurisprudence. Although most reservations have been withdrawn as of 2018, the Republic of Korea still has one reservation, namely, Article 16, paragraph 1(g). In its concluding observations on the eighth periodic report of the ROK, the CEDAW committee reiterated as follows:

> 46. The Committee is concerned that article 781, paragraph 1 of the Civil Code maintains the patrilineal principle as it stipulates that a child may assume his or her mother's surname only when the

39) There is a large body of Western feminist literature on the problems of discrimination against women in conjunction with the dichotomy of the public/private sphere. For example, Carole Pateman, *Feminist Critiques of Public/Private Dichotomy*, in Public And Private In Social Life (S.I. Benn and G.F. Gaus eds. Croom Helm Ltd. 1983), Iris Marion Young, Justice And Politics Of Difference (Princeton University Press, 1990).

40) For an interpretation of the patriarchal family of Korea from the viewpoints of tradition, history, and colonialism, *see* Hyunah Yang, HanKook GaJokBeob IlKki -JeonTong, SigMinJiSeong, GenderEi GyoChaRoEaSeo [Reading the Family Law –at the Crossroads of Tradition, Coloniality, and Gender] (Seoul: Changbi, 2011) (in Korean).

> father agrees at time of marriage. The Committee is further concerned that, upon divorce, marital property is divided according to each of the spouses' relative contribution, unless they agree otherwise in a contract. The Committee is further concerned that a reconciliation procedure is mandatory even in cases of divorce based on domestic violence, and that the ideology of preservation of the intact family leads to awarding visitation rights and child custody to abusive fathers. It is further concerned at the lack of social and economic protection to women in de facto unions.
>
> 47. The Committee calls on the State party to amend article 781, paragraph 1, of the Civil Code to abolish the patrilineal principle in order to bring its laws in line with article 16, paragraph 1 (g), of the Convention.[41)]

Since the current Civil Code Article 781 should have eliminated all the unconstitutional elements according to the Constitutional decision delivered in 2003 as we saw above, it is supposed to be constitutional, and thus to comply with the CEDAW as well. However, the reservation of Article 16 paragraph 1(g) of CEDAW provision has not been withdrawn until now.[42)] How could this continued reservation of the pertinent Article regarding the surname be possible that have passed the constitutional review? This situation raises the question whether such an interpretative discrepancy regarding Article 781 Paragraph 1 between the CEDAW and a country's Constitution could be tolerated. Based upon the examination of a Constitutional case and the CEDAW reservation I would like to further discuss gender effects of the paternal surname system in the next chapter.

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41) CEDAW Committee 69 Session (19 February 2018 -09 march 2018), Concluding observations on the eighth periodic report of the ROK, refer to https://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1157&Lang=en

42) For further details on the criticism that the Korean government's accession to CEDAW under many reservations, which exempted it from immediate revision of its domestic laws, was a political measure to acquire the title of "State Party to the CEDAW" rather than an expression of its strong will to improve the human rights situation, *see* Inseop Chung, *Korea's Implementation Status of Major International Human Rights Treaties,* 221 Human Rights And Justice (1995) (in Korean).

## IV. Surname as the Systematic Construction of the Gender

In this section, I would like to discuss the system of surname in terms of the system of gender construction. This is because a surname is not just confined to how a child and a person are identified, but it extends to the critical tools for the construction of lineage and that of the parent-child relationship, thus defining motherhood and fatherhood.

### *1. Maternal lineages (母系; moke) versus paternal lineage (父系; buke)*

The broadest scope of relatives in Korean family law can be found in the notion of 'blood relatives (血族; *hyuljok*),' literally meaning the kin who share the blood. However, the definition of blood relatives in the Article 768 of the Civil Code is not very clear: "one's lineal blood relatives (Article 768)". In the provision for the scope of close relatives (親族: *ch'injok*) in Article 777, we can find that "blood relatives within eighth degree (寸數; *ch'onsu*) of relationship" are defined as close relatives. Indeed, the definitions of blood relatives and close relatives became very much 'gender-neutral' after the revisions in 1990. There is no notion such as paternal side of blood relatives or maternal side of relatives in the law. Gender equality was achieved between maternal and paternal side of relatives, as if one could have or constitute the maternal side of blood lineage in the same manner as the paternal side of blood lineage. Without clear guidelines about what exactly 'blood' means, it is impossible to identify, since one could have so many ancestors with different 'blood.' Thus, a human being consists of many diverse blood elements that cannot be represented by a surname. Thus, the 'blood' represented by a surname is far from that which can be defined physiologically. Rather, it is only a reaffirmation of what is represented by it socially. This 'social' blood that defined blood relations or close relatives is precisely what Castoriadis diagnosed a long time ago – the "imaginary" construction of the social institution.[43] The 'feeling' of sharing the blood via the surname could be a

43) Cornelius Castoriadis, Imaginary Institution Of Society (Kathleen Blamey trans, London: Blackwell, 1987).

fascinating example of the imaginary dimension of the social institution. Who could be the maternal side of blood relatives? How can one identify the maternal side of blood relatives let alone close relatives? Kinship does not simply exist in calculating the degree of relationship, but in having the social mechanism or social tools through which the genealogy can be traced. For example, one has mother's father's father's father (*oegojobu*, fourth degree) and his spouse (*oegojomo*, fourth degree). There could be numerous relatives derived from them, such as the descendant's siblings and their ascendants, etc. In having such a pervading patrilineal surname system, a society ends with little tools to trace the maternal side of relatives. Moreover, would they be genuinely 'maternal' blood relatives? As soon as we try to imagine the maternal side of relatives, they quickly transform into the mother's 'paternal' relatives. When paternal lineage is about the father's father's lineage, the maternal lineage should start from the mother's mother's lineage and the relatives derived from her ought to be the natal family. However, it is not even easy to determine the mother's mother (*oejomo*, second degree)'s surname and place of origin let alone identify her natural family members. Structurally, the patri-local marriage established during the Chosun dynasty in which the wife's place of living after wedding ought to be the husband's house and village in conjunction with the children's succession of the patri-lineal surname weakened and submerged a married woman's connection with her natal family. This way, even an attempt to trace the maternal lineage in one's imagination encounters an 'opaque' wall due to the lack of any symbolic tools rather than the lack of mother's blood.

The surname/place of origin has indeed been the original point in the map of genealogy, and genealogy book and ancestral veneration are other mechanisms to identify the close relatives. They –the surname/place of origin that one inherits, genealogy book, ancestral veneration, etc. - have worked as the mechanism to construct the paternal blood lineage, in which only sons could have proper membership, since their surname could be 'inherit-able.' If the notion of 'blood' in paternal side of blood relatives has been alive only in the imagination, this imagination would be strengthened and reconfirmed by endless social efforts as seen above. Notably, it is this *social* blood that nullified women's and mother's blood, and that rendered father's blood dense and real.

It is also interesting to see that maternal lineages have been plural and divergent, whereas paternal lineage is singular and convergent. This is because maternal lineages ideally have three lines: mother's mother's side, mother's father's side, father's mother's side. Among them, mother's mother's side of lineage would be the central maternal lineage.[44] Women's membership in the kin has always been plural, overlapped, and yet marginal. Thus, a married woman retaining her natal surname is scarcely the sign of women's autonomy and equality, but an indicator of the iron-rule of un-changeability of the paternal surname, and thus the woman's natal surname is destined to disappear and to be a 'outsider-within.'[45] As the result, the mother who did not carry the 'blood' continued to remain as the function of procreation, while father's blood line has continued to explain one's genetics as well as social affiliations. 'The castration of mother' in Irigaray's language would precisely mean this symbolic death of the maternal. There is no representation of motherhood other than 'real' blood, intimacy, and the memory. It is not just the mother who is rendered incapable of inheriting her own symbolic blood and lineage. It is also the entire group of daughters that not have such capacity.

In this regard, the 'gender neutral' boundary of close relatives (Art. 768) and blood relatives (Art. 777) discussed above, without the tools for constructing maternal genealogy, is nothing but a gift box without a gift. The mothers in this regard are not the members of kin but the 'ground' of it. A woman's inability to give the children her surname is not a nominal phenomenon but 'symbolic' inability to build the lineage, identity, and even existence in the family. But that is not exactly women's inability but the law's inability to implement equal distribution of the symbolic blood between genders - men and women. The lack of social sign of the mother's blood precisely marks the 'the symbolic' that I problematized in the beginning of this essay. The meaning of 'the symbolic' in this context is again double. It is a critical tool for representing the order of things. Yet it also designates intangible matters compared to ancestral veneration or

44) For a more detailed analysis of the kinds of women's lineages, *see* Hyunah Yang, *supra* note 40, at Ch.9.

45) 'Outsider-within' is a terminology to aptly diagnose married women's position who maintains her natal surname (Refer to Chao-ju Chen's article in this volume).

genealogy books, but is not lack of substantial effects.

### *2. Motherhood within the Institution of Fatherhood*

The surname also constructs the meaning of motherhood and thus fatherhood, and defines the individual's relationship with his/her children. Even after the abolition of the family-head and the family-register, and the deletion of Articles 781 to 785 regarding the child's membership in the family-register, the provisions defining the children as 'belonging to the father' are still very robust. Let us see the Article 844 regarding the *ch'insengcha* (親生子), for instance. This provision also constructs and interprets the notion of mother's blood as empty and meaningless in conjunction with the surname clause.

> Article 844 (Presumption of Husband's Child) (1) A child conceived by the wife during the subsistence of marriage shall be presumed to be the child of the wife's husband.
>
> (2) A child born two hundred days after the day on which the marriage relations were terminated, shall be presumed to have been conceived during the subsistence of marriage.

Paragraph (1) defines the condition under which a child is presumed as a 'natural, 'i.e. 'the biological child of the father, while paragraph (2) specifies the period of matrimony within which the child is presumed to be the biological offspring of the husband. Put together, the article provides a secure ground for presuming that every child born within matrimony is the child of the father, or more precisely, the *ch'insengcha,* meaning "a child of the natural father." The law's inclination to establish a secure fatherhood for the child is evident in the virtual absence of motherhood in the definition of the child. As seen in the provision above, the child is curiously born from *the wife* of the husband rather than to the mother of the child. Is this an accidental expression? It is not, because it matches the very grammar of this provision, where not natural motherhood but the marital relationship with the father establishes the legal relationship of mother and child. It is interesting to see that no terms such as mother and father appear in the legal definition of this child. In this way, the current institutions of

surname and fatherhood put very much emphasis on the 'marriage.' The distinction such as child 'out of wedlock' is a very keen issue in keeping the order of this fatherhood. However, the father's status as husband to the mother is quite different from the mother's status as wife to the father. This is because biological fatherhood must be presumed on the ground of intercourse with the mother and the indirectness of fatherhood is inevitable.[46] On the other hand, biological motherhood is certain in most cases. Motherhood in this provision is not absent, but it exists in a distorted shape: the mother exists only when the husband defines the child's mother who was his wife at the time of pregnancy. Thus, motherhood in this institution is heavily socialized – secure only through marriage and the husband. From Articles 844 to 865, the core issue is whether a child is indeed the biological child of the father, which can be translated as 100% control of the sexuality of married women which does not seem tenable in the current society.

### *3. Other Discriminatory Effects*

According to the majority opinion delivered in the Constitutional Court seen above, no concrete rights are violated or restricted on account of the patrilineal surname principle. It regarded the surname as a mere "signifier." I find that the understanding of discrimination within the context of the Constitutional Court's discourse addressed only the tangible level. As we have seen above, the patrilineal surname system discriminates against women in a broader and systematic way, far beyond the level of the rights of an individual woman. As the absolute majority of people in Korea have carried the paternal surname, this surname system itself carried substantial effects of degrading women in the following ways: a) father's or paternal lineage are represented as having the more important 'blood' compared to the mother and maternal lineage. It is against the Constitution in its discrimination against women; b) married women are surrounded by

46) Let alone these male and marriage-centeredness as pointed out, the strong assumption on the biological fatherhood of the child who were born within the marriage has become under the challenge due to the easily available DNA test and increasing use of artificial insemination.

the family members whose surnames are different, i.e. the husband's surname. Thus, she becomes 'outside-within' in the family. c) As seen in the effects of the father's affiliation with the child, it is against the un-wed mother-child relationship and lifestyle as a unit.[47]

*1) Restriction to women's sexuality*

I would like to discuss more tangible consequences of the male-centered surname system. First of all, the surname needs to be examined in relation with women's sexuality. Under the patrilineal surname law, 'a legitimate father' for each child is a prerequisite for a woman to give birth to socially accepted children. This poses a risk for a woman who wishes to engage in sexual relations. What are men and women risking by having sex? It is women who could be pregnant, and either to continue or to discontinue pregnancy is a grave risk to women. Both giving birth to a child and having an abortion are serious choices in the trajectory of a woman's life. In society and law, where carrying the father's surname is the norm and the normal, however, woman's risk in having sexual relations becomes even heavier. When a woman becomes pregnant without an identifiable father, not only the responsibility for childcare, but the social stigma against the 'abnormal' child tends to fall upon her. For a man, however, a sexual relationship is not encumbered by the risk of pregnancy and even supposing that he assumes his responsibilities towards his female partner for an unwanted child, his responsibilities as an unmarried father have nothing to do with the patrilineal surname system.

*2) Restriction to constituting the family*

It also hinders women's right to constitute a family in a serious manner. Insidiously, the paternal surname has worked as a mechanism by which women are forced to depend on men's will to marry and to constitute a family, only when she wants to have a child or even to have sexual relations in a steady manner. Under these social conditions, it tends to be the woman who needs to obtain the partner's agreement to carry the responsibility when she becomes pregnant in case. This poses the difficulty

47) *See* Shin, *supra* note 27, for the opinion of the unconstitutionality of the current Article 781 of the Civil Act.

for the woman to become the active initiator in having sexual relations and establishing family relationship such as cohabitation, marriage, and remarriage. This also means that the man's will to marry or to constitute a family becomes critical in having steady intimate/sexual relations. In this context, it is notable that the Constitutional Court of Korea mandated in 2009 that the 'crime of sexual intercourse under pretense of marriage' (Article 304, the previous Criminal Code) was unconstitutional.[48] It is also notable that the Korean Criminal Code has prohibited abortion as a criminal act (Article 269 & Article 270). In doing so, legal standards regarding women's sexuality are rendered incoherent, and thus women's sexuality in Korea seems strangely twisted: it is merely stated that everyone can enjoy sexual freedom and the right to sexual determination regardless of gender and marital status. Although it has seldom been acknowledged, the surname law has played a critical role in controlling and shaping women's sexuality by rendering it dependent on the man's desire and will, even without thinking about sexuality.

In cases where the court's permission is sought to change the child's surname from the father's to the mother's usually when the mother gets divorced, the courts' first concern has been the possibility of the mother's remarriage.[49] That is, for a child to change its surname to that of the mother, the mother should convince the court, if not officially, that she will not remarry. This evidently interferes with the woman's right to marry, and might as well be termed a 'modern version of forced chastity' imposed upon the mother by the law for 'the welfare of her child.' The system of surname may merely be a 'symbol' or 'signifier' to men, who have enjoyed their rights to individual choice as freely as they enjoy the right to air. Likewise, in the case of a change of surname to that of the stepfather, the

48) Constitutional Court[Const. Ct.], 2008Hun-Ba58 et al. (consol.), Nov. 26, 2009. According to the majority opinion, the previous Article 304 of Criminal Code has treated women as immature beings, whose sexual freedom was always bound to the man's willingness to marry, has discriminated women and restricted their freedom. From the point of view of Article 781 Civil Code, however, the law has contributed to women's systematic dependency on men in the decision of having sexual relations and of marriage.

49) Lee, *supra* note 16, at 67-69; Seung-yi Oh, *Changing Family Name and Origin in Korea: A Review of Supreme Court Decisions*, 2-2 Korean Journal Of Gender And Law 57 (2010) (in Korean).

stepfather will not see his freedom to remarry or his sexual relationships constrained by law. This is a politics what surname institution entailing to influence women's sexuality and reproductive choices, even though the influences are always on the surface of cognition. In consonance with Michel Foucault, the surname system can be regarded as an example par excellence of the 'micro-physics of power' that permeates thoroughly the realms of body, desire, and emotionality.

*3) Discriminatory effects on the members of not very 'normal' family*

It should also be noted in this context that the legal marriage is another mechanism that controls women's sexuality in conjunction with the patrilineal surname. Without an identifiable father, children in Korea have been treated as 'illegitimate.' Neither has a couple in cohabitation been very acceptable to the Korean law and society. All of these mean that Korean society has heavily been a "legal-marriage-society" in its approach to dealing with sexual relations and reproduction. In spite of Korean law's design, the diversity in the family form and relationship has increased noticeably. Non-traditional family forms such as single-parent families, remarried families, same-sex families, and the group families have increased.

A shift in the concept of 'family' has also taken place somewhat changed, implied by the remark that 'the legal holder of parental rights or the *de jure* custodian cannot compete with the *de facto* custodian' in the cases of surname change. The primary considerations regarding a request for surname change are as follows: "the actual caregiver of the child," "the existence of a bond with the biological father," and "the child's own wishes".[50] In this context, the notion of family is changing from a legal and lineage-bound one to the actual relations, especially 'care' relationship among the members. The current surname clause has diverged from this family trend oriented on the 'real family life.'

Accordingly, there will be many legal issues raised that could not be easily solved by the law built on the 'imaginary form' of the normal family.[51] The increasing number of couples deciding to assign the mother's

50) Lee, *supra* note 16, at 48, 74.

51) For example, there are a variety of family forms within remarried families alone:

surname to their children and the requests for surname change could be significant indicators of the demands of the contemporary Korean society.[52] Thus, the preexisting family law and its frame define the members of the 'different' family members such as un-wed mother and her children, un-wed father and child without identifiable mother, child who carries mother's surname while whose mother is remarried, etc. as being 'exceptional,' not vice versa. It is time the law and legal frame accommodate the people's needs and lifestyle.

## V. Conclusion: Implications of the Patrilineal Surname System in East Asian Feminist Jurisprudence

It is encouraging to see some discussion has been rebooted on the issues of surname law revision in the context of low reproduction and population policy. This kind of discussion was not likely taking place during the active discussion on family-head law revision in early 2000s. In this article, I try to thematize the meaning of 'maternal surname' and how 'empty' it has been. In doing so, how patrilineal surname principle has discriminated against mothers, 'their children,' and the matrilineal relatives by depriving women of the capability to pass on the surname, and how it restricts a woman's right to make reproductive choices and initiate a family formation. Rather than to provide the child a legitimate father in order to be a 'normal' member of the society as amended in the current Article, this study

nonresidential stepparent families, residential stepparent families, nonresidential stepfather families, nonresidential stepmother families, residential stepfather families, residential stepmother families, mixed maternal stepparent families, mixed paternal stepparent families, and childless stepparent families. In Korea, only residential stepparent families are considered a "normal" remarried family. Eun A Kim, *The Issues on the Law of Domestic Relations Concerning Remarried Families, 24-3* Korean Journal Of Family Law (2010).

52) The court statistics on surname change requests demonstrated the actual need for this measure. The numbers of surname change requests between 2008 and 2011 were consistently high after the explosive peak in the first year of enforcement of the Article, accounting for 25% of the cumulative total during this period (16,531 cases in 2008, Jurisdiction Yearbook (2009), 951; 7504 cases in 2009, Jurisdiction Yearbook (2010), 978; 6392 cases in 2010, Jurisdiction Yearbook (2011), 984; 6254 cases in 2011, Jurisdiction Yearbook (2012), 1008) (*see* Seung-yi Oh, *supra* note 28, at 41). Further research on the trend is needed.

proposes a more universal design to accommodate such diverse and real needs in the law that grants both mother and father an equal opportunity to give one's surname to the child which complies to the CEDAW Article 16, 1(g) as well.

Based upon this study, the basic guideline of the revision of the Article 781 of the Civil Code can be suggested as follows: a) as for the paragraph 1 of the Article, "a child's surname needs to be decided by the agreement between the mother and father." This will be the most important and fundamental change of the Article.[53] As maternal surname gradually becomes 'normal', the distinction between child within marriage and outside marriage weakens and so does the distinction between un-wed and wed mother as well; b) for the timing of the decision for the child's surname, the decision at the birth of child, not at the time of registration of marriage, is recommendable. This will give more time to deliberate about each couple's needs and family situation ; c) the phrase such as "when the father is not known" as in the Paragraph 3 has been discriminatory to the children of the un-wed mothers. Instead, it needs to be revised in the following way: "when the father is not known, a child shall assume the mother's surname. When the mother is not known, a child shall assume the father's surname; d) as for Paragraph 5, regardless of the father's affiliation with the child, keeping the previous (mostly mother's) surname for the child should be the principle; f) related to d), more opportunities needs to be given to the child or the adult offspring to choose one's own surname as to maintaining or changing it.

In this suggestion the revision, the meaning of surname would also be changed in the following way. First, the surname will become more an indicator of the individual rather than the lineage.[54] To put it differently,

53) 71.6% of respondents among 3,303 chose "both mother and father' agreement" as the way of deciding the child's surname in 2018 survey (*see* Kyungae Cho, *supra* note 28.). For the cases when the agreement between mother and father cannot be reached to, other legal options need to be made.

54) For this opinion, *see* Song & Park, *supra* note 19, and the discussions presented at the 'Symposium on more equality in the family 2018'; *see* also Seung-yi Oh's discussion, *Where is the Surname Going? Actual Practices of the Surname Changing in Korea and the Dissonant Tides underneath*, Proceeding for the Conference, *'Surname Issues' in Emerging Feminist Jurisprudence in East Asia*, Asia-Pacific Law Research Institute and Gender Research Institute at SNU, Nov. 13, 2017.

the signifier of the surname is no longer fixed to the patrilineal hierarchy, but moves towards the sign of concrete family relationships and individual identity. In relation to it, the surname should be dealt with in terms of individual 'right of naming.' 'The surname as the individual identity was indeed the opinion delivered by Justice Song Injoon, Justice Jeon Hyosook at the Constitutional Court. In their opinion, the surname was an issue of mainly three persons - the mother, father, and the child in question.[55] In addition to this, the meaning of surname will change as the one to realize the child's welfare.

This study attempts to bring light to the obsoleteness of the paternal surname principle from the view of family needs and realities on the one hand, and to its unreasonable-ness from the view of basic rights and gender equality/difference. In doing so, I try to expose and examine how insignificant the 'mother's blood' maternal genealogy has been in the law and society. If and when the maternal surname becomes an ordinary surname option, it will lead to shatter a deeper layer of the surname order and to let the mother's blood and symbol visible. With this reasoning, I do not entirely agree with the opinion of the significance of surname as the individual identity and choice. Even though the diversity in the family increases on surface, the 'phallus-centrism' in the patrilineal family seems neither to be weakened nor to be replaced by alternative grammar. While recognizing the needs for accommodating diversity in the families, jurisprudence of 'personal choice' or 'private matter' in the surname issues is not enough when the surname as the symbols of the lineage and ancestors is considered. This is not the way of reaffirming the binary code of two genders - men and women, but a way of dismantling the paternal lineage as the only available lineage so far. Rather than the binary code, however, the women/the mother/the femininity have been the byproduct of the men/father/the masculinity. In following Luce Irigaray, only then, there will be "two genders."

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55) In sociology similar discourse could be found. Anthony Giddens predicts that the 21st century will be a period of structural transformation in private life, if the 20th century was a period of structural transformation in the public sphere. This means that intimate realms such as marriage, sexuality, and love will form the driving force bringing about social changes. *See* Anthony Giddens, The Transformation Of Intimacy: Sexuality, Love And Eroticism In Modern Society (Stanford: Stanford University Press, 1992).

Still, I think that the idea of the surname as individual choice and identity will serve as a good basis for energy the direction toward increasing 'flexibility' in choosing or maintaining one's surname. Therefore, balancing between increasing flexibility in the surname options and procedures, on the one hand, and providing more chances to carry the maternal surname on the other, is the task of feminist jurisprudence for the Korean surname law. In other words, harmonizing individual choice theory and inventing feminist 'tradition' theory is a unique task what the feminist jurisprudence in Korea needs to seek.