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Confucian Ethics, Judges, and Women: Divorce under the Revised Korean Family Law

Kay C. Lee

CONFUCIAN ETHICS, JUDGES, AND WOMEN: DIVORCE UNDER THE REVISED KOREAN FAMILY LAW

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Abstract: The historic revision of the South Korean Family Law in 1989 abolished many entrenched legal practices based on Confucian ethics that discriminate against women. Among its many provisions, the law provides for an equitable division of marital property upon divorce and ends the tradition of the father's automatic right to child custody, unless waived. However, in a legal system where judges wield unquestioned authority and wide discretion, judicial decisions based on traditional assumptions about women and family continue to frustrate the democratic intent of the revised law. Given the vague laws that give the judiciary broad discretion, real changes are possible only with further protective measures enacted by the legislature. In the interim, judges must critically examine their unquestioned authority as well as personal biases in their legal and social contexts.

I. INTRODUCTION

The South Korean[1] legislature revised its family laws[2] in 1989; the revisions went into effect in January 1991. For the first time in Korean history, these laws provide a foundation for women to actually obtain legal rights equal to that of men at divorce, an equality guaranteed in principle in the Korean Constitution.

The new family laws are a victory for the women's movement, which dates back to 1973 when 61 women's organizations formed the All Women's Federation to Revise the Family Law.[3] Backed by this coalition of women's groups, the few women in the National Assembly introduced

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[1] This Comment is confined to the laws and social changes in the Republic of Korea (South Korea). Those of the People's Republic of Korea (North Korea) differ in significant ways. Although the Korean peninsula is divided into two Koreas, the designation of "Korea" or "Korean(s)" in this Comment refers only to South Korea or South Korean(s).

[2] Minbop [Civil Code], Book IV [hereinafter Family Law], *in* CURRENT LAWS OF THE REPUBLIC OF KOREA, vol. II (Seoul: Korea Legislation Research Institute, 1994). Korean Civil Code is divided into five books. Following the German Civil Law model, the first three books deal with general provisions, property rights, and obligations in general. The fourth and fifth books are an institutionalized version of Korean customs covering family and successions. CHIN KIM, KOREAN LAW STUDY GUIDE 10 (1987).

[3] Rosa Kim, *The Legacy of Institutionalized Gender Inequality in South Korea: The Family Law*, 14 B.C. THIRD WORLD L.J. 145 n.1 (1994), *available in* WESTLAW, TP-ALL Database.

and pushed through the laws that laid the foundation for the revision.[4] The struggle of the small minority of women legislators was complicated by the mass rallies waged by the Confucianist lobby against the revision.[5] The fact that the predominantly male legislature resisted the pressure from the traditionalists[6] is a clear indication of the changes taking place in Korea.[7] Instituting a democratic form of government was one such change. After four decades of dictatorship in one form or another, establishment of a democratic government in 1987 suddenly made the women's vote count.[8]

Although the new laws grant broad discretion to the courts, the legislative intent behind the revision was to guarantee equal rights for women in the areas of marriage, divorce, child custody, and property inheritance.[9] For example, under the revised law, the marital residence is no longer presumed to be solely the husband's family home. Rather, it must be jointly determined by the couple upon marriage.[10] Most significantly, for the first time,

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4 YONHAP YONGAM [The United Yearbook] 250 (1993) [hereinafter YONGAM]. Between 1948 and 1991, on the average, women comprised no more than 2% of the legislative body. The worldwide average of women legislators was 10% during the same period. In 1992, only three out of 299 members of the National Assembly were women. *Id.*

5 *See* Karl Schoenberger, *Korea: It's suffer, not suffragette*, L.A. TIMES, Oct. 16, 1989, at A1; Sam Jameson, *Changing Lifestyles: S. Koreans Shake Family-Tree Rules*, L.A. TIMES, Mar. 17, 1992, at 4 [hereinafter *Family-Tree Rules*]. *See also South Korea: No Navels, Please—We're Korean*, Reuter Newswire, Aug. 8, 1994, *available in* Westlaw, LATIMES Database [hereinafter *No Navels*]. The traditionalists also exert a significant pressure on law enforcement. For example, in 1994, in the hottest summer since the turn of the century, some young women wore cropped T-shirts that leave their waists exposed. Police arrested women wearing cropped T-shirts in response to protests by Confucian elements demanding modesty in women. Even after a judge freed two women for wearing "Navel-Ts," the city police declared that it will continue to arrest women wearing the navel T to teach them a lesson. *Id. See also, The Battle of the Belly-Button*, THE ECONOMIST, Sept. 24, 1994, *available in* LEXIS, ASIAPC Library, ECON File [hereinafter *Belly-Button*].

6 "Traditionalists" in this Comment refer to the Koreans adhering to Confucian ideals, such as male ancestor worship, filial piety, among others. See *infra* notes 21-25 and accompanying text.

7 The legislature was not as successful against the Confucian lobby on the issue of the abolition of the family headship system and prohibition against intra-clan marriage. *See* Rosa Kim, *supra* note 3, at 5-6. *See also infra* notes 25-27 and accompanying text.

8 In this new political atmosphere, the long suppressed human rights issues, such as equal rights for women, found supportive forums in Korea and in the international human rights organizations. The All Women's Federation was instrumental in Korea's ratification of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women in 1984. The convention went into effect as domestic law in 1985, with an important exception: Article 16(g) concerning a woman's right to choose a family name, profession, and occupation. G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N.Doc. A/34/36 (1979), *cited in* Rosa Kim, *supra* note 3, at 6-9. As a result of the changed political atmosphere, women gained the Equal Employment Rights Law in 1987, and finally the Revised Family Law in 1991. YONGAM, *supra* note 4, at 250.

9 Bong-hui Han, *Hanguk Gajokbope Hynjaewa Jonmang* [*The Status of the Korean Family Law and its Future*], BOPRYUL SHINMUN [THE LAW JOURNAL], Sept. 26, 1994, at 14.

10 Family Law, art. 826.

the law entitles a woman to an equitable share of the marital property upon divorce.[11] Equally remarkably, a father may no longer automatically assume his right to child custody upon divorce.[12] Lastly, abolishing the practice of entitling the female child to only one quarter of the male child's inheritance, the new law treats the male and female children equally for inheritance purposes.[13]

The changing times have also made an impact on the Korean judiciary, and some courts have honored the legislative intent of equal rights for women. Even so, individual judicial decisions still reveal great reluctance to challenge the traditional Confucian ethics about women and the family. These ethics provide the judges with a "consistent and well-articulated set of principles" for defining family and the expected relationships within the family.[14] The judges also face external obstacles that tend to make it easier for them to identify with the traditional social norms. Powerful social institutions, such as the Confucian lobby,[15] the conservative police force,[16] and the mass media[17] continue to recreate and reinforce the images of traditional families.

This Comment will show that, in spite of the legislative intent behind the recent revision, women are not yet being treated equally or equitably. On the whole, the interpretation and application of the revised Korean law still privilege men. Real changes will occur only if the unquestioned judicial assumptions about law and social norms are challenged in their legal and societal contexts.

In what follows, Part I provides an overview of the concept of family in the Confucian legal tradition of Korea and a survey of the Korean legal system, with particular emphasis on the family law. Part II analyzes the

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[11] Family Law, art. 839(2). Before the law was revised, a wife was entitled to only some "compensation for suffering" if the court found the husband to be the party responsible for marital breakup. *See infra* note 124.

[12] Family Law, art. 837. Prior to the revisions, a woman who filed for divorce, even if the grounds were charges of physical or mental abuse, automatically lost custody of her children unless the man waived this right through a special custody agreement. Rosa Kim, *supra* note 3, at 3.

[13] Family Law, art. 1009.

[14] Eva R. Rubin observed the practices of the U.S. Supreme Court justices, who do not stray too far from a basic agreement (i.e., ideology) about family. EVA R. RUBIN, THE SUPREME COURT AND THE AMERICAN FAMILY: IDEOLOGY AND ISSUES 8 (1986).

[15] *See No Navels, supra* note 5, at 1.

[16] *Id.*

[17] Television dramas tend to portray women according to the traditional ethics that mandate the ideals of virtuous wife and sacrificial mother. Feminists in Korea have made a small stride recently, however, when "Half Failure," a sanitized television version of short stories dealing with the problems of contemporary, rather than traditional, women were aired. *See* Schoenberger, *supra* note 5, at 1.

cases involving grounds for divorce, marital property division, and child custody, to illustrate how the existing legal standards and social norms affect women in Korea. It then suggests the kind of changes that would encourage a deeper understanding of women's experience and the forces that affect it, so that the intent of the family law revision has a better chance of being put into practice.[18]

II. FAMILY LAW IN THE CONFUCIAN LEGAL TRADITION

A. Family as a Confucian Social and Legal Concept

The extraordinary nature of the family law revision and the uphill battle women face in seeing its intent actually implemented can be appreciated only if the role of the family in Korea is properly understood. As in most societies, family does not exist in isolation but is part of "an intricate, interrelated social system" that generally encourages marriage and disapproves marital breakdown.[19] This societal control over family is particularly pronounced in Korea where family constitutes "the centerpiece of the entire society."[20]

The Korean family law is a legacy of Korea's own version of Confucianism,[21] founded on the tradition of male ancestor worship.[22] As such, maintenance of the paternal pedigree is a central purpose of the

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18 The political and methodological underpinnings of this Comment may be characterized as one version of feminism. The general aim is to promote equality between women and men by making the gender the focus of the analysis. Analyzing the social and legal systems from the woman's point of view reveals how supposed "differences associated with women are taken for granted and, unexamined, may serve as a justification for laws that disadvantage women." Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 843 (1990). *See also* Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990); Judith G. Greenberg, *Introduction to* MARY JOE FRUG, POSTMODERN LEGAL FEMINISM (1992).

19 EVA RUBIN, *supra* note 14, at 23.

20 DAE-KYU YOON, LAW AND POLITICAL AUTHORITY IN SOUTH KOREA 8 (1990).

21 *See supra* note 2. What is loosely termed Confucianism really consists of numerous schools of philosophy. Confucianism as a branch of philosophy was more successful than others, since its values were sufficiently diverse to embrace the changing circumstances and compromise with major factions. For a detailed discussion of Confucianism and its various schools of thought, as well as the implication in the modern times, *see* Derk Bodde, *The State and Empire of Ch'in*, in THE CAMBRIDGE HISTORY OF CHINA (D. Twitchett and M. Loewe, eds.) 20-102 (1986); BENJAMIN I. SCHWARTZ, THE WORLD OF THOUGHT IN ANCIENT CHINA (1985).

22 YOON, *supra* note 20, at 8-9. *See also* Sam Jameson, *Unchanging South Korea Celebrates Its Ancient Roots*, L.A. TIMES, Oct. 1, 1993, at A12 [hereinafter *Unchanging South Korea*]; Teresa Watanabe, *South Korean Women Stride Toward Equality*, L.A. TIMES, June 21, 1994, at World Section 3.

family.[23] Great importance is attached to blood relationships, represented by the extended family covering several generations of male lines.[24] Under this system, individuals count for little, except as members of a male-defined family, which constitutes a single unified entity in the eyes of the law.[25]

Older family law, and its revised version to some extent, is an essential element of the Confucian ethics, which are themselves premised on male superiority.[26] Through the family register system ("Hojok"),[27] the law sanctions male authority over the rest of the family on personal, social, and legal matters.[28] The family register is a complex system that preserves each clan's record through the generations.[29] The law regulates who may be included in the family register.[30] Proof of registration, like birth certificates, is a mandatory document for acquiring identification cards, such as passports, and official documents for education, marriage, or divorce.[31]

The register also contains each family's ancestral history and reflects social class.[32] As a western reporter observed, most clans "keep multi-volume registers tracing their ancestry back hundreds of years. The major clans . . . maintain offices and staffs that compile records, build monuments to major clan ancestors and maintain their graves."[33] Moreover, the register

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23 YOON, *supra* note 20, at 8; *Unchanging South Korea*, *supra* note 22.

24 YOON, *supra* note 20, at 8.

25 Hojokbob [Family Registration Law] is a law that is separate from the Civil Code. Its eight-part provisions govern the minute details of the registration and removal of individuals from their family upon birth, adoption, marriage, divorce, and death. The law is premised on the single "head of the household" concept, as provided by Family Law, art. 781. Hojokbop [Family Registration Law], *printed in* TAEBOBCHON [GREAT LAW DICTIONARY] (Seoul: Bobchon Chulpansa, 1995).

26 From the family "comes all discrimination in this society . . . men against women, first son against second son, father against mother. This is the original trouble-maker." This lamentation about the Confucian family system by Dr. Lee Tai-Young, the first woman lawyer and founder of the Korea Legal Aid Center for Family Relations, was voiced after decades of legal aid works in family relations. *Quoted in* Clyde Haberman, *Seoul Journal: Defining Kith and Kin in the Land of Kim and Lee*, N.Y. TIMES, Feb. 23, 1987, at 4.

27 Hojok is an institutionalized system that strictly accounts for each family's patrilineal history. *See supra* note 25.

28 *Id. See also* Family Law, art. 781.

29 In the past, strong family relations based on kinship contributed to building powerful clans ("Yangban"), which enjoyed vast land holdings and political power. YOON, *supra* note 20, at 9.

30 Family Law, art. 781.

31 Rosa Kim, *supra* note 3, at 3.

32 One's social status is perpetually determined by the position of the ancestor's, and any and all positions in government held by the ancestors are recorded in the registry. *See Family-Tree Rules*, *supra* note 5.

33 *Unchanging South Korea*, *supra* note 22.

provides the basis for determining the legitimacy of marriages between parties with a common surname or origin of ancestry.[34]

For women, the family register is a social institution that determines their social and legal identity. The family law still requires women to abandon their own family register upon marriage and enter into the husband's family register.[35] Coupled with the Confucian male headship system which recognizes only the male head of the family as its legal representative, the registration law makes it nearly impossible for women to assert legal rights within the family and in their relations with the outside world.[36] This patrilineal system significantly limits women's right to property, since most property and business dealings are delegated to men, who tend to acquire the titles to property, which are exempt from division upon divorce.[37]

The tenacity of the Confucian legacy is most starkly exposed on *Chusok*, the 2,000-year-old autumn-moon festival. Tens of millions of Koreans join in the mass migration to return to their ancestral homes to celebrate the harvest and worship their male ancestors.[38] Mothers, wives, aunts, sisters, and daughters cook and clean for days to prepare for the ceremony. On the day of *Chusok*, the male head of the extended family pours wine "into separate cups for each male member of the four past generations and leads the fathers and sons of the current extended family in deep bows."[39] The women and girls wait in the kitchen or outside.

Thus, in Korea, the concept of family is closely linked to both formal laws and Confucian ethics centered on the worship of the male ancestors. To understand this relationship between law and societal ethics that control family, it is necessary to examine the elements of the legal system and how they operate.

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34 Family Law, art. 809, prohibits marriage between people sharing the same surname and origin.

35 Family Law, art. 826 (3).

36 *See* Family Law, arts. 778-796, which define and limit the head of family and family members.

37 *See infra* note 124 and accompanying text.

38 In 1993, "an estimated 26 million of the nation's 43 million people staged a mass migration to their native towns to carry out the rites. Most of the others gathered with relatives in their own homes." *Unchanging South Korea, supra* note 22, at A12.

39 *Id.*

B. *The Korean Legal System*

1. *The Confucian and Democratic Foundations of the Law*

For the Koreans with their four-thousand year history,[40] rich with indigent and borrowed customs and ethics, the concept of formal law as a social tool is a relatively new idea.[41] Koreans followed customary law[42] handed down by the ancestors as examples of behavior[43] until the Yi Dynasty (1392-1910 A.D.) imported a body of formal law from Ming China.[44] The Ming Dynasty Code of China closely followed the basic tenets of Confucianism.[45] In this socio-legal order, the status of every individual was clearly defined in a strict hierarchical order of domination-subordination; for example, the ruler over the ruled, father over son, and husband over wife.[46]

Korea was liberated from Japanese colonial rule in 1945. Shedding the draconian colonial laws,[47] Korea adopted a constitution that followed the basic tenets of rights enumerated in western countries such as the United States, Great Britain, and Germany.[48] In line with the rights guaranteed in

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[40] The traditional Korean calendar ("Danghi") is calculated by adding 2,333 years to the western calendar. For example, Year 1995 in the western calendar would be Year 4,328 according to the traditional Korean calendar. Myths account for much of the beliefs about the origin of the country. However, significant archaeological evidences uncovered in shell mounds and other remains confirm the essential points of the myths. *See* YONHAP NEWS AGENCY, KOREA ANNUAL 258 (1984).

[41] Throughout the Three Kingdoms (37 B.C.-917 A.D.), the Koryo Dynasty (918-1391 A.D.), and the Chosun Dynasty (1392-1910), formal law ["yul-hak"] existed only to the extent necessary for a small number of low-ranking officials to aid the governors administering physical punishment. Chong-ko Choi, *On the Reception of Western Law in Korea*, 9 KOREAN J. COMP. LAW 141, 142-43 (1981).

[42] Customary law in the Korean context generally refers to community standards for maintaining peace and order. This resulted in a conservative ideology based on the primacy of authority and "the sanctification of the past." PYONG-CHOON HAHM, KOREAN JURISPRUDENCE, POLITICS AND CULTURE 17 (1986). Customary law tended to modify behavior through community interaction. By appealing to the community standards, intervening authorities (usually the landlords or government officials) attempted to "shame" the violators of peace and order in the community. *Id.* at 24.

[43] Chong-ko Choi, *supra* note 41, at 142.

[44] CHIN KIM, *supra* note 2, at 4.

[45] SUPREME COURT OF KOREA, JUDICIAL SYSTEM OF KOREA 3 (1991) [hereinafter JUDICIAL SYSTEM OF KOREA].

[46] YOON, *supra* note 20, at 6.

[47] *Id.* at 25-26. The Japanese colonial administration had instituted a western form of government based on the German Civil Code system, largely for efficient and forceful administration of the colony. Although retaining much of the earlier legal system, Koreans focused on governmental accountability to the governed. *Id.* at 22-26.

[48] Linda Sue Lewis, Mediation and Judicial Process in a Korean District Court 34-35 (1984) (unpublished Ph.D. dissertation, Columbia University) [hereinafter Lewis Dissertation]; Suk Tae Lee,

these countries, the Korean Constitution guarantees equality of the citizens and prohibits discrimination based on sex, religion, or social status.[49] Moreover, the constitution provides special protection to women by requiring the government to affirmatively promote the welfare and rights of women.[50]

Thus, the modern constitution of Korea based on the western tradition already contains the legal foundation for rights of women. However, democratic concepts embodied in the constitution are relatively new ideas, subject to the individual interpretation of the judges. Hence, this new system of law cannot be understood apart from the judges and the courts which interpret and apply the law within a society permeated by Confucian ethics.

2. *The Judiciary*

The court system functions on three levels: the supreme court, high courts, and district courts, including the family court in Seoul.[51] Because the interpretation and enforcement of the revised family law starts at the family court level, its historical foundation and special role in the legal system are briefly examined below.

a. *The history of the Family Court and its role in the legal system*

In 1962, the All Women's Federation petitioned for an amendment of the inheritance laws and the establishment of a family court.[52] The women representing the various organizations argued that "family matters should be heard in secret hearings in which the parties may reconcile or reach an ami-

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South Korea: Implementation and Application of Human Rights Covenants, 14 MICH. J. INT'L L. 705, n.79 (1993).

[49] Honbop [Constitution], art. 11(1) [hereinafter Honbop], *in* I CURRENT LAWS OF THE REPUBLIC OF KOREA (Seoul: Korea Legislation Research Institute, 1994).

[50] Honbop, art. 34(3).

[51] As the court of last resort, the supreme court hears appeals against the decisions of high courts, and the appellate divisions of the district courts and the family court. Each of the four high courts in Korea consists of a presiding judge and, usually, three associate judges. These high courts hear appeals against verdicts and judgments of district courts and the family court in civil and criminal cases, administrative cases, and special cases designated by law. District courts which have primary jurisdiction over most cases are set up in Seoul and 11 provincial cities. JUDICIAL SYSTEM OF KOREA, *supra* note 45, at 6-19.

[52] Although the South Korean supreme court had contemplated the founding of family courts earlier, primarily as a result of the establishment of such courts in Japan in 1949, the more serious plans were not discussed until after 1961. Woo-dong Park, *Gajong Bopwon 20 Nyone Hwegowa Jonmang [20 Years of Family Law Court in Retrospect and Prospect]*, GAJONG BOPWON SAHGONE MUNJEJOM [FAMILY COURT ISSUES] 6-34 (1983).

cable settlement by appealing to the moral principles, compassion, and experience of the learned professionals in the educational, psychological, sociological, and medical fields."[53]

Following the All Women Federation's suggestion, in 1963, the Family Court Procedure Act provided for the family court to hear all cases involving matrimonial, juvenile, and other domestic matters.[54] The proclaimed purpose was to promote harmony and cooperation in the family based on human dignity and equality between man and woman, as mandated by the Constitution.[55] Because of the judges' role in interpreting and enforcing the law, their perceptions of "human dignity" and "equality" become a paramount issue in the legal system.

b. The judges' role in the Korean civil law tradition

Judges exert extraordinary influence in Korea.[56] As discussed below, the weak *stare decisis* tradition of the civil law system, the absence of trial by jury and minimal use of trial attorneys, as well as the historical reverence for "the magistrate," among others, account for this influence.

In the civil law tradition of Korea, higher court decisions do not generally enjoy binding precedential power.[57] However, they "exert a significant *de facto* influence upon subsequent court decisions."[58] This means that trial court judges may, except for those cases remanded, choose to interpret statutes on their own or follow the opinions of higher courts.[59] In the family court and lower civil courts, judicial power is especially pronounced, since parties are seldom represented by a lawyer.[60] In these

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[53] Tae-young Lee, HANGUK EHON YONGU [EXAMINATION OF DIVORCE IN KOREA] 307 (1969), *quoted in* Park, *supra* note 52, at 9. Regardless of whether these women were motivated by the desire to shield other women from the traditional stigma accompanying divorce, or distrust of the judicial system, their plea resulted in a law that mandates a conciliation hearing for all judicial divorce cases. *Id.*

[54] Park, *supra* note 52, at 10. Currently, Seoul is the only city with a special family court of its own; in other cities, the district courts handle such matters. *Id. See also* JUDICIAL SYSTEM OF KOREA, *supra* note 45, at 11-12. The Family Court Procedure Act was also wholly amended in 1990 to serve as the primary source of law regulating domestic procedures. *Id.*

[55] Honbop, art. 36(1).

[56] As of December 1, 1991, there were 14 supreme court justices, 236 high court judges, and 799 district court judges, including family court judges, for a total of 1049. The total number of public prosecutors was 807 as of August 1, 1991; the total number of practicing lawyers was 2,135 as of March 12, 1991. *See* CHIN KIM, *supra* note 2, at 14, 18-19.

[57] *Id.* at 8.

[58] *Id.* at 20; *see also* CHIN KIM, *supra* note 2, at 8.

[59] CHIN KIM, *supra* note 2, at 8.

[60] Lewis Dissertation, *supra* note 48, at 72.

proceedings, the judge actively questions witnesses, admonishes defendants, and offers advice on points of law.[61]

In general, determining how judges exercise their discretionary power involves complex questions dealing with social and psychological dimensions. However, the educational and training background of the judges may provide some insight into their professional norms.

1) The uniform education and training of the judges

All aspirants to a legal career in Korea undergo the same process of passing the state judicial examination for entry into a two-year study at the Judicial Research and Training Institute ("JRTI").[62] Each year, the government predetermines a set number of applicants to be admitted to JRTI.[63]

The state judicial examination for entry into JRTI consists of three phases. First, tens of thousands of candidates take the initial multiple choice test on law, history, economics, and a foreign language.[64] Only about 1,500 go on to the second hurdle—an essay test on law and "national ethics."[65] Those who pass the essay test face a personal interview designed to "screen out individuals deemed to be security risks or otherwise politically unreliable."[66]

The select group of people surviving the interview is admitted to a two-year government-sponsored course at the JRTI. Upon completion, a few choose to go into private practice, while most opt for public service as either a prosecutor or judge.[67] Thus, judgeship in Korea, at least at the trial level, is the fruit of the same compulsory training that all lawyers receive.

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61 *Id.* at 72.

62 Kyong-hwan Ahn, *How Do We Produce Judicial Officials?* KOREA FOCUS ON CURRENT EVENTS, 1993, at 31-32 (1993).

63 JAMES M. WEST, EDUCATION OF THE LEGAL PROFESSION IN KOREA, 19 (1991). In recent years, the number has been around 300. *Id.* at 20.

64 *Id.* at 19.

65 *Id.* It has been observed that "compulsory courses in national ethics relate back to traditional Confucian notions of political morality as well as to Prussian and Japanese theories viewing propagation of loyalty to the state as the primary function of 'modern' public education." Dae-Kwon Choi, *Legal Education in Korea: Problems and Reform Efforts*, 29(2) SEOUL L.J. 114 (1988), *cited in* WEST, *supra* note 63, at 19 n.51.

66 WEST, *supra* note 63, at 19. Until 1980, the total number of the successful examinees was less than 150; until 1977 less than 100. The total number of people failing the final interview numbered three (out of 1235) between 1963 and 1979; the number skyrocketed from 1980 until 1988 to 177 out of 2390, slightly over 7 percent. *Id.* at 86.

67 Lewis Dissertation, *supra* note 48, at 73.

Having gone through the same legal training in a single national center, Korean judges, for the most part, are a homogeneous group.[68] An ethnography of the judges in a large rural city reveals that they tend to use a "conventional, bureaucratic approach . . . in a relatively closed world in which hierarchies [are] fixed and most issues [are] resolved on an authoritarian basis without much external pressure for extensive rationalization of decisions handed down."[69]

Education is not the only common social force shaping the judicial decisions in Korea. As shown below, the judges also share the image of the "Confucian magistrate."

2) *Judges as the parents of the people*

The modern ideal of the Korean judiciary, which is overwhelmingly male (98%),[70] follows the traditional ideal of the magistrate as the "parent of the people,"[71] entrusted with guiding and protecting the litigants. Befitting the paternalistic conception of the magistrate is the notion of benevolence or leniency toward the litigants. Thus, when a respected judge was appointed chief of a district court, a local magazine praised him for "inspir[ing] many litigants with his kind advice."[72]

As a parental figure, a judge may be kind, compassionate, or impatient. The magistrate "actively directs every inquiry, coaxing shy witnesses, scolding others who stray from the point, and admonishing some to tell the truth."[73] It has also been observed that "civil court judges are particularly scornful of those whom they feel have violated accepted standards of behavior or have acted in socially inappropriate ways."[74] Thus, litigants are well

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[68] Most lower court judges start a few years after graduation from an undergraduate study in law, and then enter a private law practice after some years of judgeship. *Id.* at 76.

[69] WEST, *supra* note 63, at 35.

[70] Linda Sue Lewis, *Her Honor the Judge: Women and the Legal Professions in Korea* (Harvard Korea Colloquium Paper, Apr. 10, 1990), *noted in* WEST, *supra* note 63, at 82. For 38 years (1951-1989), only 74 women passed the judicial examination. There has been a slight increase in the number of women passing the examination since 1989 when 14 women succeeded. In 1990, 12 women were admitted, and in 1991, 18 more women were admitted. *Id.*

[71] Lewis Dissertation, *supra* note 48, at 191.

[72] Chon Il Kurap'u [Chon Il Graph], *New Court Heads Appointed*, (June 1980), *reprinted in* Lewis Dissertation, *supra* note 48, at 71.

[73] Lewis Dissertation, *supra* note 48, at 177. The description is based on an ethnographer's personal observation of civil proceedings in district courts. Family court proceedings are not open to public for observation.

[74] *Id.* at 196.

advised to approach the judges as humble supplicants with petitions for a wise and fair judgment.[75]

The judges' role as the "parents of the people" has a great impact on judicial divorce, which is granted only if a judge finds a legally acceptable ground for divorce. A brief overview of the law on divorce is thus vital in appreciating the Confucian social dynamics of the interplay between paternalistic judges and parties to judicial divorce.

3. *Divorce Law in Korea*

Divorce in Korea was a relatively rare phenomenon until 1980. Since then, the overall divorce rate has seen a steady increase, from 5.5 percent in 1980 to 12 percent in 1991.[76] By 1994, one out of every seven marriages ended in divorce.[77] Along with the rising rate of divorce, the number of women filing for divorce also increased.[78]

Korean family law provides two ways of dissolving a marriage: divorce by agreement and judicial divorce.[79] Divorce by agreement requires minimum judicial involvement. This can be contrasted to contested cases, where couples are required to submit their differences to a conciliation council in the family court.[80] The council's role is to help couples reconcile the differences or, failing that, reach an agreement for divorce.[81] Cases not solved at the conciliation hearing are sent to trial for judicial divorce.[82]

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[75] *Id.* at 80.

[76] Choon-eui Hong, *Youchak Bawooja Ehon Chung-goowa Patanjooe Ehon [Petition for Divorce by the Party at Fault and No Fault Divorce]* HYUNDAI MINBOPE KWAJEWA JONMANG [THE CURRENT TASK AND FUTURE PROSPECTS FOR MODERN CIVIL LAW] 199 (1994) [hereinafter HYUNDAI].

[77] *Belly-Button*, *supra* note 5.

[78] Women petitioned for divorce in 48 percent of the cases in 1979. By 1990, women petitioned for divorce in 57 percent of the cases. Hong, *supra* note 76, at 199.

[79] Family Law, arts. 834-843. In 1990, the number of judicial divorce cases reached the highest number. Out of 90,411 cases filed, 20,142 (22.28%) were resolved in court. Yong-ok Kim, *Hyubeui Ehone Whagin [Confirmation of Divorce by Agreement]*, *in* HYUNDAI, *supra* note 76, at 191.

[80] Gajokbop [Family Law], art. 11(2). Gajokbop is a set of provisions governing, among other matters, divorce procedures. It is not part of the Civil Code, Book IV, entitled "Relatives," which has been referred to as "Family Law" in this Comment.

[81] Although designed to soften the judicial fiat (*see supra* note 52 and accompanying text), the conciliation council composed of learned members of society tends to uphold the social norms. The common belief in traditionally Confucian societies is that conflicts should be "settled by mediation within the lineage, family, guild, local community, or other relevant groups." Lewis Dissertation, *supra* note 48, at 24. The parties are frequently cajoled, persuaded, or even rebuked to avoid the conflicts. *Id.* at 243.

As shown in the official picture in JUDICIAL SYSTEM OF KOREA, *supra* note 45, at 11, the physical setting of the conciliation proceeding also belies the ideology of harmony that is perpetuated at the expense

a. Divorce by agreement

Divorce by agreement is essentially a removal of the wife's name from the husband's family register,[83] after the couple reaches an agreement on property and children.[84] The couple then submits to a judge a copy of the husband's family register, application for divorce, and a request for judicial confirmation. The judge verifies the identity of the couple, and asks the parties whether the agreement was made voluntarily.[85] If satisfied with the voluntary nature of the agreement, the judge stamps both the confirmation form and the "Report of Divorce."[86]

The final step involves the removal of the wife's name from the husband's family register within three months.[87] After the removal, the woman

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of the weaker party to the conflict. Seated at one end of a semicircle table is the judge, flanked by two conciliators on each side. The parties sit side by side, facing the judge, near the other end of the table. Because the couple is seated some distance from the table, there is a conspicuous space between the parties and the judge and conciliators. The lone woman conciliator is in a demure traditional costume, while the others are in western suit and tie. Even when a couple is making a mandatory appearance for the judicial confirmation of the parties' voluntary intent to divorce, they are seated side by side facing the judges. *Id.* at 27. In contrast, parties in non-domestic matters are seated opposite from each other. *Id.* at 21.

Consistent with the focus on the emotional aspects of marital disputes, family matters are relegated for the most part to less rigorous legal proceedings. But conciliation can be turned into a tool to "block the use of litigation by the other party, whose legal basis may be much stronger." Setsuo Miyazawa, *Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior*, 21 LAW & SOC. R. 219, at 234-35 (1987). Conciliation may also be "used to press weaker parties into accepting less than they could have expected had their case gone through traditional adversarial channels." David Greatbatch & Robert Dingwall. *Selective Facilitation: Some Preliminary Observation in a Strategy Used by Divorce Mediators*, 23 LAW & SOC. R. 613 (1989). This risk is even more of a problem for women in a traditionally male-dominated society, where the husband holds the economic and other means of control for the most part. *See also* Rhode, *supra* note 18.

[82] There is one conciliation council within each of the district courts, and also in the family court in Seoul. Each council is composed of at least three members: a judge, who acts as chairman, and two or more nonjudicial people of "learning and high moral standing," such as psychiatrists, social workers, or psychotherapists. Tae-yong Lee, WHAT CAN I DO? (1981), Soun-Sook Chyung, trans. Seoul: Korean Legal Aid Center for Family Relations, *quoted in* Lewis, *supra* note 48, at 140. The council's decision carries the same force as a judicial decree. *Id.* at 135.

[83] Sang-suk Lee, *Saerang-gwa Gyolhone Bopryul* [*Law on Love and Marriage*] 287, Seoul: Bopryul Shinmunsa (1987).

[84] The couple may circle any one of the five pre-printed reasons on the petition form. The loosely defined categories—(1) marital conflicts, (2) familial conflicts, (3) health, (4) money, (5) others—appear to provide some space for privacy and flexibility. Report of Divorce, *reprinted in* SANG-SUK LEE, *supra* note 83, at 288-89.

[85] The law specifies "joint signatures." Family Law, art. 836.

[86] SANG-SUK LEE, *supra* note 83, at 289.

[87] Despite the perfunctory nature of the confirmation process, once divorce by agreement is pronounced, courts are reluctant to reconsider the fairness of the original agreement. The court in one case refused to revoke the agreement for a woman who claimed her former husband had defrauded her for the sole purpose of obtaining the agreement. Judgment of July 28, 1981, Daebopwon [Supreme Court], 80 me 77.

re-enters her name into her paternal family register.[88] Children remain in the father's family register, regardless of legal and physical custody.[89]

b. Judicial divorce

The Korean judicial divorce law is premised on the fault-based system of a contest between a "wrong-doer" and the "wronged."[90] The courts reason that a "guiltless" spouse should not be forced into unwanted divorce.[91]

Korean legal scholars supporting the fault-based system generally cite the following reasons: Granting divorce to the party at fault goes against the Confucian morality ("doei"), and it may encourage the husband to arbitrarily abandon his wife, as was the practice in the past.[92] Moreover, by forcing a couple to stay in marriage, it is believed that a wife will be able to continue to use the common property and receive support.[93]

The fault-based system in Korea acknowledges six grounds for divorce:[94] (1) Infidelity; (2) malicious desertion; (3) extreme cruelty by the spouse or the spouse's lineal ascendants;[95] (4) spouse's extreme cruelty to

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88 Family Law, art. 787(1).

89 *Id.*

90 The Korean Supreme Court has repeatedly held that Korean divorce law is premised on the fault-based system. *See* Judgments of June 8, 1971, 71 me 18; July 12, 1983, 83 me 11; April 23, 1993, 92 me 1078.

91 Bong-hui Han, *supra* note 9, at 14.

92 *See* Tae-yong Lee, *supra* note 52, at 302-303; Kwang-hyun Chong, HANGUK GAJOKBOP YONGU (RESEARCH ON KOREAN FAMILY LAW) 801 (1967); Choon-eui Hong, *supra* note 76, at 202.

93 Choon-eui Hong, *supra* note 76, at 202.

94 Family Law, art. 840.

95 Lineal ascendants include parents and grandparents. A woman must show extraordinary suffering for the court to grant divorce under the "extreme cruelty" ground. The traditional notion that women "belong" to men persists, and to date no case has recognized wife beating as the sole grounds for divorce under extreme cruelty. Yet, according to the survey of 340 women conducted by the Korea Women's Hotline, one in ten Korean women are beaten by their husbands almost every day, and about three in ten women suffer violence at the hands of their spouses once a month on the average. *South Korea: Wife Battering in S. Korea is Endemic, Says Poll*, Reuter Newswire-Far East, Apr. 3, 1994, *available in* WESTLAW, INT-NEWS Database.

It appears that extreme cruelty, in the court's eyes, requires more than the kind of sustained and systematic abuse of human dignity that wife beating represents. For example, the court granted divorce to a woman abused by her husband and his family in an extended family home. In this case, the scornful family ostracized the wife by systematically shunning her, slandering and cursing, interrogating her about her personal phone calls, movements in and out of the house, and family finances, and interfering with her intimate relations with the husband. The husband joined his family in abusing the wife. When the wife's pregnancy resulted in a miscarriage, the husband charged her with the criminal act of illegal abortion. Judgment of April 17, 1978, Daebopwon [Supreme Court], 77 re 140.

one's own lineal ascendants; (5) missing for three years; (6) any other cogent reasons.[96]

Women consulting the Seoul Legal Aid Center during 1991 through 1993 most frequently cited "extreme cruelty," "other cogent reasons," or "malicious desertion" as the ground for divorce.[97] However, judges seldom grant judicial divorce on grounds other than infidelity.[98] For parties denied judicial divorce, only two recourses are available: divorce by agreement or no divorce at all.

Part III describes how the entrenched Confucian social system and existing legal standards affect Korean women in a proceeding for judicial divorce.

III. EFFECTS OF LEGAL AND SOCIAL PRACTICES ON WOMEN UPON DIVORCE

Adjudication of family matters in Korea is fraught with subjective, contextual, and personalized tests with an extraordinary amount of discretion reserved for judges.[99] To the extent that the laws dealing with divorce and child custody provide judges with extremely general and flexible standards, judges bear the ultimate responsibility for deciding the outcome.

On occasion, the courts have been willing to break away from the male-centered Confucian traditions that discriminate against women.

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[96] Adhering to the traditional norms that discourage marital conflict, courts are extremely reluctant to grant divorce under this provision. When the court makes an exception, it generally refuses to apply the fault standard. For example, in a case where a wife sued for divorce because the husband interrogated the wife about her premarital sexual conduct, the court granted divorce to the wife but denied compensation, holding that she did not establish any fault on the part of the husband. Judgment of Nov. 29, 1964, Daebopwon [Supreme Court], 64 de 320.

[97] Suk-cha Kim, *Ehon Wonin (Grounds for Divorce)*, HYUNDAI, *supra* note 75, at 180, 184. The "other cogent reasons" also constituted the most frequently cited ground for men during 1991 through 1993. Excluding the "miscellaneous" category under "other cogent reasons," men cited wife's illness or disease and personality conflict most frequently. Women's main grounds continued to be extreme maltreatment from husband or his ascendants (31.9%) and "other cogent reasons" (38.7%). Unlike women, however, abuse by the spouse or her ascendants was cited in only 4.6% of the cases. Malicious desertion was the next most frequently cited reason for men. *Id*, at 184.

[98] *Id.* at 178-79. In 1991, the grounds for divorce for 21,699 cases, excluding cases withdrawn before the mediation, involved infidelity (43.9%) and malicious desertion (17.4%). Most desertions occur as a result of "unchaste" spouses leaving the spouse. Thus, 61.3% of the cases involve infidelity in one form or another. Extreme cruelty by the spouse or spouse's ascendants amounts to 16.8%. Likewise, in 1992, of the 21,699 official cases, infidelity was the most frequently cited reason (46.7%), followed by malicious desertion (18.1)%, and spousal abuse (17.6%). *Id.*

[99] This applies to the legal processes in the United States as well. *See* Jane W. Ellis, *The Changing Face of Divorce Custody Law in Washington State* 329-330 (1994), HYUNDAI, *supra* note 76, which notes "virtually unfettered discretion" of trial judges in child custody cases.

However, most judges are not yet ready to abandon all of the cultural values that keep women in the lower economic status in this traditional society. To illustrate just how these cultural values and stereotypes affect the judicial decisions, presented below are cases dealing with the concept of fault in judicial divorce, division of marital property, and the awarding of child custody.

A. The Ambivalent Judicial Attitude Toward the Fault-Based System in Korea

In a fault-based system, whether to allow a divorce at all is a paramount issue. Marriage is deemed to be a stabilizing social, economic, and moral force for good, and is not to be easily dissolved.[100] Thus, extremely solid grounds are needed to break up the family. Another policy behind the high threshold requirement for "fault" divorce has been to protect the economically weaker woman from losing the economic and social advantage of marriage when abandoned by her husband.[101]

However, in a traditional society, the economically stronger husband would be in a position to threaten or bribe the woman into divorce by agreement, while the converse is not likely to be true. Lacking the means to bargain for divorce by agreement, more women than men turn to the court.[102] Although more women than men turn to the judiciary for help, it is doubtful whether they actually benefit under the fault-based divorce system as it is carried out in Korea.

To be sure, the court's double standard is not nearly as pronounced as it used to be. In the past, Confucian ethics regarding the virtues of a wife and the unquestioned rights of a husband dictated whether a party was entitled to judicial divorce. For example, the Supreme Court held and confirmed later that a wife, who left her husband because he could not provide for the family, had committed a malicious desertion.[103] On the other hand, if a husband deserted his family because he was not accorded due respect as the patriarch of the family, and if his only fault was not

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100 RUBIN, *supra* note 14, at 3.

101 Hong, *supra* note 76.

102 In 1993, of the 4,473 who visited the Legal Aid Center, 3,841 were women. Suk-cha Kim, *supra* note 97, at 184. In Japan, women file three-quarters of petitions for divorce mediation. Taimie L. Bryant, *Marital Dissolution in Japan*, 17 LAW IN JAPAN 73, 77 (1984).

103 Judgment of Jan. 6, 1948, Daebopwon [Supreme Court], 4280 minsang 144; Judgment of Dec. 9, 1969, Daebopwon [Supreme Court], 68 me 31.

supporting the family during his desertion, his desertion was ruled not malicious.[104] Instead, the court ruled that fault lay with the wife who did not show proper respect for the husband in the first place.[105]

Unlike in the past, the discriminatory practices of the judiciary are not carried out in a simple formulaic way. The system struggles through the different fact patterns it faces, and this seeming struggle, as illustrated below, gives the perception of fairness.

The articulated legal philosophy that a wrong-doer is not entitled to petition for divorce is not a clear-cut rule. The rigidity of the fault standard wavers when judges confront the proper role of women, as dictated by Confucian morality. For example, in 1987, a woman filed a criminal charge against her husband who had deserted her and their children to live with his mistress.[106] The wife had been subjected to physical beatings and public humiliation each time she appealed to him for reconciliation.[107] The court granted divorce to the husband, who sued for divorce after serving his sentence for adultery in a separate criminal action.[108] In this case, the court reasoned that, where the "innocent" party has clearly shown a willingness to divorce [inferred from filing a criminal charge], even the guilty party may be granted divorce.[109]

Significantly, the court's opinion, which is ordinarily nothing but a terse statement of the facts and rules, repeatedly emphasized the fact that the wife refused to withdraw the criminal charge against the husband and, as a result, the husband's medical license was revoked.[110] The court appears to have been motivated by its irritation at the recalcitrant wife who "caused" the loss of the husband's medical license. Thus, the supposedly clear legal concepts of wrong-doers and the wronged in the fault system become blurred by the deeply-held sense of social morality held by the judges.

The same court—which had struggled to balance the merits of an abusive and adulterous man's acts against the wife's audacity in bringing a criminal charge against the husband—returned to the traditional rhetoric of adultery as the evil and proper cause for divorce in another case where it

104 Judgment of June 24, 1986, Daebopwon [Supreme Court], 85 me 6.
105 *Id.*
106 Judgment of Apr. 14, 1987, Daebopwon [Supreme Court], 86 me 28.
107 *Id.*
108 Ordinarily, divorce is granted to the party complaining of adultery upon conviction and sentencing of the adulterous party. In this case, however, divorce was not effectuated because of an administrative foul-up. *Id.*
109 *Id.*
110 *Id.*

was a wife who was charged with the crime. In this case, decided in 1994, the wife left the husband as a result of conflicts with her parents-in-law, who lived with the couple.[111] While separated, she was involved in three different extra-marital affairs with the guests of the tea house she operated to support herself.[112] The husband charged her with adultery and the wife served seven months in prison.[113] The wife paid the compensation demanded by the husband in return for his voluntary seal for divorce.[114] After receiving the compensation, the husband reneged on his promise.[115] Although the court granted divorce to the wife, as there had been "an objectively verifiable intent" on the part of the husband to divorce, it reaffirmed the societal condemnation of adultery.[116]

At no point did the court consider the wife's conflict with the parents-in-law, the cause of the marital separation in the first place. What appears to have been taken for granted is the unquestioned assumption that a wife's duty is to practice the virtues of self-sacrifice and tolerance in her dealings with the lineal ascendants of the husband (i.e., parents-in-law).

Judges may feel an obligation to discourage the breakdown of a traditional social institution, such as the extended family system. However, most extended families involve a living arrangement with the husband's family, and serious conflicts between the wife and the husband's family are a chronic social problem.[117] Indeed, one of the grounds for divorce involves "cruelty" to (or by) in-laws.[118] Given these social and historical contexts, judges must question whether the woman should shoulder the responsibilities of fostering harmony in an extended family.

B. Property Division

Within months after the effective date of the revised law, women petitioned in divorce actions for equitable division of property,[119] and these

111 Judgment of Apr. 12, 1994, Seoul Gajong Bopwon [Family Court], 93 de 22429, as reported in Bopryul Shinmun [The Law Journal], May 9, 1994, at 10.

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.*

117 Ho Chong, *Ehon Wonine Kwanhayo* [In re Grounds for Divorce] at 320, *in* FAMILY COURT ISSUES, *supra* note 52.

118 Family Law, art. 840 (3-4).

119 The first decision regarding property division under the new law was handed down by the Seoul Family Court on May 15, 1991, 90 de 62624.

early cases reached the Supreme Court by 1993.[120] While tradition-breaking decisions were being hailed in these heady times, two fundamental problems continue to hamper women's rights to an equitable division of property.

First, the new law deals with a limited proportion of a couple's property. Divisible marital property is defined as that which was "realized by cooperation of both parties and *other circumstances*" [emphasis added],[121] or any property of uncertain ownership.[122] The so-called "special property" which was acquired prior to marriage and that acquired during the marriage in the husband's or wife's name is not divisible as marital property.[123] The 1991 revision did not amend this paragraph, which continues to be a source of inequity in Korea, where men still represent the household in most business and property transactions.[124] As long as the system of male headship continues, women are entitled to only a limited portion of the marital property.

Aside from the constraints imposed by the male headship system, women face an uphill battle against the unchanged judicial assumptions about women's worth. Most Korean legal scholars interpret the new law to mean dividing property according to the contribution each made to the marital property and fairness concerns over the parties' post-divorce economic condition.[125] Similarly, the Seoul Family Court held in 1991 that division of property is premised on the amount of contribution made by each party and consideration and protection of the party with less economic means.[126] However, the marital property division cases decided under the revised law to date starkly illustrate the problem of laws that depend on broad judicial discretion. In a society where women are still regarded as the

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120 Bong-hui Han, *supra* note 9, at 14.

121 Family Law, art. 839-2 (2).

122 Family Law, art. 830 (2).

123 Family Law, art. 830 (1).

124 In the past, a wife was allowed only "compensation" for unjust divorce, and only if she was deemed to be the "innocent" party. By custom and by law, which recognizes only the patrilineal family registration, all marital property was deemed to belong to the husband. Rosa Kim, *supra* note 3, at 4-5.

125 *See* Yong-jin Ohm, *Ehonshie Jaesan Bunhal Chongukwon* [*Petition for Property Division upon Divorce*], HYUNDAI, *supra* note 76, at 220.

126 It also declared that Family Law art. 843, which provides for compensation to the "innocent" party for suffering resulting from unwanted divorce, is an issue separate from the issue of property division. Thus, a woman may petition for both her rightful share of property as well as compensation for divorce. Judgment of May 16, 1991, Seoul Gajong Bopwon [Family Court], 90 de 62624. *See also* Judgment of June 7, 1991, Seoul Family Court, 89 de 58308; Judgment of June 13, 1991, Seoul Family Court, 91 de 1220.

primary caretaker at home or relegated to secondary jobs, even an equal division means a gross disparity in the living standards after divorce.

Because women's work has been traditionally devalued in Korea,[127] as in Japan and in most other countries, dividing property according to wife's "contribution" toward the accumulation of the marital property often translates into a token award.[128] Thus far, a Korean woman being awarded 50 percent of the marital property has been rare enough to merit an entry in *Yonhap Yongam*, an annual publication devoted to noting the most significant events of the year.[129] In one case, the Seoul Family Court ordered a physician to pay one-half of the value of the marital property[130] to his wife.[131] At the time of the couple's wedding, the husband was still in medical training. Thus, the court reasoned that the entire property to be divided had been accumulated during the marriage.[132] In another case, the court also awarded one-half of the marital property to a wife who not only did all of the housework but also was the main provider for the family, by peddling household items door-to-door, while even managing to put funds aside as family savings.[133] The fact that these 50-percent awards were noted as unprecedented judicial magnanimity[134] is a poignant reminder of the status of women in a paternalistic legal system.

Also hailed was the decision that a wife who was at fault is entitled to some marital property.[135] While in prison for adultery, a woman petitioned for marital property. The court ordered the wife to pay the husband 20 million won (about $25,000) to compensate him for his suffering. The court then recognized the wife's homemaking contribution to the marital property

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127 Even though an equal opportunities law was passed in 1987, the maximum penalty inflicted on firms that openly recruit only men for any position requiring more than "tea-serving" has been only 1 million won (approximately $1,200)." *Belly-Button, supra* note 5. According to the International Labor Organization, Korean women work longer hours than women in other countries; yet, they earn only 54% as much as men. *Id.*

128 In Japan, broad judicial discretion results, in fact, in low monetary award for women upon divorce. Two reasons have been cited. First, judges have a very poor understanding of the dismal economic circumstances of women, and second, "lower awards are expected to deter divorce actions." Bryant, *supra* note 102, at 82.

129 YONGAM, *supra* note 4, at 361.

130 Family Law, arts. 830 and 839 do not take into account any future earnings of a spouse as property in calculating marital property.

131 Judgment of June 13, 1991, Seoul Gajong Bopwon [Family Court], 91 de 1220.

132 *Id.*

133 Judgment of June 7, 1991, Seoul Gajong Bopwon [Family Court], 89 de 5838.

134 *See supra* note 129 and accompanying text.

135 Judgment of Jan. 10, 1992, Seoul Gajong Bopwon [Family Court], as reported in YONGAM, *supra* note 4, at 347.

as amounting to 30 percent, and ordered the husband to pay her 50 million won (about $62,500).[136] The wife ended up with $37,500, which amounts to about 18 percent of the marital property of $208,000. Despite the court's rhetoric of "equity" and "other circumstances," in the end all that the court considered was the extent of the wife's contribution to marital property, measured by the traditional yardstick that devalues women's worth.

A similar case, also hailed as an enlightened decision because the court granted property to an adulterous wife, clarifies what is really meant by "other circumstances" in the property division context.[137] The Supreme Court held that the wife's entitlement should be lessened because she took some of the family funds.[138] Notably, however, the court also pointed out that her behavior—frequently leaving the home and behaving in an unchaste manner—is an additional ground for reducing the award.[139]

Although judges are not required to be sociologists or to work with social science data, they must stay "in touch with the flow of events in the world outside of the courts"[140] for equitable property division in a divorce proceeding. One way to stay in touch with the realities of the women's world is to listen to them. In an effort to persuade the legal system to more properly value a woman's worth, various figures have been calculated for judicial consideration. According to Korean Women *Minwoohwe* ["Democratic Friends' Association"], on the average, a Korean wife works 15.4 hours per day at home.[141] Calculated at the rate professionals would charge, her work was deemed to be about 880,800 won per month (about $1,100).[142] The government figures are considerably lower, with an average of 7-hour work days for about $650 per month.[143] In the absence of other fair measures, the court could base its decision somewhere between the highest and lowest figures.

However, sole reliance on the reformation of individual judges is not significantly different from the traditional faith in the magistrates as parents.

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136 *Id.*

137 *See supra* note 121-124 and accompanying text.

138 Judgment of May 11, 1993, Daebopwon [Supreme Court], 93 se 6.

139 *Id.*

140 RUBIN, *supra* note 14, at 184.

141 YONGAM, *supra* note 4, at 470.

142 *Id. See also* Sang-suk Lee, *supra* note 83, at 149, for the type of "professional" help that would be used for such calculation. For example, cleaning and dish washing would be done by a maid, children would be taken care of by a nanny, management of the household and trips to the bank and government bureaus for family business would be done by a butler.

143 YONGAM, *supra* note 4, at 470.

Lucky litigants benefit from benevolent judges while others suffer arbitrary and capricious decisions from less-enlightened judges. Women need something that is more structurally sound and predictable than the possibility that an individual judge has had a change of heart. A structural change is possible only through legislative reform on the fundamental issue of the Confucian male headship.

Until the legislature is able to overcome the powerful Confucian lobby against the abolition of the male headship system, it could legislate concrete protective measures in property division cases. For example, where 50 percent of the common property would be inadequate to support a non-wage-earning party after divorce, that party should be given more than 50 percent of the common property. Where the common property is so meager that even a substantial portion would result in inequity, the party with more career assets should be ordered to make support payments after divorce. Even where the property is substantial, post-divorce payments may be necessary in some cases for the parties to maintain the customary living standards.[144]

Enforcement of post-divorce compensation may be a problem that needs to be dealt with in concert with the legislative and executive branches of the government. For example, changing a police force that tends to reinforce conservative social values at the expense of the weaker party, usually women, is not an easy task.[145] However, if equality between men and women is indeed a social goal, the judiciary, as well as the other branches of power, should do nothing less.

C. *Child Custody*

The historic revision of Korean family law requires a couple to jointly determine the question of child custody upon divorce.[146] Prior to the revi-

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144 Sam-wha Kim, *Jaesan Boonhal Chunggukwon* [*Right to Petition for Division of Property*] 22, *in* INKWONKWA JUNGEUI [HUMAN RIGHTS AND JUSTICE] (1991); Young-gap Kim, *Jaesan Boonhal Chunggukwon* [*Right to Petition for Division of Property*] 28, *in* SABOPHANGJUNG [LEGAL ADMINISTRATION] 1991(8); Me-young Cho, *Jaesan Boonhal Chunggukwon* [Right to Petition for Division of Property] 82, *in* SABOPHANGJUNG [LEGAL ADMINISTRATION], 1990(8).

145 Wife beating is still considered a family matter and seldom merits police intervention. Sexual harassment and rape cases have only recently begun to receive proper attention by the law enforcement and courts. *See* Teresa Watanabe, *South Korean Women Stride Toward Equality*, L.A. Times, June 21, 1994, at World Report 3; *Wife Battering in S. Korea is Endemic, Says Poll*, Apr. 3, 1994, Reuter Newswire-Far East, *available in* WESTLAW, INT-NEWS Database.

146 Family Law, art. 837(1).

sion, the father automatically claimed child custody, unless he waived this right.[147] Moreover, even if the father waived his right to child custody, he remained the sole parental authority ["chinkwon"].[148] Thus, the mother was compelled to defer to the remote father's decision on all matters regarding the selection, registration, and transfer of the child's school; a child's marriage before reaching the legal age for marriage; management and disposal of the child's property; and any other matters related to the child's education, health and welfare.

The new law empowers the court to resolve the issue in cases of disagreement between the parties.[149] Judges are to consider the age of the child or children, "the property status of the father and mother, and any other circumstances thereof."[150] As in the case of marital property division, the law on child custody is sufficiently vague to allow for broad judicial discretion.

In exercising their discretionary power under the new custody law, judges continue to rely on their unexamined cultural assumptions at the expense of the economically underprivileged women. In a traditionally male-dominated society, where men control the economic means, reliance on "property status" as a criterion tends to eliminate most mothers as custodians.

For example, in a case decided in July 1994, the Seoul High Court awarded custody to the father because of his superior property status.[151] The court acknowledged that the husband's [unspecified] fault had compelled the wife to leave the family. Yet it focused on the fact that the young children (5 and 10 years old) had been living with the father while the wife was away, and that the father had the superior economic means.[152] The problematic reality is that because the woman had been a full-time mother and wife until she was driven out, she was not in any position to assert financial capacity to raise the children, or question the husband's fitness as a parent. On the other hand, as an executive officer in an international company, the father presented a strong case based on his property status.

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147 Rosa Kim, *supra* note 3, at 5.

148 Family Law, art. 909, governing "Parental Authority" has been revised to give authority to both parents.

149 Family Law, art. 837(2).

150 *Id.*

151 Judgments of Seoul Godeng Bopwon [High Court], 93 re 1022 and 1039, as reported in Bopryul Shinmun [The Law Journal], July 7, 1994, at 13.

152 *Id.*

A month earlier, the same court had awarded custody to a father, who had been judicially determined to be the party responsible for the marital breakup. Even though the court acknowledged the husband's known practice of domestic violence, the court based its decision solely on the husband's financial status.[153]

As shown in these cases, awarding child custody to the father because of his superior economic means is a particularly egregious form of gender bias based on circular reasoning: expecting mothers to stay home and then taking away their children because of their weak economic base. The Confucian tradition systematically suppresses meaningful job opportunities for women outside the home.[154] Taking the children away from the mother is a grave injustice for another deep-rooted reason. The patriarchal and patrilineal society of Korea has compelled women to derive their identity from the sons they bear to perpetuate the male ancestry.[155] Given this social context, judges should interpret the laws that would allow women to live as they choose without fear of drastically lessened living standards or loss of children.

The "property status" test is inherently unfair. Until the law is amended, the judiciary must use its discretionary power to level the playing field. Judges must seriously reflect on the inseparable connection between the award of child custody and marital property. An equitable share of the marital property, including post-divorce child support payments when necessary, should eliminate property status as a test of parental fitness. Judges may then consider other tests, such as a history of parental violence or the age of the child, in making decisions about child custody.

IV. CONCLUSION

Judges continue to rely on the Confucian social norms as an essential basis for exercising their judicial discretion in family matters. Complete eradication of judicial discretion is neither desirable nor possible. Moreover, individual assumptions represent a personal and social dynamic,

153 Bopryul Shinmun [The Law Journal], June 13, 1994, at 5.

154 *See supra* note 127.

155 The law continues to sanction the automatic registration of children born of a marriage into the father's family register. Hojokbob, *see supra* note 25. Pressure on a Korean woman to produce a son is so strong that both men and women believe that an inability to bear a son is a ground for expelling wife from home. Thus one woman with two daughters and no son lamented, "I could go to a fortune teller and be told I have no children. Daughters don't count. Under Korean custom, my husband could drive me from my home and deprive me of my status as a wife." Schoenberger, *supra* note 5, at 1.

which is difficult to institutionalize or to regulate. However, judges should consciously reflect on the woman litigant's struggles, particularly in a traditional society, and refrain, to the extent they are capable, from imposing personal and social norms that perpetuate injustices to women not visited on men.

Without judicial self-examination of taken-for-granted social assumptions, broad judicial discretion can easily turn into a tool that perpetuates discriminatory societal norms. This is not an accusation against judges of bad faith assumptions based on simple misogyny or chauvinism. Rather, this is an argument that cultural assumptions are not easily questioned. Moreover, the status quo that maintains the asymmetrical relations of power between men and women is both more comfortable and less threatening than a struggle for change.

A law that is remedial in nature requires special and sustained efforts for enforcement. This requires an elevated sense of equity premised on the principled application of judicial discretion. Judges need not decide in favor of a woman. However, they must search for and attempt to eradicate gender bias. In other words, they must pay special attention to a set of interests and concerns that otherwise may be, and historically have been, overlooked.[156]

156. *See* Bartlett, *supra* note 18.