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Marriage for Immigration in the Republic of Korea: Decoupling Controls in Immigration Law, Family Law, and Criminal Law*

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Abstract

The incidence of cross-border marriage has been significantly increasing for the last 20 years in Korea. A considerable part of it is marriage for immigration. Korea has coped with this challenge by combining several doctrines independently developed in immigration law, family law, and criminal law. This article analyzes this combination. It argues that the current approach is strange and decoupling regulations in each field–immigration law, family law, and criminal law– and formalizing the conditions for immigration are suggested. Though this alternative would not fully harmonize all the conflicting interests, it would facilitate privacy protection, family autonomy, and the transparency and fairness of procedure without surrendering immigration control.

KEY WORDS: marriage for immigration, simulated marriage, voidness of marriage, untrue entry in an officially authenticated original deed, simple naturalization

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I. Introduction

In Korea the incidence of cross-border marriages has been sharply increasing for the last 15 years. Until the early 1990s the percentage of cross-border marriages remained relatively stable at about 1.2%. Then around

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1995, this number started to increase rapidly. It peaked at 13% in 2005 and was still at 8.6% in 2012.[1] This upswing has absolutely been driven by the increase in the number of marriages between Korean males and foreign females—especially from the PRC and Vietnam. While only 13.2% of Korea's cross-border marriages were between Korean males and foreign females in 1991, this percentage increased to 77.8% in 2008 and remained relatively steady in 2012 at 72.9%. Most foreign-born spouses were Vietnamese, Chinese, or ethnic Korean-Chinese, the ratios of which in 2012, for example, were 26.5%, 23.7%, and 18.8%, respectively.[2]

This increase is said to have started in the early 1990s when the Korean and PRC governments cooperated to promote cross-border marriages between Korean men in rural areas and ethnic Korean-Chinese women in the Yanbian Korean Autonomous Prefecture,[3] marking the establishment of diplomatic relations between the two governments. In addition, in 1999 the Korean government lifted regulations on the marriage brokerage industry,[4] which is believed to have significantly contributed to the increase. In addition to those external factors, there are internal factors that influenced the increase in cross-border marriages. First, it became more difficult for Korean men in rural areas to find Korean women willing to marry them, which was a negative by-product of the rapid, unbalanced growth of this country. These men had little choice but to set their sights on foreign women. As a result of the growth of the marriage brokerage industry, some Korean men were paid considerable money to marry foreign women—about 5 million KRW. The foreign spouses often paid significant fees—between 8 and 12 million KRW—to these marriage brokers because they wanted to live in Korea, to have occupations in Korea, and to support their family in their homelands. This was a very burdensome amount considering the economic condition of their

1) Bogeonbokjibu [Ministry of Health and Welfare], 2013 Bogeonbokjitonggyeyeonbo [2013 Statistical Yearbook] 27 (2013) (S. Kor.). .

2) *Id*. at 27-28.

3) Most are descendants of Koreans who had been deported by the Japanese or had exited Korea during the Period of Japanese Occupation from 1910 to 1945. They use Korean language as well as or more than Mandarin Chinese.

4) *See* Kajonguiryee kwanhan pomnyul [Family Rite Act], art. 5. The article prohibited the unregistered marriage brokerage business, but it was abolished in 1999.

homelands. They would generally decide to marry after meeting their prospective spouse only for a couple of days. In short, the motives of foreign spouses to marry Korean men has been mainly economic, to get permission to live in or immigrate to Korea, and to get employed to earn money.[5)]

This kind of marriage, which serves as a tool for immigration (*marriage for immigration*), has been observed in many countries throughout the 20th century, and Korea is not an exception. Nonetheless, the legal ramifications of marriage for immigration had not been much discussed in Korea until recently. This is because most immigrants were not foreigners who wanted to enter Korea but Korean women who wanted to leave Korea, an area that Korean law and legal practice had little to do with. The scene, however, has changed. Along with the economic growth of Korea and the globalization of both Korea and emigrating countries, more and more foreigners are attempting to immigrate to Korea. At the same time, the topic of marriage for immigration is becoming increasingly prominent in legal practice as well as in legal theory.

Korean regulations on marriage for immigration mainly leave the process in the hands of public prosecutors. In such cases, the legally dominant issue is not whether the foreign spouse should be permitted to immigrate to Korea but whether she honestly intended to engage in a marital relationship at the time of the marriage. And then, even though the fact that she wanted to immigrate to Korea does not necessarily mean that she had not intended to engage in a marital relationship at all (*simulated marriage*), the judgment on the first factor is easy to dominate the judgment on the latter one. This paper focuses on this issue–a disposition of a foreign-born spouse who has entered in Korea via marriage with a Korean but is now suspected to make a simulated marriage only for getting immigration permission. It argues that the current approach is strange and decoupling regulations regarding this issue in immigration law, family law, and

5) Hyun Sohye, *Kukchehoninŭi Iron'gwa Shilmu* [*The Theory and the Practice of International Marriage*], 35 Minsap'allyeyŏngu [Journal of Private Case Law Studies] 1175, 1179-1187 (2013) (S. Kor.). It is not different in other countries. *See* Lynskey, *Immigration Marriage Fraud Amendment of 1986: Till Congress Do Part Us*, 41 University of Miami Law Review 1088 (1987) (for the U.S.); European Commission, Misuse of the Right to Family Reunification. Marriage for Convenience and False Declaration of Parenthood (2012) 24 ff. (for E.U. member states).

criminal law is needed. At the same time it also purports to provide an overview of Korean marriage law and its influence on Korean immigration law. Thus, before exploring problems of the current regime and making policy suggestions, the courses of developments of related legislations, cases, and doctrines would be presented in some detail.

II. Marriage for Immigration in the Context of Immigration Law, Family Law, and Criminal Law in Korea

1. Independent Developments of Related Doctrines in Immigration Law, Family Law, and Criminal Law

1) Privilege or Benefit granted to Foreign-Born Spouses in Korean Immigration Law

Similar to the immigration laws in many other countries, Korean immigration law grants certain privileges or benefits to a spouse of a Korean. Though these privileges have been granted since the passage of the Korean Nationality Act of 1948, the first act of its kind in Korea, the nature of the privileges have changed over time.

Under the Korean Nationality Act of 1948, as soon as the marriage was granted, the foreign wife of a Korean husband obtained Korean nationality *ipso iure* (i.e., without any application for naturalization or naturalization process [category 1 of article 3 of the Korean Nationality Act of 1948]). It is worth noting that the opposite case is not regulated in the same way: if a Korean woman marries a foreign husband and in so doing acquires nationality in his native country, she loses her Korean nationality (category 1 of article 12 of the Korean Nationality Act of 1948). Thus, it was not required that a foreigner lose her nationality in her native country in order to acquire Korean nationality; however, if foreign nationality was acquired, Korean nationality was likewise revoked. This asymmetry triggered debate at the scheduled session of the Legislation and Judiciary Committee of the Korean National Assembly. Baek, the head of the committee, made the following remarks regarding those two provisions at the session: "The East Asian tradition has seen the family as the most important, whose master or head is the husband; so, wife has a good reason to acquire the nationality of

her husband when she is a foreigner; even though the foreign wife comes to have dual nationality as a result, it ought to be tolerated."[6] These comments show that the asymmetric regulation was an inevitable compromise of the *principle of identical nationality of married couple*, which had not been expressively addressed, possibly because it had been taken for granted, along with two other principles of Korean nationality law—the *principle of avoiding dual nationality* as well as the *principle of avoiding statelessness*.[7] These provisions included a sort of a legislative ordering of these principles: when all three requirements could not be met simultaneously, the most important was to prevent statelessness. Although guaranty of identical nationality was second to this goal, it, however, still had priority over the prevention of dual nationality. Because the Korean Nationality Act of 1948 had already guaranteed Korean nationality for the foreign wife of a Korean husband, the Korean Immigration Control Law, which was enacted first in 1963 and has been one of two constituents of Korean immigration law, indicated that no further privilege or benefit was granted to a foreigner married to a Korean.

The Korean Nationality Act was significantly revised in 1997, and the updated version came into effect in 1998. As soon as the Seoul High Court made a request for a constitutional review of the principle of *paternal-side-limited ius sanguinis principle* on August 20, 1997, the Ministry of Justice of Korea hurried to finish drafting an amendment of the Korean Nationality Act and submitted it to the Korean National Assembly. The Korean National Assembly discussed and passed the bill, with only slight modification, in just a couple of months.[8] This revision was mainly

6) Myoung Sunku, Lee Chulwoo, & Kim Kichang, KukchŏkkwaPŏp: Kŭ Kiwŏn'gwa Mirae [Nationality and Law: The Origin and the Future] 59-60 (2009) (S. Kor.).

7) The Minister of Justice Lee In summarized three principles of the draft of Kukchokpop [Nationality Law] of 1948 as follows: (1) the principle of *paternal side limited ius sanguinis* to preserve the ethnic homogeneity of Korean, (2) the principle of *avoiding dual nationality*, and (3) the principle of complementary *ius soli* to avoid statelessness. *Id*. at 55-56.

8) As a result, the revised Korean Nationality Act came into effect before the Constitutional Court of Korea decided on the constitutionality of the Korean Nationality Act prior to the revision. Nonetheless, the Constitutional Court of Korea declared that some provisions of the Korean Nationality Act prior to the 1998 revision were unconstitutional because they were opposed to the principle of equality of man and woman before law promulgated in art. 3 of the Constitution of the Republic of Korea, and the principle of equal

intended to substitute paternal-side-limited ius sanguinis with *unlimited ius sanguinis*, whereby either parent—the father or mother—could pass nationality to their child. As a result, a new mechanism was implemented that made it possible to retain nationality in a certain country and not in others to avoid dual nationality.[9)]

To promote gender equality, the revised Korean Nationality Act of 1998 abolished the *ipso iure* acquisition of Korean nationality by foreign wives. Granting Korean nationality to both the foreign wife of a Korean man and the foreign husband of a Korean woman doesn't seem to have been regarded as a realistic alternative by Korean legislators; the alternative was to grant a foreign spouse of a Korean the option to obtain nationality in Korea or retain nationality in their native country. If he or she chose not to obtain Korean nationality, the nationality of one spouse would differ from that of the other. To this extent, the principle of identical nationality of married couples was loosened. Nonetheless, this principle still influenced the new legislation in two ways: first, the revised Korean Nationality Act of 1998 made the naturalization process for a foreign spouse of a Korean much easier (*simple naturalization*. subparagraph 2 of article 6 of the Korean Nationality Act of 1998). He or she could obtain permission for naturalization through being married to the Korean spouse and having domicile in Korea for only two and a half years, or by being married to the Korean spouse for three years and having domicile in Korea for one year. He or she is not required to sustain his or her domicile in Korea for five years, which is a requirement for general naturalization under article 5 of the Korean Nationality Act of 1998. These requirements have changed several times since 1998. The domicile-sustaining period for the first alternative has been reduced to two years. In addition, a provision was added to protect the nationalities of those who are unable to continue the

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treatment of man and woman in family life promulgated in article 36 of the Constitution of the Republic of Korea. *See* Constitutional Court, 97Hun-Ga12, Aug. 31, 2000 (S. Kor.). The UN Convention on the Elimination of All Forms of Discrimination against Women of 1979 provided another driving force. The Korean National Assembly ratified the convention with reservation of article 9 thereof, because this provision contradicted the Korean Nationality Act directly. *See* MYOUNG, LEE & KIM, *supra* note 6, at 67-69. For more detailed information of this revision, *see also* SUK DONGHYUN, KUKCHŎKPŎP [LAW OF NATIONALITY] 65-70 (S. Kor.).

9) See category 1 of art, 2 and arts. 12, 13 of the Korean Nationality Act.

marriage due to the death or disappearance of their Korean spouse or other causes out of their control; nonetheless, the basic framework remains unchanged. All other requirements for general naturalization need to be met, and the Minister of Justice maintains a discretionary power to reject permission for simple naturalization even if all aforementioned requirements are met.[10] In practice, however, these requirements seem to matter rarely.[11]

Secondly, in order to compensate for the tightening of requirements to acquire Korean nationality, a privileged or beneficial status of sojourn for the foreign spouse of a Korean who had not yet acquired Korean nationality but had domicile in Korea was introduced. Category 16 of article 9 of the Executive Decree of the Korean Immigration Control Law, revised in 1984, enacted a new form of visa for the spouse of a resident in Korea, the current equivalents of which are article 10 of the Korean Immigration Control Law and article 12 combined with schedule 1 of the Executive Decree thereof. Under these provisions, the foreign spouse of one who has a visa for permanent residency (F-5) in Korea is granted an F-4 visa, and the foreign spouse of one who has Korean nationality is granted an F-6 visa, both of which last for three years and can be renewed. In addition, one who is approved by the Minister of Justice to have been unable to continue marriage due to the death or disappearance of his or her Korean spouse or other causes out of his or her control[12] also can obtain and retain an F-6 visa. This benefit can be explained by the *principle (or right) of family unification*,[13] the higher rank principle that justifies the principle of identical nationality of married couples in nationality law.

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10) *See* Supreme Court [S. Ct.], 2009Du19069, July 15, 2010 (S. Kor.). *See also* Supreme Court [S. Ct.], 2010Du8348, May 12, 2010, 2010Du1675, Oct.28, 2010 (S. Kor.)

11) Suk, *supra* note 8, at 125-126, 145, 151 (S. Kor.).

12) Note the parallel between subparagraph 2 of art. 6 of the Korean Nationality Act and schedule 1 of the Executive Decree of Ch'uripkukkwallibop [Immigration Control Law].

13) Park Kuichun & Lee Yubong, Ch'uripkukkwallibŏpkwa Kukchŏkpŏp Kaesŏne Kwanhan Yŏn-gu: Oeguginnodongja, Ijuyŏsŏng mit Ijua-dong Munjerŭl Chungshimŭ-ro [The Study for Reforming the Immigration Control Act and the Nationality Act: focusing on foreign laborers, immigrant women and children] 81-83 (2012) (S. Kor.); Kim Byungrok, *Pulbŏpch'eryu Oegugin Kangjet'oegŏŭi In'gwŏn Munje* [*A Few Issues of Human Rights on the Deportation of Illegal stay alien workers*], 17(3) Chosŏndae Pŏp'angnonch'ong [Chosun law journal] 23, 27 ff. (2010) (S. Kor.).

The principles or interests considered seem to be the same: prevention of dual nationality as well as statelessness and promotion of family unification (sometimes by guaranteeing identical nationality of the married couple and sometimes by granting status of sojourn). The way to negotiate between these sometimes-conflicting interests, however, has changed. Although the foreign spouse of a Korean still receives benefits, the benefits are not as extensive as previously offered. He or she has to wait for years and to meet further requirements.[14] The ordering is not simple anymore; it relies on more complex criteria and, sometimes, the evaluation of specific factors relevant to the case. So what was the impetus of this change? The answer to that question lies in how one defines and regulates marriage, which is a matter directly related to family law.

2) Understanding of Marriage According to Family Law

The Korean Civil Code was enacted in 1958 and effectuated in 1960. At that time, many provisions on marriage and family in the Korean Civil Code revealed its patriarchal character. For example, subparagraph 2 of article 826 of the Korean Civil Code prescribed that a wife should live with her husband in his residence, and subparagraph 1 of article 909 declared that only a father had parental authority. It also presupposed a stereotypical gender role in families: according to article 833 and subparagraph 2 of article 830, the husband should bear all living costs unless he made other arrangement with his wife, and all objects for which ownership was not clear presumably belonged to the husband.[15] These provisions show a specific understanding of marriage: the husband goes out to work and earn money, and the wife takes care of the household, gives birth to babies, and raises them; the husband is the head of the family, and so he has the power to determine the residence of his family and other important matters including the way to raise their child; the wife should respect her husband's decision. In this system, the wife can find herself in

14) Another change in the way those conflicting interests were balanced relates to the principle of avoiding dual nationality. The revised Korean Nationality Act of 1998 accepts more exceptions to this principle.

15) Lee Dongjin, *Honin'gwannyŏm, Injŏk Honinŭimu, Kŭ Wibane Taehan Chejae* [*The Understanding of Marriage, the Personal Obligations therefrom, and the Sanctions against breach of those obligations*], 53(3) Sŏuldae Pŏp'ak [Seoul Law Journal] 483, 503-504 (2012) (S. Kor.).

serious social and economic trouble if she becomes divorced. A process for division of marital property did not exist in the Korean Civil Code of 1960 because the property of the wife was strictly separated from that of the husband (*separate property system*); this was of minor importance to wife because she had little chance to accumulate her own property. Thus, divorce was not easy. And actually it was not easily allowed. Article 840 of the Korean Civil Code prescribes that either the husband or wife can file for a divorce when the other party has committed an act of infidelity, deserted him or her maliciously, maltreated him or her severely, or there exists any other serious issue making it difficult to continue the marriage (*judicial divorce*).[16] Unlike other causes of divorce, the last one, an issue that makes it difficult to continue the marriage, could have been classified as a *no-fault divorce cause*. No evidence exists to indicate that the Korean Civil Code adopted a *fault-based divorce system*.[17] The Supreme Court of Korea, however, had interpreted the divorce law of the Korean Civil Code as a kind of fault-based divorce law in two ways: first, it established a rule that a divorce decree would not be granted to the party who was responsible for the breakup of the marriage;[18] second, the notion of a serious issue making it difficult to continue the marriage was interpreted narrowly.

Those abovementioned provisions have been amended step-by-step. Under subparagraph 2 of article 830 of the Korean Civil Code revised in 1977, co-ownership of property is presumed when it is uncertain whom

16) Minbeob [Civil Code] has two modes of divorce: *divorce by agreement* (art. 834 thereof and following articles) and *judicial divorce*. Most divorced couple have a divorce by agreement. This is logical, as divorce by agreement is easier and cheaper than judicial divorce. The negotiation for divorce by agreement itself, however, usually reflects the legal regime for judicial divorce. *See* Mnookin and Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale Law Journal 950 (1979).

17) It is exactly the contrary. Art. 840 of the Korean Civil Code modeled for the revised Japanese Civil Code of 1946, and the legislators of the Japanese Civil Code of 1946 actually intended a no-fault divorce system. *See* 22 Revised Japanese Civil Law Annotated 348-351 (Simazu & Abe eds., 2008) (Japan).

18) *See* Supreme Court [S. Ct], 65Mu37, Sept. 21, 1965 (S. Kor.); Supreme Court [S. Ct], 70Mu41, Mar.23, 1971 (S. Kor.); Supreme Court [S. Ct], 82Mu57, Mar. 22, 1983 (S. Kor.). The Supreme Court of Korea did not address the legal basis of this rule. Many academicians suggested the legal basis of this rule be estoppel or a duty of good faith promulgated in art. 2 of the Korean Civil Code.

they belong to (the ratio of stakes is 50% to 50%).[19] In addition, under article 833 of the Korean Civil Code revised in 1990, living costs should be shared by husband and wife (the ratio is determined on a case-by-case basis considering all the relevant factors). Under the same amendment, the residence is to be determined by agreement between the husband and wife or, if they cannot arrive at an agreement, by the decision of the Family Court (subparagraph 2 of article 826 of the revised Korean Civil Code of 1990). Furthermore, parental authority is to be exercised jointly by both parents, and, when they do not arrive at an understanding, one of them can call upon the Family Court to decide how to exercise parental authority (subparagraph 2 of article 909 of the revised Korean Civil Code of 1990).

All of these revisions can be seen as the result of a step-by-step evolution toward gender equality.[20] Subparagraph 1 of article 36 of the Constitution of the Republic of Korea of 1948 had already declared that marriage and family life ought to be based on the dignity of every individual and the equality of both genders. Nonetheless, the Korean Civil Code of 1960 did not respect this constitutional postulate.[21] Along with the advancement of women's social, economic, and political status, however, all of these provisions appeared more and more outdated, unfair, and,

19) This revision is of very little meaning in practice because there are rarely cases when it is uncertain to whom a property belongs (real estates and stocks, the most important properties, use a registration system, and the titleholder of receivables are found by the interpretation of the contract, which is regarded as a matter of legal argumentation rather than that of factual proof). In cases where this law is applicable, the properties in question usually have relatively low values (think of tangibles). The theoretical and ideological significance of this revision, however, cannot be exaggerated.

20) Yang Changsu, *Kajokkwan'gyeŭi Pyŏnhwawa Ch'injokpŏp* [*The Transformation of Family Relationship and Family Law*], 18 Minsap'allyeyŏngu [Journal of Private Case Law Studies] 481, 490 ff., 502 ff. (1996) (S. Kor.); Yune Jinsu, *Honin'gwa Ihonŭi Pŏpkyŏngjehak* [*Law and Economics of Marriage and Divorce*], 9(1) Pŏpkyŏngjehangnyŏngu [Korean Journal of Law and Economics] 35, 37-38 (2012) (S. Kor.); Lee, *supra* note 15, at 510-511.

21) This fact was thoroughly recognized by the legislators of the Korean Civil Code of 1960. The deliberation process of the draft of the Korean Civil Code is filled with debates on this point. Some argued that constitutionally mandated gender equality of constitution was not in harmony with Korean tradition or it was too early to fully realize gender equality in 1960, and, in the end, they won. *See* Yune Jinsu, *Tradition and the Constitution in the Context of the Korean Family Law,* 5(1) Journal of Korean Law 194, 197-199 (2005) (S. Kor.). *See also*, Yang, *supra* note 20, at 487-490.

ultimately, unconstitutional.[22] Divorce law also changed. The 1990 revision granted both parties in a divorce a claim to divide of *de facto* marital property (i.e., all the property accumulated during the marriage irrespective of its titleholder [article 839-2 of the Korean Civil Code of 1990]). Simultaneously, courts started to loosen the requirements for judicial divorce: first, exceptions to the rule prohibiting a divorce decree for the one deemed at fault in the divorce have been developed,[23] and even where no exception is found, the rule is not applied as strictly as it was before;[24] second, they interpreted the paramount cause of divorce—the serious issue making it difficult to continue the marriage—more generously.[25]

For now, it is important to note what promoting gender equality in family law resulted in. As is revealed in the revised articles of 826, 833, and 909 of the Korean Civil Code of 1990, the gap created by abolishing the husband's authority and responsibility was filled with the couple's agreement. It is noteworthy that the concept of marriage in family law has been thus formalized: the law simply defers the formation and transformation of a certain family unit and spousal relationship to the

22) The Constitutional Court of Korea declared certain family law provisions, including those not addressed in this paper, unconstitutional. On the Constitutional Court's role in the course of development of Korean family law, *see generally* Yune, *supra* note 21.

23) *See* Supreme Court [S. Ct], 86Mu28, Apr.14, 1987 (S. Kor.); Supreme Court [S. Ct], 87Mu9, Apr.25, 1988 (S. Kor.); Supreme Court [S. Ct], 88Mu740, June 27, 1989 (S. Kor.); Exceptions approved in the abovementioned cases can be summarized as follows: (1) when it is obvious that the defendant also wants to get divorced (but does not agree to do so only to torture the spouse who wants divorce), (2) when the claimant's fault is not graver than the defendant's, or (3) when the fault the claimant made has no causal relationship with the breakup. *See* Kim Jusu & Kim Sangyong,Ch'injoksangsokpŏp [Law of Family and Succession] 193-196 (11th ed. 2013) (S. Kor.).

24) *See* Supreme Court [S. Ct.], 2009Mu2130, Dec. 24, 2009 (S. Kor.), and also Kim & Kim, *supra* note 23, at 192-193.

25) *Compare* Supreme Court [S. Ct.], 66Mu34, Feb.7, 1967 (S. Kor.); Supreme Court [S. Ct.], 78Mu34, Feb.13, 1979 (S. Kor.); *and* Supreme Court [S. Ct.], 66Mu4, Apr. 26, 1966 (S. Kor.); *with* Supreme Court [S. Ct.], 85Mu85, Mar. 25, 1986 (S. Kor.), Supreme Court [S. Ct.], 90Mu552, Jan.11, 1991 (S. Kor.); Supreme Court [S. Ct.], 86Mu90, Dec. 22, 1987 (S. Kor.). It is no wonder because this cause of divorce, as a general provision, can and should reflect the changing values of a society. On the function of a general clause, *see* Lee Dongjin, *Pullyun'gwan'gyeŭi Sangdaebange Taehan Yujŭnggwa Kongsŏyangso k* [*A Bequest for a Concubine against Public Policy and Boni mores*], 16(4) Pigyosabŏp [Journal of Comparative Private Law] 1, 3-7 (2006) (S. Kor.).

relevant parties and does address only the process of negotiation for forming their marriage; it no more cares the reached agreement itself–the substantive aspect of their marriage. In this way, marriage is shifting from a public institution common to all members of a society to a private arrangement between the parties of that specific marriage.[26)]

Therefore, it is clear why the ranking of the aforementioned principles was changed in the revised Korean Nationality Act. So long as women stayed in the house as housewives and a stereotypical notion of marriage was preserved, conferring nationality or sojourn status upon a foreign wife simply because she married a Korean did not risk very much. The more the legal understanding of marriage becomes formalized, the coverage of marriage extended, and the actual lifestyle of married couples diversified, the more likely it is for cross-border marriage to be abused. For this reason, further criteria were needed to determine whether a particular marriage deserves to be privileged by immigration law.

3) Simulated Marriage in Family Law and Criminal Law

Similar to family laws in many other jurisdictions, the Korean Civil Code also utilizes a civil marriage system. Couples who want to make a *de iure* marital relationship have to make an agreement regarding their marriage and report it to the official governing the registration of family relationships (article 812 of the Korean Civil Code). However, the characteristic of Korean Civil Code does not require the couple to make (or represent) their marital agreement or perform marital ceremony in front of the official. Instead, it only requires a report and registration of the marriage; this systemic modeled after the Japanese Civil Code (*report system*).

Likewise, category 1 of article 815 of the Korean Civil Code declares that a marriage the parties did not agree to is void.[27)] Concerning this provision, two issues need clarification: first, what the marriage agreement means, and second, what the consequences are of a void marriage.

Regarding the definition of the marriage agreement, there are generally two different positions: one argues that the marital intent, as a condition of

26) Lee, *supra* note 15, at 511-512.

27) This provision also modeled after the Japanese Civil Code.

valid marriage, is to form a functioning marriage (i.e., a both spiritual and corporal community life, which typically includes living in the same residence, sharing earnings and living costs, having sexual intercourses, maintaining relationships with each other's relatives, etc.) (*substantial marital intent*),[28] while the other argues that a shared agreement to register as a married couple is enough to establish a valid marriage, and the intent to make a functioning marriage should be neither required nor examined (*formal marital intent*).[29]

The Supreme Court of Korea follows the former view. Accordingly, a marriage registration between parents made only to legitimize their son based on fears that his illegitimacy could break a proposed match for him[30] or a marriage undertaken only to prevent one party from being fired from a job as a teacher at an elementary school[31] would be considered void. As a simulated marriage, they would be deemed to lack substantial marital intent. This is understandable in two respects: first, when this case law was formed, there existed a specific and substantial model of marriage based on a stereotypical traditional family; most couples lived in the same residence, had sexual intercourses,[32] and, as a result, children; the husband went to work to earn money, and the wife cared for the household and the children. Thus, it was easy to define what marriage was, and there was very little need to acknowledge other forms of relationship as marriage.

Second, case law on so-called *de facto marriage* might have influenced on

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28) Kim & Kim, *supra* note 23, at 83-85; Lee Hwasook, *Kajokpŏpsang Pŏmnyurhaengwielsŏ Ŭisawa Shin'go* [*Will and Registration in the Juridical Act in Family Law*], 36 Minsabŏp'ak [The Korean Journal of Civil Law] 613, 627 ff. (2006) (S. Kor.).

29) Jung Kwanghyun, Han'guk Kajokpŏbyŏngu [Studies on Korean Family Law] 753 (1967) (S. Kor.).

30) *See* Supreme Court [S. Ct.], 74Mu23, May 27, 1975 (S. Kor.). This case seems to be the first case where the Supreme Court of Korea dealt with the simulated marriage issue. Though Supreme Court [S. Ct.], 75Mu26, Nov. 25, 1975 (S. Kor.) ruled that a marriage in which both parties agreed to get divorced as soon as their sons were reported and registered as their legitimate children should not be void, this decision remained an exception. This decision will be revisited below.

31) *See* Supreme Court [S. Ct.], 79Mu62&63 (consol.), Jan. 29, 1980 (S. Kor.).

32) The fact marital rape did not constitute a (rape) crime though was not expressly prescribed in Hyongbeob [Criminal Code] could be added. *See* Supreme Court [S. Ct.], 70Do29, Mar. 10, 1970 (S. Kor.), *overruled by en banc* Supreme Court [S. Ct.], 2012Do14788, May 16, 2013 (S. Kor.).

the interpretation of marital intent as a condition of a valid de iure marriage. De facto marriage means a form of cohabitation, and this does not meet the report and registration requirement of *de iure marriage*. Korean courts tried to protect members of such marriages by *quasi-marriage theory*, which argued that parties involved in de facto marriages should be provided with some of the legal protections originally designed for parties involved in de iure marriages. In order to justify this interpretation or analogy, this theory required that all of the other (or at least most) requirements of de iure marriage—except report and registration—including the marital intents of both parties,[33] should be met. Marital intent, in this sense, was inevitably substantive, as there was no report and registration in de facto marriage—otherwise, it would not discern the protected de facto marriage from other unprotected relationship. This substantive understanding of marital intent aimed at protecting de facto marriage, in turn, could have influenced the understanding of marital intent as a condition of de iure marriage.

It is also important to consider what void marriage means. Again, two different positions are presented. The majority view found in civil procedure literature argues that void marriage is not void ab initio and per se, but rather is retrospectively[34] voidable by the procedure of declaration of nullity of marriage (article 2 of the Korean Family Litigation Act). For, this case is classified as a family case and so is subject to the Family Court's jurisdiction, and the decree to declare nullity of marriage has *erga omnes* effect (articles 21 and 22 of the Korean Family Litigation Act).[35] The majority view found in family law literature is different. It argues that void marriage is null and void ab initio and per se irrespective whether the

33) *See* Supreme Court [S. Ct.], 79Mu3, May 8, 1979 (S. Kor.). This decision required marital intent on the part of each party as a subjective condition of the protected de facto marriage and substantive marital life as an objective condition thereof, which could be recognized as a spousal community life from the viewpoints of social perception as well as familial order.

34) Korean family law acknowledges voidable marriage in addition to void marriage. Voidable marriage can be nullified by the procedure to rescind marriage but has no retrospective effect. *See* arts. 816 and 824 of the Korean Civil Code.

35) Song Sanghyun & Park Ikhwan, Minsasosongbŏp [The Law of Civil Procedure in Korea] 196-197 (7th ed. 2014) (S. Kor.).

decree to declare the nullity of marriage has been granted.[36] The Supreme Court of Korea follows the latter.[37]

As a result, it becomes possible to punish simulated marriage as a crime under the Korean Criminal Code. According to articles 228 and 229 of the Korean Criminal Code, any person who makes a false report to an official and has that official register the false fact in the authentic deed or equivalent or any person who utters the falsely registered deed shall be punished by imprisonment for up to three years or by a fine up to 7 million KRW. The very essence of this crime is a sort of false preparation of official document that is governed by article 227 of the Korean Criminal Code. Untrue entry in an officially authenticated original deed is a type of false alteration of the officially authenticated original deed, an official document, committed by the person who submitted false record in order to exploit the innocent official. It actually limits the scope of criminal punishment, as it criminalizes preparation not of all the official document but of part of it.[38] Because all of the other requirements are met, it is only left to determine whether reporting and registering a simulated marriages a marriage is untrue (i.e., false). Unlike in the similar situation in contract law—reporting and registering simulated transfer of immovable[39]—the Supreme Court of Korea ruled that it is false so that it constitutes a violation of that provision. Moreover, the registration itself is regarded as an utterance as noted in article 229—and therefore also a violation of it.[40] Thus, parties of simulated marriage shall be punished by imprisonment for up to four-and-a-half years or by a fine up to 10.5 million KRW.

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36) Kim & Kim, *supra* note 23, at 113-114.

37) *See* Supreme Court [S. Ct.], 55Da399, Dec. 22, 1956 (S. Kor.).

38) If it were not for these provisions, preparation of all the official document exploiting the innocent official would have been punished as an *indirect principal* of a crime of violation against art. 227 of the Korean Criminal Code. *See* Lee Jaesang, Hyŏngbŏpkangnon [Criminal Law: Individual Crimes] 590 (5th ed. 2007) (S. Kor.).

39) *See* Supreme Court [S. Ct.], 71Do2417, Mar. 28, 1972 (en banc) (S. Kor.); Supreme Court [S. Ct.], 91Do1164, Sept. 24, 1991 (S. Kor.)

40) *See* Supreme Court [S. Ct.], 85Do1481, Sept. 10, 1985 (S. Kor.); Supreme Court [S. Ct.], 95Do2049, Nov. 22, 1996 (S. Kor.). These decisions will be revisited below.

2. *Regulation on Marriage for Immigration in Korea as an Unintended Mixture of Independently Developed Doctrines in Immigration Law, Family Law, and Criminal Law*

1) *Dynamics of Immigration Law, Family Law, and Criminal Law in Regulating Marriage for Immigration*

The regulatory regime regarding marriage for immigration in Korea can be seen as a mixture of all the independent regulations imposed by immigration law, family law, and criminal law.

As explained earlier, Korean immigration law grants legal privileges to a foreigner who marries a Korean or a resident of Korea. These privileges can be considered one of the legal consequences of marriage. As can be expected, however, the Supreme Court of Korea, which interprets the intent to marry as a condition of valid marriage substantively, sees marriage only for immigration as a sort of simulated marriage and thus declares this type of marriage null and void ab initio.[41] In actuality, marriage for immigration seems to be the only category of simulated marriage of practical importance today; marriage for legitimization or retention of occupation is no longer relevant concerns.

Moreover, the Supreme Court of Korea regards a marriage where one party had mental reservations about engaging in the marital relationship and the other party did not as lacking marital intent as a simulated marriage,[42] though such a marriage is also voidable for fraud,[43] and judicial divorce for malicious desertion or another serious cause is possible.

This approach in family law, in turn, seems to influence regulations regarding immigration law. As explained earlier, Korean immigration law, especially the Korean Nationality Act of 1998, is not satisfied with ascertaining the existence of cross-border marriage between a Korean and a foreigner. It requires the relevant parties to meet further requirements.

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41) *See* Supreme Court [S. Ct.], 71Do2417, Mar. 28, 1972 (en banc) (S. Kor.); Supreme Court [S. Ct.], 91Do1164, Sept. 24, 1991 (S. Kor.)

42) *See* Supreme Court [S. Ct.], 2010Mu574, June 10, 2010 (S. Kor.).

43) See category 3 of art. 816 of the Korean Civil Code, under which fraud and duress in the course of representing marital intent is a cause to make that marriage voidable.

Generally speaking, however, the issue most frequently raised and accepted in cases regarding the permission for or rejection of naturalization seems to be whether both parties have continued a "normal" marriage for the required period,[44] which is similar to the criteria used to judge whether a marriage is simulated.[45] When a marriage is void ab initio and per se, it never satisfies the requirement to obtain naturalization or issuance of visa, as the marriage as a condition of simple marriage or F-4 visa ought to be the valid one. When the requirement of marital intent is interpreted strictly, other requirements might well play little role in excluding improper application for immigration. Conversely, once this practice has been consolidated, it could be difficult to lessen the criteria of marital intent, as it is a concept relevant not only to family law but also to immigration law through controlling permission for naturalization or issuance of visas.

More importantly, the regulation on marriage for immigration is in the hands of the public prosecutor under this regime. As has been explained, reporting and registering a simulated marriage is a crime—a violation of articles 228 and 229 of the Korean Criminal Code. Prior to the revision of the Korean Nationality Act in 1998, this was the only way the government interfered with marriage for immigration. After the 1998 revision, where *ipso iure* acquisition of Korean nationality has been substituted with the application and permission for naturalization, officials of the Korea Immigration Service, a part of the Ministry of Justice, were granted authority of inspection (article 20 of the Korean Nationality Act) to decide whether the Minister of Justice should permit naturalization or, if already permitted, revoke the permission (articles 6 and 21 of the Korean Nationality Act). So, he or she can (1) request another relevant

44) *See* Seoul Administrative Court [Admin. Ct.], 2009Guhap23372, Nov. 20, 2009 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2009Guhap29097, Dec. 3, 2009 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2009Guhap22331, Dec. 4, 2009 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2009Guhap24085, Dec. 31, 2009 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2009Guhap32000, Jan. 15, 2010 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2009Guhap30950, Feb. 17, 2010 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2009Guhap37746, Apr. 2, 2010 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2009Guhap50442, July 23, 2010 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2010Guhap17618, Sept. 2, 2010 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2010Guhap7994, Sept. 9, 2010 (S. Kor.).

45) *See* Seoul Administrative Court [Admin. Ct.], 2010Guhap42052, May 13, 2010 (S. Kor.).

governmental agency to investigate the applicant's personal background, criminal history, and current situation during his or her stay, or seek an opinion on other necessary matters, (2) request the applicant to submit evidential documents, and, more importantly, (3) make a field inspection of the residence (article 4 of the Executive Decree of the Korean Nationality Act).[46] Because officials who find simulated marriage in the course of inspection are required to report it to a criminal investigative agency such as police or public prosecutor, those found to have registered simulated marriage could ultimately be criminally charged. The fact that most cases concerning marriage for immigration were not civil or family cases but criminal or administrative cases[47] indicates that the initiative of regulating this type of marriage is in the hands of public agencies, especially public prosecutors.

It is not the end of the story. In principle either party of a simulated marriage should be granted a decree to declare nullity of the marriage if he or she wants to correct the record in the registration of family relationships (article 101 of the Korean Act of the Registration, Etc. of Family Relationship). According to the Supreme Court of Korea, however, when the criminal conviction is upheld, the registration can be corrected merely through permission of the Family Court rather than a decree to declare

46) Similarly, the head of the Korean diplomatic mission abroad has authority to examine the course of communication and the marital intent, Korean language ability of the sponsored applicant for visa, preparation of the residence in Korea, and the like in order to judge whether marriage is really intended and "normal" marital life is possible. *See* art. 9-5 of Churipgukgwallibeop Sihaenggyuchik [Administrative Order of the Korean Immigration Control Law] (S. Kor.).

47) *See* Supreme Court [S. Ct.], 71Do2417, Mar. 28, 1972 (en banc) (S. Kor.); Supreme Court [S. Ct.], 91Do1164, Sept. 24, 1991 (S. Kor.). *See also* Seoul Administrative Court [Admin. Ct.], 2009Guhap23372, Nov. 20, 2009 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2009Guhap29097, Dec. 3, 2009 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2009Guhap22331, Dec. 4, 2009 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2009Guhap24085, Dec. 31, 2009 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2009Guhap32000, Jan. 15, 2010 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2009Guhap30950, Feb. 17, 2010 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2009Guhap37746, Apr. 2, 2010 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2009Guhap50442, July 23, 2010 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2010Guhap17618, Sept. 2, 2010 (S. Kor.); Seoul Administrative Court [Admin. Ct.], 2010Guhap7994, Sept. 9, 2010 (S. Kor.).

nullity of that marriage.[48)]

2) Legal Criteria and Factual Evidences Used in Judging Marriage for Immigration

As explained earlier, in Korea a marriage undertaken solely to obtain nationality is considered a simulated marriage, which is null and void according to family law, constitutes a crime according to criminal law, and provides no basis for the immigration benefit according to immigration law. Nonetheless, this does not necessarily mean that regulations regarding marriage for immigration are overly strict in Korea. That depends highly on the perspective of the government official, public prosecutor, or judge dealing with the evidence and facts related to the case. Let me explain further.

Whether the parties involved in a marriage truly intended to form a marital bond is a problem of fact finding. The fact that matters here, however, rests squarely in the minds of the parties in question. Strictly speaking, their intent is unobservable and unverifiable. Moreover, the intent to marry is usually oriented to the martial relationship as a social reality—not to the legal effect of de iure marriage. Couples rarely recognize the legal meaning of marriage—specifications of spousal rights and duties. They often have little interest in it, and might not even consider that they are entering a legal relationship by getting married. Or worse yet, their intent might be amorphous or unclear. As marriage represents a comprehensive and long-standing relationship, it is difficult for most couples to create a detailed agreement regarding the condition of their marriage. As a result, determining the marital intent is very difficult. Except for rare situation where the parties expressively agreed their marriage to be a simulation without any legal effect, it is a problem of construction of parties' intention rather than interpretation of it. Governmental officials, public prosecutors, and judges have no choice but to collect clues in attempt to construct the intention of the marrying parties. Like other constructions, this one is inevitably influenced by the attitude of the constructor.

This begs the question, what attitude or approach those constructors in

48) *See* Supreme Court [S. Ct.], 2009Su64, Oct. 8, 2009 (S. Kor.).

Korea, especially judges, have. Of course, their attitude cannot be simply generalized. In fact, it might be impossible to predict, as this kind of judgment is highly influenced by the context of the relevant case. However, based on decisions that address this issue in some detail, it is clear that judges can and sometimes do interfere with a marriage for immigration strongly when they believe doing so is justifiable.

The most important case in this regard is the Korean Supreme Court's decision rendered on June 10, 2010 (2010Mu574). In that case, the plaintiff, a Korean national man, was married to the defendant, a Philippine national woman. They had a wedding ceremony in the Philippines and entered Korea together. The defendant, however, disappeared, leaving a note written that she married to support her family and needed to go make money—only after one month from entering Korea. The plaintiff filed a lawsuit to request that the marriage be declared void. The claim was dismissed on the following grounds: the defendant had run a "normal" spousal life with the plaintiff for one month after entering Korea; she had a trip with the plaintiff to Jeju Island shortly before leaving the home; according to the aforementioned note, she left the home with hesitation regarding whether she should continue the marriage or go to work to support her family. The Supreme Court of Korea, however, reversed this judgment. The following factors were given as the grounds for reversal: the plaintiff carefully helped the defendant to adapt to a life in Korea; the defendant left her new home after only one month; the defendant wrote that she felt that she should work to support her family, that was why she married to him, and that she really appreciated him making it possible for her to work in Korea legally; she became able to work in Korea shortly before she left the home; her cousin who lived in Korea and corresponded with her believed she entered Korea in order to support her family in the Philippines; and they never had sexual intercourse during the period she stayed in the home because she refused to have such a relationship with him. The factors the Supreme Court of Korea listed, except for the lack of sexual intercourse, were not seemingly persuasive enough to judge whether the relevant marriage was a simulation. They just proved that the defendant had an economic motive when marrying the plaintiff, but did not refute the possibility that the defendant also intended to make a true marriage. Thus, this decision suggests that either the evidentiary requirement for simulation

in case of marriage for immigration is especially low or that consummation of the marriage is a decisive factor to determine whether it is a simulation.

There are other cases that support this presumption. A decision recently rendered by the Seoul Administrative Court[49] rejected a request for permission of naturalization on the following grounds: the plaintiff entered Korea in 1999 and stayed for years despite expiration of her visa before she married a Korean man; she reentered Korea as a wife of a Korean national (F-2 visa) only six months after she married and left Korea; the facts indicate that she registered the marriage in order to avoid expiration of her visa; she revealed that her sister as well as her husband's brother and mother were unaware of their marriage; they had no wedding ceremony; she had no relationship with her husband's friends; and her husband stayed in Seoul for only two or three days per week and spent most of his time in other areas where he went to work. These facts indicate that they had no spiritual and corporal community life.

Here is another decision[50] made on very similar ground: again, the plaintiff stayed in Korea despite expiration of her visa; each spouse provided a different explanations regarding how they came to meet each other; the plaintiff did not know about her husband's brothers and sisters; in the course of field inspection, the plaintiff, asking her husband to cooperate with her, told him that she had to return to her Chinese ex-husband unless she acquired Korean nationality, indicating she had continued a de facto marriage relationship with her ex-husband; she did not tell her daughter who lived in Korea, about her marriage, and the Korean husband was unaware that she had a daughter. Furthermore, this decision pointed out that she requested mediation for divorce three months before the second anniversary, which could be used to infer that they had not had a "normal" marital relationship for two years.

Yet another decision[51] rejected the request for naturalization on the following grounds: most of the plaintiff's stay in Korea was made possible by a G-1 visa; the plaintiff and her Korean husband registered their

49) *See* Seoul Administrative Court [Admin. Ct.], 2010Guhap7994, Sept. 9, 2010 (S. Kor.).

50) *See* Seoul Administrative Court [Admin. Ct.], 2009Guhap57252, Aug. 27, 2010 (S. Kor.).

51) *See* Seoul Administrative Court [Admin. Ct.], 2010Guhap498, May 26, 2010 (S. Kor.).

marriage only five months before the expiration of the plaintiff's visa, and it was unclear how they came to meet; the plaintiff requested issuance of an F-2 visa instead of a G-1 visa but revoked this request, saying that her husband left the home; the plaintiff filed for a divorce without trying to search for her husband as soon as he left the home; though the plaintiff wrote in the complaint for divorce that she intended to have a genuine marriage, and not a marriage for money or immigration, she requested permission of naturalization. These facts indicate that she married in order to avoid expiration of her visa and to acquire Korean nationality and she filed for a divorce when her husband did not cooperate with her.

It is suggested that a foreigner who married a Korean and wants to live in Korea should live with the Korean spouse and avoid being parted temporarily for as long as possible—at least for two years. They should not file for divorce during that period. They should let their parents, brothers, and sisters know about their marriage. They should keep acquaintances and maintain communication with each one's family, and they should have sexual intercourse. Couples may have to provide evidences to prove these facts, and, more importantly, the governmental official, public prosecutor, or judge will likely inspect the couple and their home in order to collect evidences regarding those facts.

III. Discussion

1. Substantial Aspects

1) Difficulty in Harmonization of Conflicting Interests in Marriage for Immigration

Decades ago, marriage for immigration was not a serious issue. There were very few marriages for immigration, and few difficult questions regarding how to handle it. Let me explain this point in some detail before discussing the current situation.

First, the state haste authority to determine proper and improper immigration requests (*state interest to control immigration*).[52] As is evident

52) Ping v. U.S., 130 U.S. 581, 609 (1889); Oceanic Steam Navigation Co. v. Stranahan, 214

through the study of history, nationality (and also citizenship), a person's attribution to a certain county, provides a criteria according to which the country imposes duties (to obey) as well as grants rights and powers as a national (or, traditionally, subject).[53] Considering the increase in state function today, to whom a country imposes duties as well as grants rights and powers as a national has become an increasingly politically and economically sensitive issue.[54] In addition, having the rights and powers of a national in a modern democratic country includes the right to participate in political process either as a voter or as a representative. Thus, status as a national can influence the identity of a political community. And the issue of national security cannot be overlooked. Every country has the right to reject a foreigner's immigration application, and it has the responsibility to accept its own national and power of diplomatic protection for him or her.[55] Most countries in the world follow a *selective immigration policy* and prefer prospective immigrants who have professional competences or are going to invest a considerable amount of money in the country—in short, those who would contribute to the country. Korea is not an exception thereof. Even when they permit immigration and naturalization more generously, they still require prospective immigrants to integrate and engage fully through learning the language and understanding the culture.

National's *right to family unification*, however, also deserves respect. Although there is no provision in Korean law and no decision of the Constitutional Court of Korea that addresses the right to family unification,[56] subparagraph 1 of article 36 of the Constitution of the Republic of Korea imposes on the state a duty to protect marriage and family life. Some adjudications rendered by the National Human Rights Commission of Korea, most of which are cases related to the regulation of marriage for immigration, also dealt with this issue as a violation of

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U.S. 320, 340 (1909); Abrams, *Immigration Law and the Regulation of Marriage*, 91 Minnesota Law Review 1625, 1638 ff. (2000).

53) Myoung, Lee & Kim, *supra* note 6; Suk, *supra* note 8, at 15-16, 28.

54) This consideration explains the reason why most countries require a prospective national to be competent enough to support his or her own lifestyle as a condition of immigration and why they regulate foreigner's economic activities including employment.

55) Suk, *supra* note 8, at 26-28.

56) Sung Nakin, Hŏnbŏp'ak [Constitutional Law] 801-804 (13th ed. 2013) (S. Kor.).

subparagraph 1 of article 36 of the Constitution.[57] The reason why the issue has not been raised lies in the fact that freedom of movement is well protected at the domestic level. Regarding cross-border marriage, however, it is required that foreigners who make family with nationals be permitted immigration to ensure that national can live with their family.

Freedom of equal and autonomous family life and the *right to privacy* also deserves respect. The former is protected by the same article of the Constitution of the Republic of Korea (subparagraph 1 of article 36), and the latter, by article 17 thereof, which concerns the privacy of the spousal relationship.[58] When marriage and family is used as a substantial criterion to investigate immigration requests, it could infringe upon freedom of equal and autonomous family life and the right to privacy, as inspection to internal spousal life would be required.

When marriage has a unified and definite form in law as well as in society, the potential conflict between the state's interest in controlling immigration and the individual's interest in family unification can be successfully avoided. As marriage had a unified and definite form and could be rarely abused for other purposes, it could at least guarantee the foreign spouse's integration and engagement in Korean society as well as her loyalty to Korea. Because marriage itself guaranteed a certain situation to support permission for immigration or naturalization, further inspection of the spousal relationship of the relevant family was not needed as much. In this way, infringement on the freedom of family life and the right to privacy could be avoided also.[59]

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57) *See* GukgaIngwonWiwonhoe [National Human Rights Commission], 02Jinin1428, Jan. 13, 2003 (S. Kor.); GukgaIngwonWiwonhoe [National Human Rights Commission], 03Jinin931, Sept.8, 2003 (S. Kor.); GukgaIngwonWiwonhoe [National Human Rights Commission], 04Jinin1581, Aug. 16, 2004 (S. Kor.). *See also*, Rae, *Alienating Sham Marriages for Tougher Immigration Penalties: Congress Enacts The Marriage Fraud Act*, 15 Pepperdine Law Review 181 (1988).

58) Sung, *supra* note 56, at 635.

59) Immigration laws in many jurisdictions also used to grant foreign wives of their nationals their nationality merely on the basis of the marriage. *See* 8 U.S.C. §1152 (1982); art. 12 of the French Civil Code [Code Civil] of 1804; art. 6 of the German Nationality Act [Reichs- und Staatsangehörigkeitsgesetz]of 1913; art. 9 of the Austrian Nationality Act [Staatsbürgerschaftsgesetz] of 1965; art. 3 of the Swiss Citizenship Act [Bürgerschafsrecht] of 1952.

As the understanding of marriage in family law has been formalized and the modality of marriage in society has become increasingly diversified, however, the potential conflict has been realized. Now marriage no longer guarantees the adequacy of immigration permission for those who marry Koreans. If a formalized concept of marriage is accepted in family law as well as in immigration law, the advancement of equality and autonomy in marriage would be preserved, infringement on privacy of spousal relationship could be avoided, and family unification would not be endangered. In this case, however, the state's interest of immigration control would be entirely surrendered. This could encourage prospective immigrants to abuse cross-border marriage as an instrument to easily obtain nationality, which, in turn, would contribute to the social devaluation of marriage in general. The question of whether to abandon to control immigration is highly political and should be decided through the political process by the appropriate representatives.

On the contrary, when marriage mainly or solely for immigration is excluded from the jurisdiction of family law as well as from that of immigration law, the achievement of equal and autonomous marriage could be at least partly neutralized, a traditional understanding of marriage could revive again, and the privacy of spousal relationship could be endangered—instead of protecting the state's interest in immigration control. This backward step in family law and infringement of privacy can be observed in Korea. As explained earlier, a cross-border couple has an incentive to pretend that they have a stereo-typical marriage in order to avoid suspicion from governmental officials and public prosecutors, and their internal spousal life, including their relationship with each other's relatives and friends and their sexual life, is subject to investigation. For example, the question of whether a couple has had a sexual intercourse cannot play a decisive role in judging whether a marriage between two Koreans is a simulation; doing so would constitute privacy infringement. Nonetheless, this criterion is used to judge whether cross-border marriage is a simulation.

2) Decoupling Family Law and Immigration Law and a More Formalized Approach

A complete solution to this dilemma might not be possible.

Implementing more fine-tuned policy alternatives is possible, however.

First, it is recommended to decouple family law and immigration law, or validness of marriage and permission for immigration.[60] Unless the criteria used to determine immigration permission are separated from those used to determine validity of marriage, it is hard to avoid the need for judges to negate marriages that appear suspicious in terms of immigration law.

Traditionally, the concept of void and voidable marriage complemented strict divorce law. Though divorce was not allowed in principle, some couples were allowed to leave behind their unhappy marriage via the construction of void or voidable marriage. Along with the divorce law reform in 1960-1980, however, the practical importance of these concepts decreased. Now, wide acceptance of simulated marriage has made it difficult to differentiate between the two situations—no marriage and broken marriage. Herein lies the reason why case law sees that the agreement of parties of a marriage to exclude some effects of marriage does not always negate the marriage itself but only the agreement to exclude some effects of marriage,[61] and also the reason why the case law developed a *doctrine of retrospective explicit or implicit rectification of void marriage*[62] in

60) Many courts in the U.S. follow this approach. Even a marriage solely for immigration, which cannot be benefited in immigration law, is still valid in family law (common law). *Compare In re* Appeal of O'Rourke, 310 Minn. 373, 246 N.W.2d. 461 (1976); Mpiliris v. Hellenic Lines, Ltd., 323 F.Supp. 865 (S.D. Tex. 1970); *and* 8 U.S.C. §1151 (1986). *See also* Abrams, *supra* note 52, at 1668 ff.; Lynskey, *supra* note 5 at 1094 ff. In Swiss number 4 of art. 120 of the Civil Code, which negated a simulated marriage for immigration, was abridged along with the tightening of the condition of immigration permission for foreign spouse of Swiss national in immigration law. *See* Geiser & Luchinger, *zu Art. 105, n. 15-16 in* Basler Kommentar zum Zivilgesetzbuch I (2.Aufl. 2002) (Ger.). There are voices to maintain to decouple family law issue from immigration law issue also in Germany and France. For German law, *see* Eisfeld, Die Scheinehe in Deutschland im 19. und 20. Jahrhundert 219 ff. (2005) (Ger). For French law, *see* Murat, *La lute contre les marriages de complaisance se poursuit*, JCP 1993, I, 3639 n° 4 (Fr.).

61) *See* Supreme Court [S. Ct.], 74Mu23, May 27, 1975 (S. Kor.). According to the majority opinion in German legal literature, an agreement to exclude some of the effects of marriage does not negate the marriage itself but only negate that agreement, because if the provisions for the effect of marriage be converted to the conditions for a valid marriage, they would be devaluated. *See generally*, Eisfeld, *supra* note 50, at 190 f.

62) *See* Supreme Court [S. Ct.], 65Mu61, Dec. 28, 1965 (S. Kor.); Supreme Court [S. Ct.], 91Mu30, Dec. 27, 1991 (S. Kor.). *See also* Supreme Court [S. Ct.], 90Mu293, Dec. 26, 1990 (S. Kor.), according to which the intention or agreement not to live together and just to

violation of article 139 of the Korean Civil Code, which includes only prospective rectification of a void juridical act. In this regard, it is recommended to be especially prudent when deciding whether a marriage is a simulation. Unless obvious evidence that refutes any other interpretation is presented, courts should avoid deciding that a marriage be simulated and should defer the disposition of it to divorce procedure.[63] Deciding the legal status of a marriage should be based not on what the couple intended before but what they are doing now.[64] Nonetheless, this is

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communicate does not negate the substantive marital intent.

63) *See* Kim Youngsin, *Honinŭisa'ŭi Ŭimie Kwanhan Koch'al* [*A Study on the Meaning of 'Agreement on Marriage'*], 36(4) Oebŏmnonjip [HUFS Law Review] 346, 351-355 (2012) (S. Kor.) (discussing more prudent examination of substantive marital intent); Choi Bongkyung, *Tamunhwagajŏnge Kwanhan Yakkanŭi Kajokpŏpchŏk Munjejŏm* [*Einige familienrechtliche Probleme dermultikulturellen Familien in Korea*], 25(2) Kajokpŏbyŏn-gu 297, 305 (2011) (S. Kor.) (discussing total Exclusion of Legal Effects of Marriage). *See also* Hepting, *Das Eheschließungsrecht nach der Reform* [*The Marriage Law after Reform*] FamRZ 1998, 713, 730 (Ger.) (maintaining that the evidential requirement in the annulment proceeding of marriage for immigration should be as high as in ordinary criminal proceedings). Swiss Federal Court also denied to nullify a marriage in a case very similar to that of Supreme Court [S. Ct.], 2010Mu574, June 10, 2010, (S. Kor.). *See* BGE 98 II 1 (Switz.). For various factual and evidential factors considered in deciding marriage for immigration, *see* European Commission, *supra* note 5, at 31 ff.

64) In this regard, the case where one party intended to form a marital relationship and the other had no intention to do so (mental reservation) should be discerned from the case of simulation. If this marriage is void per se and ab initio irrespective of awareness and willing of the one who had marital intent, the innocent also would lose all the benefit and protection granted by the marriage. It is difficult to say that the protection of the innocent who believed to be married is less important than the rejection of recognition of that marriage based on vague criteria. The most important reason why marital intent is required as a condition of valid marriage is to prevent coerced marriage. This function is, however, fulfilled by marriageable age (over 18 years. art. 807 of the Korean Civil Code), fraud, and duress (category 3 of art. 816 of the Korean Civil Code; Korean case law interprets the concept of fraud and duress flexibly enough to substitute the concept of lack of marital intent). In addition, it should be considered the marital intent of each spouse as a condition of valid marriage in a cross-border marriage is governed by the law of the native county of each party. *See* art. 36 of Gikjesabeob[Act of Private International Law]; Suk Kwanghyun, Kukchesabŏp' Haesŏl [Private International Law Annotated] 445-447 (2013) (S. Kor.). *See also*, Suk Kwanghyun, *Han'gukpŏbwŏne Chegidoen Chunggukpŏbŭi Chaengjŏm: Kyeyakpŏp, Pulbŏp'aengwibŏp, Honinbŏpkwa Oegukp'an'gyŏrŭi Sŭngint'pchip'aengŭl Chungshimŭro* [*Several Chinese Law Issues raised before Korean Courts: with Emphases on Laws on Contract, Tort, Marriage and Recognition and Enforcement of Foreign Judgment*], 51(3) SŏuldaePŏp'ak [Seoul Law Journal] 181, 209-213 (2010) (S. Kor.); Hyun, *supra* note 5, at 1230 ff. There are many jurisdictions which adopt formal marital intent view as a condition of valid marriage. For example, the U.S. (*See*

not the case, as the conditions of permission for immigration depends on the validity of the marriage and there are no other devices to control immigration permission. Furthermore, there are many consequences and benefits associated with marriage, and not all of them are subject to scrutinization for immigration control. It would be better to acknowledge a marriage and grant them all the effects and benefits of marriage other than the effect or benefit in immigration law.[65)]

Moreover, this approach could pose more serious danger. Judges might be conscious that the real issue at hand was immigration control. This would not, however, be addressed in the judgment, as the only legal issue would be the marital intent. And because whether a couple had an intention to make a marriage before they registered their marriage is unobservable and unverifiable; judges would infer the intention from the observed and proved clues before and after concluding marriage. It is very difficult to discern if an individual intended to make a real marriage but changed his or her mind after the marriage was registered or if there was never any intention to make a real marriage at all.[66)] In short, as judges would suffer lack of factual or evidential grounds to decide whether the marriage is a simulation. Thus, they tend to, and actually have no choice but to, supplement this lack with a presumption for one party or another or

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In re Appeal of O'Rourke, 310 Minn. 373, 246 N.W.2d. 461; *Mpiliris*, 323 F.Supp. 865; 8 U.S.C. §1151), Germany, Austria, and Switzerland adopt the formal intent approach. Although both Austrian and Swiss law had provisions to negate a marriage solely for immigration (art. 23 of the Austrian Marriage Act [Ehegesetz]; number 4 of art. 120 of the Swiss Civil Code [Zivilgesetzbuch] prior to revision of 2000, and German law has provisions to prohibit simulated marriage in general (number 2 of subparagraph 2 of art. 1314 of the German Civil Code [Bürgerliches Gesetzbuch]), the formers do not deal with this issue as a simulated marriage, and the latter is applied only to marriage for immigration cases. *See* DIEKMANN, FAMILIENRECHTLICHE PROBLEME SOGENANNTER SCHEINEHEN IM DEUTSCHEN RECHT UNTER DES ÖSTERREICHISCHEN UND SCHWEIZERISCHEN ZIVILRECHTS (1991) (Ger.). On the contrary, French law follows the substantial intent view. According to Cass. civ. 1er 20. novembre 1963, D. 1963, S. 465 (Appietto), a marriage which excludes some of the effects given by marriage law is void when it pursues mainly the advantages given by laws other than marriage law, so that a marriage for immigration is void. *See* Fulchiron, *Acquisition de la nationalité française à raison du mariage*, JCL.–DROIT INTERNATIONAL PRIVÉ FRANÇAISE, Fasc. 502-560 (1995) (Fr.).

65) *See* Seoul District Court [Dist. Ct.], 96No3403, July 12, 1996 (S. Kor.). Though this decision adopted a formal marital intent view, this argument holds true even when we adopt a more prudent examination of the substantive marital intent view.

66) DIEKMANN, *supra* note 64, at 173.

with their own conjectures. As explained in the previous chapter, Korean courts seem to follow the latter approach. It might channel the traditional image or concept of family and, sometimes, an unexamined and unjustified bias toward foreigners, especially from the countries less developed than Korea to this judgment. Making matters worse, some judges think that they decide only whether the marriage is a simulation and do not consider any other factors–even though which is not the case. In such cases, which are highly likely, judges' attitudes toward diverse forms of marriage or foreign immigrants are examined neither by themselves nor by others. Open and transparent control is always better than hidden, or, sometimes, unconscious control. Decoupling the family law issue (simulation) from the immigration law issue (eligibility to immigrate) and directly examining whether an immigration request might well be accepted according to immigration law will enable this open and transparent control.

Decoupling family law and immigration law has another advantage. When the power of immigration decision-making rests solely with judges, it can be difficult for them to perform successfully all their roles of prohibiting improper attempt to immigrate to Korea and to strictly check the legality of their decision and possible biases; these two roles have opposite directions. If we separate the former role from the latter, and confer the former, which is highly political, to governmental officials (the Korean Immigration Service), judges can concentrate on the latter role to check the legality of adjudication made by a governmental official, which would allow them to be more objective and unbiased.

However, this is not enough. Even if family law and immigration law are decoupled, the problem of infringement of privacy remains unsolved. We cannot grant privileges or benefits, such as issuance of a visa or permission for naturalization, to a foreigner whenever or just because he or she is married to a Korean—though we should take that fact into consideration. A couple's right to family unification depends on the definite form of the marriage. For example, when couple agrees to marry but live separately,[67] family unification would not matter so much. Because there is

67) Think of the marriage between a Chinese actress Tang Wei and Korean movie director Kim Taeyong. According to their announcement, Tang will not live in Korea despite their marriage.

always a possibility that the couple did not honestly report what their marriage would be, there remains always a necessity to decide whether the relevant marriage really needs some benefit in terms of issuance of visa or permission of naturalization to promote family unification. This might need an investigation of the internal spousal relationship. Thus, the problem of difficulty and danger in dealing this issue might be just shifted from criminal and family court judge to immigration agency without any lessening.

If the condition of immigration is more formalized, however, the extent of the privacy infringement can be lessened and the difficulty in deciding this issue can be avoided. Instead of requiring "normal" marriage, it is recommended to lengthen the period needed to acquire permanent residence and nationality, and introduce more thorough procedures to examine the purpose of cross-border marriage before issuing visas. The fewer benefits that are granted to foreign spouses of a national, and the more cost or burden that is associated with acquiring nationality, the less cross-border marriage would be abused only to enable an immigration and the less need there would be for a thorough inspection that might constitute severe infringement of privacy.[68] Actually, Korean immigration law still grants great benefits to foreign spouse of Korean relative to immigration laws in other countries. In addition, an inspection that seriously endangers the privacy and personal lives of a couple should be prevented expressly and more strictly. For example, a question about sexual life of a couple should be prohibited on principle.[69]

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68) This is the reason why the benefit granted to foreign spouse of national in terms of immigration permission has been decreased or totally abolished in most jurisdictions. *See* art. 9 and abolishment of art. 6 of the German Nationality Act [Staatsangehörigkeitsgesetz] of 1969; arts. 37, 37-1 of the French Code of Nationality [Code de la nationalité française] of 1973; art. 11a of the revised Austrian Nationality Act of 1983; the U.S. Immigration Marriage Fraud Amendment of 1986, 8 U.S.C. §1186a; and art. 15 and abolishment of art. 3 of the revised Swiss Citizenship Act of 1990 (also with the amended Federal Constitution of 1982). *See also* Choi Bongkyung, *Kukcheijuyŏsŏngŭi Pŏpchŏk Munjee Kwanhan Sogo* [*Über die rechtliche Probleme um die Einwanderinnen durch Internationale Eheschliessung*], 51(2) Sŏuldae Pŏp'ak [Seoul Law Journal] 131, 149 (2010) (S. Kor.).

69) DeArmas, *For Richer or Poorer or Any Other Reason: Adjudicating Immigration Marriage Fraud Cases within the Scope of the Constitution*, 15 Journal of Gender, Social Policy & the Law 743, 758 ff. (2007); Diekmann , *supra* note 64, at 17. *See also* art. 15c of the Swiss Citizenship Act.

2. *Procedural Aspects*

1) Distorted Communication

Another problem in the current regulatory regime on marriage for immigration in Korea lies in the fact that public prosecutors have procedural initiative. As explained earlier, marriage for immigration is void per se and ab initio as a simulation, meaning that it constitutes a crime of *untrue entry in officially authenticated original deed*. Therefore, public prosecutors can and do investigate and charge foreigners when are suspected of being a party in a simulated marriage. Governmental officials also have the authority to make a field investigation.

Some consequences of this approach are well demonstrated by a Seoul Northern District Court's decision rendered on February 19, 2009 (2008No1702).[70] Korean marriages broker A offered Korean man B 3,000,000 KRW to enter into a simulated marriage. Refusing the offer, B told A that he was very lonely and wanted to get married and live with his wife; 3,000,000 KRW was not a lot of money for him, and so B said he was not willing to marry for money. A told B, however, that he could not broker the marriage unless B was paid and so B had better accept the money and spend it on the prospective wife. When B agreed and was paid 3,000,000 KRW, the broker A introduced a Chinese woman C who lived in China to B. B got married to C, and brought her to Korea. They lived together in Korea and had sexual intercourse. Of course, as soon as C entered Korea, she got employed. She seemed to contribute to support their household with the money she earned. B did not, however, let his relatives know about his marriage. After a year or so, they broke up. A, B, and C were charged as *aiders* (article 31 of the Korean Criminal Code) and *co-principals* (article 30 of the Korean Criminal Code) of untrue entry in officially authenticated original deed. The Seoul Northern District Court, as an appellate court, quashed the conviction of the first instance to A and C (B did not appeal) and declared them not guilty.

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70) I participated in the procedure as one of three judges constituting the appellate court panel and drafted the judgment myself. Some of the underlying facts is based on my memory. On details of this case, *see* Kim, *supra* note 63, at 353-354.

Judging by all the factors presented, the judgment of the appellate court could be supported even by the criteria adopted by the Supreme Court of Korea and other lower courts in Korea. They had sexual intercourses and lived together in the same residence for more than one year. C even contributed to support their household with her earnings. Despite that one of her motives to get married to B was to make money and she had paid the broker's fee, these factors were insufficient to rebut the claim that they had substantial marital intent. The question here is not whether the judgment of the appellate court is justified; it is why the public prosecutor charged them and the first judge convicted them.

This question cannot be answered definitely of course. The interesting point is, however, that B, the Korean husband, testified that their marriage was a simulation[71] in the courtroom even though he had told A that he would not enter into a simulated marriage. The main reasons he presented were that he had been paid 3,000,000 KRW for the marriage and C had paid a considerable amount of money to enter Korea where other people said the marriage was typically a simulation to be criminally charged. As a whole, B did not seem to understand the legal meaning of simulated marriage and did not seem to discern a simulated marriage from a marriage validly made but shortly thereafter broken up. Other people's (inaccurate) advice must have contributed to this misunderstanding. On the contrary, C made a statement that she had been divorced in China for years, had been lonely and so also had wanted a real marriage and real companionship, had tried to continue the marriage but could not do so because of language and cultural differenced as well as B's economic incompetency. C, however, suffered lack of language skills to explain the subtle difference between simulated marriage and valid.

This is not unique. In general, a Korean spouse involved in a cross-border marriage tends to be undereducated and poor, and a foreign spouse tends to lack language skills. As explained earlier, the criteria that Korean courts use to judge whether a marriage is a simulation are subtle and nuanced. The authoritative structure of criminal proceedings can distort communication in the courtroom because one of the parties, the defendant,

71) As B did not appeal, B was not a defendant any longer in the appellate proceeding so that he could testify as a witness.

is also subject to the judgment. And there exists no criminal proceeding generous to foreigners especially who cannot speak the language used in the courtroom. In this situation, lack of education, low economic status, lack of language skills could be factors causing the procedure to be handled improperly, amplifying the disadvantages associated with this regulatory regime.

2) Decriminalization of Simulated Marriage

This danger can be avoided by decriminalizing simulated marriage.[72] This is possible simply by overruling some case laws.

There is no compelling ground on which to view the reporting and registering of a void marriage as a crime of untrue entry in officially authenticated original deed. It depends on how the term "false" is defined as a condition of this crime. It is totally consistent that the report of a simulated marriage, which is void from a family law perspective, is not false because untrue entry in an officially authenticated original deed only considers factual aspects, e.g., whether the applicant(s) actually made an application; whether the application form reflects details such as name, birth date, address, nationality honestly; whether they wanted to report and register a marriage. It does not matter whether the application is valid from a private law perspective.[73] Actually, the Supreme Court of Korea followed this view in a case where both parties simulated a contract to convey a real property from one to the other (which is void per se and ab initio as a simulated juridical act; see article 108 of the Korean Civil Code) and registered this conveyance. The Supreme Court of Korea declared that it did not constitute a crime of untrue entry in an officially authenticated original deed because both applicants[74] made an application to register

72) Participating or conspiring to engage in marriage fraud (for immigration) is under criminal punishment in many jurisdictions. *See*, Rae, *supra* note 57, at 193 ff.(constitutes a violation of 8 U.S.C. §1325). *See also* European Commission, *supra* note 5, at 39 ff.(with regards to EU member states). It is, however, not strongly enforced in many countries, and even criticized in some. *See* Obergericht Zürich SJZ 1982, 129 (Switz.); Luderitz, *Mißbräuchliche Personenstandsänderung oder: spouse-leasing in Germany*, *in* Festschrift für Oehlerzum 70. Geburtstag 498 (1985) (Ger.).

73) *See* Seoul District Court [Dist. Ct.], 96No3403, July 12, 1996 (S. Kor.).

74) An application to register conveyance of a real property should be made jointly by the

their conveyance[75] and did not care that the contract and the registration were also void.[76] So, overruling the case law related to the meaning of "false" in simulated marriage would not contradict any other case law related to a crime of untrue entry in an officially authenticated original deed. On the contrary, there exists a contradiction regarding the ways the existing case law interprets this provision in two situations.[77]

Moreover, the proposition that reporting and registering a simulated marriage constitutes a violation of articles 228 and 229 of the Korean Criminal Code presupposes that a simulated marriage is void per se and ab initio. However, it would be impossible to say that the registration was "false at the time of reporting and registering a simulated marriage" if it were not void per se and ab initio, but only retrospectively voidable. Of course, the Supreme Court of Korea and the majority view in family law literature in Korea see a void marriage as void per se and ab initio. The objective or function of this regime is, however, to enable collateral attack. Though the standing to bring a suit requesting that a marriage be declared void is confined to the parties of the marriage, their guardian, or certain range of relatives (article 23 of the Korean Family Litigation Act), those who could not or did not bring that suit can maintain in other suits that the marriage was void.[78] For example, coheirs of a deceased person can fight the alleged heirship of others, arguing that their heirship is based on a void marriage.[79] This consequence of void marriage, however, does not support the criminalization of simulated marriage for several reasons:

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seller-owner and the buyer. See art. 28 of Pudongsan Dunggibop [Registration of Real Estate Act] (S. Kor.).

75) *See* Supreme Court [S. Ct.], 71Do2417, Mar. 28, 1972 (en banc) (S. Kor.), Supreme Court [S. Ct.], 91Do1164, Sept. 24, 1991 (S. Kor.).

76) If a contract is void per se and ab initio, the conveyance made to perform the contract is also void per se and ab initio under the Korean Civil Code (*Principle of Consensual Transfer*). *See* Supreme Court [S. Ct.], 75Da1394, May 24, 1977 (S. Kor.), Supreme Court [S. Ct.], 80Da2968, July 27, 1982 (S. Kor.).

77) Suk Donghyun, *Kajanghoninshin'go-ga Kongjŏngjŭngsŏwŏnbonbulshilgijaejoee Haedanghanŭnji* Yŏbu [*Does Registering a Simulated Marriage Constitute a Crime of Untrue Entry in Officially Authenticated Original Deed*?], 6 Hyŏngsap'allyeyŏngu [Journal of Criminal Case Studies] 330, 339-341 (1998) (S. Kor.).

78) *See* Supreme Court [S. Ct.], 2013Du9564, Sept. 13, 2013 (S. Kor.).

79) *See* Supreme Court [S. Ct.], 55Da399, Dec. 22, 1956 (S. Kor.).

First, this construction, which enables collateral attack, is only to benefit others' private interests and not for state or public interest. That is the reason why public prosecutors do not have standing to bring a suit requesting that a marriage be declared void.[80] The current case law bypasses this limit by criminalizing reporting and registering of simulated marriage and allowing correction of registration of family relationship based on the conviction. It deviates from the original function or intent of the void per se and ab initio construction. More importantly, it contradicts the doctrine of retrospective explicit or implicit rectification of void marriage. As explained before, a marriage void for simulation could be retrospectively rectified. Considering the purpose or function of this doctrine, those couples that retrospectively rectified their marriage should not be subject to criminal punishment. The problem is that there is no construction to justify this result. If a change of circumstance that occurred after committing a crime should influence the possibility to punish the crime, the circumstance should be an *objective condition of punishment*. There is no provision to prescribe that the voidness of marriage and lack of rectification is an objective condition of punishment of article 228 of the Korean Criminal Code—without which it cannot be construed by judges.

Second, the propriety of this construction itself is dubious. Let me revisit the example above. The reason why the deceased did not bring a suit to request declaration of voidness of his or her marriage might lie in the fact that he or she did not want to deprive his or her (simulated) spouse of the privileges or benefits of the (simulated) marriage. This construction fails to account for this possibility on the part of those who have the standing to bring the suit according to article 23 of the Korean Family Litigation Act. The most absurd result of this construction is that a child of the simulated couple is deemed to be an illegitimate child. Because of these defects, this

80) In Germany, Switzerland, Austria, and France, public prosecutors or immigration agency have standing to bring a suit to nullify simulated marriage. *See* art. 1316 of the German Civil Code; art. 106 of the Swiss Civil Code; art. 28 of the Austrian Marriage Act; and art. 172 of the French Civil Code. According to art. 28 of the Austrian Marriage Act the only one who can bring a suit to nullify a marriage solely for immigration is the public prosecutor). However, there are few suits brought by public prosecutors in these countries. Swiss Federal Court overruled its case law to actually deny the power of immigration agency to bring this suit. *See* BGE 77 II 193 (Switz.). *See also* Diekmann, *supra* note 64, at 138 f., 160 f.

construction has been repeatedly criticized in family law literature.[81)]

IV. Conclusion

The incidence of cross-border marriage has been significantly increasing for the last 20 years in Korea. A considerable part of this trend is composed of marriages for immigration (i.e., marriages which aimed at getting privileges or benefits such as visa issuance or naturalization permission). Korean law previously granted a foreign spouse, especially a foreign wife who married a Korean, significant benefits under immigration law. Because the way marriage is understood socially as well as legally has changed, however, marriage is often abused as a vehicle to enter and work in Korea. As the definition of marriage is widened and largely formalized, the marriage contract can no longer be relied on to guarantee the appropriateness of the spouse's immigration. Korean law has coped with this problem by combining several doctrines independently developed in family law and criminal law. Marriage for immigration is sometimes void per se and ab initio in family law, and as a result reporting and registering one, a condition of marriage in Korean law, constitutes a crime. Because the privileges attached to marriage in immigration law presuppose voidness of the marriage, a foreign spouse in a simulated marriage cannot be granted the privileges. As it is a crime, the procedure that deals with this issue is a

81) *See* KIM & KIM, *supra* note 23, at 116. In many jurisdictions, a void marriage is not void until the court declares it void. *See* arts. 201 and 202 of the French Civil Code; art. 1310 and the following articles of the revised German Civil Code of 1998; art. 27 and the following articles of the Austrian Marriage Act; art. 109 of the Swiss Civil Code; Raymond, *Mariage–Demandes en nullité–Mariage putative*, J.CL.–civil art. 201 à 202 Fasc.120 (2004) (Fr.). *See also* Wellenhofer, *zu §1313 BGB Rn. 1*, *in* MÜNCHENER KOMMENTARZUM BGB (6.Aufl. 2013) (Ger.); Stabentheiner, *zu §§29~31 EheG Rz. 6 ff. in* KOMMENTAR ZUM ALLGEMEINEN BÜRGERLICHEN GESETZBUCH 2. BAND/4. TEIL: EHEG, KSCHG (Rummel hrsg, 3.Aufl. 2002) (Ger.); Geiser&Luchinger, *Art. 109, in* BASLER KOMMENTAR ZUM ZIVILGESETZBUCH, *supra* note 60 at N. 2ff. U.S. Courts have declared marriage solely for immigration be "void" in several cases. *See* United States. v. Rubenstein, 151 F.2d 915 (2d Cir., 1945); Lutwak v. U.S., 344 U.S. 604 (1953); Faustin v. Lewis, 85 N.J. 507, 427 A.2d 1105 (1981). Most of them are, however, the cases for annulment of the marriage and not collateral attack. *Compare* the cases with *In re Appeal of O'Rourke*, 310 Minn. 373, 246 N.W.2d. 461; *Mpiliris,* 323 F.Supp. 865, all of which are collateral attack cases, and so they can be reinterpreted to mean "voidable."

criminal one and the initiation of this procedure is in the hands of a public prosecutor. This approach, however, poses the danger of negating the achievements of modern family law (i.e., the autonomy and equality of marriage liberated from a stereo-typical marriage model based on patriarchy and preexisting gender roles). More importantly, it might encourage an unchecked and even unconscious bias toward foreign women from less developed countries. In the least, it necessarily infringes on the couple's privacy regarding their internal spousal relationship. These dangers are amplified by the criminalization of an immigration attempt via marriage. Defendants of a criminal charge are easily deprived of the opportunity to clarify the truth and to correct possible bias; not to mention, many foreign women do not speak Korean very well.

Though it seems impossible to fully harmonize all of the conflicting interests, there exits an approach better than the current one. Substantially, it is recommended to decouple family law and immigration law regarding this issue (i.e., the decision related to voidness for simulation and the decision related to propriety of immigration) and to further formalize the conditions for immigration. In this way, immigration control can be performed more openly and transparently by the administrative agency, whereas the management of the legality of immigration control can be handled independently by judge, which would contribute to the exclusion of possible bias, and the likelihood of privacy infringement can be decreased. Procedurally, decriminalization of immigration attempts via marriage seems to be the best solution. Some of these recommendations can be realized only by new enactment or amendment of statutes, while others can be realized merely by overruling preexisting case laws.