***Case on Prohibition and Nullity of Marriage between Blood Relatives within Eighth Degree of Relationship***

[2018Hun-Ba115, October 27, 2022]

* First Draft

In this case, the Court held that while Article 809, Section (1) of the Civil Act, which prohibits a marriage between blood relatives within the eighth degree of relationship, does not violate the Constitution, Article 815, Item 2 of the Civil Act, which declares null and void a marriage that is in violation of Article 809, Section (1) of the Civil Act, does not conform to the Constitution.

## Background of the Case

On May 4, 2016, Complainant and H.S. registered their marriage. On August 1, 2016, H.S. filed an action for nullity of marriage on the grounds that he and Complainant are within the sixth degree of relationship. The Sangju branch of the Daegu Family Court found that the above marriage registration was one between blood relatives within the eighth degree of relationship, and confirmed its nullity based on Article 809, Section (1) and Article 815, Item 2 of the Civil Act (2016DeuDan646).

Complainant appealed to the Daegu Family Court (2017Leu5150). While the appeal was pending, she petitioned the court to request constitutional review of Article 809, Section (1) and Article 815, Item 2 of the Civil Act, which prohibits a marriage between blood relatives within the eighth degree of relationship and prescribes it as a ground for nullity of marriage, respectively (Daegu Family Court 2017JeuGi1432). Following rejections of both the appeal and petition on January 25, 2018, Complainant filed the constitutional complaint in this case on February 19, 2018.

## Subject Matter of Review

The subject matter of review in this case is the constitutionality of Article 809, Section (1) (hereinafter referred to as the "Marriage Prohibition Provision") and Article 815, Item 2 (hereinafter referred to as the "Nullity Provision," and together with the Marriage Prohibition Provision, hereinafter referred to as the "Provisions at Issue") of the Civil Act (amended by Act No. 7427 on March 31, 2005). The Provisions at Issue read as follows.

## Provisions at Issue

Civil Act (amended by Act No. 7427 on March 31, 2005)

Article 809 (Prohibition of Consanguineous Marriage, etc.)

(1) A marriage may not be allowed between blood relatives (including the blood relatives of an adoptee before full adoption) within the eighth degree of relationship.

Article 815 (Nullity of Marriage)

A marriage is null and void if it falls under any one of the following Items:

2. Where the marriage is in violation of Article 809, Section (1);

## Summary of the Decision

### 1. Whether the Marriage Prohibition Provision infringes freedom of marriage

The Marriage Prohibition Provision aims to prevent confusion that may arise in connection with the interrelationship, roles, and status among close blood kin due to consanguineous marriage, and to maintain the functions of the institution of family. This provision amounts to an appropriate means of achieving these legitimate legislative purposes. Its rationality is acknowledged, because it respects the intent of the constitutional nonconformity decision of the Court on the former Civil Act's ban on marriage between persons with the same surname and clan origin—which prohibited marriage between patrilineal relatives regardless of the distance of the relation—and because it limits the scope of consanguineous relationship in which marriage is forbidden, based on the widely accepted scope of kinship in our society and based on the understanding and agreement on creating family relationship founded on gender equality. Since the Marriage Prohibition Provision cannot be considered as imposing restrictions unnecessary or excessive to achieve its legislative purposes, it does not fail the least restrictive means test. Further, the scope of limitation on the choice of a legal spouse covers blood relatives within the eighth degree, and thus cannot be regarded as broad. In contrast, there is a vital public interest in protecting and maintaining family order by prohibiting marriage between blood relatives within the eighth degree. Therefore, the Marriage Prohibition Provision does not fail the balance of interests test.

Accordingly, the Marriage Prohibition Provision does not infringe freedom of marriage by violating the rule against excessive restriction.

**2. Whether the Nullity Provision infringes freedom of marriage**

**A. Constitutional nonconformity opinion of Justices Lee Seon-ae, Lee Eunae, Lee Jongseok, Lee Youngjin, and Lee Mison**

The Nullity Provision aims to guarantee the effectiveness of the Marriage Prohibition Provision, and is an appropriate means of achieving this legislative purpose. However, if marriage is rendered void uniformly and retroactively when the parties discharge the rights and duties of husband and wife after consanguineous marriage, and when they give birth to a child or circumstances exist where there seems to be expectations of trust and cooperation within the family, this may lead to results at odds with the original legislative purpose of maintaining the functions of the family institution. The legislative purpose of the Nullity Provision would satisfactorily be attained even if a consanguineous marriage was rendered void in limited cases where it creates apparent confusion to, *inter alia*, the status and relationship of close blood relatives, and where it seriously impairs the functions of the family institution. If it is unclear what constitutes such cases, the functions of the family can be protected by providing for the allowance of the dissolution of a prospective marriage through annulment. For these reasons, the Nullity Provision is an excessive restriction that goes beyond the scope necessary to achieve its legislative purpose, and as such fails the least restrictive means test. Moreover, although the public interest served by the Nullity Provision is not insubstantial, given the significance of the private interest restricted by this provision, the Nullity Provision fails the balance of interests test.

Therefore, the Nullity Provision infringes freedom of marriage by violating the rule against excessive restriction.

**B. Constitutional nonconformity opinion of Justices Yoo Namseok, Lee Suk-tae, Kim Kiyoung, and Moon Hyungbae**

As will be stated in the dissenting opinion as to the Marriage Prohibition Provision, this provision is nonconforming to the Constitution due to the overly broad scope of the prohibition. Thus, the Nullity Provision is likewise nonconforming to the Constitution due to the too broad scope of consanguineous marriage that it renders null and void. If the scope of the ban on consanguineous marriage is constitutionally narrowed by amendment of the

Marriage Prohibition Provision, the Nullity Provision is, within the narrowed scope of the marriage ban, recognized as satisfying the tests of legitimacy of legislative purpose and appropriateness of means. The legislative purpose of the Nullity Provision would satisfactorily be achieved if it rendered a marriage void in limited cases where the functions of the family institution is seriously impaired by, for example, marriage between lineal blood relatives and between brother and sister; and if other prospective consanguineous marriage was dissolved by annulment. This would still be so, even if the existing legal status of the parties and their children was maintained. Nonetheless, the Nullity Provision renders null and void all cases of violation of the Marriage Prohibition Provision, thus failing the tests of least restrictive means and balance of interests.

Therefore, the Nullity Provision infringes freedom of marriage by violating the rule against excessive restriction.

**C.** The Court declares the Nullity Provision nonconforming to the Constitution in order that it continues to apply until legislative amendment is made by December 31, 2024. However, the case underlying the instant constitutional complaint shall be put on hold until the Nullity Provision is amended, such that revised new law shall apply to that case.

**Summary of Dissenting Opinion of Four Justices as to the Marriage Prohibition Provision**

The ban on consanguineous marriage under the Marriage Prohibition Provision derives from an incest taboo, a universally established norm of mankind. The legislative purposes of the Marriage Prohibition Provision are to maintain family order and protect the functions of the family institution. However, the marriage ban under the Marriage Prohibition Provision extends far beyond the scope of the incest ban, covering all blood relatives within the eighth degree. We do not believe that the notion in which blood relatives within the eighth degree are considered “close relatives” is nowadays still accepted universally, regardless of region or generation. Since there is no separate “status announcement” mechanism that enables the identification of kinship, it is difficult for relatively distant kin to learn of the existence or degree of blood-kin relationship. Further, the legislature should strive to create the institution of marriage in consideration of the consistency with international norms, because the scope of proscription against marriage in a number of countries including Germany, Austria,

Switzerland, France, the United Kingdom, Japan, and China is relatively narrower than that of the Marriage Prohibition Provision, and because it is the globally accepted notion that freedom of marriage should be respected and protected as a universal human right. Nevertheless, the Marriage Prohibition Provision blindly sets forth the scope of the marriage ban, such that it matches the scope of kin under the Civil Act. When looking at the results of genetic research, we cannot find any scientific proof as to whether marriages between blood relatives within the eight degree are uniformly harmful to the children or offspring in terms of genetics. Thus, a genetic perspective does not provide a reasonable ground to limit the freedom to choose a marriage partner.

Therefore, the Marriage Prohibition Provision is an excessive restriction that goes beyond the scope necessary to achieve its legislative purpose. As such, it violates the rule against excessive restriction and infringes freedom of marriage.

However, because the unconstitutionality of the Marriage Prohibition Provision lies in the broadness of the ban on consanguineous marriage, a decision of nonconformity to the Constitution is warranted in order that the legislature may newly create the institution of marriage after due consideration of methods to constitutionally amend the scope of prohibited marriages.